THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 299/2020

In the matter between:

BRUCE GORDON McMILLAN **APPELLANT**

and

BATE CHUBB & DICKSON INCORPORATED **RESPONDENT**

Neutral citation: *McMillan v Bate Chubb & Dickson Incorporated* (Case no 299/2020) [2021] ZASCA 45 (15 April 2021)

Coram: ZONDI, MOCUMIE and SCHIPPERS JJA and GORVEN and EKSTEEN AJJA

Heard: 19 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 April 2021.

Summary: Prescription: firm of attorneys sued for breach of mandate arising out of drafting an antenuptial contract subsequently found invalid by court – whether prescription begins to run on date of judgment declaring the antenuptial contract invalid – prescription begins to run as soon as the creditor acquires knowledge of the facts necessary to institute action –whether costs of two counsel should be awarded.

ORDER

On appeal from: Eastern Cape Division of the High Court, East London (Makaula J) sitting as court of first instance:

The appeal is dismissed with costs.

JUDGMENT

Zondi JA (Mocumie and Schippers JJA and Gorven and Eksteen AJJA concurring):

[1] On 13 October 2017, the appellant, Mr McMillan, instituted action in the Eastern Cape Division of the High Court, East London against the respondent, a law firm, for damages for breach of an oral mandate. The summons was issued on 13 October 2017. The record does not indicate when it was served. The respondent delivered a special plea in terms of which it contended that the appellant's claim had prescribed. By agreement between the parties, the court a quo (Makaula J) made an order in terms of rule 33(4) of the Uniform Rules of Court (the separation order) that certain specified issues including those arising from the respondent's special plea, be separately adjudicated before all other issues.

[2] Makaula J, after hearing evidence on the separated issues, upheld the special plea. The learned judge considered it unnecessary to determine the further issues raised in the separation order in the light of his conclusion on the prescription point. He granted the appellant leave to appeal to this Court. The parties agreed that if we were to uphold the appeal in respect of the prescription issue, we should deal with other issues separated, rather than referring the matter back to the court below.

[3] I consider it convenient to deal first with the prescription point, because if the appeal in respect thereof is dismissed, it will become unnecessary to consider the further issues in the separation order. The issue is whether the court a quo was correct to hold that when the summons was issued on 13 October 2017, the appellant's claim

had become prescribed. Stated differently, the question is: when did prescription start to run in respect of the appellant's claim for damages against the respondent? In terms of s 11(*d*) of the Prescription Act 68 of 1969 (the Act), this claim is subject to a three-year extinctive prescription period. The respondent alleged that prescription started running on 9 or 12 May 2014, when its director had advised the appellant to consult a different attorney, as he had a potential claim against the respondent, and not on 18 October 2016, when the high court declared that the antenuptial contract was invalid, as contended by the appellant. The respondent claimed that the three-year prescription period ended on 12 May 2017. On that premise, by the time the summons was issued, his claim had already prescribed.

[4] The answer to this question depends on the interpretation of s 12(3) of the Act and its application to the facts of this case. The respondent bears the onus to prove that the appellant's claim had become prescribed by 13 October 2017.

[5] For the purposes of the adjudication of the prescription point, the following facts are common cause or not seriously disputed. During or about November 1998, and at East London, the appellant and the respondent entered into an oral agreement in terms of which the appellant gave the respondent an oral mandate to prepare an antenuptial contract for the purposes of regulating the financial affairs of the intended marriage between the appellant and one Rosemary Lois Jannaway (the appellant's former wife).

[6] The express and material terms of the oral mandate given to the respondent, according to the appellant, were that the respondent should prepare a written antenuptial contract which would exclude all community of property between the appellant and his former wife, and for the accrual system to apply to the marriage. The antenuptial contract should exclude from the accrual all the business assets owned by the appellant, comprising a farm together with livestock and implements, shares, and loan accounts, valued at R810 105.

[7] The respondent accepted the mandate as aforesaid, and prepared an antenuptial contract which they presented to the appellant and his former wife for signature on 1 December 1998. The appellant alleged that in breach of the oral

mandate, the respondent failed to prepare the antenuptial contract in accordance with their instructions.

[8] He averred that the respondent in fact drew up an antenuptial contract, dated 1 December 1998, which was declared to be void ab initio. The divorce action was heard by Plasket J. In it, the appellant's former wife contended that the antenuptial contract was void ab initio. Soon after this plea in the divorce was delivered, on 9 May 2014, the respondent firm orally advised the appellant that this point had been taken, that the appellant might have a claim against the respondent and that he should consult another attorney to take the matter further. This was followed by a communication in writing to that effect, dated 12 May 2014. This will be dealt with in more detail below. The new attorney represented the appellant in the divorce action which culminated in an order by Plasket J, declaring the antenuptial contract to be void ab initio. On this basis, it was held that the marriage was one in community of property and the estate was dealt with on that basis, which meant that all of the business assets fell into the joint estate. The respondent was thus obliged to pay his former wife 50 percent of his net estate which amounted to R4 885 073.

[9] As I have stated, the respondent pleaded that the appellant's claim had become prescribed. It asserted that the breach of mandate relied upon by the appellant occurred in 1998, which was more than three years prior to the issue of summons. In the alternative, the respondent alleged that, on or about 9 May 2014, the appellant was informed during the consultation with Mr Kretzmann, a director of the respondent, that there appeared to be a problem with the terms of the written contract and that he may have a claim against the respondent. This advice was subsequently confirmed by the respondent in a letter addressed to the appellant on 12 May 2014.

[10] The respondent accordingly argued that as at 9 May 2014, alternatively, 12 May 2014, the appellant was aware of all the material facts upon which the purported claim against it could be formulated, but he nevertheless failed to institute action within a period of three years from either of those dates. The respondent accordingly contended that the appellant's claim had prescribed in terms of s 12(1) Act.

[11] The respondent denied that it had breached their oral mandate or that it failed to prepare an antenuptial contract in accordance with the appellant's instructions. It contended that it had executed the mandate according to the standards of a reasonable attorney of average ability. It alleged that at the time of the drafting of the antenuptial agreement, it did not anticipate, nor could it have been anticipated by a reasonable attorney, that the antenuptial contract which it had drafted, could or would be declared null and void later.

[12] The appellant replicated to the respondent's special plea and denied that his claim had become prescribed. He asserted that he could not have acquired knowledge that a debt was due to him by the respondent at any time before final judgment had been delivered in the divorce action, which was finalised before Plasket J.

[13] The appellant further alleged that the respondent and its directors, at all material times, disputed that there was any valid claim against the respondent and the respondent's director, Mr Schultz, testified under oath that he had fully complied with the mandate given to the respondent, as pleaded in the particulars of claim. The appellant argued that, absent a concession that there had been a breach of the mandate, or that the respondent was liable to the appellant for the consequence of such a breach, the appellant could not have known that the antenuptial contract was invalid, until such time as the high court pronounced pertinently on the validity and enforceability of the antenuptial contract.

[14] The appellant testified on the issues that were separated by the court a quo. The purpose of his evidence was to show that, by reason of the provisions of s 12(3) of the Act, prescription only began to run once Plasket J delivered his judgment on 18 October 2016, which declared the antenuptial contract to be invalid and void ab initio.

[15] The appellant's evidence was to the following effect. During 1998, the appellant and his ex-wife intended to get married. At the time, the appellant was a production manager at the East London abattoirs. He had known the respondent firm for some time in his capacity as one of the directors of Elliot Brothers Auctioneers. It provided legal advice to them on business-related matters. During December 1998, the appellant and his other directors had a meeting with two of the attorneys of the

respondent firm. After the meeting, the appellant mentioned to them that he was about to get married and he needed to have an antenuptial contract prepared. He was introduced to Mr Nico Schultz (Mr Schultz), who was one of the directors of the respondent. The appellant had a brief discussion with Mr Schultz during which the appellant explained the nature of the legal advice he was seeking.

[16] A date was arranged for the second meeting with Mr Schultz. The appellant was asked to attend the second meeting with his former wife and to bring their identity documents and a list of assets and their values, which would also indicate assets which he wanted to be excluded from the accrual system. The appellant, in the presence of his former wife, prepared a list of assets with a total value of R810 105. The nett value of his former wife's estate at the time was R20 000.

[17] At the second meeting with Mr Schultz, the appellant and his former wife provided Mr Schultz with the documentation he had requested for purposes of preparing an antenuptial contract. The appellant and his former wife agreed that they intended to get married out of community of property, subject to the accrual system. They instructed Mr Schultz to prepare the antenuptial contract, reflecting their marriage as such. It was held by Plasket J that no further terms were agreed upon between the parties and that the first time they were confronted with clauses 4 and 5 of the antenuptial contract was when it was presented to them for signing.

[18] Some few days later, the appellant and his former wife attended at the respondent's office to sign the antenuptial contract. It was read to them by Mr Schultz in the presence of Mr Kay, a notary public, also employed by the respondent.

[19] The relevant provisions of the antenuptial contract read as follows:

'1. That there shall be no community of property between them.

2. That there shall be no community of profit or loss between them.

3. That the marriage shall be subject to the accrual system in terms of the provisions of Chapter 1 of the Matrimonial Property Act, 1984 (Act No 88 of 1984).

4. That for the purpose of proof of the net value of their respective estates at the commencement of the intended marriage the intended spouses declared the net value of their respective estates to be as follows:

4.1	that of the said **BRUCE GORDON McMILLAN** is R810 105,00 consisting of:-	
4.1.1	Farm 656 Monte Rosa	480 000,00
4.1.2	Elliot Brothers Loan Account	100 000,00
4.1.3	Elliot Brothers Shares	100,00
4.1.4	Tomlinson & Wootton Loan Account	30 000,00
4.1.5	Tomlinson & Wootton Shares	5,00
4.1.6	Livestock and Implements	160 000,00
4.1.7	Motor Vehicle	40 000,00
		R810 105,00

4.2 that of the said **ROSEMARY LOIS JANNAWAY** is R20 000,00 in respect of cash on hand.

5. That the assets of the parties or either of them, which are listed hereunder, or any other asset acquired by such party by virtue of his/her possession or former possession of such assets, shall not be taken into account as part of such party's estate at either the commencement or the dissolution of the marriage.

The assets of **BRUCE GORDON McMILLAN** so to be excluded are:-

(a) All business interests presently owned or to be acquired in the future.

The assets of **ROSEMARY LOIS JANNAWAY** so to be excluded are NIL.'

[20] The appellant was not aware that the antenuptial contract, which he and his former wife concluded, did not correctly reflect his intention to exclude from the accrual system his business assets, valued at R810 105. He became aware of that fact when his former wife instituted divorce proceedings against him, in which she, inter alia, sought an order declaring the antenuptial contract to be void and her marriage to be one in community of property. The issue concerning the validity and enforceability of the antenuptial contract was referred to Plasket J for determination on a separated basis. In the event, the learned judge concluded that clauses 4 and 5 of the antenuptial

contract are contradictory and irreconcilable. He found the antenuptial contract to be void on account of vagueness. In reaching his conclusion, Plasket J relied on the judgment of this Court in *B v B* [2014] ZASCA 14, in which an antenuptial contract with provisions similar to the one under consideration was held void for vagueness, because two of its clauses were so contradictory and incoherent.

[21] The circumstances in which the appellant was made aware that the antenuptial contract could be invalid were the following. On 7 March 2014, he attended a meeting at the respondent's offices with Ms Amanda Fredericks and Mr Kretzmann, both in the employment of the respondent firm, to explore how the divorce between him and his former wife could be settled.

[22] At this meeting, the possibility of rectifying the antenuptial contract was explored, because of a perceived conflict between clauses 4.1 and 5 thereof. The strategy used was to first attempt to settle the divorce, which the appellant did. When that failed, a decision was taken by the appellant, on the advice of Ms Fredericks that counsel would need to be instructed to draft pleadings, including a claim for rectification.

[23] On 14 April 2014, the appellant attended a consultation with Ms Fredericks and the appointed counsel for the purpose of providing instructions to counsel for a plea and counterclaim, including a claim for rectification of the antenuptial contract.

[24] On 9 May 2014, the appellant attended a further consultation at the respondent's offices with Ms Fredericks and Mr Kretzmann. There he was advised by Mr Kretzmann that there was a problem with the antenuptial contract drafted by the respondent, that the drafters may have made an error and that because of a conflict of interest between the respondent and the appellant, he should seek independent legal advice. The appellant left the offices of the respondent after the consultation on 9 May 2014 with his file and subsequently consulted with Mr Graham Bell of Cooper Conroy Bell & Richards Incorporated (Cooper Conroy).

[25] The discussion of 9 May 2014 was confirmed in a letter addressed to the appellant by Mr Kretzmann on 12 May 2014. In the letter the appellant was again

advised of the error in the antenuptial contract which may lead to a claim against the respondent, that as a result, the respondent was withdrawing as the appellant's attorney of record and that he should seek further legal advice.

[26] The respondent formally withdrew as the appellant's attorney of record in the divorce proceedings by way of notice of withdrawal, dated 9 May 2014, served upon the appellant's former wife's attorneys on 13 May 2014.

[27] Cooper Conroy filed a notice of appointment as attorneys of record on the appellant's behalf on 28 May 2014, which notice was dated 20 May 2014, and proceeded to act for the appellant throughout his divorce proceedings and still represents the appellant in the current proceedings.

[28] The appellant filed a plea and counterclaim, the latter dated 16 July 2014, during July 2014. The counterclaim included a claim for rectification which clearly recognised the error in the antenuptial contract and the need for such rectification by the appellant. As regards rectification and the contention that the appellant had to wait for this defence to be determined by Plasket J before all the facts could be known, it is significant that the appellant made a crucial concession noted in the judgment of Plasket J. This was that no agreement had been reached at all between him and his former wife on the terms of the agreement prior to signature of the antenuptial contract. A prior agreement, which was not reflected in the written contract due to a common mistake of the parties, is a prerequisite to a successful claim for rectification. Without any prior agreement as to the terms, a claim for rectification could not succeed.

[29] The appellant conceded that his own attorney, Mr Graham Bell, could have assessed the risk or potential of a claim against the respondent in May 2014, and that he was aware when he left the respondent's offices that he 'may' have a claim against them. This concession must be correct, because the judgment of this Court in *B v B*,[1] dealing with a matter on all fours with the present one, had been handed down in March 2014. Likewise, as mentioned above, the attorney would have been able to

[1] *B v B* [2014] ZASCA 14.

advise that, if no prior agreement had been reached as to the terms of the agreement, the claim for rectification could not succeed.

[30] The court a quo determined that the appellant's claim had become prescribed. It rejected the appellant's contention that the prescription started running in October 2016, which was based on the allegation that the appellant could not have acquired knowledge that a debt was due to him by the respondent at any time before the final judgment that was delivered by Plasket J. As para 64 of the court a quo's judgment is central to its finding, it must be quoted in full:

'But in May 2014, it became apparent that there was a problem with the ANC. Such problem necessitated the defendant's withdrawal from representing the plaintiff. In the words of the defendant a "potential claim" and conflict "of interest" was looming. The plaintiff was alarmed by the events to realise that his assets were at stake as a consequence of the divorce and the discovering of the reality that validity of the ANC was in question. It became apparent that there was a conflict between clauses 4.1 and [5] of the ANC hence there was an application for its rectification. As at that stage it became manifest that the plaintiff was to a large extent going to lose his assets as a consequence of the wrong manner in which the contract was drafted hence the application for rectification was pursued.'

[31] The court a quo concluded at para 67:

'Based on the facts, the plaintiff's cause of action was complete in May 2014 except for a pronouncement by Plasket J on the validity of the ANC. Furthermore, pursuing his cause of action, the plaintiff was not dependant on Plasket J's judgment. I do not agree with the submission by Mr Cole in this regard for the reasons discussed above. *It might have been "one piece of evidence which was lacking to prove" his case*.' (Emphasis added.)

[32] The comment made by the court a quo in the last sentence of para 67 of the judgment is rather unfortunate, as it tends to muddy its reasoning. In argument before us, it was heavily relied upon by the appellant's counsel as providing support for the contention that the appellant's cause of action could not have been complete before a finding was made by the high court, declaring the antenuptial contract invalid. But that reliance was misplaced.

[33] It is a settled principle that, when interpreting a court's judgment or order, the court's intention must be ascertained primarily from the language of the judgment or

order according to the usual well-known rules of interpretation. The judgment or order, and the court's reasons for giving it, must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact is admissible to contradict, vary, qualify, or supplement it.[2] The court a quo held that the appellant's claim had prescribed. It is in this context that the court a quo's statement in the last sentence of para 67 should be understood.

[34] The appellant challenged the findings of the court a quo on two main grounds. It was submitted by the appellant firstly, that the court a quo erred in holding that the appellant had a complete cause of action for professional negligence against the respondent on 12 May 2014 in circumstances where the antenuptial contract was only declared invalid by Plasket J in the divorce proceedings in October 2016. Before then, so ran the argument, nobody could have anticipated a problem. Both the appellant and his former wife had considered the antenuptial contract to be valid. It was accordingly submitted by the appellant that prescription could not have commenced running before the judgment of Plasket J in October 2016. The appellant, it was argued, could not have sued the respondent. Secondly, it was submitted by the appellant that, as the respondent's directors disputed that there was a claim against the respondent for professional negligence, he could not have known that the antenuptial contract was invalid. Thus, prescription only began to run once Plasket J delivered his judgment on 18 October 2016 regarding the validity of the antenuptial contract. Before then, he did not have the necessary facts upon which to formulate a claim against the respondent.

[35] I reject the appellant's contention that, prior to the declaration of invalidity of the antenuptial contract by Plasket J in October 2016, he could not have had knowledge of all the material facts he needed before he could institute legal proceedings against the respondent. In order to succeed in an action for damages against an attorney for professional negligence, a plaintiff is required to allege and prove: (a) a mandate given to and accepted by the attorney; (b) a breach of the mandate; (c) negligence in the sense that the attorney did not exercise the degree of skill, knowledge and diligence

[2] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-F; *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA) para 10.

expected of an average practising attorney; (d) that he had suffered damages; and (e) that damages were within the contemplation of the parties when the mandate was extended. In this case there can be little dispute about (a), (b), (c) and (e). As to (d), the appellant had been sued by his wife for half of his estate. He had approached the respondent to defend the claim when they advised him that there was a problem with the drafting of the antenuptial contract. It was manifest at that stage that he had suffered damages as a result of the error.

[36] Section 12 of the Act provides as follows:

'(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

. . .

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[37] As I have said, the appellant had acquired knowledge of all necessary facts on which to sue the respondent on 9 May 2014, when he attended a consultation at the respondent's offices. Thereafter the appellant was given his divorce file and went to see another attorney on the same day. The discussion that took place at the meeting of 9 May 2014, was confirmed in a letter addressed by Mr Kretzmann to the appellant on 12 May 2014. The letter reads:

'Dear Bruce,

McMILLAN DIVORCE

1. I refer to our meeting on Friday 9 May 2014.

2. The Antenuptial Contract seems to contain an error and mistake which may be attributable to the drafter thereof and notary public (Nico Schultz and Chris Kay) both of whom were in the employ of Bate Chubb & Dickson Inc. at the time. Without any admission of liability or negligence, we have informed you that this may lead to a claim against our firm for which you should seek independent advice. I confirm that in the circumstances we need to withdraw from representing you any further.

3. In accord, we have now filed a Notice of Withdrawal of Acting (attached). Your new attorneys should file a Notice of Acting as soon as possible.

4. We wish you well.'

[38] The period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action.[3] As this Court recently held in *Fluxmans Incorporated v Levenson*:[4]

'Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This Court stated in *Gore NO* para 17 that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case "comfortably". The "fact" on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. *Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity) (Claasen v Bester [2011] ZASCA 197; 2012 (2) SA 404 (SCA)*.' (Emphasis added.) (Footnote omitted.)

[39] Section 12 requires knowledge only of the material facts from which the prescriptive period begins to run ─ it does not require knowledge of the legal

[3] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) para 17.
[4] *Fluxmans Incorporated v Levenson* [2016] ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA) para 42.

consequences.[5] Accordingly, the appellant's cause of action was complete as soon as he was informed on 9 May 2014 of the potential conflict of interest arising from the fact the respondent's directors may have drafted the antenuptial contract incorrectly. There is no reason in logic or in law, why he could not successfully have joined the respondent as a third party in the divorce proceedings at that stage, claiming payment from it of any sum which he may be ordered to pay to his former wife as a result of the respondent's negligence.

[40] The appellant's second contention that, due to the respondent's directors' failure to concede liability, he could not have had salient facts upon which to formulate a claim against the respondent until such time as the high court pronounced pertinently on the validity of the antenuptial contract in October 2016, is also rejected. The Constitutional Court in *Links*[6] held that it is not necessary for a party relying on prescription to accept liability.

[41] In conclusion, the appeal must be dismissed. The court a quo correctly found that the appellant's claim, which he instituted on 13 October 2017, had become prescribed. He acquired knowledge of all the material facts on which to institute his claim against the respondent on 9 or 12 May 2014. Consequently, prescription began to run on 9 or 12 May 2014 when the appellant was informed that there was a problem with the antenuptial contract, arising from the perceived conflict between the provisions of clause 4 and clause 5. That is the date when he acquired knowledge of all material facts on which to institute a claim for damages against the respondent. Prescription did not commence to run on 18 October 2016 when Plasket J delivered his judgment on the invalidity of the antenuptial contract. It may be that the appellant had not appreciated the legal consequences flowing from the facts, but his failure to do so did not delay the date prescription commenced to run. Similarly, the respondent's failure to concede liability did not delay the date prescription began to run. In light of the conclusion I have reached on the prescription point, which is

[5] *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* [2009] ZASCA 25; 2009 (3) SA 577 (SCA); [2009] 3 All SA 475 (SCA) para 37.
[6] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) para 42.

dispositive of the appeal, it is unnecessary to consider the further issues raised in the separation order.

[42] As regards the issue of costs, the respondent sought costs of two counsel to be awarded. In my view, the matter did not deserve the services of two counsel. The issue for determination was a narrow one, which, despite its importance, was not complex. In the circumstances, costs of only one counsel will be awarded.

[43] In the result, the appeal is dismissed with costs.

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Zondi JA
Judge of Appeal

Appearances:

For appellant:	S H Cole
Instructed by:	Cooper Conroy Bell & Richards Inc, East London
	Webbers Attorneys, Bloemfontein
For respondent:	E A S Ford SC (with him J J Nepgen)
Instructed by:	Joubert, Galpin & Searle Inc, Port Elizabeth
	c/o Bate Chubb & Dickson Inc, East London
	Honey Attorneys, Bloemfontein