THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 286/17

In the matter between:

ANTON LOGGENBERG N O	**FIRST APPELLANT**
CHARLOTTA AUGUSTA LOGGENBERG N O	**SECOND APPELLANT**
LEON LOGGENBERG N O	**THIRD APPELLANT**
CHARLOTTA AUGUSTA LOGGENBERG N O	**FOURTH APPELLANT**
ANTON GEORG VORSTER N O	**FIFTH APPELLANT**

and

NICOLAAS PETRUS MAREE	**RESPONDENT**

Neutral citation: *Loggenberg N O & others v Maree* (286/2017) [2018] ZASCA 24 (23 March 2018)

Coram: Seriti, Wallis and Swain JJA and Pillay and Schippers AJJA

Heard: 20 February 2018

Delivered: 23 March 2018

Summary: Practice – pleadings – exception – non-compliance with s 2(1) of the Alienation of Land Act 68 of 1981 – alleged sale of land not reduced to writing – appellants orally agreed with respondent that he purchase a farm for the benefit of a trust to be formed and that trust would be entitled to transfer of the farm upon reimbursement of respondent's costs – trustees seeking to enforce

oral agreement – vagueness – agreement not a contract of sale – not invalid in terms of s 2(1) of Act 68 of 1981 – appellants' pleadings disclosing a cause of action and not vague – case remitted for trial.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Daffue J sitting as court of first instance):

1 The appeal succeeds with costs.

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

'(a) The exception to the claim contained in prayers 1 and 2 of the plaintiffs' particulars of claim is upheld and those prayers are struck out.

(b) The exception to the claim contained in prayer 3 of the plaintiffs' particulars of claim is dismissed.

(c) The exception contained in paragraph 5 of the first defendant's notice of exception that the oral agreement pleaded in paragraph 26 of the plaintiff's particulars of claim is void for vagueness, is dismissed.

(d) Each party shall pay his/her own costs.'

3 The case is remitted to the high court for trial.

JUDGMENT

Schippers AJA (Seriti, Wallis and Swain JJA and Pillay AJA concurring):

[1] The Loggenberg family live on a farm called Weltevreden comprising two pieces of land in Parys in the Free State. The farm was previously owned by the Anton Loggenberg Familie Trust (the Family Trust). It is now in the registered ownership of the respondent, Mr Nicolaas Maree, an attorney and formerly a close friend of Mr Anton Loggenberg. The action from which this appeal arises is an attempt by Mr Loggenberg, his wife and son (the plaintiffs),

in their capacities as trustees of the Chacoranja Trust (the Trust), to compel Mr Maree to transfer Weltevreden to the Trust.

[2] Summons was issued in June 2016, accompanied by detailed particulars of claim setting out the background to the case. Prior to the action being instituted Mr Loggenberg and the Trust obtained an interdict against Mr Maree preventing him from transferring Weltevreden to the fifth defendant, Mr Louis Claassen, who had purchased it for R5.2 million. Mr Claassen played no role in the present proceedings and it may well be that he is leaving the defence to Mr Maree. The response to the particulars of claim was a notice of exception delivered on behalf of Mr Maree. He did not plead over. The exception was argued before Daffue J in the Free State Division of the High Court, Bloemfontein, and upheld with costs. The present appeal is with his leave.

[3] The pleaded claim in summary was the following. Mr Loggenberg was insolvent when the Family Trust was created in 1997 to protect the family's interests. He continued farming operations on the farm through two close corporations. In 2007 the debts of the Family Trust and one of the close corporations were consolidated and re-financed by a loan to the Family Trust of some R2.3 million by clients of Maree & Bernard Attorneys. In 2010 when the close corporation was liquidated it was discovered that the Family Trust was indebted to it in an amount of R442 480. The liquidators obtained judgment for this amount, a writ of execution was issued and Mr Maree bought the farm at a sale in execution on 12 October 2011 in the circumstances described below.

[4] After taking advice from a Pretoria attorney, Mr Maree and Mr Loggenberg entered into a contract for the benefit of a third party with the following oral, alternatively implied, terms (the oral agreement). Mr Maree would purchase Weltevreden at the sale in execution for the benefit of a new

trust to be created to protect the interests of Mr Loggenberg and his family. Although Mr Maree would become the registered owner of the farm, Mr Loggenberg and his family would continue to reside on Weltevreden and Mr Loggenberg would continue his farming activities. Once the new trust was established, Weltevreden would be transferred to it against payment to Mr Maree of the costs he had incurred in acquiring and obtaining registration of the farm in his name, and repayment of the loan to the clients of Maree & Bernard Attorneys. Mr Maree would arrange the finance for this through Maree & Bernard Beleggers. It was alleged that he would engage in reasonable and bona fide negotiations with the Trust for the transfer of the farm, and with the investors for the necessary finance. The newly established trust would in any event be entitled to transfer of Weltevreden from Mr Maree against payment of the amounts mentioned. Finally it was said to be an implied or tacit term that he would not encumber or sell Weltevreden without entering into negotiations with the Trust concerning implementation of the oral agreement.

[5] In accordance with the oral agreement, Mr Maree bought Weltevreden for R500 000 on behalf of the trust to be created. The Chacoranja Trust was established on 15 May 2012. Mr Loggenberg, his wife and Mr Maree were the appointed trustees, authorised by the Master on 6 June 2012 to act in that capacity in terms of s 6(1) of the Trust Property Control Act 57 of 1988. Mr Maree resigned as trustee on 26 May 2016. It is alleged that the Trust accepted the benefit conferred by the oral agreement and that at the beginning of 2013, Mr Maree was informed that the Trust anticipated shortly thereafter being in a position to pay the amounts that it was obliged to pay in order to procure transfer of Weltevreden in its favour. However, it was alleged that Mr Maree breached his obligations under the oral agreement by selling Weltevreden to Mr Claassen for R5.2 million.

[6] The plaintiffs sought the following relief in the particulars of claim:

'1. An order directing the first defendant to negotiate bona fide and reasonably with the first to third plaintiffs, with the aim of concluding an agreement for the acquisition and transfer of the Weltevreden farms with the trustees of the Trust.

2. An order in terms of which the first defendant is directed, on behalf of the investors of Maree & Bernard Attorneys, to negotiate bona fide and reasonably with the trustees of the Trust, in order to conclude an agreement for the financing of the Trust for the acquisition and transfer of the Weltevreden farms.

3. In the alternative to prayers 1 and 2, an order in terms of which the first defendant is ordered to:

3.1 transfer ownership of the Weltevreden farms to the trustees of the Trust at some time, upon fulfilment of the tender and payment of the monies referred to in paragraph 42.2 of the plaintiffs' particulars of claim; and

3.2 take all necessary steps, sign documents and give instructions in order to transfer the Weltevreden farms at some time to the trustees of the Trust.'[1] (My translation.)

[7] Mr Maree took exception to the particulars of claim on the basis that they did not disclose a cause of action. He raised three arguments in support of the exception. First, he contended that the agreement alleged was an alienation of land in the form of a sale, and invalid because it was not incorporated in a deed of alienation as required by s 2 of the Alienation of Land Act 68 of 1981 (the Act). Second, he alleged that the agreement was void for vagueness, both because it embodied an agreement to agree on matters such as the terms of the transfer and financing arrangements, and because in the absence of agreement

[1] The order sought reads:
'1. 'n Bevel in terme waarvan die eerste verweerder gelas word om *bona fide* en redelikerwys met die eerste tot derde eisers te onderhandel met die oogmerk om 'n ooreenkoms ter verkryging van oordrag en transport van die Weltevreden plase met die trustees van die Trust te sluit.
2. 'n Bevel in terme waarvan die eerste verweerder gelas word om namens die beleggers van Maree & Bernard Prokureurs *bona fide* en redelikerwys met die trustees van die Trust te onderhandel ten einde 'n ooreenkoms ter finansiering van die Trust ter verkryging van oordrag en transport van die Weltevreden plase te sluit.
3. In die alternatief tot smeekbedes 1 en 2, 'n bevel in terme waarvan die eerste verweerder gelas word om:
3.1 die Weltevreden plase in eiendom aan die trustees indertyd van die Trust oor te dra teen nakoming van die tender en die betaling van die gelde waarna in paragraaf 42.2 van die eisers se besonderhede van vordering verwys is; en
3.2 alle nodige stappe te doen, dokumente te teken en opdragte te verleen ten einde die Weltevreden plase aan die trustees indertyd van die Trust oor te dra.'

on such matters the agreement was incurably vague. Third, and in anticipation of an argument being raised that the common law should be developed to render agreements to agree enforceable in law, he argued that this was not an appropriate development of the common law.

[8] The relief sought in the exception was an order upholding it and either dismissing the plaintiffs' claims with costs, or striking out the particulars of claim with costs. Alternatively, it asked that prayers 1 and 2 be dismissed or struck out.

[9] The court a quo held that the particulars of claim did not sustain a cause of action. On any reasonable construction thereof the Trust was required to pay Mr Maree the costs incurred in purchasing the farm and related costs, together with the outstanding loan of the Family Trust. This, the court said, was nothing other than the ultimate sale of Weltevreden to the trustees of the Trust. It concluded that the oral agreement was void for want of compliance with s 2(1) of the Act. The court also upheld the exception on the ground of vagueness. It found that the oral agreement as pleaded was so vague that the particulars of claim would not be saved by evidence and was excipiable upon every interpretation that the pleading could reasonably bear. Finally, the court a quo held that the so-called agreement to negotiate so as to conclude a further agreement, was void. In this regard the court found that there could not be any suggestion of bona fide negotiations for the conclusion of an oral agreement aimed at the alienation of immovable property. This was in direct conflict with the relevant statutory requirements.

[10] The exception was upheld with costs, followed by the following confusing and vague order:

'2. All paragraphs in the plaintiffs' particulars of claim that relate to the relief sought in prayers 1 & 2, including the relevant prayers, are struck out with costs, including the costs of two counsel.'[2] (My translation.)

The doctrine of vagueness, based on the rule of law, is a foundational value of our constitutional democracy. It requires laws to be written in a clear manner with reasonable certainty but not perfect lucidity.[3] Court orders must comply with this standard: vague provisions in a court order violate the rule of law.[4]

[11] Neither counsel was able to say what paragraph 2 of the order meant or which portions of the particulars of claim survived. In addition, the plaintiffs were granted leave to amend the particulars of claim and the question arises: which paragraphs required amendment? Nor was it clear that the order correctly reflected the intention of the learned judge. Although prayer 3 of the order was not expressly struck out, the judgment itself made it clear that the prayer could not be sustained both on the ground that it embodied an agreement that did not comply with s 2 of the Act and because the agreement was in any event too vague to be enforceable. Finally the argument in this court was rendered more confusing by a concession by counsel for the plaintiffs that he would no longer pursue the claim in terms of prayers 1 and 2. This led his opponent to submit that the appeal had effectively been abandoned.

[12] It is clear from the judgment that the court found that the agreement to transfer Weltevreden to the Trust constituted a contract of sale which was invalid because it did not comply with s 2 of the Act and was in any event unenforceable. Those findings, as a matter of law, applied equally to the relief

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[2] Paragraph 2 of the order of the court a quo reads:
'Alle paragrawe in eisers se besonderhede van vordering wat verband hou met die regshulp aangevra in bedes 1 & 2, insluitende die betrokke bedes, word deurgehaal met koste, insluitend die koste van twee advokate.'

[3] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 108; *National Credit Regulator v Opperman & others* [2012] ZACC 29; 2013 (2) SA 1 (CC) para 46

[4] *Minister of Water & Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para 14.

sought in paragraph 3 of the particulars of claim and were the findings against which leave to appeal was sought and granted. Indeed, counsel for the respondent submitted that prayer 3, which was based on the validity of the oral agreement to transfer Weltevreden (without further negotiation), was perhaps erroneously not struck out. So, irrespective of whether the prayer remains, the terms of the judgment are inconsistent with it being legally sustainable. The submission that there is no longer an appeal before this Court save for the question of costs, since the plaintiffs have abandoned the relief sought in terms of prayers 1 and 2 of the particulars of claim, is incorrect.

[13] This brings me to the question whether the oral agreement fell foul of s 2(1) of the Act, which reads:

'**Formalities in respect of alienation of land**

No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[14] The Act defines 'alienate' as meaning 'sale, exchange or donation'. It was not suggested that this transaction was either an exchange or a donation, which left only a sale. This being an exception, the excipient had to persuade the court a quo that upon every construction which the particulars of claim could reasonably bear, no cause of action was disclosed.[5] Put differently, Mr Maree had to show that upon every reasonable interpretation of the oral agreement, it contemplated the sale of Weltevreden to the Trust.

[15] A contract of sale is a consensual agreement by which one of the contracting parties (the seller) binds itself to the other (the buyer) to exchange a thing for a definite sum of money (the price) which the buyer promises to pay to

[5] *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 817F; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Ltd* [2018] ZASCA 9 para 9.

the seller.[6] The essentials of the contract are agreement upon the *merx*, the price and the obligation of the seller to deliver the *merx* to the buyer.[7]

[16] The relationship between Mr Loggenberg and Mr Maree cannot be described as being one of buyer and seller. Neither can the relationship between the Trust and Mr Maree be so described. Instead, the oral agreement as pleaded is based solely on the relationship between Mr Loggenberg and Mr Maree. This is buttressed by the following allegations in the particulars of claim. The Loggenberg family was in financial difficulty. Mr Maree agreed to purchase Weltevreden on behalf of a trust to be formed and register the farm in his name until the trust could acquire ownership of it. The Loggenberg family would continue to live and farm on Weltevreden. After its establishment, the trust would be entitled to transfer of Weltevreden upon reimbursement of Mr Maree's costs incurred in acquiring the farm (there is no hint of profit or payment for his services) and payment of the amount owed to the clients of Maree & Bernard Attorneys. Mr Maree would not be entitled to encumber or sell the farm without negotiations concerning implementation of the oral agreement.

[17] Further, it was alleged that at the sale in execution Mr Maree and Mr Loggenberg informed members of the public that Mr Maree was buying Weltevreden on behalf of the Loggenberg family and they were asked not to push up the bids. In accordance with the oral agreement, Mr Maree bought Weltevreden for R500 000 whereas its market value was R1 million. The Trust was established in 2012 and Mr Maree (unlike a seller) and Mr Loggenberg became trustees. Pursuant to a meeting in 2013 at which Mr Loggenberg informed Mr Maree that the Trust would be in a position to repay the purchase

[6] A A Roberts *Wessels Law of Contract in SA* 2 ed (1951) para 4419; *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 400.
[7] *Commissioner for Inland Revenue v Wandrag Asbestos (Pty) Ltd* 1995 (2) SA 197 (A) at 214J.

price and costs which Mr Maree had incurred in acquiring Weltevreden, on 27 March 2013 and 8 April 2013 amounts, each of R1 million, were paid into the trust account of Bernard & Maree Attorneys for inter alia the acquisition of Weltevreden by the Trust.

[18] These allegations in the particulars of claim must for present purposes be assumed to be correct, unless they are clearly false or cannot possibly be proved.[8] Reasonably interpreted, the allegations are capable of sustaining a cause of action that Mr Maree bought Weltevreden on behalf of the Trust and took transfer thereof into his own name, with an undertaking to transfer the farm to the Trust when called upon to do so, upon reimbursement of his costs and payment of the loan by the Family Trust to Maree & Bernard Attorneys. So interpreted, the oral agreement does not constitute a sale of Weltevreden to the Trust. This is not new. More than a century ago in *White v Collins*,[9] Ward J explained the nature of such a claim as follows:

'If A buys a property on behalf of B from C and takes transfer into his own name with a promise to B to transfer it to him when called upon, B has an *actio in personam* to compel A to transfer the property to him.'

[19] This statement by Ward J was approved in a minority judgment by Greenberg JA in *Du Plessis v Nel*,[10] that a promise by A to hold freehold property registered in her name in trust for B is a contract to deliver such property on demand, and is not a contract of sale of fixed property as contemplated in the Transvaal Transfer Duty Proclamation 8 of 1902.[11]

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[8] *Natal Fresh Produce Growers' Association & others v Agroserve (Pty) Ltd & others* 1990 (4) SA 749 (N) at 754J-755B.
[9] *White v Collins* 1914 WLD 35 at 37.
[10] *Du Plessis v Nel* 1952 (1) SA 513 (A) at 526H-527B.
[11] Section 30 of the former Transfer Duty Proclamation read:
'No contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto or the agent's duly authorised in writing.'

[20] This Court endorsed Greenberg JA's view in *Dadabhay v Dadabhay & another*.[12] The appellant and the respondent entered into an oral agreement in terms of which the respondent agreed to buy an erf from the Community Development Board on behalf of and as nominee for the appellant, but refused to transfer it when called upon to do so. A defence based on s 1(1) of the General Law Amendment Act 68 of 1957 was dismissed.[13] This Court held that the oral agreement was neither a contract of sale nor a cession in respect of an interest in land; and that the word 'nominee' may well have been used in the relevant oral agreement to denote that the respondent would act as a trustee in buying the property and thus would thereafter sign all documents, when called upon by the appellant to do so, in order that it could be registered in her name.[14]

[21] Counsel for the respondent submitted that unlike *Dadabhay*, the acquisition of Weltevreden by the Trust against payment of the price to be determined and financed, was nothing other than a sale; that the Trust did not even exist at the time of the stipulation in its favour; and that all it allegedly acquired on acceptance of the stipulation was the right to purchase the farm at a price to be determined and financed.

[22] The submission is unsound. A typical *stipulatio alteri* or contract for the benefit of a third party, is a contract concluded between A and B for the benefit of a third party C, who by accepting the benefit becomes a party to that contract so that it is A and C who are bound to each other.[15] Such a contract has been

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[12] *Dadabhay v Dadabhay & another* 1981 (3) SA 1039 (A) at 1048H-1049A; 1049G-1050A.
[13] Section 1(1) of the General Law Amendment Act 68 of 1957 reads:
'No contract of sale or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this section unless it is reduced to writing and signed by the parties thereto or by their agents, acting on their written authority.'
[14] This judgment was followed in *Du Plooy & another v Du Plooy & others* [2012] 4 All SA 239 (SCA); [2012] ZASCA 135 paras 32 and 33.
[15] *Crookes N O & another v Watson & others* 1956 (1) SA 277 (A) at 291E-F; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172A-E.

recognised as enforceable in relation to a company not yet formed.[16] So, nothing turns on the fact that the Trust was not in existence when the oral agreement was concluded. It appears that the agreement was a fairly typical *stipulatio alteri*. Once the Trust was established, by accepting the benefit of the oral agreement, it could obtain the right Mr Loggenberg contracted for, ie the transfer of Weltevreden. And since the oral agreement was capable of being construed other than as a sale, it would not be prohibited by s 2(1) of the Act. Of course, it is an entirely different matter whether the oral agreement can be proved and whether the Trust indeed accepted the benefit of that agreement. But these are matters for trial, not exception.

[23] What remains is the exception that the contract is void for vagueness. It is a settled principle that the question whether a purported contract is void for vagueness should not lightly be decided on exception.[17] In this regard the dictum of Harms JA in *Namibian Minerals Corporation v Benguela Concessions*[18] is particularly apposite:

'Once a court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf *Pezzuto v Dreyer and Others* 1992 (3) SA 379 (A); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the court should strive to uphold – and not destroy – bargains.'

[24] Given the nature of the oral agreement and that language used in a contract should be approached sensibly and fairly, I do not think that the court a

[16] *McCullogh v Fernwood Estate Limited* 1920 AD 204 at 205-206.
[17] *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514F.
[18] *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 561G-I.

quo at the exception stage was able to say with certainty or the requisite degree of confidence, that the agreement was not an enforceable contract on account of vagueness and that the plaintiffs had no case. Instead, there remained the possibility that evidence might resolve uncertainties in the oral agreement, such as the amount that Mr Maree was authorised to bid for the farm; the identity of the investors and the terms of the proposed finance for the acquisition of the farm by the Trust; the effect on the oral agreement if the Trust did not obtain the necessary finance; and Mr Maree's reimbursement costs.[19]

[25] The remaining question regarding vagueness – the alleged mutually destructive allegations in the particulars of claim, namely that there would be negotiations for the transfer of Weltevreden, but that the Trust would in any event be entitled to transfer of the farm – is no longer in issue since the plaintiffs have abandoned paragraphs 1 and 2 of the relief sought. It follows that the court a quo's finding that the oral agreement as pleaded was so vague that no evidence could resolve the uncertainties, cannot stand.

[26] In their written submissions and in oral argument the plaintiffs indicated that they no longer intend to proceed with paragraphs 1 and 2 of the relief sought and their claim that the common law should be developed so as to permit enforceability of an agreement to enter into bona fide negotiations. In my view, the plaintiffs' approach was sensible: whether the common law should be developed is not a matter that should be decided by way of exception.[20] In any event this Court has recently held that a development of the common law such as was suggested by the plaintiffs is not justified on constitutional grounds and the Constitutional Court refused leave to appeal against that judgment.[21]

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[19] *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 676F-H, approved in *Murray & Roberts* fn 17 at 514F.
[20] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC) para 26.
[21] *Roazar CC v The Falls Supermarket* [2017] ZASCA 166 paras 16-24.

Therefore the exception to paragraphs 1 and 2 of the relief sought was properly upheld and fairness dictates that each party should pay its own costs in respect of the proceedings in the high court. The plaintiffs have been substantially successful on appeal and there is no reason why costs should not follow the result.

[27] The following order is made:

1 The appeal succeeds with costs.

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

'(a) The exception to the claim contained in prayers 1 and 2 of the plaintiffs' particulars of claim is upheld and those prayers are struck out.

(b) The exception to the claim contained in prayer 3 of the plaintiffs' particulars of claim is dismissed.

(c) The exception contained in paragraph 5 of the first defendant's notice of exception that the oral agreement pleaded in paragraph 26 of the plaintiff's particulars of claim is void for vagueness, is dismissed.

(d) Each party shall pay his/her own costs.'

3 The case is remitted to the high court for trial.

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A Schippers

Acting Judge of Appeal

APPEARANCES

For Appellant:	B Knoetze SC Instructed by: Symington & De Kok, Bloemfontein
For Respondent:	FH Terblanche SC (with him AJ Wessels and H Struwig) Instructed by: Strydom & Bredenkamp Inc, Pretoria EG Cooper Majiedt Inc, Bloemfontein