FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3775/2009

In the matter between:

AFRICAN PRESBYTERIAN BAFOLISI CHURCH OF SOUTHERN AFRICA Applicant

and

M J MOLOI 1st Respondent
D S MKHWANAZI 2nd Respondent

JUDGEMENT: RAMPAI J

HEARD ON: 19 NOVEMBER 2009

DELIVERED ON: 7 JANUARY 2010

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[1] These are motion proceedings. The nature of the relief sought is two-fold. First, the African Church applies to have its deponent declared as its constitutionally elected and legitimate arch bishop. Second, it also applies for a final interdict to have the first respondent and the second respondents prohibited and restrained from exercising their powers and fulfilling their duties as its arch bishop and general secretary respectively. The declaratory relief and interdictory relief are the primary reliefs which are sought

together with an ancillary secondary relief which includes a mandatory interdict to compel the first respondent to hand over certain things to the applicant's deponent. The respondents oppose the application.

[2] In its founding affidavit, the applicant contends that the synod held at Wesselsbron during April 2008 resolved that the first respondent should retire as arch bishop; that Rev Swartbooi was elected as the new arch bishop; that the latter would effectively succeed the first respondent; that he would be inaugurated during the Easter Convention that was to be held in April 2009; and that the first respondent subsequently accepted those resolutions by the inter synod at the annual synod held at Warden during December 2008.

[3] In their answering affidavit the respondents contend that the first respondent is still the arch bishop of the applicant; that he never resigned or retired as arch bishop; that the circumstances in which the first respondent is obliged to vacate his office are limited and that such circumstances are regulated by the provisions of the constitution of the applicant.

[4] There are a number of issues, which arose from the papers. Of these primary issues, the principal issue is whether the first respondent has resigned or retired as arch bishop of the applicant. The other issues include questions as to whether or not Rev Swartbooi is authorised to bring the application on behalf of the applicant, whether or not Rev Swartbooi had been constitutionally elected as the arch bishop of the applicant and whether or not the interdicts sought against the respondents should be granted.

[5] A brief exposition of the legal principles will do. In the first place, the nature of a church needs to be explored. A church is a religious institution. People become members of a particular religious denomination by choice. Similarly, churches admit new members by choice. There are no legal rules which regulate the relationship between a church and any of its individual members. The religious bond between a church and its member is built on a voluntary spiritual association characterised by a common sharing of identical religious convictions.

[6] Now any association, be it religious or sporting in nature, is founded on an underlying notion of mutual agreement[1]. Such mutual agreement is usually symbolised by the [1]adoption of a constitution. In a religious context, a individual who joins an established church is required to subscribe to the foundational beliefs, ethos and convictions of a particular church. Through such subsequent subscription an individual concerned is deemed to have retrospectively endorsed the original adoption of a constitution of a church. A new member then becomes bound by the constitution in much the same way as the founding fathers of the church concerned

[7] The lifespan of a church is theoretically infinite. When an association exists as an entity with rights and duties independent from the rights and duties of its individual members and has perpetual succession it is called a *universitas personarum*, a juristic person[2]. Such is the legal nature of a church.

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[1] Joubert: The Law of South Africa, 2nd Edition, Volume 1, par 619. **Turner v Jockey Club of SA** 1974 (3) SA 638 (AD) at 645B – C. **Van Vuuren v Kerkraad: Morelig Gemeente: NG Kerk OVS** 1979 (4) SA 548 (O) at 557D – E.

[2] Joubert *supra,* para 618.

[8] The constitution determines the nature and scope of the association's existence and activities, prescribes the powers of the various officials, demarcates such powers not only those of the individual officials but those of the structural organs of an association[3].

[9] In general domestic remedies have to be exhausted when conflict and disputes arise between the church and its members before relief may be sought in a court of law[4].

[10] In the second place, the legal principles applicable to motion proceedings must also be kept in mind. In motion proceedings the affidavits take the place not only of the pleadings but also of the essential evidence which would be led at a time for the determination of the issues in the litigant's favour[5]. In motion proceedings final relief may be granted where the disputes of fact have arisen on affidavits if those facts averred in the applicant`s affidavit which had been admitted by the respondent, together with the facts averred by the respondent, justify such a final order,

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[3] Joubert *supra*, para 620.

[4] Joubert *supra*, para 636. **Crisp v SA Council of Amalgamated Engineering Union** 1930 AD 225 on 236 and **Jockey Club and Others v Feldman** 1942 AD 340 on 362.

[5] **Hart v Pinetown Drive-in Cinema (Pty) Limited** 1972 (1) SA 464 (D) at 469 D – E and **Transnet Limited v Ruhenstein** 2006 (1) SA 591 SCA at 600 G – H.

provided the denial by the respondent of a fact alleged by the applicant does not raise a real, genuine or bona fide dispute of fact. In such a case final relief may be granted if the court is satisfied as to the inherent credibility of the applicant's factual averment.

[11] There may well be exceptions to the aforesaid general rule. Where disputes of fact have arisen on affidavits in motion proceedings, final relief may nonetheless be granted, if the allegations or denials of the respondents are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers[6].

[12] It is also a salient principle of our law that in motion proceedings an applicant has to make out his case in the founding affidavit. An applicant's case stands or falls on the averments made in the founding affidavit. An applicant is not allowed to make out a mere skeleton of a case in the founding affidavit and to supplement that case in the replying affidavit[7].

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[6] **Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at 634H – 635C.

[7] **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & Others** 1974 (4) SA 362 (T) at 369A-B.

[13] I now proceed to examine the factual allegations for and against the two conflicting versions. I deal with the declaratory relief first. The church seeks to have its deponent, Rev Swartbooi declared as a legitimate and constitutionally elected arch bishop of the Presbyterian Bafolisi Church of Southern Africa. To do so it becomes imperative to enquire into the constitutionality of the election process. The enquiry is important seeing that the first respondent avers that he is still the arch bishop and denies: firstly that he resigned or retired on any grounds and secondly that Rev Swartbooi has been duly elected as his successor in accordance with the constitution of the church. Until December 2007 the first respondent was the undisputed supreme leader of the applicant church. By then he was 60 years old. He was elected the supreme leader thereof at Heilbron in December 1978. He was elected into the highest office of the applicant church for a specified period of 5 years. He was re-elected in 1983 to lead the church for 5 more years. No elections were held in 1988 when the first respondent's second term of office expired.

[14] On the 16 December 1989 the constitution of the church was amended. The motion was introduced to amend the constitution. The periodic election of the arch bishop was abolished. Once elected, an arch bishop was to remain an arch bishop for as long as he lived. The amendment effectively meant that unless the arch bishop resigned or became disqualified in specified circumstances, his term of office could only terminate through his death or if the synod decided that he could no longer properly perform his duties as clergy on account of old age or illness. On the 15th September 1990 the constitution was then amended. The essence of the amendment was the insertion of clause 12.1 in the church constitution. All these matters were common cause.

[15] About two years ago, during December 2007 the applicant held its Annual Synod at Disaster, in Qwa Qwa. According to the applicant, motion was introduced and debated. The debate revolved around the retirement of the first respondent as the sitting arch bishop. The motion, which was about the early removal of the first respondent from the supreme office on account of his advanced age, was debated at length.

The synod was divided. The Disaster Synod failed to resolve the matter one way or the other. So the question as to whether the first respondent as the arch bishop should be retired on a account of advanced age was referred to a special gathering still to be convened. According to the first respondent his age and pension were indeed discussed within the context of his possible retirement. These matters were discussed. The discussion was due to some concern about the provisions of clause 12 of the constitution. Such provision deals with specified factual circumstances that have to be established before the supreme church leader can be called upon to vacate his office.

[16] It appears that the final amendment of the constitution was not in line with the resolution in that in clause 12 explicit provision is made about death but none about age. Therefore, the constitution as the supreme law of the church should prevail since it overrides any resolution of the church. This matter as regards age does not feature anywhere within the ambit of clause 12. Accordingly an arch bishop cannot be evicted from the office on grounds of age even if such an arch bishop cannot properly perform his duties because of

such old age unless there is medical evidence to verify that his incapacity was occasioned by advanced age.

[17] The issue of removing the first respondent from office as a serving arch bishop on account of advanced age was an item on the agenda of a special gathering which was subsequently convened and held at Wesselsbron on the 21st to the 22nd April 2008. At that Inter Synod the church delegates still held divergent views on the matter. The motion was then put to the vote to resolve the impasse. The result of voting was recorded as follows: 27 voted in favour of the first respondent's retirement on account of advanced age; 8 against and 4 abstained. These figures imply that 39 delegates were polled at the special gathering. But there is no averment by the applicant's deponent as to whether such number of delegates formed the quorum or not. If the special gathering was not quorid, the debate, the voting and the outcome thereof were meaningless and unconstitutional.

[18] Because it had not been averred and proven that the gathering was properly convened, that it was properly attended, that the synod was properly constituted, that the

delegates who participated in the proceedings were properly accredited, that the elective synod was quorid; that the issue old age as the substantive ground relied upon was constitutionally permissible and that the voting procedure was regular – it cannot be argued that the motion was correctly and duly carried. It follows, therefore, that the particular decision of the synod was invalid. The onus of alleging and proving all those averments on the balance of probability rested on the applicant. The applicant church failed to discharged such onus. Accordingly, it has not been established, through necessary averments fully set out in the founding and not replying affidavit, that the first respondent resigned or vacated the office of leadership in accordance with the constitution. A replying affidavit, however factually detailed, can never redeem the skeleton of a factually deficient founding affidavit – **Titty`s Bar** *supra*.

[19] It is common cause that the Annual Synod held in 1989 resolved to amend the constitution in order to provide that the arch bishop would only vacate his office upon death or if the synod should decide that he could no longer perform his duties properly because of old age or illness. The

constitution provides that the synod is empowered to effect constitutional amendments (clause 20 (iii) (b)). In order to give effect to the resolution the constitution was amended on the 15th September 1990. However, the amendment did not fully capture the gist of the resolution. Although clause 12 refers to death no reference whatsoever is made to the advanced age of the incumbent. Why this portion of the resolution was not captured in the final amendment of the constitution does not appear on the papers of the applicant. What does appear though is that it never found its way into the constitution.

[20] It follows from the aforegoing that if the decision of the Wesselsbron Synod was constitutionally invalid any other decision or action by the subsequent synod stemming from it was also invalid. From a barren soil no seed germinates. In the absence of proof that the first respondent was constitutionally removed from office as the arch bishop he remained the applicant's arch bishop. He could not have been removed on grounds of mere advanced age only since such ground was not provided for in the constitution. It logically follows, therefore, that the purported election of the

applicant's deponent, Rev. Swartbooi, as the first respondent's successor was an irregular process. The election was premised on a foundation erected on a shivering sand.

[21] Mr Steenkamp argued that since the synod is the supreme governing body of the church its resolutions, findings, decisions, rules, orders, and directions were binding on the whole church including its arch bishop. The fact that the synod is the supreme governing body of the church does not empower it to act in a manner that is unconstitutional. The supremacy of the governing structure of the applicant does not serve and will never serve as a carte blanche to legalise flagrant violations of the rights of its members. The rights of the first respondent as an incumbent supreme leader of the church are spelled out in clause 12 of the constitution. He had a legitimate expectation that he would only be removed from the supreme position in accordance with the provisions of clause 12. The law expects nothing less. When there is a conflict between a resolution and a constitution of a church, the former must yield to the latter.

[22] The constitution of the applicant provides that the arch bishop will only vacate office in the following specified circumstances:

> "12. VACATION OF OFFICE BY MEMBER OF MINISTRY.
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> Any member of our ministry shall vacate his office or deemed to have vacated his office if he
>
> 1. is dead;
> 2. has resigned;
> 3. permanent or regarded by doctors as suffering permanent loss of memory or he is disabled;
> 4. he is absent without leave to (sic) more than 3 consecutive gatherings and that the judicial committee through judicial proceedings has recommended to the synod for expulsion;
> 5. he is found guilty by the judicial committee and the synod for maladministration corruption of any other offence that in the opinion of the said bodies expulsion is the last resort."

[23] Consequently the power of the synod to resolved that the arch bishop shall vacate office is limited to those specified instances as set out above. From all the aforesaid circumstances, the resignation is relevant to the issue to be

adjudicated in this proceedings. See Clause 12(b). The rest of the grounds are not relevant to this case. The first respondent expressly denies that he has resigned. On the appellant's own papers there are no allegations which could possibly support the finding that the first respondent had indeed resigned. On the contrary it is quite clear that right from the onset, at Disaster and particularly at Wesselsbron, the first respondent was opposed to the idea that he should vacate his office by way of early retirement on account of his advanced age. The fact that the synod delegates were called upon to vote for or against the motion and the outcome of such voting exercise, strongly support the version of the first respondent as corroborated by the second respondent that he did not voluntarily resign. In the circumstances, it cannot be argued that the first respondent's denials are so far-fetched, disingenuous and untenable as to justify their outright rejection. **Plascon-Evans** supra.

[24] The version of the applicant is disputed by the respondent. Mr Steenkamp contended that since the version of the respondents, are unlike that of the applicant, was not corroborated by any senior church official it fell to be

dismissed as far-fetched. In motion proceedings it is impermissible to consider and decide the issues on the basis of the probabilities or improbabilities inherent in the conflicting factual allegations. It is thus of no consequence as to how many senior church officials corroborated the version of Rev. Swartbooi. Since the first respondent denied the allegation, his version must prevail. In the circumstances I find that the applicant has not proved, on a balance of probabilities, that the first respondent has resigned as arch bishop. For this reason, Rev. Swartbooi cannot be declared to have been constitutionally elected as the legitimate arch bishop.

[25] The constitution of the applicant contains detailed provisions regarding the elections, the appointment of electoral officer, the preparations and publication of the voters roll which provisions become applicable whenever the office of a senior church member becomes vacant (clause 17). The applicant has failed to allege that there have been compliance with such provisions before Rev. Swartbooi was elected arch bishop as alleged. The applicant is not entitled to rectify the deficiency of its founding affidavit in the replying

affidavit as the applicant purported to do by alleging that Rev. Swartbooi had been unanimously proposed and elected as arch bishop during the annual synod held at Warden during December 2008. **TRANSNET LTD** *supra.* The applicant's aforesaid failure to make out a case in the founding affidavit to show that Rev. Swartbooi was duly elected in accordance with the provisions of the constitution is fatal. Such a fatal flaw strongly militates against the grant of the declarator sought by the applicant.

[26] On behalf of the applicant it was also contended that seeing that the first respondent had participated in the proceedings at all the gatherings of the synod relative to the dispute and presided over the synod gathering held at Warden during December 2008 when Rev. Swartbooi was elected as the new arch bishop and seeing that the first respondent even made an announcement to that effect, he was now precluded from changing his mind, by turning around and disassociating himself from the resolution whereby Rev. Swartbooi was elected as the new arch bishop. The contention holds no water. The motion for the amendment of the constitution so as to provide for the arch bishop's

compulsory early retirement on account of advanced age was not carried by unanimous resolution of the synod at Wesselsbron. Therefore the maxim of unanimous consent, which binds all the participants who supported a certain decision or standpoint notwithstanding its defects does not apply. The maxim is well known and recognised in our law. By virtue of this maxim the courts have always been inclined and prepared to condone non-compliance with formalistic requirements or to attach no adverse consequences to irregular proceedings on the ground that those concerned had unanimously consented to dispense strict formalities[8].

[27] We now know that the motion was not supported by 12 of the 39 delegates. This represents more than 33% of the voters. Such huge lack of unanimity virtually destroys the argument that the first respondent, through his active participation legitimised the subsequent election of Rev. Swartbooi. In my view it was still open to the first respondent to claim that the meeting of the synod was improperly conducted and therefore irregular. But even if it were accepted that the first respondent participated as alleged

[8] Lewim: **The Law Procedure and Conduct of Meetings**, 5th Edition, 27.

and that he even blessed Rev. Swartbooi as his successor, his participation would still not have redeemed the abortive decision of the synod previously taken at Wesselsbron by a deeply divided house. Lack of unanimous consent was very apparent at that meeting of the synod. The first respondent denied the allegation that Rev. Swartbooi was constitutionally elected. However, even if he had admitted it, his admission would not have changed anything to the applicant's advantage. This is so because irreparable damage had already been done at Wesselsbron before his alleged conduct at Heilbron.

[28] It was also contended on behalf of the applicants that the respondents disobeyed the decisions of the applicant's synod. A number of defined and rebellious accusations were cited in support of the contention. Among others, it was alleged that the first respondent refused to hand over certain title deeds to the applicants; that he failed to account for certain funds he had allegedly collected in Qwa-Qwa during the 2009 Easter conference and that he refused to step down as the arch bishop during the 2009 Easter conference held at Frankfort.

[29] Mr Van der Watt contended on behalf of the respondents that the respondents were not obliged to obey and comply with unlawful or invalid decisions taken by the applicant's synod at Disaster, Wesselsbron, Heilbron, Warden, Frankfort or anywhere else. I am persuaded by the contention. The whole debate right from the beginning at Disaster to the end at Frankfort revolved around the advanced age of the first respondent as a ground for disqualifying him from continuing in the office as the arch bishop. I have already indicated that such a debate was constitutionally impermissible. In the circumstances I have come to the conclusion that Rev. Swartbooi was not duly and constitutionally elected as the arch bishop of the applicant and thus cannot be declared the legitimate supreme leader of the applicant. In the circumstances I will decline the declaratory relief sought.

[30] In the third place a cursory overview of the legal requisites relative to the grant of a final interdict in motion proceedings is also necessary. The requisites of a final interdict are well known. They are: a clear right; an injury actually committed

or reasonably apprehended and the absence of a similar protection by any other ordinary remedy[9].

[31] As regards a right, a clear right is established when an applicant, on a balance of probabilities, proves facts, which in terms of substantive law, establish the right relied on[10]. As regards injury, the second requisite of harmful injury is satisfied when interference, infringement or invasion of the applicant's right is proved[11]. As regards the absence of another adequate and effective remedy, the third requisite is satisfied when another adequate remedy is proved which establishes that there is no other legal remedy which is ordinary, reasonable and adequate in the circumstances that can afford the applicant a similar and effective protection[12]. As a general rule the applicant must first exhaust other available remedies before seeking recourse in a court of law[13].

[32] First and foremost it was incumbent upon the applicant to prove a clear right. The applicant had to show that it had or

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[9] **Setlogelo v Setlogelo** 1914 AD 271 on 227.
[10] **Joubert** *supra* para 397.
[11] **V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services & Others** 2006 (1) SA 252 SCA at 257G – 258C.
[12] **Joubert** *supra,* para 322.
[13] **Pietermartizburg City Council v Local Road Transportation Board** 1959 (2) SA 758 (N) at 772C – 773C.

has a clear right in order to obtain a final interdict against the respondents. The applicant seeks a final interdict in order to have the first respondent prohibited and restrained from exercising the powers and performing the duties of an arch bishop. The church was founded in 1918. The first respondent was elected as its fourth moderator in 1978. Since 1979 the title moderator was replaced with that of an arch bishop. The relief is sought on the foundation that the first respondent is no longer the arch bishop of the church. I have already found otherwise. Since the second relief flowed directly from the first it too cannot be granted. On the factual allegations I am satisfied that the applicant has failed to established a clear right which warrants the grant of a final interdict restraining the respondent from exercising the powers and performing the functions which are ordinarily performed by the arch bishop of the applicant.

[33] To obtain a final interdict, an applicant has to prove all its requisites. If one of the requisites is not established, then an interdict cannot be granted. If the first respondent as the arch bishop has misappropriated the church funds as insinuated or broken any rules of the church, the church is

not remediless. It can take or institute disciplinary enquiry against him. There is no allegation in the founding affidavit as to why the church did not exhaust the domestic remedies before seeking redress in a court of law. **Pietermaritzburg City Council** *supra*.

[34] In the instant case, the church has failed to prove a protectable right. **Reddy v Siemmens** *supra*. Because a clear right has not been established, it becomes unnecessary to determine whether the other basic elements of final interdict have been established. It follows as a matter of logic that where there is no right there can be no injury actually committed or reasonably apprehended. I would therefore, refuse the second relief in the form of a final interdict against the first respondent. It is clear on papers that at least two requisites of a final interdict were not met.

[35] I am also of the view that no sustainable case has been made out to justify the grant of a final interdict against the second respondent by prohibiting and restraining him from exercising the powers and performing the duties of the general secretary of the aforesaid church.

[36] According to paragraph 10 of the founding affidavit the applicant through its deponent, Rev. Swartbooi, accused the second respondent of collaborating with the first respondent by disrupting church services and creating divisions in the church. It was further alleged that he destabilised the church by agitating its congregations to defy decisions of the synod, in particular its resolution to retire the first respondent early on account of his advanced age.

[37] The second respondent denied the accusations (paragraph 24 confirmatory affidavit to the answering affidavit). In response to the second respondent's denials, the applicant's deponent generally replied that the contents of the second respondent's affidavit as far as the confirmatory affidavit contradicted the true facts as set out in the founding affidavit were untrue. He went on to say that the second respondent was not precluded from performing his duties as the general secretary.

[38] The allegation against the second respondent as made in the founding affidavit were characterised by vagueness. No

factual particulars were furnished about any disruptive incident or any defiant incitement as boldly alleged. Therefore the second respondent denials in general and in particular his denials of the alleged unholy alliance with the first respondent and the rebellious incitement must be accepted. Once this is done, and there is no sound reason why it should not, then there remains nothing to justify the grant of a final interdict against the second respondent. In reaching this conclusion, I am fortified by the applicant's own say-so that the second respondent was not suspended or relieved of his duties as the general secretary of the applicant (See paragraph 27.2 of the replying affidavit). Accordingly the applicant has failed to established a clear right to justify an order prohibiting the second respondent from exercising the powers and performing duties of the general secretary of the aforesaid church.

[39] I chose to decide the matter on the substantive merits and not technical or formal grounds. To do so I assumed, without determining the issue, that the applicants deponent Rev. Swartbooi was authorised not only to depose to the founding affidavit but also to move the current applicant on

behalf of the applicant even though he did not make such an allegation. In terms of the constitution of the applicant, only the arch bishop is entitled to represent the applicant in actions brought by or against the applicant.

[40] It follows from the aforegoing that the applicant's failure to prove that the first respondent had not voluntarily resigned as the arch bishop; that he has vacated the supreme office; that Rev. Swartbooi had been duly and constitutionally elected as it supreme leader and that he constitutionally replaced the first respondent, logically necessitate a finding that the proceedings were not duly authorised and that the applicant's deponent consequently lacked *locus standi*. Since the applicant's deponent lacked *locus standi* no relief could be granted in this matter even if on the merits a case had been made out in favour of the applicant. On this ground alone I would refuse to grant the application as a whole.

[41] During the course of his reply counsel for the applicant attempted to bolster the case of the applicant by relying on certain clauses of the constitution of the applicant. The attempt was challenged by counsel for the respondents.

Since such clauses were not canvassed in the heads of argument filed by the applicant or referred to in the founding papers, I was persuaded that such a belated attempt was not permissible. The civil practice in motion proceedings does not allow a litigant to ambush his adversary[14].

[42] There remains the issue of costs. The court has a discretion, which must be judiciously exercised. There were a number apparent factual disputes in this application. Despite such foreseeable factual disputes, the applicants persisted with its application for a final relief on motion proceedings. The applicant did so at its own peril. I can see no reason why the successful party should not be awarded costs. No reason exist why the general rule that costs should follow cause should not apply.

[43] In the premises the following order:

1. The application is dismissed.
2. The respondents' costs shall be borne and paid by the applicant and its deponent Rev. N. G. Swartbooi jointly and severally, the one paying the other to be absolved.

[14] **Port Nolloth Municipality v Xhalisa & Other** 1991 (3) SA 98 heard together with **Luwalala & Others v Port Nolloth Municipality**. **Kriel v Terblanche NO & Andere** 2002 (6) SA 132 (NCA).

M. H. RAMPAI, J

On behalf of applicant:	Adv. M.D.J. Steenkamp Instructed by: Moroka Attorneys BLOEMFONTEIN
On behalf of Respondents:	Adv. D.J. van der Walt Instructed by: Naudes Attorneys BLOEMFONTEIN

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