REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 31871/2008

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

DATE: ____________ ______________________
SIGNATURE

In the matter between -

JULIA BASETSANA KUMALO PLAINTIFF

and

CYCLE LAB (PTY) LTD DEFENDANT

JUDGMENT

BORUCHOWITZ, J:

[1] At issue is whether, in the circumstances of this case, the publication by the defendant of the plaintiff's photograph constitutes an *iniuria*.[1]

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[1] A generally accepted definition of an *iniuria* is the wrongful and intentional infringement of an interest of personality. See *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154C

[2] The plaintiff is a celebrity and public figure who has built a successful career as a model, television presenter, magazine editor and businesswoman. The defendant operates a shop at Fourways, Johannesburg, under the name "Cycle Lab" where it carries on business as a retailer of bicycles and cycling products.

[3] The material facts are few and relatively uncontentious. During February 2007 the plaintiff attended at the defendant's store with the intention of purchasing a bicycle and related cycling paraphernalia. Upon entering the store she was assisted by a sales representative who helped her choose a bicycle and then some clothing. While trying on cycling helmets, a man approached the plaintiff and took her photograph. She continued shopping and purchased accoutrements such as sun-glasses, a heart monitor and a drinking reservoir and then left the defendant's store.

[4] It is common cause that the defendant incorporated the plaintiff's photograph in an advertisement for its store, which was published in a magazine entitled "abouTime" and in a brochure called "Cycling News".

[5] The plaintiff avers that she did not agree to the taking of the photograph or to its further use for advertising purposes. Her unchallenged evidence is that upon learning of the unauthorised publication she was greatly angered and embarrassed; her anger stemmed from the fact that the defendant had sought to exploit her image for commercial purposes without

her knowledge and consent, and had published a low-quality photograph of her in a poorly designed advertisement for its shop. She felt that she had been abused and her privacy invaded. The plaintiff was embarrassed as she feared that her friends, professional colleagues and peers would assume that she had consented to the publication of the photograph, thereby lowering her professional standards and standing.

[6] Mr Andrew McLean, a director of the defendant, described the circumstances surrounding the taking of the photograph. He explained that the defendant had launched a new section of its business which was to specialise in the sale of lady-specific cycling products. He wanted to advertise the newly-branded area and planned to have a photograph of a woman in the advertisement. As the defendant did not have the financial wherewithal to pay for a professional model, he decided to use his wife. By chance, the plaintiff entered the shop. He immediately recognised her and knew that she was a celebrity with a nationwide face, and decided that he would use the plaintiff as a model instead of his wife. What was particularly appealing to McLean was the fact that the plaintiff was black and this presented the defendant with an opportunity to promote cycling among black women. He instructed a Mr De Villiers, who was present, to take a photograph of the plaintiff.

[7] Mr McLean also testified that there was no plan on his or the defendant's part to utilise the plaintiff's image illegally or to capitalise on her name, and for that reason he did not use the plaintiff's name in the

advertisement. He further denies that it was the defendant's intention to insult or degrade the plaintiff or in any way to injure and damage her reputation and dignity.

[8] There is a factual dispute as to whether the plaintiff gave her consent to the taking of the photograph. Mr De Villiers testified that such consent was indeed granted but he cannot recall whether the plaintiff signified her assent expressly or tacitly, by nodding her head. Both McLean and De Villiers concede that they did not seek or obtain the plaintiff's express permission to utilise her photograph for advertising purposes. The plaintiff's evidence is that although De Villiers asked for permission he took her photograph before she was able to reply to his request; she also offered no objection after the taking of the photograph or ask what the photograph was to be used for as she did not wish to create any unpleasantness.

[9] The plaintiff claims damages for *iniuria* on four separate grounds. The first claim is for sentimental damages based on the *actio iniuriarum* (Claim 1). The second is a claim for constitutional damages arising from a violation of the plaintiff's rights to dignity and privacy as enshrined in ss 10 and 14 of the Constitution (Claim 2). This claim is brought in the alternative to Claim 1 and is relied on only in the event of the Court finding that the plaintiff is not entitled to a remedy under the existing common law. The third is a claim for patrimonial or special damages which the plaintiff is alleged to have sustained as a result of the defendant's unauthorised publication of her image (Claim 3).

The fourth claim, which has been abandoned, is founded on unjustified enrichment.

[10] In its plea, the defendant admits that a photograph of the plaintiff was taken and that it caused the photograph to be incorporated in a cycling advertisement which appeared in "*The Cycling News*" and the in-flight magazine "*About Time (1 Time)*". The defendant alleges that the photograph was taken with the plaintiff's knowledge and consent and that she impliedly consented to the photograph being published in the aforementioned publications. The defendant avers that the purpose and motive behind the publication of the photograph was not to insult or degrade the plaintiff but to portray her in a healthy and positive way and to promote her as a good role model. The defendant denies that in publishing the photograph it intended to humiliate and degrade the plaintiff or to injure and damage her reputation and dignity. Accordingly the defendant denies liability.

[11] It was agreed at the outset of the trial that the merits of the plaintiff's claim be separated from the quantification thereof and that the only issue to be decided was whether the plaintiff had suffered an infringement (*iniuria*) to her personality rights as a result of the publication of her photograph.

CLAIM 1

[12] The cause of action relied on is the *actio iniuriarum* which protects a person's *dignitas*. The concept of *dignitas* is a collective term embracing all

personality rights and interests with the exception of the right to a good name (*fama*) and bodily integrity (*corpus*), and embraces privacy, dignity and presumably the right to identity (see *Jackson v SA National Institute for Crime Prevention and Rehabilitation of Offenders*).[2]

[13] The essential requisites to establish an action for *iniuria* have been authoritatively laid down by Melius De Villiers in the "*Roman and Roman-Dutch Law of Injuries*" (1899 at 27). They are (1) an intention on the part of the offender to product the effect of his act (*dolus*, *animus iniuriandi*); (2) an overt act which the person doing it is not legally competent to do and which, at the same time, is (3) an aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other. These time-worn principles were approved in *Delange v Costa*.[3]

[14] The plaintiff contends for the wrongful infringement of three inter-related, but distinct, personality interests, namely identity, privacy and dignity.

[15] Identity is defined as a person's uniqueness which individualises such person, and is manifested in various facets of personality (or *indicia*) which include, among other things, one's physical appearance or image and is considered a separate right of personality.[4]

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2 1976 (3) SA 1 (A) at 11F-G.

3 1989 (2) SA 857 (A) at 860I-861B

4 Neethling's "*The Law of Personality*" (2 ed) (2005) 36.

[16] Features of a person's identity have been held to be deserving of legal protection (see *O'Keeffe v Argus Printing & Publishing Co Limited and Another*;[5] *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*; [6] *Bernstein v Bester*[7]; *National Coalition for Gay and Lesbian Equality v Minister of Justice*[8]; *Grütter v Lombard and Another*.[9]

[17] Identity is infringed by the falsification of a person's true image or identity. A recognised form of falsification occurs where a person's image is used or appropriated without his or her permission for advertising purposes, creating the false impression that such person has consented to such conduct or supports the advertised product, service or business.[10]

[18] But an infringement of identity may also, although not necessarily, be accompanied by an infringement of privacy. The concepts of privacy and identity are closely related (see *Bernstein* (*supra*)). A breach of privacy occurs when there is a disclosure of true facts to outsiders contrary to the determination and will of the person concerned. A right to privacy encompasses the competence to determine the destiny of private facts, and

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5 1954 (3) SA 244 (C).

6 1977 (4) SA 376 (T) at 386G.

7 1996 (2) SA 751 (CC) para 65

8 1998 (6) BCLR 726 (CC) para 28.

9 2007 (4) SA 89 (SCA).

10 PPJ Coetser: "*Die Reg op Identiteit* (1986) 146; Neethling's "*The Law of Personality*" (2 ed) pp 255-257; see also Neethling: "*The Concept of Privacy in South African Law* 122 (2005) *SALJ* 18 at 24.

the individual concerned is entitled to dictate the ambit and method of disclosure of such facts (*National Media Limited and Another v Jooste*).[11]

[19] Academic writers are divided as to whether it is the right to privacy or identity that is primarily violated when a person's image is used without permission for advertising purposes. Professor McQuoid-Mason contends that such use is a violation of a person's right to decide for themselves who should have access to their image and likeness – something that goes to the root of individual autonomy or privacy.[12] Professor Neethling holds, to the contrary, that it is primarily the right to identity that is infringed in such circumstances.[13] For present purposes it is unnecessary to resolve these differences

[20] Whether a particular act constitutes an *iniuria* must necessarily be determined by the facts and circumstances of each case and considerations of legal policy, the convictions of the community or *boni mores*. The wrongfulness of an infringement must be objectively tested against the prevailing norms of society.

[21] In *O'Keeffe,* a case which is not dissimilar to the present, a photograph was unauthorisedly used for advertising purposes was held to constitute an actionable *iniuria*. Watermeyer AJ stated as follows (at 249D-E):

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11 1996 (3) SA 262 (A) at 271C-H).

12 D McQuoid-Mason, "*Invasion of Privacy: Common Law v Constitutional Delict – Does it make a difference?*" 2000 *Acta Juridica* 227 at 231.

13 Neethling: "*The Concept of Privacy in South African Law*" *op cit* 24.

> "… The unauthorised publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's *dignitas*. It is not necessary for me in the present case to hold, and I do not hold, that this is always so. Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like. ... "

[22] In the present matter, the plaintiff's image has been used in a misleading way. It generates the false impression that she endorses the lady-specific cycling products sold by the defendant and the defendant's campaign to promote cycling among women. Use of her image in this manner constitutes a violation of her right to identity. The appropriation and misuse of the plaintiff's image is wrongful and would be considered by persons of ordinary and reasonable sensibilities to constitute an *iniuria* which is deserving of legal protection.

[23] The use of the plaintiff's photograph in an advertisement without her permission not only constitutes an infringement of the personality right to identity but also, as previously indicated, a violation of the plaintiff's privacy, since a personal fact, namely her image, was publicly exposed contrary to her determination and will.[14]

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[14] See McQuoid-Mason *supra* n. 12, and Neethling *supra* n. 13.

[24] In a broad sense, the plaintiff's right to *dignitas*[15] has also been infringed. She claims, among other things, that she felt abused and insulted and that her self-esteem was impaired as a result of the defendant's conduct. I am satisfied that a reasonable person in the position of the plaintiff would justifiably have felt a sense of anger and insult, as the plaintiff claims she did, and would have regarded the conduct of the defendant's conduct in publishing her photograph as offensive (tested by the general criterion of unlawfulness – objective reasonableness).[16]

[25] I turn now to the various contentions advanced on behalf of the defendant.

[26] The defence of consent can readily be disposed of. Consent is a ground of justification that negates the wrongfulness of the defendant's conduct. During cross-examination Mr McLean admitted that neither he nor Mr De Villiers sought or obtained the consent of the plaintiff to use her photograph for advertising purposes. He stated, however, that if the plaintiff had for any reason objected thereto he would not have made use of the photograph.

[27] By not objecting after the photograph had been taken, the plaintiff may have implicitly agreed to the taking of her photograph, but such agreement did

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[15] Dignity, under s 10 of the Constitution, encompasses something broader than the Roman law concept of *dignitas*. See *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W) at paras [11] and [14]; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at 418; "*Neethling's Law of Personality*" *op cit* 27-28 and 192-194.

[16] J Burchell "*Personality Rights and Freedom of Expression: The Modern Actio Iniuriarum*" (1998) 328-334; Neethling's "*Law of Personality*" at 192.

not extend to the use of the photograph for advertising purposes. The defence of consent can only succeed if the defendant's actions fall within the limits of the consent given (see *National Media Limited v Jooste* (*supra*) at 272E). Thus, for example, in *O'Keeffe* (*supra*), where the plaintiff had consented to her photograph being used to illustrate a news item but not as an advertisement for a certain make of rifle, the publication of the photograph was considered not to fall within the ambit of the consent. In similar vein – although in a different context - see *Kidson v SA Associated Newspapers Limited*.[17] There, the plaintiffs had consented to their photographs appearing in a nursing journal to assist in a campaign for the recruitment of nurses, but not for purposes of an appeal for funds. The publication of the photographs was held not to be consensual.

[28] The overwhelmingly probabilities are that McLean did not seek the plaintiff's consent to utilise the photograph for advertising purposes as he knew that it was extremely unlikely that she would agree thereto. McLean's assertion that if the plaintiff had for any reason objected he would not have made use of the photograph is disingenuous as he admits that the plaintiff was never told that the photograph was to be used in an advertisement for the defendant's business. For these reasons the defence of consent cannot be upheld.

[29] It was further argued that as a public figure the plaintiff had surrendered her right of privacy to the extent that she was not entitled to a reasonable expectation of privacy while shopping for private purposes. The

[17] 1957 (3) SA 461 (W).

submission is based on the proposition that a public figure is considered to a certain extent to have forfeited his or her right to privacy.[18]

[30] While the plaintiff's status as a celebrity may require her to accept that when appearing in public she may attract more attention than others who are not celebrities, she retains the right to be protected against an infringement of her right to privacy and identity by the non-consensual publication for advertising purposes of a photograph taken when she was about a private shopping trip. It is universally accepted that public figures or celebrities have a legitimate expectation of protection and respect for their private lives.[19] The determining factor is usually whether such intrusion is in the public interest or for the public benefit. Professor McQuoid-Mason points out, however, that the defence that the plaintiff is a public figure cannot avail a defendant in cases where the plaintiff has been placed in a false light or his or her image has been wrongfully appropriated for advertising purposes.[20] I concur in this view. The appropriation by the defendant of the plaintiff's image by using her photograph in an advertisement cannot be justified on the basis that she is a public figure or celebrity.

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18 See WL Prosser, "*Law of Torts*" (4 ed) 1971 at 823.

19 See *A v B plc* [2003] QB 195 (per Lord Woolf CJ); *Van Hanover v Germany*, European Court of Human Rights (Third Section) 24 June 2004; *MGN Limited v The United Kingdom*, European Court of Human Rights (Fourth Section) 18 January 2011.

20 See D McQuoid-Mason, "*Law of Privacy in South Africa*" *op cit* 220; see, also, Prosser *op cit* 827.

[31] Another proposition contended for by the defendant is that the image of the plaintiff, as it appears in the advertisement, cannot be said to be objectively degrading, humiliating or insulting to her as it does not reflect the plaintiff in a false light or misrepresent the true state of affairs. The plaintiff is pictured as a shopper in the defendant's store trying on a helmet with the assistance of a store assistant, and this is a true representation of what she was doing at the relevant time. The plaintiff is also not named in the advertisement and her identity is not easily recognisable. These contentions cannot avail the defendant. As I have already indicated, the use of the plaintiff's image in the context of the advertisement is a falsification of her image in that the impression is falsely generated that she endorses the lady-specific products sold by the defendant and its campaign to promote cycling among women. That the defendant did not use the plaintiff's name in the advertisement is legally irrelevant: what matters is that the plaintiff's image has been used unauthorisedly and in a misleading way. It is also not necessary for the attachment of liability that the photograph depict the plaintiff in an objectively degrading, humiliating or insulting manner.

[32] A further novel argument advanced on behalf of the defendant is that because the plaintiff has chosen to exploit the intellectual property that attaches to her name, image and persona through a company, Maleshwane Trading (Pty) Limited, she had thereby deprived herself of the fundamental personality right to control the use to which her image and other elements of identity may be put and/or the right to sue for infringement. This contention is equally without merit. Whilst it is true that the plaintiff uses a company to

promote her image and persona, she has not thereby abandoned the right to choose who is to have access to her image. Personality rights are inseparably bound up with one's personality. They do not exist independently of the human personality and are incapable of being transferred. There is a fundamental distinction between personality rights and intellectual or immaterial property rights which are capable of being transferred and have a separate legal existence (see in this regard W.A. Joubert "*Grondslae van die Persoonlikheidsreg*").[21]

[33] Finally, I turn to the question of *animus iniuriandi* (intent). It is well settled that what this encompasses is not only the intention to achieve a particular result, but also the consciousness that such a result would be wrongful (see *Minister of Justice v Hofmeyr;*[22] *Dantex Investment Holdings (Pty) Limited v Brenner and Others NNO*).[23]

[34] Counsel for the defendant submitted that the defendant's representatives had no appreciation of the fact that they may have infringed the plaintiff's rights. McLean testified that he did not think it was wrong to use the plaintiff's photograph as he had previously used images of Lance Armstrong, the international cyclist, without repercussion, and did not think that the plaintiff would object to having her photograph published in the defendant's advertisement or that he required her consent. He also did not believe that the photograph lowered the plaintiff's standards but depicted her

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21 at 120-121 and 129.

22 (*supra*) at 154C-F.

23 1989 (1) SA 390 (A) at 396E.

as "a normal healthy South African out shopping", and did not use the plaintiff's name in the advert.

[35] None of these contentions has any merit. McLean and De Villiers deliberately chose not to inform the plaintiff that her photograph was to be used for advertising purposes. Upon seeing the plaintiff enter the defendant's store, they consciously and deliberately seized upon the opportunity of photographing her without disclosure as to the true purpose for which her photograph was to be used. The fact that McLean thought the plaintiff would not be embarrassed by the photograph in the advertisement and that the photograph would not lower the plaintiff's standards and depict her as a 'normal healthy South African' is irrelevant. What is of significance is that the defendant, through its controlling mind, McLean, deliberately appropriated the plaintiff's image and likeness without her consent and utilised same for its commercial advantage. In so doing, the defendant must, as a probability, have been conscious that what it was doing was wrongful.

[36] McLean's explanation as to why he selected the plaintiff is unconvincing and improbable. He suggested that any woman would have sufficed as a model to promote the new ladies' section of the defendant's store. But this is highly improbable. It is clear that he targeted the plaintiff purely because she was a well-known female celebrity.

[37] The probabilities are that the defendant intended to publish the photograph in an advertisement without the plaintiff's consent, well aware that

the consequence of such act was likely to infringe the plaintiff's image rights, privacy and/or her dignity. Alternatively, in achieving its object, the defendant, through its controlling mind, Mr McLean, foresaw the real possibility of the plaintiff's rights of personality being infringed, but proceeded recklessly despite that foresight. The defendant thus acted with either *dolus directus* or *indirectus*.[24]

[38] Having wrongfully infringed the plaintiff's personality interests the defendant is presumed to have acted *animo iniuriandi*. The defendant has failed to rebut this presumption.

[39] The plaintiff has satisfied the requisites necessary to establish an action for *iniuria*.[25] By reason of the unauthorised publication of the plaintiff's photograph, the plaintiff has suffered an infringement of her personality rights entitling her to the payment of sentimental damages.

CLAIM 2

[40] Constitutional damages are claimed arising from an alleged violation of the plaintiff's rights to dignity and privacy as enshrined in ss 10 and 14 of the Constitution. This claim is proffered in the alternative to Claim 1. The finding

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[24] Compare: *NM & Others v Smith & Others (Freedom of Expression Institute as Amicus Curiae*) 2007 (5) SA 250 (CC) at para [125].

[25] See para 13 *supra*.

in relation to Claim 1 renders it unnecessary to adjudicate upon this claim. It bears mention, however, that the Constitutional Court, in *Fose v Minister of Safety & Security*,[26] set its face against a direct application of the Constitution where there exists an adequate common-law remedy. The purpose of constitutional damages is to vindicate an infringement of a constitutional right and to prevent a further breach thereof. It was held in *Fose* that the remedy granted under the *actio iniuriarum* is appropriate for the preservation of personality rights (see, also, *Dendy v The University of the Witwatersrand & Others*).[27]

CLAIM 3

[41] This is a claim for patrimonial or special damages. The plaintiff alleges that her name and likeness are of proprietary value to her and that in consequence of the defendant's wrongful and unlawful conduct she has sustained special damages in the amount of R250 000, being the diminution of the value of her likeness to her patrimony occasioned by the unauthorised publication of her likeness in association with the defendant's products. Compensatory damages may be claimed in respect of patrimonial loss caused by an *iniuria*; what is controversial, however, is whether the appropriate action for the recovery of such damages is the *actio iniuriarum* or *actio legis Aquiliae* (see Neethling *op cit* 65-68). It is not necessary to resolve this question as no evidence has been presented by the plaintiff to prove that

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[26] 1997 (3) SA 786 (CC) at para [98].

[27] 2005 (5) SA 357 (W).

any diminution in the commercial value of her image or her patrimony was caused as a result of the publication of her photograph. The plaintiff does not contend that she suffered any financial loss or that any of the companies with whom she had contracted to act as a brand ambassador have sought to terminate their commercial relationships with her. The plaintiff has not established any causal connection between the *iniuria* perpetrated by the defendant and any alleged patrimonial loss.

[42] It is important to note that the claim for patrimonial loss rests upon the infringement of her personality right to identity and not upon any immaterial property right that the plaintiff holds. As mentioned above, the plaintiff promotes her image, persona and brand through a company. She has also caused the names "Bassie", "Basetsana" and "Basetsana Kumalo" to be registered under the Trademarks Act, 194 of 1993. The immaterial or intellectual property rights held by the plaintiff exist independently of the plaintiff's personality rights and are capable of separate enforcement. The plaintiff has not sought to enforce these rights. The appropriation by the defendant of the plaintiff's image may constitute the delictual wrong of passing off but the plaintiff does not assert such claim.[28] In foreign jurisdictions, the remedy of passing off is often utilised for the protection of advertising images.[29] Neither was the plaintiff's case pleaded or argued on the basis that the Court should recognise a free-standing or independent patrimonial

[28] See, in this regard, *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Limited; Lorimar Productions Inc and Others v OK Hyperama Limited and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152G.

[29] See *Irvine v Talksport Limited* [2002] 2 All ER 414; *Henderson v Radio Corporation (Pty) Ltd* 1969 RPC 218.

immaterial property right to identity along the lines contended for by certain academic writers.[30]

[43] For these reasons, the question in issue is decided in favour of the plaintiff. I find that the unauthorised publication by the defendant of the plaintiff's photograph for advertising purposes constitutes an *iniuria* entitling the plaintiff to the payment of sentimental damages. She thus succeeds on Claim 1. By agreement between the parties, the quantification of such damages stands over for later determination.

[44] The plaintiff, as the successful party, is entitled to the costs of the action.

[45] It is ordered as follows:

(1) The quantification of the plaintiff's damages is postponed *sine die.*

(2) The defendant is to pay the costs of the action to date.

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[30] See F Mostert: "*The Right to the Advertising Image*" (1982) 99 *SALJ* 413; Coetser *op cit* 146-147; André M Louw: "*Suggestions for the Protection of Star Athletes and Other Famous Persons Against Unauthorised Celebrity Merchandising in South African Law*"; "*SA Mercantile Law Journal*" 2007 (Vol 19) 272 at 291; J Neethling: "*The Concept of Privacy in South African Law*" *op cit* 27.

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BORUCHOWITZ J

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	17TH JUNE 2011
ON BEHALF OF PLAINTIFF	:	ADV L FRIEDMAN
INSTRUCTED BY	:	CHUENE INCORPORATED
ON BEHALF OF DEFENDANT	:	ADV M G REBELO
INSTRUCTED BY	:	FRANK BICCARI ATTORNEYS