REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 11366/2022

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

DATE: 25 September 2024

SIGNATURE OF JUDGE:

[redacted]

In the matter between:

FIRSTRAND BANK LIMITED
(Reg no: 1929/001225/06) **APPLICANT**

and

MALESELA LUCAS LEBELO
(Id No: [redacted] **FIRST RESPONDENT**

MALESELA LUCAS LEBELO NO
(Id No: [redacted]
(in his capacity as the appointed
Executor in the estate of the
late Mahlapa Lilian Lebelo) **SECOND RESPONDENT**

THE MASTER OF THE HIGH COURT,
PRETORIA
administration of deceased
estate's department **THIRD RESPONDENT**

JUDGMENT

Basson AJ

Introduction:

1. This is an application for Summary Judgment the Applicant seeks monetary payment of monies lent and advanced, a declarator that

the immovable bonded property be declared specially executable with ancillary relief.

2. I refer to the parties as in the main action and to First and Second Defendants jointly, as "*Defendants*", unless otherwise stated.

3. The Defendants in their plea peculiarly "noted" a substantial portion of the allegations in the Particulars of Claim. Uniform Rule of Court 22(2) ("*Rule/Rules*") provides that a Defendant shall in his/her plea either admit or deny or confess and avoid all the material facts alleged or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.[1] Rule 22(3) provides that if this is not done, the material fact pleaded by the Plaintiff shall be deemed to be admitted.[2] I therefore deem those paragraphs were material facts are noted, to be admitted.

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[1] *"(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies".*

[2] *"(3) Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea."*

4. The Defendants admit that the home loan was in arrears[3] and inasmuch conceded that they did not have a defence to the merits of the matter.[4] They confined their defence to two issues only in that Plaintiff did not comply with:

4.1 the provisions of sections 129(1)(b) and 130(1)(b) of the National Credit Act, Act 34 of 2005 (the "*NCA*"); and

4.2 the provisions of clause 4.29.7 of the Home Loan Agreement.

5. The nub of their defence is thus that:

5.1 the summons was issued prematurely i.e. less than ten working days from date of delivery of the notices in terms of section 129 and 130 of the NCA; and

5.2 the delivery of the notices was not in accordance with clause 4.29.7 (specifically 4.29.7.2) of the Home Loan Agreement concluded between the parties.[5]

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3 Paragraph 4 of the Plea.

4 Paragraph 9 of the affidavit resisting Summary Judgment.

5 *"4.29.7 any notice given in terms of this agreement shall be in writing and shall be deemed to have been duly received by the addressee:*

4.29.7.1 ……..;

4.29.7.2 if posted by prepaid registered post, on the date of collection thereof;

4.29.7.3 ……; "

6. Other than as set out above, no other real issues were disputed on the merits in either the plea or the affidavit resisting summary judgment.

Background:

7. Plaintiff, on 8 April 2009 concluded a Home Loan Agreement (the "*Home Loan Agreement*")[6] with First Defendant and Mrs Mahlapa Lillian Lebelo in terms whereof it lend and advanced them money for the purchase of a sectional title unit in a scheme known as Midrivier Estate in respect of the land and buildings situated at T[redacted] Extension [redacted] Township, Local Authority - Ekurhuleni Metropolitan Municipality ("Midriver Estate").

8. Mrs Lebelo passed away on 3 December 2020 whereafter Third Defendant appointed First Defendant as the Executor.[7] He is cited in his nominal capacity as Executor. It is evident from paragraph 22 of the affidavit resisting Summary Judgment deposed to by Mr WM Chongo (who declared that he at all relevant times dealt with the matter) of Mashiane, Moodley, Monama Incorporated Attorneys ("*Mashiane*") that "*….. The Plaintiff was fully aware of the fact that the Defendants were legally represented. This is evident from the*

6 Annexure "X" to the Particulars of Claim.

7 Annexure "A" to the Particulars of Claim.

fact that the Plaintiff also sent the Notice to our offices by a registered mail." (sic)

9. The Lebelo's, when concluding the Home Loan Agreement hypothecated the Midriver Estate as security by way of a Sectional Covering Mortgage Bond with number SB 026593/09.[8]

10. It is not in dispute that the home loan was, as at 23 February 2022, in arrears to the amount of R73 875.50. This is not only admitted in paragraph 4 of the Plea, but repeated in paragraph 7 of the affidavit resisting Summary Judgment.

11. Clause 4.29.7.2 of the Home Loan Agreement is also relevant. It seems that Defendants latched onto the portion which reads *"…… on the date of collection thereof;"* to bolster their defence of non-compliance with section 129 of the NCA.

12. Page 1 of the Home Loan Agreement encapsulates the elected physical, postal and email addresses of the parties at which they would accept communication, notices and documents. This is confirmed in clauses 4.29.1, 4.29.2 and 4.29.3 of the Home Loan Agreement whilst clause 4.29.6 provides that the elected addresses may amended , in writing be on 10 days' notice.

[8] Annexure "B" to the Particulars of Claim.

13. The physical and postal addresses of defendants initially reflected as [redacted] L[redacted] Road, [redacted] S[redacted] H[redacted] Midrand ("S[redacted] H[redacted] on page 1 of the Home Loan Agreement was struck through and in hand script amended to 13 Hockenheim Complex, Berlyn Street, Kyalami ("Hockenheim"). First Defendant also elected his e-mail address to be Llebelo@sars.gov.za.

14. The essence of Defendants' defence is that Plaintiff's summons was issued prematurely (on 24 February 2022) in that the section 129 notice dated 8 February 2022[9] was received on 11 February 2022 (when their attorneys collected the aforesaid notice from the post office) and that this afforded them only 8 (eight) days to consider their position.

15. They also rely thereon that a further notice was delivered to Mashiane's offices by the Sheriff on 23 February 2022. I interpose to mention that the return of service of the Sheriff reflects the actual date of service of the further notice as 22 February 2022 as is evident from the Return of Service filed under section B, item 6 (page B10) of Caselines.

16. Briefly put, the defence is that the 10 (ten) day period afforded a credit receiver in sections 130(1)(a) and 130(1)(b) of the NCA to

9 Annexure "LL1" to Defendants' Plea.

consider his/her position has not yet expired whilst the service of the notice by the Sheriff on 22 February 2022, afforded even less time.

17. Defendants' argument focussed on the section 129 notice of 8 February 2022 received on respectively 11 February 2022 and 22 February 2022 and not on the numerous section 129 notices which was dispatched, not only to all of Defendants' elected addresses as reflected on the first page of the Home Loan Agreement, but also to their attorneys, Messrs Mashiane, Moodley, Monama Incorporated between 3 and 9 February 2022.

18. In fact, Defendants, despite Plaintiff relying on the section 129 notices of 26 January 2022 (attached to the Particulars of Claim as Annexure "F") as compliance with section 129 of the NCA, ignore these notices, do not deal therewith or in any sense refer thereto save for a scant reference to notices dispatched between 3 and 9 February 2022.

19. Annexure "F" reflects that Plaintiff's attorneys on 26 January 2022 addressed three sets of section 129 notices to Mashiane and the Defendants at the Midriver Estate, S[redacted] H[redacted] and Hockenheim property addresses.[10]

[10] See section A, Caselines pages 33 to 41.

20. Although it may still be argued that none of the 26 January 2022 notices were collected by Defendants, it is evident, from what is set out below, that it was properly delivered at the elected addresses. In addition, the notices were also sent to the Defendants c/o their attorneys, Mashiane to their physical address (Suite [redacted], [redacted] Floor, K[redacted] and W[redacted] [redacted] W[redacted] Street, Sandton,2196) and postal address (PO Box 784040, Sandton, 2146). Both these addresses are the addresses of Mashiane as is reflected in the pleadings and the letters attached to the pleadings.

21. Annexure "F" also reflects that the 26 January 2022 notice was dispatched by registered mail to Mashiane's postal address (under track and trace number [redacted] and the physical address (under track and trace number [redacted] on 27 January 2022.

22. The notice sent to Mashiane's postal address ([redacted] was scanned at Benmore post office on 4 February 2022 (at 07:58) and the first notification sent (the same day) at 08:12.

23. The notice to Mashiane's physical address ([redacted] was scanned at the Benmore post office on 8 February 2022 (at 08:58) and the first notification sent (on the same day) at 09:25.

24. If delivered on respectively 4 and 8 February 2022, it was 12 and 16 days before the summons was issued on 24 February 2022. This would have been sufficient notice in terms of section 129 read with section 130. I would have expected of Mr Chongo to comprehensively deal with, or to confirm or deny, whether the 26 January 2022 notices were received or not. However, they were completely silent on this.

25. Defendants elected to rather focus on the 8 February 2022 section 129 notice (Annexure "LL1" to the Plea, section A page 78) received on 11 February 2022 and the notice served by the Sheriff on 22 February 2022 (Section B page 10 of Caselines).

26. It is relevant for purposes of the conclusion I ultimately reach that reference be made to the letter Mr Chongo wrote to Plaintiff's erstwhile attorneys, Vezi & De Beer Incorporated on 23 February 2023 attached as annexure "LL2" to the plea. This letter was, according to Mr Chongo, dispatched on 23 February 2022.[11] Therein Mr Chongo indicates "*that they shall seek instruction and revert with a substantive response.*" Paragraph 3 of this letter is telling. It expressly states that: "*In light of the above, we further advise that our client shall in all likelihood enter into a settlement plan"*

[11] See paragraph 16 of the affidavit resisting Summary Judgment.

27. It seems that the settlement plan never materialised because the application for summary judgment was delivered on 30 May 2022,[12] whereafter Defendants, on 14 September 2022 delivered the affidavit resisting summary judgment.[13] It appears that defendants, rather than "*enter into a settlement plan*" elected to utilise the technical defences raised in the plea and the affidavit resisting Summary Judgment which is, at most, dilatory.

28. Paragraph 15 of Plaintiff's Particulars of Claim copiously deals with the notices sent in terms of section 129 on 26th of January 2022. T as already stated, these notices were sent by registered mail whilst the trace and tracking slips especially indicate that the notices were delivered on respectively 4 and 8 February 2022 to Mashiane.

29. Defendants curiously, in respect of paragraph 15 of Plaintiff's Particulars of Claim pleaded that they: " ….. *deny the contents of these paragraphs are denied.*" (sic) whilst failing to deal with the fact that the section 129 notices were drafted on 26 January 2022, handed in at Menlo Park post office on 27 January 2022 and their after delivered between 3 and 9 February 2022. Especially no mention is made of the delivery to Mashiane.

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12 Section C, page 23 of Caselines.

13 Section C, page 33 of Caselines.

30. What the Defendants then do, is to make a quantum jump and start dealing with the provisions of paragraph 4.29.72 of the Home Loan Agreement. Defendants remained curiously silent about the 26 January 2022 section 129 notices and the delivery thereof to the post office.

31. The essence of Defendants' case is that that the premature issue of the summons, after receipt of the 8 February 2022 notice on 11 February 2022 which "*left them with only eight days to elect what to do"* whilst the further notice served on 23 February 2022 (which was 22 February 2022) left it with only one day to make an acceptable arrangement to pay the outstanding debt. This argument is persisted with despite the fact that the late Mrs Lebelo passed away on 3 December 2020, that the estate has, as at February 2022 not been finalised, that Mashiane was, at all relevant times acting as their attorney, yet they have, in all this time, knowing of the outstanding debt and that it was in arrears, not made an acceptable offer and/or arrangement to settle the debt.

32. Plaintiff for its case relies on the section 129 notices of 26 January 2022 and not on the 8 February 2022 notice received on 11 February 2022 or served on them on 22 February 2022. Paragraph 15 of the Particulars of Claim expressly states that it was the 26 January 2022 notices that were sent to the defendants' chosen *domicilium citandi et executandi* addresses as well as to Mashiane.

33. I do not intend to deal with the notices sent to the Defendants at the Midriver Estate, S[redacted] H[redacted] or Hockenheim properties. I intend to focus only on the two registered notices sent to Mashiane.

34. It is evident that the registered letter with track and trace number [redacted] dispatched to Mashiane's postal address was delivered on 4 February 2022 at 07:59 whereafter a first notification was sent to Mashiane at 08:12 on the same day. This was fourteen working days before issue of the summons on 24 February 2022.

35. Regarding the registered letter sent under track and trace number [redacted] to Mashiane's physical address, it is evident that this notice was registered on 8 February 2022 at 08:58 and the first notification sent to the Mashiane, the same day at 09:25. This was eleven working days before the issue of the summons on 24 February 2022. I will return to the issue of "*delivery*" below.

36. I can only but assume that the section 129 notice of 8 February 2022 was again send as a reassurance that Defendants had knowledge of the proceedings to be instituted. This, in my view, is confirmed by the section 129 notice served on 22 February 2024. For Defendants to therefore raise and refer to two section 129 notices whilst no reliance thereon is placed by the Plaintiff in its Particulars of Claim, is mischievous, if not somewhat opportunistic.

37. It need firstly be stated that the commencement of proceedings without prior (sufficient) notice does not render the proceedings a nullity. It merely requires an adjournment of proceedings in order to permit the credit provider to properly give notice before the proceedings may be resumed. Such failure therefore does not invalidate the proceeding and is purely dilatory.

38. The delivery of the notice in terms of section 129 and 130 requires of the credit provider to allege and prove that the notices was delivered to the consumer. Where post is used, it will suffice to show delivery if there is proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer in the absence of proof to the contrary. This, I submit the Plaintiff did.

39. As already indicated, Defendants elected to ignore (in their plea) the positive allegations made by Plaintiff in paragraph 15 of its Particulars of Claim and failed to deal therewith in either the affidavit resisting Summary Judgment or the Heads of Argument.

40. Defendants as much conceded in paragraph 9 of the affidavit resisting Summary Judgment that they do not have any defence to the merits of the matter. This, in itself begs the question why the application for Summary Judgment should further be postponed in order to cure an alleged defect.

41. As was stated in ***Sebola and Another v Standard Bank of South Africa Ltd and Another***[14]:

> "*the requirement that a credit provider provides notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that a credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery."*
> (Own underlining)

42. As perplexed as Defendants' plea to paragraph 15 of Plaintiff's Particulars of Claim where it pleaded to paragraphs 13 and 15 that "*the Defendants deny the contents of these paragraphs are denied.*" is Mr Chongo's statement that:

> "*14. As a matter of fact, the Plaintiff delivered the section 129 Notice by registered mail, during the period of 3 to 9 February 2022.*"[15]

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14 2012 (5) SA 142 (CC).

15 Paragraph 14 of the affidavit resisting Summary Judgment.

43. This is, if anything, an admission of delivery. Nowhere in the affidavit resisting Summary Judgment or the Plea is it stated that the aforesaid notices (the 2 notices sent to Mashiane's physical and postal addresses) were not received.

44. As already stated, the plea to paragraph 15 rather elected to focus on the alleged non-compliance with clause 4.29.7.2 of the Home Loan Agreement rather than explicitly denying that the notices dispatched between 3 and 9 February 2022, were ever delivered. In fact, the notice dispatched on 8 February 2022 was, by Defendants' own submission, received on 11 February 2022.

45. The first time that the denial of the receipt of the 26 January 2022 notices (dispatched between 3 and 9 February 2022) were not received by the Defendants is to be found in paragraphs 10 and 11 of Defendants' Heads of Argument.

46. Paragraph 10 thereof states that:

> "*The Plaintiff claims that it sent one of the various purported section 129 notices to the chosen domicilium via registered post during the period of 3 to 9 February 2022. This is despite the fact that the Applicant knew that the Defendants were legally represented by their current Attorneys of record, as such, the notice ought to have been served at the address of the Attorneys of Record.*"

47. This, it is submitted was achieved by sending the section 129 notices of 26 January 2022 to Mashiane's physical and postal address.

48. It is apparent that Plaintiff (perhaps out of overcautiousness) dispatched section 129 notices to all the addresses reflected on the first page of the Home Loan Agreement as well as that of Mashiane's firm. The reason Plaintiff dispatched the 26 January 2022 letter to Mashiane was because it knew that Mashiane was, at the time representing the Defendants and that the firm would bring the notice to their attention.

49. What is even more curious is the rather unintelligible remark in paragraph 11 of Defendants' Heads of Argument that:

> "*Be that as it may, according to the Defendants, this (notice) never reached their attention hence the notice was never collected by them (Defendants) as required by clause 4.29.7 of the Home Loan Agreement, and at all material times, its (notice) existence was unknown to the Defendants.*"

50. The author of Defendants' Heads of Argument in paragraph 10 of the Heads of Argument seems to want to argue on the section 129 notices despatched between 3 to 9 February 2022 (which, for the first time mention is made of that was not received although this was nowhere broached in the Plea or the affidavit resisting summary judgment) was never received whilst he suddenly, in paragraph 11

of the Heads of Argument jumps to the notice which they say, should have been properly received and referred to in clause 4.29.7 of the Home Loan Agreement. The argument is, with respect, somewhat nonsensical.

51. What is even more perplexing is that it is not denied in the Heads of Argument that the section 129 notices were not received. The fact of the matter is, at best for Defendants, being legally represented, was that the bond repayments were in arrears, that (at best for them) by 11 February 2022, they are purported to have had full knowledge of the content of the section 129 notice of 8 February 2022. Yet, they elected to only on 23 February 2022 (whilst apparently using the notice served by the Sheriff on 22 February 2022) as an excuse, to justify the writing of the letter of 23 February 2022.

52. If, in contested proceedings the consumer avers that the notice did not reach them, the Court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must, in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed. As already indicated, Defendants nowhere allege that any of the section 129 notices reached them, nor does

anyone from Mashiane's office declare whether or not the said notices were not received or not.

53. It is evident, from the conspectus of facts, that Defendants (or then Mashiane) is careful not to openly deny that any of the 26 January 2022 notices were received by them or by Mashiane. There is merely the somewhat non-sensical denial of a denial in the plea with the admission of delivery of the notices in terms of section 129 of the NCA. Rather, Defendants elected to focus on the time section 129 notice of 8 February 2022 received on 11 February 2022 and again served on 22 February 2022. They completely ignore or fail to deal with the notices in terms of section 129 that Plaintiff relies upon in the Particulars of Claim.

54. The least I would have expected is an outright denial (as is expected from a Defendant in terms of Rule 22) that the section 129 notices of 26 January 2022 were never received by either the Defendants or, at least from a responsible person in the offices of Mashiane. I must say, I have my doubts that at least the 26 January 2022 notices were not received by Mashiane.

55. But even if it be accepted that none of the 26 January 2022 section 129 notices were received, it leaves the question open as to what Defendants (or their legal representatives) did between 11 February 2022 and 23 February 2022 when it addressed annexure "LL2" to

the Plaintiff's attorneys. I would be hard-pressed to believe that Defendants' attorneys did not, during this time, advise them.

56. Even in the absence of any denial that the section 129 notices were received and that there was short notice contrary to the provisions of section 129 of the NCA, I am in full agreement with Unterhalter J in ***Benson and Another v Standard Bank of South Africa and Others***[16] where he contends that any non-compliance with the provisions of the NCA which is cured prior to the hearing of the application for judgment, does not necessarily require an adjournment of the application. As in Benson, *in casu* there were simply no further steps that was required of the credit provider, save to again, rather risibly so, to have the section 129 notices served again before it can proceed.

57. No purpose will be served in adjourning the proceedings. As Sebola makes it clear, any non-compliance does not invalidate the proceedings. It merely delays the finalisation thereof and was ensconced to ensure that due process is followed for a credit receiver to enjoy his or her rights. With our court rolls as clogged up as it is, if not being pragmatic, it makes a mockery of the system. Especially as in this case where the Defendant's already had

16 2019 (5) SA 152 (GJ).

knowledge of the section 129 notice (through their attorneys) for eight days before the summons was issued.

58. To conclude: the application for Summary Judgment was served on 30 May 2022. That is in excess of two months after the Defendants' attorneys indicated that Defendants would "*in all likelihood enter into a settlement plan"*. Yet, nothing seems to have been done between 23 February 2022 and 30 May 2022. Defendants rather elected to file an affidavit resisting Summary Judgment on 14 September 2022. The matter was thereafter heard on 15 May 2023 and even on that date, there was no indication that a settlement plan was on the table.

59. To further delay, in my view, would serve absolutely no purpose. The non-compliance (even if it be accepted that the first time Defendants had knowledge of the section 129 notice on 11 February 2022) has long since been cured and, in my view, the Defendants had sufficient time to consider their position, especially because they are legally represented. To therefore, as Unterhalter J stated in ***Benson***, if the non-compliance has been properly cured by the time the matter is heard in Court:

> *"require an adjournment for its own sake has no point and is inconsistent with the scheme of sections 129 and 130 of the NCA."*

would be absurd.

60. I am of the view that the Defendants obtained actual notice of their rights as required in terms of section 129. In any event the time it took for the matter to serve on 15 May 2023 was sufficient to cure any non-compliance. As already stated, by the time the matter was heard, a period in excess of one year and two months has already expired. There was, accordingly compliance by Plaintiff with the requirements of section 129 and 130 at the time the application for summary judgment was heard.

61. On the strength of the proof attached to the Particulars of Claim and especially the fact that the section 129 notices were sent to Defendants' attorneys of record and the fact that any possible non-compliance with section 129 and 130 has long since been cured, the Defendants have failed to make out a case that the registered letter containing the section 129 notice was not properly delivered.

62. The argument of non-compliance with clause 4.29.7 of the Home Loan Agreement is, for the same reason, as superfluous. In these circumstances the Defendants failed to set up a *bona fide* defence to Plaintiff's claim.

63. In the circumstances I make the following order:

The First and Second Defendants, jointly and severally, the one to pay, the other to be absolved are ordered to:

1. Pay the sum of R524,065.37.

2. Pay interest on the sum of R524,065.37 at the rate of 7.25% per annum, calculated daily and compounded monthly in arrears from 5 January 2022 to date of payment, both dates inclusive.

64. I also make an order:

64.1 declaring the Unit consisting of Section no. 245 as shown and more fully described on Sectional Plan No. SS393/2009, in the scheme known as MIDRIVER ESTATE in respect of the land and building or buildings situate at T[redacted] EXTENSION [redacted] TOWNSHIP, EKHURHULENI METROPOLITAN MUNICIPALITY of which section the floor area, according to the said Sectional Plan is 93 (ninety three) SQUARE METRES in extent; and

64.2 an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held by Deed of Transfer [redacted]

specially executable.

64.3 an order authorising the Plaintiff to execute against the said mortgage immovable property as envisaged in Rule 46(1)(a)(ii) of the Uniform Rules of Court subject to a reserve price of R595,000.00.

64.4 authorising the Sheriff to execute the Writ of Execution.

64.5 that the mortgaged immovable property may, in terms of Section 30(b) of the Administration of Estates Act, 66 of 1965 be sold.

64.6 that First and Second Defendants pay the costs of this application on a scale as between attorney and client.

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BASSON AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Heard on: 15 May 2023

Judgment delivered on: 25 September 2024

Counsel for Applicant: Nic G Louw

Attorneys for Applicant: Van Hulsteyns Attorneys

Counsel for 1st and 2nd Respondents: XN Mahlalela

Attorneys for 1st and 2nd Respondents: Mashiane, Moodley & Monama Inc.