REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 96943/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 22 August 2024 E van der Schyff

In the matter between:

Jaco Cronje	First Applicant
Anibet Investments (Pty) Ltd	Second Applicant
and	
Forgeweld Engineering (Pty) Ltd	First Respondent
Greg van der Kroll	Second Respondent
Khulanathi Construction t/a Themba Welding t/a Springbok Tank Manufacturers	Third Respondent
Sheriff Kempton Park	Fourth Respondent
Sheriff Bela-Bela	Fifth Respondent

Sheriff Johannesburg North	Sixth Respondent
The Companies and Intellectual Property Commission of South Africa	Seventh Respondent
Liberty Group Ltd	Eighth Respondent

JUDGMENT

Van der Schyff J

Introduction

[1] This is essentially an opposed application for the rescission of a default judgment handed down on 10 December 2018 and the setting aside of sales in execution that occurred pursuant to the default judgment being granted.

[2] Two interlocutory applications follow the main application. The first applicant (Mr. Cronje) seeks an order in terms of section 165 (8) of the Companies Act, 71 of 2008, to continue with the main application in the name and on behalf of the second applicant (Anibet). The first and second respondents (hereafter referred to as the respondents since they are the only respondents participating actively in the litigation) seek an order in terms of Rule 6(15) of the Uniform Rules of Court, to strike out allegations in the replying affidavit.[1] Both the interlocutory applications are opposed.

Factual Chronology

[3] The parties filed a joint chronology. The summary thereof provided in the joint practice note captures the essence of the factual background:

[1] The respondents initially sought the striking out of content in the founding and replying affidavits, but persisted only with the application as far as the replying affidavit is concerned.

3.1 Both Mr. Cronje, and the second respondent (Mr. Van der Kroll) were directors and had an interest in the first respondent, Forgeweld Engineering (Pty) Ltd (Forgeweld Engineering);

3.2 Mr. Cronje was an employee of Forgeweld Engineering in addition to being the sole shareholder of Anibet;

3.3 Forgeweld Engineering issued summons against both Mr. Cronje and Anibet in 2016 for the alleged theft and misappropriation of Forgeweld Engineering's funds;

3.4 A notice of bar was served on Mr. Cronje and Anibet in May 2018;

3.5 On 2 November 2018, Mr. Cronje published a notice of his application for voluntary surrender in the Government Gazette;

3.6 On 10 December 2018, Forgeweld Engineering obtained default judgment against Mr. Cronje and Anibet;

3.7 On 10 July 2019, Mr. Van der Kroll intervened in Mr. Cronje's voluntary surrender application. The application was postponed.

3.8 On 11 November 2020, a sale in execution was held whereby Anibet's shareholding in Forgeweld Engineering was sold to Mr. Van der Kroll;

3.9 On 18 March 2021, Mr. Cronje's shareholding in Anibet was sold to Mr. Van der Kroll;

3.10 A further sale in execution was held whereby Mr. Cronje's interest in an annuity held with Liberty, the eighth respondent, was sold and paid out to Mr. Van der Kroll;

3.11 The voluntary surrender application was heard on 14 October 2021, again postponed, and dismissed on 22 March 2022

3.12 The current application for the rescission of the default judgment was issued on 30 August 2023.

Discussion

Rescission

[4] Counsel for the applicants submitted that the rescission application is brought both in terms of rule 42(1)(a) of the Uniform Rules of Court and in terms of the common

law. More specifically, counsel submitted that there was fraud on the part of Mr. Van der Kroll and that certain facts were not brought to the court's attention when default judgment was sought.

Rule 42(1)(a)

Absence

[5] Rule 42(1)(a) provides that the court may rescind or vary an order or judgment erroneously sought or granted in the absence of a party affected thereby. Once an applicant has met the requirements for rescission, a court is endowed with a discretion to rescind its order. This discretion must be exercised judicially. The issues to be determined here are whether the order was (i) erroneously sought and/or (ii) erroneously granted and (iii) in the absence of Mr. Cronje and Anibet.

[6] In determining whether the order was granted in Mr. Cronje and Anibet's absence, the recent Constitutional Court decision in *Zuma v the Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others*[2] is instructive. The majority explained that the word 'absence' in rule 42(1)(a) 'exist[s] to protect litigants whose presence was precluded, not those whose absence was elected.' This judgment of the Constitutional Court reaffirms the position as previously stated by the Supreme Court of Appeal in *Freedom Stationary (Pty) Limited v Hassam.*[3]

[7] Neither Mr. Cronje nor Anibet were present in court when the application for default judgment was heard, but after the *Zuma decision,* it is evident that 'not being present' and 'being absent' are not synonyms in the context of Rule 42(1)(a). Mr. Cronje and Anibet were given notice of the case against them, they had sufficient opportunity to participate in the matter, but nonetheless elected not to participate.

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[2] 2021 (11) BCLR 1263 (CC).

[3] 2019 (4) SA 459 (SCA) at para [32].

[8] Mr. Cronje contends that the advice he received from his legal representative was that the publication of the notice of his voluntary surrender suspended all legal proceedings against him and that he was not required to oppose the application for default judgment.

[9] The implication or effect of the publication of a notice for voluntary surrender is discussed in more detail below when the aspect of the setting aside of sales in execution is dealt with. For present purposes, it suffices to state that voluntary surrender proceedings do not suspend all legal proceedings akin to the moratorium placed on legal proceedings in business rescue proceedings.[4] If Mr. Cronje received such advice, it was wrong, and it is sufficient to repeat the words of Govindjee J in *J.A.N. v N.C.N.*[5]

> 'Unfortunate as this may appear, a litigant who, by mistake of herself or her legal adviser, abandons relief to which she is, or may be, entitled, cannot easily succeed in claiming that relief. This strict approach is confirmed by *Joseph v Joseph*, the court confirming that it had no jurisdiction or power to recall or amend an order it had deliberately made consequent to a mistake, in the absence of fraud of the other party in the course of the proceedings.'[6]

[10] Mr. Cronje does not aver that it was fraud perpetrated by Mr. Van der Kroll's that led him not to oppose the application for default judgment. The summons was issued already in 2016, and by November 2018, when the notices were published, no plea was filed. Despite having obtained permission to defend the action when a summary judgment application was dismissed, Mr. Cronje's failure to file a plea led to him being barred from pleading. Even receiving notice of an application for default judgment could not spur him to participate in the action. The only inference that can be drawn if regard is had to the timeline of events is that Mr. Cronje deliberately chose not to participate in the continuation of legal proceedings on his own and

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[4] Section 133 of the Companies Act 71 of 2008.

[5] (2283/2021) [2022] ZAECMKHC 14 (17 May 2022) at para [36].

[6] *Joseph v Joseph* 1951 (3) SA 776 (N) at 780.

Anibet's behalf. In the affidavit filed in support of the voluntary surrender application the debt owed to Forgeweld Engineering is unequivocally stated as a liability. The reliance on the voluntary surrender application as an excuse or explanation for the default seems to be an afterthought relied on in an attempt to circumvent the ensuing consequences.

[11] This is the end of the application for rescission in terms of Rule 42(1)(a), but for completeness's sake, I will deal with the other requirements.

Order erroneously sought

[12] An order is erroneously sought if, among others, there was no proper notice to the absent party,[7] where the notice-of-default requirement of the National Credit Act 34 of 2005 was not met,[8] or where judgment was sought and granted after the capital amount claimed had already been paid.[9] I address Mr. Cronje's contention that the publication of the notice for voluntary surrender effectively placed a moratorium on all legal proceedings below. The order was not erroneously sought.

Order erroneously granted

[13] If regard is had to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape),*[10] an order may be said to have been erroneously granted if, at the time of its issuing, there was a procedural irregularity or error made during the proceedings that is patent in the record. The Supreme Court of Appeal cautioned that while rule 42(1)(a) caters for mistake, rescission does not follow automatically upon proof of a mistake.

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[7] *Custom Credit Corporation Ltd v Bruwer* 1969 (4) SA 564 (D).

[8] *Kgomo and Another v Standard Bank of South Africa* 2016 (2) SA 184 (GP).

[9] *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of South Africa (Pty) Ltd* 1947 (4) SA 234 (C).

[10] 2003 (6) SA 1 (SCA).

The court has a discretion, which it must exercise judicially. Because rule 42(1)(a) is a rule of court, its ambit is 'entirely' procedural.[11]

[14] The Constitutional Court in *Zuma* reaffirmed the trite principle that an applicant seeking rescission must show that at the time the order was made, there existed a fact that had the judge been aware of it, would have induced such judge not to grant the order.[12]

[15] This fact that the judge was not aware of must be something more than the defence raised against the claim. The Constitutional Court explained it as follows:[13]

> 'Mr Zuma's bringing what essentially constitutes his "defence" to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court's attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order.'

[16] The Supreme Court of Appeal explained succinctly in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd:*[14]

> '[I]n a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does

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[11] *Supra* par [6].

[12] See, among others, *Daniel v President of the Republic of South Africa* 2013 (11) BCLR 1241 (CC) at para [6].

[13] *Zuma, supra* at para [64].

[14] 2007 (6) SA 87 (SCA) at para [27].

> not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment'

[17] An order will be erroneously granted if it is obtained through fraud. In *Naidoo v Matlala NO*[15] Southwood J explained that fraud is committed where facts are deliberately misrepresented to the court.

[18] To succeed on the ground of fraud, a party must prove that the respondent gave incorrect evidence during the initial proceedings, that the applicant did so fraudulently with the intention to mislead the court, and that this false evidence diverged the truth to such an extent that the court would have given a different judgment had it been aware of the true position.[16] With regard to the onus resting on a party relying on fraud as the basis for the rescission of an order, it was previously held that the proper procedure to follow where a judgment is sought to be set aside on the ground of fraud is by way of action and not by way of motion.[17]

[19] Courts have set a high threshold before countenancing an allegation of fraud.[18] In *Schierhout v Union Government*[19] the court stated:

> '[B]aseless charges of fraud are not encouraged by courts of law. Involving as they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be

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[15] 2012 (1) SA 143 (GNP) at 153

[16] *J.A.N. v N.C.N.* (2283/2021) [2022] ZAECMKHC 14 (17 May 2022) at para [30]. See also *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.

[17] *Davel v Swanepoel* 1954 (1) SA 383 (A) at 384.

[18] *J.A.N. supra* at para [32].

[19] 1927 AD 94 at 98.

lightly made, and when made should not only be made expressly *but should be formulated with a precision and fulness which is demanded in a criminal case.*' (My emphasis.)

[20] In *Hotz v Hotz*[20] Goldstein J, writing for a Full Court, stated that a litigant seeking to set aside an order on the basis of fraud bears the onus of proving that had truth been told, the order would not have been granted. It is likewise not sufficient that there should have been perjury to which the successful litigant is a party, there must have been a causal connection between the perjury and the judgment to be set aside.[21]

[21] The mere circumstance that certain material facts were not disclosed does not in itself establish the fact that there has been a willful concealment of evidence, a fraudulent intent must be affirmatively proved.[22] A non-fraudulent misrepresentation of fact, which induces an error on the part of the judge granting the order, however, does not entitle a party to obtain rescission of the judgment.[23] Prinsloo J explained in *Independent Municipal and Allied Trade Union obo J Erasmus and A B J Craukamp v City of Johannesburg*[24] that patent dishonesty cannot be equated to fraud, as fraud requires a false representation by means of a statement or omission or conduct made knowingly in order to gain a material advantage.

[22] Mr. Cronje explains in the founding affidavit that Mr. Van der Kroll started accusing him of theft, fraud and the misappropriation of company funds in 2016. Mr. Van der Kroll and Forgeweld obtained a preservation order and instituted an action claiming an amount totaling more than R8.6 million from Mr. Cronje. Mr. Cronje proceeds to list the respective claims against him and Anibet and provides an answer, or his defence, to the respective claims. The facts he refers to, which he claims were not revealed to the judge granting the default judgment, are the facts constituting the defences he belatedly raises.

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[20] 2002 (1) SA 333 (W) at 336J-337A.

[21] *Solomon v R* 1905 TS at 713-714.

[22] *Cape Town Town Council v Pinn* (1906) 23 SC 213.

[23] *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W) at 897A-B.

[24] (JS 606/08) [2017] 38 ILJ 2774 (LC) at para [38].

[23] Counsel for Mr. Cronje submitted that Mr. Van der Kroll's conduct in seeking relief to which he and Foregweld are not entitled, and the 'unsubstantiated allegations' made by Mr. Van der Kroll are sufficient to substantiate an inference that the default judgment was obtained through fraud. I disagree. Mr. Cronje's exposition does not meet the test laid down in *Schierhout.*

[24] Having regard to the above, Mr. Cronje did not make out a case for rescission in terms of rule 42(1)(a).

Common law

[25] In *Britz v Matloga*[25] Khumalo J quoted from *Mudzingwa v Mudzingwa*[26] where the court explained:

> 'It is firmly established that a judgement can only be rescinded under the common law on one of the grounds upon which restitution *in integrum* would be granted, such as fraud or some other just cause including Justus error ... certainly a litigant who himself was negligent and the author of his own misfortune will fail in the request for rescission.'

[26] As restated and confirmed in *Zuma,*[27] the existing common law test is simple, an applicant for rescission under the common law must establish both that it has a reasonable and satisfactory explanation for its failure to oppose the proceedings leading to the judgment or order being granted, and that it has a *bona fide* case that carries some prospects of success.

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[25] (21653/2011) [2015] ZAGPPHC 171 (25 March 2015).

[26] 1991 (4) SA 17 (ZS).

[27] *Zuma, supra,* at para [71].

[27] In *Van Aswegen v McDonald Foreman & Company Ltd*[28] the court stated that an applicant for rescission must prove that at no time did it renounce its defence and that it throughout had a serious intention of proceeding with its case.

[28] As I have already stated above, I do not find Mr. Cronje's explanation that he was under the impression that the publication of a notice of a voluntary surrender application suspends all legal proceedings to be a reasonable or satisfactory explanation for his default. This explanation does not explain his failure to file a plea that caused him to be barred after a notice of bar was delivered on 16 May 2018. It also does not explain his failure to subsequently apply for a removal of the bar. Mr. Cronje's approach to the action does not show any serious intention of defending the civil action either on his own or Anibet's behalf.

[29] I find it peculiar and contradictory that Mr. Cronje relied on a debt owed to Forgeweld in the voluntary surrender application in the amount of R 8,000,000.00, but he claims now to have a defence to the action instituted by Forgeweld. He states in the same affidavit that he was summarily dismissed because of allegations of theft, but he does not indicate the liability towards Forgeweld as an alleged liability. It is this liability that caused his alleged insolvency. The indebtedness to Forgeweld is portrayed in the affidavit supporting the voluntary surrender application as a foregone conclusion – Mr. Cronje states:

> 'Ek was Direkteur by Forgeweld Engineering. As gevolg van beweerde diefstal is ek summier ontslaan. Forgeweld het voortgegaan met siviele litigasie teen my. Ek verdien al vir meer as twee jaar geen inkomste nie en kan geen van my skuldeisers betaal nie.'

He then includes in the list of liabilities -

> 'Forgeweld Engineering Verw, N.Viviers/dr/FR24017 [R] 8 000 000-00.'

He does not state that an action was instituted and that he is defending the action.

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[28] 1963 (3) SA 197 (O).

[30] Mr. Cronje's failure to convince the court that there is a reasonable explanation for his default, together with his inability to explain the inordinate delay in instituting the rescission application, an aspect dealt with below, causes me to find that Mr. Cronje did not meet the first requirement to succeed in the application for rescission.

Inordinate delay

[31] No time period is prescribed for a common law rescission application. This does not mean that the period within which a rescission application in terms of the common law is to be filed is indefinite and open-ended. The maxim *vigilantibus non dormientibus lex subvenit* finds application,[29] and entails that the application for rescission must be made within a reasonable time.[30]

[32] *In casu,* it is common cause that default judgment was granted on 10 December 2018. Notices of sales in execution were published on 26 and 30 October 2020. Sales in execution occurred on 11 November 2020 and 18 March 2021. The voluntary surrender application was dismissed on 22 March 2022. On 29 May 2023, Mr. Cronje was given notice of a Shareholders meeting of Anibet. On 30 August 2023, the rescission application was launched.

[33] Mr. Cronje does not even attempt to explain the delay in launching the rescission application except for claiming that he was informed that the commencement of voluntary surrender proceedings precluded him from opposing the action. He does not explain when he first became aware of the existence of default judgment, and why he did not start doubting the correctness of the legal advice he received when he realized that sales of execution occurred. Mr. Cronje explains that he attended the sale in execution that occurred in November 2020 – yet, he did not inform the Sheriff of the voluntary surrender application nor took any steps to prevent the sale

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[29] The law assists those who are vigilant, not those asleep upon their rights. See *Independent Municipal and Allied Trade Union*, *supra*, at para [63], and *Pathescope (Union) of South Africa Ltd v Malinick* 1927 AD 305.

[30] *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* (A221/2019) [2021] ZAGPPHC 599 (16 September 2021)

from occurring or set it aside soon after it occurred. Mr. Cronje avers that he launched the rescission application soon after he became aware that the voluntary surrender application was dismissed. He fails to explain, however, why he only became aware of the fact that the voluntary surrender application was dismissed on 3 June 2023 when the judgment dismissing the application was already delivered on 22 March 2022.

[34] Mr. Cronje ought to have sought condonation for the inordinate delay in launching the rescission application. He failed to do so. I need not continue to address the fact that no condonation was granted for the late filing of a replying affidavit in the voluntary surrender application, another example of either ineptitude or a lackadaisical approach to legal proceedings. I only mention it herein because Mr. Cronje now states that the replying affidavit contained vital information that the court did not consider at the time, as if it is relevant for this application. It is trite that condonation is not merely for the asking. It is likewise long established that there comes a point when a client has to bear the consequences of its attorney's conduct. The court is not privy to the extent of legal advice given to Mr. Cronje, but at some point, he had to ask himself why legal proceedings are continuing despite the alleged advice that voluntary surrender proceedings suspend legal action and 'prevent' him from opposing proceedings instituted against him, although as I indicated above, Mr. Cronje did not actively defend the action even prior to the commencement of legal proceedings.

Sales in execution

[35] Mr. Cronje claims that the sales in execution that occurred subsequent to the publication of the notice of voluntary surrender are *ab initio* void as they occurred contrary to the provisions of section 5(1) of the Insolvency Act 24 of 1936 (the Insolvency Act).

[36] Section 5(1) of the Insolvency Act provides as follows:

> '**5. Prohibition of sale in execution of property of estate after publication of notice of surrender and appointment of *curator bonis*.**—(1) After the publication of a notice of surrender in the *Gazette* in terms of section *four*, it shall not be lawful to sell any property of the estate in question, which has been attached under writ of execution or other process, unless the person charged with the execution of the writ or other process could not have known of the publication: Provided that the Master, if in his opinion the value of any such property does not exceed R5 000, or the Court, if it exceeds that amount, may order the sale of the property attached and direct how the proceeds of the sale shall be applied.

[37] The Sheriff of the Court arranging a sale in execution is the person 'charged with the execution of a writ'. Mr. Cronje does not make any allegation in the founding affidavit that any of the Sheriffs involved in the sales of execution was aware of the voluntary surrender proceedings. He informs the court that he attended the sale that occurred in November 2020, but he does not aver that he informed the Sheriff of the pending voluntary surrender proceedings – he only took issue with the value of the shares that were to be sold in execution.

[38] I agree with the respondents' contention that reliance on section 5 of the Insolvency Act is rendered nugatory since the voluntary surrender application was dismissed. Vuma AJ, in the judgment dismissing the voluntary surrender application, expressed the view that Mr. Conje's conduct:

> 'shows no *bona fide*[s] on his part in bringing the application for voluntary surrender.'

[39] The Constitutional Court in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*[31] dealt with the fate of legal proceedings launched by a party with an ulterior motive and held that circumstances may arise where the court must

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[31] 2024 (1) SA 331 (CC) at para [77].

'safeguard the integrity of its processes.' The principle found application in a subsequent decision of the Supreme Court of Appeal in *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services*[32] where the court found that a business rescue application, tainted by abuse, was not 'made' as envisaged in section 131(6) of the Companies Act 71 of 2008, and that the moratorium on legal proceedings did not come into operation. Vuma AJ essentially found that the voluntary surrender proceedings constituted an abuse of process. In these circumstances, any reliance by Mr. Cronje on section 5 of the Insolvency Act is ill-founded.

Section 165 (6) and striking out application

[40] In light of the finding above, it is not necessary to deal in detail with the question of whether Mr. Cronje had the requisite *locus standi* to institute legal proceedings in the name and on behalf of Anibet Investments (Pty) Ltd. It suffices to state that Mr. Cronje failed to indicate any exceptional circumstances that absolved him from the requirement to follow the procedure set out in section 165(2)-(4) of the Companies Act. As a result, Mr. Cronje did not have the requisite authority or *locus* to act on behalf of Anibet. This is relevant to the cost order that stands to be granted.

[41] I am of the view that the respondents' approach to the striking-out application is overly technical. Mr. Cronje, belatedly, filed a notice of motion seeking the relief provided for in section 165(6) and incorporated the averments he felt were sufficient for the relief sought in the replying affidavit. The respondents did not suffer any prejudice as they could have approached the court seeking permission to deal with the new matter included therein.

Costs

[42] The general principle is that costs follow success.

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[32] 2024 (1) SA 400 (SCA) at para [36].

[43] The unexplained inordinate delay that preceded the institution of this rescission application substantiates the granting of a punitive costs order against Mr. Cronje.

ORDER

In the result, the following order is granted:

1. **The application is dismissed with costs on attorney and client scale, including the costs of senior and junior counsel where so employed.**

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	J. Vorster
Instructed by:	WC Dippenaar
For the first and second respondents:	MP van der Merwe SC
Instructed by:	Weavind & Weavind
Date of the hearing:	15 August 2024
Date of judgment:	22 August 2024