THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1350/2019

In the matter between:

WARREN JOHN FLETCHER **APPELLANT**

and

GILLIAN CLAIRE MCNAIR **RESPONDENT**

Neutral citation: *Fletcher v McNair* (1350/2019) [2020] ZASCA 135 (23 October 2020)

Coram: CACHALIA, MAKGOKA AND PLASKET JJA AND EKSTEEN AND SUTHERLAND AJJA

Heard: 7 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 23rd day of October 2020.

Summary: Trust — trustee — removal of — breakdown in relationship between co-trustees originating from outside the Trust – on its own not sufficient for removal of co-trustee — determinative test always whether Trust property and affairs imperilled.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Vally J with Wepener and Mahalelo JJ concurring, sitting as court of appeal): judgment reported *sub nom McNair v Crossman* 2020 (1) SA 192 (GJ).

1 The appeal is upheld with costs, which includes the costs in the application to adduce further evidence.

2 The order of the Full Court is set aside and substituted with the following:

'The appeal is dismissed with costs.'

JUDGMENT

Makgoka JA (Cachalia and Plasket JJA and Eksteen and Sutherland AJJA concurring):

[1] This appeal concerns the removal of the appellant, Mr Warren Fletcher, as a trustee of the McNair Family Trust (the Trust) at the instance of the respondent, Mrs Gillian McNair. Sitting as the court of first instance in the Gauteng Division of the High Court, Johannesburg (the high court), Mudau J dismissed the respondent's application with costs. On appeal, the Full Court reversed the decision and removed the appellant as a trustee and replaced him with the respondent's sister. With the special leave of this court, the appellant appeals against the order of the Full Court.

[2] The Trust is an inter vivos one, created by a deed of trust in 2006 in terms of which Mrs Morag Crossman was the founder and first donor. The first trustees were her husband, Mr Gerald Crossman (Mr Crossman), her son, the late Mr Steven McNair (the deceased) and his wife, the respondent. Mr Crossman was the deceased's stepfather. The respondent and her two adult children are the beneficiaries of the Trust. In terms of the deceased's Will the appellant replaced the deceased as a trustee

upon the latter's death. The respondent and Mr Crossman are the co-executors of the deceased's estate.

[3] The Trust assets comprise a share portfolio worth approximately R2.8 million and a 75 percent shareholding in a property-owning company, Top Spin Investments 101 (Pty) Ltd (Top Spin). Mr Crossman owns the remaining 25 percent of the shares in Top Spin. The respondent and Mr Crossman are co-directors of Top Spin, which purchases, sells and lets property. It relies on rental income to meet its financial obligations.

[4] During his lifetime, the deceased was a businessman. As of March 2008 and until shortly before his death in August 2010, he was a 75 percent shareholder and director of Applied Pneumatics SA (Pty) Ltd (Applied), which sold pneumatic products, but is now in liquidation.[1] Mr Crossman was also a 25 percent shareholder and director of Applied. The deceased was involved in the day to day management of Applied that leased several properties from Top Spin in Port Elizabeth, Johannesburg, and Richards Bay.

[5] The deceased was diagnosed with a terminal cancer in February 2010. When his demise became inevitable, he invited his brother, Mr David McNair (Mr McNair), to become involved in the management of Applied. He also transferred 24 percent of his shareholding in Applied to Mr McNair, and thus retained 51 per cent of the shares. Four days before his death, Mr McNair and the respondent were appointed as directors of Applied. Thus, when the deceased died, the shareholding in Applied was as follows: the deceased (51 percent); Mr Crossman (25 percent) and Mr McNair (24 per cent). As a result, upon his death, the deceased's estate held his 51 per cent shareholding.

[6] After the deceased's death, Mr McNair continued his managerial duties in Applied, until June 2015, when the relationship between him and the respondent soured, and the respondent took over as a manager. The reasons for the fall-out

[1] The final order of liquidation was granted on 2 June 2017.

between the respondent and Mr McNair are not germane to the dispute in this appeal. Suffice it to say that it created much tension between them and affected the smooth running of Applied. They did not agree on how Applied had to be managed. They accused each other of misappropriation of funds, and they laid criminal charges against each other in this regard.

[7] Meanwhile, the relationship between the respondent, on the one hand, and the appellant and Mr Crossman, on the other, also deteriorated, both in their capacities as shareholders of Top Spin and as trustees. The respondent accused the appellant and Mr Crossman of excluding her from the affairs of Top Spin, and of siding with Mr McNair in respect of her conflicts with him, or at the very least, of being supine in the face of what she considered oppressive conduct on the part of Mr McNair against her. The respondent further accused the appellant and Mr Crossman of not acting in the best interests of the Trust and of having conflicts of interest.

[8] In this regard, it has to be pointed out that apart from being a trustee, the appellant is an accountant, and a director of Alchemy Financial Services Incorporated (Alchemy Finance). That entity was responsible for the monthly bookkeeping for Top Spin and the secretarial administration of Top Spin, Applied and the Trust. As a representative of Alchemy Finance, the appellant operated the bank account of Top Spin. The appellant was also a representative of Alchemy Audit Services Incorporated (Alchemy Audit), which was the auditor of Top Spin and was appointed to administer the deceased's estate.

[9] The complaints by the respondent against the appellant and Mr Crossman, as set out above, gave rise to three issues. The first concerned Applied's debt to Top Spin, for which she became personally liable. The second was about the sale of a Top Spin property in Port Elizabeth. The third related to a distribution agreement involving Applied. Below is a summary of each.

[10] Regarding the first, Applied owed rental money to Top Spin in respect of the properties it leased from Top Spin. On 12 November 2015 during a shareholders' meeting of Top Spin the respondent assumed personal liability for the debt, should

Applied not pay it within three months, and it was resolved as such. As of February 2016, Applied had still not settled its debt to Top Spin. On 8 February 2016, the respondent requested Mr McNair's cooperation to release certain of Applied's funds to enable it to meet its obligations. Mr McNair refused. The respondent complained that the appellant and Mr Crossman, knowing that Applied had funds to settle its debt to Top Spin, stood by and did nothing about Mr McNair's refusal to release the funds.

[11] A shareholders' meeting of Top Spin was held on 24 March 2016. Only the appellant and Mr Crossman attended. The respondent had earlier indicated her unavailability to attend due to short notice and had requested the meeting to be rescheduled to a later date. Her request was not acceded to, and the meeting went ahead in her absence. Two relevant resolution were taken in that meeting: first, to take legal action against the respondent for Applied's debt, pursuant to her undertaking in the meeting of 12 November 2015. Second, to sell one of Top Spin's properties in Port Elizabeth.

[12] Pursuant to the first resolution, on 12 April 2016, Top Spin's attorneys sent a letter of demand to the respondent, after which she paid Applied's debt. The respondent complained that the decision to pursue legal action against her only, and not jointly with Applied, was a vendetta against her by the appellant and Mr Crossman aimed at ruining her financially. The respondent suggested that the decision to sell the Port Elizabeth property, taken in her absence, served as proof that the appellant and Mr Crossman were intent on excluding her from the decision-making in Top Spin and indirectly, in the Trust.

[13] The respondent's complaint about the distribution agreement was this: In July 2006, Applied's international supplier requested a letter confirming Applied's shareholding. The respondent requested the appellant, in his capacity as a representative of Alchemy Finance, to write the requested letter. The appellant obliged, but also mentioned in the letter that Applied's shareholders and directors were engaged in both criminal and legal proceedings against each other.

[14] The respondent objected to the reference to her regarding the criminal charges, and pointed out that, at that stage, the only charges were those laid by her against Mr McNair, and there were none against her. The appellant refused to amend the letter, and the respondent elected not to send it. As a result, the international distributor cancelled the agreement, and later transferred it to Mr McNair's newly formed company. The respondent held this out as an example of the appellant's collusion with Mr McNair and Mr Crossman to harm the business of Applied.

[15] Against this factual background, the respondent launched an application in the high court for the removal of the appellant and Mr Crossman as trustees of the Trust. The application came before Mudau J, who dismissed it with costs in the light of this court's decision in *Gowar.*[2] He subsequently granted leave to appeal to the Full Court. Before the appeal was heard by the Full Court, Mr Crossman resigned as a trustee, and thus took no part in the appeal. That was still the position in this court.

[16] The respondent's appeal was upheld by the Full Court, which granted an order removing the appellant as a trustee and replaced him with the respondent's sister. The appellant is aggrieved with that order, hence the appeal to this court.

[17] Before I consider the Full Court's reasoning and conclusion, it is necessary to restate the law on the removal of trustees in the light of certain remarks by the Full Court on this subject.

[18] The court has inherent power to remove a trustee from office at common law. This power is also sourced in s 20(1) of the Trust Property Control Act 57 of 1988 (the Act) which provides that:

'20. Removal of trustee ─

'A trustee may on application of the Master or any person having an interest in the Trust property, at any time be removed from his office by the court if the court is satisfied that his removal will be in the interests of the Trust and its beneficiaries.'

[2] *Gowar and Another v Gowar and Others* [2016] ZASCA 101; [2016] 3 All SA 382; 2016 (5) SA 225 (SCA).

[19] Our jurisprudence on the removal of trustees is neatly collated in *Gowar* at paras 31-32. There, Petse JA undertook a useful examination of authorities, from which the following principles can be distilled:

(a) the court may order the removal of a trustee only if such removal will, as required by s 20(1) of the Act, be in the interests of the Trust and its beneficiaries;

(b) the power of the court to remove a trustee must be exercised with circumspection;

(c) the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate;

(d) the deliberate wishes of the deceased person to select persons in reliance upon their ability and character to manage the estate, should be respected, and not be lightly interfered with;

(e) where there is disharmony, the essential test is whether it imperils the Trust estate or its proper administration;

(f) mere friction or enmity between the trustee and the beneficiaries will not in itself be an adequate reason for the removal of the trustee from office;

(g) mere conflict amongst trustees themselves is not a sufficient reason for the removal of a trustee at the suit of another;

(h) neither mala fides nor even misconduct are required for the removal of a trustee;

(i) incorrect decisions and non-observance of the strict requirements of the law, do not of themselves, warrant the removal of a trustee;

(j) the decisive consideration is the welfare of the beneficiaries and the proper administration of the Trust and the Trust property.

[20] With these principles in mind, I consider three specific passages in the judgment of the Full Court, which need clarification. The first two appear in para 29. In the first passage, the court mentioned that:

'The court's power to remove a trustee though is not restricted to the statutory grounds. Its power to remove a trustee is derived from its inherent power which has been recognised in our law for over a century and has now been entrenched in the law by s 173 of the Constitution of the Republic of SA, Act 108[3] of 1996 (the Constitution).'

[3] The Constitution was previously also numbered as if it were an Act of Parliament – Act No.108 of 1996 – but, since the passage of the Citation of Constitutional Laws Act of 2005 neither it nor the Acts

[21] Section 173 of the Constitution reads:

'173. Inherent power – The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice.'

[22] There are two distinct parts of s 173. The first relates to the court's inherent power to regulate its own processes. This relates to matters of procedure. The second concerns the court's power to develop the common law, which relates to substantive issues of law. It is the latter power that the court must have had in mind when it made that reference. This is because the removal of trustees is an issue of substantive law, and not of procedure. The Full Court's reference to the court's inherent power in relation to the removal of trustees should therefore not be conflated with the court's inherent power to regulate its own process. The court's remarks should thus be understood to mean that in terms of s 173 of the Constitution, the court has inherent power to develop the common law on the removal of trustees, where the interests of justice dictate.

[23] In the second passage in para 29, the court discussed a possible further ground on which a trustee may be removed at common law. After pointing out that courts have traditionally removed a trustee for misconduct, incapacity or incompetence, the court said the following:

'Though it must be said that each of these three grounds may also be a basis for an application for removal in terms of s 20(1) of the Act if it can be proved that the alleged misconduct, incapacity or incompetence imperils the Trust property or the administration of the Trust and courts have often found this to be the case. However, there is a further ground, which I elaborate upon below. It is that the relationship between co-trustees has broken down to the extent that they no longer have any mutual respect and trust for each other. This too, can be brought under s 20(1) of the Act, for it could imperil the property or administration of the Trust. But it does not always have to be so.'

[24] Later, at para 35 the court elaborated on this ground:

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amending it are allocated Act numbers. The Constitution now is referred to and cited as 'The Constitution of the Republic of South Africa, 1996.'

'[E]ach [of the Trustees] should accept that despite their differences the other is acting in the best interest of the Trust and its beneficiaries. Once that mutual respect and trust is lost then their position as co-trustees is imperiled. At that point the dial has moved and the administration of the Trust as well as the management of its property is placed at risk. Put differently, their incompatibility places the Trust property and its affairs at risk. It is a risk that the Trust should not be exposed to for the obvious reason that should it eventuate the detrimental effect on the Trust could be devastating and irreversible.'

[25] The suggestion that 'once mutual respect and trust is lost' then 'the administration of the Trust as well as the management of its property is placed at risk' should be qualified. I assume that what the court meant to convey was that if the loss of mutual respect and trust among trustees results in the Trust property being imperiled, that could form a basis for removal of one or more of the Trustees. This seems to tie in with the court's earlier remarks when introducing this topic.

[26] It has to be so, because loss of mutual trust and respect does not, without more, translate to a ground for the removal of a trustee, or to a conclusion that the Trust property has been imperiled. It must further be established that, as a result, the Trust property has been imperiled or the administration of the Trust and the management of its property are at risk. That is a factual enquiry. In other words, it cannot be assumed a priori that because there is lack of trust, respect or compatibility among trustees, the Trust property is imperiled, and therefore, the removal of a trustee is justified. The determinative test is always whether any state of affairs – be it incompetence, misconduct, incapacity, or lack of trust and respect among trustees or beneficiaries – has resulted in the Trust property or its proper administration being placed at risk.

[27] The other remarks appear in para 33, where the court sought to distinguish *Gowar* as follows:

'It is important to note that while the appellant and her children as beneficiaries seek the removal of the second respondent as trustee the appellant also does so as a co-trustee. To that extent the learning in *Gowar* …is of limited value to our facts for it focusses only on the conflict or enmity between a beneficiary and a trustee, and not between co-trustees.'

[28] With respect, there is no basis in our law for this distinction. The grounds on which a trustee may be removed do not depend on who the applicant is, be it a trustee, a beneficiary or any other interested person. This purported distinction led the Full Court to an erroneous belief that it was not bound by *Gowar*, whereas it was, and obliged to follow it. Its misdirection led it astray, as demonstrated below.

[29] I turn to the reasoning of the Full Court. It upheld the appeal on two bases. First, it found that the counter-accusations between the respondent and the appellant showed that they had lost respect and trust for each other. This, it said, was sufficient for the removal of both as trustees. However, as there was no counter-application by the appellant, he was the one to be removed. The court said:

'The contentions of the second respondent [the appellant] notwithstanding, in my judgment the allegations made by him against the appellant together with the allegations made by the appellant [the respondent] against him reveal an indisputable fact: the enmity between them is very deep. Aligned to this fact is more than a reasonable probability that neither of them will recover from such deep enmity in the near future. They clearly have no trust and respect for each other and this state of affairs will not abate anytime soon.'

[30] After noting that the removal of both parties as trustees was alluded to during the hearing, and that it could not entertain that, the court proceeded as follows:

'All that was before the Court was that she and the second respondent had no respect for each other, had lost all trust and confidence in each other and that the continuation in office by the second respondent would make it impossible for the Trust's affairs to be diligently conducted by the Trustees. Hence, the application for his removal. The Court should, therefore, restrict itself to the issue of his removal only. Had either of the respondents brought an application for the simultaneous removal of the appellant the outcome may have been different. It is not necessary though for us to speculate on the issue. The only issue before us is the removal of the second respondent. On that issue I hold that the appeal should succeed.'

[31] I assume, for present purposes, that the Full Court was correct in its observation that the counter-accusations between the respondent and the appellant had created enmity between them and had eroded mutual trust and respect. But it is instructive that nowhere in its reasoning, did the court attribute that solely to the appellant. On the contrary, it appears that the court considered both the respondent and the appellant

to be equally responsible. This is apparent from the remarks that 'had either of the respondents brought an application for the simultaneous removal of the appellant the outcome may have been different.'

[32] If, in the view of the Full Court, both were responsible for the state of enmity, lack of trust and respect, it is inexplicable why the appellant was removed. It appears on the court's reasoning that he was removed because he did not bring a counter-application for the removal of the respondent. This is clearly wrong. What is more, these were motion proceedings. There is no suggestion that the appellant's averments were far-fetched or clearly untenable. If the scale was evenly poised, as the court's reasoning suggests, then a real, genuine and bona fide dispute of fact arose – the type envisaged in *Wightman.*[4] A final order should not have been granted unless the court was satisfied that the conduct of the appellant imperiled the Trust property or its proper administration or that his removal would otherwise be in the interests of the Trust and its beneficiaries.

[33] I turn now to the second basis. The Full Court found that the appellant had damaged Applied's business by stating in the letter to the international distributor that the shareholders of Applied had laid criminal charges against each other. I have discussed this in paras 13 and 14 above. Of this issue, the court said (at para 37):

'There is another reason why the appeal should succeed. The court a quo did not consider the fact that the second respondent [the appellant] falsely represented to a third party that the appellant [the respondent] was subjected to a criminal charge with regard to her conduct at Applied; refused to withdraw the representation when the true facts were brought to his attention and that his action significantly damaged the business of Applied. While this significant failure of judgment on his part concerned Applied and not the Trust, it must be remembered that his roles in both Applied and the Trust were very closely connected. This is manifested in, inter alia, the allegations he made against the appellant in his answering affidavit … and in the meetings of the shareholders of Top Spin (in which the Trust is the majority shareholder) where the issue with regard to Applied took central stage. In other words,

[4] *Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; [2008] 2 All SA 512; 2008 (3) SA 371 (SCA) para 13.

the misrepresentation of the true facts with regard to the affairs of Applied contaminated the business affairs of the Trust. It, I hold, justifies his removal as a trustee of the Trust.'

[34] The Full Court misconstrued the facts. As explained already, the letter was never sent to the intended recipient. When the appellant refused to amend the letter as requested, the respondent decided not to transmit it to the international distributor. Thus, the reason the distribution agreement was cancelled was not because of the letter, as the Full Court incorrectly assumed. On the respondent's version, the agreement was cancelled and later transferred to Mr McNair's company, as a result of Mr McNair's false representations about Applied to the international distributor. Accordingly, there was no false representation by the appellant to a third party, as found by the Full Court. Its conclusion was based on an incorrect understanding of the facts. Consequently, it erred in relying on this as a basis for the removal of the appellant.

[35] The Full Court seemingly drew a negative inference against the appellant for inviting Mr McNair to the meeting of Top Spin shareholders on 12 November 2015. According to the respondent, Mr McNair was not a shareholder of Top Spin. The appellant's explanation was that the information at his disposal then, was that Mr Crossman had sold his 25 percent shareholding in both Top Spin and Applied to Mr McNair and resigned as director of both companies. On that understanding, Mr Crossman could be present as a trustee. The respondent fully participated in that meeting, without objection to either Mr Crossman or Mr McNair's presence. Her legal representative was present in that meeting. Despite the Full Court making much of this aspect and devoting a great deal of attention to it, there is simply nothing to it.

[36] The Full Court did not deal with the other complaints by the respondent, namely the decision to pursue her for Applied's debt to Top Spin and the sale of the Port Elizabeth property. The first one was a major issue on the papers and in the court of first instance. As I have already mentioned, both decisions were taken in a Top Spin shareholders' meeting on 24 March 2016. I consider each briefly. As stated earlier, the first decision stemmed from the respondent's undertaking in a meeting of

12 November 2015 to personally assume Applied's debt to Top Spin, should Applied fail to settle the debt within three months.

[37] The respondent sought to suggest that she made the undertaking under duress, and that the appellant had failed to advise her that she had no legal obligation to make the undertaking. There is no merit in this suggestion for the simple reason that the respondent's legal representative was present in that meeting. The respondent's attempt to infer a sinister motive in the decision by the appellant and Mr Crossman in the meeting of 24 March 2016 similarly lacks merit. They were entitled to pursue legal action based on an undertaking, voluntarily and validly made, by the respondent. That they elected to pursue her and not Applied is irrelevant. The fact is that the respondent had not complied with her undertaking to settle Applied's debt. This caused financial pressure on the Trust investment where time was of the essence.

[38] This also contextualises the decision to sell the property in Port Elizabeth. The decision was necessitated by the respondent's failure to honour her undertaking, which added pressure on Top Spin's finances. The appellant and Mr Crossman explained that the property was vacant, and they considered it a good commercial decision to sell it, based on the financial implications for Top Spin and ultimately, the Trust. According to the respondent, the appellant and Mr Crossman had conspired to sell the property without consulting her, by taking that decision in her absence on 24 March 2016. She said that when she found out about the sale, she initially sought to scuttle it but later 'reluctantly' agreed to the sale.

[39] In the light of the above, the respondent's attempt to show this decision as proof of collusion between the appellant and Mr Crossman to exclude her from the decision-making in Top Spin is unsustainable. It is disingenuous and lacks candour, especially in the light of the fact that she later agreed to it.

[40] I turn now to the appellant's alleged non-action when Mr McNair declined the respondent's request to release some of Applied's funds. The respondent complained that both the appellant and Mr Crossman stood by and did nothing about Mr McNair's conduct. The Full Court agreed with her and said that the appellant did nothing despite

being ‘intimately involved in the affairs of Applied and Top Spin and therefore was fully apprised of her efforts.’

[41] To my mind, the criticism was unwarranted. The appellant was not a shareholder or director of Applied, and as such had no leverage to force or prevail upon Mr McNair to release the funds. Neither the respondent nor the Full Court made any suggestion as to what the appellant could possibly have done about this. I am unable to think of any. The fact that he was ‘intimately involved in the affairs of Applied and Top Spin and therefore was fully apprised of her efforts’ took the issue no further.

[42] In the final analysis, given the nature of the shareholding in both Applied and Top Spin, the conflict between the respondent and Mr McNair in Applied, on the one hand, and that in Top Spin between the respondent, Mr Crossman and the appellant, on the other, indirectly, spilled over to the Trust. But there is no evidence that those frictions had any significant impact on the administration of the Trust. It seems the Trust is functioning relatively well in the circumstances. Meetings are held where effective decisions are taken for the benefit of the Trust.

[43] For example, in the meeting of the Trustees on 25 May 2016 a wide range of issues were discussed, and resolutions taken, despite the acrimony between the respondent and her co-trustees – the appellant and Mr Crossman. This meeting is especially significant in this regard because this is where the respondent formally demanded the resignation of the appellant. Despite that, the meeting proceeded with its business. Another meeting was held on 22 March 2017. A resolution was taken there authorising the respondent to transfer R50 000 from an investment account into the Trust’s current account to pay for various costs of the Trust. What is more, the respondent and her children, as the beneficiaries of the Trust, have received distributions and loan repayments of nearly R5 million. The Full Court did not take into account any of these considerations.

[44] I therefore conclude that the state of the relationship of the appellant and the respondent has not imperiled the Trust property or its proper administration. I find no

other basis on which it would be in the interests of the Trust and its beneficiaries to remove the appellant.

[45] This brings me to counsel for the respondent's invitation to this court to consider English law, having referred us to several authorities. I am not persuaded that we need to resort to English law. Our law on the removal of trustees is well-settled after nine decades, starting with *Sackville West v Nourse & another* 1925 AD 156 and many others, right through to *Gowar*. In any event, I find no discernable differences between English law and ours. In both systems, the overriding consideration seems to be whether the Trust property is imperiled by any conduct of a trustee, and whether the interests of the beneficiaries would be served by their removal. In exercising that power, the courts do so with circumspection.

[46] There remains the issue of costs. The respondent made an application to adduce further evidence on appeal. This related to the resignation of Mr Crossman and whether the Full Court was aware of this when it heard the appeal and the impact thereof. This was irrelevant for the purposes of this appeal. After a brief debate during the hearing of the appeal, counsel for the respondent did not persist with the application. The respondent has to bear the costs of that application.

[47] In all circumstances, Mudau J was correct in dismissing the respondent's application in the first instance and, as the Full Court erred, as I have demonstrated, the appeal has to succeed. The following order is made:

1 The appeal is upheld with costs, which includes the costs in the application to adduce further evidence.
2 The order of the Full Court is set aside and substituted with the following:
'The appeal is dismissed with costs.'

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T M Makgoka
Judge of Appeal

APPEARANCES

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