THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 312/2024

In the matter between:

KURT ROBERT KNOOP	**FIRST APPELLANT**
JOHAN LOUIS KLOPPER	**SECOND APPELLANT**
JUANITO MARTIN DAMONS	**THIRD APPELLANT**
KGASHANE CHRISTOPHER MONYELA	**FOURTH APPELLANT**
and	
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	**FIRST RESPONDENT**
KOORNFONTEIN MINES (PTY) LTD	**SECOND RESPONDENT**
OPTIMUM COAL MINE (PTY) LTD	**THIRD RESPONDENT**
OPTIMUM COAL TERMINAL (PTY) LTD	**FOURTH RESPONDENT**
RONICA RAGAVAN	**FIFTH RESPONDENT**
DHANASEGARAN ARCHERY	**SIXTH RESPONDENT**

Neutral citation: *Kurt Robert Knoop and Others v Tegeta Exploration and Resources (Pty) Ltd and Others* (312/2024) [2025] ZASCA 96 (30 June 2025)

Coram: HUGHES, WEINER, UNTERHALTER and BAARTMAN JJA and MOLITSOANE AJA

Heard: 19 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 30 June 2025.

Summary: Uniform Rules of Court – Rule 7 – whether the court a quo erred in issuing a declaratory order that the attorneys for the second respondent were authorised to represent such respondent in the main application – business rescue – whether a director has power to appoint attorneys on behalf of a company in business rescue – whether the declaratory order is a 'decision' within the meaning of s 16(1)*(a)* of the Superior Courts Act 10 of 2013 – whether the 'decision' is appealable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Phooko AJ sitting as court of first instance):

1 The appeal succeeds with costs including the costs of two counsel where so employed.

2 The order of the high court is set aside and replaced with the following:

'(a) The application in respect of prayers 1, 2, 3 and 4 are dismissed.

(b) The fifth and sixth respondents are to pay the costs personally, including the costs of two counsel where so employed, jointly and severally.'

JUDGMENT

Weiner JA (Hughes, Unterhalter and Baartman JJA and Molitsoane AJA concurring):

Introduction

[1] The appellants are the appointed business rescue practitioners (the BRPs) of the first to fourth respondents (the companies). The fifth respondent, Ms Ragavan, is a director of the first and second respondents, and the sixth respondent, Mr Archery, is a director of the third respondent. This appeal concerns whether or not a director of a company under business rescue has the authority to appoint attorneys to act on behalf of the company.

Background

[2] On 21 October 2022, Ms Ragavan and Mr Archery, purporting to act on behalf of the companies, launched an application in the Gauteng Division of the High Court, Pretoria (the high court) for, inter alia, the removal of the first and second appellants as the BRPs of the companies. They also sought a declarator that the third and fourth appellants were not properly appointed as BRPs. The companies were joined as co-applicants. Purporting to exercise their powers as directors of the companies, Ms Ragavan and Mr Archery appointed Van der Merwe and Van der Merwe Attorneys (VDM) to act for the companies in the application.

[3] The BRPs disputed the authority of VDM to act for the companies. They delivered a notice in terms of Rule 7 of the Uniform Rules of Court on 2 November 2022. On 21 November 2022 the respondents filed resolutions and powers of attorney from Ms Ragavan as the director of the companies, purportedly authorising VDM to act for the companies. The BRPs also disputed these documents and the authority of VDM.

[4] The respondents sought the following relief:

‘1. That, insofar as it may be necessary, that leave be granted in terms of section 133(1)(b) of the Companies Act, 71 of 2008 (as amended) ("the Companies Act”), for the Applicants to bring this application;

2. That the First Respondent be removed as Business Rescue Practitioner of the First to Fourth Applicants;

3. That the Second Respondent be removed as Business Rescue Practitioner of the First to Third Applicants;

4. That it be declared that the Third Respondent is not a Business Rescue Practitioner of the Second to Fourth Applicants;

5. That it be declared that the Fourth Respondent is not a Business Rescue Practitioner of the Second and Third Applicants;

6. That Companies and Intellectual Property Commission be ordered to update their records to reflect the orders in prayers 2 to 5 above;

7. That the First to Fourth Respondents, and any other Respondent who opposes the application, pay the costs of the application on an attorney and client scale including the costs of two counsel.'

[5] The high court found that VDM was not authorised to represent the first, third and fourth respondents but was authorised to represent the second respondent (Koornfontein). On 11 December 2023, the BRPs applied for leave to appeal against the order in relation to Koornfontein. On 20 February 2024, the high court granted leave to appeal to this Court. The appeal is only in relation to the order contained in paragraph 78(c) of the judgment, which states:

'It is declared that the authority of Van der Merwe and Van der Merwe attorneys have been established and that Van der Merwe and Van der Merwe attorneys are authorized to represent the Second Applicant [Koornfontein] in the removal application.'

Appealability

[6] The respondents firstly raised the issue of appealability of the judgment, stating that the decision was not final but interlocutory and accordingly did not pass the test set out in *Zweni v Minister of Law and Order*[1]. In *DRDGOLD Ltd and Another v Nkala and Others* (*DRDGOLD*),[2] this Court referred to the judgment of Harms AJA in *Zweni* where he held:

'…"The expression 'judgment or order' in s 20(1)[3] of the Act has a special, almost technical, meaning; all decisions given in the course of the resolution of a dispute between litigants are not 'judgments or orders' . . .."[4]

…

Harms AJA famously concluded at 532I-533A:

"A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings".'

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[1] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); [1993] 1 All SA 365 (A) (*Zweni*).
[2] *DRDGOLD Ltd and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA).
[3] The previous iteration of s 16 which provides 'An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court as the case may be.'
[4] *Zweni* para 532C-D.

[7] The respondents sought to rely on this Court's judgment in *Unica Iron and Steel (Pty) Ltd v Minister of Trade and Industry* (*Unica*),[5] where this Court referring to *Zweni*, held that if 'the order is not final nor definitive of the rights of the parties to the action and does not have the effect of disposing of any portion of the relief claimed in the main proceedings' it is interlocutory and not appealable.

[8] In *Unica,* the question raised had become academic and it was therefore not susceptible to an appeal. That position is clearly distinguishable from the situation in this case. The appellants, however, contended that, in any event, the issue went beyond simply whether or not the power of attorney was valid. The effect of the judgment is final in that the order granted by the high court allows the company to proceed with unauthorised litigation in terms of s 139. It is not an interlocutory application. It is definitive of the party's rights in this regard. Unauthorised litigation cannot be permitted to proceed. Thus, I am of the view that the order of the high court is appealable.

Legislative regime

Rule 7(1)

[9] Rule 7(1) provides:

'7 Power of Attorney

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[5] *Unica Iron and Steel (Pty) Ltd and Another v The Minister of Trade and Industry and Another* (1332/21) [2023] ZASCA 42 (31 March 2023) para 11 (*Unica*).

[10] The respondents' submissions turned on the interpretation of Rule 7. It is their view that all that is required to satisfy the requirements of the rule is the production of a power of attorney. A court, it contended, cannot go behind the power of attorney to enquire whether the person who instructed the attorney, had the power or authority to do so.

[11] However, Rule 7 specifically states that the person claiming the right to act on behalf of the companies (VDM in this case), must satisfy the court that *he is authorised so to act*. To be so satisfied, the power of attorney must issue from a person vested with the authority to give the power of attorney. If the person lacks the authority to do so, the power of attorney does not evidence that its bearer is authorised to act.[6] The respondents' submission cannot be accepted.

The Companies Act

[12] Prior to business rescue, and in terms of s 66 of the Companies Act 71 of 2008 (the Act), the board of directors is the only organ of a company with authority to exercise all powers and perform any functions of the company. However, s 66 states that it operates unless the Act provides otherwise.[7]

[13] The appellants contended that Chapter 6 of the Act contains provisions which 'provide otherwise' in that, after business rescue commences, the board of directors is substituted by the BRPs. Section 137(2)*(a)* and *(b)*, provide that:

'137 Effect on shareholders and directors

(2) During a company's business rescue proceedings, each director of the company-

(a) must continue to exercise the functions of director, *subject to the authority of the practitioner;*

(b) has a duty to the company to exercise any management function within the company *in accordance with the express instructions or direction of the practitioner,* to the extent that it is reasonable to do so;' (Emphasis added.)

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[6] *Unlawful Occupiers, School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA); 2005 (4) SA 199 (SCA) para 16.

[7] All sections referred to in this judgment are references to the Act, unless otherwise stated.

[14] It is thus clear that, in terms of s 137(2), the directors are obliged to continue to exercise their functions but can only do so subject to the authority or express instruction of the BRPs. This is one of the provisions which qualify the powers of directors contained in s 66(1).

[15] The Act grants explicit powers to the BRPs in terms of s 140, which provides:

'(1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter-

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

…

(3) During a company's business rescue proceedings, the practitioner-

…

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77.'

[16] The BRPs are thus accorded 'full management control of the company' in place of the board and management of the company but may delegate any of their powers and functions to the directors or erstwhile management. The BRPs have the duty to run and manage the company on a day-to-day basis and have full management control over the company's property, including its financial resources.[8]

[17] The director's powers and functions are subservient to the practitioner's authority, instruction, or direction in terms of the Act. This issue was dealt with

[8] *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd (in Business Rescue) and Others* [2023] ZASCA 34; 2023 (4) SA 78 (SCA) para 7-27 (*Ragavan*); *Prinsloo v S* [2015] ZASCA 207; [2016] 1 All SA 390 (SCA); 2016 (2) SACR 25 (SCA) para 46; *Tayob v Shiva Uranium (Pty) Ltd* 2020 JDR 2672 (SCA) para 24 (*Tayob*).

in *National Director of Public Prosecution v Sharma and Others*,[9] (*Sharma*) where Musi JP held that '[i]t is correct that the directors remain directors, but, importantly, they operate under the authority of the business rescue practitioners.'[10]

[18] Musi JP found that, instituting or defending legal proceedings has financial implications for the company in business rescue. The appellants relied on the reasoning in *Sharma* that the directors cannot commit any of the company's property and assets to the payment of legal fees because this would undermine the statutory scheme of business rescue. The BRPs would be divested of control of that portion of the company's money needed to pay the legal fees. This would result in the BRPs being unable to manage the company in terms of s 140(1)*(a)*. In relation to the business rescue plan, the BRPs would either be unable to prepare a plan in accordance with s 150[11] that identifies the property and assets of the company available to pay creditors; or would be unable to put any plan to creditors for adoption in terms of s 150; or would be unable to implement such a plan when it had already been prepared, voted on and adopted by creditors. As Musi JP stated:

'This on its own is more than enough reason why the business rescue practitioners must be centrally involved when litigation on behalf of the company in business rescue is embarked upon.'[12]

[19] Musi JP found that the directors of the company had no right to authorise attorneys to oppose proceedings on its behalf, without the authority of the BRPs, and that the decision to appoint the attorneys was void for lack of approval by the

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[9] *National Director of Public Prosecution v Sharma and Others* [2021] ZAFSHC 172; 2022 (1) SACR 289 (FB) (*Sharma*).
[10] Ibid para 29.
[11] Section 150 provides: 'Proposal of business rescue plan
(1) The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.'
[12] *Sharma* para 30.

BRPs. The only persons who have the power to bind a company in business rescue, in such circumstances are the BRPs.

[20] This Court in *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd (in Business Rescue) and Others*[13] (*Ragavan*) held that s 133(1)*(a)* prohibits enforcement action against the company in relation to any property belonging to it. This reflects the practitioner's control in relation to the claims by third parties to the property of the company. This has an effect on the assets of the company being used to finance legal proceedings which would interfere with the proper control of the company under business rescue.

The high court

[21] The high court found that Ms Ragavan could validly appoint VDM to act on behalf of Koornfontein in the main application. It found that directors have the power to appoint and remove practitioners and that the power is not subject to the authority of the BRPs.

[22] Phooko AJ's reasoning was that it would make no sense for the directors to first seek approval from the practitioner to remove him or her from office, and further that, if the BRP had died, there would be no practitioner to approve the process to replace him or her. The appellants submitted that this reasoning conflates two different issues – the appointment of a substitute practitioner in the event of death, resignation or removal, on the one hand, and the removal of a practitioner in terms of s 139(2).

Discussion

[23] The removal and replacement of a BRP are dealt with in s 139, which provides:

'139 Removal and replacement of practitioner

(1) A practitioner may be removed only-

[13] *Ragavan* Op cit fn 1.

(a) by a court order in terms of section 130; or

(b) as provided for in this section.

(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;

(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;

(c) engaging in illegal acts or conduct;

(d) if the practitioner no longer satisfies the requirements set out in section 138 (1);

(e) conflict of interest or lack of independence; or

(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130 (1) *(b)* to set aside that new appointment.'

[24] When a company by resolution, places itself under voluntary business rescue, its board has the power in terms of s 139(3), to appoint a substitute practitioner in the event of the practitioner's death, resignation or removal. But s 139(2) does not permit the company, the board or a director to bring an application to remove a practitioner. It only permits an 'affected person'[14] to bring such application. The definition of 'affected person' specifically excludes the company and directors which therefore do not have the authority to make the application referred to under s 139(2). Alternatively, the court can *mero motu* make such an order, in certain circumstances.

[25] Subsequent to *Sharma* and the decision of the high court in the present matter, this Court confirmed in *Islandsite Investments (Pty) Ltd v The National*

[14] An affected person as defined in s 128(1)*(a)* is '(i) a shareholder or creditor of the company;
(ii) any registered trade union representing employees of the company; and
(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.'

Director of Public Prosecutions and Others[15] (*Islandsite*) that directors cannot represent companies in litigation and cannot authorise an attorney to do so. Gorven JA in *Islandsite* held that the nature of the supervision that the BRPs exercise over the company:

'…is not the supervision which must be demonstrated, at every point, to advance the rehabilitation of the company. That would be a recipe for contestation for every decision and would result in the paralysis of the process of business rescue. It is supervision in every respect. In addition, the management of the company's affairs, business and property are part of the process. It is implicit in the definition that the BRPs are the persons engaged in the supervision of the company.'[16]

Gorven JA stated further that:

'... What must be borne in mind is that both the directors and the BRPs are enjoined to act in the best interests of the company. The first resort would be to explore whether the directors and the BRPs are able to agree on the conduct of the POCA litigation. If agreement cannot be reached, and if it can be shown that the BRPs had acted or were about to act in a manner which could be shown to prejudice the company, there are remedies available to interested parties such as directors.[17]

In the light of the provisions of the [Companies] Act, there is no warrant for finding that the directors have the requisite authority to appoint attorneys to litigate on behalf of the company. The clear interpretation of the Act affords the BRPs that authority in the POCA litigation. This is, in particular, because property of the company is implicated in the POCA litigation. It follows that the order of the High Court cannot be faulted. As a result, the appeal must be dismissed.'[18]

[26] The high court distinguished between governance and management and found that the BRPs had management control but did not have control over governance. In this regard, the directors relied on the dictum in *Tayob v Shiva Uranium (Pty) Ltd*[19](*Tayob*) that the board retains power on strategic matters of the company during business rescue. According to Gorven JA in *Islandsite,*

[15] *Islandsite Investment (Pty) Ltd v The National Director of Public Prosecutions and Others* [2023] ZASCA 166; 2024 (5) SA 20 (SCA) (*Islandsite*).
[16] Ibid para 15.
[17] Ibid para 22.
[18] Ibid para 23.
[19] *Tayob* para 23.

'…that does not properly understand the dictum in *Ragavan.* It simply recognised a category of decision-making power but found it unnecessary to decide who enjoyed this power.'[20]

[27] In *Islandsite*, Gorven JA, in construing the provisions of the Act concerning the respective authority of the BRPs and the directors during business rescue, referred to the unitary approach of interpretation and stated as follows:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.'[21]

[28] The goal of business rescue in s 128 is to rehabilitate the company. The BRPs are the temporary supervisors of the company. The management of the company's affairs, business and property are part of the process of supervision.

[29] In *Islandsite* the directors contended that the authority of the BRPs must be construed narrowly. However, the NDPP referred to the reasoning in *Ragavan*, which was that a court should construe the authority as having a wide meaning and that BRPs are given full management control in the Act. This Court held that the '…facilitation of the rehabilitation of a company expressly includes management of property. Everything that has to do with the company's debtors clearly falls within the category of management.'[22]

[30] In *Tayob,*[23] it was held that when a company was placed in voluntary business rescue, through a resolution of the Board of Directors, the appointment

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[20] *Islandsite* para 11.
[21] *Islandsite* para 14.
[22] *Ragavan* para 18.
[23] *Tayob* para 23.

of a substitute practitioner does not fall within the powers or authority of a practitioner. That matter however had to do with the situation where a practitioner dies, resigns or is removed from office. Referring to *Tayob*, this Court in *Ragavan*, stated as follows:

'In that matter the court had to address a narrow issue of who of the board or an affected person represented "the company" in appointing a new practitioner in terms of section 139(3) of the Act. In situations where a practitioner dies, resigns, or is removed from office. the court held that the appointment of a practitioner did not fall within the "full management powers" or authority of a practitioner. In that case, the power of the board was found in s 139(3) and was not expressly qualified. In other words, the function fell outside the ambit of the authority of a practitioner and could not be subject to the approval of a practitioner as contemplated in s 137(2)*(a)* of the Act.[24]

[31] In a voluntary business rescue, as in *Tayob*, the directors were empowered in terms of s 139(3) to appoint a new BRP. But this does not apply in a business rescue, which is not voluntary. Section 66 is thus restricted by s 139(2).

[32] The directors in the present matter also contended that the removal of a BRP relates to a strategic matter of the company and to governance rather than to full management control. Governance matters are dealt with in the Act. They relate to shareholders' rights and resolutions, the calling of meetings, directors' powers and duties, eligibility, election and removal, the board and committees and their meetings. The appellants contended that a decision to institute litigation is a management power rather than one of governance. Gorven JA, in *Islandsite*, stated that, '…the distinction sought to be drawn between powers of management and governance of companies is unhelpful in the present enquiry. … [T]he enquiry is whether the provisions in the Act relating to business rescue provide an exception to the general provisions of s 66(1) regarding the powers of directors.'[25]

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[24] *Ragavan* para 27.
[25] *Islandsite* para 21.

[33] It is a policy issue that the transfer of control and power from the Board to the BRPs is part of the process of business rescue. The removal of a practitioner can be done by a court order in terms of s 130[26] or as provided for in s 139. As stated above, this can only be done upon request of an 'affected person', or on the court's own motion, and the court may remove a practitioner from office on various grounds.

[34] Contrary to the reasoning of the high court, in essence, the Act provides that even if a director has appointed the BRPs, such director does not have the right to remove them. A director might have the right to replace them if one of them dies, resigns, or is removed for another reason, but only where the business rescue was voluntary.

[35] The directors have limited rights in their capacity as a director. They can apply *qua* director for interdictory or declaratory remedies. The court can *mero motu* remove a practitioner if the case for an interdict brought by a director makes out a case for removal. But s 139 specifically precludes a director or the company from removing a practitioner.

[36] There are other remedies that the directors enjoy. Some of the remedies are contained, inter alia, in s 165 of the Act. In terms of s 165(2), a director may serve a demand upon a company to commence or continue legal proceedings or take related steps to protect the legal interests of the company. This also applies to a company under business rescue. In such a case, the demand would be served upon

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[26] '130 Objections to company resolution

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-

(a) setting aside the resolution, on the grounds that-

…

(b) setting aside the appointment of the practitioner, on the grounds that the practitioner-

(i) does not satisfy the requirements of section 138;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

(c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected person.'

the BRPs, and if the BRPs do not make an application contemplated in subsec 3, the BRPs would appoint an independent and impartial person or committee to investigate the demand and report to the board on it.

[37] Section 165 ensures that the directors cannot incur costs without the BRP's sanction and a court will not make an order in terms of s 165 unless the litigation costs are provided for. But this is no answer to the question of the authority of the directors. These powers of directors contained in s 165 are different to the power in s 139, which specifically precludes a director or the company from removing a practitioner.

[38] In regard to the declaratory relief sought in respect of the third and fourth appellants, the leave to appeal relates only to prayer 78(c) of the high court's order. There is no cross-appeal by the respondents against the dismissal of the declarations in respect of the third and fourth appellants.

[39] The NDPP submitted that the directors, Ms Ragavan and Mr Archery should be directed to pay the costs of the appeal personally. They had no authority to represent the companies, and instruct the attorneys to appeal the judgment of the high court on their behalf. As stated in *Islandsite*: 'If persons who are not authorised to do so, purport to appoint attorneys to represent a company, it can hardly be expected of the company to bear the costs flowing from that action.'[27]

[40] Accordingly, the following order is made:

1 The appeal succeeds with costs including the costs of two counsel where so employed.
2 The order of the high court is set aside and replaced with the following:
'(a) The application in respect of prayers 1, 2, 3, and 4 are dismissed.

[27] *Islandsite* para 25.

(b) The fifth and sixth respondents are to pay the costs personally, including the costs of two counsel where so employed, jointly and severally.'

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S WEINER

JUDGE OF APPEAL

Appearances

For the appellants:	G Wickins SC with L Van Tonder
Instructed by:	Smit Sewgoolam Inc, Johannesburg
	McIntyre Van Der Post, Bloemfontein.
For the second respondent:	P Louw SC with L Van Gass
Instructed by:	Van Der Merwe and Van Der Merwe, George
	Honey Attorneys Inc, Bloemfontein.