

SOUTH AFRICA / JUDGMENT

Nordbak (Pty) Ltd v Wearcon and Others (43028/08) [2009] ZAGPHC 40; 2009 BIP 362 (W) (12 February 2009)

[2009] ZAGPHC 40

COURT

High Courts - Gauteng

BEFORE

Levenberg AJ

CASE / FILE NUMBER

43028/08

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 43028/08

DATE: 12/02/2009

In the matter between

NORDBAK (PTY) LTD APPLICANT

and

WEARCON (PTY) LTD 1ST RESPONDENT

WEARCON INDUSTRIES CC 2ND RESPONDENT

ANDRE VORSTER 3RD RESPONDENT

J U D G M E N T

LEVENBERG AJ: This is an application in which the applicant seeks an order interdicting the respondents who are competitors of the applicant from utilising the applicant's trade secrets unlawfully.

Both of the applicants produced certain chemical based compounds that are used in mining and industry to protect surfaces of installation such as conveyer belts, pulleys, crushers and the surfaces of ore bearing motorised and railway trucks.

The third respondent was employed by the applicant and after his resignation he established the first two respondents.

Up to 2006 the respondents merely acted as agents of another producer Cutlass. In 2006 they started marketing their own products.

These products were similar to products that the applicant had developed some years before. The applicant suspected the respondents

had come into possession of the applicant's formulations and that the respondents were using these formulations to compete with the applicant.

On 28 September 2007 the applicant obtained an affidavit by previous employee of the respondents to the effect that the respondents were indeed in possession of some of the applicants' secret stolen formulations and that they were used by the respondents. He also testified that the formulations were kept on respondents' computers.

Prior to that, during August 2006 there was a break-in at the offices of the applicant and only three computers out of the eight on the site were stolen. These were coincidentally the computers that contained the applicant's secret formulations. These were not in fact new computers and not of any great intrinsic value in themselves.

During March to April 2007 Mr H Gardener, the managing director of the applicant learnt that the first two respondents were now

manufacturing Waercoat TL, a directly competing product of the applicant's Nordtile. Although suspicious, the applicant did not prove that the respondents have the applicant's new epoxy technology. During the first few months of 2007 the first and second respondents brought several new directly competing products onto the market, all with names which the applicant contends or clearly intended to present themselves as related to the applicant's products.

The applicant also employed a Mr J Venter, he resigned on 2 May 2007 and took up employment with the second respondent in June 2007.

Mr Venter resigned from the second respondent and on 28 September 2007 deposed to an affidavit concerning his knowledge of the conduct of unfair competition by respondents. Venter stated that Mr Combrink whilst employed with the applicant had stolen some of the applicant's secret formulations. He allegedly copied same. The products now being manufactured by the respondents were, according to Mr Venter based upon the applicant's formulations

and the applicant's written formulations of the respondents' copies thereof as contained on the computers of the third respondent.

On 10 October 2007 the applicant applied for an Anton Pillar order in the Transvaal Provincial Division to preserve the evidence

contained on the respondents computers. At the same time the applicant applied for an interim interdict to restrain the respondents from unfairly competing against it.

I pause here to note that although not directly relevant, it was explained to me by counsel for the applicant during the course of argument that the applicant had gone in the Transvaal Provision Division, because the Anton Pillar order sought to conduct its

searches not only within the area of jurisdiction of the WLD, but also within the area of jurisdiction of the TPD.

On 10 to 12 October 2007 the applicant's computer expert, a Mr P Furber, duly authorised by the Anton Pillar order made mirror copies of the computer hard drives of the third respondent, E Vorster and N Hamman which were retained as per the Anton Pillar order in the possession of the third respondent.

The third respondent, E Vorster and Hamman were ordered by the sheriff not to access the said computers at all, should they take

them home on 10 October 2007. They agreed to this and then took the computers home.

It emerges from the examination subsequently conducted by the applicant's computer expert that when they took these computers

home they deleted the incriminating information on the hard drive. However technology being what it is, the computer expert was able to determine when they had deleted that technology and precisely what they had deleted so that ultimately the attempt to destroy the evidence done in the face of an Anton Pillar order failed.

During October 2007 the applicant laid a complaint of theft with the SAPS against the respondents. The South African Police Service were advised that the Sheriff was in possession of preserved evidence.

In the light of the opposing affidavits filed in the interim application that was brought in Pretoria for interim relief at the

same time as the Anton Pillar, the applicant launched an application under rule 35 (12) and 35 (14) in that proceeding. Ultimately that application was unsuccessful.

During November 2007 the applicant also instituted action against the respondents and Mr Combrink for final interdictory relief,

passing off, trademarks, infringement and damages.

Those of the respondents who are defendants in that application have along with the other defendant Mr Combrink pleaded in that action. I pause to note here that the plea which was filed before discovery of the information that had been deleted from the hard drive contains a bare denial of the applicant's claims. In other words there is a bare denial that the applicant has confidential information and that the respondents have in any way utilised the applicant's confidential information.

On 12 November 2007 the respondents delivered an opposing affidavit to the applicant's interim interdict application. The respondents there denied being in possession of applicant's formulations stated that Venter was a liar and that they had developed all their product formulations themselves. They presented no documentary evidence of any worth in this regard. It was as a consequence of that denial that the applicant brought the application under rule 35 (12) and rule 35 (14) for further documents.

I pause here to note that, based upon what subsequently occurred, it is evident that the respondents filed false affidavits under penalty of perjury in the interim application.

The SAPS then calls a section 205 subpoena to be issued to the Sheriff to produce the preserved evidence. The SAPS also requested

Mr Furber, the computer expert to analyse the copied hard drive during February 2008.

It appears from the founding papers that the respondents were uncooperative in making their expert available to meet with Mr Furber

and that is the explanation for the delay in analysing the hard drives. In fact from my perspective in this application it is

irrelevant whether there is a valid excuse for that delay or not.

As alluded to above, Mr Furber found that the third respondent had deleted numerous formulations and data from his computer hard drive during the night of 10 October 2007. Mr Furber retrieved them and hand copies thereof to the SAPS.

It was during April 2008 that the respondents delivered their plea in the action.

The outcome of Mr Furber's findings on behalf of the SAPS were not made available to the applicant. The respondent's

expert did not have to be present at the SAPS investigation, but as it was an SAPS investigation Mr Furber could not make those results available to the applicant.

Accordingly it was only on 25 April 2008 that Mr Furber was able to meet with the respondents' expert and investigate the computer hard drives with the respondents' expert.

Definite matches were found in four products of the respondents as compared to four of the applicant's product. The respondents'

attorneys were present and they noted the comparisons. The deletions were again retrieved. No hard copies of the respondents'

formulations were provided to the applicants.

Starting at page 32 of the applicant's founding affidavit the applicant has comprised an impressive schedule reflecting the comparative information that resulted from Mr Furber's search. What the applicant indicates on those schedules is the name of the applicant's product and the name of the competing product of the respondents. The applicant then analyses the various chemical components of these respondents. I have looked at them and to my mind they appear to be almost identical. In any event there is no answering affidavit from the respondent to dispute this.

The respondents' formulation refers to a chemical called Desmocap 1100. There is in fact no such product and the reference

should either have been to "Desmocap" or "Desmocap 11". The applicant's Mr Gardener testifies at page 41 of the papers that he recalls the applicant at one point made an error on one of its formulations and referred to Desmocap

1100. Mr Gardener observed that it would appear that the respondents must have obtained a copy of that formulation and "slavishly copied" the non-existing product into their formulations. Desmocap 1180 is in fact a diluted version of Desmocap 11.

I pause here for a moment to note that I have not analysed in detail the evidence set forth in the applicant's founding affidavit in support of its contention that it has trade secrets and confidential information to preserve. I believe that the facts as set out there are impressive and demonstrate clearly that the applicant had confidential information that it was entitled to protect in accordance with the provisions of our law of unfair competition, confidential information and trade secrets that were worthy of protection and accords with our law of unlawful competition.

The papers demonstrate that these trade secrets have significant economic value to the applicant and have been developed at great

expense over time by the applicant. The applicant is in fact the market leader in its field. This information is not generally

available and therefore not known to others. This information represents a valuable economic interest of the applicants and the

applicant is entitled to legal protection of that information.

The applicant has indicted that these formulations are so secret that the applicant has not sought a patent on them. The reason for this is that in order to apply for a patent the applicant would have to disclose its formulations publically and the applicant is concerned that others may then copy these formulations as the respondents have in fact done.

I point out these formulations are, the applicant has established these formulations, had been used by the applicant in trade and industry. The information is highly secret and confidential and only available to a restricted number of people.

The respondent is indisputably a competitor of the applicant. The misappropriation of the applicant's trade secrets amounts to the wrong of unlawful competition at the very least. There are also criminal charges being investigated as I understand it. Counsel was unable to say what the precise nature of those charges were and the precise nature of the charges not mentioned in the founding affidavit, I do not wish to speculate on what those charges are.

However, on the facts before me it appears that the respondents misappropriated the applicant's trade secrets. As a matter of probability in the affidavit before me it appears that the trade secrets may have been stolen in the technical sense of the word when the applicant's computers which were property of the applicant were removed, but I cannot, I make no finding here on this issue. It appears also as a matter of probability that they were also stolen in the technical sense of the word when Combrinck removed the documents from the office and then replaced them later. If Combrinck did this, even if the removal and replacement of the documents does not constitute a theft in the strict sense of the word, it may very well be a fraud, in other words the applicant was deceived into believing that its products had not been stolen.

But I do not need to go into all of this, I am satisfied that the wrong of unlawful completion has been affirmatively established. It has been affirmatively established that the respondents have been using the applicant's trade secrets in order to compete

unfairly with the applicant. It is therefore also been established that the applicant is entitled to protection.

I pause here to note that the respondent has put up no answering affidavit in these proceedings. Accordingly subject to what I have to say below about the respondent's request for additional time to file affidavits, the court is entitled to infer that every allegation made in the founding affidavit is true. I specifically called upon the respondent's counsel to address me on the issue of whether the application failed to make out a prima facie for the relief sought. The only issue that the respondent focussed on with respect to the question of whether a prima facie case had been made out was the question of the form of the order sought by the applicant. The allegations in the founding affidavit must therefore be taken to be undisputed.

In relation to the requisites for a final interdict as set out previously by the appellate division in the seminal case of *Sedlogolo v Sedlogolo*, I am satisfied that the applicant has in its founding papers made out an appropriate case. The applicant has demonstrated:

A clear right, the right to protect its confidential information.

The applicants also established an act of interference by the respondent as I have described above.

The interdict should not be granted if there is another suitable remedy available to the applicant.

I find in this case that there is no other suitable remedy available to the applicant other than an interdict. The applicant's

damages may prove very difficult to prove. The respondent's conduct has been so gross and mala fide as alleged in these papers that it is difficult to see how it can be controlled in the future except through an interdict.

However, this does not end the inquiry. The respondents in this application chose not to file an answering affidavit. Instead they chose to bring an application to stay these proceedings on the basis of *lis alibi pendens* in that the issues that arise in this application form the subject matter of the claim in the action that has previously been instituted. I note that there is no trial date available for the action until 2010.

In order to evaluate this plea of *lis alibi pendens* it is necessary to examine some of the subsequent procedural developments in the Pretoria litigation and in the Johannesburg action.

I also note that the action was instituted in Johannesburg against the three respondents and Marco Combrink.

Those four persons or entities filed a with prejudice [Indistinct] "skikkingsaanbod in terme van reel 34" in both the pending Johannesburg action and the application for interim relief in Pretoria on or about 22 May 2008. That document has been attached to the founding affidavit in this application is Annexure HH5. Because of the importance of this document I read out the relevant provisions in full:

"GELIEWE KENNIS TE NEEM dat die eerste en tweede verweerders onvoorwaardelik aanbied om die eiser se eis te skik soos volg

Die verlening van 'n bevel ten gunste van die eiser teen die eerste en tweede verweerders soos gevra in bede 1.1 van eiser se dagvaardiging tot die volgende mate:

'Using directly or indirectly the plaintiff's trade secrets and confidential information, including any of the plaintiff's formulations.'

Die verlening van 'n bevel ten gunste van die eiser teen die eerste en tweede verweerders soos gevra in bedes 1.1 van eiser se aansoek gebring in die Transvaalse Provinsiale Afdeling van die Hoë Hof van Suid Afrika onder saak nr: 46548/07.

'Using directly or indirectly the applicant's trade secrets and confidential information, including any of the applicant's formulations.'

Betaling deur die eerste en tweede verweerders [gesamentlik en afsonderlik, die een betaal die ander verskoon te word] aan die

eiser van die bedrag van R500 000.00 in terme van bede 4 van eiser se dagvaardiging tesame met rente op die bedrag van R500 000.00

bereken teen 15.5% p.j. vanaf datum van diening van die dagvaardiging tot datum van betaling.

Betaling deur die eerste en tweede verweerders [gesamentlik en afsonderlik, die een betaal die ander verskoon te word] van die eiser se koste tot op datum van bestelling hiervan, op die skaal soos tussen prokureur en kliënt in hierdie saak, sowel as die eiser se aansoek gebring in die Transvaalse Provinsiale Afdeling van die Hoë Hof van Suid Afrika onder saak nr: 46548/07 en saak nr: 46547/07.”

I pause to note that although the ‘skikkingsaanbod’ which I will refer to from here on as the with prejudice offer concedes the primary relief in the action and in the interim application, it does not concede all of the relief. Most significantly it offers a limited amount of damages i.e. R500 000.00. The applicant could not simply accept this offer without accepting it as a composite offer. Although it has not been explained on the papers this is presumably why the applicant did not accept the offer at the time.

I also note and it is significant in the light of what I am now going to find that the tender of costs was made on the attorney and client scale. So the respondents recognised that their mendacity in relation to the applicant’s entire claim would entitle the applicant to attorney and client cost up until the date of the offer.

It is rare to see a with prejudice offer of this nature. The fact that it was made demonstrates how damning the evidence obviously was against the respondents.

I also note that notwithstanding that this offer was made the respondents did not then do the right thing in the main application

and amend their plea to admit the misuse of trade secrets and to concede the applicant’s right to an interdict. The respondents

were clearly hoping to get away with a payment of R500 000.00 in damages. The applicant was not willing to accept such a limited amount in damages.

After the applicant lost the application under rule 35 (12) and 35

(14) in the interim application proceedings in Pretoria, the applicant withdrew the interim application in Pretoria. The applicant’s reason for doing so are fairly obvious. At the time when the application was initially launched the applicant did not have at its disposal the damning evidence it subsequently obtained. The applicant was therefore presumably at risk of not succeeding in that application.

Once the experts had met the deleted information recovered and the applicant’s comparison done and the respondents had made their tender, the applicant had significantly more than a clear right, though open to some doubt, the applicant had a clear right.

For the applicant to have proceeded with the interim application the applicant would then had to file a supplementary founding affidavit. Presumably the request to file the supplementary founding affidavit would then have been opposed.

In all the circumstances the applicant took the decision to withdraw the application for interim relief and to move on the very strong evidence it had obtained, including the admission contained in the with prejudice offer for final interdictory relief on this particular aspect of the case.

Although I am not sure whether there is a complete explanation for this in the founding papers. However, counsel for the applicant

explained to me from the bar that the delay in bringing the present application had to do with awaiting the outcome of the applications

under rule 35 (12) and 35 (14) in the Pretoria High Court interim application.

I do not think it is material whether there was a delay of several months in bringing the present application. There were a number of procedures afoot. The respondents had behaved dishonestly and fraudulently and one can excuse the applicant for being confused as to what the appropriate manner was for the applicant to proceed at that stage.

I am not impressed with the argument that the applicant's delay in bringing this application after discovery of the damning

evidence should somehow be held against the applicant in the *lis alibi pendens* interlocutory application.

As alluded to above the respondents chose not to file an answering affidavit in this application notwithstanding that they were afforded an extension of time by the applicant. The respondents have also not complained in these proceedings that they have had inadequate time to file an answering affidavit.

Instead the respondent's strategy was to bring an application to stay the proceedings on the basis that proceedings on similar

issues were pending in the action. In the replying affidavit in the application for stay the respondents asked for additional time to file an answering affidavit in the event that the application for stay was refused.

However the respondents did not indicate what the basis of their defence would be in the event should they file such an answering affidavit.

I pause here to mention that this matter was heard over a period of two days starting on 11 February 2009 and ending on 12 February 2009. Late yesterday afternoon I asked the respondents' counsel specifically what the respondents' would say in the event that the respondents put up an answering affidavit.

Respondents' counsel indicated to me that the answering affidavit if it was put up would focus on the form of the relief sought. Respondents' counsel in a very able argument sought to persuade me that the relief sought was too wide and might be unfairly prejudicial to his clients.

I then specifically asked the respondents, called upon the respondents' counsel to prepare overnight a short affidavit outlining the basis of the defence that the respondents would seek to set out in their answering affidavit if they were given additional

time. This morning no such affidavit was tendered. I specifically asked counsel for the respondents if he wanted to tender such an affidavit and he elected not to. In the result, if I dismiss the application for stay on the grounds of *lis pendens* there are no answering affidavits before me.

Now we move to the application for *lis pendens*. There are some differences in the relief sought in the main action and the relief sought in this application. As pointed out by the applicant's counsel there is an additional party in the action, Mr Combrink.

More importantly significant additional relief is sought including damages which by definition cannot be sought in application

proceedings. The core issue that is the same in these proceedings as in the main action concerns the interdict that is sought in this action.

I am satisfied having reviewed the pleadings in the action and this application that there is a significant overlap between the cause of action inserted there and the cause of action inserted in this application. The parties are sufficiently similar that, subject to the exercise of my discretion, a plea of *lis alibi pendens* might otherwise work.

Before I analyse the manner in which I have exercised my discretion I pause to note that the applicant objected to the manner in which the respondents brought this application for stay. The applicant argued that the plea of *lis alibi pendens* should have been raised in an answering affidavit. This is fairly formulistic and I have considered the application for stay as if it had been raised in an answering affidavit.

I think that what the applicant's counsel is really touching on is a more fundamental problem. When the defence of *lis alibi pendens* is raised in an action it is the practice of a defendant to plead over. Applying the action formulation to an application module the answering affidavit should contain facts which justify the plea of *lis alibi pendens* and then the respondent should "plead over" by setting out its defence on the merits in case the application does not succeed. This is not what occurred here.

The respondents' counsel drew my attention to *Geldenhuis v Kotze* 1964 (2) SA 167 (O) as being the case that indicated the manner in which a court should exercise its discretion in deciding whether or not to allow an action or application to proceed notwithstanding that there is a pending action appertaining to the same subject matter going on at the same time.

I am not going to analyse all of the factors contained in *Geldenhuis v Kotze*. Ultimately the court has an overriding discretion and as appears from *Geldenhuis v Kotze* the court must ultimately be guided by whether the balance of convenience and equity is in favour of allowing the case to proceed.

Another important factor that emerges from *Geldenhuis v Kotze* that should be considered in determining whether or not to allow the second action or application to proceed is whether the respondent or defendant has a proper defence to the action. If the respondent does not have a bona fide defence there is very little reason to allow the plea of *lis alibi pendens* to succeed.

I am satisfied that in this case it is both convenience and equity requires that this application be dealt with and that the defence of *lis alibi pendens* not be acceded to. I say this for the following reasons:

Firstly, as to convenience I am in as good a position to decide this matter at this stage as the trial court will be in the action. I have reviewed numerous amounts of paper, heard lengthy argument. The facts set out in the founding affidavit are not contested. It is therefore convenient for the court to dispose of this matter at this stage.

Secondly, as to equity the equity scream out in favour of the applicant in this case. The applicant is the victim of a delict,

perhaps a fraud. So far the applicant has recovered no compensation by way of damages. The applicant has had to chase after its rights in more than one proceeding in more than one court. There is no reason why the applicant's remedy should not be withheld from it at this stage.

Thirdly, the facts of this case are very unusual. At this stage there is no dispute that the applicant is entitled to the relief

that it seeks in prayer 1.1. I specifically asked counsel for the respondent and he conceded that he did not contest the applicant's

right to relief under prayer 1.1 and that it accorded exactly with the intent of the with prejudice offer made in the prior proceedings.

Fourthly, there is accordingly in the present situation no dispute about the applicant's right to the main relief it seeks in this application. A postponement will only keep the applicant out of its rights that much longer.

The respondents have not offered up any defence or even a summary of a defence, either in this application or in the main action. In fact, the with prejudice tender amounts to a concession of the applicant's claim on this particular issue in the main action.

The applicant was not in a position to move for a final interdict on undisputed facts until after it had initiated the action. This is because it did not have at its disposal the evidence and the with prejudice offer that the applicant now relies upon. These new developments entitle the applicant to come to court.

The determination of this issue at this stage will relieve the parties as well as the court of the obligation to hear extensive

evidence traversing the same subject matter as was traversed in this application. I note again that notwithstanding that the respondents conceded with prejudice the applicant was entitled to interdictory relief, they did not amend their plea to make the necessary admissions and put the issue beyond doubt for the purposes of trial.

I am convinced given the history of mendacity by the respondents as enumerated at length in the founding affidavit it is essential that the applicant obtain final relief to protect its rights as soon as possible.

Accordingly I exercise my discretion to permit the applicant to go on with this application in these proceedings notwithstanding the overlap between the relief sought in this application against the first two third respondents and that sought against them in the main action.

As a result of that order I dismiss the respondent's application to stay these proceedings on grounds of *lis pendens* with cost on a party and party scale.

The reason why the costs are rewarded on a lesser scale to the scale on which I intend to award costs with respect to the main application is that the respondents had a good faith argument on *lis alibi pendens* and they were entitled to bring the issue to the fore. Ultimately I have come to the applicant's rescue based upon the exercise of my discretion and for that reason a punitive order cost on that particular interlocutory application is not justified.

We come then to the respondent's request for additional time to file an answering affidavit. As noted above, I afforded the respondents an opportunity to file a brief affidavit summarising the defence that they propose to put up in an answering affidavit. They chose not to do so.

The facts in this situation are analogous to those that arose in the case of *Bade and another v Weston* 1967 (1) SA 134 (C) and in *Standard Bank of South Africa Limited v RTS Techniques and Planning (PTY) Ltd and others* 1992 (1) SA 432 (T).

I pause here to note that the decision in the Standard Bank matter is that of two judges. It is a full bench decision and it is in every sense binding upon me. In that case the respondents in motion proceedings raised a point of law and elected not to file affidavits. When the point of law failed on appeal the respondents

sought permission from the appeal court to file an answering affidavit. The court refused permission.

After analysing the authorities in some detail the court stated at page 442 (G):

"The respondents are seeking an indulgence and in doing so they should furnish cogent reasons for not complying with the provisions of rule 6 (5) (d) and the procedure of practice established over many years relating to application proceedings. They should at least have given some indication of the nature of the defence they intended to raise. The mere statement that they have a defence is not sufficient. The Court should not be left to speculate upon the possible defences which they might wish to raise. It is

common cause between the parties of the first respondent had been placed in liquidation. The liquidator does not wish to be joined, but abide the decision of the court. In considering the application for a postponement, or at this stage an opportunity to file further affidavits, I am disinclined to accede to the request. Insufficient facts and information have been placed before the Court. I cannot exercise my discretion in favour of the respondents and in my view the application ought to be refused."

The same considerations apply here. I in fact went further than the Appeal Court in the Standard Bank case. I afforded the respondents

an opportunity to file a supplementary affidavit at least setting out in brief the basis of their defence and they failed to do so.

This brings me to the form of the order. There was some debate about the form of the order and the parties exchanged drafts. It was clear that the respondents conceded from the outset that an order in terms of prayer 1.1 would be sufficient. Ultimately this morning after some debate over this issue the applicant's attorney handed up to me a draft order which is Annexure X hereto and which is going to be the order that I will make. I have interlineated that order to accede to some of the requests of the respondents' counsel concerning the appropriate manner of formulating the order.

In relation to the cost the applicant has sought a punitive cost award. The respondents' argued against such an award on the basis that there has been no mendacity in the manner in which this application has been conducted. I must say again that the

respondents' counsel defended his clients honestly and forthrightly in the highest standards of the bar. Therefore the attorney and client cost award that I am about to make does not reflect badly upon him in any way.

I believe that an award of attorney and client cost is justified not only when there has been mendacity in the conduct of the proceedings, but where there has been mendacity in the conduct of the respondents leading up to the proceedings. I have detailed the history of bad faith conduct by the respondents leading up to these proceedings.

However, even after the proceedings were initiated, the respondents should have conceded that the applicant was entitled to the relief it sought. Instead they chose to bring an application for a stay under *lis pendens*. They chose not to file an answering affidavit and they chose to ignore my invitation to set out the basis of their defence in an encapsulated form this morning. Their decision to proceed for relief in the form of a stay rather than put up an answering affidavit is one that they can also be criticised for in the light of the fact that they have no defence to the claim.

In the result I am going to make a punitive award of cost. I hereby make an order in terms of the draft which is marked "X"

and on which I have interlineated.

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