IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable
Appeal case no: **A170/2023**

In the matter between:

JACOBUS CORNELIUS CONRAAD ROUX	Appellant
and	
KAREN FORTEIN NO	1st Respondent
HASSEN KAJIE NO	2nd Respondent
(in their capacities as liquidators of CRE Stropers CC [in liquidation] Master reference B4/2020)	

Neutral citation: *Roux v Fortein NO and Others* (A170/2023) [2025] ZAFSHC 167 (6 June 2025).

Coram:	JP Daffue, C Reinders et I Van Rhyn JJ
Heard:	02 December 2024
Delivered:	06 June 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 06 June 2025.

Summary: Liquidation of close corporation - creditor paid directly by one of the close corporation's debtors after provisional liquidation - close corporation finally liquidated - appeal against order that amount received by creditor be paid to the liquidators - on appeal, the full bench held that payment to creditor was to the detriment of other creditors in the *concursus creditorum* - appeal dismissed.

ORDER

The appeal is dismissed with costs, inclusive of the costs of counsel on scale B.

JUDGMENT

Daffue J (Reinders and Van Rhyn JJ concurring):

Introduction

[1] More than a century ago Innes J reiterated the following:

'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body.'[1] (emphasis added)

The learned judge confirmed that the principles in sequestration apply equally in liquidation. Lord De Villiers CJ put it as follows in the same judgment:[2]

'The effect of a winding-up order is to establish a *concursus creditorum,* and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors.' (emphasis added)

[2] This appeal against an order of a single judge of this division with leave of the court *a quo* involves a consideration and adjudication of the principles applicable to *concursus creditorum*.

The parties

[3] The appellant is Mr Jacobus Cornelius Conraad Roux, a major male farmer of the Bethlehem district, Free State Province. He was represented in the proceedings before us by Adv R van der Merwe on instructions of Blair attorneys, Bloemfontein.

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[1] *Walker v Syfret* NO 1911 AD 141 at p 166.
[2] *Ibid* at p 160.

[4] The first and second respondents are Ms Karen Fortein and Mr Hassen Kajie in their official capacities as liquidators of CRE Stropers CC (in liquidation). The liquidators were the successful applicants in the court *a quo*. Adv L Meintjes appeared on their behalf before us on instructions of Noordmans Attorneys, Bloemfontein.

[5] In order to avoid confusion, I shall herein after refer to the appellant as Roux, to the respondents as the liquidators and to CRE Stropers CC (in liquidation) as CRE Stropers.

The claim and the opposition thereto

[6] The liquidators instituted motion proceedings against Roux, claiming that a void disposition of property was effected in terms of s 341(2) of the Companies Act 61 of 1973 (the 1973 Companies Act). In addition, they initially claimed payment from Roux in the amount of R107 000, being the value of the void disposition, together with interest and costs. The notice of motion was amended during argument to substitute the amount of R107 000 with the amount of R107 553.75.

[7] Roux opposed the application primarily on legal grounds. He denied that the payment of R107 553.75 constituted a disposition of CRE Stropers' assets within the meaning of s 341(2) of the 1973 Companies Act, or that the payment constituted a disposition of any right of action of CRE Stropers. He relied on the fact that when the payment was made to him, the amount did not constitute property of CRE Stropers and furthermore, the payment was not made from CRE Stropers' bank account. In the premises, so he argued, the liquidators' reliance on s 341(2) was bad in law.

The judgment of the court a quo

[8] The court *a quo* did not find that there was a disposition by CRE Stropers itself which ought to be declared void within the meaning of s 341(2). I quote:

'[11] Although it is clear that CRE Stropers knew at the date of the invoice that the first respondent had already been paid, there is no evidence on the papers that CRE Stropers had any complicity or involvement in the request of the first respondent that resulted in the payment to him on 3 March 2020. Consequently, this court cannot find that there was a disposition by CRE Stropers itself which should be declared void. For the disposition to be void, section 341(2) expressly requires a disposition by any company being wound-up and unable to pay

its debts. (My underlining). The provisions of the Companies Act relating to winding-up apply *mutatis mutandis* to close corporations.'[3]

[9] Having come to the aforesaid conclusion, the court *a quo* dealt with the objective and common cause facts and concluded as follows:

'[12] ... Now, in the first place, CRE Stropers could never issue an invoice for payment on that date [25 September 2020], because at that time it was already in final liquidation and in the hands of the liquidators for a period of more than a month. Only the liquidators were in a position to claim the invoice amount for distribution among the *concursus creditorum*.

[13] Nor could the first respondent lay claim to the amount owed to him by CRE Stropers after its provisional liquidation on 27 February 2020. By doing so, he only brought about a benefit to himself to the detriment of other creditors in the *concursus creditorum*. In my view, there can be no doubt that nothing should be allowed to be done by a creditor to prejudice the rights of other creditors. ...'[4]

The relevant facts

[10] On 15 January 2020, one of CRE Stropers' creditors instituted liquidation proceedings against it under case number 112/2020. No opposition was raised and a provisional liquidation order was granted on 27 February 2020, followed by a final order of liquidation on 13 August 2020.

[11] On 6 July 2020 the Assistant Master appointed the liquidators. On 23 July 2021, a year later, the second meeting of creditors was held in terms whereof creditors approved the usual resolutions pertaining to the liquidators' authorities.[5]

[12] The liquidators held an insolvency enquiry at the request of Bismarck Boerdery CC, the applicant in the liquidation proceedings. An extract of the record of proceedings was placed before the court *a quo*.[6] I shall return thereto during my evaluation.

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[3] Record p 142: judgment para 11; the judgment is also reported in Saflii as *Fortein N.O. and Another v Roux and Another* (1059/2023) [2023] ZAFSHC 311 (7 August 2023).
[4] Record p 143: judgment paras 12 & 13.
[5] Record pp 34-36: annexure OA3 to the founding affidavit.
[6] Record pp 57-65: annexures OA13 and OA15 to the founding affidavit read with paras 40.3, 43.2 & 45 of the founding affidavit.

[13] On 25 September 2020 CRE Stropers issued an invoice for services rendered (harvesting costs) to JJ Bester van Niekerk Boerdery (Van Niekerk Boerdery) in the amount of R374 808.[7] The person who signed the invoice on behalf of CRE Stropers, apparently its sole member, Riaan Corbett (Corbett), deducted three amounts from the original amount due, to wit R150 000 in respect of BKB, R107 000 in respect of Koos and a small amount in respect of diesel. It is common cause that the reference to Koos is indeed nobody else, but Roux. Consequently, CRE Stropers' nett invoice amounted to R106 132 only which amount was paid to it on the day of the invoice. On 3 March 2020, more than six months prior to this invoice, Van Niekerk Boerdery paid R107 553.75 to Roux as confirmed under oath by its director, Jenetha van Niekerk (Van Niekerk).[8] Although this payment is slightly more than R107 000, it is common cause that Van Niekerk Boerdery settled Roux's claim after the provisional winding-up order had been granted.

[14] It must be accepted as common cause that Corbett as the sole member of CRE Stropers, having been aware of its insolvent status and the appointment of the liquidators, issued the aforesaid invoice to Van Niekerk Boerdery. Corbett should have been fully aware that CRE Stropers could not claim money from its debtor after winding-up and thereby ignoring the insolvency status of the CRE Stropers.

Applicable legal principles

[15] Section 341(2) of the 1973 Companies Act reads as follows:

'(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

[16] The vexed question to be considered is whether the payment to Roux by Van Niekerk Boerdery out of funds owing to CRE Stropers could be regarded as *void ex tunc* within the meaning of s 341(2). If not, whether the liquidators were entitled to the relief granted on the basis as found by the court *a quo*.

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[7] Record pp 20 and 45: para 24 of the founding affidavit read with annexure OA8.
[8] Record pp 88, 89, 92 and 93: paras 4-6 of Van Niekerk's affidavit read with annexures OAN 1 and OAN2.

[17] It is interesting to note that s 341(2) refers to dispositions by the company being wound-up. Section 178(2) of the 1926 Companies Act[9] merely referred to dispositions of property of the company. The distinction is apparent. More about this later. It suffices to say at this stage that the purpose of s 341(2) is clear, *ie* to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of creditors. The Supreme Court of Appeal stated the position as follows in *Pride Milling Company (Pty) Ltd v Bekker NO and Another (Pride Milling Company)*:[10]

'The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.'

[18] The time of commencement of winding-up proceedings is relevant. The winding-up of CRE Stropers commenced at the time of the presentation to the court of the application for winding-up, to wit 15 January 2020.[11] For purposes hereof it is not relevant at what exact time on the 15th the application was presented. The effect of s 348 of the 1973 Companies Act is to make the commencement of winding-up retrospective to the time when the application was lodged with the registrar of the court.[12]

[19] It is trite that the mischief aimed at by s 348 is a possible attempt by dishonest directors, members or creditors from snatching some unfair advantage during the period between the presentation of the application for a winding-up order and the granting of that order by the court.[13] The purpose is clearly to nullify such attempts.

[20] A disposition in terms of s 341(2) is not defined in the 1973 Companies Act. That being the case, s 339 of this Act stipulates that the provisions of the law of insolvency are to be applied *mutatis mutandis* in the winding-up of companies unable

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[9] Act 46 of 1926.
[10] *Pride Milling Company (Pty) Ltd v Bekker NO and Another* 2022 (2) SA 410 (SCA) para 30; and see *Smith NO and Another v Malan NO and Another* (4222/2022) [2023] ZAFSHC 417; 2024 (4) SA 624 (FB) (26 October 2023) for a summary of the legal principles with reference to other authorities.
[11] Section 66 of the Close Corporations Act 69 of 1984, read with item 9 of schedule 5 of the Companies Act 71 of 2008 together with s 348 of the 1973 Companies Act.
[12] *Development Bank of Southern Africa Ltd v Van Rensburg NNO* 2002 (5) SA 425 (SCA) para 8.
[13] In *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (WLD) at p 347B Snyman J dealt with s 115 of the 1926 Companies Act, but the principle remains the same.

to pay their debts in so far as they are applicable. Therefore, one has to consider the Insolvency Act.[14]

[21] Section 2 of the Insolvency Act defines disposition as follows:
"disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and '**dispose**' has a corresponding meaning.'

[22] Property is defined in s 2 of the Insolvency Act as 'movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee.'
Movable property is defined in the same section as 'every kind of property and every right or interest which is not immovable property'.

[23] It is trite that the liquidators in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, and shall apply the same in satisfaction of the costs of the winding-up and the claims of creditors, whereafter the balance shall be distributed amongst those entitled thereto.

[24] A *concursus creditorum* is governed by common law principles. In *Ward v Barrett NO and Another NO*[15] it is stated that a *concursus creditorum* 'presupposes conflicting interests of a number of creditors who pursue their claims against the same property, insufficiency of the debtor's means to satisfy all the creditors in full, and an order of Court commencing the *concursus*.' The court continued:
'In the result, creditors enjoy, as from that date [the commencement of *concursus*], the protection which is necessary to ensure payment according to recognised priority of claims and to prevent the satisfaction of one creditor to the prejudice of another.'

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[14] 24 of 1936.
[15] *Ward v Barrett NO and Another NO* 1963 (2) SA 546 (A) at 552; see also *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A) at p 803J; and *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (In Liquidation)* 1969 (1) SA 660 (A) at pp 671G-672D.

I reiterate what was said in *Walker v Syfret*[16]:

'No transaction can thereafter [after the sequestration or winding-up order] be entered into with regard to estate matters by a single creditor to the prejudice of the general body.'

[25] In *Vereins-Und Westbank AG v Veren Investments and Others*[17] the Supreme Court of Appeal held as follows pertaining to ratification by a creditor of a payment made by the debtor to a third party:

'[12] . . . Thus, should the debtor unilaterally pay a stranger to the contract, if the creditor later ratifies and approves the action, this constitutes a valid payment and is considered valid from the moment of payment (and not from the moment of ratification and approval).

[13] It follows that the unilateral nature of the local bank's conduct cannot thwart its payment to the German bank, provided that the German bank subsequently approved that conduct. ... The principle already cited applies equally: subsequent approval is effective to validate the payment from the time when it was originally made, even though the payee did not have access to it.'

[26] Section 341(2) is not aimed at recovery of property. It renders the disposition void *ex tunc*, but the court may in its discretion validate the disposition as provided in the proviso to the section.[18] Roux, as a beneficiary, could have approached the court to validate the disposition, but he failed to do so. The liquidators' remedy in respect of the invalidated disposition is not regulated by the section, but has to be determined by the general law.[19] The principles pertaining to the *concursus creditorum* must be applied.

Evaluation of the court a quo's judgment and submissions by the parties

[27] The parties made detailed submissions. I shall endeavour to consider those that I regard to be relevant to the pertinent issues. I keep in mind that Mr Van der Merwe submitted that the liquidators brought Roux to court, seeking relief in terms of s 341(2) and not in terms of any other statutory provisions, either in terms of the Insolvency Act or otherwise. He submitted further that the court *a quo* erred in adjudicating a dispute on issues not raised or defined by the parties. The fundamental question that lay at the heart of adjudication of the application, so he submitted, was

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[16] *Walker v Syfret loc cit*, quoted in para 1 of the judgment *supra*; see fn 1.
[17] *Vereins-Und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA) paras 12&13.
[18] *Smith NO and Another v Malan NO and Another loc cit* paras 28 -32.
[19] Blackman *et al*, *Commentary on the Companies Act*, revision service 2 at 14-51.

whether the payment by Van Niekerk Boerdery to Roux constituted a disposition as contemplated in s 341(2).

[28] The liquidators alleged in the founding affidavit that Van Niekerk Boerdery made the relevant payment on instructions of CRE Stropers to Roux.[20] The liquidators continued in averring that despite Corbett's awareness of the winding-up, he proceeded to give instructions to Van Niekerk Boerdery to effect payment to Roux from funds which should have been paid to CRE Stropers, thereby preferring one creditor to the detriment of the general body of creditors.[21] Although Roux admitted receiving payment, he denied that the payment constituted a disposition of assets or a disposition of a right of action within the meaning of s 341(2). According to him, at the time payment was made to him, the amount did not constitute property of CRE Stropers and furthermore, the payment was not made from CRE Stropers' bank account.[22]

[29] Contrary to what was alleged by the liquidators, Van Niekerk, the sole director of Van Niekerk Boerdery, deposed to an affidavit which the liquidators relied upon as their reply to the answering affidavit. According to her, BKB and Roux approached her directly regarding payment due by CRE Stropers to them. They requested her to pay BKB and Roux respectively from the amount due and payable to CRE Stropers. Consequently, the amounts paid to BKB and Roux by her company settled the amounts due by CRE Stropers to BKB and Roux.

[30] Bearing in mind the contradictory versions referred to above, it is also important to consider the evidence led during the insolvency enquiry. Corbett, CRE Stropers' sole member, testified that CRE Stropers owed BKB R150 000. On a question why he decided to pay BKB and not Bismarck Boerdery, the response was not properly transcribed, but he confirmed thereupon that BKB had been 'preferred above Bismarck Boerdery'. Corbett also testified about the payment to Roux. He mentioned the following when requested to state why Roux was paid and not Bismarck Boerdery: 'Seker maar dieselfde as BKB' (loosely translated as for the same reason as BKB). Therefore, Roux was preferred above the liquidating creditor as was the case with

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[20] Record p 20: para 24 of the founding affidavit.
[21] Record p 21: para 27 of the founding affidavit.
[22] Record p 75: para 13&14 of the answering affidavit.

BKB. Corbett continued to testify that BKB and Roux had requested Van Niekerk to pay them. The reason advanced is recorded as follows: 'Ja, seker hulle het seker geweet ek is insolvent.' (yes, they probably knew that I was insolvent).

[31] I accept that Roux spoke directly to Van Niekerk and requested Van Niekerk Boerdery to settle the amount due by CRE Stropers to him. The court *a quo* correctly summarised the evidence. There is no evidence that Corbett on behalf of CRE Stropers and Roux agreed that Van Niekerk Boerdery may pay Roux directly. This lack of evidence does not necessarily mean that no disposition by CRE Stropers took place. The definition of disposition in s 2 of the Insolvency Act quoted above comes into play and needs further consideration.

[32] The liquidator's counsel submitted that s 341(2) applied and that Roux did not even attempt to validate the payment by relying on the proviso contained in the section. In arguing the matter, he pointed out that CRE Stropers still had a right of action against Van Niekerk Boerdery and even if CRE Stropers was not aware of the arrangement between Roux and Van Niekerk Boerdery and the payment to Roux on 3 March 2020, Corbett on behalf of CRE Stropers accepted this payment and approved it, *ie* CRE Stropers ratified the payment whereupon the invoice to Van Niekerk Boerdery was issued whilst deducting the payment made to Roux. Based on these facts, counsel argued that CRE Stropers retrospectively approved the payment and/or transfer of money and in doing so abandoned its claim against Van Niekerk Boerdery. This constituted a disposition of property or rights of action in accordance with the definition of disposition in s 2 of the Insolvency Act. I agree with this approach. The liquidator's counsel conceded that his argument in respect of the above issue differed from the reasoning of the court *a quo*, but submitted that same is immaterial and/or irrelevant as it is trite that an appeal lies against the substantive order of a lower court and not the reasoning of that court.

[33] When Corbett deducted the amount paid by Van Niekerk Boerdery to Roux, CRE Stropers clearly abandoned the right to claim this amount from Van Niekerk Boerdery to which it was clearly entitled in respect of services rendered. As Innes J said over a century ago,[23] 'the hand of the law is laid upon the estate' upon sequestration which also applies with equal force in the case of winding-up.

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[23] Quoted in para 1 of this judgment *supra*.

[34] CRE Stropers, through its sole member, Corbett, demonstrated *mala fides* by issuing an invoice to Van Niekerk Boerdery on 25 September 2020 and long after the provisional and final winding-up orders. Corbett should have played open cards and informed the liquidators of CRE Stropers' claim against Van Niekerk Boerdery which amount should have been collected to be distributed amongst the *concursus creditorum* after the deduction of administrative costs. I differ from the court *a quo's* approach in paragraph 11 of its judgment for the following reason. Even if Corbett was initially unaware that Roux approached Van Niekerk Boerdery for payment and did in fact receive payment, he on behalf of CRE Stropers ratified this direct payment to the detriment of the *concursus creditorum*. In doing so, CRE Stropers' right of action was abandoned. Therefore, a disposition by it within the context of s 341(2) took place.

[35] I do not agree with the submission by Roux's counsel that a right to property within the context of this matter could only have been disposed of by CRE Stropers if the claim against Van Niekerk Boerdery had been ceded to Roux and that this did not occur in *casu*. I accept that, based on the facts before the court *a quo*, Corbett on behalf of CRE Stropers abandoned the right to claim the full amount due to it, well-knowing that Roux has already been paid R107 000 as is evident from the invoice issued to Van Niekerk Boerdery.

[36] The liquidators approached the application from a wrong point of view. It was not necessary for them to ask that the payment to Roux be declared void in terms of s 341(2). The section is clear as authoritatively stated in *Pride Milling Company*[24] and in several other judgments. The default position is that all dispositions referred to in the section have no force and effect in the eyes of the law. The court *a quo* did not declare the payment void in terms of s 341(2) as mentioned above. It did not have to. It merely ordered Roux to pay the liquidators the amount of R107 553.75 plus interest and costs based on its finding in paragraph 13 of the judgment.

[37] I agree with the court *a quo* that Roux could not lay claim to the amount owed to him by CRE Stropers and in the process seek payment from Van Niekerk Boerdery. Therefore, as the court *a quo* held, 'nothing should be allowed to be done by a creditor to prejudice the rights of other creditors.'

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[24] *Loc cit* at para 30.

[38] Roux's counsel submitted with reference to paragraphs 12 and 13 of the court *a quo's* judgment that it 'clearly found in favour of the respondents [the liquidators] based on the court's view that the payment made to the appellant [Roux] amounted thereto that the respondent (sic) was preferred above other creditors'. Clearly counsel meant to refer to the fact that the court *a quo* found that Roux was preferred above other creditors. Therefore, the argument continued to the effect that the liquidators did not approach the court based on any of the provisions of ss 26 to 31 of the Insolvency Act. The argument continued that Roux did not have to meet a case premised on those sections. He is wrong. Those sections of the Insolvency Act apply to transactions that have occurred before sequestration. Clearly, the court *a quo* did not consider any of these kinds of transactions referred to in the relevant sections. It pertinently held that Roux could not lay claim to an amount owed to him by CRE Stropers after its provisional liquidation on 27 February 2020 and in doing so he brought a benefit to himself to the detriment of other creditors in the *concursus creditorum*. This approach cannot be faulted.

[39] Counsel's reliance on *Fischer and Another v Ramahlele and Others*[25] does not support Roux at all in these circumstances. The facts were properly placed before the court and although I have referred to the contradiction in the versions of the liquidators and Van Niekerk, the court *a quo* came to its conclusion based on the facts presented to it. No new issues were raised which were not traversed in the affidavits. Furthermore, the court *a quo* did not 'change the factual issues' presented by the parties with reference to *Member of the Executive Council, Department of Education, Eastern Cape v Komani School & Office Supplies CC, t/a Komani Stationers.*[26]

Conclusion

[40] I conclude that there is no merit in the appeal and that it should be dismissed. There is no reason why the costs should not follow the result. Both counsel submitted that an award of costs should include the costs of counsel on scale B.

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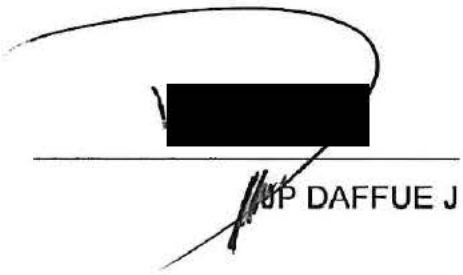
[25] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) paras 13-15.
[26] *Member of the Executive Council, Department of Education, Eastern Cape v Komani School & Office Supplies CC, t/a Komani Stationers* 2022 (3) SA 361 (SCA) para 53 relied upon by Roux's counsel.

Order

[41] The following order is made:

The appeal is dismissed with costs, inclusive of the costs of counsel on scale B.



JP DAFFUE J

I concur

C REINDERS J

I concur

I VAN RHYN J

Appearances

For appellant:	R van der Merwe
Instructed by:	Blair Attorneys
	Bloemfontein
For 1st and 2nd Respondents:	L Meintjes
Instructed by:	Noordmans Attorneys
	Bloemfontein