THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1212/2016

In the matter between:

CRADLE CITY (PTY) LTD **APPELLANT**

and

LINDLEY FARM 528 (PTY) LTD **RESPONDENT**

Neutral citation: *Cradle City v Lindley Farm* (1212/2016) [2017] ZASCA 185 (06 December 2017)

Coram: Navsa ADP and Tshiqi and Petse JJA and Tsoka and Mbatha AJJA

Heard: 06 November 2017

Delivered: 06 December 2017

Summary: Interpretation – Sale Agreement – Indemnity and Undertaking – respondent to provide vacant occupation – reciprocity principle applicable – the obligations interlinked – remedy – judgment suspended until vacant occupation is given – counterclaim – absolution from the instance.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Strijdom AJ sitting as a court of first instance):

1. The appeal is upheld to the limited extent reflected in the substituted order that follows:

   '(a) The defendant is ordered to pay in respect of claim 3 an amount of R3 767 158 less an amount of R1 159 095, together with interest thereon at 15.5% per annum a *tempora morae*

   (b) Judgment against the appellant in respect of claims 1 and 2, together with an amount of R1 159 095, is suspended until such period as the unlawful occupiers are evicted from the property'
2. The appeal in respect of the counterclaim is upheld.

2.1 The order of the court below is substituted as follows:

   '(a) Absolution from the instance is granted.'
3. In respect of costs pertaining to both the claim and the counterclaim, each party is ordered to pay its own costs.

JUDGMENT

Tshiqi JA (Navsa ADP and Petse JA and Tsoka and Mbatha AJJA concurring):

[1] The issues that arise in this appeal concern a written sale agreement concluded on 23 March 2009 between the respondent (the plaintiff in the high court) Lindley Farm 528 (Pty) Ltd, and the appellant (the defendant in the high court) Cradle City (Pty) Ltd, and encompasses a subsequent Indemnity and Undertaking, signed by

the parties on 7 May 2009. In terms of the sale agreement Lindley Farm sold the immovable property, described as Remaining Extent of Portion 13 of the farm Lindley 528, measuring 90,2408 hectares and held under deed of transfer T3914/1990 (the property) to Cradle City for an amount of R112 million, excluding VAT.

[2] The relevant clauses of the sale agreement are the following:

'2. Purchase price

The purchase price of the Property is an amount of R112 000 000, 00 (One Hundred and Twelve Million Rand) excluding VAT,

2.1 It is recorded that, at date hereof, the Purchaser has paid a non-refundable amount of R19 000 000, 00 (Nineteen Million Rand) excluding VAT, as a deposit to the Seller in respect of the purchase price, an amount of R3 000 000, 00 (Three Million Rand) as a non-refundable penalty agreed by the parties and agreed interest of R2 325 000, 00.

2.2 The balance of the purchase price, in an amount of R93 000 000, 00 (Ninety Three Million Rand) excluding VAT is payable as follows:

2.2.1 R43 000 000, 00 on registration of transfer of the property into the name of the Purchaser:

The Purchaser shall deliver an irrevocable guarantee, acceptable to the Seller's conveyancer, for an amount of R51 680 000, 00 (Fifty one million six hundred and eighty thousand Rand) (being R43 000 000, 00 plus R8 680 000, 00 VAT) to the conveyancer before or on 27/03/2009.

The parties shall procure that transfer of the property be effected into the name of the Purchaser as soon as possible after signing hereof by both parties. All outstanding documents to give effect to the aforegoing shall be submitted to the conveyancer before or on 27/03/2009.

2.2.2 R50 000 000, 00 (Fifty Million Rand), plus VAT thereon, plus arrear interest in an amount of R7 267 175, 00 (as at 31/03/2009) plus further interest as set out in 2.2.3 is payable not later than 30 (thirty) months after registration of transfer of the property into the name of the Purchaser.

Should, at expiry of the aforementioned 30 months, special economic/financial conditions exist and not sufficient sales in the proposed township having been realised to satisfy the Nedbank bond and to pay the balance [of the] purchase price the Purchaser may request the Seller, not later than 60 days before expiry of the said 30 months, for an extension of a further 6 months for payment of the balance purchase price.

In the event of the aforegoing extension be[ing] requested the provisions of 2.2.5 below will come into operation.

2.2.3 The balance [of the purchase] price and arrear interest – from time to time – shall attract interest at prime calculated monthly in arrear[s], compound, and payable together with the amount as set out in 2.2.2 above.
2.2.4 All monies received shall, firstly, be applied towards interest due and thereafter towards [the] balance purchase price.
It is agreed that the initial Nedbank loan amount will not exceed R170 000 000, 00.
It is recorded that, after payment of the Nedbank loan all payments received in respect of sales, net of commission, VAT and cost of sales even before the date referred to an 2.2.2 above, shall be paid to the Seller.
2.2.5 Should payment as contemplated in 2.2.2 above – i.e. after 30 (thirty) months – not be made on due date:
2.2.5.1 A penalty of 20% of the amount then outstanding, shall become due and payable by the Purchaser to the Seller.
2.2.5.2 The Seller shall have a right to register a second bond on the Cradle City properties in favour of the Seller as additional security, the costs of such registration to be for the account of the Purchaser.
….

4. Possession and risk
Possession shall be given by the Seller to the Purchaser on the date of transfer, together with vacant occupation, from which date the Purchaser shall be entitled to all benefits from and be liable to all risks of ownership in respect of the Property including liability for rates and taxes and any other charges of levies on the Property from such date.

[3] When the sale agreement was concluded, it was known to both parties that there were unlawful occupiers on the property, but when it transpired, shortly before transfer that the unlawful occupiers had not yet been evicted, Mr Pansegrouw, a director of Lindley Farm, in what seems to have been an attempt to appease Cradle City, wrote a letter dated 4 May 2009 to them stating:

‘The company will fully comply with the Provisions of clause 4 as set out in the Agreement of Sale dated 23/03/2009.

Should there be any unlawful occupiers present on the property at the date of registration of the Transfer of the Property, we undertake to remove any such occupiers at our cost within a reasonable time but not later than 28/02/2010, [the] said undertaking will only apply to the

number of unlawful occupiers that might be present on the Property at the time as stated above.

We confirm that Lindley Farm 528 (Pty) Ltd will not be held responsible for the removal of any additional unlawful occupiers which might occupy the said Property after the date of registration of the transfer.'

[4] The property was transferred from Lindley Farm to Cradle City on 7 May 2009, but on this date, seemingly in an effort to address concerns pertaining to the presence of the unlawful occupiers on the property, the parties signed an Indemnity and Undertaking which reads as follows:

'1. We, the undersigned, LINDLEY FARM 528 (PROPRIETARY) LIMITED ("Lindley Park 528") hereby –

1.1 agree and undertake in favour of CRADLE CITY (PROPRIETARY) LIMITED ("Cradle City"), by no later than 31 August 2009 at our cost, to take all such steps and to do and procure the doing of all that is requisite in order to lawfully evict all squatters including but not limited to all on the list attached hereto marked as Appendix 1, occupying the Remaining Extent of Portion 13 of the Farm Lindley No. 528, Registration JQ, the Province of Gauteng, measuring 90. 2408 (ninety point two four zero eight) hectares (the "Land") as at the date upon which the Land is transferred into the name of Cradle City in the relevant Deeds Office (the "Squatters")

1.2 indemnity and hold Cradle City harmless against:-

1.2.1 any and all claims, losses, damages, actions; liabilities, expenses, including, all legal fees and expenses on an attorney and own client basis (collectively, the "Claim/s") which may be made against Cradle City-

1.2.1.1 as a result of a breach of any or all of our undertakings referred to in this indemnity;

1.2.1.2 arising from or ancillary to or connected with the occupation of the Squatters on the Land and/or the eviction or removal of the Squatters from the Land;

1.3 agree and undertake in favour of Cradle City to make payment under this indemnity as soon as Cradle City becomes obliged to make any payment in respect of any of the Claim/s in an amount equal to the amount paid by Cradle City to settle the Claim/s.

2. We, the undersigned, CRADLE CITY (PROPRIETARY) LIMITED hereby-

2.1 agree and undertake to sign all documents and do what is reasonably necessary to enable Lindley Park 528 to perform its obligations set out in 1.1'.

[5] The contemplated eviction of the unlawful occupiers was not achieved by 31 August 2009 and it is their presence on the property and the refusal by Cradle City to pay the balance of the purchase price that has led to the present dispute. Lindley Farm instituted action against Cradle City. Claim 1 consisted of two parts. In the first part it claimed payment of the balance of the purchase price plus VAT, and in the second part of Claim 1 it claimed payment of the penalty of 20% which would be due in terms of clause 2.2.5.1 of the agreement. In Claim 2 it claimed payment of the clearance costs it alleged it had paid on Cradle City's behalf. In this regard it relied on Clause 3 of the sale agreement which stipulates that any amounts advanced by it to pay for transfer and clearance costs would be paid by Cradle City to it within 90 days from the date of registration of transfer. Claim 3 concerned an alleged entitlement to monies payable by the Gauteng Department of Roads and Transport, in respect of expropriation of a portion of the property. It alleged that the parties had concluded an oral agreement which was thereafter confirmed via email on 2 March 2010 in terms of which Cradle City agreed to pay Lindley Farm an amount of R3 767 158, which represented a partial compensation which the Department paid for the expropriation of the portion of the property.[1]

[6] After Cradle City entered an appearance to defend, Lindley Farm launched an application for summary judgment, placing reliance on the terms of the sale agreement. Cradle City opposed the application for summary judgment and Lindley Farm filed a replication. After argument, leave to defend was granted to Cradle City. In its plea, Cradle City referred to the Indemnity and Undertaking and alleged that this formed an essential part of the sale agreement and should therefore be read therewith.

[7] Regarding the first part of Claim 1, Cradle City pleaded that Lindley Farm had not complied with the terms of Clause 4 of the sale agreement and the Indemnity and Undertaking in that it failed to provide it with vacant occupation. In this regard it pleaded that Lindley Farm was not entitled to the balance of the purchase price and had issued summons prematurely. Concerning the second part of Claim 1, it disputed

[1] The email confirming the oral agreement records that the parties agreed that Lindley Farms would be paid the full R4 372 413 even though the particulars of claim indicate R3 767 158

liability for the penalty, and said that upon a proper interpretation of the sale agreement, the penalty provision contained in 2.2.5.1 does not apply.

[8] Regarding Claim 2, it denied that Lindley Farm was entitled to the relief claimed. And with regard to Claim 3, Cradle City pleaded that the obligation to refund Lindley Farm arose only if the former was in a position to do so which it was not, because it suffered significant damages as a result of the breach by Lindley Farm of the terms of the sale agreement.

[9] Cradle City referred to a number of repeated payments of an amount of R77 273 each of which were received by Lindley Farm, totalling R1 159 095 which it said concerned another sale agreement concluded between Lindley Farm, Cradle City and Lanseria Warehousing (Pty) Ltd. It said that Lindley Farm's claim for the remainder of the purchase price could only have been due 30 months after transfer. It then pleaded that any amount it may have owed to Lindley Farm for interest was extinguished by set-off and particularly by the payment of the numerous instalments of R77 273, which combined, amounted to R1 159 095.

[10] Cradle City also filed a counterclaim in terms of which it claimed damages against Lindley Farm in an amount of R300 000 000. In this regard it alleged that it had already paid Lindley Farm an amount of R43 000 000 as at the date of transfer, but that as a result of the failure on the part of the latter to provide vacant occupation and as a result of fraudulent misrepresentation made by Lindley Farm to the effect that it would procure an ejectment of the occupiers from the property, it had suffered significant damages. It alleged that if vacant occupation had been provided, the property would have been valued at R300 000 000, but that the consequence of the occupation of the property by the unlawful occupiers was that it was valueless.

[11] In its adjusted replication Lindley Farm alleged that the Indemnity and Undertaking had the effect of varying Clause 4 of the sale agreement and that instead of having an obligation to give vacant occupation, the only obligation was that it had to have taken all the steps and done and procured all that was required in

order to lawfully evict all squatters from the property by no later than 31 August 2009, which duty it alleged it had complied with. In the alternative, Lindley Farm alleged that should the court find that Cradle City was entitled to withhold the payment due on the 27 November 2011 until unlawful occupiers had been evicted, then the reasonable cost to achieve the eviction of the unlawful occupiers and vacant possession of the property would not exceed an amount of R6 000 000. It then pleaded that the court should find that Cradle City was entitled to be paid a reduced contract price, to be determined at the discretion of the court, but not exceeding R6 000 000. Subsequent to the hearing of the appeal, Lindley Farm filed supplementary papers and increased the amount of R6 000 000 to an amount of R10 000 000 instead. I will deal with these two tenders in further detail hereinafter.

[12] Three witnesses testified at the trial: two property valuators, namely Mr Grant Fraser, for Lindley Farm and, Mr Roger Long for Cradle City and one of the directors of Lindley Farm, Mr Jacobus Pansegrouw. The two valuators had prepared a joint minute in which they stated that there were approximately 40 unlawful occupiers who occupied approximately 20 structures. However, during Mr Long and Mr Pansegrouw's testimonies, it transpired that there were probably 44 or more structures. Mr Long said that he and Mr Fraser were informed by the Bank's representatives that the Bank would not approve property finance whilst there were unlawful occupiers on the property.

[13] During cross examination, Mr Pansegrouw conceded that the unlawful occupiers were difficult and unwilling to co-operate. He also agreed that in his affidavit in support of an application for their eviction he had stated that the whole Cradle City development was in suspense as a result of the unlawful occupation. It thus transpired that the original calculation that the cost of the negative influence of the presence of the unlawful occupiers in the property was approximately R6 000 000 was unreliable. First, the valuators were unaware of the presence of another group and second, they were not aware that the unlawful occupiers were not willing to move. Both these considerations were not factored in the initial calculations.

[14] That brings me to the question whether Cradle City was entitled to vacant occupation or not. At the commencement of the trial in the high court Lindley Farm conceded that clause 4 of the sale agreement meant that Cradle City would be given vacant occupation. The question for determination is whether the Indemnity and Undertaking should be interpreted to mean that Lindley Farm was expected to provide vacant occupation as foreshadowed in clause 4 of the sale agreement or whether, as contended by Lindley Farm, all that was expected from it was to show that it had taken the necessary steps towards that goal. If the contention by Lindley Farm is accepted, this would lead to the inescapable conclusion that in signing the Indemnity and Undertaking agreement Cradle City abandoned its right to vacant occupation which it was entitled to in terms of the sale agreement, and settled for a lesser right which would be satisfied if it was only shown that Cradle City had taken the legal steps aimed at achieving the eviction.

[15] Cradle City on the other hand, submitted that the Indemnity and Undertaking did not release Lindley Farm from its obligation to provide vacant occupation, but only postponed that obligation from the date of transfer, to the 31 August 2009. Regarding the balance of the purchase price, Cradle City submitted that the obligations of the parties are reciprocal, and that for as long as it has not been given vacant occupation, there is no obligation on it to pay.

[16] A proper interpretation of the Indemnity and Undertaking requires a consideration of its language, context, purpose and background. (See *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) at para 3; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18)

[17] The terms of the Indemnity and Undertaking must be considered in the following context: the letter dated 4 May 2009 was written some 3 days before the date of registration, when it transpired that the unlawful occupiers still remained on the property. In the letter Lindley Farm said that it would ‘fully comply with the provisions of Clause 4, as set out in the agreement’ and that ‘should there be any unlawful occupiers present on the property at the date of registration of the Transfer of the Property, [it] under[took] to remove any such occupiers at [its] cost within a

reasonable time but not later than 28/02/2010. It is clear therefore that the purpose of the letter was to assure Cradle City that Lindley Farm would comply with the terms of the sale agreement, albeit on a different date. On 7 May 2009, which was the date on which registration was to happen, the Indemnity and Undertaking was signed. This, too, although different in construction from the letter, is consonant with the objective, ie to provide vacant occupation.

[18] There is no logical reason why a party who realised, at the date of transfer that a condition that gave it a stronger right had not been complied with, would suddenly enter into an agreement that weakens that right, especially if the weakened right compromises the very purpose for which it entered into the agreement. The submission by Lindley Farm that for as long as steps were taken to obtain eviction, it did not matter whether such steps were in fact eventually successful or not lacks merit.

[19] A finding that vacant occupation was not envisaged, would mean that Cradle City was prepared to spend substantial amounts of money on property that would not be suitable for the purpose for which it was bought, and that included ineluctably obtaining finance to that end, which would not be possible with the obstruction presented by the unlawful occupiers. This does not make sense. It follows that the purpose of the Indemnity and Undertaking was to assure Cradle City that it would be given vacant occupation within a reasonable period but not later than 31 August 2009 to enable it to proceed with the contemplated development

[20] This then brings me to the question whether the balance of the purchase price is due and payable by Cradle City. Cradle City chose not to exercise its right to cancel the sale agreement but elected to hold Lindley Farm to it. In these circumstances the answer to whether the balance of the purchase price is payable or not depends on whether the reciprocity principle is applicable. The principle of reciprocity (*exceptio non adimpleti contractus*) recognises the fact that in many contracts, the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances. Whether there is such an intention must often be determined by an interpretation of the contract (See Van der Merwe et al *Contract: General Pronciples 5th ed (2015)* at 335; and the references therein). In

fact, there is a presumption that interdependent promises are reciprocal unless there is evidence to the contrary (*Contract General Principles*, supra). The common intention is that neither should be entitled to enforce the contract unless he/she has performed or is ready to perform his/her own obligations. (See RH Christie and G Bradfield *Christie's Law of Contract in South Africa* 6th ed (2011) at 437; *Hauman v Nortje* 1914 AD 293 at 300; *Wolpert v Steenkamp* 1917 AD 493 at 499; *Nesci v Meyer* 1982 (3) SA 498 (A) at 513F).

[21] The principle also applies where the performance of the defendant must be rendered in instalments and the plaintiff is subject to a duty that must be fulfilled before or on the date of the defendant's instalment. Reciprocal obligations may even arise from separate contracts (see *Motor Racing Enterprises (Pty) Ltd (in Liquidation) v NPS (Electronics)* Ltd 1996 (4) SA 950 (A); *Contract, General Principles* supra).

[22] Where a contractant does not properly perform in terms of an indivisible obligation and the co-contractant upholds the contract, the latter may retain the inadequate performance or reject it and claim proper performance. If the inadequate performance is rejected, the contractant who has committed mal-performance cannot claim counter-performance unless he/she offers proper performance anew. If, however, the inadequate performance is retained, the question arises whether the contractant who has performed defectively or incompletely may, in spite of his/her inadequate performance, claim counter-performance from the defendant. (See *Contract, General Principles* at 337)

[23] If a defendant does withhold his performance he/she will have to allow the plaintiff the opportunity to complete defective performance in so far as proper performance still remains possible. The explanation for this is that a defendant who upholds the contract and relies on the defence of reciprocity, in effect, demands proper performance and is therefore only entitled to withhold performance in so far as proper performance is outstanding (see *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 412). If the defective performance is eventually properly completed by the plaintiff the defence of reciprocity is exhausted (see *Thompson v Scholtz* 1991 (1) SA 232 (SCA) at 242G).

[24] A plaintiff who is temporarily unable to perform may nevertheless be granted judgment but will not be entitled to execute on it without performing or tendering performance. If he/she delays performance for an unreasonable time the defendant, notwithstanding the judgment against him/her, may cancel the contract after duly placing the plaintiff *in mora.* Subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract. (See *McGlinchey v De Kok* 1985 (2) SA 550 (D); *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at 198B; *R H Christie: The Law of contract in South Africa* at 440)

[25] In the present matter the sale agreement created bilateral obligations and it was envisaged that the Plaintiff (Lindley Farm) would perform before the Defendant (Cradle City). The Plaintiff had to procure for the Defendant vacant occupation by 31 August 2009, whereas the Defendant only had the obligation to pay the remainder of the purchase price 30 months after date of transfer; the 30 month period expired only in November 2011. The unlawful occupiers are still in the property and it follows therefore that until Lindley Farm has given vacant occupation, it has not delivered to Cradle City the property in the state the parties agreed upon. This finding however does not necessarily mean that a suitable remedy in the present circumstances is to dismiss the application for eviction until vacant occupation has been given. The reality is that Cradle City has made an election to retain the inadequate performance and has not terminated the contract. For that reason and as will be illustrated herein below, it is necessary to explore the two alternative solutions proposed by Lindley Farm.

[26] In the first alternative Lindley Farm has submitted that in the event the court finds that Cradle City was entitled to withhold the payment until vacant occupation has been given, the court should reduce the contract price with an amount not exceeding R6 000 000. Whilst this has been found to be a workable solution in other matters, (see *Hauman v Nortjie* 1914 AD 293; *Klopper v Engelbrecht* 1998 (4) SA 788 (W); *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)) this option is not suitable in this matter because Mr Fraser conceded that the basis on which he and Mr Long calculated the cost of the negative influence of the presence of the unlawful occupiers in the property was incorrect. This renders

the estimate of approximately R6 000 000 unreliable and it is not possible in the circumstances to quantify the negative impact of presence of the unlawful occupiers on the property. As stated above, Lindley Farm has now tendered an alternative amount of R10 000 000, but the basis for the quantification of this amount is unclear and cannot resolve the problem.

[27] In the further alternative Lindley Farm, in its heads of argument, asked that it should nevertheless be given the judgment in its favour, but that it should be held not to be entitled to execute upon it without performing or tendering performance. Cradle City submits that this option is not suitable in this matter because it is difficult to get the unlawful occupiers off the property, that there is no precedent for granting this kind of a relief under circumstances such as these and that it would render the defence of *expectio* nugatory.

[28] Whilst I accept that the eviction of the unlawful occupiers has proven to be more complicated than what the parties originally anticipated, the reality, as stated above, is that Cradle City has made an election to persist with the agreement and did not terminate it. However, it is clear from the evidence that Lindley Farm is continuing with its efforts to evict the unlawful occupiers in order to present vacant occupation to Cradle City. Neither party has accepted that this is not achievable. If an order along the lines proposed by Lindley Farms is granted, there will be no prejudice on either party. This remedy would provide Lindley Farm with an opportunity to take all measures possible in order to lawfully evict the unlawful occupiers within a reasonable time in order to make sure that the defective performance is eventually properly completed. In that event it would be able to execute the judgment granted in its favour. In the event that it fails to remedy the defective performance within a reasonable time, then Cradle City would have the option to terminate the contract and claim any proven damages arising from any proven breach. If the unlawful occupiers are evicted, the defence of reciprocity would be exhausted and Cradle City would be entitled to execute its judgment.

[29] This then brings me to Claim 3. It was not seriously disputed by Cradle City that the defence of reciprocity was not available to it in relation to Claim 3. The amount was due in terms of a separate portion of the land for which it received

compensation from the State. The proviso that Cradle City had to pay it when it is in a position to do so means that it had to pay it once the money had been paid to it. This amount is due and payable.

[30] Regarding the counterclaim, no evidence was led to show what the market value of the property was at the date of the conclusion of the sale agreement nor its value now that it is occupied by the unlawful occupiers. Cradle City thus failed to adduce sufficient evidence to prove its claim. An appropriate order should have been to grant absolution from the instance. (See *Oliver's Transport v Divisional Council, Worcester* 1950 (4) SA 537 (C)

[31] Costs

In light of the conclusion reached above, both in relation to the claim and the suspension of the order, it would be just and equitable to require each party to pay its own costs. The same will apply in respect of the costs of the court below.

[32] I make the following order:

1. The appeal is upheld to the limited extent reflected in the substituted order that follows:

'(a) The defendant is ordered to pay in respect of claim 3 an amount of R3 767 158 less an amount of R1 159 095, together with interest thereon at 15.5% per annum a *tempora morae*

(b) Judgment against the appellant in respect of claims 1 and 2, together with an amount of R1 159 095, is suspended until such period as the unlawful occupiers are evicted from the property'

2. The appeal in respect of the counterclaim is upheld.

2.1 The order of the court below is substituted as follows:

'(a) Absolution from the instance is granted.'

3. In respect of costs pertaining to both the claim and the counterclaim, each party is ordered to pay its own costs.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For the Appellant:	M P Van der Merwe SC
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