THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 263/19

In the matter between:

PHILLIPA SUSAN VAN ZYL NO **APPELLANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Phillipa Susan van Zyl NO v The Road Accident Fund* (263/19) [2020] ZASCA 51 (6 May 2020)

Coram: MAYA P and ZONDI and MOKGOHLOA JJA and KOEN and EKSTEEN AJJA

Heard: 16 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 6 May 2020.

Summary: Interpretation of statutes – provisions of Prescription Act 68 of 1969 not applicable to claims under the Road Accident Fund Act 56 of 1996 – prescription of such claims regulated by s 23 of Road Accident Fund Act.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Bloem J, sitting as court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Zondi JA (Maya P and Mokgohloa JA and Koen and Eksteen AJJA concurring)

[1] This appeal concerns the question whether the running of prescription in respect of Mr Koos Jacobs' claim for damages under the Road Accident Fund Act 56 of 1996 (the RAF Act) is governed exclusively by the provisions of s 23 of the RAF Act, or whether s 13(1) of the Prescription Act 68 of 1969 also applies to the claim. On behalf of Mr Jacobs it was contended that the provisions of s 13(1) of the Prescription Act also apply to his claim for compensation under the RAF Act and that his claim therefore had not become prescribed. The argument on behalf of the Road Accident Fund (the RAF), by contrast, was that the provisions of s 23 of the RAF Act apply to the exclusion of s 13(1) of the Prescription Act.

[2] The Eastern Cape Division of the High Court, Grahamstown (Bloem J) held that the provisions of s 23 of the RAF Act apply to the claim to the exclusion of s 13(1) of the Prescription Act, and held that Mr Jacobs' claim had indeed become prescribed. It accordingly dismissed Mr Jacobs' claim. The appeal, with leave of the court below, is against this order upholding the special plea.

[3] The issue arose in these circumstances. On 1 May 2010 and at Willowmore, Eastern Cape, Mr Jacobs, who was born on 2 November 1972, sustained serious head injuries when a motor vehicle bearing registration number CB 534376, in which he was a passenger, was involved in a collision. His occupational functioning

has been adversely affected due to the combination of physical difficulties (left hemiparesis and communication difficulties) and symptoms of Organic Brain Syndrome. The nature and extent of the injuries sustained by Mr Jacobs are set out more fully in the medico-legal report compiled by Dr David Shevel. He lodged a claim with the RAF on 18 January 2017, some seven years after the date of the accident. The RAF repudiated the claim based on prescription. In terms of s 23 of the RAF Act Mr Jacobs' claim should have been lodged with the RAF by 30 April 2013 and he should have served summons against the RAF by 30 April 2015. He did not do so for the reasons that will become apparent later in this judgment.

[4] On 28 November 2017 the appellant was appointed as the *curatrix ad litem* to Mr Jacobs by order of court. That order placed Mr Jacobs under curatorship. On 8 March 2018 the appellant in her capacity as *curatrix ad litem* instituted action against the RAF[1] in which she claimed damages on behalf of Mr Jacobs. The RAF defended the action and raised a special plea of prescription. It contended that the right to claim compensation under s 17 of the RAF Act had prescribed as it was not lodged within the period of three years from the date of the accident, and that Mr Jacobs did not fall under the categories of persons referred to in s 23(2) of the RAF Act. The persons referred to in s 23(2) are 'a minor; any person detained as a patient in terms of any mental health legislation; or a person under curatorship'. Subsection (3) provides that once a claim has been lodged in terms of s 17(4)*(a)* or s 24 of the RAF Act, a claimant gains an additional two years before the claim finally prescribes.[2]

[5] It is apparent from the facts thus far set out that Mr Jacobs, because of prescription, could not claim compensation under the RAF Act unless the provisions of the Prescription Act also apply to his claim. The appointment of the

[1] It is not clear when the summons was served on the RAF.
[2] Mr Jacobs was placed under curatorship on 28 November 2017 when his claim had become prescribed under the Act.

~~a~~ curatrix did not render him retrospectively a person under curatorship as contemplated by s 23(2)*(c)* of the RAF Act. That appointment occurred when his claim had already prescribed.

[6] In her replication, the appellant pleaded that although Mr Jacobs did not *strictu senso* fall within the class of persons referred to in s 23(2) of the RAF Act, he had at all times material hereto, since the incident on 1 May 2010, been of unsound mind and/or was insane and/or unable to manage his affairs and would have qualified for the appointment of a *curator ad litem* to assist him with the litigation. The alternative reply to the RAF's prescription plea was pleaded as follows:

'6. Further in the alternative and in any event, the provisions of sections 12(3) and/or 13(1)(a) of the Prescription Act 68 of 1969 find application, in that the Patient, at all material times hereto:

6.1 has lacked (a) the requisite capacity to institute action, and (b) the ability to gain *"knowledge of the identity of the debtor and of the facts from which the debt arises"*, as envisaged by section 12(3) of Act 68 of 1969; and/or

6.2 is to be regarded as an *"insane"* person (i.e. of unsound mind incapable of managing his affairs and with no capacity to institute action) as envisaged by section 13(1)(a) of Act 68 of 1969, read with *Road Accident Fund v Smith NO* 1999 (1) SA 92 (SCA) and *RAF v Mdeyide and another* 2007 (7) BCLR 805 (CC) at paragraphs 31 to 40.'

[7] Section 23 of the RAF Act provides:

'**23. Prescription of claim.**—(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.

(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against—

(a) a minor;

(b) any person detained as a patient in terms of any mental health legislation; or

(c) a person under curatorship.

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)*(a)* or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.'

[8] The material provisions of s 13(1)*(a)* of the Prescription Act read:

'**13. Completion of prescription delayed in certain circumstances**.–(1) If-

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1)…the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

[9] The special plea was separately adjudicated by the high court and for that purpose the parties agreed that the following facts were common cause between them:

'1. The patient was involved in a motor vehicle collision on 1 May 2010;

2. The patient's claim was lodged with the Road Accident Fund on 18 January 2017;

3. The Curatrix Ad Litem was appointed by a court order on 28 November 2017;

4. Purely for purposes of the adjudication of the Special Plea of prescription, the Defendant admits:

4.1 The content of the medico-legal reports of Dr D Shevel and Dr R Melvill;

4.2 That the patient, Mr Koos Jacobs, was rendered of unsound mind and/or non-compos mentis as a result of the injuries sustained in the incident dated 1 May 2010, as described in the Particulars of Claim at paragraph 3. In the event of the Special Plea not being upheld, the Defendant shall not be bound by such admission and reserves its rights to obtain its own expert reports in rebuttal of the views expressed in the reports of Dr Shevel and Dr Melvill.

5. Summons was issued against the Defendant of 8 [March] 2018.'

[10] In upholding the special plea the high court held that s 13(1)*(a)* of the Prescription Act does not apply to Mr Jacobs' claim because of the inconsistency between the provisions of that section and those of s 23(2)*(b)* of the RAF Act.

[11] Counsel for the appellant submitted that upholding the high court judgment will result in the exclusion of two classes of persons from protection, namely mentally incapacitated persons, unless they are detained as patients in terms of the mental health legislation referred to under s 23(2)*(b)* and other mentally disabled unless they are under curatorship as envisaged in s 23(2)*(c)* of the RAF Act. He argued that the decision of this Court in *Road Accident Fund v Smith NO,*[3] which held that both classes of persons were protected by s 13(1)*(a)* of the Prescription Act, was not overruled expressly by the Constitutional Court in *Road Accident Fund and Another v Mdeyide*[4] (*Mdeyide 2*). His alternative argument was that should it be found that *Mdeyide 2* impliedly overruled *Smith*, that *Mdeyide 2* was distinguishable, on the facts, from the present matter. This is on the basis that *Mdeyide 2* concerned a person who was found to have been of sound mind, not a person under curatorship, with the result that it did not deal, first, with s 13(1)*(a)* of the Prescription Act; and secondly, with the effect of s 23(2)*(b)* of the RAF Act on insane persons or persons of unsound mind.

[12] In *Smith*, upon which the appellant placed much reliance, the facts, which bear resemblance to the present case, were that on 27 May 1989 Mr Sibiya sustained bodily injuries in a motor vehicle collision. In terms of the court order dated 14 June 1984, the respondent was appointed as *curator ad litem* to Mr Sibiya by reason of his mental derangement. Shortly thereafter the respondent , on behalf of Mr Sibiya, lodged a claim for compensation in terms of article 62 of the schedule (the Agreement) to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (the 1989 Act). The claim was lodged with the Multilateral Motor Vehicle Accidents Fund whose rights and obligations subsequently devolved upon the present respondent in terms of s 2(2)*(a)* of the RAF Act.

[13] During September 1995 the respondent (Smith) instituted action against the appellant in the high court in which he claimed compensation on behalf of Mr

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[3] *Road Accident Fund v Smith NO* 1999 (1) SA 92 (SCA); [1998] 4 All SA 429 (A).
[4] *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC).

Sibiya. The appellant raised a special plea that the claim had prescribed. It argued that article 56 of the Agreement regulated the running of prescription under the 1989 Act to the exclusion of the Prescription Act and that at the time of the respondent's appointment as *curator ad litem,* the claim had already become prescribed. In response thereto the respondent argued (a) that the provisions of the Prescription Act prescription do not run against an insane person or a person under curatorship, and that Mr Sibiya was both insane and a person under curatorship as contemplated in the 1989 Act; and (b) that article 56 of the 1989 Act provides that prescription shall not run against a person under curatorship, and that Mr Sibiya was such person.

[14] The high court found that because Mr Sibiya was insane, the period of prescription prescribed by article 55 of the Agreement had not been completed when the action was instituted by the respondent. It accordingly dismissed the appellant's special plea.

[15] On appeal the issue was whether the running of prescription in respect of Mr Sibiya's claim under the 1989 Act was governed by the provisions of articles 55 and 57 of the Agreement, or whether s 13(1) of the Prescription Act was also applicable. Farlam AJA, who wrote on behalf of the majority, held that the Prescription Act also applied to third party claims under the Agreement. He reasoned that in the common law the principle was accepted that prescription did not run against persons under disability during such disability. The Prescription Act also protects persons under disability (including those who are insane) from the consequences of the running of prescription, no longer by suspending the running of prescription, but by delaying its completion until a year has elapsed since the disability in question has ceased to exist. According to Farlam AJA, if Parliament had intended to deprive persons who had been protected from the running of prescription under the common law and later protected under s 13(1)*(a)* of the Prescription Act of any protection at all from prescription, he would have expected much clearer language than the language which was used.

[16] This was the position regarding the relationship between the RAF Act and the Prescription Act in relation to the prescription of claims under the RAF Act, until the Constitutional Court judgment in *Mdeyide 2*.

[17] In *Mdeyide v Road Accident Fund*[5] (*Mdeyide*) a blind, illiterate and innumerate man sustained certain bodily injuries in a motor vehicle collision on 8 March 1999. On 17 September 1999 Mr Mdeyide, at his wife's urging and accompanied by her, visited the offices of the attorneys to obtain advice and assistance. One of the attorneys consulted with him and his wife in preparation for submitting a claim for compensation against the RAF. On 11 March 2002, more than three years from the date of the collision, a claim for compensation was lodged with the RAF on his behalf.

[18] On 3 February 2003 the RAF wrote to Mr Mdeyide's attorney stating that his claim had prescribed, but that it was willing to entertain it provided that an application for condonation was made.

[19] Mr Mdeyide's action for damages flowing from the injuries sustained in the collision was instituted on 27 February 2004. In response thereto the RAF raised prescription in terms of s 23(1) of the RAF Act. Mr Mdeyide replicated. He pleaded that he had no concept of time and space and that his personal circumstances were relevant because they enabled him to rely on s 12(3) of the Prescription Act. This section provides that '[a] debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. . . .'

[20] The matter was heard by Notshe AJ. He concluded that s 23(1) of the RAF Act applied to Mr Mdeyide's claim and that his claim had prescribed in terms of that section. Notshe AJ found that s 23(1) of the RAF Act; insofar as it does not make provision for the knowledge of the debtor and of facts from which the debt

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[5] [2006] ZAECHC 125.

arises, infringed upon Mr Mdeyide's rights of access to court as enshrined in the Constitution. He declared s 23(1) to be inconsistent with the Constitution and for that reason, he dismissed the RAF's special plea. Notshe AJ thereupon referred the matter to the Constitutional Court for confirmation of the order of invalidity.

[21] In *Road Accident Fund v Mdeyide and Another*[6] (*Mdeyide 1*) the matter came before the Constitutional Court to confirm the declaration of invalidity order, which it declined to do. The Constitutional Court concluded that insufficient evidence had been presented in the high court regarding Mr Mdeyide's capacity to litigate. It remitted the matter for further evidence, remarking that Mr Mdeyide might have been able to invoke the protection of s 13(1)*(a)* of the Prescription Act if it were to be found that after the accident he had in fact been of unsound mind and in need of a *curator ad litem* and one had been appointed for him before the termination of the three-year period.

[22] The high court thereupon conducted an inquiry, as envisaged in rule 57 of the Uniform Rules of Court, into Mr Mdeyide's capacity to litigate. Although the high court found that Mr Mdeyide was of sound mind, it nevertheless reinstated the original order. It referred the matter to the Constitutional Court for confirmation.[7]

[23] In the Constitutional Court two main submissions were made on behalf of Mr Mdeyide. First, it was argued that it was not necessary to reach the constitutional issue. The argument was, that, by virtue of s 16 of the Prescription Act, s 12(3) of the same Act applies also to cases falling under the RAF Act and delays the commencement of prescription, until the creditor acquires knowledge of the identity of the debtor. Consequently, prescription would only have begun to run when Mr Mdeyide found out about the RAF during his first consultation with his attorney. Thus, so it was argued, his claim would not have prescribed when he

[6] [2007] ZACC 7; 2007 (7) BCLR 805 (CC); 2008 (1) SA 535 (CC).
[7] *Mdeyide 2*.

filed it. The alternative submission was that the high court was correct in its reasoning and conclusion that s 23(1) of the RAF Act was unconstitutional.

[24] In determining whether the provisions of the Prescription Act applied also to Mr Mdeyide's claim, the Constitutional Court had regard, first, to the text of s 23(1) of the RAF Act and secondly, to the provisions of s 16 of the Prescription Act,[8] which state that the provisions of the Prescription Act apply save insofar as they are inconsistent with the provisions of any Act of Parliament.[9]

[25] In relation to the text of the RAF Act, the Constitutional Court noted that the words 'notwithstanding anything to the contrary in any law' appearing in s 23(1) of the RAF Act, indicated that the RAF Act was drafted with the knowledge that other provisions on prescription might exist on the statute book and in common law and that the purpose of the RAF Act was to regulate a specific and separate area, namely claims for compensation against the RAF, regardless of any other legal rule.

[26] As regards the question whether the provisions of the Prescription Act were ousted by the provisions of the RAF Act, the Constitutional Court undertook a consistency evaluation between the two Acts. It found that s 12(3) of the

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[8] Section 16 provides:
'(1) Subject to the provisions of subsection (2)*(b)*, the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.
(2) The provisions of any law–
(a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or
(b) which, if this Act had not come into operation, would have applied to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974, shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.' (Emphasis added.)
It is clear from the text of s 16 of the Prescription Act that the section recognises the fact that there were other pieces of legislation which regulated prescription before the RAF Act came into operation. Section 16(2) of the Prescription Act safeguards the continued application of the legislation concerned in certain circumstances.

[9] The RAF Act in this case.

Prescription Act and s 23(1) of the RAF Act 'differ with regard to the central topic in the two provisions, namely the point when prescription starts to run.'[10] The Constitutional Court stated that s 23(1) simply relies on the date on which the cause of action arose, provided the requirements of s 17 are met. It does not require knowledge of the identity of the debtor and of the facts from which the debt arises, as s 12(3) does. As regards the identity of the debtor the Constitutional Court had this to say at para 49 of the judgment:

'As to knowledge of the *identity of the debtor*, the RAF as the debtor against whom claims are lodged, differs from the debtors whose identity is referred to in the Prescription Act. The reason why knowledge of the identity of the debtor is required in the event of prescription of claims in general is obvious. One may often know that money is being owed to you, for example in terms of a delictual claim for damage to property, but one may not know who caused the damage and thus who to claim from, until this knowledge is gained from some investigation or the emergence of evidence otherwise. In contrast, the RAF does not have an "identity" in the same sense that debtors in general have. It is not one of several or numerous possible wrongdoers. It was never an actor in the facts making up the cause of action. As indicated earlier, knowledge of the identity of the driver or owner of the vehicle is in any event required by section 17. The RAF is a statutory body specifically created for the purpose of compensating the victims of road accidents. Knowledge of the identity of the debtor thus means knowledge of the law, that is that a victim of a motor vehicle accident has a claim against a public fund, namely the RAF.'

[27] The Constitutional Court concluded that the Prescription Act was inconsistent with the provisions of the RAF Act and that s 12(3) of the Prescription Act can, therefore, not apply to claims under the RAF Act.[11] The appellant's contention that the *Smith* case was not overruled by the Constitutional Court in *Mdeyide 2*, is therefore unsustainable in light of its findings.

[28] The conclusion that s 23(1) was drafted specifically to regulate claims for compensation under the RAF Act is also borne out by the background against

[10] *Mdeyide 2* para 47.
[11] *Mdeyide 2* para 53.

which the section was enacted. The words 'notwithstanding the provisions of any other law relating to prescription', were first inserted by s 11(1)*(a)* of the Compulsory Motor Vehicle Insurance Amendment Act 69 of 1978.[12] This was in reaction to the confusion that prevailed regarding whether prescription was governed by the relevant third party compensation legislation or by the Prescription Acts of 1943 and 1969. It has been retained in all subsequent sections of third party compensation legislation, including the Multilateral Motor Vehicle Accidents Fund Act dealing with prescription.

[29] Prior to the amendment of s 24(1) of the Compulsory Motor Vehicle Insurance Act 56 of 1972, there were judicial pronouncements to the effect that both the Prescription Act and the common law relative to interruption and suspension of prescription applied to the prescriptive provisions of the section and its precursor, s 11 of the Motor Vehicle Insurance Act 29 of 1942,[13] and that therefore prescription under the MVA Act did not run against, for example, a person of unsound mind.

[30] For these reasons the reliance by the appellant on the judgment of Tuchten J in *Van Rooyen NO v Road Accident Fund*,[14] cannot be correct. In that judgment Tuchten J held that *Smith* was not impliedly overruled by *Mdeyide 2* on the ground that the Constitutional Court in *Mdeyide 2* did not expressly overrule or criticise *Smith,* nor did it refer to the issue of availability of s 13(1)*(a)* of the Prescription Act, which was left open in *Mdeyide 1*.

[31] In my view, *Van Rooyen NO* was clearly wrong to the extent that it sought to create an exception, in respect of incapacitated persons, to the rule that the

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[12] This Act was repealed by s 19 of the Motor Vehicle Accidents Act 84 of 1986, which was in turn repealed by s 27 of the RAF Act.
[13] *Terblanche v South African Eagle Insurance Co Ltd* [1983] 2 All SA 13 (N); 1983 (2) SA 501 (N) at 504C-H.
[14] *Van Rooyen NO v Road Accident Fund* [2018] ZAGPPHC 675; 2019 (2) SA 290 (GP).

Prescription Act and the RAF Act are inconsistent and that the question of prescription of third party claims is solely governed by the RAF Act.

[32] It was also submitted by the appellant in her heads of argument that in interpreting s 23 of the RAF Act, which, it was contended, directly affects Mr Jacobs' right of access to courts, the high court should have had regard to s 34 of the Constitution and, with reference to *Mbele v Road Accident Fund* [2016] ZASCA 134; [2016] 4 All SA 752 (SCA); 2017 (2) SA 34 (SCA) para 17, the purpose of the RAF Act. It is correct that when interpreting any legislation, a court is enjoined by s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights. The Constitutional Court in *Makate v Vodacom (Pty) Ltd and Others*[15] explained how this interpretation exercise was to be approached:

'The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.'

[33] Section 23 of RAF Act does not affect mentally incapacitated persons' right of access to a court if they are detained as patients in terms of the mental health legislation or are under curatorship. Prescription of the claims of such persons is suspended for the duration of their detention as patients in terms of any mental health legislation, if they were detained, or, if they were place under curatorship, for the duration of such curatorship. In the present case the incidence of prescription should have been managed by the timeous detention of Mr Jacobs in terms of the mental health legislation and/or by the appointment of a *curator ad litem* who could have instituted his claims timeously. This would have suspended the running of prescription in terms of s 23(2)*(c)* of the RAF Act. The construction that I have placed on s 23 of the RAF Act does not have the effect of preventing the dispute between the appellant and the RAF from being resolved by a court of

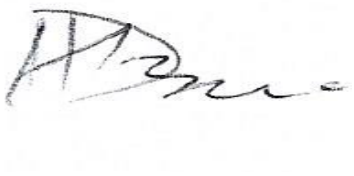
[15] [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 89.

law nor does it undermine the purpose of the RAF Act. Regrettable as this result may be, the Constitutional Court has already considered the interpretation of the RAF Act and held that claims under the Act are governed exclusively by the provisions of the said Act to the exclusion of any other law.

[34] For these reasons, I hold that the Prescription Act does not apply to claims for compensation under the RAF Act. It is excluded because its provisions are inconsistent with those of the RAF Act relating to prescription. Section 23 of the RAF Act was intended to be fully comprehensive on the subject of claims for compensation under the RAF Act and was intended to exhaust its subject matter. The high court was therefore correct in upholding the special plea of prescription.

[35] The next question to determine is the issue of costs. The general rule, when it comes to costs liability, is that costs should follow the result unless there exist sound and proper reasons for a departure from this principle. Having regard to the state of health of Mr Jacobs as set out in the medico-legal reports of the experts, which indicate that due to the severity of the injuries he has been rendered impecunious, I am of the view that there exists a sound reason to depart from the general rule. For that reason, in the exercise of my discretion, I would not order Mr Jacobs to pay the respondent's costs.

[36] In the result the appeal is dismissed with no order as to costs.



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ZONDI JA

JUDGE OF APPEAL

Appearances:

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