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(1) REPORTABLE YES/NO.
(2) OF INTEREST TO OTHER JUDGES:YES/NO.
(3) REVISED
15/4/10 DATE ..... SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT: MTHATHA)

CASE NOS.: 1691/09 & 1757/09

In the matter between:

GEORGE MOFOKENG MOKABO	**1st Applicant**
PRESBYTERIAN CHURCH OF AFRICA	**2nd Applicant**

and

BANILE BISHOP NOCANDA	**1st Respondent**
PRESBYTERIAN CHURCH OF AFRICA LTD (Section 21 Company)	**2nd Respondent**

JUDGMENT

NHLANGULELA J:

[1] On 21 September 2009 the *interim* court granted a *Rule Nisi* under Case No. 1691/09, incorporating an *interim* order, calling upon the respondents to show cause why a final order should not be granted interdicting them from using the name of the second applicant and holding a general meeting from 22 - 27 September 2009 in the name, description and auspices of the second applicant. On 25 September 2009 the *interim* court granted a further *Rule Nisi* under Case No. 1757/2009 calling upon the respondents to show cause why they should not be committed to prison for contempt of the *interim* order of 21 September 2009 preventing them from holding a general meeting as aforementioned. This is now a return day of the said *Rule Nisi*.

[2] The parties in both applications are the following: The first applicant is George Mofokeng Mokabo, an adult male, who sues herein in his capacity as the reverend and Moderator for the Cape Presbytery of the second applicant. He has been duly authorized to do so in terms of a certificate issued in terms of s 16 of Chapter 20 of the Constitution of the Presbyterian Church of Africa. The second applicant is Presbyterian Church of Africa, an un-incorporated association with legal capacity to sue and be sued in terms of its Constitution and practicing religious faith throughout the African

Continent including the Republic of South Africa. The second respondent will hereinafter be referred to as "the church".

[3] The first respondent is described by the applicants as Banile Bishop Nocanda, an adult male director of the second respondent. He describes himself as a Moderator of both second applicant and second respondent churches. The second respondent is Presbyterian Church of Africa, a company registered in terms of the provisions of s 21 of the Companies Act No. 61 of 1973 with it principal place of business situate at No. 45 Callaway Street, Mthatha. The main business / main object of the second respondent is to "worship teaching community services based on a belief in a deity". The second respondent will hereinafter be referred to as "the company".

[4] At this final stage of the two applications the enquiry turns only on proof by the applicant that the three requisites for a final interdict exist. Those requisites are the following:

(a) a clear right

(b) an injury actually committed or reasonably apprehended; and

(c) the absence of similar protection by any other ordinary remedy.

See: *Herbestein and Van Winsen: The Civil Practice of The High Courts Of South Africa*, 5th Edition at 1456 and the cases quoted thereunder.

[5] It is necessary to state at this early stage that *Mr Dukada*, senior counsel who appeared with *Mr Mtshabe* on behalf of the applicants, informed the Court that the applicants will not persist with the *interim* relief in paragraphs 2.2.2, the interdict concerning the holding of a general meeting, because such relief has been overtaken by the events. In similar vein the Court was informed that the applicants will abandon the interdictory relief in paragraph 2 of the notice of motion under Case No. 1757/2009 that the respondents be compelled to stop the meeting. What remains under both applications are the interdict against use of the name of the church, an interdict for committal of the first respondent to imprisonment for disregarding the order of court dated 21 September 2007 and the issue of costs.

[6] It was submitted by *Mr Dukada SC* that the company is not opposing the relief sought due to failure to deliver an opposing affidavit or a notice that its opposition is based on points of law only. The first respondent did file an answering affidavit purportedly doing so on behalf of the company

because of his claim that he was the elected Moderator in the company church. However, the reading of the first respondent's affidavit does not show that he was duly authorized by the company to depose to that affidavit on its behalf. In the circumstances the first respondent would not be entitled to represent the company, a body incorporated in terms of s 21 of the Companies Act 61 of 1973, without having obtained the necessary authority to do so.

Consequently, I agree with *Mr Dukada SC* that the company conceded the relief sought against it by the applicants under both applications. It is, therefore, proper to consider the factual context in which the first respondent opposed and the company conceded the relief sought in both applications.

[7] The first applicant, who deposed to the affidavits filed on behalf of the church in both applications stated as follows: On 24 August 2009 it came to his attention that the first respondent, apparently championing his cause and that of the company, issued an open invitation to " all Moderators, Commissioners and Delegates" to attend a 2009 General Assembly meeting on 22 – 27 September 2009 at Zwide – Veeplas Circuit, 26 Khoza Street, Zwide, Port Elizabeth (the premises). A copy of a notice of invitation is

attached to the papers as annexure "GMM 2". This venue is situated within the jurisdiction of the Cape Presbytery of the church. The Presbytery covers an area starting from Cape Town and ending in the Transkei region. Port Elizabeth is part of that area. The first respondent issued this notice acting purportedly in his capacity as the Moderator of the church. The first applicant stated further that the premises on which the meeting was sought to be held is the property of the church which was acquired for the exclusive use of its members. Aggrieved by the fact that there would be a general meeting convened by the respondents in the name of the church and at the property owned by it the church addressed a letter of demand to the respondents calling upon them to stop the meeting and convene the general meeting in the official name of the company and at the premises that were owned by the company.

[8] The first applicant stated that the reasons why it was improper for the respondents to use the name of the church is because the first respondent was a leading member of a dissident group within the church who excommunicated themselves in the year 2001 by breaking away from the church and conducted their own church separately. On 25 October 2000 the dissident group had formed itself as Biz Africa 1185, a shelf company

registered in terms of s 21 of the Companies Act 61 of 1973 (the Companies Act). On 03 December 2000 the dissident group changed its name from Biz Africa 1185 to Presbyterian Church of South Africa, Association incorporated under section 21. The first respondent together with certain Vuyisile Ngoza and Mongezi Mpuku became the first directors of the company with effect from the date of registration. According to the applicants the registration of the company using the name of the church was intended to confuse the general membership and donors of the church and then take them over together with the assets of the church into a new church but masquerading as the original church. The first applicant stated that the attitude of the church in all the efforts of the respondents is not to interfere in the affairs of the section 21 company which was formed by the first respondent but to prevent the clandestine efforts of the first respondent from unlawful use of the name of the church to protect the image, membership and assets of the church which are in existence in the African Continent and Republic of South Africa.

[9] Very little or nothing was done by the first respondent to deal with the facts and allegations that are set out in the founding affidavit. All that the first respondent has stated is that the premises are not the property of the

church. He stated further that the first applicant has no right to use the premises because he and the members of his group defected from the church leaving him (the first respondent) and his group to take over the administration and assets of the main church. These averments raise no genuine disputes of fact. The first respondent regards himself as a Moderator of the church but then there is no supporting evidence by the church to confirm such an allegation. He produced no proof of acquisition of the church assets. For his convenience he concealed the fact that he was a director of the company. None of the directors of the company placed credible evidence before this Court to show that they are *bona fide* members of the church. The Court will decide the first application on the basis of facts and allegations as contained in the founding affidavit. Therefore, it will be safe to conclude that the first respondent admitted the facts as set out in the founding affidavit of the applicants. The following cases shall apply: *United Methodist Church of South Africa v Sokufudumala* 1989 (4) SA 1055 (0) at 1059A and *Ebrahim v Georgoulas* 1992 (2) SA 151 (B) 153D.

[10] On the second application for contempt of the court order dated 21 September 2009, the first respondent stated that he did not have an intention to disregard the court order as he had thought that the application was a

product of mischief performed by the applicants. In explaining the lack of intention, he stated that upon receipt of the order and the application papers on 22 September 2010 in Port Elizabeth he noticed that the notice of motion appeared to have been issued in Port Elizabeth High Court. He then went to Port Elizabeth High Court to clear the confusion. When he was informed that Case No. 1691/09 was allocated to a matter of *Absa v Mellville Adams* he concluded that the order was erroneous despite the heading on it which read: Mthatha High Court. These facts were not gainsaid by the applicants.

[11] Numerous points in *limine* have have been raised in the first respondent's answering affidavit. As a matter of practice, points in *limine* raised have to be considered first since they have the potential of disposing of the entire application without a need of going into the merits of the case. I will deal with the points in *limine* raised by the first respondent in the paragraphs that follow.

[12] The first point in *limine* is that the relief sought by the applicants in both applications cannot be confirmed because the meeting sought to be interdicted took place on 22 - 27 September 2009. *Mr Dukada SC* submitted that the final relief in terms of paragraph 2.2.1 of the notice of motion, that

the respondents be stopped from using the name of the church may still be confirmed to guard against future unauthorized use of the name of the church. There is *merit* in the submission made on behalf of the applicants. A consideration of the aforementioned relief by the final court is not of academic importance as suggested by *Mr Noxaka*, the legal representative of the respondents. The point in *limine* under question is, therefore, dismissed.

[13] The second point in *limine* is that the application under Case No. 1691/09 based on the relief pertaining to the use of the name of the second applicant by the respondents is *lis pendens* before this Court under Case No. 1177/09. In this matter the applicants seek a relief that the respondents be interdicted and restrained from: "using the name Presbyterian Church of Africa." The applicants in the matter under Case No. 1177/09 were the first respondent and the church in this matter. The respondents were Eric Matomela and Zweledinga Mabece. The first applicant, Banile Bishop Nocanda, prosecuted the application as the Moderator of the Presbyterian Church of Africa. The relief sought by the applicants was an interdict to stop the respondents from attending meetings of the church, convening meetings under the name of the church and performing duties of a Moderator and Stated Clerk of the church. A dispute which arose from that

matter was, *inter alia*, whether the Presbyterian Church of Africa and Presbyterian Church of Africa, a company established in accordance with the provisions of s 21 of the Companies Act, were the same or separate entities. Another dispute raised relates to the question whether Mr Nocanda was a Moderator of the church and entitled as such to sue on its behalf.

[14] *Mr Dukada SC* submitted that the present application is not *lis pendens* under Case No. 1177/09. The test of the legal objection based on *lis pendens* was stated by the Supreme Court of Appeal in *Nestle (SA) (Pty) Ltd v Mars Incorporated* [2001] 4 All SA 315 (SCA) at 319 as follows:

> " The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to is conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally. There is room for the application of that

> principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of action."
>
> (The underlining is mine for emphasis)

It seems to me that the legal objection as raised by the first respondent does not pass muster in terms of the aforementioned case. In the first place, the parties in this case are not the same as the parties in the matter under Case No. 1177/09 and in the second place, the dispute raised in this matter is not the same as the disputes in the matter under Case No. 1177/09. In this case the respondents have not disputed that the company is an incorporated association in terms of s 21 of the Companies Act. Consequently, the legal objection of *lis pendens* is dismissed.

[15] The third point in *limine* is that the applicants have no power to sue as it is the Deacon's Court, one of the administrative structures of the church, that is empowered to do so in terms of Chapter 1, clause 13 read with clause 32 of the Constitution of the church. *Mr Noxaka* contended that annexure "GMM 1", which is a certificate in terms of s 16 of Chapter 20 of the church

constitution, giving the first applicant a right to sue on behalf of the church, is irregular because such certificate did not emanate from the Deacon's Court. In reply, *Mr Dukada SC* submitted that the Deacon's Court cannot sue and be sued because it is not a *universitas* in form and, therefore, it has no legal capacity to sue and be sued in law. He submitted further that, in equal parlance, the Deacon's Court cannot authorize any member of the church to sue or defend in any legal proceedings involving the church as it is only the church which can do so. I am satisfied that the Deacon's Court is not a *universitas* capable to sue and be sued in litigation. The church is such a *universitas*. The first applicant having been duly authorized in terms of the certificate of the church to institute the applications on behalf of the church, the church is properly before the Court. The third point in *limine* must, similarly, fall to the ground.

[16] The fourth point in *limine* is that the Deacon's Court should have been joined as a party in these proceedings involving the church. This submission cannot be sustained. The Deacon's Court is neither a *universitas* nor an incorporated association. The name and the image sought to be protected in these proceedings belong to the church as a whole. The interest sought to be protected is not limited to the Cape Presbytery. Any interest that the

Deacon's Court may have in the protection of the existence of the church would be subservient to and derived from the church.

[17] The fifth point in *limine* is that the application must be dismissed for lack of compliance with the provisions of s 48 of the Companies Act. The section reads as follows:

> **"Recourse to Court in matters as to names –** Any company or person aggrieved by the decision or the order of the Registrar under sections 41, 42, 43, 44 or 45 may, within one month after the date of such decision or order, apply to the Court for relief, and the Court shall have power to consider the merits of any such matter, to receive further evidence and to make any order it deems fit."

Based on the provisions of s 48, *Mr Noxaka* contended that the applicants ought to have joined the Registrar of Companies as he/she is a party having a direct interest in the relief sought that the name of the company should not be used.

[18] Sections 41-44 provide for a procedure to be adopted by the Registrar of companies in registering the name of a company, reservation of name of a

company, registration of translation and shortened form of name or defensive name and a change of name the and the effect thereof. In terms of s 45 (1) a name shall be changed by the Registrar *mero motu* within a period of one year of the registration if in his opinion the registration thereof is undesirable. In terms of s 45 (2) he/she may change a name on objection lodged to him/her within the same period of time if he/she is satisfied that the registration thereof is undesirable or is calculated to cause damage to the objector. In terms of s 45 (2A) a person who has not lodged an objection may within a period of two years after registration of a name apply to the court for an order directing a company to change its name if the registered name is undesirable or is calculated to cause damage to the applicant. In terms of s 45 (3) the Registrar may, at any time, change a name if it gives so misleading an indication of the nature of its activities as to be calculated to deceive the public. It is a decision of the Registrar taken under ss 45 (1), (2) and (3) that any company or person aggrieved thereby is permitted in terms of s 48 to apply to a court of law for review. In this case *Mr Noxaka* contended that the application should be dismissed because the applicants did not apply to court in terms of s 48 for a review of the Registrar's decision to register the name of the company. Further, *Mr Noxaka* contended that flowing from non-compliance with s 48 the applicants should

be non-suited for the application because they brought it outside a prescribed or reasonable period after registration of the name of the company.

Mr Noxaka relied on the case of *Peregrine Group (Pty) Ltd And Others v Peregrine Holdings Ltd And Others* 2000 (1) SA 187 (W) in support of the submission that the applicants should have applied to court for the changing of the name of the company.

[19] In reply to the contentions based on ss 45 and 48 *Mr Dukada SC* submitted that the applicants' case is based on the case of *Old Apostolic Church of Africa v Non-White Old Apostolic Church of Africa* 1975 (2) SA 685 (C). Whereas the case of *Peregrine* concerns an application in terms of s 45(2A) the application in the *Apostolic Church* matter is based on a delictual claim of passing-off. This delict is defined in the case of *Capital Estate And Others v Holiday Inns Inc And Others* 1977 (2) SA 916 (A) at 929 C-D as follows:

> "The wrong known as passing off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a

reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another.

[20] The gist of the complaint of the applicants regarding the unauthorized use of the name of the church is captured in paragraph 15 of the founding affidavit where the first applicant stated as follows:

"15.1 It is clear from the documents referred to above that the 1st respondent and his group, after having left the 2nd applicant, they surreptitiously formed a Section 21 Company and gave it the name of Presbyterian Church of Africa in an effort to take over the general membership and assets of the 2nd applicant. It is not the intention of the 2nd applicant to interfere in the affairs of the Section 21 Company which was formed by the 1st respondent and his group.

15.2 However, the 2nd applicant is completely against the clandestine attempt by the 1st respondent and his group to take over the membership and assets of the 2nd applicant by utilizing the legal machinery set out in the Companies Act. The 1st respondent and his group, in exercise of their freedom of religion, are

> entitled to form their own church should they wish to do so but not to engage themselves in an exercise which is intended effectively to disband the existing church of the 2nd applicant by illegal means i.e contrary to the provisions of the Constitution of the 2nd applicant."

It is evident from the contents of paragraph 15 aforementioned that the applicants do not seek to disband the membership of the company or to deregister its name under which it conducts business based on the stated objective of the company.

[21] It seems to me that the applicants are aggrieved by the mischief of the respondents as illustrated on annexure "GMM 2". As I understand the case of the applicants the objection to annexure "GMM 2" lies in the fact that the name and epithets which have defined the separate identity of the church for a period of well over 100 years are under threat of being taken over by the respondents surreptitiously. The company and the first respondent have very unapologetically used the insignia of the church bearing its name and year 1898, the date on which the church was established, description and auspicies of the church. Yet the company was established only in the year

2000. Further, the church has accumulated a number of movable and immovable properties in the form of church buildings. The estimated value of the assets is two billion rands currently. The money to acquire and maintain the assets and to run the business of the church derive from the members and donors of the church. I am of the view that the cause of action in this matter compares with that of the matter of *Old Apostolic Church, supra*. There the court said at 689 D-E:

> " As I have already said the applicant church requires funds to perform its functions, and those funds come from voluntary donations made primarily by its members. The church accordingly needs members. I have no doubt, too, that from time to time applicant church receives funds from benefactors who are not members of the church. If therefore potential members, or benefactors, are likely to be misled by the similarity of the names into thinking that the respondent church is the applicant church, or a branch of it, it seems to me to follow that there is a real possibility of damage to the applicant because non-White persons might join the respondent church thinking that they are joining the non-White section of the applicant church or benefactors might donate moneys to respondent thinking that they are benefiting applicant."

[22] The naming of the company should be viewed in proper perspective. Section 49 of the Companies Act lays down an imperative when it comes to the naming and identity of a registered company. Section 49 (3), which is relevant to the company, reads:

> "The name of an association not for gain incorporated under this Act shall not include the word and statement referred to in subsection (1) (c) but the statement "Association incorporated under section 21" shall be included in and be subjoined to the same name: Provided that an association not for gain incorporated under this Act before the commencement of the Companies Amendment Act, 1980, may instead of the same statement include in and subjoin to its name the statement "Incorporated association not for gain".
>
> (The underlining is mine for emphasis)

In terms of s 49 (8) failure by a registered company to comply with s 49 (3) is a criminal offence. It seems to me that describing a registered company by its full name is not optional. Similarly, it does not avail the company to describe itself by a name other than that under which it was registered. I therefore agree with *Mr Dukada SC* that the manner in which the name of the second respondent should have been cited in annexure "GMM 2" is

"Presbyterian Church of Africa (Association incorporated under section 21)".

[23] On the foregoing, I am of the opinion that the case of *Peregrine, supra*, does not apply in this case to the extent that the cause of action in that case was based on the provisions of s 45 (2A) of the Companies Act. The provisions of s 48 also do not apply in this case because the applicants' cause of action is not based on a decision taken by the Registrar in terms of ss 45 (1), (2) and (3) of the Companies Act. As I have already stated the applicants' cause of action is a delictual claim of passing-off. The applicants have proved on a balance of probabilities that there is a reasonable likelihood that the public may be confused into believing that the business of the company is, or is contracted with, the business of the church, the confusion is due to the wrongful conduct of the respondents and the confusion will probably cause irreparable damage to the church (cf. *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E) at 280 F-G)

[24] The legal objection that the application should be dismissed because of undue delay in the pursuit of an interdict against use of the name of the church arises from the heads of argument. Consequently, in deciding this

point the Court should have regard to the founding affidavit of the applicants. It appears from the founding affidavit that the interdict sought was prompted by the unauthorized conduct, which is admitted by the first respondent, of convening meetings in the name of the church rather than in the name of the company. Those meetings did take place between 22-27 September 2009. There is also genuine fear that the respondents will repeat these meetings in the future. That being the case there is no scope for a submission that the applicants should be non-suited based on the delay rule as considered in the case of *Ntombomzi Gqwetha v Transkei Development Corporation Ltd and Others* Case No. 242/04. dated 30 May 2005 (unreported). Further, in any event, the applicants do not seek a remedy of review which was the central issue in the case of *Gqwetha.*

[25] Since the merits of the applicants' case have been admitted by the first respondent and conceded by the company it is my judgment that the requisites for the grant of a final interdict in terms of paragraph 2.2.1 of the notice of motion have been proved by the applicants.

[26] I now turn to deal with the second application for contempt of the order of this Court dated 21 September 2009. *Mr Mtshabe* urged the Court

to punish the first respondent by imposing a term of imprisonment for failing to stop the meeting when he had already received the Court order from the Sheriff of Port Elizabeth on 22 September 2009 at 10H00. *Mr Noxaka* submitted that the first respondent had no intention of disregarding the court order as he had reasonable grounds to believe that the application on which it was based had been brought before the Port Elizabeth High Court. Upon enquiring if the Port Elizabeth Court had indeed issued the order he found that it did not do so. The conduct and state of mind as entertained by the first respondent should be measured against the principles that are applicable to an application of this nature. The principles were well set out in the case of *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 344, paragraph [42] in the following terms:

> "(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
>
> (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt;

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt;

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

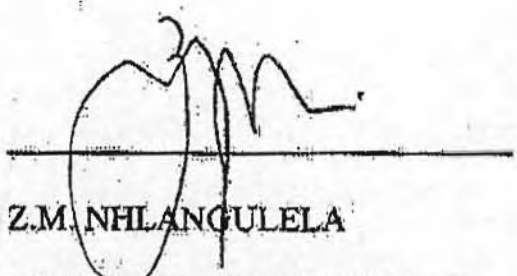
[27] There is merit in the explanation proffered by the first respondent that he was confused by the heading of the notice of motion, on which it appears that the application was filed in: "Eastern Cape High Court, Port Elizabeth". The heading of the notice of motion was a basis for confusion in my view. Those who represented the applicants, and who drafted the founding papers, ought to have foreseen that by choosing to write the names of a wrong court

on the notice of motion confusion could arise. The claim by the first respondent that he was confused by the papers served upon him was not contradicted by the applicants pertinently. Consequently, I agree with *Mr Noxaka* that absent the evidence of deliberate intention on the part of the first respondent to disregard the court order, it cannot be said that wilful and *mala fide* non-compliance with the court order has been proved by the applicants beyond a reasonable doubt. Nevertheless, enough has been done by the applicants to prove that the first respondent's conduct would have warranted an order forcing him to comply with the court order. The first respondent could still have contacted the Sheriff to enquire from this Court on his behalf if it was correct of him to ignore the court order. For some inexplicable reasons he did not do so. As a direct consequence of this conduct the applicants were compelled to bring the application for contempt of court. In the circumstances the costs of both applications must be paid by the respondents.

[28] In the result the following order shall issue:

1. The respondents be and are hereby interdicted and restrained from using the name: "Presbyterian Church of Africa."

2. The respondents are ordered to pay costs of the application, jointly and severally the one paying the other to be absolved, including costs occasioned by the employment of two counsel.



Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Date of hearing	:	16 March 2010
Delivered on	:	15 April 2010
Appearing for the applicants	:	Adv. N.K. Dukada SC, who appeared with Adv. N.Z. Mtshabe
Instructed by	:	C.Z. Mbanjwa Incorporated Locally represented by M.D. Mzanywa & Co MTHATHA

Appearing for the respondents : Mr A.F. Noxaka, of

A.F. Noxaka & Co

MTHATHA