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IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 4/2019

CIV/APN/167/2018

HELD AT MASERU

In the matter between

SECHABA MAPHIKE **APPELLANT**

and

PIERRE-YVES SACHET (MD & CEO TOTAL SOUTH AFRICA (PTY) LTD) **1ST RESPONDENT**

ONWARD TUBELA (MD TOTAL LESOTHO (PTY) LTD **2ND RESPONDENT**

MPHO LIPHOTO (DEPOT MANAGER) **3RD RESPONDENT**

TOTAL SOUTH AFRICA (PTY) LTD **4TH RESPONDENT**

TOTAL LESOTHO (PTY) LTD **5TH RESPONDENT**

PUMA MARARIUS ENERGY LTD (sic) **6TH RESPONDENT**

LETELE KHALIKANE **7TH RESPONDENT**

OFFICER COMMANDING POLICE (HOOHLO POLICE STATION **8TH RESPONDENT**

COMMISSIONER OF POLICE	**9TH RESPONDENT**
ATTORNEY GENERAL	**10TH RESPONDENT**
DEPUTY SHERIFF OF THE HIGH COURT (THABANG MOKHOTHU)	**11TH RESPONDENT**

CORAM : DAMASEB AJA
CHINHENGO AJA
MTSHIYA AJA

HEARD : 14 OCTOBER 2019
ELIVERED : 1 NOVEMBER 2019

SUMMARY

Appellant prosecuting civil claim for damages for unfair dismissal in Labour Court against incola company – All shares in incola company sold by peregrine shareholder, holder thereof, to peregrine purchaser; Appellant, misconceiving nature of transaction and believing incola company will cease to exist thereby him becoming disentitled to receiving payment of damages in case of success in Labour Court, filing urgent application in High Court ex parte to found jurisdiction by arrest of persons and attachment of property of company and other incola and peregrine respondents and for interdictory relief, in respect of peregrine respondents without applying for edictal citation in terms of Rule 6 of the High Court Rules 1980;

Rule nisi with interim relief granted refusing the arrest of peregrine respondents but allowing attachment of property and interdictory relief;

Deputy sheriff attaching property without strictly complying with interim order;
Appellant applying for order of contempt of court believing interim order in relation to interdictory relief not complied with - Respondents filing answering affidavit in opposition to interim order and to contempt application and at same time filing counter-application to stay and set aside attachment of property - Judgment entered in favour of respondents but without dealing with issues in applications for contempt and counter-application and costs;

Appellant appealing to Court of appeal against judgment - Before appeal heard respondent applying to High Court in terms of Rule 45 of High Court Rules for it to supplement/vary its judgment and deal with issues omitted in judgment;

At hearing of appeal against judgment Court ordering, by consent of parties, that Rule 45 application be heard and finalized before appeal is heard – Judge in High Court finalizing Rule 45 application and giving judgment dismissing appellant's application for contempt with costs and granting respondents' application to supplement judgment and also granting counter-application with costs;

Appellant appealing against both judgments after filing additional grounds of appeal;

On appeal Court dismissing appeal and granting part of costs on attorney and own client scale and part on ordinary scale

JUDGMENT

CHINHENGO, AJA:-

Introduction

[1] Two judgments of the High Court (per PEETE J) are on appeal before us. The first one was delivered on 28 November 2018 and the second on 15 August 2019.

[2] The first judgment is concerned with three applications that came before the judge *a quo*: an *ex-parte* application to found jurisdiction and for interdictory relief; an application for contempt of court and a counter-application for a stay of execution.

[3] The second judgment dealt with certain issues raised in the second and third applications, which the first judgment did not address. It also dealt with an application in terms of Rule 45 of the High Court Rules on variation and rescission of orders generally. I will refer to this fourth application as the "Rule 45 application". The respondents filed this application requesting the court to supplement the first judgment in order to correct patent errors and omissions in that judgment.

Errors of law, fact and conceptual errors in appellant's papers

[4] The appellant's application and appeal can only be described as a comedy of errors, both factual and legal. They are replete with conceptual errors as well. It is tedious to have to deal with all of them. The number of such errors, I think, constrained the respondents to file copious answering affidavits and heads of argument. The former run into no less than fifty pages and the latter is some eighty-six pages long. It is necessary that I should highlight these errors as and when I deal with each circumstance giving rise to them. In this way, I think, I will be able ultimately to show the basis of my conclusions or decisions on each of the issues on appeal before this Court.

First application: arrest of persons and property to found jurisdiction

[5] The appellant herein, (Sechaba Maphike) commenced proceedings at the Directorate of Dispute Prevention and Resolution (DDPR) claiming M3 146 446.80 as damages for unfair dismissal from employment by the 5th respondent ("Total Lesotho"). He sued Total Lesotho only. He lost his case in that forum. He then took the matter on review to the Labour Court in 2015 - Case

No. LC/REV/110/15. That case has been postponed on many occasions and is still pending in that court.

[6] On 30 January 2019, the 4th respondent ("Total SA"), which, until then, held all the shares in Total Lesotho, sold its entire shareholding in that company to Puma Mauritius Energy Ltd ("Puma Energy"), the 6th respondent, and sent a letter to all customers and clients of Total Lesotho advising them of that development. That letter reads-

> "To Customers and Clients
>
> Subject: Change of ownership notification letter
>
> Deal All
>
> This letter serves to formally announce and inform you that the operations of Total Lesotho (Pty) Ltd (TL), (registration number 83/83) located at Matsoane Road, Industrial Area, Maseru, have been sold to Puma Mauritius Energy Limited. The change of ownership would be effective from 28/02/2018 subject to closing conditions being that:
>
> The new operations will thereafter be rebranded to Puma. From 1 February 2018 until 28 February 2018 when the handover from TL to Puma is complete, Total Lesotho has no intention to change the management and operations of the business.
>
> The supply terms and ordering process will remain unchanged during this period: the last day to place your order for product from TL will be 26 February 2018. All payments that will be made after 28 February must be paid in the name of Puma. Puma will notify you of the change of bank details in due course.
>
> Upon change over, contracts will be ceded to Puma, you will continue to enjoy the same terms under your current contract

until its maturity, thereafter new terms can be negotiated with Puma.

All correspondence related to the operations from 1 March 2018 can be forwarded to Thembisile Erica Hamca at Puma. Her details will be sent to you in due course.

Total Lesotho thanks you for your support. We wish you all the best in future business relations with Puma.

Thank you.

Yours faithfully,

Pierre-Yves SACHET

MD & CEO Total South Africa (Pty) Ltd."

[6] The above circular letter came to the appellant's attention. He misunderstood it to mean that, as a result of the transaction mentioned in the letter, Total Lesotho was to cease to exist as an entity, its business operations would be taken over by Puma Energy and consequently he would not be able to recover his damages even if he won his case in the Labour Court against Total Lesotho.

[7] He accordingly filed an *ex-parte* application in the High Court at the beginning of February 2018 for the relief I set out in the following paragraphs. In written communication to appellant's legal practitioners and in the answering affidavit in opposition to the confirmation of the *rule nisi* issued in consequence of the *ex-parte* application, the respondents made it plain to the appellant that Total SA had merely sold its entire shareholding in Total Lesotho to Puma Energy and that Total

Lesotho would continue to exist as a company and retain all its assets. The appellant does not appear to have appreciated this. He persisted in error by failing to understand basic principles of company law with the result that he failed to distinguish between a sale of shares and a sale of assets of a company; between the ownership of assets by a company and non-ownership of the same by shareholders of the company or its employees however high ranking they may be. In this connection it is necessary to clearly set out the legal position of a limited liability company.

[8] The *locus classicus* is *Salomon v Salomon & Co* [1897] AC 22 at 51, which has been affirmed in a plethora of cases, one of which was referred to by the respondents in their heads of argument - *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper & Others* 2018 (4) SA 71 (SCA) para. [27] p 80 which states:

> "It is trite that a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own, separate from those of its shareholders. Its property is its own and not that of its shareholders. This follows from the separate legal existence with which a company is by statute endowed. Thus, in *Shipping Corporation of India Ltd* Corbett CJ said 'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its

> shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify piercing or lifting the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words device, stratagem, cloak and sham have been used...."

[9] The first relief that the appellant sought was the arrest of the 1st respondent, Pierre-Yves Sachet ("Sachet") and the 2nd respondent Onward Tubela ("Tubela"), respectively the Managing Director and Chief Executive Officer of Total SA and former Managing Director of Total Lesotho. The latter was the Managing Director shortly before the shares in Total Lesotho were sold to Puma Energy and had since left Lesotho permanently for his home country, South Africa. The intended arrest was to found jurisdiction, an arrest *ad fundandam jurisdictionem.*

[10] In his founding affidavit the appellant stated that Sachet was "currently staying in South Africa" and Tubela was

"temporarily staying in Lesotho." He went on to state at paragraph 18 of his affidavit that –

> " I have been advised and believe the same to be true that the 1st and 2nd respondents will be here in Lesotho on the 01st day of March 2018 for smooth handover."

[11] It is clear from the said paragraph 18 of the appellant's founding affidavit that as at the time thereof the appellant was aware that both Sachet and Tubela were not within the jurisdiction of the court. The appellant had a cause of action only against his employer, Total Lesotho, against which he made allegations of unfair dismissal in proceedings in the Labour Court. Sachet and Tubela were not within the jurisdiction so as to entitle him to seek their arrest in order to found jurisdiction. They were *perigrini* of Lesotho.

[12] The law is that in order to succeed in an application to arrest a person to found jurisdiction, the applicant must establish that he has a cause of action against the person concerned, and that that person is within the jurisdiction. In this regard Rule 6(8) of the High Court Rules 1980 provides that-

> "On the application of an *incola* of Lesotho the court may order the arrest of a *peregrinus* who is temporarily within the jurisdiction of the court subject to the following conditions-
>
> (a) The applicant must show that he has a good cause of action against the *peregrinus* and inter alia he must produce a

> certificate of an advocate or attorney who certifies that he has considered the question on information given and from documents produced by the applicant and that in his opinion the applicant has a good cause of action against the *peregrinus*.
>
> (b) If the court grants the application it shall order a warrant of arrest to be addressed to the sheriff. Such warrant shall be as near as possible in accordance with Form "E" of the First Schedule herein.
>
> (c) The sheriff shall bring the *peregrinus* to court as soon as possible and if the *peregrinus* gives such security for the claim or for his further presence within Lesotho as may seem to the court to be adequate, the *peregrinus* shall be immediately released from custody."

[13] The appellant did not establish any of these requirements of Rule 6(8) – respondents' presence within the court's jurisdiction; a good cause of action against them and the certificate by an advocate. He also did not proceed in terms of Rule 5 of the High Court Rules, which provides in mandatory terms that no process or any document whereby proceedings are instituted shall be served outside Lesotho except with the leave of the court. This procedure is commonly referred to as edictal citation. It is understandable that when the *ex-parte* application came before MAKARA J, he did not grant the relief prayed for by the appellant in this connection.

[14] The second relief was for an attachment, also to found jurisdiction, of the property of Sachet, Tubela, Total SA and Total Lesotho "situated at Motso'ene Road Industrial Area, Maseru and Maputsoe Filling station in Leribe worth plus or

less M3 146 446. 80… pending finalization of this application and review application in LC/REV/110/15." The property concerned is set out in detail at paragraph 15.1 of the affidavit. It is "office block, [fuel] storage tanks, products in the tanks (diesel, paraffin and premium), lube store, loading pumps, pipelines and Maputsoe Filling Station."

[15] The appellant sought the attachment of the above-mentioned property without ascertaining who the owner thereof was. The papers before this Court show that Sachet, Tubela and Total SA did not own the property. Some of the property belonged to Total Lesotho and some to third parties unconnected to the appellant's damages claim. An attachment to found jurisdiction is not competent against *incolae* defendants: the court exercises jurisdiction on the mere fact that they are *incolae*. Total Lesotho and the third party are *incolae* of the court. So, while in their case the property belonged to them, an attachment of the property was incompetent.

[16] Total SA had been a mere shareholder of Total Lesotho until 28 February 2018 when Puma Energy purchased its entire shareholding, which was also a few hours before the appellant's *ex-parte* application was heard and granted. Sachet and Tubela were just employees of Total SA and they and their employer were *peregini* of the court.

[17] Rule 6(1) and (2) of the Rules of the High Court provides that-

> "(1) The court may on application grant leave for the property of a *peregrinus* which is in Lesotho to be attached in order to give the court jurisdiction in an action which the applicant intends to bring against such *peregrinus.*
>
> (2) The applicant must satisfy the court -
>
> > (a) that he has a prima facie cause of action against the *peregrinus*; and
> >
> > (b) that the property sought to be attached is the property of the *peregrinus* or that the *peregrinus* has some right in the property; and
> >
> > (c) that the applicant himself is an *incola* of Lesotho and that the respondent is a *peregrinus*.
> >
> > (d) The applicant may in the same application apply for leave to serve defendant by edictal citation."

[18] The appellant's application did not satisfy the requirements of Rule 6 above: it did not establish that the peregrine respondents had any property in Lesotho or that the property attached belonged to them. It did not establish that the appellant had a *prima facie* cause of action against the peregrine respondents. And it did not apply for leave to sue by edictal citation.

[19] The third relief was for an interdict restraining the 1st, 2nd, 4th an 5th respondents and their staff and agents "from making preparation to remove or repatriating property belonging to the

1st, 2nd, 4th and 5th respondents to South Africa … pending finalization of this application and review application in LC/REV/110/15." Again, the appellant did not bother to ascertain whose property it was and whether or not it was capable of being removed or repatriated to South Africa or by whom. The 4th respondent, Limpho Liphoto, ("Liphoto") was merely a Depot Manager. The reference to unnamed "staff and agents" did not precisely identify the persons on whom the order would be binding. There is no indication on the papers that the requirements of an interim interdict or final interdict were met.

[20] The fourth relief was for an order prohibiting the 1st, 2nd, 4th and 5th respondents "from transferring ownership of their said assets pending finalization of this application and review application in LC/REV/110/15." The observations I have made relating to ownership of the property apply to this relief as well. The papers show that the appellant was aware, or should have been aware, that no assets were the subject of the agreement between Total SA and Puma Energy: only shares were sold.

[21] The fifth relief was for an order prohibiting Puma Energy from "[receiving] transfer and ownership of the said assets pending finalization of this application and review application in LC/REV/110/15." This relief was based on an erroneous understanding of the transaction between Total SA and Puma Energy in that the subject of the sale was not any assets of Total

Lesotho but 100% shares held by Total SA in Total Lesotho. This sale was between two entities, both *peregrini* of the courts of Lesotho. Additionally, the contract of sale was entered into outside Lesotho.

[22] The sixth relief was for an order directing the 3rd respondent, "Mpho Liphoto, Depot Manager", "to give to the Registrar the property that [is] worth the applicant's claim pending finalization of this application." Liphoto was not the owner of the property and could not thus decide to hand it over to the Registrar.

Interim *ex parte* order granted

[23] On 28 February 2018 MAKARA J issued a *rule nisi, ex-parte,* returnable on 14 March 2018 and also granted, as interim relief, all the relief sought by the appellant except the arrest of Sachet and Tubela. He thus ordered that pending the finalization of the application before him and the review application in the Labour Court, property at Motso'ene Road Maseru and Maputsoe Filling Station, Leribe, purportedly belonging to Sachet, Tubela, Total SA and Total Lesotho be attached to found jurisdiction; that the same respondents and "his staff or his agents" be prohibited from "preparing to remove or repatriating to South Africa" the property of the same respondents; that the same four respondents "be interdicted

from transferring ownership of their assets"; that Puma Energy be prohibited from "receiving transfer of the said assets", and that the 3rd respondent, Liphoto, was to hand over the said property to the Registrar pending the finalization of the application before the judge.

[24] It is not necessary to comment in great detail on the interim relief save to say that it propagated the confusion in the appellant's application. It compounded the confusion by directing that the interim relief granted was to hold not only until the application before the judge was finalized but also until the review application in the Labour Court was finalized. Clearly both the appellant and the judge did not properly apply their minds to the relief sought and the interim order granted.

[25] Interim as it was, the order had drastic and perhaps unintended consequences on the part of the judge. It authorized the attachment of both *incola* and peregrine property in circumstances where it was not competent to do so. It imposed an obligation to obey an interim court order on persons with whom the appellant was not in court. It attached property belonging to third parties unconnected with the litigation in the Labour Court between the appellant and his employer. It sought to found jurisdiction in a matter in which the Labour Court was already exercising jurisdiction. It failed to maintain the distinction between a company and its property and the

shareholder's interest in the company and, generally, the place of the shareholder and employees of the company in that scheme of things. It gave confidence to the appellant that he could proceed willy-nilly against anyone and everybody somewhat connected to Total Lesotho without laying any foundation therefor.

Second application for contempt of court

[26] After the application for the arrest of persons and property was lodged on 28 February 2018 and nothing seemed to be happening, the appellant lodged another application on 26 March 2018 for contempt of court alleging that the 3rd respondent (Liphoto), Total Lesotho, Puma Energy and the 7th respondent ("Khalikane") should be committed to prison for contempt of the interim order until they purged their contempt by "restoring all the fuel that has been dissipated from the attached fuel tanks at the 5th respondent depot at Industrial area and at Maputsoe filling station to date" and directing the deputy sheriff "to lock all gates to the attached property including the gates into the fuel depot that has been attached hereto pending the review of the application of the applicant in LC/REV/110/15 which is pending in the Labour Court." The 7th respondent, identified as "of c/o Puma Mauritius Limited Industrial Area Maseru district" was made a respondent allegedly because, after the attachment, he confirmed to the

appellant that he was aware of the attachment and he and Puma Energy were receiving the attached property in violation of the interim order. The 8th to 10th respondents were also added as respondents purportedly to secure the observance of the interim relief and enforcement of the contempt order, when issued.

[27] At paragraph 15 of the founding affidavit the appellant averred that the interim order had been served on all the respondents, i.e., 1st to 10th respondents, by the sheriff "who attached all the movable and immovable property of the 5th respondent …per return of service marked SMM2 attached hereto."

[28] It is interesting to note that the deputy sheriff's return of service dated 1 March 2018 states that he served the interim order and other papers on the 1st, 2nd, 3rd, 4th and 5th respondents by leaving a copy thereof with

> "Mr Shopholo G45 Guard at 6:55 pm in the premises of the 5th respondent" [and that he attached] "ALL PROPERTY OF THE 5TH RESPONDENT, MOVABLE AND IMMOVABLE IN MASERU AND MAPUTSOE …".

[29] Notably (a) the deputy sheriff did not prepare an inventory of the property that he attached, (b) the deputy sheriff did not ensure that the property attached equated to the amount of the appellant's claim, (c) the deputy sheriff did not serve the interim

order upon the respondents except, at the very best, only upon Total Lesotho. Additionally it is in dispute as to exactly what time he served the interim order.

[30] His return gives the time as 6:55 pm. The entry in a book maintained by the G45 guards indicates that the service was at 7:05 pm, which was just outside the period for effecting valid service as provided in Rule 4(3) of the High Court Rules. That Rule states that "service shall be as near as possible between the hours of 7.00 a.m. and 7.00 p.m."

[31] Before the application for contempt was lodged the appellant's legal practitioners wrote a letter on 15 March 2018 to the respondents' attorneys to which they received the following response dated 19 March 2019:

> "Dear Sirs,
>
> Sechaba Maphike - Yves Sachet and Others Case number: CIV/APN/67/18
>
> We are in receipt of your letter dated 15 March 2018. As you know, we act for the respondents in the matter.
>
> We refer to our client's answering affidavit and request that you carefully consider the contents thereof as all your issues of concern were addressed therein. Further, it is made clear that the agreement between Total South Africa (Pty) Ltd (TSA) and Puma Mauritius Energy Ltd (Puma Energy) is a sale of shares agreement, in terms whereof TSA sold 100% of its shareholding in Total Lesotho, which does not entail a transfer of Total Lesotho's assets. As such, Total Lesotho retains all its assets and it continues to exist, as it has done before the conclusion of the Share Purchase Agreement (SPA). We also

refer you to the extracts of the Share Purchase Agreement (SPA) annexed to our client's answering affidavit as 'AW4'. In the circumstances we deny that our clients have violated the terms of the interim order by transferring the assets of Total Lesotho as alleged in your letter.

In any event we point out that your client's interim court order was obtained after 14:30 on 28 February 2018, more than 3 (three) hours after the sale was perfected and our local client, Total Lesotho, was served with the application thereafter. In this regard we refer you to the extract of the SPA providing for the Effective Date and the closing time of the SPA.

We further wish to confirm that neither the Ex Parte Urgent Application nor the Interim Court Order has been served on TSA, its CEO and Managing Director, nor the former Managing Director of Total Lesotho or Puma Energy.

In the circumstances should your client be minded to launch contempt proceedings, such will be vigorously opposed and we will seek a punitive costs order against yourselves *de bonis propriis* and costs against your client on an attorney and own client scale. For such purposes, this letter will be placed before the Honourable Court.

We trust that you will find the above in order.

Yours faithfully

(signed)
Harley and Morris"

[32] Despite receipt of the above letter the respondent went ahead and lodged the contempt application.

Third application: counter-application

[33] The respondents filed their opposition to the contempt application together with a counter-application. In the counter-

application they sought an order enrolling the counter-application to be heard together with that main application to found jurisdiction and the contempt application; an order staying and setting aside the attachment by the deputy sheriff; an order declaring that attachment by the deputy sheriff was void and contrary to the interim court order, and an order directing that the respondents were not liable for the deputy sheriff's costs of attachment.

First judgment[33] On the return day the learned judge, PEETE J, before whom the *rule nisi* came for confirmation or discharge, was, therefore, to hear and determine all the three applications – the application to found jurisdiction and for interdictory relief, the contempt application and the counter-application.

[34] The 1st to 6th respondents vigorously opposed the *rule nisi* and the concomitant interim relief to be granted. The basis of the opposition was that, pursuant to a confidential Share Purchase Agreement entered into between Total South Africa and Puma Energy on 25 January 2018, Total SA had sold its 100% shareholding in Total Lesotho to Puma Energy. That agreement had been perfected as of 28 February 2018 at 11:00 am, which were some three and half hours before the *rule nisi* was granted by MAKARA J.

[35] The other grounds of opposition were that the appellant had not proceeded in terms of nor complied with, Rules 4 (on service of process) and 5 (on edictal citation) of the High Court Rules in order to institute proceedings against Sachet, Tubela, Total SA and Puma Energy, all *peregini* of the court; that the appellant had no cause of action against all the cited parties except Total Lesotho; that the Labour Court had already assumed jurisdiction in the matter between the appellant and Total Lesotho and it was unnecessary to seek to found jurisdiction which already existed, more so against parties in relation to which the appellant had no cause of action; that the property attached belonged to Total Lesotho and the 7th respondent, Letele Khalikane ("Khalikane"), as the case may be, both *incolae* of the court, and not to any of the other respondents; that there was absolutely no cause to sue the respondents other than Total Lesotho in light of the Share Purchase agreement the relevant provisions of which had been brought to the appellant's attention; that the assets identified for attachment were in any event incapable of repatriation to South Africa.

[36] His Lordship, **PEETE J**, dealt with the matters before him on the return day, 12 October 2018, and delivered his judgment on 29 November 2018. He discharged the *rule nisi* and appears to have also dismissed the appellant's contempt of court

application. In arriving at his decision the learned judge stated, among other things, the following at paragraphs 29 to 38:

> "29. According to the Share Purchase Agreement signed on the 25th January 2018 the closing date was to occur at 11 am on the 28th of February 2018" and, as fate had it, the effective attachment interim order was only served by the Deputy Sheriff at 6:55 pm at the G45 offices of Total Lesotho (5th respondent). That was "seven" hours after the passing of ownership.
>
> 30. Thus when attached the (shares) properties belonged no longer to Total Lesotho but to Puma Energy Mauritius against which the applicant had no claim before the DDPR. During all this scenario, Total Lesotho remained the *incola.*
>
> 31. I have not been convinced that the Shares Sale Agreement was concocted or simulated by Total Lesotho and the onus was on the applicant to show the agreement was conceived and manipulated to defeat the applicant's claim for damages of M3 146 446.80 before the DDPR. Nor has any prayer to have it set aside as fraudulent been made.
>
> 32. ....
>
> 33. Where shares are being attached *ad fundandam jurisdictionem* the applicant seeking attachment must satisfy the court that the shares are property of the peregrine debtor. Since the claim for damages before the DDPR for M3 146 446.80 is against Total Lesotho. The attachment *in casu* is invalid upon the idle reasoning that attachment cannot be made under Rule 6 of the High Court Rules 1980 because Total Lesotho is not a *peregrinus* but an *incola* nor can it stand against Total South Africa because applicant had no claim against Total South Africa in the DDPR damages claim. This is the quandary of the applicant's case.
>
> 35. Whilst there may be a *prima facie* case against Total Lesotho – an existing company and *incola*, it has no valid claim against Total South Africa unless it has been proven that the obligations and liabilities of Total Lesotho were ceded to Total South Africa under the Shares Purchase Agreement of the 28th February 2018.

> 36. The inordinate delay in prosecuting the application for review before the Labour Court is due to the fact that the Labour Court is perhaps overladen with cases but it is not for this court to determine the issue of prospects of success in the review application. The ultimate success or failure of the application for review will finally put the matter to rest if and when it comes.
>
> 37. For the present proceedings before this court, it is clear that the attachment order cannot be allowed to stand under Rule 6 of the High Court Rules 1980 – upon the main reasoning that the property – even the shares – of Total Lesotho could not be attached *ad fundandam jurisdictionem* because Total Lesotho was and continues to be an *incola* whose property can only be attached in execution of a judgment of court.
>
> 38. For these reasons, the *rule nisi* granted by MAKARA J on 28th February 2018 at 2:30 is hereby discharged along with the contempt order granted."

[37] This judgment should have disposed of the three applications before the court in express terms. It did so expressly only in relation to the application to found jurisdiction. It did not do so in relation to the contempt application and the application to set aside the attachment by the Deputy Sheriff. In paragraph 38 where it refers to the contempt application the judgment appears to have been oblivious of the fact that there was no order issued by **MAKARA J** in respect thereto. It had in fact been placed before **PEETE J** together with the other two applications: he should therefore have made an order dealing specifically with that application, including an order with respect to costs. His order was in the result ambiguous where it purported to discharge the *rule nisi*

"along with the contempt order granted" when no such order had been granted.

[38] It stands to reason that due to inadvertence, the learned judge did not dispose of the contempt application before him. As for the third application by the respondents, clearly the learned judge did not advert to it at all. He made no order as to whether that application was dismissed or not or as to what became of the respondents' prayers for the setting aside of the attachment and denial of the deputy sheriff's costs of attachment.

Overall propriety of judge's reasoning and decision[39] The learned judge's reasoning and conclusion can hardly be faulted in relation to the application to found jurisdiction, except paragraph 30 where he confounds the attachment of shares and attachment of properties and appears not to have appreciated the difference between ownership of shares which had by then passed from Total SA to Puma Energy and ownership of assets which remained with Total Lesotho. The judge was correct in recognizing that the appellant was already before the Labour Court with Total Lesotho and that that court had assumed jurisdiction in the matter between the two *incola*

litigants, the appellant and Total Lesotho. Once assumed, jurisdiction continues until final judgment is handed down.[1] He was correct in finding that in principle property belonging to an *incola* respondent cannot be attached to found jurisdiction because the court exercises jurisdiction over an *incola* on the basis of that fact alone.[2] To this extent the decision of the learned judge is unimpeachable.

[40] Sachet and Tubela were mere employees of Total South Africa and domiciled and resident in South Africa. The property mentioned in the notice of motion and the founding affidavit belonged to Total Lesotho and/or another third party, and not to them. An applicant for attachment of property to found jurisdiction has to prove that the person whose property is to be attached is the owner thereof and that the property concerned is within the jurisdiction of the court[3], among other equally important requirements, such as that the applicant must establish a *prima facie* case against the person concerned: in other words he must show that he has a cause of action against such person.[4] In this case the property belonged to Total Lesotho and/or to another third party. It did not belong to

[1] See Zimbabwean case of ***Walls v Walls*** 1996 (2) ZLR 117 (H)

[2] Cf Shiebler v Kiss 1985 (3) SA 489 (SWA)
[3] See generally Van Winsen The Civil Practice of the Supreme Court of South Africa, 4th ed p.60
[4] See Ex parte Accrow Engineers (Pty) Ltd 1953 (2) SA 319 (T); Lecomte v W & B Syndicate of Madagascar 1905 TS 696 at 704

either Sachet or Tubela nor was it established that any of those two persons had any other property within the jurisdiction of the court.

[41] Sachet and Tubela were not within the jurisdiction of the court and no arrest warrant to found jurisdiction could be issued against them; hence MAKARA J did not issue such order. Nor did they have any property in Lesotho. Sachet and Tubela were not parties to the ongoing litigation between the appellant and Total Lesotho. No judgment could be obtained against them in the Labour Court

[42] Where it is intended to institute proceedings against a *peregrinus*, the applicant must proceed in terms of Rule 6 of the High Court Rules by way of edictal citation, which application may be filed together with an application for arrest of person or property to found or confirm jurisdiction. No proceedings may be instituted outside the jurisdiction without the authority of the court. The appellant's application for the arrest of persons who are *peregrini* of the court and the attachment of property of *peregrini* respondents, both natural and juristic, without an edictal citation was fatal to the application.

[43] Total SA and Puma Energy are *peregrini* of the court and could not be sued without edictal citation nor could their property be attached to found jurisdiction without following the

same procedure, assuming that they had property within the jurisdiction.

[44] The third respondent Liphoto was only a depot manager and not even a party to the proceedings between the appellant and Total Lesotho or the owner of the property purportedly attached. He could not lawfully have been directed to handover to the Registrar property belonging to his employer in the circumstances. It was, on first principles, incompetent for such an order to be sought and made against him.

[45] The seventh respondent in the contempt application was not connected to any of the other respondents or the proceedings in the Labour Court. He was in the same position as the 8th to 10th respondents who were needlessly cited as parties to the contempt application. It is trite that the deputy sheriff enforces court orders and, only when he comes up against resistance, may he call upon the police to assist him in enforcing or executing them.

[46] I have stated above that the learned judge *a quo* did not dispose of the counter-application. In omitting to do so he, in all probability, proceeded from the premise that if he discharged the *rule nisi*, which he did, it followed the contempt application and the attachment by the deputy sheriff became otiose or negated and the costs of attachment were no longer claimable

from the respondents. The respondents did not share this view, and I think, rightly so.

Appeal against first judgment

[47] The appellant was not satisfied with the judgment of **PEETE J** of 29 November 2018 and appealed against it. He filed his notice of appeal and grounds thereof on 14 January 2019. That appeal came before this Court (**MAHASE ACJ, MUSONDA & MTSHIYA AJJA**) during the 2019 April Court Session.

[48] The Honourable judges issued an order by consent of the parties on 17 May 2019 postponing the appeal to the 2019 October Session of this Court. By this time, the respondents had already lodged the Rule 45 application and it was pending in the High Court. The consent order accordingly directed that the Rule 45 application, *"which was launched after filing of this appeal, must be finalized, completed and an order of court must be handed down by the court a quo on or before Friday 23 August 2019"*, and *"costs of the April 2019 appeal will be argued at the October 2019 Appeal Session."*

Fourth Application: variation/supplementation of first judgment: Rule 45 application

[49] I have stated above that the respondents i.e., the 1st to 7th respondents, did not share the view that the learned judge had, in his judgment of 29 November 2018, disposed of all the issues raised in the counter-application and the application for stay and setting aside of the attachment. Accordingly, they instituted proceedings in terms of Rule 45 of the High Court Rules, which provides that –

> "(1) The court may, in addition to any other powers it may have *mero motu* or upon application of any person affected, rescind or vary –
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as a result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this Rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.
>
> (4) Nothing in this Rule shall affect the rights of the court to rescind any judgment on any ground on which a judgment may be rescinded at common law."

[50] In launching this application, the respondents contended that whilst the three applications were heard together, the

judgment of 29 November 2018 contained patent errors and omissions and that it was therefore necessary for the court *a quo* to "provide a supplementary judgment and order" specifically spelling out that -

> (a) the counter-application was enrolled in the main application as a counter-application to be heard with the contempt application and the main application or, alternatively, that it be heard with the main application and the contempt application;
>
> (b) costs are awarded to the 1st to 6th respondents as a consequence of the dismissal of main application – the *ex parte* application to found jurisdiction and interdict;
>
> (c) the contempt application was dismissed with costs;
>
> (d) the attachment by the deputy sheriff was stayed and set aside;
>
> (e) the 1st to 7th respondents were not liable for the deputy sheriff's costs of attachment; and
>
> (f) the appellant and his legal practitioners were to pay the costs of the counter-application on the scale as between attorney and own client.

[51] The appellant opposed the Rule 45 application. The matter again came before PEETE J in accordance with the consent order issued by this Court. The appellant not only opposed the application on the merits but also raised certain preliminary issues for the court to consider.

[52] I have earlier stated that by the time the Rule 45 application was heard, the appellant had already appealed against the first judgment. As such when he opposed the Rule 45 application, he raised the following preliminary issues –

> (a) the decision in the first judgment was already on appeal in Case No. C of A (CIV) No. 4/2019. As such the respondents could only apply for the remedies that they were seeking in the Rule 45 application in the appeal before the Court of Appeal because all the issues in the main application, the contempt application and the counter-application *"will be fully determined by the Court of Appeal as they form part of the record"*; and
>
> (b) the respondents were heard and argued the matters that they were now raising and a decision given. As such "rescission" was not the appropriate relief. And so far as variation of the order was concerned, the respondents

could obtain relief by way of either a cross-appeal or an appeal against the first judgment.

[53] In dealing with these preliminary issues the respondents, in their replying affidavit, averred:

> "5.2 The complaint by the applicants in the Rule 45 application is indeed that this Honourable Court did not make directions, judgment and orders regarding two of the three applications, therefore requiring the applicants to request relief as set out in the Notice of Motion requesting a supplementary judgment and order dealing with the issue of costs, the contempt application and the counter-application.
>
> 6.1 The applicants in the Rule 45 application do not seek the rescission of the judgment or order, but instead seek that the Honourable Court provide a judgment or order with reference to various omissions and a patent error in the judgment dated 29 November 2018...
>
> 6.2 It is denied that there are any remedies either in the form of a cross-appeal or an appeal in circumstances where there are no judgments or orders with reference to the contempt application or the counter-application. As such there are no final judgments or orders which are appealable in terms of both the Act and the Rules of Court."

Second judgment[54] **PEETE J** heard the Rule 45 application and, in a judgment dated 15 August 2019, made the following order-

> "Having perused the pleadings in this case which is now on appeal and having taken cognizance of certain omissions and patent errors in the judgment of this court delivered on 28 November 2018, this court is of the view that the application

made [under] Rule 45 of the High Court Rules 1980 should succeed with costs and the order is as follows:

(a) The main application by Mr Sechaba Maphike to attach properties (filling stations) of Total Lesotho (Pty) Ltd in regard to which MAKARA J had made an interim order – is dismissed with costs.

(b) Counter-application of the respondents succeeds with costs.

(c) Contempt application made by the applicant Mr Maphike is dismissed with costs.

(d) The respondents should not bear the Sheriff's costs for attachment executed at Maseru and Maputsoe Filling Stations on 28th February 2018."

[55] The appellant was again dissatisfied with this second judgment and filed additional grounds of appeal.

Appellant's grounds of Appeal against the first and second judgments

[56] The appellant's grounds of appeal against the first judgment may be paraphrased as follows. The judge erred in failing to apply his mind to the fact that –

(a) the sale of 100% shares of Total Lesotho by Total SA meant that all the assets of Total Lesotho "belonged and were owned by [Total SA] and thus had to be attached as assets of the *peregrinus* as opposed to assets of an *incola*";

(b) the sale of 100% shares and assets of Total Lesotho by Total SA to Puma Energy was made by a *peregrinus* to another *peregrinus* which entitled the appellant to attach them to found jurisdiction;

(c) the sale of 100% shares of Total Lesotho to Puma Energy meant that all the shares and assets of Total SA were now "totally owned" by the "peregrines";

(d) that by 11.00 am on 28 February 2018 the shares no longer belonged to Total SA and Total Lesotho when payment for them was still to be made, and that being the case, the appellant was not late in attaching the assets before they actually passed to Puma Energy; and

(e) that the assets of Total Lesotho remained vested in it when they and the shares 'were totally owned and sold by a *peregrinus* to another *peregrinus*, being Total SA and Puma.

[57] Having regard to what I have earlier stated in respect of the separate existence as a company of Total Lesotho, the effect of the sale of shares, and the retention of its assets by Total Lesotho as its own, the above grounds of appeal are not properly formulated and liable to confuse the reader. Had the appellant maintained the necessary distinction between a company and

its property on the one hand and shareholders and their ownership of shares in the company on the other and, had he fully appreciated the essence of a sale of shares as against a sale of assets, he would not have framed his grounds of appeal the way he did.

[58] After the second judgment was delivered the appellant filed additional grounds of appeal that may also be paraphrased as follows: The learned judge misdirected himself by failing –

> (a) to dismiss the Rule 45 application when it was lodged after the appeal against the first judgment had been filed which meant that the High Court was *functus officio* "*on the matter";*
>
> (b) to hold that the Rule 45 does not apply where an appeal has already been noted;
>
> (c) to dismiss the counter-application for setting aside the attachment as irregular when issues raised therein "were consequential to the determination of the main application [to found jurisdiction], eg.,if the main application was dismissed the deputy sheriff would not demand his fees for the attachment [that] has been determined as unlawful"; and

(d) to dismiss the contempt application "notwithstanding that the respondents were in contempt of the interim order given by MAKARA J at the time."

Analysis

[59] The appellant's first three grounds of appeal against the second judgment are no longer of any moment in view of the consent order issued by the three judges of this Court on 17 May 2019. That order permitted the hearing of the Rule 45 application in the High Court with a view to having any appeal against the judgment in that application heard together with the appeal against the second judgment, thereby rendering the contentions in the grounds of appeal against the second judgment irrelevant for present purposes. Thus, the complaint (a) about the High Court having been *functus officio;* (b) that Rule 45 was not applicable after an appeal has been lodged; and (c) that issues raised in the counter-application in the High Court were consequential because, for example, if the main application was dismissed the deputy sheriff would not demand his fees for the attachment that had been determined as unlawful by that court; were rendered untenable by the consent order of 17 May 2019.

[60] The only ground of appeal that survives the 17 May consent order is that **PEETE J** erred in not dismissing the contempt application when the respondents were in contempt of **MAKARA J**'s judgment. In respect of this ground of appeal the appellant stated the following in the heads of argument at paragraph 26:

"The respondents failed to comply with the said order of the honourable court and continued with their transfer [of] the said property to the 6th respondent [Puma Energy] whereby the 6th respondent accepted the transfer of the said property in utter contempt of the order of court. Appellant further learnt that the 3rd respondent [Liphoto] failed to identify the properties that [are] worth appellant's claim. The properties of the 4th and 5th respondents [Total SA and Total Lesotho] both movable and immovable were attached by the deputy sheriff per the return of service duly filed."

[61] The respondents dealt with this ground of appeal and submitted that the appellant's concern was with the failure of the judge in the first judgment to find the respondents in contempt yet in that judgment the learned judge did not at all deal with the contempt and only referred to it for the first time in paragraph 38 of that judgment. They further submitted that after the second judgment was delivered, the appellant did not note an appeal against the judge's dismissal of the contempt application with costs, meaning that there was no appeal against that decision for this Court to consider.

[62] They also contended that even if it were held that an appeal was properly noted, **MAKARA J**'s several directives of 23 and 26 March 2019, 18 April 2019 and 8 May 2019 that Total Lesotho could continue trading, thereby in effect suspending the contempt order, had compromised any finding of contempt. In addition, the order was not served on Sachet, Tubela, Total SA, Liphoto and Puma Energy. Khalikane who was also cited was not even a party to the first application and could not have had knowledge of the order.

[63] There was non-compliance with the requirement relating to "Form D". They went on to point out that the issues of edictal citation, misjoinder, ownership of the attached property, which I have highlighted elsewhere in this judgment mean that the claim with regards contempt against Liphoto, Total Lesotho, Puma Energy and Khalikane or other respondents, and regarding the business of Maputoe Filling Station which was run by one Boloetsi Senti and not even Total Lesotho could not found an order of contempt against all the respondents. For contempt to hold the appellants had to prove the court order, proper service thereof on the respondents, non-compliance therewith, wilfulness and *mala fides* on the part of the respondents all of which were not established. In this connection the respondents' counsel referred to

Fakie NO v CCI Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 344G-345A which sets out the requirements for a finding that a contempt of court has been committed. The specific paragraph is [42](c).

[64] For the sake of brevity of this judgment I must say that I am persuaded that the reasons given by the respondents tending to show that the contempt order would have been incompetent anyway, which they set out at pages 44 to 61 [paras. 63 – 96] of their heads of argument, are correct. The appellant's ground of appeal, as submitted by the respondents is conceptually faulty. There was a patent error in the first judgment wherein the learned judge discharged the contempt order when such order had not been granted at that stage and only came before the High Court in consequence of the Rule 45 application whereupon the judge properly dismissed the contempt application. The appeal against the dismissal of the application should therefore be dismissed.

Purported appeal against counter-application on stay and setting aside of attachment

[65] The learned judge **PEETE J** did not in his first judgment deal at all with the respondents' counter-application to stay and set aside the attachment of the

property. He accordingly did not give any judgment on the counter-application nor could he have done so. This failure by the judge resulted in the Rule 45 application. As properly submitted by the respondents at paragraph 103 of their heads of argument, "although the appellant appealed against the Rule 45 application, [he] did not formulate any additional grounds of appeal as a consequence of the findings and judgment of the court *a quo* [and] as such, in the event of a finding against the appellant in the Rule 45 application there would be [no] substantial appeal against the [counter-application]." To my mind whatever concerns the appellant had in regard to the counter-application for stay and setting aside of the attachment, they are properly to be considered in the context of the second judgment in which the counter-application was fully considered and dismissed.

Rule 45 application

[66] The main issues raised by the respondents in the Rule 45 application were that –

(a) although the first judgment disposed of the appellant's main application to found jurisdiction by dismissing it, it did not make a finding with respect to the other applications before the judge;

(b) in the case of the contempt application it erroneously stated that "*the rule nisi granted by Makara J on 28 February at 2:30 is discharged along with the contempt order granted*" thereby committing a patent error as no contempt order was granted by **MAKARA J**;

(c) the judgment was silent on the issue of costs in relation to all the three applications;

(d) the judgment was silent on the issue whether or not the counter-application for stay and setting aside of the attachment was either dismissed or not.

[67] The appeal grounds against the second judgment relating to the Rule 45 application were, as earlier stated, that the application was lodged after the appeal was lodged, that it should have been dismissed because consequential to the dismissal of the main application on founding jurisdiction the deputy sheriff would have had no right to demand fees of attachment which had been found to be unsustainable, and that the contempt application should have succeeded given that the respondents were undoubtedly in contempt of **MAKARA J**'s interim order.

[68] I have addressed these grounds of appeal and concluded that the learned judge ably and properly dealt with the Rule 45 application in the second judgment and in the same judgment correctly dismissed the earlier applications namely, the contempt application and the counter-application.

[69] In general I must observe again that there were quite a number of conceptual, legal and factual issues with the appellant's case that were perpetuated by the granting of the interim order on an *ex parte* basis and without thoroughly examining the issues and imponderables at stake and by the handing down of the first judgment also without dealing with all the issues placed before the court. The result was a thoroughly scrambled egg. Care must be taken by the courts in this jurisdiction not to grant interim reliefs without closely considering the issues and ramifications of the ensuing order. There is always a real danger, if necessary attention is not paid to applications brought on urgency and seeking interim relief, that parties including those that may not even be properly before the court or against whom the applicant has no cause of action, may be prejudiced in their rights without sufficient cause; orders impossible to comply with and directed at wrong parties may be made; contempt of court applications may in consequence thereof be filed to no

avail, and judgments of court may have to be supplemented or varied in order to address omissions, ambiguities and patent errors. The appellant's pleadings in this case and the first judgment exemplify the dangers inherent in not properly applying one's mind to issues that one has to deal with.

Costs

[70] The respondents asked as against the appellant and in relation to the appeal on the main application (founding jurisdiction and interdictory relief), the contempt application and the counter-application (stay and setting aside of attachment) for "special attorney and own client costs and that the appellant and his legal practitioners be sanctioned as a consequence of the abuse of process" referred to in the answering affidavit. In relation to the appeal against the judgment on the Rule 45 application, they asked for costs on the party and party scale.

[71] In support of the higher level costs, respondents' counsel pointed to the following as justifying such costs (I refer only to those considerations with which I agree)-

(a) in relation to the main application –

(i) the review application in the Labour Court was a matter between the appellant and Total Lesotho only, and for that reason the appellant cannot possibly have had any entitlement to be paid by the other respondents even if he were successful in that court;

(ii) the appellant did not have any cause of action against any other respondents (excepting Total Lesotho) entitling him to institute proceedings to attach and arrest to found jurisdiction;

(iii) the appellant was not entitled at law to attach Total Lesotho's property to found jurisdiction since the Labour Court already had jurisdiction;

(iv) the appellant did not apply for edictal citation against all peregrine parties;

(v) the appellant acted as if Total SA and Puma Energy acquired rights in the assets of Total Lesotho as a result of the share purchase transaction when those assets remained the

property of Total Lesotho and entirely vested in it.

In respect of the factors (i) to (v) counsel referred to *Tanki Mponye v Total Lesotho (Pty)* in which the court granted costs on an attorney and own client scale for similar reasons;

(b) in relation to the contempt of court application-

(i) the appellant failed to comply with Form D of the First Schedule to Rule 6(9) of the High Court Rules and as a result no specific property was identified for attachment contrary to procedure;

(ii) the appellant did not show by acceptable evidence that he served all the respondents consequently failing to comply with the rules of court and thereby displaying a willful and *mala fide* approach;

(iii) the appellant did not meet all the requirements of a contempt of court in circumstances where the liberty of some of the respondents was at stake;

(c) in relation to the counter-application (stay and setting aside attachment) –

(i) there was no compliance with the interim order that required the deputy sheriff to attach so much of the property as would be as near as possible to satisfy the appellant's claim of M3 146 446.80 but went on to attach property far in excess of the value of the claim;

(ii) the deputy sheriff did not have a warrant specifically identifying property of the peregrine respondents or tending to indicate that the peregrine respondents had any interest in the property to be attached as required by law;

(iii) the deputy sheriff improperly effected service of process intended for respondents, other than Total Lesotho, on a security guard and "Puma Mararius Energy Ltd (a non existing entity or an *incola*) unconnected to the litigation in the Labour Court "by pushing it through the fence next to the main door";

(iv) the deputy sheriff wrongfully attached the assets of an *incola* Total Lesotho and those of another

incola Boloetsi Senti, owner of Mupotsoe Filling Station, who was not a party to any litigation and when he had not even been served with the interim order;

(v) generally, the deputy sheriff acted contrary to the interim court order in relation to identification and value of goods attached and therefore outside the scope of his mandate.

[72] The appellant's counsel did not deal with the request for costs on a higher scale in his heads of argument and appears to have been content with his prayer that in the event his client succeeded, he must be awarded costs.

[73] I think there is merit in the respondents' contentions on costs. This judgment demonstrates that there were many errors of law and procedure that justify my comment at the beginning of this judgment that the manner in which the appellant prosecuted this matter leaves a lot to be desired and amounts to a comedy of errors. An award of costs on the scale asked for by the respondents against both the appellant and his counsel is eminently justified. Equally justified would be a warning to the appellant's legal practitioners that the conduct of litigation in a manner amounting to an abuse of court process, as

happened in this case, ordinarily would constrain this Court to make an order of costs *de bonis propriis* against them.

[74] In April this year this Court directed, with the consent of the parties, that the costs that the parties incurred by at that session would be argued when the appeal is finalized. The parties did not directly submit on those costs but I am satisfied that in the circumstances of this case it is proper that I must make an award of those costs. In my view the appellant having ultimately lost the appeal he must meet those costs.

[75] The order of this Court is accordingly that-

1. The appeal is dismissed with costs.

2. The order of the High Court in relation to costs is altered to provide that appellant shall pay the respondent's costs in the court *a quo* related to the main application, the contempt of court application and the counter application on the attorney and own client scale.

3. The appellant shall pay the respondent's costs in the court *a quo* related to the application for supplementation or variation of the judgment of 29 November 2018 and the

costs referred to in paragraph (d) of the Consent order of 17 May 2019 on the ordinary scale of fees.

_____

M.H.CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

_____

P.T. DAMASEB

ACTING JUSTICE OF APPEAL

I agree

_____

N.T.MTSHIYA

ACTING JUSTICE OF APPEAL

For Appellant: Adv B H Sekonyela

For Respondents: Adv Adv H Louw