

SOUTH AFRICA / JUDGMENT

Schabort N.O. v Botha and Others (1531/2014) [2015] ZANWHC 23 (2 July 2015) [2015] ZANWHC 23

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1531/2014

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IN

THE NORTH WEST HIGH COURT

MAHIKENG

CASE

NO.: 1531/2014

In

the matter between:

JACOBUS
HENDRIK SCHABORT N.O.
Plaintiff
and
CORNELIUS
ALWYN BOTHA
1st
Defendant
J
BOTHA
2nd Defendant
M
BOTHA
3rd Defendant

JOMANE
EIENDOMME (PTY) LTD
4th Defendant
THE
MASTER OF THE HIGH COURT OF S.A.
5th Defendant
CIVIL
MATTER
KGOELE
J
DATE
OF HEARING
: 14
MAY 2015
DATE

OF JUDGMENT : 2 JULY 2015
FOR

THE PLAINTIFF : Adv. P.G.
Cilliers (SC)
With
Him Adv. J H Roelofse
FOR

THE RESPONDENT : Adv. A.M. Heystek

JUDGMENT

KGOELE J:

A.

INTRODUCTION

- [1] This is an application for summary judgment against the first to fourth defendants for payment in respect of five claims. Initially in the particulars of claim of the main action there were sixth claims, but summary judgment was not sought in respect of the sixth claim. I will refer to the parties as they are in the main action.
- [2] The plaintiff is a duly appointed executor in the deceased estate of the late Cornelius Botha (the deceased) who passed away on 21st October 2003. He replaced the first defendant, who is the father of the deceased, as an executor of the deceased estate.

The first defendant was removed by a Court order as executor on the 14th May 2012 and the plaintiff appointed consequently on the 22 June

2012. The second defendant is the son of the first defendant

and the third defendant, his daughter. The fourth defendant is a Private Company which the first defendant describes as his.

- [3] A brief background to this matter is to the effect that the first defendant resigned under circumstances where the relationship with the deceased's wife (his daughter-in-law), Mrs Tiana Botha, broke down completely as a result of tension and clashes that developed between them after the passing of the deceased. Tiana Botha brought an application against the deceased estate for the payment of maintenance to her and her twin sons that were born after the death of the deceased. She also brought an application to the North Gauteng High Court for his removal as executor of the estate under case number 25374/2011. A consent order was granted in terms whereof the first defendant was removed as executor.
- [4] Of the remaining five claims three of them are against the first defendant and two are jointly against the first and the fourth

defendants and furthermore jointly against the first, second and third defendants. The first to the fourth defendants are

opposing the granting of the summary judgment.

B. THE CLAIM IN THE SUMMARY JUDGMENT APPLICATION

- [5] It is of importance that all the initial five claims sought by the plaintiff be set out from the onset because of their importance to the decision taken by this Court as it will become clearer later in the judgment. They were couched as follows from the particulars of claim in the main action:-

The Plaintiff's first claim : As against the first defendant only

- [6] In this claim the plaintiff alleges that during the course of the administration of the deceased estate by the first defendant he failed to effect payment of moneys received by him for the benefit of the deceased estate, in his capacity as the then duly appointed executor of the deceased estate alternatively, he failed to have payment of moneys paid to the deceased estate and/or for the benefit of the deceased estate effected into the cheque account(s) or savings account(s) opened in the name of the estate.
- [7] The moneys referred to in paragraph 6 above, comprised of the following:-
- 12.1 The amount of R185 523,05 on 7 March 2006 – in respect of repayment of rent by the landlord with regards to the lease of the premises from where the deceased carried on the business of the Sun City Pharmacy ("the Sun City Pharmacy").
- 12.2 The total amount of R2 266 669,00 during the period December 2006 to January 2007 – in respect of the proceeds of the sale of the Sun City Pharmacy.
- 12.3 The total amount of R80 000,00 on a date that could not be ascertained by the plaintiff, in respect of the sale of foreign currency by the Defendant.

12.4 The amount of R175 000,00 during or about 2004 – in respect of the proceeds of the sale of the deceased's Toyota Prado motor vehicle.

12.5 The total amount of R1 769 359,42 during the period January 2004 to February 2004 – in respect of the proceeds of the deceased's life insurance policies.

12.6 The amount of R95 836,64 during the period from during or about November 2003 to September 2006 – in respect of the rental income from an immovable property in the deceased estate, namely unit 5, Hampton Village, Rustenburg.

12.7 The amount of R114 825,37 during the period during or about November 2003 to September 2006 – in respect of the rental income from an immovable property in the deceased estate, namely, unit 7, Hampton village, Rustenburg.

[8] The plaintiff further alleged that the failure to deposit all the amounts referred to above was done in contravention of Section

28(1)(a) of the Administration of Estates Act 66 of 1965 (The Act) and in breach of the fiduciary duties that rested upon the first respondent as executor and therefore caused harm and damages to the deceased estate in the amounts referred to above.

The Plaintiff's second claim: As against the first defendants only:-

[9] In this claim the plaintiff alleges that during the course of the administration of the deceased estate by the first defendant, in particular during the period 21 October 2003 to 4 November 2006, he failed to effect payment of the amount of R20 101 196,00 in respect of the turnover of the Sun City Pharmacy into the cheque account(s) or savings account(s) opened in the name of the estate.

[10] According to the plaintiff the failure in this claim is again indirect contravention of the express provisions of Section 28(1)(a)

of the Act and a breach of the fiduciary duties that rested upon the first respondent which ultimately caused harm and damage to the deceased estate in the amount stated above.

The Plaintiff's third claim: As against the first defendant only

[11] In this claim the plaintiff alleges that during the period 2004 to 2006, and during the course of the administration of the deceased estate, the first defendant caused payment in the total amount of R902 772,11 to be made to himself and he paid the said amount from the funds that were held in the cheque account and/or the savings account opened in the name of the deceased estate.

[12] The plaintiff further alleges that this payment was made without legal cause when the estate of the deceased was not indebted to the first defendant and in breach of the fiduciary duties that rested on the first defendant and furthermore, caused the deceased estate harm and damage in the amount set out above. In the premises the estate of the first defendant was unjustifiably enriched at the expense of the deceased estate.

The Plaintiff's fourth claim: As against the first and the fourth defendants

[13] In this claim the plaintiff alleges that on or about 9 October 2006, and during the course of the administration of the deceased estate, the first defendant caused payment in total amount of R966 412,74 to be made to an entity over which he had control, namely the fourth defendant, and he paid the said amount from the funds that were held in the cheque account and/or the savings account opened in the name of the deceased estate.

[14] The plaintiff further alleges that the payment referred to in paragraph 14 above was made in contravention of the express provisions of Section 35(12) of the Act and without legal cause in that:-

14.1 the payment to the fourth defendant was made as an ostensible payment of a creditor's claim before the Master of the High Court of South Africa made a ruling in respect of the objection that was lodged by the deceased's wife in terms of Section 35(7) of the Act;

14.2 the deceased estate was, as at the date of the payment to the fourth defendant, not indebted to the fourth defendant in the amount of the R966 412,74 or at all.

The Plaintiff's fifth claim: As against the first, second and third defendants

[15] In this claim the plaintiff alleges that during the financial year ending 28 February 2004 and during the course of the administration

of the deceased estate, the first defendant caused payment to be made from the deceased estate as follows to the second and the third defendants:

15.1 The amount of R485 301,00 to the second defendant as an ostensible payment of a bequest from the deceased estate;

15.2 The amount of R485 301,00 to the third defendant as an ostensible payment of a bequest from the deceased estate.

[16] The plaintiff further alleges that the payments were made in breach of the statutory duty placed upon the first defendant in terms of Section 34 and 35 of the Act and caused damages to the deceased estate of the amount set above as they constituted payment of monies sine causa and the second and third defendants were unjustifiably enriched at the expense of the deceased estate.

[17] At the beginning of the hearing Advocate P G Cilliers SC on behalf of the plaintiff informed the Court that the plaintiff concede that leave to defend be granted to the respondents in regard to the rest of the claims except the following three of which the application of Summary Judgment is persisted on:-

17.1 In regard to the 1st claim against the first defendant only

- Claim in paragraph 12.1 of the particulars of claim
- Claim in paragraph 12.2 of the particulars of claim

(Both found under paragraph 7 of this judgment)

17.2 In regard to the 2nd claim against the first defendant only.

(found under paragraph 9 of this judgment)

C.

SUBMISSIONS

POINT IN LIMINE

[18] Advocate A.M. Hystek on behalf of the three defendants raised a point in limine to the three claims the plaintiff persisted on in his application for Summary Judgment to the effect that all of the unlawful conduct

and/or unlawful payments that are subject to these claims occurred before the appointment of the plaintiff as the executor of the estate as such he, the plaintiff, has no personal knowledge or had no dealings nor was he involved in the affairs of the estate at the time they arose. This factor is according to him common cause between the parties. He based this contention on the premise that the plaintiff has no personal knowledge regarding the loan agreements concluded between first and the fourth defendants with the deceased. Furthermore, he argued, plaintiff also has no personal knowledge regarding the financial transactions and bookkeeping matters relating to the estate during the time of first defendant's appointment as executor and he would also have no personal knowledge in particular regarding the decision, practical arrangements and financial aspects regarding the continuance of the Pharmacy's

business in favour of the estate. The allegations contained in the summons can, at best, so he submitted, only be based on

inadmissible hearsay evidence.

- [19] Advocate Heystek further developed his argument to the effect that the plaintiff is therefore clearly also not in a position to form an opinion as to the bona fides of the defendants' defences to the action, including the purpose for which appearance has been entered to defend the action. He mainly referred to the case of Bowman, NO v Howe 1980 (2) SA 226 (W) at 228D-H and that of Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd, 1959
- (3) SA 362 (W), also referred to in Bowman case, as support for this proposition.
- [20] In reply the plaintiff's counsel submitted that Rule 32 (2) of the Uniform Rules of Court provides that the affidavit should be made by the plaintiff himself or any other person who can swear positively. Further that, plaintiff is not required to do more than assert that he can swear positively to the facts because plaintiff is suing in his representative capacity. According to him it is quite obvious that he got knowledge of the facts from the documentary records in the estate file. He does not rely on an oral agreement. As a basis for this proposition plaintiff's counsel relied on the case of Maharaj v Barclays National Bank Ltd 1976 (1) SA p419 and Kurz v Ainhirn 1995 (2) SA p408.
- [21] In my analysis of the arguments by both counsel and the case law they both referred to this Court, I find the following remarks by Van Dyk J, in the matter of Bowman referred to by the defendant's counsel, apposite to the present matter where a trustee also unsuccessfully applied for summary

judgment :

"It was submitted on behalf of the plaintiff that this was not the type of situation in which this was a valid objection to the form of the affidavit filed on behalf of the plaintiff, the contention being that a Court should accept that the plaintiff, having been duly appointed as trustee of the insolvent, must of necessity have had insight in the books of account dealing, inter alia, with this transaction and that in the exercise of his duties he must personally have obtained the information sworn to in the affidavit referred to. As such, it was contended, he obtained the 'personal knowledge' testified to in the said affidavit.

In my view the position in this case is indeed covered by what was decided by MARAIS J in the Mowschenson case referred to above. The conclusion of the contract of sale, the cancellation of the bond, the payment of commission and all other matters referred to in the particulars of claim are all inseparably part and parcel of the plaintiff's cause of action. After the defendant has made the allegation that the plaintiff has had no part in any of those dealings, especially in view of the fact that the allegation is made that the transactions referred to in the plaintiff's particulars of claim relate to a period of time prior to his appointment and in respect whereof the plaintiff has had no dealings whatsoever; coupled with the further allegation that the plaintiff at no time interviewed the defendant in respect of the alleged transactions, the plaintiff must have obtained the information sworn to from someone else. [My own emphasis]

On the basis of the Mowschenson case I have to determine the matter on the assumption that the defendant's allegation in this regard is correct. On the reading of Mowschenson's case and that of Trekker Investments (Pty) Ltd it does not become necessary to investigate whether the defendant has disclosed a bona fide defence in the opposing affidavit because, when once a Court comes to the conclusion that there is a reasonable possibility that the plaintiff's case is defective, the application ought to be dismissed."

[22] In the case of Mowschenson and Mowschenson also referred to in the Bowman case, Marais J held that the remedy for summary judgment is an extraordinary remedy and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of a Court to the defendant. That can only be done if there is no doubt that the plaintiff has an unanswerable case. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.

[23] In this Mowschenson's case the defendant resisted the granting of summary judgment, inter alia, on the ground that the supporting affidavit was based on hearsay information and therefore inadmissible. Marais J, referred to the principle that a defendant is entitled to dispute the validity of the verifying affidavit and that if it is reasonably

possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant. The defendant in that matter stated that the deponent on behalf of the plaintiffs must be making hearsay statements. The Court held that the probabilities support that statement; but even without that support, the Court was of the opinion that where such a conflict as the present one arises, causing a doubt as to the validity of the application and therefore as to the jurisdiction of the Court,

summary judgment must be refused. [My own emphasis]

[24] I fully agree that in the circumstances of the present case, the defendants correctly attacked the validity of the verifying

affidavit. In my view and as correctly submitted by the defendants' counsel, the circumstances in this matter are on

point with that in the Bowman's case. If one looks at the defences raised by the defendants, it is clear that some further knowledge is required beyond an examination of the documentation which is relevant to the contractual relationship as alleged by the defendants, which if proved, could constitute an adequate defence to the claim. The following remarks by Erasmus in his "Commentary – The Superior Court Practice at page B1-216C – B1-216D" are in my view also apposite in this matter and support the conclusion that I arrived at;-

"What is one to make of these conflicting judgments which all followed from that of Maharaj? It appears to me that there are at least three important points that should be emphasized.

1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, ex facie the papers which have been filed, there is no jurisdiction for concluding that opposition can be granted as anything other than a delaying tactic.
2. As Corbett JA emphasized in Maharaj, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.
3. While a measure of commercial pragmatism needs to be taken into account, in that many of these summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point". [My own emphasis]

[25] Plaintiff alleged in paragraph 12.1 of the particulars of claim that the amount of R 185 523.05, in respect of repayment of rental by the landlord with regard to the lease of the premises from where the deceased carried on the business of the Sun City Pharmacy, on 7 March 2006, had not been paid into the deceased's estate bank accounts. More significantly, first defendant's answer to this allegation is that the total sum of R 902 772.11 was a payment in respect of a valid claim which he had against the deceased estate and which had to be paid, therefore according to him such payment could not have been prejudicial to the deceased estate.

[26] According to the first defendant his personal claim against the deceased estate relates to a loan made by him to his late son in the amount of R 3,3 million, together with interest at the rate of 15% per annum, in order to enable the deceased to purchase the Pharmacy. Furthermore, according to the first defendant, the deceased made numerous payments to the first defendant during his lifetime and, as at 30 January 2002, the outstanding balance amounted to R 1 815 785.00 as appears from the summary by the accountant, Mr Marais.

[27] In my view, taking into consideration this defence by the first defendant, it is doubtful as to whether the plaintiff has personal

knowledge of the loan alleged to have been concluded by the first defendant and the deceased long before he, plaintiff was appointed

and or whether the deceased estate was or not indebted to the first defendant in the said amount. It is significant in this regard to mention that the plaintiff has already conceded to the other claims where the defendant had raised a similar defence. The said claims are found in the fifth claim that were levelled against the second and third defendants to the effect that the money paid to them were monies sine cause as they were paid as an ostensible payment of a bequest from the deceased estates. The first defendant's defence to this was also to the effect that the moneys paid to them were remunerations in terms of an employment agreement signed in order to prevent

unnecessary financial losses and to procure the business entity of the Pharmacy for the estate. Ironically these claims were not persisted with by the plaintiff in the Summary Judgment application. This is so because it is clear that the plaintiff has no personal knowledge of these agreements and or arrangements including the financial decisions taken regarding the continuance of the Pharmacy's business in favour of the estate. The probabilities support the statement that at best the allegations by the plaintiff is based on hearsay evidence. There is therefore doubt as to the validity of the application by the plaintiff.

DEFENCES

- [28] The two amounts in respect of Claim 1 upon which the plaintiff seeks judgment relates to repayment of rent that was made by the landlord to the deceased and the proceeds of the sale of the deceased's Pharmacy.
- [29] There is no dispute that the first defendant has indeed opened a current account and a savings account in the name of the estate with a bank in the Republic as contemplated in Section 28(1) of the Act. However, the plaintiff alleges that, during the course of the administration of the deceased estate by the first defendant, the first defendant has failed to effect payment of monies received by him for the deceased estate into these accounts of the estate.
- [30] With regard to the claim of R185 523,05 being the repayment of rental by Sun City due to the Pharmacy the first respondent admits to have paid it to his personal account. He gave a reason that his legal representative whom he appointed to assist him in administering the estate advised him to do that in reduction of the balance of the loan. He stated further that he was at that time aware that the deceased estate was solvent and able to pay all of its creditors. According to him, and as advised, having regard to the reasonably high interest rates due on the amounts owing to both himself and the fourth defendant, and further, to the nominal rate of interest earned by the estate on cash in the bank, it was deemed appropriate to settle those obligations as soon as possible to prevent the accrual of further interest as it would clearly be in the interest of the estate and its beneficiaries.
- [31] The plaintiff's counsel response on these allegations is that Section 28 of the Act is peremptory and the first defendant could not have by-passed it. He could have compiled with it and then claim later as a creditor more so because Section 46 thereof provides for a penalty for non-compliance with the provision of Section 28.
- [32] Section 46 referred to by the plaintiff's counsel provides as follows:-

"Failure to pay over moneys"

Any executor who fails to pay over any money to the Master or to any other person or to deposit it in any banking account under section twenty-eight when required by or under this Act to do so, or who uses or knowingly permits any co-executor to use any property in the estate except for the benefit of the estate, shall pay into the estate an amount equal to double the amount which he has so failed to pay over or to deposit or to double the value of the property so used: Provided that the

Master may, on good cause shown, exempt any executor, in whole or in part, from any liability which he may have incurred under this section.” [My own emphasis]

[33] The underlined words qualifies the provision of this section in that it still has to be determined whether the failure to do so, was or was not in the benefit of the estate. Plaintiff’s counsel submitted on this point that the latter part underlined “except for the benefit of the estate”, does not relate to money but only to the property used. In my view, this is a narrow interpretation of the section.

Plaintiff’s counsel furthermore loses the fact that in all the claims including the ones the plaintiff did not persist with, the words “as a consequence of the breach of these fiduciary duties the estate of the deceased suffered some form of damages and loss” are embodied. These words speak volume and are all inseparable part and parcel of the cause upon which the action of the plaintiff is based. Plaintiff’s counsel seems to say that a mere contravention automatically offers the plaintiff a remedy in the circumstances of this matter. This is not so. No allegation was made in the plaintiff’s papers that the mere

contravention resulted in the moneys lost or that the first defendant misappropriated the moneys from the estate. What compounds the problem with these submissions further is that as already indicated plaintiff had not persisted with claim 3 against the defendant and the other claims against the second and third defendants because the defence and the principle claimed by the first defendant in those claims also are the same as in this one that, all the payments were done for the benefit of the estate as it did not suffer any loss.

[34] Although the cause of action is not framed in this way, if the trial Court upholds the first defendant’s defence, the plaintiff’s

complaint can only be that a creditor (ie the first defendant) had been paid before the finalisation of the account as contemplated by section 35 (12) of the Act. Support of this view is found in the case of Barclays Bank v Estate Scheepers 1936 OPD 67 wherein it was held that there is nothing to prevent an executor from discharging the estate liabilities before confirmation of the estate accounts, but he or she runs the risk that if it subsequently transpires that the liabilities discharged were not payable, the executor will be held personally liable under the Act to any third party who has sustained a loss by virtue of the wrongful payment.

[35] In as far as the second amount in claim 1 relating to the proceed of the sale of the Sun City Pharmacy is concerned the allegations are that a total amount of R2 266 669,00 had not been paid into the deceased estate and the estate suffered damages and loss. The first defendant admits that the proceeds of the sale of the pharmacy was paid into two accounts – the one being a Standard Bank account, account number: [.....] or the “pharmacy’s” current account. The first defendant furthermore avers that some of the payments were made into an account which is not an estate account as contemplated in Section 28(1) of the Act. The name of this account is CA Botha t/a Sun City Pharmacy. This account was a separate account not opened in the name of the estate as required by the provisions of Section 28(1)(a) of the Act.

[36] Similarly, it seems the plaintiff refuses to acknowledge these payments made into the Pharmacy's business account solely

because the account was not specifically opened in the name of the estate as required in terms of the provisions of Section 28(1)(a) of the Act. In my view, relying purely on the provisions of Section 28(1)(a) and ignoring the fact as already alluded above that the deceased estate suffered any or no damages whatsoever in this regard will still be highly technical.

[37] In addition, the submissions on behalf of the plaintiff also lose sight of the proper interpretation and purpose of the provisions of section 28(1)(a). In order to succeed, the plaintiff had to prove not only that such sum had been received by the first defendant, but also that it was received "for" the estate.

[38] According to the defence of the first defendant the moneys had been received 'for' the sale of the business (ie the Sun City Pharmacy) and had been duly paid into the bank account which had been utilised solely for the business operations of the Pharmacy. The first defendant further states that this account was opened in terms of the provisions of section 28(1)(a) of the Act and it is purely a technicality (ie the name of the account) which causes the plaintiff to pursue a highly technical claim.

[39] Similarly these arguments lose sight of the purpose of the Act which is adequately served by the provision providing for the penalisation of an executor who uses moneys belonging to the estate for purposes other than the benefit of the estate. The mere failure to deposit the moneys into the cheque or savings accounts opened in the name of the estate, but into a business account which had also been operated for the benefit of the estate, could, similarly to the remarks made in *Feldman v Migdin* 2006 (6) SA 12 (SCA), possibly be regarded as not having caused any loss to the estate. In this case it was held that to further impose a penalty equal to twice the amount of the said purchase price would, in the circumstances, be unduly harsh and could not have been the intention of the legislature. Section 46 is punitive in nature and, in the absence of indications to the contrary, a more lenient interpretation

should be favoured. See: paragraphs 21 and 22 of the Feldman

judgment.

[40] The circumstances upon which the last claim which the plaintiff persisted on in the Summary Judgment application, the submissions

made by both counsel and the legal authority aspects of this claim are exactly similar to that of the claim for moneys of the proceeds

of the sale of the Sun City Pharmacy. This claim relates to the turnover of the Sun City Pharmacy. I am of the view that nothing more need to be said about this claim except to reiterate what has been said already above. In this instance it must be mentioned that the plaintiff's defence is that the Pharmacy continued to operate for the benefit of the estate over some months until it could be sold as a profitable and viable business and whether that constitute moneys received for the

estate or not or for continuing the business operations until the beneficial sale of the business could be procured and or was beneficial to the estate equally remains a question still to be answered, and unfortunately, not by this Court in this current application.

[41] The conclusion that I reach is that the first defendant has a bona fide defence in all the claims that the plaintiff persisted on in that:-

- They are defences that are valid and good in law;
- It is best suited for the Trial Court to determine whether the first respondent had valid claims or not against the estate of the

deceased; and most importantly

- It is furthermore best suited for the Trial Court to determine the question whether the manner in which the first respondent conducted

the affairs of the estate caused harm or damages to the deceased estate.

In my view, leave to defend these claims which are the subject matter of this application should be granted as well.

D. ORDER

[42] Consequently the following order is issued:-

42.1 The application for Summary Judgment in respect of the remaining three claims the plaintiff persisted on is dismissed;

42.2 The first to the fourth defendants are granted leave to defend these claims inclusive of all the other claims the plaintiff conceded to that leave be granted in the Main action.

42.3 The costs shall be the costs in the Main action.

A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS:

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FOR THE DEFENDANT : Van Rooyen Tlhapi Wessels Inc.

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