REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 008709/2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

14/11/23

In the matter between

ANNIE JEANETTA DE JONGH	Applicant
and	
ANDREW PHILIPPIDES	First Respondent
LEIGH DOROTHY HARPUR	Second Respondent
LEIGH HARPUR INCORPORATED	Third Respondent

JUDGMENT

WANLESS AJ

Introduction

[1] The facts of this matter giving rise to the present application are saddening in more than one respect. Firstly, they involve the theft of monies held in trust by a practising attorney in contemplation of the transfer of an immovable property. Secondly (and perhaps most alarmingly) it appears that rather than this being a rare occurrence, it is not an isolated incident but one which has plagued the legal profession for some time. It is, without doubt, a sad indictment on the noble profession of the practice of law.

The facts

[2] In this application the facts which are either common cause or cannot be seriously disputed by either of the parties are the following:

2.1 one ANDREW PHILIPPIDES, adult male ("*the First Respondent*"), is the owner of an immovable property situated at[...], Umhlanga, KwaZulu-Natal ("*the property*") and put the property up for public auction on 21 April 2022;

2.2 the First Respondent accepted the bid of the DE JONGH FAMILY TRUST ("*the Applicant*"), for the property;

2.3 the Applicant paid the stipulated 5% deposit of R205 000.00 ("*the deposit*"), plus auctioneer's fees, on the fall of the hammer;

2.4 in terms of the written agreement of sale ("*the agreement*") entered into between the Applicant and the First Respondent the First Respondent appointed one LEIGH DOROTHY HARPER, adult female ("*the Second Respondent*"), a practising Attorney, practising as such under the name and style of LEIGH HARPER INCORPORATED ("*the Third Respondent"*) to attend to the registration of the transfer of the property from the First Respondent to the Applicant;

2.5 on 1 May 2022 the Applicant paid the balance of the purchase price of R4 247 447.53 ("*the balance*") into the bank account stipulated by the Second Respondent on her *pro forma* statement;

2.6 it transpired that the bank account stipulated by the Second Respondent was not a trust account; the Second Respondent misappropriated the balance *prior* to the registration of transfer of the property and absconded;

2.7 the First Respondent has terminated the mandate of the Second Respondent and appointed a new conveyancer to attend to the transfer of the property;

2.8 the First Respondent has purported to cancel the agreement after placing the Applicant on terms to pay the balance stolen by the Second Respondent into the Trust Account of the newly appointed conveyancers and the Applicant failing to have done so.

[3] The application instituted by the Applicant is opposed by the First Respondent. Neither the Second or Third Respondents have filed a notice of opposition.

The relief sought by the Applicant

[4] The Applicant seeks the following relief:

"*1. The First Respondent is declared to be in breach of the agreement concluded between the Applicant and him on 22 April 2022, in relation to the sale by the First Respondent to the Applicant of the immovable property Unit […] in the Sectional Title Scheme La Lucia Bay, SS 126/1982, situated on Erf […] La Lucia Extension 12, KWAZULU-NATAL and held under Deed of Transfer ST52947/2007, with its physical address at[…], Umhlanga Rocks, KWAZULU-NATAL ("the property");*

2. *The First Respondent is ordered and directed, within 10 (ten) days from date of the granting of this order to:*

2.1 cause and secure registration of transfer of the property from the First Respondent to the Applicant;

2.2 in this aforesaid regard and pursuant thereto, to: -

2.2.1 to sign all such documents;

2.2.2 effect all such payments;

2.2.3 lodge with the Registrar of Deeds, or cause to be submitted to the Registrar of Deeds all such documents; and

2.2.4 generally perform all such acts as may be necessary, to cause and secure registration of transfer of the property from the First Respondent to the Applicant;

2.3 furnish the Applicant or its nominee forthwith, on demand, with satisfactory proof of all such acts performed or to be performed by the First Respondent as contemplated in subparagraph 2.2 above, to cause and secure registration of transfer

of the property from the First Respondent to the Applicant;

3. *In the event of the First Respondent failing, refusing or neglecting to perform all such acts as contemplated in paragraph 2 above within 10 (ten) days and furnishing the Applicant with satisfactory proof evidencing the First Respondent's compliance with paragraph 2 above the Sheriff of the High Court is authorised, directed and appointed to attend to and perform all such acts and sign all such documents as may be necessary to effect, secure and cause transfer of the property from the First Respondent to the Applicant;*

4. *The First Respondent is to pay the costs hereof."*

[5] In broad summary, the Applicant submits that in terms of the agreement the Second Respondent acted as the First Respondent's agent and that payment by the Applicant to the Second Respondent was equivalent to payment to the First Respondent. Arising therefrom, it is further submitted that if this Court decides the aforegoing in favour of the Applicant it must follow that the First Respondent is not entitled to cancel the agreement and that the Applicant is entitled to the relief sought.

The First Respondent's opposition to the relief sought by the Applicant.

[6] The First Respondent submits that in the event that this Court holds that it was an express term of the agreement that the balance was to be paid into trust as security for the purchase price, as opposed to such payment into trust constituting payment of the purchase price the case of the Applicant must be dismissed with costs.

[7] Whilst the First Respondent has not specifically asked for any relief by way of a counter-application, it must follow that should this Court dismiss the application, then the deposit will be retained by the First Respondent as *rouwkoop*.

The issues

[8] In a joint minute the parties attempted to set out therein the issues to be decided by this Court in this application. This attempt to define the issues in the present matter, whilst obviously highly commendable, did not prove to be totally successful and, in some respects, merely served to complicate matters. In this regard, this Court refers to the attempts by the parties to set out their differences as to

what they understood to be the remaining issues after setting out those where there was no disagreement. Rather than (a) only complicate matters further; and (b) burden this judgment unnecessarily, it is not the intention of this Court to deal therewith. In the premises, this Court shall simply set out hereunder what it, in its opinion, perceives to be the real and/or material issues which it is called upon to decide in this application.

[9] These issues are:

9.1 whether the Second Respondent was the First Respondent's agent or the Applicant's agent in receiving and holding the balance in trust;

9.2 whether the agreement was validly cancelled by the First Respondent or the Applicant is entitled to the order sought for specific performance.

[10] The parties referenced as an issue whether it was a tacit or express term of the agreement that payment of the balance was to be made by the Applicant as security for the purchase price. In the opinion of this Court, whilst the question as to whether the balance was paid to *secure* the purchase price

or to discharge the Applicant's obligation to *pay* the purchase price, is the crucial question to be answered in this application (as will become clear later in this judgment) the question as to whether such payment was a tacit or express term of the agreement is not a "stand alone" issue for the purposes of this Court reaching a decision in this application. Rather, as will become abundantly clear in this judgment, the interpretation and implementation of the said term, when interpreting the agreement and applying the agreement to the facts of this matter, is inextricably bound up with the resolution of the two central issues, as set out above.

[11] Having set out the issues in this matter, it is now necessary for this Court to turn and consider the applicable principles of law.

The law

[12] In the matter of *Minister of Agriculture and Land Affairs and Another v De Klerk and Others*[1] it was held[2] that:

[1] *2014 (1) SA 212 (SCA)*

[2] *At paragraph [16]*

> "*Whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser in this instance depends solely on the terms of the deed of sale. The conveyancer received and held the money paid over to him in terms of the sale although not as a party to the deed of sale. No other tacit or express authorisation is relied upon. I am of the view, on a proper construction of the deed of sale, that the Court a quo correctly concluded that the conveyancer was not the agent of the seller in receiving payment of the purchase price."*[3]

[13] Further, in the matter of *Baker v Probert*[4] the erstwhile Appellate Division *("AD")* held, *inter alia*, that:[5]

> "*In considering whether York Estate was the agent of the defendant for receiving payment of the purchase price, it is important at the outset to bear in mind what the expression "agent of the defendant" means in the present context. It means no more than the person authorised by the defendant to accept payment of the purchase price by the plaintiff. It connotes a mandate by which the seller confers authority on the agent "his mandatory" to represent him in the acceptance of the payment of the purchase price, with the consequence, in law, that payment to the agent is equivalent to payment to the seller*."[6]

[14] Also, in *Baker,* the Court held the following:[7]

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[3] *Emphasis added*

[4] *1985 (2) SA 429 (AD)*

[5] *At 439C-E*

[6] *Emphasis added.*

[7] *At 439G-H*

> "*It is clearly implicit that York Estate is authorised by the defendant to receive the purchase price for, were it not so, the purchaser would have been obliged to pay it to the defendant. York Estate, when it received the payment with knowledge of the provisions of clause 3, prima facie accepted the mandate from the defendant to do so as the agent of the defendant, to whom it was obliged to pay over the money when he had complied with his own obligation to deliver the share certificates in terms of clause 5. Moreover, the parties clearly intended that payment by the plaintiff to York Estate would operate as a complete discharge of her obligation under the contract, thus equating payment to York Estate with payment to the defendant."*[8]

[15] It is fairly trite and a long-established legal principle that a principal is liable for the dishonest acts of his agent, even where the agent commits a fraud upon the principal.[9]

[16] Insofar as the correct legal principles are concerned in respect of the interpretation of documents in general the much-cited passage from *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] offers guidance as how to approach same. That guidance was recently summarised by

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[8] *Emphasis added*

[9] *Raven Plantation v Abrey 1928 AD 143 at 153; Randbank Bpk v Santam Versekeringsmaatskappy Bpk 1965 (2) SA 456 (W) at, inter alia, 457G-458C; Chappell v Gohl 1928 CPD 47; Randbank Bpk v Santam Versekeringsmaatskappy Bpk 1965 (4) SA 363 (AG) at 372D-E*

[10] *2012 (4) SA 593 (SCA) at paragraph [18]*

the SCA[11] as follows:

> *"It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. The triad of text, context, and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words, and the place of the contested provision within the scheme of the arrangement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, "[t]he inevitable point of departure is the language of the provision itself"*

[17] Interpretation is accordingly to be approached holistically: simultaneously considering the text, context and purpose.[12]

[18] The modern-day approach to the interpretation of written instruments was restated by the SCA in *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*[13] where it was stated:

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[11] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd 2021 JDR148 (SCA) at paragraph [254]*

[12] *University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 (CC) at paragraph [65]*

[13] *(264/2019) [2020] ZASCA 16 (25 March 2020)*

> *"It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production… The inevitable point of departure is the language used in the provision under consideration."*[14]

[19] It is permissible when interpreting the document, to have regard to the manner in which the parties implemented the said document.[15]

Conclusion

[20] As correctly pointed out by Adv Smit, on behalf of the First Respondent, amongst the plethora of decisions dealing with the unfortunate theft of monies held in trust by attorneys, there are probably an equal number thereof where findings were made that the said attorneys, in matters of purchase and sale, acted as the agent of the purchaser as were made that the attorneys acted as the agent of the seller. In determining whether, in a particular matter, an attorney is the agent of the purchaser or the seller (or even both)[16], it is clear that (as dealt with earlier in this judgment), it is

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[14] *At paragraph [8]*

[15] *Capitec Bank Holdings Ltd (supra) at paragraphs [35] and [36]*

[16] *Basson v Remini and Another 1992 (2) SA 322 (NPD)*

necessary to interpret the agreement entered into between the parties. This is common cause between the parties in the present matter. Moreover, there was no material dispute between the parties as to either the correct principles to be applied when carrying out such an interpretation or the facts to be applied thereto, in this application.

[21] Clause 3 of the agreement deals with the payment of the purchase price by the Applicant to the First Respondent in respect of the property. Subclause 3.1 thereof provides for the payment of the deposit. In terms of subclause 3.3:

> *"3.3 The balance of the Purchase Price shall be secured to the satisfaction of the Seller's Attorneys, by a written guarantee from a Bank or registered financial Institution, payable free of exchange against registration of transfer of the PROPERTY into the PURCHASER's name. The PURCHASER may elect to secure the balance of the Purchase Price by payment in cash to the SELLER's Attorneys who shall hold same in trust, pending registration of transfer into the name of the PURCHASER. The aforesaid guarantee shall be presented and/or cash shall be payable by the PURCHASER to the SELLER's Attorneys within 45 (Forty-Five) days from receipt of a written request to that effect from the SELLER's attorneys."*[17]

[17] *Emphasis added*

[22] The provisions of clause 3 of the agreement must be read with the provisions of clause 9 thereof which deal with transfer and the costs of transfer. In particular, subclause 9.1 of the agreement states:

> *"9.1 Transfer of the PROPERTY shall be passed, by the SELLER's Attorneys, as soon as possible after date of acceptance, provided the PURCHASER has paid or secured all amounts payable in terms hereof."*[18]

[23] On behalf of the Applicant, Adv Botha, when submitting that this Court should interpret the agreement on the basis that the Second Respondent received payment of the balance from the Applicant as the agent of the First Respondent, relied, in the first instance, on the matter of *Baker (supra)*[19] where it was held:

> *"…I have difficulty in visualising a situation (save possibly for an exceptional case) in which there could be due performance of the obligation to pay the purchase price, by paying it to a third party, unless that third party was appointed and authorised by the seller to accept the payment, thus constituting him his agent for the purpose."*[20]

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[18] *Emphasis added*

[19] *At 440B*

[20] *Emphasis added*

[24] In *Baker* the main issue which the AD had to decide was whether or not an estate agent was the agent of the seller for the purpose of receiving payment of the purchase price. The Court held that it was clearly implicit in clause 3 of the contract that the estate agency was to act as the seller's agent *for the purpose of receiving payment* and that payment to the agency would operate as a complete discharge of the purchaser's obligations under the contract.

[25] This Court understood the submissions of Adv Botha to be that, relying on *Baker*, where payment of the purchase price is paid by a purchaser to a third party then, as a general principle, the third party is *prima facie* and unless exceptional circumstances exist, the agent of the seller and payment of the purchase price is deemed to have taken place. If these are indeed the submissions relied upon by the Applicant, they cannot, for the reasons set out hereunder, be correct.

[26] The said submissions are incorrect in that, *inter alia*, they are based on a misinterpretation of the (correct) principles of law as set out, by the AD, in *Baker*. In the first instance, the *dicta* relied upon by the Applicant at *440B* must be seen

in the correct context. When read properly with that directly preceding and following same, it is clear that Botha JA was merely confirming a general principle of law, namely that each case must be decided on its own facts. This principle had been clearly enunciated by the learned Judge earlier in his judgment at, *inter alia*, the reference of the judgment also relied upon by the Applicant, namely that at *439G-H*.

[27] Of course, as set out earlier in this judgment, ultimately whether a conveyancer acts as the agent of the seller for receiving payment of the purchase price from the purchaser, depends largely on the agreement of sale.[21] In the premises, if falls upon this Court to interpret the agreement in the present matter.

[28] In the first instance and applying the well-established and correct principles of interpretation (as also set out earlier in this judgment) to subclause 3.3 of the agreement, it is clear that the balance of the purchase price would be *secured*, to the satisfaction of the Second Respondent, by written guarantee from a Bank or registered financial institution. Thereafter, the *secured* amount would be *payable* when registration of the property into the Applicant's name took

[21] *Paragraph [12] ibid*

place. The Applicant was given the option or election to *secure* the balance of the purchase price (the deposit having been paid in terms of subclause 3.1 of the agreement) by payment, in cash, to the Second Respondent, *who would hold same in trust*, pending registration of the transfer into the name of the Applicant.

[29] From the aforegoing, it is clear that:

29.1 the agreement provided for *payment* of a deposit (*subclause 3.1 of the agreement*) in direct contrast to the *securing* of the balance of the purchase price *(subclause 3.3 of the agreement)*;

29.2 the requirement that the balance of the purchase price be *secured (but not paid)* could be fulfilled by the purchaser in two ways. That is, the purchaser had a choice to either obtain a written guarantee from a Bank or registered financial institution, *or* pay in cash to the conveyancing attorney who would hold the money in trust until registration of transfer (the agreement being silent in respect of any interest accrued in respect thereof);

29.3 the election given to the purchaser to *secure* the balance of the purchase price (and not to *pay* the balance of the purchase price) by *either* providing the written guarantee *or* paying the balance of the purchase price as provided for in terms of subclause 3.3 of the agreement, supports an interpretation not only that the Second Respondent was not the agent of the First Respondent but also that payment was to secure the balance of the purchase price rather than discharge it.

[30] As part of its case that the Second Respondent was the agent of the First Respondent and received the balance on behalf of the First Respondent in discharge of its obligations to pay the purchase price, the Applicant submitted that it was assisted by subclause 9.1 of the agreement. In this regard, it was submitted that the word *"secured"* as used in this subclause, refers to the payment of the purchase price being *"secured"* by delivery of a bank guarantee, payable upon transfer. It was further submitted that where payment of the purchase price was made in cash then the obligation to transfer was unconditional since the Applicant had paid the purchase price. In this manner the Applicant (if this Court understood the submissions made on the Applicant's

behalf correctly) seeks, in the first instance, to draw a distinction between (a) the purchase price being paid or secured; and (b) the manner in which such payment may be made and security provided *(by reading subclause 9.1 with subclause 3.3 of the agreement).* This interpretation placed upon the wording of subclause 9.1 on behalf of the Applicant cannot be sustained. Applicant's Counsel submits that subclause 9.1 supports the interpretation sought by the Applicant of subclause 3.3. In light of that already held by the Court above[22] and, once again, applying the correct principles of interpretation (with particular reference to the ordinary and grammatical meanings to be applied),upon a reasonable interpretation of the agreement, there can never be a distinction between *"pay"* and *"secure"* as contended for on behalf of the Applicant (where the Applicant contends that payment of the balance was unconditional and discharged the Applicant's obligations in terms of the agreement). As to the attempt on behalf of the Applicant to draw a distinction between the manner in which payment may be made and security provided, this Court has great difficulty in accepting the submissions made on behalf of the Applicant in support thereof. In this regard, it is clear, once again, from the ordinary rules of grammar and syntax, together with the

[22] *Paragraph [31] abid*

wording of subclause 9.1 of the agreement, that this subclause is silent as to *how* the amounts referred to in clause 9 were to be paid or secured. Arising therefrom, it would be improper to arrive at the singular interpretation ascribed to this subclause of the agreement by the Applicant that in terms of this subclause the Applicant has paid the balance and thereby discharged its obligations in terms of the agreement.

[31] Further, clause 9 of the agreement specifically deals with transfer and costs of transfer. Subclause 9.1 of the agreement (*as set out fully earlier in this judgment)* refers to the purchaser paying **or** securing **all** amounts payable in terms of the agreement before transfer may be passed. From the aforegoing, it is clear that transfer could not take place unless the purchaser had paid *or* secured **all** amounts payable in terms of the agreement, with particular reference to the transfer costs and not just the purchase price. In the premises, it is difficult to understand how this subclause assists the Applicant in its argument (if applicable thereto at all).

[32] As correctly noted in *Agu v Krige,*[23] yet another matter dealing with the misappropriation of the purchase price paid by a purchaser into a conveyancer's trust account, in that case by the conveyancer appointed by a seller in terms of a deed of sale, it does not necessarily mean however that because the seller appointed the conveyancer and the conveyancer was the seller's attorney (the same facts as the present matter) that the conveyancer was the seller's agent for receiving payment of the purchase price.[24]

[33] In *Agu,* relied upon by the Applicant, the learned Acting Judge, in reaching the decision that the conveyancer acted as the seller's agent to receive payment of the purchase price on the seller's behalf, appears to have placed a fair amount of weight upon the fact that the said conveyancer was the seller's attorney of longstanding. It is common cause in the present matter that the Second Respondent had acted as the First Respondent's attorney in the past.

[34] The facts giving rise to the appointment by one party of the conveyancer to hold monies in trust (also relied upon by the Applicant in the present matter in support of the relief

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[23] *2019 JDR0716 (WCC)*

[24] *At page 14; Minister of Agriculture (supra) at 218E-F*

sought) should not, in the opinion of this Court, be a factor which should be given much weight, if any weight at all, when deciding the crucial issue as to whether the conveyancer acts as the agent of that party when receiving payment of the monies to be held in trust. This is particularly so in the case of the sale of an immovable property where it has become an accepted trade custom in such matters for the seller to appoint the conveyancer in the deed of sale entered into between the parties. In the premises, in light of, *inter alia*, the fact that the seller (a) appoints the conveyancer in terms of the deed of sale for an immovable property; and (b) that it would not be unusual that such an attorney appointed by the seller would be well-known to the seller, should have little or no bearing on a court's decision as to whether that attorney acts as the agent of the seller when accepting payment of the purchase price by the purchaser.

[35] Clause 3 of the agreement in the present matter is distinctly different to those in other matters referred to in this judgment[25]. This distinction is, as dealt with earlier in this judgment, clearly illustrated by the use of the word *"secure"* and the election given to the purchaser to either secure the

[25] *Baker (supra) at 437C-E; AGU (supra) at 4*

balance by way of a written guarantee or cash. The distinction is further enforced by the clear and separate manner in which the deposit and the balance are to be dealt with in terms of the agreement. It is clear from a reading thereof that clause 3 of this agreement is very different to that contained in a "normal" or "usual" deed of sale. In the premises, it requires to be properly interpreted as such.

[36] If the "innocent bystander" test was to be applied, it is highly improbable that either of the parties, when entering into the agreement, if asked, would have answered in the affirmative that should the purchaser elect to make payment to the attorney in cash to secure the balance of the purchase price pending registration of transfer, rather than by providing a suitable guarantee and that attorney stole those monies, the seller would be liable therefor.

[37] The only reasonable interpretation that can be given to the agreement in this matter which would ultimately give it *true* business efficacy, is that the balance was paid by the Applicant to the Second Respondent to secure the balance. Insofar as it may be necessary for this Court to deal therewith, it is clear that same is an express and not a tacit term of the agreement *(the Applicant having misconstrued*

the First Respondent's submissions in respect of the interpretation of the agreement when the parties attempted to define the issues in the joint minute as dealt with earlier in this judgment). Applicant elected to provide security in cash rather than in the form of a written guarantee which it was, in terms of the agreement, entitled to do. Payment of the balance by the Applicant to the Second Respondent secured the purchase price in terms of the agreement but did not discharge the Applicant's obligations in terms of the agreement to pay the balance in terms thereof. That obligation would and could only be discharged upon transfer of the property and payment of the balance by the Second Respondent to the First Respondent. In accepting the balance in cash from the Applicant the Second Respondent acted as the agent of the Applicant and not the agent of the First Respondent.

[38] Before the balance could be paid to the First Respondent it was stolen by the Second Respondent. The First Respondent placed the Applicant on terms to pay the balance which the Applicant has failed to do. In the premises, the First Respondent was entitled to cancel the agreement. It must follow that the Applicant is not entitled to the relief sought and the application must be dismissed.

Costs

[39] It is trite that (a) costs fall within the general discretion of the court and that (b) unless unusual circumstances exist, costs normally follow the result. No such circumstances were drawn to the attention of this Court. In the premises, the Applicant should be ordered to pay the costs of this application.

Order

[40] This Court makes the following order:

1. The application is dismissed.

2. The Applicant is to pay the costs of the application.

B.C. WANLESS

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing:	8 November 2023
Date of judgment:	14 November 2023

Appearances

On behalf of the Applicant:	Adv. J. G. Botha
Instructed by:	Postma Attorneys
On behalf of the 1st Respondent:	Adv, M. Smit
Instructed by:	Martin Pike Incorporated
	% Vos Attorneys