IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable
Case No: A43/2025

In the matter between:

A[...] V[...] E[...] Appellant

and

A[...]2 T[...] V[...] E[...] (nee D[...]) Respondent

Coram: **DOLAMO, J et RALARALA, J et ADAMS, AJ**
Heard: **23 July 2025**
Delivered: **05 June 2026**

Summary: Appeal - motion proceedings where a dispute of fact arises - whether a court correctly exercised its discretion by not *mero motu* referring the matter for oral evidence - rule 6(5)(g) - contemplates the exercise of a discretion in the true sense wherein the judicial decision-making process involves a choice between a number of

equally permissible options - court not compelled to *mero motu* refer the matter for oral evidence - appeal dismissed.

ORDER

In the result, I would propose the following order:

1. The appeal is dismissed with costs, such costs to include costs of the application for leave to appeal to the Supreme Court of Appeal, with costs of counsel on scale A.

JUDGMENT

RALARALA, J
INTRODUCTION

[1] This is an appeal against a judgment and order of Mthimunye, AJ handed down on 03 June 2024. In the court aquo, the Appellant launched an application to enforce clause 3 of a written agreement ('the Suzuki Agreement') concluded by the Appellant and the Respondent on 16 December 2021. In terms of the said agreement the appellant gave the respondent a gift of a Suzuki Jimny GLX motor vehicle. ('the Jimny'). The Jimny was purchased by the Appellant in terms of an instalment sale / lease agreement entered into between the Respondent and MFC Nedbank ('the Nedbank Agreement'). In terms of the Suzuki agreement, the Appellant undertook to pay to MFC Nedbank the monthly instalments for the purchase of the Jimny.

[2] According to clause 3 of the Suzuki agreement, the Respondent would remain the rightful owner of the Jimny in all instances, with the exception that if she

separates from or divorces the Appellant for any reason, prior to the settlement or closure of the Nedbank agreement, in which case ownership will cede to Appellant.

[3] The court aquo dismissed the application with costs. It is that order that is the subject of this appeal.

FACTUAL BACKGROUND

[4] Subsequent to the conclusion of the Suzuki agreement, the parties concluded an antenuptial contract on 11 March 2022. On 13 March 2022, the parties were married and on 4 April 2022, the antenuptial contract was registered by the Registrar of Deeds.

[5] On 8 August 2023, Appellant refinanced the Nedbank agreement in respect of the Jimny with Investec Bank Limited ('Investec') and entered into an instalment sale agreement and credit facility in respect of the Jimny ('the Investec Agreement'). The Investec agreement resulted in the settlement of the MFC Nedbank debt in terms of the Suzuki agreement, thereby terminating the Nedbank Agreement between the Respondent and MFC Nedbank. On 15 August 2023, MFC Nedbank addressed correspondence to the Respondent confirming that the account has been settled. On 7 September 2023, Investec was registered as the owner of the Jimny.

[6] The marriage relationship between the parties deteriorated rapidly. As a result, On 29 December 2023, the Respondent applied for and obtained an interim protection order in terms of the Domestic Violence Act 116 of 1998 against the Appellant. In terms of the said interim protection order the Appellant was precluded from refusing the Respondent access to their marital home. The return date for the hearing of the protection order application was 22 January 2024, which was subsequently postponed to 18 March 2024. The protection order was ultimately withdrawn pursuant to a settlement agreement concluded by the parties on 15 March 2024.

[7] Preceding the settlement agreement an incident occurred on 27 January 2024, which resulted in the Respondent leaving the marital home to reside with her mother, upon advice of her attorney. On 28 January and 09 February 2024, the

Respondent communicated to the Appellant her intention to return to the marital home to collect her possessions. The Appellant refused her access to their marital home and changed the door locks notwithstanding the preclusion of same in terms of the interim protection order.

[8] As a result of the above incident, the Appellant launched an application seeking an order that the Respondent transfer ownership of the Jimny to him. The Appellant contended that the Respondent moved out of the marital home and by doing so she breached clause 3 of their written agreement, which precluded the Respondent from separating from the Appellant before the Jimny was paid off by the Appellant.

[9] The court *a quo* had to determine whether the dispute of fact raised by the Respondent amounted to a material and *bona fide* dispute of fact. Secondly, notwithstanding the said dispute of fact whether the court *a quo* can still decide the matter on the papers. Thirdly, whether ownership has passed to the Respondent in respect of the Jimny on settlement of the MFC Nedbank Agreement. In a detailed judgment which it handed down on 4 June 2024 the court a quo determined that the Appellant failed to satisfy the court that the Respondent has separated or divorced from him and thereby breached clause 3 of the Suzuki Agreement.

[10] Aggrieved by the outcome, the Applicant applied for leave to appeal, however he was unsuccessful. On 27 November 2024, leave to appeal was granted by the Supreme Court of Appeal to the full court of this Division.

[11] The central issue in the Appellant's grounds of appeal is whether the court *a quo* was obligated to exercise its discretion in favour of referring the matter to oral evidence *mero motu*. The secondary issue pertains to the court *a quo's* handling of the factual disputes presented by the Respondent, particularly the court's interpretation of clause 3 of the written agreement.

LEGAL PRINCIPLES AND DISCUSSION

[12] The extent to which a court of appeal may intervene in the determinations of a court of first instance is well-defined in our legal framework. The fundamental premise is that an appellate court possesses limited power to interfere with the decision of a trial court. The observations of the Supreme Court of Appeal in *Malan and Another v Law Society of the Northern Provinces*[1] are pertinent:

> *"A court of appeal has limited powers to interfere with a decision of the court of first instance. In relation to the first leg of the inquiry, which is factual, appeals are subject to the general limitation that courts of appeal defer to the factual findings of courts of first instance (R v Dhlumayo 1948 (2) SA 677 (A))."*

[13] However, the deference ordinarily accorded to a lower court's factual findings in trial proceedings essentially has a different basis when the matter on appeal was decided in motion proceedings, as is the case in this matter. The distinction is significant and was articulated with clarity, in Malan as well. The rule contemplates that a court of appeal may interfere with a decision of the court aquo where that court decided the case on the papers in motion proceedings, as in such a case the court of appeal is in as good a position to judge the facts as was the court *a quo.*

[14] The circumstances when a court of appeal can interfere with the exercise of a discretion[2] by the court a quo also generally forms part of an appeal court's considerations. Depending on the type of discretion the court *a quo* exercised, whether 'strict' or 'loose' will determine the appellate court's degree of interference. An appellate court is generally slow to interfere with a loose discretion, while a strict discretion is open to interference if it was not exercised judicially. This would be in an instance where it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles[3].

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[1] *2009 (1) SA 216 (SCA) at par 12*

[2] See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras 85 – 89 and *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361I.

[3] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[15] This appeal involves a matter that was determined in the court *a quo* on motion proceedings. Accordingly, save to the extent that any finding turns on matters uniquely within the advantage of the court *a quo*, this Court is in as good a position as the court *a quo* to evaluate the evidence on the papers, to decide the factual issues on the record, and to apply the *Plascon-Evans*[4] approach to resolve genuine and *bona fide* disputes of fact.

[16] It is also trite that an appeal lies against the order of a court, not its reasons. Even if the reasoning of the court *a quo* is found to be wanting, the appeal must be dismissed if the order is nonetheless correct[5].

[17] In motion proceedings a court is generally confined to the common-cause facts[6]. Nevertheless, where genuine factual issues emerge from the affidavits, the court is not compelled to automatically grant or deny relief; instead, it possesses several alternatives as stipulated by rule 6(5)(g) [7]. A court may dismiss the application outright if the disputes were reasonably foreseeable and the applicant nonetheless opted for motion proceedings[8] alternatively if the application is not dismissed, the court can adopt the procedure that best ensures that justice is served with the least delay[9] and in that regard exercises a discretion[10]. The court can also decide the matter on the respondent's version[11] or resolve the dispute where it can be resolved on the papers.

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)
[5] See *President of the Republic of South Africa and Another v Tembani and Others* 2025 (2) SA 371 (CC) at ; *Zurich Ins Co SA Ltd v Gauteng Provincial Govt* 2023 (1) SA 447 (SCA)
[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), 1984 (3) SA 623 (A) at 634
[7] Rule 6(5)(g) provides: Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise
[8] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T);
[9] *Johannesburg City Council v The Administrator Transvaal (1)* 1970 (2) SA 89 (T)
[10] *Cresto Machines(Edms) Bpk v Die Afdeling Speuroffisier SA Polisie Noord-Transvaal* 1970 (4) SA 350 (T) 365; *Pautz v Horn* 1976 (4) SA 572 (O)
[11] As per the *Plascon-Evans supra*-approach

[18] The Respondent argues contrary to the stance taken by the Appellant to the effect that there was a duty on the court *a quo* to *mero motu* refer a matter for oral evidence. Appellant's counsel in this regard relied on *Du Plessis En 'n Ander v Tzerefos*[12], where the court stated:

> *"Nie een van die partye het op enige stadium aansoek gedoen dat die aangeleentheid vir mondelinge getuienis verwys moes word nie of dat een van die deponente aan kruisverhoor onderwerp moes word nie. 'n hof kan egter ook mero motu n bevel met sodanige strekking maak..."*

[19] The Respondent's counsel contends that the court *a quo* had no obligation to *mero motu* refer the matter for oral evidence, it can similarly be inferred from the above text that a court, in exercising its judicial discretion may *mero motu* refer a matter for oral evidence *sua sponte* rather than being duty bound or compelled to do so. Rule 6(5)(g) contemplates the exercise of discretion in the true sense wherein the judicial decision-making process involves a choice between a number of equally permissible options.[13]

[20] The judgement of the court *a quo* demonstrates that the court comprehensively acknowledged this reality, as well as the available options and other pertinent considerations. This is evident in the exercise of its discretion when it chose to resolve the matter based on written submissions, despite identifying a substantial and genuine factual dispute, and then dismissed the Appellant's application, as this was a permissible option under the circumstances.

[21] In *Joh-Air (Pty) Ltd v Rudman*[14] the court recognised that it requires a bold move by the court to refer the matter for oral evidence or trial *mero motu*, given the possibility that the Applicant opted not to request that the matter be referred for oral evidence or trial. The court similarly recognised that the said omission on the part of

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[12] 1979 (4) SA 819 (O) 838 A *translated into English as:*
"Neither of the parties at any stage applied for the matter to be referred for oral evidence, nor for any of the deponents to be subjected to cross-examination. However, a court may also, mero motu, make an order to that effect..."

[13] *Repas v Repas* (A151/2022) [2023] ZAWCHC 24 (13 February 2023) para 25.
[14] [1980] 3 All SA 404 (T) at 429

the applicant may be due to avoidance of being involved in costs occasioned in the said procedures. Furthermore, it may well be a stratagem adopted pursuant to the consideration of the answering papers, recognising the likelihood that prospects of success are unlikely. Where there has been no request for a referral to oral evidence it is generally undesirable that a court *mero motu* orders such referral.[15]

[22] The record clearly indicates, and the Respondent contends, that the court *a quo* was not requested to refer the matter to oral evidence; rather, the judgement of the court *a quo* specifically states that the Appellant urged the court to resolve the issue based on the submitted documents. In *Kalil v Decotex (Pty) Ltd and Another*[16] the Appellate Division (AD) reiterated that an application to refer a matter for oral evidence should be made at the onset and not after argument. In accordance with the principles articulated in *Repas, Joh-Air, Bula, and Kalil, supra*, the learned Judge was not compelled nor can be criticized for failing to *sua sponte* submit the issue for oral testimony.

[23] I note with concern that the Appellant, in his replying papers, failed to address the issues raised in the answering affidavit. The Appellant neither denied nor admitted that the Respondent vacated their marital home in response to Appellant's threats which were essentially in violation of the interim protection order granted against him. Significantly the Respondent in her answering papers manifests that the triggering of the resolutive condition in clause 3 of the Suzuki Agreement was orchestrated by the Appellant.

[24] At the hearing the court engaged counsel for the Appellant in respect of correspondence from the Respondent's erstwhile attorneys dated 28 January 2024 describing the events of 27 January 2024 which induced fear in the Respondent and clearly stating that the Respondent had upon their advice left the marital home for a few days to live with her mother. And the Appellant's actions of denying Respondent access to the marital home by changing locks to their home. Counsel could not refute the reasons for Respondent to vacate the marital home and neither did the Appellant address the Respondent's averments in this regard. The court *a quo*

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[15] *Bula and Others v Minister of Home Affairs and Others* [2012] 2 All SA 1 (SCA) para 53.
[16] [1988] 2 ALL SA 159(A) 159(A) at 981

correctly found that the Respondent in her answering papers seriously and unambiguously addressed the facts said to be disputed.

[25] The Respondent further contended that the Suzuki agreement could not be interpreted to include the refinancing term relied on by the Appellant, hence the Respondent was released from clause 3 on settlement of the Nedbank Agreement. Developing this argument, it is contended that no consent was given by the Respondent to Appellant for the refinancing of the Jimny. The Appellant submitted that the refinancing of the Nedbank Agreement through Investec had no material change to the parties' obligations and duties in respect of the Suzuki Agreement. The court *a quo* correctly dealt with clause 3 of the Suzuki Agreement reading it in the context of the entire agreement. At paragraph 57 of the judgment the court *a quo* stated the following:

> *"It is apparent from the pleadings that clause 3 of the Suzuki/Jimny agreement is the main factual dispute. As it gives rise to many issues raised by the respondent. Clause 3, however, cannot be read in isolation but must be read with all relevant terms in the Suzuki/Jimny agreement to see whether the relief sought by the applicant is justified. The relevant terms are as follows:*
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> *"A[...]2 received a Gift from A[...] in November 2020, a Suzuki GLX, AT, Registration Number C[...]. A[...]2 is the registered Owner of the vehicle. The Instalment Sale/Lease Agreement is between A[...]2 and MFC Nedbank.*
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> *[1] Although the vehicle is financed in A[...]2's name, A[...] accepts full responsibility for the instalment sale /lease agreement between A[...]2 and MFC and undertakes to honour the repayment arrangement with MFC, Nedbank (NO exceptions).*
> *[2] A[...] accepts all the terms and conditions as laid out in the instalment sale/agreement an extra tax invoice attached, with reference part one: repayment arrangements. This includes all instalments due and ballon payment (a lump sum instalment due and payable on the last date of R109,839.00 due 01/12/2026).*

[3] A[...]2 shall remain the rightful Owner of the Suzuki in ALL instances, with the exception, if she separates or divorces from A[...] for any reason, prior to the settlement or closure of the instalment Sale/ Lease Agreement in which case she cede Ownership to A[...].

[4] If A[...] separates or divorces from A[...]2 for any reason, prior to the settlement or closure of the instalment sale / lease agreement, A[...]2 will retain ownership off(sic) the vehicle and A[...] will honor these obligations as laid out (pt. 1-5 Above).

[5] A[...] undertakes to pay the monthly car insurance and general vehicle upkeep for the duration of the instalment/ lease agreement with MFC, Nedbank."

[26] Interpretation, which is a process of attributing meaning to the words used in a contract, is indeed a matter for the court. In such exercise the context provided must be considered by reading the specific provision in light of the entire document / contract as a whole and the circumstances attendant upon its coming into existence.[17]

[27] The Nedbank Agreement is between MFC Nedbank and the Respondent, with the Appellant responsible for the payment of instalments until the vehicle is fully paid. Firstly, the Appellant paid up the vehicle in terms of the Nedbank Agreement. Thus, with the proper interpretation of clause 3 the ownership of the Jimny ought to have passed to the Respondent as intended by the parties. That this ought to have been the case is clear from the Suzuki Agreement. The Appellant's notice of motion specifically sought an order in the following terms in prayer 3:

"That the Respondent be ordered to transfer ownership of the 2020 Suzuki Jimny 1.5 GLX A/T motor vehicle bearing registration number C[...] to the Applicant within 3(three) days of the order being granted."

[28] Clearly, from the onset the Appellant was of the view that ownership of the Jimny vested with the Respondent, hence the order sought is formulated accordingly. Notwithstanding the existence of the Investec Agreement, which would

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[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593(SCA) ([2012] 3 ALL SA 262; [2012] ZASCA 13 page 603 para 18.

confer ownership of the Jimny to Investec. Similar to the issue of the referral of the matter for oral evidence which was only raised post judgment in the application for leave to appeal, that is also the case in respect of the finding on ownership by the court *a quo*. Counsel for the Appellant submitted that 'factually and contractually' the Respondent is only the *bona fide* possessor of the Jimny until such time as all instalments, in respect of any instalment sale agreement with any financial institution, have been paid, which has been authoritatively decided in the *locus classicus Info Plus v Scheelke and Another*.[18]

[29] This argument is problematic as it omits consideration of the terms of the Suzuki Agreement, which explicitly indicates that the Nedbank Agreement is between the Respondent and MFC Nedbank, and that the Respondent is the registered owner of the Jimmy. It remains an uncontroverted fact that all installments in respect of the Nedbank Agreement have been paid as was the case in *Info Plus supra*, signifying that ownership ought to have been transferred to the Respondent in terms of the Suzuki Agreement. It is clear that the Appellant laboured under the very same impression and believed that, as set out in notice of motion, the relief sought is the 'transfer of ownership' of the Jimny which is in line with the text of the Suzuki Agreement.

[30] The Respondent contends that the Investec Agreement is between the Appellant and Investec thus having no bearing on the relief sought by the Appellant. Moreover, the Investec Agreement does not substitute the Nedbank Agreement because there is no express provision for refinancing in the Suzuki Agreement. This averment is not addressed by the Appellant in its replying papers.

[31] In terms of clause 3 of the Suzuki Agreement, ownership of the Jimny was contingent upon a resolutive condition, stipulating that the Respondent would be obliged to relinquish and cede ownership thereof to the Appellant in the event the Respondent separating or divorcing the Appellant before the Nedbank Agreement was fully paid. The alleged breach of clause 3 on 27 January 2024 was orchestrated by Appellant himself in that, while fully aware of the interim protection order that

[18] 1998 (3) SA 184 (SCA)

precluded him from preventing the Respondent access to the marital home, he induced fear in the Respondent leading to her attorney advising her to leave the marital home for a few days to avert any danger. It cannot therefore be successfully argued that her actions constitute separation if the intention is to return to the marital home. Put differently, if it was not for the incident that induced fear into the Respondent, she would not have left the marital home. Noteworthy is that the Appellant does not allow her access to their marital home and changes locks to the doors hindering her return. The court *a quo'*s finding that the Respondent's leave of absence was orchestrated by Appellant in order to invoke clause 3 of the Suzuki Agreement cannot be faulted.

[32] In *Wightman t/a JW Construction v Headfour* (Pty)Ltd[19] it was held that a court must take a robust approach when assessing the existence of genuine disputes of fact in motion proceedings. In applying this approach, the respondent's version of events must not be so far-fetched, clearly untenable or contrary to all reasonable probabilities, if that is found to be the case the court would simply reject the Respondent's version on the papers without referring the matter to oral evidence. The court expects the respondent to seriously address the applicant's material averments. A *bona fide* dispute of fact requires that there be something of consequence raised by the respondent, both as to substance and factual detail. In this manner a factual dispute of facts manifests and similarly allows the court to categorise it as a genuine or *bona fide* dispute of fact. Where a material dispute of facts exists, a final relief cannot be granted, the court must either dismiss the application or refer the specific dispute to oral evidence.

[33] The Constitutional Court in *African Congress for Transformation v Electoral Commission of South Africa; Labour Party of South Africa v Electoral Commission of South Africa; African Alliance of Social Democrats v Commission of South Africa*[20]remarked as follows:

> *"Motion proceedings are unsuitable to decide probabilities. Instances where final relief is sought, motion proceedings are aimed at resolving issues of law based on*

[19] 2008(3) SA 371(SCA)
[20] [2024] ZACC7; 2024 (8) BCLR 987 (CC) para 95

common cause facts. And where disputes of fact arise, absent a referral for oral evidence, the Plascon Evans approach, as amplified in Wightman, must be employed. There is no basis to reject the Commission's denial that these two applicants' failure to comply with the Election Timetable was not due to the malfunction of the OCNS, but due to their own procrastination and ineptitude. The Commission supported its denial with positive facts. There is thus genuine dispute of fact on the papers." (underlining supplied)

[34] The position proffered by Counsel for the Appellant at the hearing, that the robust approach envisages that only one version has to be considered is unsubstantiated and meritless. The Appellant approached the case on the basis that there are factual disputes and urged the court to resolve same on the papers. Similarly, the relief sought in their notice of motion is transfer of ownership from the Respondent to the Appellant, they argued on that basis before the court *a quo* and it was only during leave to appeal that they impermissibly seek to redesign the issues beyond the pleadings. Belatedly the Appellant argues that the Respondent is only the *bona fide* possessor of the Jimny therefore the court erred in finding that ownership of the Jimny passed to the Respondent in August 2023. It is well to remind ourselves that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody the evidence. *Molusi and Others v Voges N.O. and Others*[21].

[35] The argument posited by Counsel for the Appellant that the court *a quo* in its adoption of the robust approach failed to have regard to *Buffalo Freight Systems v Cadtleigh Trading* [22] where the court dealt with uncontradicted evidence and observed that the court *a quo* must have concluded that no genuine factual dispute existed and that the respondent's defense was implausible and entirely untenable. In this instance, the court *a quo* found differently i.e. the existence of a *bona fide* and material dispute of fact, hence there was no basis to reject the Respondent's version, instead the court correctly opted to dismiss the application. In my view *Buffalo Freight Systems* is distinguishable from this matter. The concerns about the robust approach are fallacious in my view.

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[21] CCT96/15) [2016] ZACC 6;2016(3) SA 370 (CC)2016(7) BCLR 839 (CC) (1 March 2016) para 28
[22] 2011(1) SA 8 (SCA) para 21; [2011] 1 All SA 1 (SCA) (24May 2010)

[36] On consideration of the record, I find that the foreshadowed disputes were not of such a nature that the court *a quo* could not determine them on the papers. Consequently, the court *a quo's* decision to determine the matter on the papers does not amount to an error that justify interference.

ORDER

[37] In the result, I would propose that the following order be made:

[37.1] The appeal is dismissed with costs, such costs to include costs of the application for leave to appeal to the Supreme Court of Appeal, with costs of counsel on scale A.

_____
N.E. Ralarala
Judge of the High Court

I agree,

_____
M.J. Dolamo
Judge of the High Court

I agree, and it is so ordered.

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Adams, AJ
Acting Judge of the High Court

APPEARANCES

For the Appellant	:	M Holland
Instructed by	:	Parker Attorneys
For the Respondent	:	K Taylor-Vermaak
Instructed by	:	Shields Attorneys