IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2023-008709

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes
[redacted]

DATE 2 April 2025

In the matter between:

ANNIE JEANETTA DE JONGH, HENDRIK LOURENS DE JONGH, AND ADV HERMAN KRIEL *NNO*	
(Trustees of the De Jongh Family Trust)	Appellant
and	
PHILLIPIDES, ANDREW	First Respondent
HARPER, LEIGH DOROTHY	Second Respondent
LEIGH HARPER INC	Third Respondent

J U D G M E N T

MAIER-FRAWLEY J (SIWENDU & FLATELA JJ concurring):

1. This appeal lies against the whole of the order of the court below[1] in which it dismissed an application brought by the appellant (as applicant) against the respondents herein, with costs. Leave to appeal having been refused by the court below, the appeal is with leave of the Supreme Court of Appeal.

2. The appellant Trust was the purchaser, on auction, of immovable property owned by the first respondent in terms of the written conditions of sale that governed the auction and sale of the property.

3. Having complied with the conditions of sale by making payment in full of the deposit and balance of the purchase price, including all other amounts payable under the sale, such as auctioneer's commission and transfer costs fees and charges, the appellant sought an order for specific performance together with ancillary relief in the court below to obtain the registration of transfer of the immovable property from the first respondent into its name.

4. The second respondent was the conveyancing attorney at the third respondent who was appointed to attend to registration of transfer of the property. Neither the 2nd or 3rd respondents participated in the hearing in the court below or in this appeal. No relief was claimed against the 2nd and 3rd Respondents, who were cited by virtue of their interest in the relief claimed by the applicant *a quo.*

Factual matrix

5. The relevant background facts are uncontentious.

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[1] Per Wanless AJ (as he then was).

6. The first respondent put his immovable property up for sale by public auction on 21 April 2022. He accepted the appellant's bid for the property at a purchase price of R4.1 million. The conditions of sale formed the written agreement of sale between the appellant and the first respondent. (hereinafter 'the agreement').

7. The appellant paid the stipulated 5% deposit (R250,000.00) plus auctioneer's commission (10% plus Vat) to the auctioneer at the fall of the hammer. The first respondent insisted on the appointment of the second respondent ('Harper'), who had acted as his attorney in the past, as the conveyancing attorney envisaged in the agreement to attend to the registration of transfer of the property. In terms of the agreement, the auctioneer was authorised to pay the deposit to the seller's attorneys (Harper) in trust, pending registration of transfer. The deposit was duly paid to the auctioneer, who then paid it over to Harper. Harper, in turn, paid the deposit to the first respondent prior to registration of transfer.

8. On 29 April 2022, the Harper sent a pro forma statement of account, inclusive of transfer costs, to the appellant, which reflected a credit of the amounts paid in respect of the deposit and auctioneer's commission, and which revealed a balance due by the appellant of the amount of R4,247 447.53.

9. On 1 May 2022, the appellant paid the amount of R4,247 447.53 into the bank account of the third respondent, as reflected on Harper's pro forma statement of account.

10. On 4 May 2022, Harper sent an updated pro forma statement of account to the appellant in which she acknowledged receipt of the appellant's

payment of the balance and all transfer costs, fees and charges, leaving a nil balance due by the appellant.

11. Aggrieved by the delay in attaining registration of transfer, the appellant appointed Postma attorneys to assist in the finalisation of registration of transfer.

12. On 5 December 2022, Postma attorneys sent a breach notice to the first respondent apropos his failure to cause registration of transfer within a reasonable period after acceptance of the appellant's offer, as envisaged in the agreement.

13. It later transpired that the bank account stipulated by Harper in her pro forma statement of account was not a trust account and that she had misappropriated the funds (excluding the auctioneer's commission and the deposit) prior to registration of transfer, where after she had absconded. Unbeknown to the appellant, Harper's practice (third respondent) had been placed under curatorship on 21 December 2021 and the Legal Practice Council had applied to have Harper's name struck from the roll of attorneys.

14. The first respondent, through his new attorneys (Martin Pyke attorneys), called on the appellant to consent to the termination of Harper's mandate, which consent was provided. Thereafter, on 9 December 2022, the first respondent terminated Harper's mandate to proceed with registration of transfer.

15. In an about turn, on 23 February 2023, the first respondent's new attorneys sent a breach notice to the appellant's attorneys, alleging that

the appellant had an obligation under the agreement to secure the balance purchase price ('the balance') and once having done so, to ensure that such security remained in place until registration of transfer. The first respondent alleged that the appellant was in breach, in that the balance was not secured. The appellant was afforded a period of 7 days in which to remedy the breach, failing which the agreement would be cancelled, in which event, the first respondent notified the appellant that he would retain the deposit paid as *rouwkoop*. This was followed by a cancellation letter, dated 7 February 2023, in which the first respondent purported to cancel the agreement.

16. In resisting the application in the court below, the first respondent relied on the above and in addition contended that the appellant breached the agreement because it did not pay the monies into Harper's trust account. Further, that once the monies were stolen, the Applicant was in breach of its obligation to ensure that the security (comprising the balance of the purchase price) remained in place until transfer.

Discussion

17. The parties each contended for a different construction of clause 3.3 of the agreement, both in the court below and in the appeal. The appellant contended that, in the event that it elected to pay the balance of the purchase price in cash, its only obligation in terms of clause 3.3 was to pay same to the seller's attorneys (i.e Leigh Harper Inc attorneys), which it duly did on 1 May 2022. The respondent, on the other hand, contended that clause 3.3 imposed upon the appellant the express obligation to *secure* the balance of the purchase price ('the balance') by payment of

cash into Harper's trust account, and a concomitant tacit obligation to ensure that such security remained in place until registration of transfer.

18. It is expedient to quote clause 3, which reads, in relevant part, as follows:

> "3. **The Purchase Price** of the PROPERTY...**shall be paid as follows**:
>
> 3.1 A deposit of 5%...of the Purchase Price to the AUCTIONEER by the PURCHASER immediately on the fall of the hammer, which amount the PURCHASER hereby authorises and instructs the AUCTIONEER to pay over to the SELLER'S Attorneys; In Trust pending registration of Transfer.
> ...
>
> 3.3 **The balance** of the Purchase Price **shall be secured** to the satisfaction of the SELLER'S Attorneys, by a written guarantee from a Bank or registered financial Institution, payable free of exchange, against registration of transfer of the PROPERTY into the PURCHASER'S name. **The PURCHASER may elect to secure the balance of the Purchase Price by payment in cash to the SELLER'S Attorneys, who shall hold same in trust, pending registration of transfer into the name of the PURCHASER. The aforesaid guarantee shall be presented and/or cash shall be payable by the PURCHASER to the SELLER'S Attorneys within 45 ...days from receipt of a written request** to that effect from the SELLER'S Attorneys.
>
> 3.4 Any payment made by the PURCHASER in terms of the Agreement shall be allocated first to the payment of AUCTIONEER'S Commission when due and subject to the provisions of clause 5 hereof,[2] then interest and thereafter to the payment of any monies due in terms to the agreement." (emphasis added)

[2] Clause 5 provided for the payment of auctioneer's commission, which, as is common cause, was paid as required.

19. As is by now trite, a unitary exercise must be undertaken by the court in its interpretation of contracts, taking into account text, context and purpose.[3]

20. While the text of a contract enjoys no interpretational primacy,[4] the starting point is to ascertain the meaning of the document as it appears from the text and then consider the context and purpose which might elucidate the text. In *Capitec,*[5] the Supreme Court of Appeal cautioned that "Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text." (emphasis added)

21. The first respondent's case for a breach by the appellant of its obligations under clause 3.3 of the agreement is premised on the use of the word 'secure' in clause 3.3. As earlier indicated, the first respondent relies, *inter alia,* on a breach of an alleged express obligation to make payment, at its election, of cash into the *trust account* of the seller's attorney.[6]

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[3] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) paras 65 & 66 (*'UJ'*); *Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022 (1) SA 100 (SCA), par 25.

[4] Id *UJ.*

[5] *Capitec Bank Holdings Ltd and Another v Coral lagoon Investments 194 (Pty) ltd and Others* 2022 (1) SA 100 (SCA) at para 51. See too: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

[6] In par 16.4.2 of the answering affidavit, the first respondent pleaded that "*The agreement further provides, clause 3.3, that the purchase price be secured by either the furnishing of a guarantee, alternatively the payment of the purchase price into the Seller's Attorneys Trust Account.*" (emphasis added).
It should, however, be remembered that clause 3.3 provided for payment of the *balance* of the purchase price, and not the full purchase price as such.

22. At the hearing of the matter, counsel for the first respondent persisted in the argument that the mechanism provided for securing payment of the balance of purchase price in clause 3.3, was for payment of the balance into the attorney's trust account. It is, however, immediately apparent from the text of clause 3.3 that it does *not* say that the balance, if paid in cash, must be paid by the purchaser into the trust account of the seller's attorneys. The first respondent's counsel readily made the concession during the hearing. All clause 3.3 says is that the purchaser may elect to secure the balance '**by payment** in cash to **the seller's attorneys, who shall hold** same in trust, pending registration of transfer...'. It is the seller's attorney who 'shall hold' the funds in trust (i.e., in her trust account) until registration of transfer. The duty to retain the funds in a trust account with the ostensible object of ensuring the availability of the funds on registration of transfer, was that of the seller's attorney, *not* the appellant. It is axiomatic, therefore, that if there was no obligation to pay the cash into the attorney's trust account, there was likewise no concomitant obligation on the appellant to ensure that the funds remained in the attorney's trust account until registration of transfer.

23. The contextual evidence does not in any event allow for the importation of the tacit term contended for by the first respondent. On the appellant's unrefuted version, it did not have the means or the authority to monitor Harper's activities in relation to how she dealt with payments received by her in order to keep the monies secure until registration of transfer. The first respondent did not provide as much as a clue as to how the appellant could or would monitor the Harper's operation and management of the third respondent's trust account, which was controlled by her in the capacity of principal. The funds were ostensibly to be held by Harper in

trust to give effect to the mandate of the client in whose name the funds were to be held in trust.[7]

24. The construction placed on clause 3.3 by the first respondent and the court below was to centre on the words 'to *secure* the balance...*by payment*' in clause 3.3. The court below effectually upheld the first respondent's contentions that (a) Harper was the appellant's agent in receiving the cash monies paid by the purchaser; (b) the appellant breached the agreement by not paying the monies into Harper's trust account; and (c) it was a tacit term of the agreement that the parties intended that the appellant's payment of cash was simply to act as security. The court below found that (d) clause 3.1 provided for *payment* of the deposit, in contrast to *securing the balance* per clause 3.3; (e) the balance could be *secured* (but not *paid*) in one of two ways: (i) by the provision of a satisfactory written guarantee; or (ii) by payment of cash in trust; (f) the cash payment provided for in clause 3.3 was to secure the balance rather than to discharge the purchaser's payment obligation; (g) in receiving the payment from the appellant, Harper acted as the purchaser's agent, so that payment to Harper did not serve to discharge the obligation to pay the seller; and (h) in the absence of the purchase price being secured as at registration of transfer, no obligation rested on the first respondent to transfer the property to the appellant.

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[7] In *Van Wyk Van Heerden Attorneys v Gore NO and Another* (828/2021) [2022] ZASCA 128 September 2022), par 23, Gorven JA pointed out as follows:
"...it is clear that attorneys operate on their trust accounts as principals and not as agents. This is because they, and only they, can instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. When attorneys operate on a trust bank account in accordance with their instructions, however, they may function at two levels. In the first place, because only they have the right to dispose of funds to the credit in that account pursuant to the banker-customer relationship, they do so as principal. In the second place, however, if they give effect to a mandate from the client in whose name the moneys are held in trust, they do so as agent." (emphasis added)

25. Both parties accept that clause 3.3 is to be read with clauses 9.1 and 14 of the agreement.[8] As regards clause 9.1, the court below found that there could never be a distinction between *pay* and *secure,* as the sub-clause is silent as to *how* the amounts referred to in cl 9.1 were to be paid or secured. It is however trite that, when interpreting a legal document, a court should not without necessity or sound reason, impute to its language tautology or superfluity.[9] A contract must be construed in such a manner that, as far as possible, effect is given to every word contained in it. Clause 3.3 provided for payment of the balance either in cash or by furnishing security in the form of a written guarantee from a bank or registered financial institution. [10]

26. When considered contextually, regard being had to other relevant provisions in the agreement,[11] clause 9.1 entitled the appellant to the transfer of the property if all amounts provided for in the agreement were

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[8] **Clause 9.1** reads:
"Transfer of the PROPERTY shall be passed, by the SELLER'S Attorneys, as soon as possible after date of acceptance, provided the PURCHASER has paid **or** secured all amounts payable in terms hereof."
Clause 14 is a breach clause, which provides, in relevant part, as follows:
"If one of the Parties commits a breach of the Agreement or fails to comply with any of the provisions hereof, then the Aggrieved party shall be entitled to give the Defaulting Party 7...days' notice in writing to remedy such breach or failure...If the Defaulting party fails to comply with such notice then the innocent party shall forthwith be entitled...:
14.1.1 to cancel this Agreement and upon cancellation: -

14.1.1.1 If the defaulting party is the PURCHASER the SELLER shall be entitled to retain all amounts paid by the PURCHASER, excluding AUCTIONEER'S commission, as rouwkoop...

14.1.1.2 If the defaulting party is the SELLER the PURCHASER shall be entitled to a full refund of all money paid in terms hereof to the seller ...

OR

14.1.2 to claim immediate performance and/or payment of all the defaulting party's obligations in terms hereof.

[9] *African Products (Pty) Ltd vAIG South Africa Ltd* 2009 (3) SA 473 (SCA), par 19.
[10] Clauses 1.6; 5.1 and 9.2 respectively provided for payment by the purchaser of the deposit to the auctioneer; auctioneer's commission; and transfer and ancillary costs.
[11] Clauses 1.6; 3; 5.1 and 9.2 of the agreement.

paid by it (a reference to payment in cash) as opposed to *secured* (a reference to the provision of a satisfactory guarantee (as envisaged in clauses 3.3).

27. The interpretation preferred by the court below in relation to clause 3.3 was that clause 3.3 provided for security, so that the appellant's cash payment of the balance of the purchase price did not represent a true or outright payment of the balance in discharge of the obligation to pay the balance, coupled with an unexpressed obligation on the part of the appellant to keep the monies it paid to the seller's attorneys, over which appellant had no further control, secure until registration of transfer. Such an interpretation leads, in my view, to insensible results.

28. Clause 14 provides, amongst others, that consequent upon the seller's default, the purchaser *shall be entitled* to a *full refund of* <u>*all money paid*</u> in terms of the agreement. On the interpretation preferred by the court below, despite having parted with its money in paying the full purchase price (the deposit and the balance in cash), upon a breach by the seller which he failed to remedy, the purchaser would only be entitled to a refund of the deposit and not the balance, since the balance would not be considered a true payment as yet. It begs the question: if the cash payment was only to constitute security, then how was the purchaser to effect true payment of the balance if it wanted to discharge its payment obligation prior to registration of transfer? In terms of clause 3.4, '<u>**Any payment** made by the PURCHASER</u> in terms of the Agreement <u>shall be allocated</u> first to the payment of AUCTIONEER'S Commission ...then interest and <u>thereafter to the payment of any monies due in terms to the agreement.</u>' (emphasis added). When clause 3.3 is read with clause 3.4 of the agreement, there was nothing prohibiting the purchaser from

discharging its obligation to pay the balance prior to registration of transfer. The balance was payable within 45 days of demand made by the seller's attorney (clause 3.3), and payment of the deposit, balance and all other amounts payable under the agreement was in fact effected by the appellant pursuant to demand and prior to registration of transfer.

29. As cautioned in *Endumeni,*[12] "A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made"

30. The apparent purpose of clause 3.3, read with clause 9.1, was to ensure that there was a person or stakeholder who could pass transfer on behalf of the seller; such a person was to have a trust account; such person was to be a conveyancing attorney; and once all amounts were either paid by the purchaser or secured in terms of the agreement, transfer would be passed by the attorney to the purchaser. The word 'secured' in clause 9.1 is to be read in the context of clause 3.3 allowing for security to be given to the seller's attorney in the form of a bank guarantee in respect of the balance if the purchaser elected to present a guarantee.

31. Apropos clauses 3, 9 and 14 of the agreement, the context in *casu* is informed by the following: (i) The parties appointed a third party (who was not a party to the agreement) to receive money from the purchaser,

[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), par 18.

for purposes of registration of transfer of the property from the seller to the purchaser;[13] (ii) The seller's attorney was the envisaged third party, who was appointed not only to receive money earmarked for the seller, but was also tasked to effect transfer to the purchaser and to pay the purchase price to the seller on registration of transfer; (iii) The seller insisted on the appointment of a specific conveyancing attorney nominated by him (Harper); (iv) Clause 3 provided for a mode of payment of both the deposit and the balance of the purchase price, which the parties agreed to. This is clear from the text of clause 3 in the first sentence located above the sub-paragraphs therein, which states that: *"**The Purchase Price** of the PROPERTY...**shall be paid as follows**:"*(emphasis added); It is further clear from the text of clause 3.3, that the only mode of payment provided for (if cash was utilised) was payment of the balance to a third party (the seller's attorney), upon demand;. (v) The purchaser and seller were in the position of debtor and creditor vis-à-vis the sale; (vi) Both the deposit and the balance of the purchase price were intended to be held in trust by the 'seller's attorney' pending registration of transfer. (vii) Harper, however, paid the deposit to the seller prior to registration of transfer and also misappropriated the cash balance, which she confirmed having received from the appellant, prior to registration of transfer. (viii) Harper's mandate was eventually terminated by mutual consent between the appellant and the first respondent.

32. As regards the interpretation by the court below, namely, that Harper acted as the appellant's agent in receiving the funds due to the seller, I agree with the appellant's counsel, that the absurdity arising therefrom is

[13] Money payments were in respect of the purchase price, including transfer costs, fees and related charges.

self-evident. It is illogical to suggest, on the facts of this matter, that the attorney who demands payment becomes the agent of the person from whom she demands payment. It is also inconsistent with the text of the agreement.

33. Whilst the court below dealt with the matter on the basis of agency, i.e., whether the seller's chosen attorney acted as the seller's or the buyer's agent in receiving the payment, the facts of the matter point to the attorney being in the position of an *adjectus solutionis causa*, (*'adjectus'*) rather than a true agent or mandatory to make payment, whether for one or the other party or both parties.

34. As the learned author Scott points out, [14] an *adjectus* is a person, other than the creditor, appointed in a contract between a creditor and a debtor as the person to whom payment should be made. Payment to the *adjectus* will discharge the obligation between the contracting parties.[15] The *adjectus* acquires no rights and the person who appoints him/her remains the creditor of the debtor.[16] The *adjectus* can only be terminated upon mutual consent between the creditor and debtor (contracting parties).[17]

35. It follows that a discharge of the payment obligation in clause 3.3 by means of the appellant's payment of the balance to the *adjectus*, amounted to a complete fulfilment of its obligation vis-a-vis the balance of the purchase price. In terms of clause 9.1, once all amounts payable

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[14] Scott on Cession – A Treatise on the Law in South Africa, First edition 2018, at p 75
[15] *Mahomed v Lockhat Bros & Co Ltd* 1944 AD 230 at 237 ff and further cases cited in fn 96 at p 75 of Scott's book.
[16] *Stupel & Berman Inc v Rodel Financial Services* 2015 (3) SA 36 (SCA) at 43D-F.
[17] *Administrator Natal v Magill, Grant & Nell (Pty) Ltd In Liquidation* 1969 (1) SA 660 (A) 669; *Stupel & Berman supra*, par 15.

under the agreement were paid, the reciprocal obligation by the first respondent to perform (pass transfer) was triggered.

36. In conclusion, payment of the balance of the purchase price to the seller's attorney constituted performance by the appellant of its obligation under clause 3.3 of the agreement. Having paid all amounts due in terms of the agreement, the appellant was entitled to registration of transfer as envisaged in clause 9.1. The appellant was therefore within its rights to send a breach notice, and consequent upon the first respondent's failure to remedy his default, to seek immediate performance as envisaged in clause 14 of the agreement.

37. In so far as the conclusion reached herein differs from that of the court below, the latter respectfully erred.

38. The seller is not without recourse. It is open to him to seek recourse against the second respondent or to lodge a claim against the Legal Practitioner's Fidelity Fund.

39. Despite the appellant having been represented by both senior and junior counsel in the appeal, the matter was not of such complexity as to warrant the imposition of costs on scale C.

40. Accordingly, the following order is granted:

ORDER

1. The order of the court a quo is set aside and replaced with the following order:

a) The 1st Respondent is declared to be in breach of the agreement concluded between the Applicant and him on 22 April 2022, in relation 20 to the sale by the 1st Respondent to the Applicant of the immovable property Unit [redacted] in the Sectional Title Scheme [redacted], [redacted], situated on Erf [redacted] and held under Deed of Transfer [redacted] with its physical address at [redacted] ("the property");

b) The 1st Respondent is ordered and directed, within 10 (ten) days from date of the granting of this order, to: -

1.1 to take all such steps necessary to cause registration transfer of the property from 1st Respondent to the Applicant;

1.2 in this aforesaid regard and pursuant thereto, to: -

1.2.1 to sign all such documents;
1.2.2 effect all such payments as may be necessary;
1.2.3 cause to be lodged with the Registrar of Deeds all such documents; and
1.2.4 generally, perform all such acts as may be necessary, to cause and secure registration of transfer of the property from the 1st Respondent and to the Applicant; and

1.3 furnish the Applicant or its nominee forthwith on demand, with satisfactory proof of all such acts performed or to be performed by the 1st Respondent as contemplated in paragraph 1.2 above, to cause and secure registration of transfer of the property from the 1st Respondent to the Applicant;

c) In the event of the 1st Respondent failing, refusing or neglecting to perform all such acts as contemplated in paragraph 1.2 above within 10 (ten) days and furnishing the Applicant or its nominee with satisfactory proof evidencing the 1st Respondent's compliance with paragraph 1.2 above, the Sheriff of the High Court is authorised, directed and appointed to attend to and perform all such acts and sign all such documents as may be necessary to effect, secure and cause transfer of the property from the 1st Respondent to the Applicant;

d) The first respondent is to pay the appellant's costs of appeal on scale B.

[redacted]

A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered:

[redacted]

T. SIWENDU
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

I agree

[redacted]

L. FLATELA
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 12 March 2025
Judgment delivered: 2 April 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 2 April 2025.

APPEARANCES:

Counsel for Appellant:	Adv EL Theron SC together with Adv JG Botha
Instructed by:	De Wet Reitz Inc
Counsel for First Respondent	Adv M Smit
Instructed by:	Martin Pyke Inc