IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION)

FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MIDDELBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

SIGNATURE

22/11/2018
DATE

CASE NO.: 555/2016

In the matter between:

TSHEPO NONYANE N.O.	**FIRST APPLICANT**
ELIZABETH WILDANA PRINSLOO N.O.	**SECOND APPLICANT**

And

GAVIN BERNARD KOTZEN	**FIRST RESPONDENT**
CRAIG ANDREW HANEKOM	**SECOND RESPONDENT**
ROAN COAL (PTY) LRD	**THIRD RESPONDENT**
BAREND JACOBUS BEZUIDENHOUT N.O.	**FOURTH RESPONDENT**
JOHANNA CHRISTINA BEZUIDENHOUT N.O.	**FIFTH RESPONDENT**
MASTED OF THE HIGH COURT, PRETORIA	**SIXTH RESPONDENT**

JUDGMENT

THOBANE AJ,

Introduction

[1] The applicants, who are the duly appointed liquidators of Liviline (PTY) Ltd, (Liviline), trading as Tau Roads and Services, in liquidation, have launched an application purportedly premised on section 341 (2) of the Companies Act, 61 of 1973 read with schedule 5 item 9 of the Companies Act, 71 of 2008. They allege that after the commencement of the winding up, there was a transfer of 501 shares that Liviline, held in Roan Coal (PTY) Ltd, the third respondent, to the second respondent and thereafter to the first respondent. The applicants contend that these were assets of Liviline.

[2] According to the Notice of Motion, the applicants seek the following relief in summary form;

1. An order extending their powers to institute these proceedings;
2. That the sale of 501 shares held in the third respondent by the company in liquidation, be declared void;
3. That the first respondent take all necessary steps to deliver to the applicants the original share certificates, in relation to the shares sated above, to the applicants;
4. That failing which the sheriff be instructed to take possession of such shares.

In addition to the above orders, the applicants seek an order for condonation of late filing of its replying affidavit.

[3] The application is opposed and three pillars of opposition are highlighted and summarised;

1. That the court should refuse condonation for the late filing of the replying affidavit and further that if the court were to be inclined to grant condonation, then in that event certain excerpts in the replying affidavit ought to be struck out;
2. That the court should decline the request to grant or authorise these proceedings this being an *in limine* point;
3. That should the court feel that merits ought to be given attention then in that event the court should exercise a discretion under section 341(2) and declare that the sale and transfer of shares to the second respondent is valid.

Applicants' case

[4] The applicants are the liquidators of Liviline (PTY) LTD, t/a Tau Roads and Services, which was placed under provisional winding-up on 22 April 2015 and finally wound up on 24 June 2015. The application was launched on 10 March 2015.

[5] It is the applicants' case that prior the winding-up Liviline, the second respondent and Chriben Trust, were shareholders of Roan Coal (PTY) Ltd, the third respondent. The shareholding of Liviline was 50,1% which represented 501 shares. The second respondent held a 25% stake

representing 250 shares. Chriben Trust had a 24,9% stake representing 249 shares. The details are contained in a sale of shares agreement which the three parties concluded.

[6] On 6 May 2015 the second respondent made certain proposals to Chriben Trust. They included a loan by Roan Coal to the trust of the sum of R300 000-00, as well as the sale and transfer of Liviline shares in Roan Coal, against payment of the sum of R300 000-00. Further that Roan Coal was prepared to pay R75 000-00 for the transfer of all shares.

[7] On 28 May 2015 Liviline's 501 shares in Roan Coal were sold and transferred to the second respondent. The transaction was recorded in a "Settlement Agreement".

[8] The applicants purportedly on behalf of the creditors of Liviline want the court to intervene and declare void the sale of the 501 shares held by Liviline in Roan Coal, which sale it is said took place after the commencement of the winding-up, and that the original share certificates, in the hands of the second respondent be handed to the applicants or the sheriff of this court.

Respondents' case

[9] The respondent is of the view that on the applicants' own version, they do not have authority to institute these proceedings as they seek to obtain

one from the fifth respondent alternatively they seek an order from this court extending their powers. They also state that in essence the applicants, in so far as the application for condonations concerned, have failed to make out a case for condonation. They go on to state that should the court be minded to grant the relief sought, then and in that event the court should exercise its discretion in favour of the respondents, by declaring the sale and transfer of 501 shares to the second respondent valid.

[10] As part of their opposition of the application and argument that the court should dismiss the application, the respondents submit, and this is conditional upon the court granting condonation for late filing of the replying affidavit, that new matter is raised therein and that is should accordingly be struck out.

[11] On the agreement of sale of shares the respondents submit that that some of the clauses of the sale of shares agreement, particularly clause 5.2. does not reflect the common continuing intention of the parties, to the extent that it refers to a resell price of R300 000-00 as opposed to a resell price of "*not less than*" R300 000-00. The respondents are also of the view that the applicants are non-suited because of the basis upon which Liviline's entitlement to the ownership of the shares arose.

[12] The respondents assert that Liviline never acquired the right to deal freely with the shares. The applicants therefore, so the argument goes, could

also not have acquired the right to deal freely with the shares as they could never have acquired greater rights than Liviline. At the time of winding-up of Liviline, purchase of sale had not taken place, thus, it is submitted, performance was incomplete. When liquidation took effect, the respondents continue, the applicants were under obligation to make an election where to uphold the sale of shares agreement or to cancel it, with certain arising options in each case including negotiating afresh and claiming payment consideration in respect of the sale of shares.

[13] The sale of shares agreement was, according to the respondents preceded by a transaction concluded on 14 February 2014 between Roan Coal and Sentula Mining Limited, for the acquisition of the latter's issued share capital in Benicon Mining (PTY) LTD, who were holders of a mining right. The second respondent states that he funded the acquisition of the shares. The first respondent was later brought in when the transaction was about to fall through, to augment funding to salvage the transaction. The second respondent deals further with terms of the agreement which I will not repeat herein. Suffice to say that the second respondent is of the view that it remains open to him to on-sell the shares and that this is contemplated in the Liviline agreement.

Legal framework

[14] Section 341(2) of the Companies Act 61 of 1973 provides as follows;

*"**341. Dispositions and share transfers after winding-up void.***

(1) .....

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders."

[15] It is trite that the effective date of winding-up shall be deemed to be the date on which the application for winding-winding-up is presented to court. In this regard section 348 reads as follows;

*"**348. Commencement of winding-up by Court.***

A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

It is further common cause that in this case the application for the winding-up of Livilines was launched in the Gauteng Division of the High Court sitting in Pretoria on 10 March 2015.

Timeline and relevant terms of the agreement

[16] Certain timelines and terms of the agreement are necessary to restate so as to put the issues in their proper perspective;

16.1. On 10 March 2015 the application for the winding up of Liviline was launched. On 22 April 2015 Liviline was provisionally liquidated and on 24 June 2015 finally wound up;

16.2. On 28 May 2015 a sequence of transactions took place, one of which was the conclusion of an agreement of sale of shares involving numerous entities and individuals. The first was between Liviline, The Criben Trust and Craig Hanekom and related to Roan Coal. The agreement is undated though.

16.3. The next agreement dated 28 May 2015, and on the face of it is said to be between Chriben Trust and Benicon Mining. It was called a royalty agreement.

16.4. A Sale of Shares and Claims Agreement bearing the same date was concluded between the Trustees of the Chriben Trust and Craig Hanekom, in relation to Roan Coal.

16.5. On the same day a Settlement Agreement was concluded between The Trustees of Chriben and Craig Hanekom.

16.6. On 21 June 2016 the current application was launched and served on 28 June 2016;

16.7. The first and second respondent's answering affidavit was delivered on 28 October 2016, some four months later, in which was incorporated a conditional counter-application;

16.8. The final appointment of the applicants as liquidators took place on 6 December 2016;

6.9. The fourth and fifth respondent delivered their affidavit on 25 April 2017;

16.10. The applicants delivered their replying affidavit on 29 November 2017 some one year after delivery of the first and second respondent's answering affidavit and seven months after the delivery of the fourth and fifth respondent's answer.

Application for condonation

[17] It is convenient that the court deal with the condonation application first. It is trite that in condonation applications all relevant factors must be considered. In ***Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)*** para 6 the Appeal Court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is

time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[18] In the current application after the appointment of the liquidators, theyapplicants caused to be convened, an insolvency enquiry in terms of section 417 and 418 of the Companies Act, on 23 May 2017. On 30 June 2017 a second meeting of creditors was convened to *inter alia* obtain authority and ratification of these proceedings. Soon thereafter on 14 August 2017 an urgent application was launched against the applicants by Roan Coal seeking and order interdicting the section 417 enquiry. The application was dismissed with costs on 23 August 2017.

[19] The timelines leading to the applicant's filing of their relaying affidavit, do not show that there was urgency in how the application was approached, on the part of all the parties. The dates below are indicative of this;

19.1. On 21 June 2016 the application is launched;

19.2. On 6 July 2016 first to third respondent file their notice to oppose;

19.3. On 25 July 2016 the fourth and fifth respondent file their notice to oppose;

19.4. On 28 October 2016 the first and second respondent file their answering affidavit;

19.5. On 25 April 2017 the fourth and fifth respondent file their answering affidavit;

19.6. On 29 November 2017 the applicants file their replying affidavit.

[20] As I follow the surrounding circumstances on the condonation application, it is the applicant's contention that being liquidators they are placed at a disadvantage in so far as information is concerned. It is contended that they play second fiddle to the respondents who have personal knowledge of transactions. The first reason they advance for the delay therefore is that the applicants had to obtain the necessary authorisation or ratification for these proceedings and that same was granted on 20 June 2016. The second reason advanced is that in light of the paucity of information, they were compelled to hold an enquiry in terms of section 417 and 418 of Companies Act. It is said these proceedings took place over a period of time and were useful in that crucial information was gathered therefrom. The last reason is to the effect that they had to wait for the filing of the fourth and fifth respondent's answering affidavit. The thrust of the submission therefore is that the applicants needed to have all the necessary information at hand before replying. The applicants assert that the respondents will not be prejudiced by the late filing and that they are strong on the merits of the case.

[21] The respondents oppose the condonation application on every conceivable ground. They argue that the delay is not sufficiently explained, both its cause and the extent thereof. They also contend that the application has no prospects of success and therefore call for its dismissal. An alternative argument is made to the effect that should the court be inclined to grant condonation then in that event certain portions of the replying affidavit should be struck out, in that introduced impermissibly are new facts raised for the first time in reply.

[22] In ***United Plant Hire (Pty) Ltd v Hills and Others 1976 1 SA 717 (A)*** at ***720E-F,*** the following was said in relation to the discretion to be exercised, albeit in the context of an appeal;

> *"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice."*

[23] The explanation provided for the delay does not to me show semblances of bad faith. The duration of the delay appears on the face of it to be excessive. However, when one considers the constraints faced by the applicants as well as the fact that the fourth and fifth respondent delayed in filing their answering affidavit, the delay is mitigated. The respondents contributed to the delay. In addition, there appears to me to be a lackadaisical atmosphere of how the litigation is conducted from both sides.

[24] The application is an important one to all the parties and the prospects of success are reasonable. When that is coupled with the fact that there appears to be no prejudice were the court to grant condonation, it means the court can exercise its discretion and grant condonation.

Authority for these proceedings

[25] When the application was launched, the applicants indicated that they had not obtained any resolution on the launching or defending of the Liviline dispute. They submitted that lack of authority did not in anyway invalidate the proceedings but that it would have an impact on costs issues. On 30 June 2017 however, at a General Meeting of Creditors, Contributories and Directors, the applicants were authorised and empowered to institute and defend all legal proceedings. In addition, the meeting resolved to ratify actions taken in relation any litigation as well as the resultant costs, *inter alia*.

[26] In ***Lynn NO and Another v Coreejes and Another (687/10) [2011] ZASCA 159; 2011 (6) SA 507 (SCA); [2012] 1 All SA 620 (SCA) (28 September 2011)***; the Appeal Court had occasion to say the following

> *"[12] Section 386(4)(a) empowers a liquidator to, inter alia, bring or defend legal proceedings on behalf of the company. The section requires a liquidator to be duly authorised by a meeting of creditors or members (s 386(3)) or by the Master in case of urgent legal proceedings for the recovery of outstanding accounts (s 386(4)) before he or she can bring such proceedings on behalf of the company. Our courts have held that if a liquidator litigates without the prescribed authority, the court may refuse to allow him his costs out of the company's assets and he may have to pay such costs himself. The litigation is not a nullity, it merely has potential adverse costs implications for the liquidator. And there is ample authority that a person against whom the unauthorised liquidator is litigating may not object to such lack of authorisation, for it is a matter between the liquidator and the creditors. Retrospective sanction of unauthorised litigation is available to the liquidator in appropriate instances, either from the creditors or members under s 386(3) or, if refused, from the Master under s 387(2) and, if the Master refuses, from the court under s 386(5) read with s 387(3)."* (Underlinings my emphasis.)

[27] In light of the issues raised, it is my view that the decision to launch these proceedings before authorisation has merit. In the result this court is unable to find that these proceedings are not legitimate, the proceedings are accordingly ratified.

The sale of shares

[28] The case that the applicants mount is to the effect that the 501 shares in Roan Coal belonged to Liviline prior its winding up. The applicants therefore argue that the sale thereof constitutes a disposition of an asset as envisaged in section 341(2) of the Companies Act. Any disposition that takes place under those circumstances is void unless the court, in the exercise of its discretion directs otherwise.

[29] 10 March 2015 is the date on which the application for winding-up was launched. It is undisputed and therefore must be accepted that it is the effective date of commencement of the winding-up. On 22 April 2015 Liviline was provisionally wound-up. On 28 May 2016, after Liviline had been provisionally wound-up, the agreement of sale of the 501 shares in Roan Coal was concluded, although, the respondents submit, that the agreement concluded did not reflect the common continuing intention the parties to the extent that it refers to the resell price of R300 000-00. The common intention, according to the respondents was that it should read, a resell price *of not less than R300 000-00.* The cause of the incorrect description, according to the

respondents was occasioned as a result of a common error of the parties that signed the agreement in the belief, albeit mistaken, that their true agreement had been recorded. The court need not deal with what the intention of the parties was at the time when the agreement was concluded.

[30] The respondents make other further points, one of which is that performance in terms of the sale of shares agreement was incomplete in that the purchase consideration had not been paid over. Another point made is to the effect that it was open to the applicants, upon their appointment, to make an election whether or not to uphold the sale of shares agreement. The respondents believe that the applicants seem to have elected to abide by the agreement.

[31] I understand the respondents to have formed common cause with the fact that the sale of shares agreement was concluded after the date on which the application for winding-up was launched. Whereafter, on the 12 June 2015, respondents contend an agreement for the funding of the acquisition of the issued share capital in Benicon Mining (PTY) Ltd. was concluded. The respondents do not take issue with the fact that the sale of shared took place after the application was launched. The thrust of their contention is that the applicants have failed to make a case for the exercise of the court's discretion in their favour as contemplated by section 341(2).

[32] There is no doubt in my mind that the sale of shares is void for it is a disposition that took place after the winding-up of Liviline. The liquidation application was launched on 10 March 2015 and the sale of shares agreement was concluded on 28 May 2015. It is self evident that the disposition took place after the launch of the application. There is plenty authority to support such a stance and and in addition, the prescripts of section 341(2) are clear. The first and second respondent attempt to wrestle ownership of the shares away from Liviline by stating that Liviline could only have become owners of the shares once the purchase price had been paid. This proposition is incorrect, regard being had to clause 4.2. of the sale of shares agreement which reads as follows;

> *"Notwithstanding the Signature Date, all risks in and all benefits attaching to the Sale of Shares has already passed to the Purchaser."*

An interpretation which suggests ownership would have eventuated later, is inconsistent with the plain reading of the above clause.

[33] In essence therefore this court is called upon to exercise a discretion, from the point of view of the respondents, to validate the sale of shares, as per the conditional counter-application or to declare it void, which is the relief sought by the applicants. Pincus AJ, in ***Lane NO v Oliver Transport 1997 (1) SA 383 (C) at page 386 to 387***, provided guidelines for the exercise by the

Court of the discretion in terms of section 341. I have omitted in large measure reference to case law. He said the following;

> *"(a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion.*
>
> *(b) Each case must be dealt with on its own facts and particular circumstances.*
>
> *(c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.*
>
> *(d) The court must be free to act according to what it considers would be just and fair in each case.*
>
> *(e) The court, in assessing the matter, must attempt to strike some balance between what is fair vis-a-vis the applicant as well as what is fair vis-a-vis the creditors of the company in liquidation.*
>
> *(f) The court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation.*
>
> *(g) The court should investigate whether the disposition was made to keep the company afloat or augment its assets.*
>
> *(h) The court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive.*

(i) The court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties.

(j) Little weight should be attached to the hardship which will be suffered by the applicant (here the recipient) if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions.

(l) Generally a court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors. See ***Herrigel N.O v Bon Roads Construction Co (Pty) Ltd & Another 1980 (4) SA 669 (SWA)*** *at 680."*

[34] The court generally leans in favour of validating a disposition if in its assessment it amounts to no more than the result of *bona fide* carrying on of the company's operations in the ordinary course of business. In the event the court holds the view that a particular disposition was made with the primary object of securing an advantage for a particular creditor in the winding up, which otherwise he/she would not have enjoyed or with the intention of giving a particular creditor a preference, it would not validate such a disposition.

(See ***Herrigel N.O. v Bon Roads Construction Co (Pty) Ltd & Another 1980 (4) SA 669 (SWA)*** at 679–680).

[35] The respondents' case is that the sale of the Liviline shares which the applicants seek to have declared void, is not akin to transactions undertaken in the normal course of business. In the first and second respondent's answering affidavit the following is set out at paragraph 62;

> *"I respectfully submit that the transfer of the Liviline shares, which the applicants seek to declare void, is not on the same footing as trading transactions usually undertaken in the normal course of business and that, in light of the unique circumstances of the matter and the provisions of the Liviline agreement, the rights of the body of creditors will not be affected in as much as Liviline would never have received consideration in excess of 300 000-00 for the on sale of the shares."* (underlining my emphasis).

[36] In light of the respondents' approach, the court need not venture into the territory of the test to be undertaken to determine whether having regard to the terms of the sale of shares agreement and circumstances under which it was entered into, the transaction was one which would normally have been entered into by a solvent businessman. We must accept, on the basis of the first and second respondent's concession, that it is not. (See ***Joosab v Ensor***

N.O 1966 (1) SA 319 (A) at 326D–G; ***Hendricks N.O. v Swanepoel 1962 (4) SA 338 (AD)*** at 345.)

[37] Scant facts are advanced in support of the counter application or put differently, why the court should exercise its discretion and validate the void disposition. On the discretion to be exercised Sutherland J in ***Engen Petroleum LTD v Goudis Carriers (PTY) LTD (In liquidation) 2015 (6) SA 21 (GJ)*** at para 24 said the following;

> *"…….. The scope for the discretion is itself a cue to limitation; it is exercised in favour of the ensnared creditor only if, by so doing, the general body of creditors is not disadvantaged by a diminution of assets to divvy up among them."*

On the facts advanced, and without having regard to the replying affidavit, I am unable to find that the transaction on the scant facts advanced prior the replying affidavit, that the disposition is tainted by any bad faith or dishonest intentions on the part of any person, particularly the contracting parties. This however is but one of many considerations as clearly set out in ***Lane NO v Olivier Transport*** *(supra)*. However, when regard is had to the interests of creditors, in the exercise of striking a balance between their interests and those of the respondents, the scales of fairness tilt in favour of refusing validation.

[38] It is an important consideration, for purposes of validation, whether the disposition was made to secure an advantage or to give preference to a particular creditor. What I consider of importance is that irrespective of the intentions behind the sale of shares, the practical effect thereof, if validated by the court, is that the general body of creditors will be unduly disadvantaged and inadvertently other creditors, including the first to third respondent, would be advantaged.

[39] I stated above that the respondents have failed to point to any prejudice were the court to condone the late filing of the replying affidavit. Courts readily condone late filing of affidavits for broader considerations such as the interest of justice. This salutary approach is dealt with reference to case law in ***Pangbourne Properties Ltd v Pulse Moving CC and Another (2009/30282, 2009/37649) [2010] ZAGPJHC 121; 2013 (3) SA 140 (GSJ) (19 November 2010)***. To underscore the profoundness of such an approach one need look no further than what is disclosed in the replying affidavit. From its contents it is clear that valuable information came out during the section 417 and 418 enquiry, the transcript in respect of which was attached to the replying affidavit. It would seem substantial amounts have been paid to Roan Coal from the mining operations. The first and the second respondent appear to be the direct or indirect beneficiaries thereof. In one instance the applicants point to the fact that royalties in excess of R9 million from an entity called UKUFISA, were paid to Roan Coal which amounts were appropriated by the

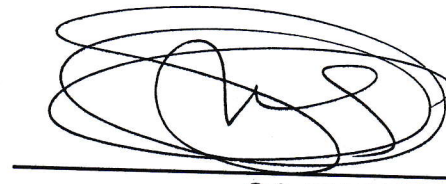
first respondent. These payments are reflected on the subpoenaed bank statements of Roan Coal. In another instance, the outcome of investigations of the liquidators revealed that the second respondent was in negotiations to sell shareholding held in Roan Coal for the sum of R280 million. Apart from the fact that these facts are of great assistance to the court, on the flip side they cast serious aspersion on the *bona fides* of the first and second respondent in their quest to have the disposition validated. One of the considerations in the exercise of the court's discretion is whether the disposition sought to be validated took place in circumstances not tainted by dishonesty or bad faith. The replying affidavit forces the court to come to the painful conclusion that the first to third respondent are the only beneficiaries from the sale of shares in total exclusion to other creditors and Liviline and therefore that their application for validation is nothing but self serving. For this additional reason, the court turns down the invitation to exercise its discretion in favour of validating the disposition.

[40] I therefore make the following order;

1. Condonation for the late filing of the applicants' replying affidavit is granted;
2. The point *in limine* is dismissed;
3. The conditional counter-application is dismissed with costs;
4. The sale of 501 shares of Liviline (PTY) LTD (Reg. No. 2010/006885/07) trading as Tau Roads and Services (In Liquidation),

held in Roan Coal (PTY) LTD (Reg. No. 2012/023029/07) is declared void;

5. The first respondent is directed to deliver or cause to be delivered to the applicants the original share certificates pertaining to the shares mentioned in 4 above, failing which, the sheriff of this court is hereby authorised to do all that is necessary to take possession of and deliver the share certificates to the applicants;
6. The first and second respondent are directed to pay the costs of this application, including costs consequent upon the employment of two counsel.



SA THOBANE
ACTING JUDGE OF THE HIGH COURT

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