



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case number: **255/07**

In the matter between:

**MICHAEL HUGH BLAKE
ODHIN INVESTMENTS CC**

1st Appellant
2nd Appellant

and

**ZAHEER CASSIM
THEODOR WILHELM VAN DEN HEEVEN NNO**

1st Respondent
2nd Respondent

CORAM: **MPATI AP, CAMERON, CLOETE, PONNAN JJA and LEACH
AJA**

HEARD: **5 MAY 2008**

DELIVERED: **29 MAY 2008**

Summary: Contract – sale of immovable property – no obligation on seller to define form of guarantee before making demand for furnishing it – written agreement stipulates clearly time when guarantees to be furnished – seller entitled to cancel for failure to furnish guarantees on due date.

**Neutral citation: M H BLAKE AND ANOTHER v Z CASSIM AND ANOTHER
(255/2007) [2008] ZASCA 67 (29 MAY 2008)**

MPATI AP:

[1] This appeal concerns the interpretation of certain clauses in a written agreement of sale of a 100% member's interest in the second appellant, a close corporation (the CC). The issue in the appeal is whether the purchaser, Mr M I Mia, and subsequently the respondents, who are the trustees in Mr Mia's insolvent estate, breached their contractual obligations, as buyers, by failing to deliver acceptable guarantees for payment of the balance of the purchase price in terms of the agreement. A related issue, which is crucial to the appeal, is whether the first appellant validly and lawfully cancelled the agreement pursuant to the alleged breach.

[2] On 15 April 2002 Mr Mia and a consortium of six persons, represented by the first appellant, who was part of the consortium, concluded a written agreement in terms of which Mr Mia purchased from the consortium a 100% member's interest in the CC. The purchase price was R1 600 000.00. The consortium was engaged in the development of immovable property on the north coast of KwaZulu-Natal, which was to be marketed under a sectional title scheme to be known as 'Lazy Lizard'. The agreement records that the developer, Dusky Dolphin Share Block (Proprietary) Limited, is the registered owner of the immovable property concerned and that it was in the process of erecting, or had completed the erection of, a sectional title scheme (the scheme). The developer intended to apply, upon erection of sectional title units forming part of the first phase of the scheme, for the registration of the sectional plan in respect of such units and the opening of a sectional title register incorporating them.

[3] The agreement records further that upon the opening of the register 'and upon compliance with the provisions of' the agreement, a unit, which it is common cause was a penthouse on the top floor of the proposed building, was to be transferred to the second appellant at the purchaser's expense. The unit was thus to be an asset in the second appellant.

[4] Clause 8.1 of the agreement stipulates, among other things, that as soon as

reasonably possible after signature thereof the sellers shall 'deliver and hand over' to their attorneys, pending fulfilment by the purchaser of his obligations, an amended founding statement (form CK 2) duly signed, resigning their membership of the second appellant. This would enable the registration of Mr Mia as sole member of the second appellant.

[5] The terms on which the purchase price was to be paid are partly set out in a schedule to the written agreement. The relevant parts of the schedule provide:

- 'A. ...
- B. ...
- C. ...
- D. R1 600 000.00
(Purchase Price – words and figures)
- D.1 R50 000.00 (FIFTY THOUSAND RAND)
(Deposit – words and figures)
- D.2 R1 550 000.00 (ONE MILLION FIVE HUNDRED AND FIFTY THOUSAND)
(Balance of Purchase Price – words and figures)
- D.2.1.1 R250 000.00 (TWO HUNDRED AND FIFTY THOUSAND)
(First guarantee – words and figures)
- D.2.1.2 _____
(First date to furnish guarantee)
- D.2.2.1 R1 300 000.00 (ONE MILION THREE HUNDRED THOUSAND)
(Second guarantee – words and figures)
- D.2.2.2 _____
(Date to furnish second guarantee)
- ...'

It will be noted that no dates were stipulated for the furnishing of the guarantees.

[6] Clause 5 of the agreement reads:

'PAYMENT OF THE PURCHASE PRICE

- 5.1 A deposit of SEE ITEM D.1 OF THE SCHEDULE shall be paid to the Attorneys within 7 (Seven) days of signature hereof by the parties to this agreement;
- 5.2 The balance of the purchase price in the amount of SEE ITEM D.2 OF THE SCHEDULE shall be paid by the Purchasers to the Attorneys on transfer date and pending the transfer date shall be secured as follows:-
 - 5.2.1 a Bank guarantee acceptable to the Attorneys for the amount of SEE ITEM D.2.1.1 shall be furnished to the Attorneys on or before SEE ITEM D.2.1.2 OF THE SCHEDULE;
 - 5.2.2 a Bank guarantee acceptable to the Attorneys for the amount of SEE ITEM D.2.2.1 OF THE SCHEDULE shall be furnished to the Attorneys on or before SEE ITEM D.2.2.2 OF THE SCHEDULE;

...'

Clause 20 of the written agreement contains special conditions which are in the following terms:

- '20.1 ...
- 20.2 With reference to clause D of the schedule, it is recorded that the said guarantee is to be furnished from the proceeds of the sale of the purchaser's property, namely 5 Villa La Mer, North Beach Road, Umdloti.
- 20.2.1 The purchaser shall have 12 months from date hereof, to sell the said property. At the end of the said 12 months period, this condition shall expire and guarantees for the full purchase price shall be provided by the purchaser.'

The term 'transfer' is defined in the written agreement as 'the date of registration in the Registrar of Close Corporations Office, Pretoria, of the Amended Founding Statement (CK 2) reflecting the Purchasers as owners of the members' interest and the words "transfer date" shall have the corresponding meaning'.

[7] Subsequent to the conclusion of the agreement, the first appellant assumed all the sellers' rights and obligations under it. It is not in dispute that Mr Mia only paid R25 000.00 of the agreed deposit of R50 000.00. There were some skirmishes between the parties to the agreement arising from Mr Mia's failure to pay the deposit in full, but these are not germane for the determination of this appeal. Mr Mia's estate was, however, provisionally

sequestered on 14 October 2003 and, finally, on 25 November 2003. On 18 December 2003 the respondents were appointed as joint trustees in Mr Mia's insolvent estate. Following their appointment the respondents advised the first appellant's attorneys, by letter dated 23 December 2003 that they intended to proceed with the purchase, on behalf of the insolvent estate, of the members' interest in the CC.

[8] Further correspondence passed between the parties relating to the furnishing of guarantees for the balance of the purchase price. On 21 January 2004 the first appellant's attorneys (Mooney Ford Attorneys) placed the respondent *in mora*. The relevant portion of the letter reads:

'... you have failed to deliver the bank guarantees referred to in clauses D.2.1.1 and D.2.2.1 of the schedule to the Sale Agreement, notwithstanding our request for same.

Notice is hereby given to you in terms of clause 13 of the Sale agreement that you are to remedy your aforesaid breaches within FOURTEEN (14) days after the date of posting hereof.'

Should you fail to remedy your breach aforesaid, our instructions are that the seller intends cancelling the Agreement without prejudice to the seller's rights to claim damages.

...'

Clause 13 of the agreement stipulates that –

'[i]n the event of either party committing any breach of the terms of this agreement, and failing to remedy such breach within 14 days of the date of the posting by prepaid registered post by the aggrieved party to the offending party requiring the remedying of such breach to the address chosen by the offending party as his domicilium citandi et executandi below, then without any further notice the aggrieved party shall be entitled either to claim specific performance under this agreement or alternatively to cancel this agreement.

...'

In response¹ the respondents confirmed holding R250 000.00 in trust² for payment to Mooney Ford Attorneys and attached to their letter an undertaking by their attorneys to pay that amount. The respondents also expressed disagreement with the contention on behalf of the first appellant that the second guarantee (of R1 300 000.00) was due and averred

1 By letter dated 23 December 2003, but faxed in January 2004.

that it would be due 'on date of transfer'.³

[9] However, on 2 February 2004 the respondents wrote to Mooney Ford Attorneys advising that they were 'in a position to deliver guarantees for the full amount of R1 550 000.00'. The last paragraph of the letter reads:

'We are issuing the guarantee for the balance [of the] purchase price in favour of your firm to comply with the conditions of the contract. Should you wish to amend the guarantee, please let us know what your guarantee requirements are.'

In a letter dated 4 February 2004 Mooney Ford Attorneys directed that the guarantee 'is to be expressed as being payable upon written confirmation' of the following:

- '1. Opening of the sectional register in respect of the scheme to be known as Lazy Lizard.
2. Transfer from Dusky Dolphin CC to Insolvent Estate M I Mia of proposed unit 702 in the scheme to be known as Lazy Lizard.
3. Release of the property described in 1 above from the operation of the existing [bond] by Dusky Dolphin CC in favour of Absa Bank Limited.'⁴

On the same day the respondents replied in the following terms:

' . . .

We have been advised by Standard Bank that a bond has been granted in favour of the purchaser in the amount of R2 250 000.00 but that their standard policy will be to authorise and sign bank guarantees only upon the completion of the building. Accordingly, guarantees for the full balance outstanding (R1 550 000.00) will be issued upon the opening of the Sectional Title Register.

. . . '

On 6 February 2004 the respondents passed on to Mooney Ford Attorneys a letter they had received from Standard Bank confirming the bond amount of R2 250 000.00 and the guarantees for R1 550 000.00 which would be issued 'once the following conditions have been met':

2 The amount was deposited in the trust account of Mooney Ford Attorneys on 4 February 2004.

3 The respondents apparently laboured under a wrong impression. After signature of the agreement the sellers' agent had inserted the words 'on date of transfer at paragraph D.2.2.2 of the schedule'. The words inserted were, however, not a term of the agreement signed by the parties to it.

4 In a previous letter dated 2 February 2004 Mooney Ford Attorneys had indicated that they would accept guarantees in their favour as suggested by the respondents in their letter of 2 February 2004. The letter also reminded the respondents that the guarantees 'are now due'.

- ‘1. Opening of a Sectional register for the scheme Lazy Lizard.
2. Transfer of the property into the name of Odhin Investments CC.
3. Cancellation of all existing bonds over the property.
4. Final inspection by SBSA (Standard Bank of South Africa) after completion.’

[10] Mooney Ford Attorneys rejected the letter from Standard Bank on the basis that its format ‘does not constitute a bank guarantee and is not acceptable in terms of the provisions of clause 5.2.2 read together with item D.2.2.1 of the schedule’.⁵ They advised further that the first appellant ‘has cancelled the Agreement’.

[11] Following a further exchange of correspondence between Mooney Ford Attorneys and the respondents, the latter launched an application for an order declaring invalid the cancellation of the agreement by the first appellant. When the matter came before Hurt J in the Durban High Court it was agreed between the parties that the respondents would deliver a declaration and that the matter proceed to trial.

[12] The declaration was delivered on 27 May 2004, but yet further correspondence was exchanged between the parties during the period June to November 2004. The respondents attempted to furnish a guarantee from Standard Bank purporting to secure the balance of the purchase price but Mooney Ford Attorneys returned it as certain paragraphs were unacceptable to them.

[13] In their amended declaration the respondents alleged that on a proper construction of the agreement the earliest date upon which the seller was entitled to call for delivery of, and Mr Mia became obliged to provide, a banker’s guarantee for the amount of R1 300 000.00 representing the second guarantee ‘was no earlier than a reasonable time before the date upon which [the first appellant’s attorneys] would be in a position to lodge the necessary documents required for the registration of transfer of unit 702’.⁶ The

5 Per letter dated 10 February 2004.

6 The main claim set out in the amended declaration is for rectification of the agreement. In a minute of a pre-trial conference in terms of Rule 37 held on 4 May 2006 it is recorded that the respondents intended to rely ‘on the alternative claim set out in paragraphs 10-15 of [the] amended declaration’. That is the claim summarised in paragraph 14, and on which the trial proceeded.

respondents accordingly sought an order directing the appellants to deliver to them ‘all documentation to enable them to obtain registration into their name of an unencumbered 100% member’s interest in [the CC]’.⁷

[14] It may be mentioned that it is not in dispute that the sectional title register was eventually opened on 21 January 2005 and that documentation for the transfer of the first unit in the scheme was lodged with the Registrar of Deeds in Pietermaritzburg on 12 January 2005. That unit was transferred into the name of the purchaser thereof on 21 January 2005. I mention this merely because it was pleaded in the declaration, the respondents alleging that they were unaware of these developments at the time.

[15] In their plea the appellants relied on clause 20.2 of the written agreement and averred, *inter alia*, that regardless of whether or not the Umdloti immovable property (Mr Mia’s) was sold, the purchaser would be obliged to furnish the first and second guarantees within a period of twelve months of the date of the conclusion of the agreement. The court *a quo* (Hurt J) upheld the respondent’s claim and declared the written agreement to be of full force and effect. It granted ancillary relief in accordance with draft orders furnished by the parties’ legal representatives at its request. This appeal is with its leave.

[16] It seems to me that the resolution of the issues in this matter depends upon a proper construction of clause 20.2.¹⁸ of the written agreement. However, the court *a quo* found in favour of the respondents on two bases. With regard to clause 20.2.1 it said:

‘ . . . I do not think that it is necessary to delve into the question of whether clause 20.2 of the “true agreement” between the parties should be interpreted as requiring the purchaser to deliver a guarantee for the full purchase price at the end of the twelve-month period referred to in clause 20.2. What is abundantly clear in this case is that by the time the seller’s attorney was instructed to deal with this aspect of the performance of the contract, both parties were genuinely under the misapprehension that their contract stipulated that “the second guarantee” would have to be provided at the time when it was necessary to secure the seller’s rights in the course of transfer. In such circumstances it would be artificial in the extreme to judge the parties’ dealings in relation to the guarantees, by the application of contractual provisions of which both of them were unaware.’

7 There is also an alternative order sought which it is not necessary to set out here.

8 Quoted in para 6 above.

(p 633)

The 'misapprehension' referred to by the court *a quo* relates to another document which is identical to the written agreement, but amended without authority by the sellers' agent who had inserted, in the schedule thereto, the words: 'ON DATE OF TRANSFER' in the space provided for the date on which the second guarantee was to be furnished.⁹ The amendments were effected after the written agreement had been signed by the parties.

[17] The court *a quo* accordingly reasoned that the matter had to be considered 'in the light of the exchanges which took place during and after December 2003'. The exchanges referred to are (a) a letter written by respondent on 22 December 2003 to Mooney Ford Attorneys advising, *inter alia*, that they would furnish guarantees within 48 hours of receiving clarification on certain matters relating to plans for the property; (b) a letter dated 14 January 2004 in which Mooney Ford Attorneys called for, among others, both guarantees to be furnished forthwith, as they were due; (c) a letter from the respondents to Mooney Ford Attorneys dated 27 January 2004,¹⁰ expressing disagreement with the latter's view that the second guarantee was due, and stating that it would only be due 'on date of transfer';¹¹ (d) a reply dated 2 February 2004 in which Mooney Ford Attorneys acknowledged that an error had occurred at the time of the conclusion of the agreement for which rectification was required as it was common cause that the guarantee could not be delivered on date of transfer, but prior to transfer and thus on demand; and (e) a response from the respondents dated 3 February 2004 stating, in the last paragraph thereof, that the guarantees were clearly intended to be delivered 'when you are in a position to lodge for transfer'.

[18] Citing *Hofmeyr NO v Brunofarms (Pty) Ltd*¹² and *Wehr v Botha NO*¹³ the court *a quo*, accepting that the guarantees were to be furnished before transfer, held that they

9 There was also another insertion in the schedule, which is not relevant for the determination of the issues.

10 This letter was in response to Mooney Ford Attorneys' letter of 2 January 2004 referred to in para 7 above and which placed respondents *in mora*.

11 This was obviously because of the insertion made by the sellers' agent as mentioned in para 17 above.

12 1955 (2) PH A 42.

(guarantees) were due 'on demand when the conveyancer is ready to lodge the documents required for transfer'. The court accordingly concluded that the *mora* notice of 21 January 2004¹⁴ 'was ineffective as a precursor to a valid cancellation of the contract'.

[19] It is true that the correspondence just referred to¹⁵ shows that the authors had before them the unauthorised 'amended version' of the written agreement. The first appellant, who was the only witness to testify at the trial, apart from an expert witness, said, however, that he had always had in his possession a copy of the unamended version of the written agreement. But apart from the first appellant's assertion, it seems to me that the court *a quo* was clearly wrong in ignoring the terms of the actual contract and to decide the issue of the due date of the guarantees on a term that was never agreed upon, which was inserted after the written agreement had been signed by the parties to it. Clause 15.1 of the written agreement provides:

'This agreement constitutes the sole and exclusive memorial of the agreement between the Seller and the Purchaser and no alteration, variation, deletion or consensual cancellation hereof shall be binding on either the Seller or the Purchaser unless reduced to writing and signed by both parties.'

The insertion in issue was not signed by the parties to the agreement and therefore not part of their agreement.

[20] The second basis upon which Hurt J found for the respondents relates to the form of the guarantees that were to be furnished. The written agreement provides only that guarantees acceptable to the sellers' attorneys were required.¹⁶ In this regard the court *a quo* said:

'Where the form of the guarantee is not defined with reasonable clarity in the contract (e.g. where the contract stipulates that the guarantee must be in a form "acceptable to the seller's attorney"), and where the seller is driven to put the purchaser on terms to deliver the guarantee, he should make it clear to the purchaser what particular features of the guarantee would make it "acceptable" to him. Otherwise he will be putting the purchaser on terms to remedy a situation where the purchaser cannot be sure that what he does will constitute

13 1965 (3) SA 46 (A) at 59E-H.

14 See para 7 above.

15 Above para 15.

16 See clause 5.2 quoted in para 5 above.

proper performance.'

And further:

'It was not, in my view, open to the seller's attorney to stipulate simply that guarantees be delivered, on pain of cancellation, and then to sit back and wait for a tender before deciding what sort of guarantee would be acceptable. In my view, it was incumbent upon the attorney, at the stage when he purported to put the Plaintiffs on terms to remedy their alleged breach, to define precisely what form of guarantee would be treated as "acceptable" by him. It is clear from the correspondence, however, that it was only in the letter of 4 February 2004 (which was at the very end of the fourteen day period stipulated in the letter of 21 January 2004) that the format of the guarantees required by the seller's attorney was clarified.'

According to this reasoning an obligation is placed on the seller to define what form of guarantee would be acceptable before a demand may be made for the furnishing of a guarantee.

[21] I do not agree with this proposition. The form of a guarantee in a written contract of sale will generally be ascertainable from the terms of the particular agreement, if not separately agreed upon by the parties. The parties may, of course, agree to amend the form agreed upon in the written agreement. And once a guarantee has been furnished the seller will either accept or reject it. If it is rejected, the seller will obviously advise the basis of the rejection, which, if unreasonable, may be challenged by the purchaser.

[22] In *Dharumpal Transport (Pty) Ltd v Dharumpal*¹⁷ the written contract of sale of certain buses stipulated that the bills of exchange to be provided by the purchaser 'shall be endorsed as guarantor and co-principal debtor by a person whom the seller shall consider as sufficient and suitable'. In an exception to a claim for payment of the balance of the purchase price, it was argued on behalf of the excipient that the stipulation made the contract depend solely upon the will of the seller and was thus unenforceable. This court held that the seller was not entitled to reject a proposed guarantor from pure caprice; and that at least the seller must exercise an honest judgment in deciding whether the proposed

guarantor was sufficient and suitable.¹⁸ Hoexter JA, for the unanimous court, elaborated thus:

'I can see no reason why a Court should not be able to determine whether the seller has exercised the *arbitrium boni viri* in rejecting a proposed guarantor. In the case of *Machanick v Simon*, 1920 C.P.D. 333, in which goods were sold subject to the seller's approval of the buyer's financial stability, it was held by JUTA, J.P., that the discretion thus given to the seller had to be exercised *arbitrio boni viri*. In the present case a discretion is given to the seller to approve of the guarantor, and he must exercise that discretion *arbitrio boni viri*.' (p 707A-B)

Similar considerations would apply in a matter such as the present.

[23] In their letter to Mooney Ford Attorneys dated 2 February 2004 the respondents convey that they were to issue a guarantee 'in favour of your firm to comply with the conditions of the contract'. Mooney Ford Attorneys were then invited to advise of their requirements '[s]hould you wish to amend the guarantee'. (My emphasis.) This clearly indicates, in my view, that the respondents were in a position to establish what the requirements of the guarantee were in terms of the contract, but were willing to depart from them in accordance with the wishes of the appellants. But nothing would have prevented the respondents from ignoring 'additional' requirements, or an amendment to the requirements agreed upon in the written agreement if those were, e.g. onerous or, for whatever reason, unacceptable to them, and to furnish a guarantee that is in compliance with the terms of the agreement. It would then be open to the respondents to lodge a challenge in the event of the seller's rejection of the guarantee.

[24] I am satisfied that in placing an obligation on the seller to define what form of guarantee would be acceptable before a demand can be made for the furnishing of it, the court *a quo* erred. The defence of the *exceptio non adimpleti contractus* raised by the respondents on the grounds that the appellants were not entitled to demand performance (furnishing of a guarantee) whilst they had failed to advise of a format of the guarantee consistent with the agreement cannot be sustained.

[25] In any event, the letter from Standard Bank¹⁹ which was passed on to Mooney Ford Attorneys by the respondents on 5 February 2004, besides the fact that it does not constitute a guarantee, clearly set new conditions regarding the furnishing of the guarantees. It stated that the guarantees would be furnished once certain conditions had been met. The contents of the letter thus amounted to an alteration of the terms of the agreement between the parties. This is prohibited by clause 15.1 of the written agreement,²⁰ unless the alteration was signed by both parties. This brings me to the proper construction of clause 20.2 of the written agreement.

[26] Counsel for the respondents submitted that on a fair reading of the agreement, and having regard to clause 20.2.1,²¹ Mr Mia was given a period of 12 months before there could be any call for guarantees. It is only after the twelve-month period that the condition would expire and that 'guarantees for the full purchase price shall be provided by the purchaser'. And as to the time when the guarantees could be demanded, counsel argued, on the principle enunciated in *Hammer v Klein and another*²² and *Wehr v Botha*,²³ that such guarantees could only be required after the period of 12 months, provided the first appellant was in a position to perform, that is, provided the seller was ready to effect transfer of the member's interest in the second appellant.

[27] I do not agree. Clause 20.2 of the written agreement stipulates clearly that the first guarantee of R250 000.00 was to be furnished from the proceeds of the sale of Mr Mia's fixed property at Umdloti. Clause 20.2.1 afforded Mr Mia a period of 12 months from the date on which the agreement became effective, within which to sell that property. This means that Mr Mia had 12 months to sell his property, and that the first guarantee would not be due until the expiry of that period. However, upon the expiry of the twelve-month period, and if Mr Mia's property had not been sold, this condition also expires 'and

18 At 707A.

19 Referred to in para 9 above.

20 Quoted in para 19 above.

21 Quoted in para 5 above.

22 1951 (2) SA 101 (A) at 105E–106C.

guarantees for the full purchase price shall be provided . . .'. A time was, therefore, stipulated as to when the first guarantee was to be furnished. If it had been furnished as stipulated, then the second guarantee in respect of which no time had been agreed upon, would have become due when the seller was ready to effect transfer of the member's interest in the second appellant.

[28] The position changed, however, when Mr Mia failed to furnish the first guarantee within the agreed twelve-month period. Now both guarantees had to be furnished. In my view, it would make no commercial sense were the sellers to stipulate a time for the delivery of the first guarantee and to be content with no time being fixed for the delivery of both guarantees in the event of a failure to furnish the first guarantee. In my view, a proper construction of clauses 20.2 and 20.2.1 is that upon failure by Mr Mia to furnish the first guarantee, as indeed occurred, both guarantees had to be furnished upon the expiry of the agreed period of 12 months. At the risk of repeating, the second part of clause 20.2.1 reads:

'At the end of the said 12 months period, this condition shall expire and guarantees for the full purchase price shall be provided by the purchaser.' (My emphasis.)

Two things were to occur at the end of the period of 12 months. The first is that the period within which the first guarantee had to be furnished was to expire. The second is that guarantees (plural) for 'the full purchase price,' i.e. guarantees for the full balance of the purchase price had to be provided.

[29] It follows that when Mooney Ford Attorneys made demand on 21 January 2004 that the guarantees be furnished the guarantees were due. The seller was accordingly entitled to place the respondents *in mora*. And upon the respondents' failure to remedy the breach within the time stipulated in the demand, the seller was entitled to cancel the agreement. The appeal must therefore succeed.

[30] Counsel were agreed that in the event of the appeal succeeding, costs should follow

the result, except for those costs occasioned by the filing by the appellants of their fourth set of affidavits in the application, and the respondents' filing of a fifth set. The appellants tendered the costs occasioned by the filing of these additional affidavits.

[31] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and for it is substituted the following:
 - '(a) The plaintiffs' claim is dismissed with costs, which costs are to exclude the costs occasioned by the filing, by the respondents in the application (defendants), of a fourth set of affidavits and the applicants' (plaintiffs') filing of a fifth set.
 - (b) The costs occasioned by the filing of the additional affidavits referred to in (a) above are to be paid by the first defendant.'

MPATI AP

CONCUR:

CAMERON JA

CLOETE JA

PONNAN JA

LEACH AJA