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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-128725

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: YES

3.REVISED: N/A

2 NOVEMBER 2026 **SNYCKERS AJ**

In the matter between:

S[...] L[...] R[...] **APPLICANT**

and

TEE JAY TRADING (PTY) LTD **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 2nd of NOVEMBER 2026.

SNYCKERS AJ:

Introduction

[1] S[...] R[...] and T[...] R[...] are married. They were the directors of a company, T Co. T Co is the owner of the property on which their matrimonial home stands. They are presently undergoing a divorce, in which the action is pending.

[2] The property owned by T Co is bonded to Standard Bank. S[...] took out the loan from the bank in his own name. T Co signed as surety for S[...]'s indebtedness to Standard Bank. In the pending divorce, T[...] obtained a Rule 43 interim order. One of the terms of the order was that S[...] should continue to pay the instalments on the Standard bank mortgage loan, by way of interim support of T[...].

[3] S[...] brought an application to wind up T Co. He says he is a creditor and T Co cannot pay its debts when due. The debt on which he claims to be a creditor is a loan said to be owing by T Co to him. That loan is in respect of the loan advance made by Standard Bank to S[...], against the bond on the property owned by T Co. The Standard Bank loan advances or draw downs were at least partly used for improvements made on the property owned by T Co – including the addition of buildings. In T Co's Annual Financial Statements, signed by the R[...]s as directors in happier times, there is a liability reflected as 'mortgage loan'. S[...] says this is a loan account in his favour for the advances used to the benefit of T Co from the loan he took out from the bank. This he says he has now called up, and T Co cannot pay. So it must be liquidated.

[4] This may strike the reader as strange, particularly in light of the Rule 43 order. It struck me as strange. I was not relieved of this sense during the hearing of this application. I shall elaborate on this below. Suffice it at this point to say that it is difficult to think that S[...] would have purported to call up the loan he says he is owed by T Co, and instituted proceedings to wind up T Co on the basis that it cannot pay its debts, had it not been for the pending divorce.

[5] On 10 April 2026, after hearing argument in an opposed application, Daniels AJ issued a provisional winding up order of T Co, in a reasoned judgment. This is the return day of that order (the order having been extended on 25 May 2026 and again on 26 July 2026, and eventually to 26 October 2026).

[6] T Co opposes the confirmation of the order. The deponent to the opposing papers is T[...]. She may represent T Co for this purpose.[1]

[7] T Co disputes the debt on which S[...] relies. It also says that if there truly is to be a loan payable to S[...] by T Co, the debt in question has prescribed. S[...] relies heavily on the T Co Annual Financial Statements of 2020 and 2021 (and those of 2017), all signed while both spouses were directors. Daniels AJ also relied heavily on these AFS in rejecting T Co's dispute of the debt at the provisional stage. Both for the existence of the debt, and for his retort to the prescription defence, S[...] relies on the AFS. If the AFS clearly reflect the debt S[...] asserts, then such reflection in the AFS would constitute an acknowledgement of the debt that would interrupt prescription. T Co says the AFS do not clearly reflect the debt asserted by S[...], and therefore I should rule in its favour on the dispute as to its existence. But, it says, should that not be so, the AFS entries cannot amount to sufficiently unequivocal acknowledgements of the debt to interrupt prescription.

[8] It would seem to me that it is unlikely that the AFS entries could be good enough to establish the existence of the disputed debt, but not good enough to be interruptions of prescription. If they establish the existence of the debt, they should also serve as acknowledgements of its existence for purposes of interrupting prescription. It became common cause before me that, if they do serve as acknowledgements of the debt asserted, then at least the 2020 AFS would interrupt prescription and there would be no cogency in the prescription defence.

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[1] See for example *Dr WAA Gouws (Johannesburg) (Pty) Ltd v HR Computek (Pty) Ltd & Others* 2025 (6) SA 89 (SCA).

[9] In the papers, T Co (through T[...]) disputes the debt asserted by S[...]. It says that the bank funds used on the property were not loans advanced to T Co intended to be repaid by T Co. It says the use of the funds for the benefit of the company (by effecting improvements on the property) had two main purposes – one purpose was to discharge S[...]'s obligation to support T[...] and their children by essentially adding to the value of their accommodation, for the family benefit, and a second purpose was to repay T Co for the use by S[...], for his own purposes and benefit, of the proceeds in an amount of R2m that were realised from a sale of property adjoining the matrimonial property and owned also by T Co. The answering papers set out that the expenses incurred by T Co were overwhelmingly household expenses or upkeep and property expenses, and that T Co did not trade. S[...]'s version was that the improvements were effected to the T Co properties in contemplation that T Co would conduct a letting enterprise from the properties, and trade at a profit. The true nature of the benefits enjoyed through the relevant bank funds was obscured by the fact that the T Co AFS reflected a second liability, under "S L R[...]", which S[...] says was a loan to S[...] for household expenses incurred by S[...] to the benefit of T Co (and T[...]), but this loan S[...] says was subordinated and not yet payable to him by T Co. The question of the nature of the mortgage liability was further obscured by the fact that the bond in question, said to give rise to the present loan from S[...] to T Co, was a successive bond mainly used for improvements, and not the original bond taken out when the property was purchased. The purchase of the property had at least partly been funded by the proceeds from the couple's erstwhile matrimonial home in Athol, a home that had been purchased for them by T[...]'s father (although S[...] says he repaid the father in that regard).

The Badenhorst Rule on the return day

[10] As we have seen, the debt on which S[...] bases his *locus standi* as creditor (and on which he mainly bases his contention that T Co is commercially insolvent),[2] is a debt

[2] As deemed under s345(1) or as actual under s345(1)(c) of the Companies Act 61 of 1973, applicable for purposes of compulsory wind-up of insolvent companies to the Companies Act 71 of 2008.

disputed by T Co. When the debt on which an applicant for liquidation or sequestration bases his *locus standi* as creditor is disputed, the so-called "*Badenhorst*" rule applies. This rule, from the case by that name,[3] is to the effect that liquidation or sequestration should not be resorted to in cases where the debt on which the creditor claims to be a creditor is *bona fide* disputed on reasonable grounds. This rule features mainly at the stage when the court decides whether to grant a provisional order (although the cases are bedevilled by the reality that, in liquidations, final orders tend to be sought in the notice of motion, even if provisional orders are often granted first and the assessment often turns on whether the requirements for provisional relief are fulfilled). What requires some consideration in the instant case is whether and how the rule features at the final stage. This is so especially in circumstances, like in the present case, where a court has already determined at the provisional stage, using the *prima facie* and balance of probabilities test applicable at that stage (a standard more easily overcome by an applicant than that applicable at the final stage),[4] that the debt was not in fact being *bona fide* disputed on reasonable grounds.

[11] The judgment of Rogers J in *Orestisolve*[5] reasoned that there was little room for the application of the *Badenhorst* rule at the final stage, as at that stage the usual rules of motion proceedings applied, with the *Plascon-Evans* test,[6] and these rules would tend to establish the existence of the debt, or the applicant would fail to establish the existence of the debt, and there would be little left for the *Badenhorst* rule to do, save perhaps to act as a tie-break against the applicant if factual disputes would otherwise have been referred to oral evidence for resolution. Whatever the attraction of this logic, it appears to me to have been rejected in favour of the proposition that the *Badenhorst* rule does indeed apply at the final stage, at least in this court. In *Electrolux,*[7] Francis J discussed the application of *Badenhorst* at the final stage and disagreed with the

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[3] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348.
[4] See inter alia *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A).
[5] *Orestisolve (Pty) Ltd t/a Essa Investments v Ndft Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC).
[6] The test for final relief on application from *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[7] *Electrolx South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* 2023 (6) SA 452 (WCC).

approach in *Orestisolve,* holding that the Supreme Court of Appeal had confirmed in two decisions that the *Badenhorst* rule applied at the final-order stage.[8] The two SCA decisions referred to in *Electrolux* are not as clear on this point as might be desired. In the first, *Afgri Operations,*[9] a final order had been sought *a quo,* and refused, and the SCA overturned the judgment by granting a final order. It did appear to apply *Badenhorst*,[10] but was mainly concerned with dispelling the proposition upheld *a quo* that the existence of a counterclaim was a sufficient basis to decline a winding up order on the exercise of the court's residual discretion. Nevertheless, *Afgri Operations* is SCA authority for the application of *Badenhorst* at the final-order stage. The second SCA decision mentioned by Francis J in *Electrolux*, namely *Freshvest*[11] cited the correct test,[12] with reference to *Badenhorst,* from decisions that were applying the test at the provisional stage, namely *Payslip*[13] and *Hülse-Reutter.*[14] In *Freshvest* the court a quo had held *Badenhorst* to have been satisfied (i.e. the debt had been *bona fide* disputed on reasonable grounds) but proceeded to direct the hearing of oral evidence, which course the SCA criticised. It is certainly not clear from the SCA discussion that it was applying *Badenhorst* at the final-order stage.

[12] Nevertheless, Francis J also referred to the judgment of Movshovich AJ in *Voltex*[15] for the proposition that the *Plascon-Evans* test was a rule of evidence, whereas the *Badenhorst* rule was a substantive rule, and the former was applicable in an application for a final order to assess whether the latter had been satisfied. This appears to me to be correct. The full court of this Division overturned the finding of Movshovich AJ in *Voltex,*[16] but, importantly for present purposes, undeniably applied

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[8] At paras 27 and 28.
[9] *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA).
[10] See paras 6 and 10.
[11] *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* 2016 JDR 2216 (SCA) [incorrectly cited in *Electrolux* as *Fresh Investments* with its WCC citation at 2015 (4) SA 449 (WCC) – *Electrolux* footnotes 16 and 20.
[12] At paras 5 and 6.
[13] *Payslip Investment Holdings CC v Y2K Tec Limited* 2001 (4) SA 781 (C) at 783H-I.
[14] *Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219E-220A.
[15] [2022] ZAGPJHC 241 (26 April 2022).
[16] *Voltex (Pty) Ltd v Resilient Rock (Pty) Ltd* 2023 JDR 2011 (GJ).

the *Badenhorst* rule at the final-order stage in doing so.[17] The SCA then overturned the full court decision, but not on the question whether *Badenhorst* applied, nor on its application, but on the oddity that a different liquidation process had already yielded a provisional order that had deprived the court of the jurisdiction to hear and determine the liquidation application in a different application.[18]

[13] I am satisfied that precedent binding on me requires me to apply the *Badenhorst* rule at the final stage, and that the approach to the issue by Movshovich AJ and Francis J is correct. After some debate on this issue, Mr *Van Tonder* who appeared for S[...], and Mr *Pye SC*, who appeared for T Co, were *ad idem* that at the final stage the question, on the application of *Plascon-Evans*, with respect to the dispute on the debt, was whether it was being *bona fide* disputed on reasonable grounds, rather than whether it had been established.

[14] What complicates the question somewhat is the fact that, at the provisional stage, Daniels AJ determined, applying the evidential tests applicable at that stage, that the debt was not being disputed *bona fide* on reasonable grounds. It is clear that this does not bind the court at the final-order stage, since the evidential hurdle for the applicant to overcome is higher (at least to the extent that disputes of fact are at issue). The parties were *ad idem* on this before me.

[15] Nevertheless, I must at least regard as persuasive the reasons that moved Daniels AJ to regard the debt not to have been *bona fide* disputed on reasonable grounds, and differ from him with some caution and with respect in this regard.

The financial statements and the debt in question

[16] Three sets of AFS of T Co featured, the 2017, 2020 and 2021 AFS. Both S[...] and T[...], as directors of T Co, approved these AFS.

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[17] At paragraph 22.
[18] *Reslient Rock (Pty) Ltd v Voltex (Pty) Ltd* 2026 (1) SA 470 (SCA).

[17] In all three sets of AFS, there are (inter alia) two different liabilities recorded.

[18] The one liability is styled “SL R[...]”. This liability, of varying amounts over the years, but some R4,5m at the relevant time, is not the debt being relied on. The AFS, describe the loan as ‘unsecured, bears no interest and is repayable on reasonable demand’. In the 2021 AFS the following is also said of this liability (something not stated in the 2017 or 2020 AFS): *“This loan will be subordinated until the company starts making a profit”.*

[19] The other liability, the contentious one, is one styled “Mortgage bond”. This is the debt on which S[...] bases his *locus standi.* This liability does not mention SL R[...] as the creditor. It does not identify the creditor at all. It is described in three different ways in each of the three different sets of AFS:

(a) In the 2017 AFS, it is described thus: *“The loan is secured over property Portion 161 of Farm Hekpoort No 504, the loan bears interest at prime less 1% and is repayable over 360 instalments”.*

(b) In the 2020 AFS, it is described thus: *“The loan bears interest at 9% and is repayable in monthly instalments of R19,109.91”.*

(c) In the 2021 AFS, it is described thus: *“The loan bears interest at 5.5% (2020: 9%) and is repayable on reasonable demand”.*

[20] In the affidavits on behalf of T Co, T[...] disputes the accuracy of the AFS. She says that their identification of the loan on which S[...] relies was a fiction, or simulated, and the entries did not reflect reality. She also says T Co was not expected to trade and never did trade. The judgment of Daniels AJ takes her to task for this, as she signed the AFS as a director. But the judgment appears to me to be premised on the proposition

that the AFS clearly reflect this loan as something owing to S[...] and that its character emerges clearly from the face of the AFS.

[21] I cannot agree with this premise. The AFS refer to a “Mortgage loan”. The only mortgage loan is a loan owing by S[...] to Standard Bank for which T Co is a surety. It is certainly possible that T Co may reflect its suretyship liability on this loan as a liability in its books. I agree, however, with Mr *Van Tonder* that this is not the case sought to be made out by T Co when disputing the debt. It does not advance the case that the liability in its books is an accessory liability owed by it to Standard Bank as surety, although it comes close to saying so by saying the only mortgage in question was one of which the bank was the mortgagee.

[22] But even if the AFS purport to reflect S[...]’s loan to the bank as a back-to-back loan account in favour of S[...] in T Co, what is going on with respect to its repayability? Can anyone take seriously the entry in the 2017 AFS that T Co was to repay this loan to S[...] in 360 monthly instalments? Or in the 2020 AFS that it was repayable in monthly instalments in a certain amount? (which I am told does not necessarily track the then applicable instalment amounts payable by S[...] on the loan to the bank). And how and why did it metamorphose in 2021 to a loan repayable on reasonable demand?

[23] One thing seems clear. The entries in respect of this liability are contradictory, and whatever this loan actually is or was as between S[...] and T Co, the AFS represent a dangerous place to look to determine this with any degree of precision. In addition, the subordinated character of the SL R[...] loan was first identified in the 2021 AFS. And on the papers it appears established (at least on *Plascon-Evans*) that “Tee Jay Trading” (T Co) never traded.

[24] And what is one to make of the Rule 43 Order? The court has ordered S[...] to keep servicing the bond. If he is correct that the entry in the T Co AFS reflects a back-to-back loan account with him in relation to his loan with the bank, then he is obliged at law in effect to keep making advances to T Co on this loan, by repaying the bank on the

primary loan taken out with the bank, which keeps the primary facility alive, on which the secondary facility, or back-to-back loan, depends. Or, at least, he is obliged at law to avoid the peril of foreclosure on the property owned by T Co at the hands of the primary creditor, the bank as mortgagee. How can it be intended (and how could it have been intended) that he could call up his own loan against T Co while maintaining this obligation to save T Co from foreclosure on the primary loan? Leave aside the fact he is using such a call up as a platform for winding up T Co. The Rule 43 Order confirms that payments S[...] makes to the benefit of T Co, that are necessary to preserve T Co's property, are payments made towards supporting T[...]. This is strong support for T[...]'s version that S[...]'s advances of mortgage bond funds to the benefit of T Co are pro rata discharges of his obligation to maintain T[...], and were always intended to be this when the agreement between S[...] and T Co was concluded, whatever the true nature of the agreement was.

[25] I should point out that the Rule 43 Order does contemplate the marketing of the property with an eye to its sale, but I don't think that detracts from the fact that the Order tends to confirm the character of payments made by S[...] for the benefit of T Co with respect to the bonded property as being pro tanto discharges of S[...]'s duty of support of T[...].

[26] One must be careful to draw a distinction between the existence of the debt that founds *locus standi* and its payability. This is because of the fact, recognised in cases such as *Hammerle*,[19] that even a contingent creditor has *locus standi* to bring a winding up. For present purposes this means that, if T Co's dispute of the debt extends only to the question whether it is presently due and payable, that would not assist it in disputing the debt for the purposes of *Badenhorst* in depriving S[...] of *locus standi*.

[27] (If the debt is not presently due and payable, however, it cannot serve as a foundation for a s345(1)(a) demand, non-satisfaction of which deems commercial

[19] *Absa Bank Ltd v Hammerle Group* 2015 95) SA 215 (SCA) para 9.

insolvency, as the debt demanded to be paid must be then due in the sense of being due and payable. And in the instant case, the contentious loan was the debt used for S[...]'s s345(1)(a) demand. This, and the aligned question of actual commercial insolvency under s345(1)(c), based also mainly on this debt, need not be considered in any depth given the conclusion that I reach on the dispute on the debt.)

[28] The question of the repayability of the debt, however, for present purposes, is not so much one of taking issue merely with when it is repayable, but it rather goes to the very character of the "loan" S[...] asserts. The dubious nature of the varying types and modes of repayability suggested in the AFS casts considerable doubt on the notion that it was repayable at all. Similarly, the recognition by the Rule 43 Order of the nature of S[...]'s payments to benefit T Co as discharges of his obligations towards T[...] goes to the dispute about whether this phenomenon in the books of T Co is properly seen as a loan by S[...] to T Co that would fall at some point to be repaid at all.

[29] In this context, it is not without significance that T[...] sets out a version that, with respect to the 2022 AFS, she consulted an accountant who advised her that the treatment of the mortgage loan in the T Co AFS was irregular, that she confronted S[...] with this, and that he responded by saying he would "take out' these entries. S[...] baldly denies this account in reply, but on *Plascon-Evans* it is difficult simply to discount this completely as incapable of taking issue, *bona fide* and on reasonable grounds, with the genuineness of the entries in the AFS, whatever they are taken to mean on their face.

[30] I believe there is more than enough, applying *Plascon-Evans,* to conclude that the debt asserted by S[...] is *bona fide* disputed on reasonable grounds.

Prescription

[31] The prescription defence was advanced on the premise, that ended up being common cause, given the authority of *Trinity Asset Management,* [20] that a debt payable on demand starts prescribing the moment the debt is advanced. Here, advances by S[...] to T Co from 2015 to 2020 are asserted. But for interruption, the debt would have prescribed. But, if the 2020 AFS acknowledged the debt, then prescription was effectively interrupted. As already intimated above, I do not think the prescription defence can be meaningfully separated from the defence that challenges the interpretation of the AFS as conclusively establishing this loan in the first place. If the AFS conclusively establish the existence of the loan, then they conclusively serve as acknowledging its existence for purposes of interrupting prescription. If they do not, then the debt is disputed sufficiently for the purposes of *Badenhorst*, given the disputes on the papers and the application of *Plascon-Evans* in favour of T Co, and then prescription does not arise.

Premature s345(1)(a) demand

[32] There was an interesting debate on the question whether a s345(1)(a) demand could itself make a debt it relied on payable. The logic of the point was that a s345(1)(a) demand required a debt to be then due, in the sense of due and payable, when it was issued.[21] This would mean its issue could not itself be that which made the debt due. This would then have required a demand (reasonably made) to call up the loan in question, independent of the s345(1)(a) demand itself, and in this case there was no such preceding demand. Neither counsel had authority for either side of this debate. It is unnecessary for the purposes of this judgment to reach a conclusion on this debate. I do tend to believe that the debt that forms the subject-matter of a s345(1)(a) demand must be 'then due' in the sense of due and payable *independently* of the s345(1)(a) demand. I may mention that S[...] sought to establish actual commercial insolvency in the sense of an inability to pay debts when due as envisaged in s345(1)(c) independently of the s345(1)(a) demand, but the issue does not arise given my

[20] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC).
[21] See *GATX-Fuller (Pty) Ltd v Shepherd & Shepherd Inc* 1984 (3) SA 48 (W) at 52-3.

conclusion. I should perhaps state that it was accepted that, if the debt were established, T Co was unable to pay it.

Interference in the Divorce Proceedings and the residual discretion

[33] In the papers, T[...] asserted that she was seeking a redistribution order in the divorce. The shares in T Co are held in a family trust. It seems that T[...] is seeking to have the assets of the trust regarded as falling into S[...]'s estate for purposes of her claim for a redistribution. She said that a winding up of T Co would interfere in the ability of the court hearing the divorce to give effect to such an order.

[34] In para 42 of the judgment of Daniels AJ, he says the following:

> "*It is my understanding that an application has been brought to join the respondent* [i.e. T Co] *to the divorce action on the basis that it is the* alter ego *of the applicant and Mrs R[...], and the property ought to be regarded by the divorce court as an asset of the applicant and Mrs R[...] for purposes of a possible redistribution."*

[35] I could not get clarity on exactly what kind of *alter ego* assertions were made in the divorce, and was advised that the pleadings did not actually assert that T Co was the *alter ego* of S[...] (or of both S[...] and T[...], as the judgment suggests).

[36] The Daniels AJ judgment finds that a liquidation of T Co would not interfere in any way with the ability of the court hearing the divorce to join T Co (or its liquidator) and *'I am of the view that the divorce Court may in fact benefit from the involvement of a liquidator in the process that might result in an order whereby the assets are redistributed as part of the ultimate order to be made in the divorce proceedings"* (para 44).

[37] I do, however, have misgivings about the desirability of a winding up of T Co if and to the extent that the court in the divorce is going to be asked to regard T Co as the *alter ego* of the R[...]s. Such a finding would essentially pierce the corporate veil and ignore the separate legal person that is T Co. A winding up of T Co is at least in principle in conflict with such an order, as it is premised on the existence of T Co as a separate entity.

[38] This difficulty would present itself as part of the residual discretion against winding up even if S[...]'s *locus standi* were established and commercial insolvency established, whether via s345(1)(a) or via s345(1)(c). Although this interference motif was a point raised in the papers on behalf of T Co, it was not a point Mr *Pye* was taking before me. It did, however, give me cause for concern. It may well have been a sufficient basis for declining to order the winding up of T Co, or perhaps staying this application pending the finalisation of the divorce, had I not found in favour of T Co on the application of *Badenhorst*.

[39] In the circumstances, the following order is made;

(a) The application is dismissed, with costs, on scale C.

(b) The provisional order issued by Daniels AJ on 10 April 2026 is discharged.

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SNYCKERS AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 27 OCTOBER 2026

DATE OF JUDGMENT : 2 NOVEMBER 2026

APPEARANCES

APPLICANT'S COUNSEL: L Van Tonder (heads of argument L Acker)

APPLICANT'S ATTORNEYS: KWA Attorneys Johannesburg

RESPONDENT'S COUNSEL: W Pye SC

RESPONDENT'S ATTORNEYS: O'Donovan Attorney Sandton