



13/11/17

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 99920/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: ☒ YES ☐ NO

(3) REVISED

DATE: 13.11.2017

SIGNATURE: _____

In the matter between:

THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION

Applicant

And

GOODLUCK PHUMZILE TSHELANE

First Respondent

THE SOUTH AFRICAN NUCLEAR ENERGY
CORPORATION SOC LIMITED

Second Respondent

MINISTER OF ENERGY

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant seeks an order that the first respondent, in terms of the provisions of section 162 of the Companies Act, 71 of 2008 ("the Act"), be placed and declared to be under probation for a period of five years. In support of the relief claimed, the applicant alleges that the first respondent breached his fiduciary duties as director of the second respondent.
- [2] The first respondent opposes the relief claimed by the applicant and has filed a counterclaim. I pause to mention that the second respondent belatedly and shortly prior to the hearing of the matter, filed an affidavit dealing with a further resolution that had been taken by its board after the application was issued. The affidavit does not take the matter any further and was consequently not allowed.

FACTUAL MATRIX

- [3] The second respondent, The South African Nuclear Energy Corporation SOC Limited ("Necsa") was established in terms of section 3 of the Nuclear Energy Act, 46 of 1999 ("the Nuclear Energy Act").

- [4] The control and management of the affairs of Necsa is regulated, in terms of section 16 of the Nuclear Energy Act, by a Board of Directors. Section 16(2)(c) stipulates that the Chief Executive Officer by virtue of holding office is a member of the Board.
- [5] The first respondent was appointed as the CEO of Necsa with effect from 1 September 2012. In the result, the first respondent is an employee and a director of Necsa.
- [6] The subject matter of the present application is the first respondent's entitlement, as an employee of Necsa, to utilise a Necsa vehicle for personal purposes.
- [7] In respect of the utilisation of Necsa vehicles, Necsa's Finance and Information Management, issued document number FIM-TRA-PRO-000 titled *"TRANSPORT PROCEDURE FOR LEASED AND OWNED VEHICLES"*. Chapter 5 of the document is titled *"PROCEDURE – FULL MAINTENANCE LEASE VEHICLES"*. According to paragraph 5.1, the procedure contained in the document is also applicable to vehicles allocated to departments.
- [8] The issue in question, to wit personal use of a Necsa vehicle is contained in paragraph 5.20 and reads as follows:
- "5.20 Personal Use*

- *Private usage will be allowed in the event of emergencies only, where employees unexpectedly need transport to and from work.*
- *No passengers may be transported, other than Necsa employees that may be affected by the temporary transport problems.*
- *Vehicles must be used for transport to and from work only and for no other private purpose.*
- *Private usage will be charged back to the responsible employee commensurate to the vehicle lease costs, to guard Necsa against financial loss.*
- *Vehicles will be provided with a full tank of fuel and must be returned with a full tank. Fuel costs will be recovered, in the event that the vehicle is returned without a full tank.*
- *Vehicles can be used for personal purposes for a maximum of 1 working day per instance. New authorisation must be sought for every working day thereafter.*
- *Any personal usage of Necsa vehicles must be authorised by the Group Executive of the division.” (own emphasis)*

[9] On 4 February 2013, Mr Ramatsui, the Senior Manager: Strategic Support, Group Functions – Office of the CEO, requested information from Mr Jansen van Vuuren in Necsa’s transport division in respect of a Necsa vehicle to be utilised by the office of the CEO.

[10] On 5 February 2013, Mr Jansen van Vuuren responded as follows:

“As you described it below, you are requesting an allocated vehicle for the Office of the CEO. Please take note of the following:

- *We can apply for an allocated vehicle through the Transport department with the necessary authorisation;*
- *Pool vehicles may however not be used for private usage, except in the case of an emergency (work to home and home to work trips constitute private usage);*
- *Pool vehicles are allocated without a driver;*
- *The precedents within Necsa are that these vehicles are generally used by lower level staff.*

The only service Necsa Transport offers with a driver is the VIP transport service:

- *This service is for business trips only;*
- *Drivers and vehicles are allocated on a first come, first serve basis and depending on availability. Drivers cannot be dedicated to a person or division."*

[11] On 20 February 2013, Mr Ramatsui formally requested a vehicle for the "Group Function – Office of the CEO". The reason for the request was stated as follows: *"to be used for transport for official trips for the Office of the CEO, and when available, for the Chairman of Necsa".*

[12] The vehicle was received and was utilised by the first respondent in fulfilling his day to day work commitments. At a board meeting on 30 May 2013, concerns were raised in respect of the first respondent's usage of the Necsa vehicle.

- [13] Mr Mabunda was mandated by the board to investigate the concerns and delivered a report dated 29 June 2013. Mr Mabunda had, *inter alia*, regard to the transport record for the period 22 March 2013 to 10 June 2013, which record reflected that the Necsa vehicle was predominantly used for travel between the first respondent's home and work.
- [14] In view of the aforesaid and at a board meeting on 30 September 2013, the board resolved that:
- i. the first respondent was not entitled to use the Lexus vehicle contrary to his employment contract, and that such practice must cease;
 - ii. the first respondent must reimburse Necsa for his personal use of the Lexus vehicle and incidentals thereto before the end of the 2013/2014 financial year.
- [15] I pause to mention that, although reference to the first respondent's employment contract in the submission prepared by Mr Mabunda was not correct, the result of the resolution, in that the first respondent must reimburse Necsa for expenses pertaining to his personal use of the vehicle, is in accordance with the policies and procedures and consequently correct.
- [16] The first respondent did not reimburse Necsa and at a board meeting on 8 and 9 September 2014, the following resolution was, *inter alia*, taken:

- i. The first respondent must comply with the resolution of 30 September 2013; and
- ii. The chief financial officer of Necsa must calculate the amount due to Necsa in respect of the first respondent's personal use of the vehicle.

[17] The chief financial officer presented a calculation of the amount due to Necsa at a board meeting held on 26 February 2015. The board was not satisfied with the calculation and therefore resolved that National Treasury should be requested to assist with the calculation of the amount due.

[18] At the hearing of the application, the amount payable by the first respondent was still not known.

Applicant's case

[19] In view of the aforesaid facts, the applicant contends that the first respondent had acted in a manner materially inconsistent with his duties as a director of Necsa.

First respondent's case

[20] The first respondent, firstly, denies that his usage of the vehicle is in breach of the policies and procedures of Necsa. The first respondent states that the Board of Necsa had, however, taken a different view and although the

vehicle was only used for business purposes, the board considered trips from and to his home as *“personal use”*.

[21] In his answering affidavit, the first applicant explained his usage of the vehicle as follows:

“.....I deny that the vehicle is used “predominantly” for private purposes. I live in Benoni, which is some 90 km from Pelindaba. Frequently, it is necessary for me to attend meetings or functions that take place either first thing in the morning or at the end of the business day. It is impractical for me first to drive to Pelindaba in the early hours of the morning and then to travel from there to the meeting in the NECSA vehicle. In such cases I would request my office to book the VIP service to collect me from home and take me to the meeting and from there to NECSA. I would do the same if meetings were scheduled for the end of the business day or after business hours, whereafter I would travel home in a NECSA vehicle rather than first travelling back to Pelindaba. This does not in my view, constitute private use of the vehicle, nor does this particular use of the vehicle predominate over the other business uses to which it was put.”

[22] The first respondent stated that, notwithstanding the divergent views, he accepts the resolution because it was taken by the Board.

- [23] Secondly, the first respondent points out that no calculation has been done to date by National Treasury and consequently, he has not been requested to pay back any amount.

Discussion

- [24] *Ex facie* rule 20.5 of Necsa's rules pertaining to the personal use of a Necsa vehicle, the first respondent's conduct is in conflict with the policies and procedure.
- [25] Having established the underlying factual position, it is necessary to have regard to the legal ramifications attached to the first respondent's conduct.

SUBMISSIONS

Applicant

- [26] The applicant is, in terms of section 162(3) empowered to launch the present proceedings. The applicant relies *in casu* on the provisions of section 162(3)(a) and (b)(ii) read with section 162(7)(a)(ii) of the Act.
- [27] The duties of a director as contemplated in section 162(7)(a)(ii) are dealt with in section 76 of the Act. In support of the relief claimed, the applicant relies, more specifically on the provisions of section 76(2)(a)(i) read with section 76(3)(a) and (b) of the Act.

[28] Applying the aforesaid sections to the facts *in casu*, the applicant made the following submissions in its founding affidavit:

"93. CIPC respectfully contends that Mr Tshelane should be placed under probation in terms of section 162 of the Companies Act because he acted in a manner material inconsistent with his duties as director of Necsa.

94. CIPC contends, in particular, that Mr Tshelane breached sections 76(2)(a)(i) and 76(3) of the Companies Act by using a Necsa-owned vehicle (and a dedicated driver) for his private use without any authorisation. In so doing, Mr Tshelane:

94.1 used his position as a director of Necsa in order to gain a personal advantage for himself, in contravention of section 76(2)(a)(i) of the Companies Act; and

94.2 did not exercise the powers and perform the functions of director "in good faith and for a proper purpose" or "in the best interests of the company", in contravention of section 76(3) of the Companies Act.

95. This is especially so given Mr Tshelane's persistent and ongoing refusal to reimburse Necsa for his private use of the Lexus motor vehicle (and dedicated driver), notwithstanding an express resolution and direction by the Board that he do so.

96. In the circumstances, and having regard to all the facts set out above, CIPC respectfully submits that it would be appropriate for this

Honourable Court to place Mr Tshelane, and declare him to be, under probation in terms of section 162 of the Companies Act, for a five year period as permitted in terms of section 162(9)(b)."

First respondent

[29] The first respondent denies the aforesaid conclusions and contends that:

- i. he did not utilise the vehicle in his capacity as CEO of Necsa, but in his capacity as CEO, i.e as an employee;
- ii. should the aforesaid contention be unsuccessful, his conduct does, in any event, not fall within the ambit of the relevant sections of the Act.

APPLICABLE LEGAL PRINCIPLES

Employee – vs - director

[30] The sections relied upon by the applicant, reads as follows:

"163(3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if -....

(a).....

(b) any of the circumstances contemplated in –

(i).....

(ii) subsections (7) and (8) apply, in the case of an application for probation."

[31] Section 162(7)(a)(ii), in turn, provides as follows:

- "162(7) A court may make an order placing a person under probation, if-*
- (a) while serving as a director, the person-*
 - (i).....*
 - (ii) otherwise acted in a manner materially*
inconsistent with the duties of a director; or..."

[32] Section 76(2)(a)(i) reads as follows:

"76(2) A director of a company must –

- (a) not use the position of director, or any information obtained while*
acting in the capacity of a director-
 - (i) to gain an advantage for the director, or for another person*
other than the company or a wholly-owned subsidiary of the
company; or..."

[33] Section 76(3)(a) and (b) provides that:

- 76(3) Subject to subsection (4) and (5), a director of a company, when acting*
in that capacity, must exercise the powers and perform the functions of
director-
- (a) in good faith and for a proper purpose;*
 - (b) in the best interests of the company; and..."*

[34] The first respondent contends that the words *"the position of director"* in section 76(2)(a) and the words *"when acting in that capacity"* in section 76(3) clearly indicate that the section is only applicable when a director is acting in

his position as a director and not when he is acting in his capacity as an employee.

[35] Mr Farlam SC, counsel for the first respondent, referred to the *Lewis Group v Woollam* 2017 (2) SA 547 WCC judgment, in support of this contention.

[36] The court in the *Lewis Group* matter, held that the term “*use the position of director*” as contemplated in section 162(5)(c)(i) of the Act, means the following:

“The conduct in question must relate to the use of the position as director, it does not relate to the performance by the person concerned of his or her duties and functions as a director because that is a matter dealt with discretely in terms of subpara (iv).”[Vide 555 C]

[37] Section 162(5)(c) that formed the subject matter of the quotation from the *Lewis Group* matter, *supra*, distinguishes between the abuse by a director of his position as a director (section 162(c)(i)) from other instances of misconduct whilst being a director (section 162(5)(c)(ii) to (iv)).

[38] In my view, the context in which the term “*the position of director*” was defined in the *Lewis Group* matter, differs from the issue *in casu*.

- [39] The court in the *Lewis Group* matter dealt with the meaning of the term in the specific context of section 162(5)(c). The question was not whether a director has, at all relevant times and even if he is acting in his capacity as the CEO (employee) of the company, a fiduciary duty towards the company.
- [40] Mr Wilson SC, counsel for the applicant, referred to English case law in support of his submission that a CEO even when acting as such, at all times also act in his capacity as director. Mr Wilson SC relied on the following remarks in *Gower and Davies' Principles of Modern Company Law*:
- "[I]t is important to note that, when applying the law relating to directors' duties, the courts do not distinguish between the actions of a director as director and actions qua manager, where the director is an executive director of the company. Those duties will apply to both aspects of the directors' activities. In consequence, some actions by senior managers of the company, provided they are also directors of the company, will be subject to the controls of the general statutory duties. Although management theory may posit that it is the role of the board in large companies to set the company's strategy and to oversee its execution, rather than to execute it itself, the law of directors' duties does not make this distinction in the case of a director who has both a board position and a non-board executive function.¹ (own emphasis)*
- [41] Mr Wilson SC, further, relied on the following extract of the English Court of Appeal decision in the matter of *Item Software (UK) Ltd v Fassihi and Others* [2004] EWCA Civ 1244 (30 September 2004):

¹ *Gower and Davies' Principles of Modern Company Law* (8th ed), section 16-9 (pp 485-486).

“the logical place to start ... is to consider the position of Mr Fassihi as a director since the duties of a director are in general higher than those imposed by law on an employee. This is because a director is not simply a senior manager of company. He is a fiduciary and with his fellow directors he is responsible for the success of the company’s business.”

[42] The facts of the *Fassihi* matter, are succinctly summarised in the head note, to wit:

“A major part of the claimant company’s business was the distribution of software products for another company (Isograph). D was managing director of the claimant and the first defendant (Fassihi) was its sales and marketing director. Under his contract of employment the first defendant’s salary was payable monthly in arrears on the last day of each month. The contract expressly provided that he should not use confidential information belonging to the claimant for his own purposes. Subsequently the claimant decided to negotiate more favourable terms with Isograph. At the same time the first defendant secretly approached that company in his personal capacity with his own proposals which involved establishing his own company to take over the contract. Meanwhile he encouraged D to press for improved terms. However, the negotiations failed and Isograph terminated the contract. The claimant then discovered the first defendant’s misconduct in seeking to divert the

contract to his own new company and he was summarily dismissed on 26 June 2000."

- [43] In view of the aforesaid circumstances, the court held that Fassihi was in breach of his duties both as an employee and a director.
- [44] In *Peter James Shafron v Australian Securities and Investments Commission* (2012) HCA 18, the High Court of Australia also considered the scope of the duties of a director. Mr Shafron ("Shafron") was employed by the company as both company secretary and general counsel. Shafron failed to properly advise the board in respect of a separation proposal and as a result the company was involved in costly litigation.
- [45] The company instituted legal proceedings alleging that Shafron had contravened section 180(1) of the Corporations Act. Section 180(1) imposes fiduciary duties on both directors and officers. Section 180(1) is, however, only applicable to officers that fall within the provisions of section 9(b)(i) of the Act, which defines such an officer as someone "who makes, or participates in making decisions that affect the whole, or a substantial part, of the business of the corporation".
- [46] Shafron argued that in providing advice to the board, he acted in his capacity as company secretary and not in his capacity as general counsel.

- [47] The court held that it was not possible to divide the two roles undertaken by Safron at the corporation. It was further held that when an individual falls within the definition in section 9(b)(i), his actions at the time should be analysed. In advising the board Safron was closely involved in formulating significant decisions and due to his high level of involvement in the separation proposal, the court held that his conduct fell within the meaning and ambit of section 9(b)(i) of the Corporation Act.
- [48] In both the *Fassihi* and *Safron* matters, the type of conduct defined the capacity in which the individual was acting. In both instances the breach of their duties as directors are clear to wit, preferring one's own personal interest to the interest of the company (conflict of interest) in negotiating a lucrative contract and being part of a board decision that caused the company tremendous financial loss. The extract from *Gowers supra* also indicates that *"...some actions by senior managers of the company, provided they are also directors of the company, will be subject to the controls of the general statutory duties."*
- [49] In the present instance, the first respondent utilised a Necsa vehicle, which was specifically procured for the office of the CEO, to fulfil his duties as CEO of Necsa.

[50] Such use is a far cry from acting in a conflict of interests or from participating in a decision that causes Necsa huge financial loss. The first respondent's conduct, does not, in my view, trigger the provisions of section 162(7)(a)(ii).

[51] In the result, I am of the view that the first respondent in the circumstances did not act in his capacity as director when he utilised the Necsa vehicle in his capacity as CEO.

[52] Should I be wrong in this regard, it is necessary to consider whether the first respondent's conduct was materially inconsistent with the duties of a director.

Conduct materially inconsistent with the duties of a director

[53] The applicant submits that the conduct of the first respondent breached his duties as a director contained in section 76(2)(a)(i) and section 76(3)(a) and (b).

Section 76(2)(a)(i)

[54] In *Henochsberg on the Companies Act 71 of 2008*, Vol 1 at 290(7), the following view is expressed in regard to the meaning and import of section 76(2)(a)(i);

"It was submitted supra (see s 75) that it can be argued that section 76(2) is, if widely interpreted, an overriding duty to avoid conflicting interests as developed in terms of the common law. It can also be argued that the

common law is applicable in any event, unless excluded by the Act. The duty not to misappropriate corporate opportunities, the secret profit rule and the duty not to compete with the company, as developed in terms of the common law is discussed infra."

- [55] The instances, referred to in *Henochsberg supra*, in which a director will breach the duty imposed by section 76(2)(a), differ vastly from the facts *in casu*.
- [56] The issue *in casu* is whether the first respondent, in utilising the Necsa vehicle in breach of the policies and procedures applicable to its use, used his position as CEO (director) to gain a personal advantage.
- [57] The conduct that would result in a breach of the duty imposed by section 76(2) discussed in *Henochsburg*, all points to a conflict of interest between the personal interests of the director and the interests of the company.
- [58] On the facts *in casu*, the only possible personal advantage the first respondent could have gained, is the saving of fuel expenses to the financial detriment of Necsa. I do not deem this gain to fall within the scope and ambit of section 76(2)(a)(i).

- [59] Even if one accepts that the aforementioned conduct does amount to a breach of the duty imposed by section 76(2)(a), one must still consider whether the conduct for purposes of section 162(7)(a)(ii) is materially inconsistent with the duty so imposed.
- [60] In the Shorter Oxford English Dictionary, Vol 1, fifth edition "*materially*" is defined as "*In material degree, substantially, considerably.*"
- [61] The term *materially* is not foreign to our law. In the realm of the law of contract for instance, a party may cancel a contract if the other party materially breached a term of the contract. In *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 SCA, the court at 803 B-C and with reference to Van der Merwe *et al Contract, General Principles* 1st ed (1993) described a material breach as a breach that goes to the root of the contract, that affects a vital part or term of the contract, that relate to a material or essential term of the contract, that is so serious that it justifies the cancellation of the contract.
- [62] Naturally, what is considered material or serious, will differ from case to case and will be dependent on the different interests at stake. Is the impugned conduct so serious (material) that it warrants the sanction of being placed on probation for five years?

[63] I have already held that the conduct complained of does not fall within the category of breach envisaged by section 76(2)(a)(i). But, even if it does and having regard to the instances of breach referred to by *Henochsberg*, I am of the view that the utilisation of the Necsa vehicle between work and home for business related trips is not materially inconsistent with the first respondent's duties as envisaged in section 76(2)(a)(i).

Section 76(3)(a) and (b)

[64] The duties contained in section 76(3)(a) and (b) entail that a director should act in good faith, for a proper purpose and in the best interests of the company.

[65] The test to be applied to the conduct of a director as envisaged in section 76(2)(a) and (b) was, with reference to the provisions of section 76(4), discussed in *Visser Sitrus v Goede Hoop Sitrus* 2014 (5) SA 179 WCC at 199 C:

"[74] Section 76(4) makes clear that the duty imposed by s 76(3)(b) to act in the best interests of the company is not an objective one, in the sense of entitling a court, if a board decision is challenged, to determine what is objectively speaking in the best interests of the company. What is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the

best interests of the company and this belief must have had 'a rational basis'. ...

and at 200G

"On the other hand, the learned authors of Palmer's Company Law say that the 'no reasonable director' test is merely an aid in answering the ultimate factual question, which is whether the directors were acting in what they bona fide believed to be the best interests of the company (para 8.2609)."

[66] The applicant in the *Visser Sitrus* matter did not rely on an absence of good faith and consequently, the test to be applied to good faith was not considered.

[67] The test applicable to proper purpose was, however, discussed as follows at para [80]:

"[80] As to proper purpose (s 76(3)(a)), the test is objective, in the sense that, once one has ascertained the actual purpose for which the power was exercised, one must determine whether the actual purpose falls within the purpose for which the power was conferred, the latter being a matter of interpretation of the empowering provision in the context of the instrument as a whole. In the context of decisions by directors, there will often be, in my view, a close relationship between the

requirement that the power should be exercised for a proper purpose and the requirement that the directors should act in what they consider to be the best interests of the company. Put differently, the overarching purpose for which directors must exercise their powers is the purpose of promoting the best interests of the company."

- [68] Whether a director acted in good faith will, in my view, form part of the investigation into the director's belief that he/she acted in best interests of the company. If a director subjectively believes that he/she acted in the best interests of the company, it is difficult to fathom that he/she will be acting in bad faith. Consequently the test for acting in good faith should be subjective.
- [69] The first respondent's explanation indicates a *bona fide* belief that by utilising the Necsa vehicle for business related trips, he used it in the interests of the company. Having regard to the purpose for which the vehicle was allocated to the office of the CEO, the first respondent seen objectively did use the vehicle for a proper purpose. The fact that the first respondent may be faulted for not having due regard to the policies and procedures applicable to the usage of the vehicle, is to my mind not a breach of his duties as a director as envisaged in section 76(3)(a) and (b).

[70] In the result, his conduct does not fall within the ambit of section 76(3)(a) and (b).

[71] Even if it did, I am of the view that the offending conduct is not materially inconsistent with his duties as a director of Necsa as envisaged in section 162(7)(a)(ii).

[72] In the result, the application stands to be dismissed.

COUNTER-APPLICATION

[73] The reason for the relief claimed in the first respondent's counter-application is difficult to grasp.

[74] The relief reads as follows:

"The decision of the respondent (the Companies and Intellectual Property Commission), communicated to the applicant on 27 July 2015, to apply to Court for an order placing the applicant on probation is reviewed and set aside."

[75] The letter dated 27 July 2015 refers to an investigation conducted by the applicant in terms of section 169(1)(c) of the Act. The relevant paragraphs read as follows:

"I have now accepted the Report prepared by the Inspectors and in terms of section 170(2)(b)(ii) of the Act, I am forwarding a copy of the Report to you. Please find attached a copy thereof for your kind attention.

Further, I wish to inform you that the CIPC will apply to a court for an order to place you as director of Necsa on probation for acting in a manner materially inconsistent with the duties of a director as provided for in section 162 of the Act."

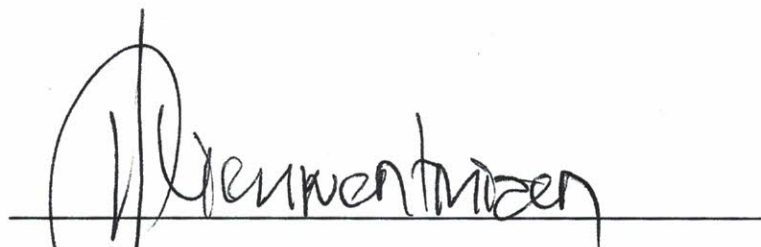
[76] The present application followed. The "*decision*" has therefore been implemented and any relief in respect thereof became moot when the application was heard on the merits. If the first respondent was of the view that the "*decision*" was the sole reason for the launching of the application and that the decision stands to be set aside, he should have taken a *point –in-limine*, which would have resulted in adjudicating the point prior to hearing the merits of the application.

[77] The counter-application is ill conceived and stands to be dismissed with costs.

ORDER

[78] In the premises, I grant the following order:

1. The application is dismissed with costs.
2. The counter-application is dismissed with costs.

A handwritten signature in black ink, reading 'N Janse van Nieuwenhuizen', is written over a horizontal line. The signature is stylized, with a large, loopy initial 'N'.

N JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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Instructed by:

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