Reportable

CASE NO. SCR 3/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HENDRIK CHRISTIAN **Applicant**

versus

METROPOLITAN LIFE NAMIBIA RETIREMENT ANNUITY FUND **First Respondent**

METROPOLITAN LIFE NAMIBIA LIMITED Second Respondent

NAMIBIA FINANCIAL INSTITUTION SUPERVISORY AUTHORITY Third Respondent

CORAM:	MARITZ, J.A., STRYDOM A.J.A. *et* CHOMBA A.J.A.
Heard on:	29-10-2007
Delivered on:	03-12-2008

REVIEW JUDGMENT

MARITZ, J.A.: [1] The applicant and his wife applied for an urgent mandatory interdict against the respondents in the High Court. The origin of the disputes which eventually culminated in the application is apparent from numerous letters and documents exchanged between the litigants. I do not propose to examine them at length for purposes of this judgment. A brief summary thereof will suffice to outline the background against which the issues in this review application fall to be determined.

[2] Both of them are members of a retirement annuity fund managed by the first respondent, a body corporate registered under the Pension Funds Act, 1956 to provide benefits for its members upon their retirement. The first respondent is underwritten by the second respondent and supervised by the third respondent. The latter is a public authority established in terms of s. 2 of the Namibia Financial Institutions Supervisory Authority Act, 2001 to exercise supervision over the business of financial institutions and over financial services generally[1]. The application is fraught with – often hostile – allegations of irregularities in the administration of the first respondent generally and, more specifically, of conflicting interests, bias and lack of good faith on the part of the first respondent in negotiating and, ultimately, refusing to refund the contributions made by applicant's wife for the

[1]See: S. 3 of the Namibia Financial Institutions Supervisory Authority Act, 2001

benefit of her retirement annuity policy with the first respondent. The alleged irregularities are denied by the first and second respondents and, in addition, they maintain that the first respondent was precluded by the provisions of the Pension Fund Act to surrender the second applicant's retirement annuity policy. Clearly frustrated that their numerous complaints to the third respondent did not produce the favourable and decisive result they had hoped for, the applicant and his wife applied on one day's notice to the respondents for the following relief in the High Court:

> "1. Condoning complainant's (*sic*) non-compliance with the rules of the Honourable Court in the bringing of this application.
>
> 2. Ordering 1st and 2nd respondents to submit to arbitration proceedings and directing third respondent to arrange the arbitration tribunal as agreed with applicants within 2 days of the Order herein.
>
> Alternatively
>
> 3. Ordering first and second respondents to comply with third respondent's directive relevant hereto.
>
> and
>
> 4. The respondents be ordered to pay punitive costs of this application."

I must also note in passing that the "Notice of Application" was modelled on the short form designed for *ex parte* applications[2] in the High Court and did not incorporate any of the notices to respondents prescribed for motion proceedings by rule 6(5) of the High Court Rules[3]. Somewhat oddly, it was accompanied by a "Certificate of Urgency" in which the applicant and his wife purported to certify that they "have perused the papers... and are convinced that (they) have disclosed urgency in the matter".

[3] The interdictory relief sought in the High Court was clearly final in effect. Final interdicts - whether prohibitory, declaratory or mandatory - which directly or substantially affects the rights, duties or obligations of persons other than the applicants, are extraordinary remedies[4] and, for that reason, they are not readily granted by Courts in the exercise of their discretion[5] if other legal remedies are available to effectively protect the applicants' rights[6] - more so, if the respondents have not been accorded a reasonable opportunity to oppose and be heard thereon. Having launched and set the application down from one day

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[2] See: Rule 6(4)(a) and Form 2(a) of the High Court Rules.
[3] Compare Form 2(b) to the Rules of the High Court.
[4] Compare: Prest, "*The Law and Practice of Interdicts*", p.45.
[5] As to the Courts' discretion, compare: *Bahlsen v Nederloff and Another*, 2006 (2) NR 416 (HC) at 424D
[6] See: *Amakali v Minister of Prisons and Correctional Services*, 2000 NR 221 (HC) at 223G-I (quoting with approval Harms J in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council*, 1987 (4) SA 343 (T) at 1077). Compare also: *Francis v Roberts*, 1973 (1) SA 507 (RA) at 512D-E and *Bosman NO v Tworeck en Andere*, 2000 (3) SA 590 (C) 595F-G.

to the next, the applicants, in effect, denied the respondents time to file answering affidavits in opposition to the final relief being sought against them and to attend to the formalities, consultations and preparations needed to assert their defence.

[4] It is therefore not altogether surprising that, when the application was called, the respondents objected at the outset of the hearing to the manner in which it had been set down and the urgency with which the applicants sought to bring it. The proceedings at the hearing, which will be discussed more fully hereunder, culminated in the following order:

> "1. That the Applicants' application is hereby refused on the grounds that they have not met the requirements of Rule 6(12)(b) of the Rules of Court and have also not followed the relevant Practice Directives for the enrolling of urgent applications.
>
> 2. That the Applicants shall jointly and severally pay the costs of the First, Second and Third Respondents.
>
> 3. That the Applicants must pay the Respondents' costs before they can proceed in the ordinary course in respect of this matter."

[5] The applicant, who has acted in person in this and in the High Court, protested not only the order but also the regularity of the

proceedings which led up to it. He launched - what purports to be – an "Application for Review" in this Court in which he gave notice of his intention to apply for the proceedings and decision of the High Court to be reviewed and for an order:

> "(a) Setting aside the entire proceedings and pronouncements of the Learned Justice Parker on the 6th March 2007 in this matter.
>
> (b) Setting aside the order of costs against applicants.
>
> (c) Ordering that the respondents were not legally before the Court.
>
> (d) Ordering that the application be determined in the absence of respondents/defendants.
>
> (e) Ordering that respondents pay all costs in this matter".

[6] The applicant, as if by right, sought to bring the application for review in this Court as one of first instance. The form thereof mirrors that of the notice of application in the case of *Schroeder and Another v Solomon and 48 Others*[7] on which the Court remarked as follows:[8]

> "…(I)n the notice of application for review, which they ineptly structured on Rule 53 of the High Court rules, the applicants boldly purported to apply some of the provisions of that rule as rules of this

[7] Unreported judgment of the Court in Case No. SCR1/2007 dated 24 November 2008.
[8] At p.11.

> Court and, where lacking, made their own rules as they went along. They, for example, informed the respondents that they are called upon to dispatch the record to the Registrar of the Supreme Court within 15 days "together with such reasons as (the respondents) are by law required to give." I should point out in passing that these are duties which, in terms of rule 53(1)(b) of the High Court, relates to the magistrate, presiding officer, chairman or officer whose decision is the subject matter of an application for review in that Court. The application further requires of the respondents, if they intend to oppose the application, to file a notice of intention to oppose, appoint an address for notice and service and to file answering affidavits (all of which had to be done within certain stipulated periods of time) failing which, the notice threatened, an order may be made against them."

These remarks apply in every respect to the review application launched by the applicant. But its similarities with the Schroeder-application do not end there: The manner in which he went about to bring the application to this Court and even the relief prayed for in paragraphs (c) and (d) bear an uncanny resemblance to that application. Therefore, the reasons given for the order in the Schroeder-judgement could have been applied *mutatis mutandis* to the application in this instance. The applicant could not as of right seek of this Court to review the High Court's proceedings as a Court of first instance under s 16 of the Supreme Court Act, 1990 ("s.16") and, without more, this Court would not have had the jurisdiction in terms of the section to do so. Had it not been for the events which unfolded

subsequently (which I shall presently deal with), the application would have been destined to meet the same fate as the one in Schroeder's case: being struck from the roll with costs.

[7] Given the importance of s.16 in the context of the discussion which will follow and to facilitate an understanding of the procedures which have been implemented, it is perhaps useful to reproduce the relevant subsections thereof for purposes of this judgment:

> "16 Review jurisdiction of Supreme Court
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> (1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of this section and section 20 have the jurisdiction to review the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.
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> (2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court mero motu whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.

> (3) The Chief Justice or any other judge of the Supreme Court designated for that purpose by the Chief Justice, may give such directions as may appear to him or her to be just and expedient in any particular case where the Supreme Court exercises its jurisdiction in terms of this section, and provision may, subject to any such direction, be made in the rules of court for any procedures to be followed in such cases."

[8] Notwithstanding the apparent inadmissibility of the review application and the significant irregularities in its form, it nevertheless disclosed alleged irregularities in the proceedings of the High Court which this Court had to take note of. The applicant is a lay litigant and, as M T Steyn J remarked in *Van Rooyen v Commercial Union Assurance Co of SA Ltd*,[9] it would "be manifestly unjust to treat lay litigants as though they were legally trained…". They are unlikely to "fully appreciate the finer nuances of litigation"[10] and, I should add, to completely appreciate the principles bearing on the Court's jurisdiction. Bearing in mind that lay litigants face significant hurdles due to their lack of knowledge and experience in matters of law and procedure and, more often than not, financial and other constraints in their quests to address real or perceived injustices, the interests of justice and fairness demand that Courts should consider the substance of their pleadings and submissions rather than the form in which they

[9] 1983 (2) SA 465 (O) at 480G-H
[10] *Per* Rabie J in Absa *Bank Ltd v Dlamini*, 2008 (2) SA 262 (T) at 268B.

have been presented[11]. The applicant might have articulated his grievances ineptly; might have overreached the ambits of his rights; might have adopted the incorrect procedure, but the substance of his complaint – which this Court had to take note of - remained the same. i.e. that the order made against him was vitiated by irregularities in the application proceedings before the High Court and should be reviewed.

[9] Prior to Independence, proceedings in the Supreme Court of South West Africa (the constitutional predecessor of the High Court) were not reviewable other than within the more restrictive framework of appeals to the Appellate Division of the Supreme Court of South Africa. Notwithstanding the new constitutional dispensation implemented as part of South Africa's democratisation, the position still prevails in the relationship between the various High Courts and the Supreme Court of Appeals of that country.[12] In Namibia, however, the position is different. Section 16(1) vests jurisdiction in this Court to review the proceedings of the High Court but, in subsection (2) thereof, limits it to the review of "irregularities" in the proceedings[13] in cases where the Court, of its own accord, decides to do so.[14]

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[11] See: *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd,* 2003 (4) SA 390 (CC) at 395B – D.
[12]as Schutz JA pointed out in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others,* 2003 (2) SA 385 (SCA) at 402C-F.
[13]*S v Bushebi,* 1998 NR 239 (SC) at 242E-G.
[14]Compare: *Schroeder and Another v Solomon and 48 Others, supra,* at p.10 par [11].

[10] Section 16(2) does not purport to prescribe the manner in which irregularities in proceedings of Courts, administrative tribunals or public authorities may be brought to the notice of the Judges of this Court. Whatever the irregularities of form may be which attach to the otherwise inadmissible review-application, they do not preclude the Judges of this Court to take notice of the substance of the alleged irregularities and to set proceedings in motion for the Court to determine, of its own accord, whether or not the irregularities and consequences thereof are such that they require of this Court to exercise its statutory review jurisdiction in the interests of justice.

[11] Mindful of the constraints contained in s.16(1) and (2) and the potential effect a decision of the Court to invoke its review-jurisdiction might have on the rights of the other litigants involved in the urgent application and those of the Judge who had presided thereon, the Chief Justice caused the Registrar to inform them that the Court intended to consider whether or not to *mero motu* exercise its review jurisdiction in respect of those proceedings. He invited them to make representations or advance submissions in that regard and, in particular, on whether (a) reliance by the Court *a quo* on the High Court Practice Directives *re* urgent applications for the order made; (b) the dismissal of the urgent application on lack of urgency, instead of striking it from the roll; and

(c) the award of a special costs order allegedly without giving the applicant an opportunity to address the Court on that issue, constitute procedural irregularities which would fall within the ambit of s. 16.

[12] In response, all the litigants (except the applicant's wife) and the Judge *a quo* filed submissions for consideration by the Court. In their submissions they addressed a number of the alleged irregularities (which will be dealt with later in this judgment) but none of them suggested that the irregularities, if proven, would not constitute irregularities in the proceedings as contemplated in the *Bushebi*-case[15]. Upon consideration of the applicant's affidavit and the submissions received, the Court was *prima facie* satisfied that irregularities in the proceedings have been disclosed and that it was necessary in the interests of justice to invoke its review jurisdiction under s. 16(1) and (2) of the Act.

[13] To facilitate the conduct of further proceedings as contemplated in s.16(3), the Chief Justice deemed it just and expedient to direct that the applicant's review application should be deemed to be an application brought pursuant to and in consequence of the Supreme Court having decided to exercise its review jurisdiction in terms of s.16(1) and (2); that the Registrar should notify the parties affected,

[15] Ibid.

the Registrar of the High Court and the Judge who had presided at the proceedings a *quo* of the Court's decision as contemplated by rule 17(a); that the Registrar of the High Court should obtain a transcription of the proceedings in that Court and collate, index, paginate, certify and file them with the registrar of this Court and for the latter to make them available for inspection and copying by any interested party. His directions also allowed for the applicant's wife to join the proceedings either as applicant or respondent and for the Judge *a quo* to join as respondent, should he be so minded or advised. The need to join a Judge in review proceedings suggested in *Jinnah v Laattoe and Others*,[16] *Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others*,[17] *Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service*,[18] *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[19] and *Kolbatschenko v King NO and Another*[20] was considered and disapproved of by Schutz JA in the *Pretoria Portland Cement*-case.[21] He held the view[22] that –

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[16]1981 (1) SA 432 (C) at 434E – F.
[17] 1998 (4) SA 275 (T) at 285F-G.
[18]2000 (2) SA 106 (E) at 114F:
[19]2000 (2) SA 934 (T) at 943G - H, 946H - 947F
[20]2001 (4) SA 336 (C) at 343H, 344D
[21]*Supra* at 402E-G.
[22]At 402G-403B.

> "(t)here are good reasons of policy why Judges should not be joined. In the first place there is no need for it. Judges know perfectly well that their decisions may be upset by a higher Court on appeal, or even by another single Judge in the case of an ex parte order. … It is not for Judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. Secondly, on grounds of convenience, I do not think that the time of Judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given. Nor should the Court have its time wasted considering invidious applications for leave to sue a Judge under s 25(1) of the Supreme Court Act 59 of 1959. Thirdly, and most importantly, it is not in the public interest that Judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that Judges should be seen as impartial and, in the kinder sense, aloof."

The only exceptions he envisaged are where "a decision has nothing to do with judicial duties (such as where a Judge acts as a commissioner in a commission of enquiry) … and where a personal attack is made on a Judge, such as bias…". In the latter instance, he suggests, the Judge should be given notice of the allegation and so be allowed the choice of intervening[23] - a consideration which, given the applicant's allegation that the Judge *a quo* was biased against him because of an earlier complaint against the Judge, is also pertinent in this application. Although I find the reasoning of Schutz JA compelling, it is not

[23]At 403F-G.

necessary for purposes of this judgment to express any final views thereon – especially in the absence of considered legal argument on the issue. As it happened, the Judge *a quo* decided not to join or formally oppose the review-proceedings.

[14] The directions further allowed for the applicant to amend the notice of application and to file a supplementary affidavit; for the respondents to oppose the application and file answering affidavits and the applicant to reply thereto; for the collation, pagination, indexing and binding of the record in the review and for the filing of heads of argument. All the respondents initially filed - but later withdrew - notices of opposition. No answering affidavits were filed and the application was not otherwise opposed at the hearing thereof.

[15] The absence of opposition, however, does not by itself entitle the applicant to judgment - as if by default. The "onus rests upon the applicant for review to satisfy the Court that good grounds exist to review the conduct complained of."[24] Precisely what would constitute "good grounds" in any given case must, by necessity, depend on facts

[24] See: *Davies v Chairman, Committee of the Johannesburg Stock Exchange*, 1991 (4) SA 43 (W) at 72H and the following authorities referred to therein: *The Administrator, Transvaal, and The Firs Investments (Pty) Ltd v Johannesburg City Council,* 1971 (1) SA 56 (A) at 86A-C and *Johannesburg City Council v The Administrator, Transvaal, and Mayofis,* 1971 (1) SA 87 (A) at 100A-B. See also: *Chairperson of the Immigration Selection Board v Frank and Another*, 2001 NR 107 (SC) at 118E-F and *Immanuel v Minister of Home Affairs and Others,* 2006 (2) NR 687 (HC) at 702C-D.

and circumstances of the case and also on the nature of the review-proceedings under consideration.[25] Traditionally, reviews have been divided into three broad categories: According to Innes CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council*,[26] the first is the process by which, apart from appeal, the proceedings of lower courts are brought before a superior court in respect of grave irregularities or illegalities occurring in the course of the proceedings.[27] The second category relates to reviews "whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty…" and, finally, those where the "Legislature has from time to time conferred upon this Court or a Judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the review procedures to which I have alluded."

[16] Although, in general terms, the century-old classification of reviews in these three broad categories are still pertinent, the defining terminology may have to be amended to reflect the momentous developments in administrative and constitutional review during recent

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[25]See: Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed., at 928
[26] 1903 TS 111 at 114-116
[27] Such as those contemplated in section 20 of the High Court Act, 1990.

decades. One of many examples is the recent trend in South Africa to consider the High Courts' power to review the proceedings in lower courts where a person's fundamental rights have been infringed, as reviews in the nature of the third category which extends well beyond the limited confines the first category.[28]

[17] In Namibia, the review jurisdiction vested in this Court by the provisions of s. 16 is unique and extraordinary. It does not exactly fit the mould of any of the three categories of review defined by Innes CJ. Allowing for the review of irregularities in all judicial, quasi judicial and administrative proceedings in the High Court, lower courts, administrative tribunals and public authorities, the section's jurisdictional sweep is substantially wider than that of the first and second categories but, inasmuch as it is limited to the review of decisions only on account of "irregularities" in the proceedings, it is again more truncated than the wide - almost supervisory - powers of review contemplated in the third category[29].

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[28] See: *Magano and Another v District Magistrate, Johannesburg, and Others (2)*, 1994 (4) SA 172 (W) at 175E – F; *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening*, 1998 (2) SA 559 (T) at 569H-J; Davids and Others v Van Straaten and Others, 2005 (4) SA 468 (C) at 486B-D. See also: Erasmus, *Superior Court Practice* at A1-69

[29] Compare the discussion of the third category by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council, supra,* at 117.

[18] The usefulness of the categorization lies in identifying the diverging grounds upon which decisions under each of the respective categories may be reviewed[30] and the latitude of approach which the Court will adopt at the hearing of the review. Reviews under s.16 do not only include the type of reviews falling within the first and second categories but extend well beyond them: for example, the reviewable irregularities in the proceedings of Courts are not limited to those enunciated in s. 20 of the High Court Act, 1990 but, in my view, will include any irregularity in the proceedings which derogates from a person's right to a fair trial guaranteed under Art.12 of the Constitution. Although not articulated in these exact words, this approach has consistently been applied by this Court. In *Bushebi*'s case, this Court discussed the meaning of "irregularity" in the context of automatic review proceedings in the High Court and quoted the following passage from *Ellis v Morgan, Ellis v Dessai*[31] with approval:

> "But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party, from having his case fully and fairly determined." (*The emphasis is mine*)

[30]See: Herbstein & Van Winsen, *op.cit.,*at 928.
[31]1909 TS 576 at 581

Similarly, in the unreported judgment of *Vaatz and Another v Klotzsch and 3 Others,*[32] this Court held that, by not affording the parties or their legal practitioners an opportunity to be heard on a point raised by the Court a quo at the outset of the hearing, it "denied them the opportunity to have the issue fully and fairly determined".

[19] But, the Court's power of review under s.16 does not only extend to judicial proceedings, it also includes quasi-judicial and administrative proceedings and the challenge will be to find an overarching measure to uniformly asses all the divergent reviews under s.16. In the absence of informed legal argument on the issue, I am disinclined to grapple with that nettle at this stage. As it is, although constrained to pronounce on some of the criteria under s.16 by which this Court may review judicial proceedings in order to assess the applicant's grievances in this review, I do with a measure of hesitation and will pronounce on it only in as far as it is necessary to address the issues in the review before the Court. Bearing in mind the need to develop jurisprudence on this issue with a measure of circumspection, these criteria are likely to be expounded on in future.

[32](Case No. SA 26/2001 dd. 11 October 2002) at p 21-22.

[20] The applicant, first and foremost, must establish that the review relates to an irregularity in the proceedings. This much is clear from *Bushebi*'s case. The irregularity need not be apparent from the proceedings but may be established by evidence *aliunde* the record. Precisely what would constitute a reviewable irregularity will depend on the facts and circumstances of each case and the body of laws applicable to the adjudication thereof, the most fundamental of which is the Constitution and, in the context of the review of judicial proceedings, the fair trial-provisions guaranteed under Art.12 thereof. The grounds of review must either expressly or by necessary implication identify the irregularities relied on in each instance. The application must also establish that the irregularity in the proceedings complained of resulted or is likely to result in an injustice or other form of prejudice being suffered. In dealing with the latter requirement, after he had found that inadmissible or incompetent evidence had been admitted in the proceedings under review, Holmes JA said the following in *Napolitano v Commissioner of Child Welfare, Johannesburg:*[33]

> "That, however, does not end the matter because the reviewing Court will not interfere if satisfied that the applicant has suffered no prejudice. This has long been recognised in the case of reviews from quasi-judicial bodies; see *Rajah and Rajah (Pty.)*

[33] 1965 (1) SA 742 (A) at 745G - 746B. Compare also: *Vize v Wilmans NO and Another*, 2001 (4) SA 1114 (NC) at 1121A-D and *Du Plessis v Prokureursorde, Transvaal*, 2002 (4) SA 344 (T) at 350C-G

> *Ltd. and Others v Ventersdorp Municipality and Others*, 1961 (4) SA 402 (AD). The underlying principle was stated at p. 408 - A to be that the Court is not interested in academic situations. That seems to me to apply equally when the Court is reviewing the proceedings of inferior courts under sec. 24 of the Supreme Court Act. See also *Jockey Club of SA and Others v Feldman*, 1942 AD 340 at p. 359".

It is with these criteria in mind that I now turn to the grounds upon which the applicant is seeking of this Court to review the order of the High Court.

[21] It is somewhat of an understatement to say that the applicant in argument seized upon every conceivable "irregularity" in support of his grievances and used intemperate language in advancing submissions and prayers in his heads of argument (e.g. that the Judge *a quo* made misrepresentations to him; that he "self-evidently undermined the authority and jurisdiction of the Registrar"; that this Court should find "that the Bench was abused" by the presiding Judge and that the Judge "stood in contempt of Court") – a tone which, unfortunately, was not moderated in his amplified and (later) final heads of argument. I pause here to note that the applicant's founding affidavit does not pertinently raise many of the grounds now being relied on as irregularities. However, consistent with the approach that "(p)leadings prepared by

lay persons must be construed generously and in the light most favourable to the litigant,"[34] I shall endeavour to find substance for those submissions in the applicant's affidavit, wherever that may be possible.

[22] A number of "irregularities" complained of do not constitute reviewable irregularities in the proceedings at all. Some of them, such as that counsel interposed in the course of the hearing without deferentially rising to do so, may be considered a discourtesy but can hardly be regarded as an irregularity. It was also discourteous conduct towards the applicant when counsel for the first and second respondents raised and commenced to argue the points *in limine* without first according the applicant an opportunity to record his appearance in person. Similarly, this discourtesy does not amount to an irregularity and, even less, amounts to a denial of the applicant's right to be heard – as he contends.

[23] As it is, the applicant advanced a number of reasons why he submits that he had been denied the right to be heard. In as far as they relate to the Court's refusal to grant the applicant condonation

[34] *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd,supra* at 395B – D

and to entertain the application as one of urgency, they are without substance. In what follows, I shall briefly deal with the reasons why they fall to be dismissed.

[24] Evidently aggrieved that the Court declined to stand the application down until after 14h00 for his preferred interpreter to become available (that is, after the applicant himself had set it down for 10h00), he argues that the Court "denied (him) *audi alteram partem*" because it declared another interpreter, normally used to interpret in criminal matters, competent to interpret the proceedings at the hearing. In the absence of an allegation that the interpreter did not truly or correctly translate the verbal exchanges during the proceedings or that the applicant had been prejudiced as a consequence, I fail to see how the use of an interpreter, other than the applicant's preferred interpreter but evidently competent in the languages used at the proceedings, could have infringed the applicant's right to be heard. The record rather suggests that the applicant wanted to use his acquaintance who knew "all about (the) matter" but who would only become available later the day. He then used the Registrar's expressed concerns about the suitability of the available interpreter as a means to obtain a deferral of the hearing

until a later time. In any event, after the Judge had explained to him that the interpreter need not be acquainted with the matter or its history in order to perform his functions, the applicant, seemingly satisfied, indicated to the Court that the matter could proceed. In view thereof, the objection now being raised seems somewhat contrived.

[25] The applicant also contends that the Court "overruled" and, in doing so, also "undermined the authority and jurisdiction of the Registrar" when it ruled that the interpreter was competent for purposes of the proceedings. This, he says, also amounted to a denial of his right to be heard. The line which the applicant seeks to draw between cause and consequence requires a leap of logic which cannot be made in the absence of an allegation that the interpreter has failed to correctly translate what was being said in court. The interrelationship between the Court and its Registrar aside,[35] it was well within the High Court's inherent jurisdiction to regulate the proceedings before it[36] when it made the ruling regarding the competency of the interpreter. The ruling did not deny the applicant his right to be heard or prejudiced him in any way.

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[35]In terms of s. 30(1)(a) of the High Court Act, 1990, the registrar (who is also the Court's sheriff) is appointed towards "the administration of justice or the execution of the powers and authority of the said court…"
[36]See: Art 78(4) of the Constitution.

[26] The applicant also complains that he was “patronized” by the presiding Judge and counsel and that they “went into intimate solicitations”. It is not suggested that any exchanges took place other than in open court or that all exchanges between counsel and the Bench have not been recorded and transcribed correctly. The record of proceedings shows nothing untoward or “intimate” in the submissions made by counsel and the exchanges with the Court in the course thereof. Other than a bold statement to that effect, the applicant did not refer to any example to sustain this complaint.

[27] Similarly, the record does not support the contention that the applicant was “patronized”. The only exchanges which could possibly have prompted the submission (not even advanced in applicant’s founding affidavit), are the explanations given by the Judge to the applicant. It is not uncommon in matters where lay litigants appear in person that the Court will explain matters of practice and procedure to them. Sometimes the Court may restate a submission made by counsel for an opposing party in lay terms to enable the lay litigant to give a considered or meaningful response thereto. This practice is intended to assist lay litigants and should be encouraged. The record does not suggest that the Court’s explanations to the applicant should be construed otherwise.

[28] Another reason advanced by the applicant in support of his contention that he had not been accorded an opportunity to state his case, is that the Judge *a quo* and counsel for the first and second respondents "coerced" the counsel who appeared for the third respondent "to change his plea of no opposition to opposition". The initial position taken by counsel for the third respondent was that the latter had no interest in the matter and that it will abide the Court's order. In the course of the exchanges which followed regarding the third respondents statutory powers, counsel raised the issue of urgency of his own accord and submitted that the application did not disclose sufficient grounds to justify the urgent hearing thereof. In the end, he contended that the application should be struck from the roll with costs. Whilst this submission reflects a shift in third respondent's original position, the contention that it was brought about by "coercion" is not supported on the facts apparent from the record. In any event, I do not find any rational relationship between the changes in the approach adopted by the third respondent's counsel and the applicant's contention that he had been denied his right to be heard on the urgency of the application. The third respondent's opposition to the applicant's prayer for condonation on account of urgency did not in any way confine the opportunity subsequently granted to the applicant

to address the Court on that issue. If anything, it must have alerted the applicant to the contention that his affidavit did not set forth sufficient facts or circumstances to render the matter urgent or that he has not shown that he could not be afforded substantial redress at a hearing in due course - as is required by rule 6(12)(b) of the High Court rules.

[29] The applicant submits that he has been denied the right to argue urgency. This contention is not supported by the record of the proceedings. After counsel for the third respondent had concluded his argument, the Court summarized the essence of his submissions and thereafter called upon the applicant to present argument in response to the respondents' contentions that the application may be disposed of without the need to consider the merits of the application. In the course of his argument, which focused mainly on the contentions of counsel for the first and second respondents regarding his non-compliance with the Practice Directive on urgent applications, the Court informed him on at least two occasions that both counsel of the respondents had had an opportunity to address the Court and that he should make whichever submissions he might wish to. Eventually, after having made quite a number of submissions - without addressing the issue of urgency – the applicant concluded by stating that it was all he had to say. There is nothing in the record to suggest that he was not

aware of the contentions of the respondents on urgency; that he was not given the opportunity to address those contentions in the course of his argument and, least of all, that the Court in any way "denied" him the right to argue on the issue of urgency.

[30] The applicant also submits that the Court allowed "a non-represented party to argue on the lack of urgency". This contention arises from an argument advanced by the applicant at the hearing that counsel had failed to file any authorization that they were entitled to represent the respondents. The rules of the High Court do not require of litigants to file powers of attorney in application proceedings.[37] In the case of artificial persons it is normally required that "some evidence should be placed before the Court to show" that they have resolved to institute or oppose the proceedings and that the proceedings are instituted or opposed at their instance.[38] That is usually done in either the founding or answering affidavits filed of record. However, in urgent applications where a respondent is brought to Court on such short notice that it has not had an opportunity to file an affidavit but nevertheless wish to oppose the application on the issue of urgency or on the basis that the founding papers lack the necessary allegations to sustain the relief being prayed for, the Court

[37] See: *Leith, N.O. and Heath, N.O v Fraser*, 1952 (2) SA 33 (O); *Parsons v Barkly East Municipality*, 1952 (3) SA 595 (E).
[38] See: *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk,* 1957 (2) SA 347 (C) at 351H.

may allow the respondent's counsel to appear and argue those issues and to file an affidavit dealing with the representative's authority at a later stage. It will be manifestly unjust if an applicant is allowed to effectively exclude any opposition at the hearing of an urgent application by giving such short notice that it is impossible for a respondent to attend timeously to the necessary formalities regarding the authority of its legal representatives. Where, as in this case, the application was brought on one day's notice, the Court correctly exercised it discretion in the interests of justice and fairness when it allowed counsel to appear for the respondents without affidavits substantiating their authority having been filed. It is also for these reasons that the applicant's prayer that this Court should order "that the respondents were not legally before the Court" cannot be countenanced.

[31] The applicant stated in his founding affidavit that the presiding Judge should have recused himself from hearing the application because of an earlier complaint by the applicant against him. The proposition underlying this contention is that, because of the earlier complaint by the applicant, the Judge *a quo* was biased against him. The "complaint" by the applicant relates to the granting of a postponement in action proceedings between the applicant's wife and

the first and second respondents. The applicant was not even a party to the proceedings. In the complaint, the applicant refers to "procedural defects" which he considered to be "gross irregularities" – amongst them that the registrar should have been joined to the application for postponement because of the "purported impropriety of the date" allocated by him; that the failure to join him "clearly made the application irregular and fatal" and that it should have been dismissed for that reason! It also contains some unsubstantiated criticism about the conduct of the legal practitioners involved in the application.

[32] In assessing whether the Judge *a quo* should have recused himself, the Court must depart from the premise that there is "a presumption that judicial officers are impartial in adjudicating disputes"[39]. In reaffirming this premise, the Constitutional Court of South Africa quoted[40] the following *dicta* by the Supreme Court of Canada (*per* L'Heureux-Dube J and McLachlin J*)* in the matter of *R v S (RD)*[41] with approval:

> "Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings

[39] See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, 1999 (2) SA 14 (CC) at 173D-E.
[40] Ibid., at 173G-H.
[41](1997) 118 CCC (3d) 353 at para [117].

> before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate Courts inquiring into the apprehension of bias. This is because Judges 'are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances': *United States v Morgan* 313 US 409 (1941) at 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at 361 in *Commentaries on the Laws of England III* . . . '[t]he law will not suppose possibility of bias in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'. Thus, reviewing Courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a Judge, in the absence of convincing evidence to that effect: *R v Smith & Whiteway Fisheries Ltd* (1994) 133 NSR (2d) 50 (CA) at 60-1."

The test for recusal is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case".[42] The test "is objective and ...the onus of establishing it rests upon the applicant".[43] As Cameron AJ pointed out in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*,[44] "...the applicant for

[42] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others, supra* at 177A-C. See also: *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service,* 1996 (3) SA 1 (A) at 8H-I which, in this jurisdiction, was followed by Teek JP in *Sikunda v Government of The Republic of Namibia and Another (1),* 2001 NR 67 (HC) at 86F-G.

[43] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others, supra* at 175B-C; *S v Basson*, 2007 (3) SA 582 (CC) at 606E-F and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, 2008 (2) SA 448 (SCA) at 454G-H.

[44] 2000 (3) SA 705 (CC) at 714A-B.

recusal …bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted".

[33] Whilst I am mindful of the special considerations in applying these criteria to lay persons,[45] this case stands on a different footing altogether. The applicant did not apply at the hearing for the recusal of the Judge *a quo.* If he had any apprehension that the Judge would be biased against him because of the earlier complaint, one would have expected of him to move such an application at the commencement of the hearing. He was, after all, the author of the complaint which he had addressed to the Judge President and, on the facts before us, it is not even apparent that the Judge in question had any knowledge of it. Moreover, even if the Judge had been aware of it, the substance of the complaint is on the face thereof so patently without merit or consequence, that he would have been entitled to disregard it. Judges have a duty to sit in all cases in which they are not obliged to recuse themselves[46] and should be alert to the danger that certain litigious lay litigants, as a result of their own ignorance or prejudices rather than because of reasons of substance, may endeavour to manipulate the composition of the Bench to hear their cases by laying frivolous

[45] Ibid., at 272A-F alluded to in the minority judgment of Mokgoro J and Sachs J.
[46] See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others, supra* at 177D.

complaints against some Judges and not against others. If, however, there are reasonable grounds on which such a litigant may reasonably entertain an apprehension that the Judge will not be impartial, the Judge should not hesitate to recuse him- or herself. Those grounds are not present in this application. It follows that the applicant failed to establish an irregularity in the proceedings by reason of the Judge *a quo* having failed to recuse himself of his own accord.

[34] Counsel for the first and second respondents contended that the set down of the application was irregular in that the applicant had failed to comply with Practice Direction 1/2007 of the High Court. Paragraph 4(a) thereof provides:

> "All urgent applications are heard by the duty Judge at 9h00, unless counsel has certified in the certificate of urgency that the urgency of the matter is such that the matter has to be heard at a time other than at 9h00 the next Court day or on public holidays and weekend days."

He also cited Practice Direction 1/2002 which requires of an applicant, if an urgent application is brought at any time other than 9h00, to state the reasons for it in an affidavit filed with the application. Based on these Practice Directions, counsel contended that the application

should be struck because the applicant and his wife had set it down for 10h00 (instead of 9h00) and because the necessary averments had not been made to justify the set down of the application at a time other than 9h00. The applicant contended that he had been advised by the Registrar to set the application down at 10h00. He stated that he had not been aware of the Practise Directives; that they did not apply to him and that he brought that application in a manner allowed by the rules of Court. The Court held the view that the Directives were binding on the applicant; informed the applicant of his view in the course of argument and, ultimately, relied on the applicant's non-compliance with them as one of the reasons for the order made.

[35] Practice Directions are issued pursuant to the inherent jurisdiction of Superior Courts as a means to facilitate the administration of justice and ensure the uniform and efficient running of the Courts. As such, they are intended to supplement the rules of practice and procedure promulgated by publication in the Government Gazette. The Practice Directions are issued and distributed through the office of the Registrar and are sometimes published in the Law Reports[47]. Legal practitioners

[47]A few examples of the more recent Practice Directions issued by various Courts in South Africa and published in the South African Law Reports may be found under the following references: *Practice Direction* 2007 (4) SA 1 (SCA); *Practice Directions* 2005 (5) SA 1 (SCA); *Practice Direction* 2004 (6) SA 84 (T); *Practice Directions* 2003 (3) SA 129 (SCA); *Practice Direction* 2 1999 (2) SA 666 (CC) and *Practice Direction* 1998 (1) SA 364 (N).

are well aware of their existence and are expected to comply with them. However, for want of publication thereof in the Official Gazette or any effective mechanism to otherwise bring them to the attention of the public at large (or at least those involved in litigation before the Court in Question), I have reservations about the binding effect thereof on lay litigants. There is not even a provision in the rules of Court which serves to alert the public or those litigants to the existence of the Directives. However, for the reasons mentioned hereunder, I do not deem it necessary to make any definite finding on this issue.

[36] The reasons for the order eventually made are contained in a belt-and-braces judgment in which the Court summarised its conclusions as follows:

> "[12] It follows that the applicants' application that this Court should condone their non-compliance with the Rules of Court and hear the matter on urgent basis cannot succeed. They have not met the two requirements under rule 6 (12 (b) of the Rules. Having so decided, it is not necessary for me to deal with any other point.
>
> [13] For all the above, the applicants' application is refused on the grounds that they have not met the requirements of rule 6 (12) (b) of the Rules of Court and they have also not followed the relevant Practice Directives for the enrolling of urgent applications and have not given any good and acceptable explanation for their failure to follow the relevant Practice Directives."

[37] The principal reason why the Court refused to grant condonation, is the failure of the applicant and his wife to satisfy the Court that the facts and circumstances advanced in the founding affidavit rendered the application so urgent that it had to be brought in the form and manner which the applicant and his wife sought to do and, in addition, that no or insufficient reasons were furnished therein to show that they could not be afforded substantial redress at a hearing in due course.

[38] These findings bear to the merits of the application concerning the issue of urgency (or the lack thereof). The applicant may or may not agree with them and, whether they are right or wrong, the Court's conclusion that the applicant and his wife did not satisfy the requirements of Rule 6(12)(b) to justify condonation of their non-compliance with the rules, is not tainted by any irregularity. The Court's jurisdiction under s.16 to review proceedings of the High Court is limited to "irregularities in the proceedings", and as Mason J said in the quoted passage from *Ellis v Morgan, Ellis v Dessai, supra,* "…an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial." Even if this Court would have held that the Court *a quo's* reliance on the Practice Directions was impermissible and irregular, it would not have produced

a different result on the issue of urgency. Therefore, the applicant failed to establish that he had suffered an injustice or any prejudice as a result of the "assumed" irregularity.

[39] Before I turn to the order of costs granted against the applicant, I must briefly refer to the formulation of the order of the Court *a quo* as issued by the office of the Registrar. It states in paragraph 1 thereof that "the applicants' application is refused." Having declined to grant condonation, the order should have reflected that the application was struck from the roll. Instead, it appears on the face thereof that the Court finally disposed of the application by "refusing" it. The record, however, shows that the Court did not intend such a result. In the penultimate paragraph of the judgment the Court agreed with counsel's contention "that the striking from the roll of (the) application does not close the door in the face of the applicants" and that, if so advised or inclined, they may pursue the matter in the ordinary course. Judging from the comments received from all the parties and the Judge *a quo* pursuant to the invitation of the Chief Justice referred to earlier in this judgment, the parties seem to be *ad idem* that this was the intended result.

[40] What paragraph 1 of the order probably refers to is the High Court's "refusal" of the application for condonation. The Court *a quo* did not conclude its judgment with a comprehensive order reflecting the result of its reasoning - which would undoubtedly have assisted the Registrar and added certainty in the formulation of the order - but left it to the Registrar's office to extract from the reasoning in the body of the judgement what it thought the order of the Court had been. The error in the formulation of the judgment appears to be administrative rather than as a result of an irregularity and may be corrected by the Registrar's office without the need that it must be addressed in this judgment.

[41] The applicant's final complaint is that the order of the Court *a quo* that he and his wife should pay the costs of the respondents in the application "before they can proceed in the ordinary course", was granted without according them an opportunity to be heard and, in effect, closed the doors of the Court to them; violated their fundamental right to seek redress in a competent Court and discriminated against them on the basis of economic status. The record reflects that the issue of costs was raised for the first time in the reply of first and second respondent's counsel. He referred to a passage in the applicant's affidavit in which the applicant had stated

that, unless the interdict is granted, they would suffer irreparable harm because they did not have the means to institute court proceedings. Based on this, counsel reasoned, the applicant might be a man of straw and would not be able to pay the respondent's costs if the application is eventually dismissed. He therefore moved an order that the applicant should pay the costs consequent upon the striking of the application before he would be allowed to proceed in the normal course. In reply, counsel for the third respondent supported the submission. The Court thereupon adjourned without according the applicant an opportunity to address this issue.

[42] It is not uncommon for a Court to make an order of costs without first having heard the parties on the issue but, when it does so, the "award is always made upon the implied understanding that it is open to the mulcted party, or his counsel, to apply, within a reasonable time, to be heard on the issue...".[48] If, however, the Court has entertained argument by one party on the issue of costs at the hearing, different considerations arise – especially if, as in this case, a punitive or extraordinary order of costs is contended for and the other party has not been given prior notice that an order, other than that costs should follow the result, will be prayed for. Orders which stay

[48]Per Ogilvie Thompson JA in *Union Government v Gass*, 1959 (4) SA 401 (A) at 412F-G. See also: Estate *Garlick v Commissioner for Inland Revenue*, 1934 AD 499 at 505.

proceedings until the costs of interlocutory or other proceedings between the same parties have been paid are particularly harsh on indigent litigants and, in reality, are likely to inhibit or terminate their ability to obtain redress of their grievances in a Court of law. Orders of this nature are usually made only within a narrow scope of cases. Orders to stay proceedings by reason of the non-payment of costs previously incurred in interlocutory proceedings or in earlier proceedings based on substantially the same cause of action are normally reserved to prevent vexations litigation[49], an abuse of the Court's process[50] or to mark the Court's disapproval of a party's conduct. In the latter regard, Hall J said the following in *Argus Printing and Publishing Co. Ltd. v Rutland*: [51]

> "The Court has a discretion in deciding whether a stay of action should be granted, or not, and the decisions appear to me to show that it will not exercise that discretion in such a way as to bar a litigant from pursuing his remedy for the infringement of his rights unless he has done something either in the incurring of the costs or in seeking to escape from paying them which invites the Court's disapproval. A factor which will weigh with the Court is whether the party who has been ordered to pay costs has incurred them by reason of some abuse of the process of the Court. Another factor is whether that party has either deliberately or through carelessness occasioned unnecessary

[49] Compare: *Western Assurance Co. v Caldwell's Trustee*, 1918 AD 262 at 272.
[50] See: *Strydom v Griffin Engineering Co.,* 1927 AD 552 at 553; De Jongh v Sliom, 1930 TPD 570 at 572.
[51] 1953(3) SA 446 (C) at 449C-F.

> costs, and a third factor the existence of which would warrant the granting of a stay is whether that party has contumaciously refused to pay the costs awarded against him, or is vexatiously withholding payment…"

[43] These criteria and the submissions which the applicant advanced in these proceedings regarding the debilitating effect of such an order on his right to seek and obtain redress are considerations which might have persuaded the Court *a quo* not to accede to the respondents' request. The Court's failure to allow the applicant an opportunity to address it on the respondent's application for such an extraordinary order of costs constitutes an irregularity in the proceedings. The prejudice to the applicant in the effect of the order is apparent: Being indigent, it effectively bars him from obtaining redress in the main application. In the view I take, it follows that paragraph 3 of the order of the High Court falls to be reviewed and set aside.

[44] The applicant is also seeking an order "that the application be determined in the absence of the respondents". For a person who has seized upon even the slightest reason in support of his contention that he had been denied the right to be heard, this prayer, which is intended to deprive the respondents of their right to oppose the interdict sought against them, seems cynical to say the least. "It is a

crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case", Yacoob J said in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening).*[52] Having brought the respondents to Court with barely a day's notice and now seeking to preclude them from stating their case in opposition to a final interdict being sought against them, is so untenable that in cannot be countenanced. Such an order, in any event, does not fall within the purview of a review under s.16. It is refused.

[45] The applicant is seeking payment of "all costs in this matter". He has appeared in person. Accordingly, the issue of costs does not arise except in the form of such disbursements as he may have reasonably incurred in pursuing this review.

[46] In the result the following order is made:

1. The proceedings in the High Court under Case No. 136/2007 refusing to condone the applicants' non-compliance with the forms and service provided for in the

[52]2002 (1) SA 429 (CC)at 440A-B.

High Court Rules and the striking of the application from the roll with costs are confirmed.

2. Paragraph 3 of the order of the High Court directing the applicants to pay the respondents' costs before they are allowed to proceed with the application in the ordinary course is reviewed and set aside.

3. The respondents jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the review, such costs to be limited to disbursements reasonably incurred.

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MARITZ, J.A.

I concur.

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STRYDOM A.J.A.

I concur.

CHOMBA A.J.A.

ON BEHALF OF THE APPELLANT:

Instructed by:

ON BEHALF OF THE RESPONDENT:

Instructed by: