IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE No. 49918/2009

DATE:22/03/2011

DELETE WHICHEVER IS NOT APPLICABLE

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

REPORTABLE

In the matter between:

ABSA BANK LIMITED Applicant

and

LYNETTE VAN EEDEN 1ST Respondent

THE MINISTER FOR SAFETY & SECURITY 2ND Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE 3RD Respondent

THE CITY OF JOHANNESBURG (METROPOLITAN POLICE DEPARTMENT, POLICE ADMINISTRATION AND LICENSING SERVICES) 4TH Respondent

LANGLAAGTE TRUCK & CAR CC 5TH Respondent

ROGER DUNCAN BUCK 6TH Respondent

HESTER MARIA BOTHA (Sheriff of the above Honourable Court, Johannesburg West & Soweto) 7TH Respondent

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JUDGMENT

WILLIS J:

[1] The applicant has approached the court by way of motion proceedings for an order setting aside the sale in execution held on 14 September 2009 in terms of which a 2005 model Nissan X-trail 2.5 SEL (R55) was sold to the fifth respondent, Langlaagte Truck & Car CC ("Langlaagte"). The applicant also seeks an order that Langlaagte return the vehicle to the applicant against payment by the seventh respondent, the sheriff, to Langlaagte of the monies which Langlaagte has paid to the sheriff at the sale in execution. Both the applicant

and the sheriff have made it clear that they consider this case to be one of critical public importance.

[2] The execution creditor and debtor have also been cited as respondents as have the Minister for Safety and Security, the National Commissioner of the South African Police Service and the City of Johannesburg (Metropolitan Police Department, Police Administration and Licensing Services) by reason of their potential interest in the matter. The applicant has been explicit in its desire that this should be treated as a test case. Of the respondents, only the sheriff opposed the relief sought. Her defence was that she or her deputy had fully complied with the Magistrates' Courts' Rules relating to the sale in execution, and had done all that could reasonably have been expected of them in terms to taking steps to safeguard the interests of persons such as the applicant. The matter was referred to oral evidence. On 10th March 2011, I granted the order which appears at the end on this judgment. I indicated that I would deliver my judgment giving my reasons later. These are they.

[3] The applicant is the owner of the vehicle. In August 2007 in Roodepoort the applicant entered into an instalment sale agreement with Lynette van Eeden, the first respondent in terms of which it sold the vehicle to her. The transfer of ownership of the vehicle from the applicant to the first respondent was subject to the suspensive condition that the first respondent pay the applicant the full amount owing

in terms of the agreement. The first respondent failed to maintain regular monthly instalments as was required in terms of the agreement.

[4] The applicant served a notice in terms of section 129 of the National Credit Act 34 of 2005 ("the NCA") upon the first respondent on 6th August, 2009. The first respondent having failed to respond to the notice, the applicant issued summons against her for the usual relief in such instances which included confirmation of the cancellation of the agreement and the return of the vehicle to the applicant. The applicant was awaiting default judgment against the first respondent when the sheriff sold the vehicle to the fifth respondent at a sale in execution for R69 500. The execution creditor was not the applicant but the sixth respondent, who had instituted action against the first respondent in the Randburg Magistrate's Court and obtained judgment against her.

[5] In her answering affidavit, the sheriff outlined the following sequence of events: (i) the sheriff's office received a letter from an attorney, acting on behalf of the judgment creditor, on 8th July, 2009 in which the sheriff was instructed to proceed to attach property of the first respondent, the judgment debtor and to sell the same in execution; (ii) a copy of the warrant of execution was attached to the letter as well as a Rule 38 indemnity; (iii) the letter addressed to the sheriff, pertinently required the sheriff was required to proceed to the first respondent's premises to effect an attachment and remove any vehicles

situated thereat; (iv) although the first respondent had chosen 17 Moray Street, Bryanston as her *domicilium citandi et executandi*, the sheriff's deputies, as instructed by the execution creditor, went to 88 Maluti Drive, Northcliff where they did not speak to or encounter the first respondent but someone else, one Rudie de Wet from whom they demanded payment to satisfy the writ; and (v) Mr de Wet indicated that he was unable to pay the amount claimed, whereupon the deputies attached three vehicles, the one which has given rise in this application.

[6] During the hearing of oral evidence, both Mr Sarel Van Deventer, the Deputy Director, Vehicle Registration and Licensing for the Gauteng Provincial Government, employed in the Department of Roads and Transport and Mr Karlie Heidt, the Head of Licensing in the Department of Transport in City of Johannesburg, testified on behalf of the applicant.

[7] Messrs Van Deventer and Heidt testified that the document upon which the sheriff had relied in her answering affidavit was one which was used to obtain a Clearance Certificate from the South African Police Services. This certificate would merely indicate that there had been no reports to the police that the vehicle had been stolen or robbed. They confirmed that their official computerised records had a register, for all licensed vehicles in the province and the city respectively, of the "title holder" (the person whom lawyers would ordinarily

call the owner – i.e. a person in the position of the applicant) as well as the "owner" (the person whom lawyers would normally call the *bona fide* possessor, the person who drives around in the vehicle as if owner and who is looked to for the payment of fines, licenses, etc). I deal with the definitions of "owner" and "title holder" in the National Road Traffic Act in paragraphs [20] and [21] below.

[8] These two witnesses said it would be a simple matter for the sheriff or her deputies to apply to the respective departments in both the Province and the City on a standard form for information as to the "title holder" and the "owner" of a vehicle. This is provided for in terms of Regulation 64 of the prevailing regulations promulgated in terms of the National Road Traffic Act, No. 93 of 1996. The fee was small – about R60. They said that there were confident that their departments would be willing to negotiate sensibly with the sheriffs for some kind of fair and equitable system to provide access to this information such that the sheriffs would not be left "out of pocket".

[9] They both emphasized that it was of the utmost importance, for the sake of good order in the province and the city, that sheriffs should ascertain such facts, relevant to title, before holding sales in execution which could result in embarrassment, inconvenience and financial loss for entirely innocent parties.

[10] The "police clearance certificate" which was issued in respect of this vehicle on 21st September, 2009 contains disturbing inaccuracies and glaring omissions. This certificate was issued in response to the sheriff's request for a certificate on 15th September, 2009, the day after the sale in execution. The certificate records that "the business" had been liquidated and that it was quite in order for the vehicle to be transferred to the fifth respondent.

[11] The sheriff herself testified. On her own admission, she took no steps to ascertain whether the vehicle was subject to an instalment sale or suspensive sale agreement or whether any one such as the applicant had any interest in the vehicle. She seemed to think that it sufficed that she had requested a police clearance certificate.

[12] Under cross-examination, the sheriff conceded that she had acted in contravention of Regulation 53 of the Regulations promulgated under the National Road Traffic Act because she proceeded with the sale without complying therewith. This Regulation provides that:

> No person shall, either for himself or herself, the State or, on behalf of another person dispose of or deliver or trade a motor vehicle unless the registration certificate, and if the motor vehicle is required to be licensed, the motor vehicle licence accompanies the motor vehicle concerned.

[13] The sheriff accepted that the National Road Traffic Act applied to her in her capacity as sheriff inasmuch as section 88 thereof provides that "This Act shall bind the state and any person in the service of the State..."

[14] At certain stages in her evidence the sheriff seemed to consider it adequate that she had advertised the proposed sale in execution of the vehicle in a local newspaper. She said that the applicant could have read the newspaper and should have noticed that its vehicle was to be sold as the registration number, being the number on the "number plate" appeared in the advertisement. The applicant has, however, pointed out that this would in no way alert it to the impending sale of a vehicle in which it has an interest because, when vehicles are sold in terms of the NCA, they have not yet been allocated registration numbers.

[15] The sheriff conceded under cross-examination that her office had overlooked and failed to follow the procedure provided for in Rule 42 of the Rules of Court, or the provisions of the Road Traffic Act and the Regulations. She was amenable to doing so in future. She accepted that she could recover her "necessary and reasonable expenses" relating to a sale in execution from the execution creditor and that the fee of some R60- for a search of information held by the Province or the City would fall under this head.

[16] Rule 42(2) of the Rules under the Magistrates' Courts Act, No. 32 of 1944 provides as follows:

> (2) Where the movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person or is under the supervision or control of a third person;
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> a) attachment shall be effected by service by the Sheriff on the execution debtor and on such third person of notice of the attachment with a copy of the warrant of execution, which service may be effected as if such notice were a summons; provided that if service cannot be effected in any manner prescribed, the Court may make an order allowing service to be effected in a manner stated in the order;
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> b) the Sheriff may, upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser, seller or such other third person, enter upon the premises where such property is and make an inventory and valuation of the said property.

[17] Mr *Meyer*, who appeared for the applicant, submitted that a plain reading of this Rule was the sheriff was obliged to effect service of the

notice of attachment and warrant of execution on the applicant and that only once the original warrant of execution had been shown to the applicant could the sheriff proceed to attach the property. I agree.

[18] I also accept the submissions of Mr *Meyer* that this Rule must be read together with section 68 (3) of the Magistrate's Court Act which provides that the sheriff may attach and sell in execution "the interest of the execution debtor in any movable property belonging to him and pledged or sold under a suspensive condition to a third party, and may also sell the interest of the execution debtor's property, movable or immovable property, or sold to him under any hire purchase contract or under a suspensive condition."

[19] Section 68 (3) of the Magistrate's Court Act makes specific reference to "any hire purchase contract or under a suspensive condition". I accept that among the consequences of this provision is that the purchaser at the sale in execution does not necessarily acquire ownership in the goods, but merely acquires the execution debtor's interest in the vehicle, which is the right to possess and enjoy the vehicle and to become the owner thereof when the instalments due have been made. See *The Trustbank of Africa Limited v Imperial Garage and Filling Station.*[1] The facts of this case indicate strongly that the purchaser had no intention of acquiring this mere residual interest.

[1] 1963(1) SA 123 (A)

Against the canvas of all the facts in this case it would make no sense to try to address this aspect in an alternative order by the court.

[20] In the definitions section of the National Road Traffic Act "Owner" in relation to a motor vehicle means:

(a) the person who has the right to the use and enjoyment of the vehicle in terms of the common law or a contractual agreement with the titleholder of such vehicle;

(b) any person referred to in paragraph (a) for a period during which such person has failed to return that vehicle to the titleholder in accordance with the contractual agreement referred to in paragraph (a) or;

(a) a motor dealer…"

[21] The word "titleholder" is defined as meaning:

(a) the person who has to give permission for the alienation of that vehicle in terms of a contractual agreement with the owner of such vehicle; or

(b) a person who has the right to alienate that vehicle in terms of the common law, and who is registered as such in accordance with the Regulations under Section 4.

[22] I agree with Mr *Meyer* that if Rule 42 is read together with the National Road Traffic Act, there is a clear legislative intention is that person such as the applicant should not be deprived of their interest in a vehicle such as the one in question without being properly informed before the sale in execution takes place in order that they can then take steps to protect their interest.

[23] Mr *Saint*, who appeared for the sheriff, relied very strongly on the provisions of section 70 of the Magistrates' Courts Act which reads as follows: "A sale in execution by the messenger shall not, in the case of a movable property after the delivery thereof or in the case of immovable property after registration of transfer be liable to be impeached as against a purchaser in good faith and without notice of any defect".

[24] Section 70 appears to have been intended to protect to a purchaser in good faith and who had no notice of any defect in title. *In casu*, the purchaser does not oppose the application. It is the sheriff who does so. In any event, nowhere in these papers is there any reliance on the purchaser having been in good faith.

[25] In *The Messenger of the Magistrate's Court, Durban v Pillay*[2] Van Den Heever JA, delivering the unanimous judgment of the court, held that: "It is clear from the English cases to which I have referred that a juristic act may be "null and void" as against one individual and yet be fully valid as against another. This limping operation is not unknown to the Roman Dutch Law."[3]

[26] Van Den Heever JA went on to express caution where court officials act *sub hasta* ("met den sterken arm" for which "using strong arm tactics" may be a reasonably good translation).[4] He said that proceedings in execution are inroads upon the rights and property of the individual in which the messenger carries out his duties *sub hasta* and in so finding, he referred with approval to Maxwell, *Interpretation of Statutes*,[5] 7th Edition at page 316 where the learned author wrote:

> where powers are … granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the …

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[2] 1952 (3) SA 678 (AD)
[3] at 683A
[4] At 683E. In *Menga and Another v Markom and Another* 2008 (2) SA 120 (SCA) at paragraph [41], the editors of the law reports added a footnote that *sub hasta* meant "in execution". I agree but it should be remembered that, more literally, *sub hasta* means "under a sword/spear/fearsome weapon of some kind". In *South African Broadcasting Corporation v Avusa Limited and Others* 2010 (1) SA 280 (GSJ)at paragraph [14], I expressed my conviction that Latin is a language of extraordinary nuance, precision and depth. In my view, the phrase *sub hasta* in this context illustrates the point fairly well.
[5] 7th Edition at page 316

> authority conferred, and is therefore probable that such was the intention of the legislature.

[27] Referring specifically to the provisions of section 70 of the Magistrates' Courts Act, Van Den Heever JA held that:

> These provisions are in harmony with the dispositions of the common law which regarded sales *sub hasta* as sacrosanct. The words are wide enough to cover not only situations such as that which arose in *Conradie v Jones* 1917 OPD 112, where property not belonging to the judgment debtor was sold in execution, but every claim that the sale be rescinded.[6]

[28] Following upon this reasoning, the court confirmed the decision in the Durban and Coast Local Division to set aside a sale in execution. The Appellate Division took the stance that under certain circumstances, a sale may be set aside even though a transfer or delivery took place. Section 70 was thus not to be seen or interpreted as an absolute or unqualified defence for a purchaser who may have acted in good faith at a sale in execution.

[29] A few months after delivering the judgment in the *Messenger of the Magistrate's Court, Durban v Pillay* case, Van Den Heever JA said

[6] At 683H

the following in *Sookdeyi & Another v Sahadeo & Another*[7] in a unanimous judgment:

> It was a principle in the Netherlands that a perfected sale in execution should after transfer or delivery of the subject matter not be lightly impugned *quoniam fiscalis hastae fides facile convelli non debeat*. (Groenewgen *de Legib. Abrogate, ad C.* 4.44.16; *ad C.* 8.44 (*sibi* 45) 13; Neostad *Decisiones*, Decis.75; *Voet* 6.1.13 and, dealing with execution *in rem*, Bynkershoek *Observ. Tumult.* Cas 45; *Cf Voet* 42.1.31 *verbis: Et quamvis nec arbiter...*).
>
> This reluctance to rescind perfected sales *sub hasta* has been received in our case law (*Lange and Others v Leisching and Others*, 1880 Foord 55; *S.A. Association v van Staden*, S.C. 95 at 98; *Conradie v Jones* 1917 O.P.D. 112).
>
> These authorities indicate that in certain exceptional circumstances a sale in execution may nevertheless be impugned. The rules in regard to this qualified inviolability of a sale in execution were in so far as magistrates' courts are concerned, codified in sec. 70. It has to be construed in harmony rather than conflict with the Common Law.[8]

[30] The *Sookdeyi v Sahadeo* case had originally been adjudicated in the magistrate's court, Durban. The learned magistrate had refused to set aside a sale in execution. The matter went on appeal in the Natal

[7] 1952 (4) SA 568 (A)
[8] At 571H-572A

Provincial Division before Broome J (as he then was) and Carlisle AJP. They found that the magistrate had not considered, in terms of section 70 of the Magistrates' Courts Act, whether the purchaser had been in good faith. Broome J and Carlisle AJP set aside the judgment and remitted the case to the magistrate to decide in the light of the evidence that may be led on this aspect. Upon a retrial, the magistrate again declined to set aside the sale. The matter went on appeal again. This time, the Natal Provincial Division dismissed the appeal. With leave having been granted, the appeal went further, to the Appellate Division.

[31] The Appellate Division dismissed the appeal. In *Menqa and Another v Markom and Others*,[9] Cloete JA disagreed with these judgments of Van Den Heever JA. It should be noted, however, that Cloete JA found unacceptable the general principle that sales *sub hasta* were sacrosanct. He did not differ with the proposition of Van Den Heever JA that there may be circumstances in which section 70 should not be interpreted in an unqualified manner. Indeed the contrary is true.[10] In this case of *Menqa v Markom and Others*,[11] the majority of the Supreme Court of Appeal ("the SCA") considered it unnecessary to decide the correctness of the aforementioned two judgments by Van den Heever JA. [12]

[9] 2008 (2) SA 120 (SCA) at paragraphs [41] to [43]
[10] See paragraph [40].
[11] 2008 (2) SA 120 at paragraph [22], footnote 15
[12] 2008 (2) SA 120 at paragraph [22], footnote 15

[32] Q*uoniam fiscalis hastae fides facile convelli non debeat* may be translated as "by reason of the fact that public confidence in the institutional weapon of execution should not lightly be disturbed" (my translation). This expression, it seems to me, summarizes the critical point: public confidence in the process of execution is fundamentally important. In the circumstances of this case, it seems clear that public confidence will be better served by an intervention in the sale of execution than by its declining to do so. It is not simply the buyers who must have confidence in the process of sales in execution but all interested parties, indeed the general public as a whole.

[33] In *Progress Shippers (Pty) Ltd v Van Staden*[13] the court granted an application by a *bona fide* purchaser of immovable property at a sale in execution for the Registrar of Deeds to pass clean transfer thereof, even though the mortgage bond in respect of the judgment debt had been irregularly registered. The facts of that case indicate that the respondent probably had himself to blame.

[34] Nevertheless, practical examples of where the court has refused to recognize a sale in execution even where the purchaser acted in good faith, and even where there may have been formal compliance with the provisions of section 70 of the Magistrates' Courts Act are to be found in a number of cases. The leading cases are *Joosub v J I Case SA (Pty) Ltd (now known as Construction and Special Equipment Co*

[13] 1963 (1) SA 87 (T)

(Pty) Ltd) and Others,[14] *Jones & Another v Trust Bank of Africa Ltd and Others,*[15] *Jubb v Sheriff, Magistrate's Court, Inanda District and Others, Gottschalk v Sheriff, Magistrate's Court, Inanda District and Others.*[16] In my respectful opinion, the *Joosub, Jones* and the *Jubb* cases are distinguished by their mutually reinforcing and comprehensive reviews of the Roman-Dutch authorities and case law.

[35] After Cloete JA had given a detailed analysis of the common law on the "*sub hasta* principle" in the *Menqa v Markom* case, he concluded that the *Joosub-Jones-Jubb* triad reflected the correct approach even though he did not "wish to be understood as agreeing with everything that was said in the judgments in those three cases".[17] The majority judgment of the SCA in the *Menga* case refrained from expressing any views on the correctness of the *Joosub-Jones-Jubb* triad, although *Joosub* was not disagreed with.[18]

[36] In *Sowden v ABSA Bank Ltd and Others*,[19] Heher J (as he then was), in this division expressly endorsed the decision in the *Joosub* case. In *Kaleni v Transkei Development Corporation and Others*,[20] Miller J followed suit.

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[14] 1992 (2) SA 665 (N)
[15] 1993 (4) SA 415 (C)
[16] 1999 (4) SA 496 (D &CLD)
[17] 2008 (2) SA 120 (SCA) at paragraph [44]
[18] See paragraphs [20] and [21].
[19] 1996 (3) SA 814 (W) at 821H-I
[20] 1997 (4) SA 789 (Tk SC) at 792E

[37] It cannot escape unnoticed that in *Rossiter and Another v Rand Natal Trust Co Ltd and Others*,[21] Milne JP (as he then was) set aside a sale in execution for want of compliance with Rule 46(7) of the Uniform Rules of Court. Similarly, in *Van Der Walt v Kollektor (Edms) Bpk en Andere*,[22] De Villers AJ (as he then was) refused to give effect to a sale in execution where the sheriff had failed to comply with the provisions of Rule 45 of the High Court Rules.

[38] Although Davis J *in Standard Bank of South Africa Ltd v Prinsloo and Another (Prinsloo and Another Intervening*)[23] seemed less than enthusiastic about the reasoning in the *Joosub* case and although, as noted above, the SCA considered it unnecessary in *Menqa v Markoms*[24] to decide the correctness of the judgments Van Den Heever JA in the *Messenger of the Magistrate's Court, Durban v Pillay* and *Sookdeyi v Sahadeo* cases, it is significant that both Van Heerden JA, delivering the majority judgment and Cloete JA the minority judgment in *Menqa and Another v Markom* respectively, agreed that to hold that the provisions of section 70 of the Magistrates' Courts Act rendered a sale in execution unimpeachable "would defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case".[25]

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[21] 1984 (1) SA 381 (N)
[22] 1989 (4) SA 690 (T)
[23] 2000 (3) SA 576 (C) at 588A-G
[24] 2008 (2) SA 120 at paragraph [22], footnote 15
[25] *Menqa v Markom* (*supra*) at paragraphs [21] and [48] respectively. *Jaftha* is more fully described as the case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

[39] Against this background, I am confident that the correct decision in the case before me is to set aside the sale in execution of the vehicle in question. Sales in execution of motor vehicles by the sheriff without at least giving notice of the intention to do so to both the "title holder" and the "owner" as defined in the National Road Traffic Act will undermine public confidence not only in the system of sales in execution but also the system of registration of vehicles provided for in the National Road Traffic Act as well as the whole system of credit financing of vehicles and the regulatory framework of the NCA.

[40] It clearly will impose no undue burden on sheriffs to require of them in this and similar cases that they take appropriate steps to ascertain who the "title holder" and "owner" of the vehicle in question may be and to notify them of an intended sale in execution. Where the "title holder" and the "owner" are separate persons this may only entitle the sheriff to sell the owner's the right, title and interest in the vehicle. Be that as it may, I am sure that, in a robust commercial hub like Johannesburg, once all interested parties have made aware of the conflicting interests at stake in the attempted satisfaction of a judgment debt, commercial sanity will, in most instances, prevail. There will be deals to be done.

[41] As this has been a test case, it seems best in all the circumstances to make no order as to costs. Rather than succeed in costs in this matter, it will be far more important to the applicant that

sheriffs should, from now on, be motivated to much more attentive to the registered interests of credit providers facilitating the sale of motor vehicles. It is often not fully appreciated that without the support of honest, conscientious, diligent sheriffs who take a pride in their work, the judgments of the courts in civil matters are, at best, mere etiolated ruminations. It is the sheriffs who give teeth to civil judgments, making them in an almost literal sense "*sub hasta*".

[42] The following is the order of the court (granted on 10th March, 2011):

> 1. The attachment of the vehicle 2007 model *Nissan X Trail 2.5 Sel (R55)*, with engine number QR25321754A and Chassis Number JN1TBN30Z0103197 ("the vehicle") as well as the subsequent sale in execution thereof held on 15th September 2009 by the seventh respondent to the fifth respondent is set aside;
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> 2. The fifth respondent is forthwith to return the vehicle to the seventh respondent as against the return by the seventh respondent of the amount of all monies paid by the fifth respondent to the seventh respondent, at or after the sale in execution;
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> 3. In the event of the fifth respondent refusing to return the vehicle to the seventh respondent, the seventh respondent is authorised to enter upon the fifth respondent's premises to attach the vehicle, and to take possession of the vehicle against

payment of the amounts paid by the fifth respondent at the sale in execution.

DATED AT JOHANNESBURG THIS 22ND DAY OF MARCH, 2011

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N.P.WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicant: *G.H. Meyer*
No Appearance for the First to Sixth Respondents
Counsel for Seventh Respondent: *F.A. Saint*

Attorneys for Applicant: Jay Mothobi Incorporated
Attorneys for Seventh Respondent: Gattoo Attorneys

Dates of hearing: 28th October, 2010; 19th January, 2011, 10th March, 2011.
Date of judgment: 22nd March, 2011