IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8049/2015

In the matter between:

SOCIETY OF ADVOCATES OF KWAZULU-NATAL Applicant

and

NATALIE DIANA LANGE Respondent

Order:

1. The respondent is suspended from practicing as an advocate for a period of six (6) months, such suspension to operate from 1 July 2016.
2. The respondent is to pay the applicant's costs, including the costs of two (2) counsel, on an attorney and client scale.

JUDGMENT

CHETTY J:

1. After hearing argument from counsel, we issued the following order:

1.1 The respondent is suspended from practicing as an advocate for a period of six (6) months, such suspension to operate from 1 July 2016.

1.2 The respondent is to pay the applicant's costs, including the costs of two (2) counsel, on an attorney and client scale.

2. What follows below are the reasons for decision, which are of significance particularly as the applicant sought the striking off of the respondent as an advocate on the basis of her attempting to mislead the High Court following upon an affidavit deposed to by her. Subsequent to the hearing of this application and the order issued above, another division of the High Court also had occasion to comment on the conduct of the respondent in respect of the circumstances giving rise to the complaint against her, and that of her partner in the misconduct, Advocate J Wild ('Wild'). We were informed at the hearing of this application that Wild was still practicing as an advocate in the Eastern Cape, but there was no indication as to if, or when, any disciplinary proceedings would be instituted against her. As will become apparent, it is not possible comment on the conduct of the respondent without doing so in respect of Wild, who appears to have been the *dramatis persona* in the events giving rise of the complaint lodged against the respondent.

3. The applicant is 60 years old, having been admitted as an attorney in 1980 and practiced for her own account from July 1981 to February 2006. After taking a sabbatical she joined the Durban Bar in January 2008. During her combined career as an attorney and advocate, the present proceedings constitute the only blemish against her professional integrity.

4. During her time at university studying towards her law degree, the respondent first encountered Wild, who was highly intelligent and by all accounts, a person who commanded the attention of others, someone by whom the respondent was awe struck. Whilst Wild went on to become a prosecutor and thereafter an advocate, at more or less the same time the respondent proceeded to get admitted as an attorney, and began to regularly brief Wild. Their professional association grew into a close friendship, and when Wild's career encountered certain "significant difficulties", the respondent remained loyal to Wild, continuing to brief her when

others refused to. Wild then relocated her practice to the Eastern Cape, but retained her contact with the respondent and stayed over at the respondent's home whenever work brought her to Durban. During the period of their long friendship, the respondent conceded that she had in fact idealised Wild as a "powerful, brilliant, infallible and vastly superior advocate". It is this admiration or idealisation of Wild that ultimately, in the respondent's submission, led her to abandon momentarily, her independence and her ability to carefully consider her actions, giving rise to the complaint of unprofessional conduct.

5. It is against this background of the respondent's association with Wild that I turn to examine the judgment of Ranchod J in the North Gauteng High Court under case number 69262/2010, delivered on 19 April 2012 as it pertains to the respondent. The facts of the matter are briefly that Richard Penwill and Andrew Penwill were co-trustees of the Beverly Trust, together with their mother, Pat Penwill. The trust was founded by the late father of Richard and Andrew. The trust was also the sole shareholder in a company which owned several properties collectively valued at approximately R15m. Andrew had a claim against his father's estate for approximately R1.7m and an arrangement had been made for this claim to be satisfied by the trust. This did not happen and consequently Andrew instituted an action against the trust and obtained default judgement in the Gauteng High Court. A warrant of execution was issued and the shares held by the trust in the company were attached by the sheriff, Durban North. A sale in execution of these shares was scheduled to take place on 29 July 2009. Wild, acting on behalf of Andrew flew to Durban on 28 July 2009 to attend the sale, armed with a mandate to buy back the shares at a higher price from any successful bidder in order to ensure that the shares ultimately were secured by Andrew.

6. The respondent, after discussions with Wild the evening before, attended the sale in execution the next day and where she successfully bid R27 300.00 for the shares. On the basis of the arrangement with Wild, the respondent sold the shares on to Wild for the amount of R34 300.00, and later signed a written agreement confirming the sale of the shares to Andrew. The net effect of the transaction, to which the respondent was party, was that Andrew had caused an asset of the trust, worth approximately R15m to be sold for a fraction of its value.

7. Richard only became aware of what had transpired in April 2010 after receiving a letter from the secretary of the company in March 2010. As a result of certain investigations, he discovered that his brother Andrew instituted action against the trustees of the trust. Despite him being a trustee, he knew nothing about the action which led to the judgment being granted against the trust. Richard then brought an application for the rescission of the judgment and asked the court to declare that the sale in execution on 29 July 2009 invalid and to be set aside. In addition he asked for the removal of Andrew as a trustee of the trust. The respondent was cited as a third respondent in the action in as much as she was the person who had initially purchased the shares at the sale in execution. Apart from the various procedural irregularities pertaining to the default judgment, Richard alleged that a gargantuan fraud had been perpetrated by his brother Andrew in obtaining the shares for a pittance.

8. The action was defended by Andrew. The respondent elected to file a notice to abide, with a brief affidavit comprising 10 paragraphs in which she confirmed that she had bid against two other persons at the sale in execution and ultimately paid the amount of R 27 300.00 for the shares. She disputed the assertion by Richard that she had been a puppet of Wild and/or Andrew, and contended that she was unaware of any fraud relating to the sale of the shares. Of particular importance to the judgment of Ranchod J was the respondent's averment in paragraph 7 of her affidavit which reads as follows:

> 'After I had acquired the share certificates from the sheriff and as I was leaving the premises of the sheriff I was offered R34,300.00 for the shares by Miss Wild, on behalf of the first respondent in his personal capacity. I verbally accepted the offer.'

9. In his judgment setting aside the default judgement granted in favour of Andrew, Ranchod J said at para 25 that it was common cause that Andrew caused an asset worth approximately R15m to be sold in a sale in execution at a fraction of its value. In so far as the events leading up to the sale in execution, Ranchod J described these as "rather strange" (see para 39). What is also apparent is that

Richard struggled to get the particulars of the person who purchased the shares at the sale in execution as Andrew's attorney refused to initially divulge those details.

10. Ranchod J then proceeded at paras 47 to 49 to draw the following conclusions from the facts before him relating to the sale in execution:

> '[47] Andrew had sent Miss Wild to represent his interests at the sale in execution. He says he had given her a mandate that she should after the conclusion of the sale approach any purchaser and offer that purchaser up to 50% more then what the purchaser paid for the shares. Both these advocates attended the sale at the sheriff's offices where Ms Lange buys them and promptly thereafter sells them on to Ms Wild to Andrew for R 34,300.00 after having purchased them for R 24,500.00. The inference is inescapable that this was part of the well-orchestrated plan to eventually have the shares in the possession of Andrew.
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> [48] In consequence, the sale of the shares must be set aside.
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> [49] I have grave misgivings about the conduct of the two advocates in this regard. Richards says he lodged a complaint with the KwaZulu Natal Bar Council about Ms Wild's conduct but nothing much came of it save the complaint was forwarded by the Bar Council to Ms Wild who responded by way of a letter and that is where the matter apparently ended . I will leave it to Richard, who is an advocate himself, to pursue the matter further if he should wish to do so after receiving this judgement, by, if necessary, approaching the General Council of the Bar if he is not satisfied with the response of the KwaZulu Natal Bar as far as Ms Wild is concerned, and he may if he so wishes to, pursue or lodge a complaint with the KwaZulu Natal Bar in so far as Ms Lange is concerned.'

11. Subsequent to the judgment being handed down, Richard lodged a formal complaint with the KwaZulu-Natal Bar Council against the respondent *"for her role in assisting Jenny Wild to perpetrate a fraud on the Beverly Trust by causing the Trust' 100% shareholding to come into the hands of my brother, a trustee and her client, for R34,300.00 thereby intending to cause the Trust enormous loss. In purchasing and reselling the shares, MS Lange directly assisted in executing the fraud on the Trust*." Richard went on to state that apart from the judgment of Ranchod J and the respondent's affidavit, he had no other evidence against the respondent, that he had

never met her and knew nothing of her except that she had appeared as Wild's attorney of record some 10 years ago, which was suggestive of a long standing relationship between the two.

12. The applicant, after receipt of the complaint from Richard, requested a response from the respondent. In a letter dated 2 June 2012 the respondent stated that she was distressed at the misgivings expressed by Ranchod J and that she had no knowledge of and played no part in a scam, as alleged. In so far as her explanation as to how she came to be at the sale in execution, the respondent stated that Wild informed her of the sale in execution a day before the event, and also informed the respondent of her mandate to buy the shares at a higher price on behalf of Andrew from any successful bidder. The respondent stated that she attended the sale primarily as a 'novelty' and for the excitement or 'fun' of bidding. According to her she had no information about or interest in the potential value of the shares, and had resolved to stop bidding at R30 000 as this was all she had at her disposal. In her view, there was nothing untoward about bidding at a sale in execution as she contended that banks often send their representatives to such sales to buy back the property for the bank. Accordingly she did not consider that her conduct was untoward.

13. The chairperson of the complaints committee correctly pointed out that her response to the committee had been in considerably more detail than the affidavit which she filed in the North Gauteng High Court. It was further pointed out to the respondent that while the explanation tendered by her to the applicant did not contradict anything set out in her affidavit, the factual omissions would suggest that she had no prior arrangement with Wild, and that even the meeting with her at the auction was entirely fortuitous. This version was patently rejected by Ranchod J as being part of a well-orchestrated plan. On that basis it was suggested to her that her affidavit to the court was at least, at a prima facie level, misleading.

14. In her response of 3 September 2012, the respondent conceded that her affidavit was deficient in certain respects and as framed, it was perhaps "somewhat misleading". In explaining the contents and brevity of her explanation in the affidavit, the respondent conceded that she should have taken greater care to deal with the

issues in dispute and to have done so in a more comprehensive manner. Notwithstanding, she contended that it was not her intention to mislead the court in anyway.

15. In response, Richard pointed out that despite the respondent's deficient explanation was not his primary complaint, but rather her unprofessional conduct in attending the auction and assisting with the perpetration of an elaborate scam. He considered that she was misleading and dishonest and tried to conceal her relationship with Wild. Richard described the respondent's behaviour as that of an 'accomplice'.

16. In light of these events, the applicant proceeded to charge the respondent with two counts of improper conduct, namely:

1. Participating as a bidder in the sale in execution on 29 July 2009 and purchasing the shares of the Beverly Trust in DJ Pennell Properties Pty Ltd as part of an elaborate scam, involving an abuse of the process of court;
2. In respect of the proceedings in the North Gauteng High Court, she deposed to an affidavit on 25 November 2010 in which she did not accurately record the full truth of her involvement in the sale in execution and subsequent transfer of shares to Andrew Penwill, with the result that the affidavit was untruthful, or at least designedly misleading.

Accordingly, the applicant contended that the respondent's conduct was not befitting that of a practising advocate.

17. The matter came before the applicant's disciplinary committee, chaired by three senior advocates of the Durban Bar, and at which the respondent was represented by Mr *Hunt* SC, who also appeared on her behalf when the matter came before this Court. The respondent pleaded not guilty to both counts. The committee found that the first charge could not be sustained and accordingly nothing further need be said in that regard. As regards the second count the committee noted that in the ordinary course it would not be improper for an advocate to bid at a sale in execution provided that the advocate is not professionally connected with anything to

do with the sale. On the basis of the factual information before it the committee found that even though the respondent was not acting as an agent of Wild or of Andrew, the practical effect of the arrangements she had made with Wild would suggest that she was acting as an agent. Notwithstanding, the committee found no basis to conclude that her conduct in this regard was unprofessional.

18. As regards the second count the committee reiterated that a cornerstone of the profession requires an advocate to be truthful and frank at all times, and to ensure that the court hears only the truth from counsel irrespective of the situation. Our courts place much reliance on the tradition that when counsel makes a submission to the court, the truthfulness of that submission must be beyond reproach. Hefer JA in *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 655G accepted Heher J's observation that:

> ‘(t)he word of an advocate is his bond to his client, the court and justice itself. In our system of practice the courts, both high and low, depend on the *ipse dixit* of counsel at every turn.'

19. The committee found that the respondent’s explanation to the North Gauteng High Court as to how she came to bid at the sale in execution was misleading and that by her silence she suppressed information which was obviously important to the court’s assessment of both her and Wild’s involvement in the matter. The impression which she attempted to give the court was that the sale of the shares to Wild, after having successfully bid for them at the sale in execution, was an unplanned coincidence. This, the committee found, could not be further from the truth. On the respondent’s own version, she accepted that she had not been truthful in her explanation, which was due to Wild convincing her that she need not have said more than what was recorded in paragraph 7 of her affidavit. She accepted Wild’s advice to her detriment. The committee found that her conduct could not be regarded as merely negligent as she knew that the contents of paragraph 7 of her affidavit was not true, and that she had not been scrupulous with the truth as she ought to have. In the result, the committee found it appropriate to impose a suspension on the respondent’s membership of the applicant for a period of six months within which she would not be able to practise as a member of the applicant. The sanction was to

commence from 1 January 2015, allowing the respondent the remainder of December 2014 to get her affairs in order.

20. Having received the decision of the disciplinary enquiry, the respondent on 11 December 2014 wrote to the applicant giving notice of intention to resign with effect from 1 January 2015.

21. This resignation, at first glance may justifiably be interpreted as an attempt by the respondent to circumvent the sanction imposed on her by the applicant. In her answering affidavit, the respondent explains that on being faced with a six month suspension, she believed that she had no option but to resign because of her dire financial predicament. In the course of 2014 she gave away a substantial amount of her work and suffered from severe depression and was hospitalised for treatment as a result of the allegations of unprofessional conduct. This explanation is consistent with the contents of a report filed by clinical psychologist Ms T B Broll, who consulted with the respondent and who prepared a report which was attached to the answering affidavit. In particular, the respondent was traumatised by the effect that her disciplinary enquiry would have on her mother, who it would appear, had supported the respondent throughout her career. She therefore suppressed her anxiety to the extent that in September 2014 she had a breakdown and gave away most of her briefs to colleagues, lost a tremendous amount of weight and became suicidal. Eventually, a colleague and her secretary informed the respondent's mother of what was taking place. The respondent was then referred to a psychiatrist and admitted to hospital for treatment.

22. There is nothing before us to gainsay the version of the respondent as to her motivation for resigning from the Bar. On the contrary, on a balance of probabilities, it is more probable than not that her resignation was prompted by the stress brought on by the disciplinary enquiry and the humiliation of the sanction imposed on her.

23. The issue before us is whether the respondent is a fit and proper person to practise as an advocate, and if not, whether she should be struck from the roll. The applicant approaches this court as *custos morum* in order to protect the interests of the Bar in KwaZulu-Natal, the interest of this court and the public at large. Despite

the respondent's resignation from the Bar, is not in dispute that the applicant has the necessary locus standi to bring this application to have the respondent's name struck from the roll.

24. Mr *Voormollen* SC, who together with Ms *Mahabeer*, appeared for the applicant, submitted in their heads of argument that the respondent's answer to the strike off application could be characterised more accurately as a plea for leniency. This is a fair assessment of the respondent's answering papers particularly as she accepted both in her answering affidavit and in her plea to count 2 that her affidavit was misleading as she failed to make mention of the relationship with Wild and the arrangement with Wild to buy back the shares for Andrew at a higher price than was initially paid for. The respondent accepted that while she acted on the basis of the advice given to her by Wild in drafting the affidavit in question, in doing so, she displayed a lack of judgement and failed in her duty to the court to make a full disclosure of all of the facts in her knowledge pertaining to the sale of the shares. The respondent accordingly accepted that her conduct fell short of that required of a practising advocate.

25. The stance adopted by the respondent when she appeared before the committee and in this Court was to accept without equivocation that her conduct in filing the affidavit before the North Gauteng High Court, despite the influence of Wild, was misleading. It was contended on her behalf that it displayed a moral lapse in her character as opposed to a character defect. The affidavit sought to give the impression that Wild's intervention on behalf of her client, after the respondent had successfully bid for the shares, and the subsequent onward sale by the respondent of the shares to Wild, was a sequence of unintended an unplanned events. As Ranchod J had however found, this was a well-orchestrated plan.

26. In *Kekana v Society of Advocates of South Africa* supra at 654D-E the Court approved of the dictum in *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A) that the first enquiry in determining whether an advocate or attorney is fit to continue practicing is:

> '…to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person in question is a fit

> and proper person to practise as an attorney. Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the Court's discretion either be suspended or struck off the roll.'

27. In the present matter and unlike the applicant in *Kekana* supra, the respondent cannot be said to have lied under oath. As the disciplinary enquiry found, what she stated in paragraph 7 of her affidavit was misleading - she had not set out of the full circumstances of her prior association with Wild or of the plans for the onward sale of the shares. On Wild's advice, the respondent was urged to disclose as little as possible. Her subsequent full disclosure of facts to the committee was not inconsistent with the facts set out in her affidavit, save that she divulged much more to the committee than she had revealed to the North Gauteng High Court. I can put the distinction no higher than that. Although she did not fabricate evidence, the common denominator is that her conduct was misleading.

28. The practice of an advocate (and that of an attorney) demand absolute personal integrity and scrupulous honesty (*Kekana* supra at 656A). The respondent accepts, for the reasons associated with the long standing relationship with Wild that she failed in her duty to maintain those high ethical standards demanded of practitioners. The conduct of the respondent and Wild were also cause for consideration by Van Oosten J in *Penwill NO & another v Penwill & others* (61782/2012) [2016] ZAGPPHC 473 (20 June 2016)[1] where the brothers Penwill again clashed this time over the validity of a will executed by their late mother, Pat. It is not necessary to traverse the lengthy factual background, save to say that the conduct of Wild featured prominently in the adjudication of that dispute, where the Court found overwhelming in favour of Richard and ordered that its judgment be forwarded to the General Council of the Bar of South Africa. At para 44 of his judgment Van Oosten J noted that Ranchod J made a number of adverse findings and comments concerning the conduct of Andrew, Wild and the respondent, and repeated Ranchod J's findings of grave misgivings about the conduct of the two advocates. Van Oosten J went on to say the following:

[1] This judgment was delivered after the hearing and order was made in the present matter.

> '[52] In conclusion Wild, in my view, was an unsatisfactory witness who clouded issues in proffering long winded, vague and irrelevant responses. Wild dishonestly and relentlessly, right from the outset, pursued her own agenda. In regard to the finding by Ranchod J that the sale in execution was an elaborate scam, Wild disingenuously maintained that "it was a *bona fide* attempt to recover shares that were going up on a public sale in execution", but reluctantly, later, conceded that it was a scam "only to the extent of the sale". The evidence reveals a carefully pre-planned scam to strip Richard of his interest in the company. Both Wild and Lange faced, or, are facing charges of unprofessional conduct brought against them by the Bisho Bar. Counsel for the defendant unconvincingly sought to defend the bona fides of the sale in execution, but was constrained in the debate that followed in argument, to concede, and correctly so, that a fraud had indeed been perpetrated.
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> [53] The integrity and professionalism of Wild and Lange acting in their professional capacities as advocates, in my view, have been shown, on the facts of this matter, to fall dismally short of the norms and standards applicable to the profession of an advocate and I accordingly, as I intimated to Wild at the conclusion of her evidence, propose to order that a copy of this judgment be forwarded to the General Council of the Bar of South Africa.'

29. In light of the facts of the present matter, we are satisfied that the applicant's disciplinary committee correctly concluded that the respondent had indeed fallen significantly short of the high standards set and to be maintained by the profession. Notwithstanding the strong hand of Wild throughout this matter and the force of her influence over the respondent, the respondent ought never to have fallen prey to the plan set out by Wild. Having found that the respondent, on a balance of probabilities was guilty of misconduct, the next enquiry is whether she is a fit and proper person to practise as an advocate.

30. Mr *Voormollen* submitted that as a matter of course in such matters, the applicant's stance is to seek an order to strike off the practitioner. This is done in order not to shackle the discretion of the Court as to what would be an appropriate sanction. The applicant accepted that each case must be determined having regard

to the particular circumstances of the matter, taking into account the nature of the misconduct, its seriousness and the moral blameworthiness of the practitioner.

31. The committee found the respondent guilty of failing to record the full truth of her involvement in the sale in execution and the purchase of shares thereat. A range of sanctions was available to it, including a fine not exceeding R25 000, an admonishment, suspension or expulsion from the Society. The committee was of the view that a fine would be an inappropriate sanction as it would not express the gravity of the respondent's misconduct. Instead, the committee determined that a suspension for a period of six (6) months would be appropriate.

32. In *General Council of the Bar of South Africa v Geach & others* 2013 (2) SA 52 (SCA) para 198 the court noted that:

> 'The most significant factor in determining the appropriate sanction must be the nature and scale of the primary misconduct.'

33. In determining a suitable sanction, this Court also takes into account that the respondent has clearly shown remorse for her conduct, which the clinical psychologist Ms Broll terms a 'moral lapse'. At the same time, the saga of the respondent having to face a disciplinary enquiry before her peers (the first in her 30 years as a legal practitioner) has allowed her the opportunity to reflect on her conduct. She accepts now that she may have been "duped" into filing the affidavit which she did, having acted under the advice of Wild. She is now cautious of blindly trusting people, as she had done with Wild. We accept, as submitted by Mr *Hunt*, that the respondent is therefore not likely to repeat her conduct, having regard to the consequences it has brought her. Not only has she had to face the humiliation of a disciplinary enquiry at which she was found guilty for misconduct, but she has also ensured significant physical and psychological trauma, including being hospitalised as a result of stress. Her unlikeliness to repeat her misconduct and the fact that this seemed to have been something foreign to her nature was echoed by two persons who submitted character references – a senior attorney and a senior advocate.

34. In *KwaZulu Natal Law Society v Moodley & another* 3072/2012 [2014] ZAKZPHC 33, 9 May 2014 para 13 the court pointed out that when faced with an application to strike off a legal practitioner:

> 'It does not follow however that every attorney who has stumbled and did something dishonest should be removed from the roll. The aim is to prevent people who are not fit to practise from doing so. But when an attorney who has suffered a moral lapse can recover from it and become a fit and proper person again we must allow him that opportunity and make it possible for him to return to practice as a productive member of society.'

35. The same principles apply in determining the fate of an advocate found guilty of misconduct. In *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 2 Brand JA pointed out in that whether an attorney is to be considered a fit and proper person to continue to practise is a value judgment, where in the exercise of its discretion a court must decide whether to impose the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice. There was obvious concern in this case expressed by the applicant that the respondent resigned as a member of the Society after receiving the decision of the committee. The applicant construed the respondent's decision to resign as an attempt to avoid the consequences of her misconduct. However, having carefully considered the explanation of the respondent and the contents of the report by Ms Broll, which have not been refuted, I am satisfied that the respondent did not act with ulterior motive to avoid the penalty imposed by the committee.

36. I am accordingly satisfied that the objectives of this Court's supervisory powers over the conduct of advocates will have been achieved by the suspension of the respondent from practise rather than the imposition of the most severe sanction of striking her off the roll. Mr *Hunt* initially contended that if we were to impose a suspension from practise, such suspension should itself be conditional. I do not agree. To do so would be to minimise the seriousness of the respondent's misconduct. Counsel wisely withdrew this contention. I however accept the submission of the respondent's counsel that if she were to be suspended, she should be allowed a period of time to wind up her affairs. Mr *Hunt* informed the

Court that the respondent had three part-heard matters in which she was involved. In order to avoid any prejudice to the respondent's clients, I considered that any suspension imposed should take effect from 1 July 2016, thereby allowing sufficient time for these matters to be completed. This is not a situation where a strike off is ordered, in which event the order cannot be deferred.

37. For these reasons, the Order in paragraph [1] of this judgment was made.

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CHETTY J

I agree

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BALTON J

APPEARANCES

For the Applicant :	Adv V Voormolen SC & S Mahabeer
	Instructed by J Leslie Ndlovu Street, Pietermaritzburg
For the Respondent:	Adv C P Hunt SC
	Instructed by Janice Sellick
c/o	Messrs Venns Attorneys, Pietermaritzburg
Date of hearing:	22 April 2016
Date of judgment:	15 August 2016