IN THE SUPREME COURT OF SWAZILAND

Civil Appeal No: 70/2013

In the matter between:

REUBEN MILLER	**FIRST APPELLANT**
THEO MASON	**SECOND APPELLANT**
PETERSTOW HOLDINGS LTD IN LIQUIDATION	**THIRD APPELLANT**

AND

GOVERNEMENT OF THE KINGDOM OF SWAZILAND	**FIRST RESPONDENT**
AMOS SHONGWE & 86 OTHERS	**SECOND RESPONDENT**

Neutral citation: *Reuben Miller and Two others v. Government of the Kingdom of Swaziland and 86 Others (70/2013) [2014] SZSC03 (2014)*

Coram: **M.M. RAMODIBEDI, CJ**
M.C.B. MAPHALALA, JA
E. OTA, JA

Heard: 13 February 2014
Delivered: 21 February 2014

Summary

Company law – winding up of a company and legal position of creditors and members – subordination agreement and legal effect thereof – creditors applied for an order *inter alia* to remove liquidators, and to expunge the claim of the holding company on the basis of a subordination agreement. They also applied for an order directing the liquidator to accept the purchase offer by Mosegedi and Associates in the sum of E5,000,000=00 – held, that the effect of a subordination agreement is that the debt continues to exist pending the fulfilment of the condition that the debtor's assets exceeds liabilities excluding the subordinated debt;

held further, that in the event of debtor's insolvency, sequestration or liquidation, the debt is extinguished and the creditor has no claim provable on insolvency; held further, that creditors

are entitled to remove liquidators in terms of sections 321 (d) of the Companies Act, 2009, and that the claim by the holding company is expunged on the basis of the subordination agreement;

held further, that both creditors and members are entitled to vote on the disposal of company assets in accordance with section 328 (2) (a) as read together with section 328 (3) (a) of the Companies Act, 2009 – the appeal succeeds in part in favour of the third appellant – the first and second appellants to pay costs of suit on the ordinary scale to the respondents.

JUDGMENT

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[1] This is an appeal against the judgment of Madam Justice Dlamini delivered in the Court a *quo* on 5 November 2013. The judgment follows an application brought by the present respondentson a certificate of urgency for the following reliefs:

1. That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency.

2. That the applicants' non-compliance with the Rules relating to the above-said forms and service be condoned.

3. That the first respondent, Mr. Reuben Miller, and the second respondent, Mr. Theo Mason, hereby be removed as liquidators of Peterstow Aquapower Swaziland (Pty) Ltd (In Liquidation) (hereunder referred to as

the “Company”) in accordance with section 321 (d) of the Companies Act, 2009 (hereinafter referred to as the “Act”).

4. That the third respondent be advised to give due regard to the wishes of the applicant as creditor that Mr. Titus Mlangeni be appointed forthwith as the liquidator of the Company, upon furnishing the third respondent with the requisite security, in accordance with sections 311 (2) read with section 316 of the Companies Act.

5. That the liquidator or liquidators of the Company, as the case may be, and are hereby directed, in accordance with the wishes of the majority of creditors having voting rights, to forthwith accept the written offer by Mosegedi & Associates Proprietary Limited (copy attached as annexure “A” hereto – to be read as if incorporated herein) to acquire the assets of the Company for a purchase price of E5 000 000.00 (five million emalangeni), in accordance with section 328 (3) (h) of the Act.

6. Costs of the application to be costs in the administration of the estate.

7. That any of the first or second respondents who may oppose this application be ordered to pay the costs of this application on such scale as may be argued at the hearing.

8. Such further and/or alternative relief as the above Honourable Court may deem fit, including the issue of a rule *nisi*.

[2] After considering the evidence as well as the submissions by counsel, the Court *a quo* granted judgment in favour of the respondents. The Court further made the following orders: Firstly, that the Master of the High Court is hereby directed to expunge the claim by Peterstow Holding Ltd (in liquidation) from the creditors' list. Secondly, that the first and second appellants are hereby removed as liquidators of Peterstow Aquapower Swaziland (Pty) Ltd (in liquidation). Thirdly, that Titus Mlangeni is hereby declared the liquidator of Peterstow Aquapower Swaziland (Pty) Ltd (in liquidation) upon furnishing the Master of the High Court with security in terms of section 311(2) as read with section 316 of the Insolvency Act. Fourthly, that the Liquidator of Peterstow Aquapower Swaziland (Pty) Ltd is hereby directed, in accordance with the wishes of the majority of creditors having voting rights, to forthwith accept the written offer by Mosegedi & Associates (Pty) Ltd to acquire the assets of the Company for a purchase price of E5 000 000.00 (five million Emalangeni). Fixthly, that the first, second and third appellants are ordered, jointly and severally, to pay the respondents' costs on the attorney and own client scale, the one paying absolves the other, with first and second appellants paying costs *de bonis propriis.* Sixthly , that the Taxing Master is directed, in terms of Rule 68 (2), not to be bound by section H of the tariff in relation to costs of Counsel. Lastly, that the Liquidator is authorized to pay the said costs from the estate and to recover such costs from the first, second and third appellants.

[3] The first and second appellants lodged the appeal timeously on 7 November 2013, two days after the judgment had been delivered. Their grounds of appeal are the following:

1. The Court *a quo* erred in finding that the removal of liquidators in terms of section 321 (d) of the Companies Act 2009 did not require a vote of creditors at a meeting of creditors in order to determine the wishes of the majority of creditors. The Court *a quo* erred, in particular, in this regard in that:

1.1 It relied on the affidavits of applicants and in particular the affidavit of Attorney Howe as evidence of the wishes of the majority.

1.2 It disregarded the provisions of the Companies Act 2009 as read with the Insolvency Act relating to the manner in which meetings of creditors are to be held and the manner in which decisions of the creditors are made.

1.3 It erred in its interpretation of section 321 (d) by holding that the section did not require a vote and by failing to interpret the section by reading it in conjunction with sections 282 and 349 of the Companies Act 2009 and the relevant law relating to insolvency in respect of the meetings of creditors.

2. The Court *a quo* erred in finding that Peterstow Holdings Limited (the "holding company") had entered into a subordination agreement in respect of its claim against Peterstow Aquapower Swaziland (Pty) Ltd ("Peterstow SD"). The Court *a quo* erred, in particular, by relying on the contradictory and improbable evidence of Douglas Barrows in that:

2.1 Barrows had filed two affidavits in the application by the holding company to liquidate Peterstow Swaziland (Pty) Ltd and alleged in the founding affidavit in that application that the holding company was a *bona fide* creditor of Peterstow Swaziland (Pty) Ltd and that its debt was due and payable; whereas he attested to an affidavit in reply in the Court *a quo* (which was not served on respondent as part of the replying affidavit) in which he alleged that the holding company had subordinated its claim against Peterstow Swaziland (Pty) Ltd.

2.2 The Court *a quo* erred in refusing an application to hear oral evidence of Barrows and to allow him to be cross-examined on the said contradiction which was relevant to the dispute of fact as to whether there existed a subordination agreement which extinguished the holding company's claim.

2.2.A It further erred in its refusal to allow oral evidence of Robert Young of KPMG to explain the statement in respect of subordination in the financial statements for the year ending 30 June 2011.

3. The respondents herein instituted the urgent application without joining the holding company (in liquidation) which had a direct and substantial interest in the application. The Court *a quo* permitted intervention but erred in that the holding company's rights to be heard were curtailed by the Court *a quo's* requirement that its affidavit on the merits be filed by 8.30 am on 1st November 2013. The ruling in respect of the filing of an affidavit on the merits required the holding company to obtain an affidavit overnight from a deponent in Mauritius.

4. The Court *a quo* erred in disregarding the fact that the holding company remained a proven creditor at the meetings of creditors and that it held 97% of the claims in terms of value. The Court *a quo* erred in law in failing to take into account that the holding company's proven claim had not been lawfully set aside or invalidated by any procedure or proceedings prior to the application in the Court *a quo*.

5. The Court *a quo* erred in finding that the third respondent, the Master of the High Court, had been properly served, should abide the decision of the Court and need not be called to give oral evidence in respect of the wishes of the creditors.

6. The Court *a quo* erred in ordering the liquidator appointed in the order of the Court *a quo* to accept an offer to acquire the assets of the company in liquidation in that such direction to accept the said offer was not approved or directed by a resolution passed by a vote of the majority of creditors as required by law.

7. The Court *a quo* erred in the exercise of its discretion in respect of costs in ordering the first and second respondents to pay the costs *de bonis propriis* in that the respondents had opposed the application reasonably and responsibly and have *bona fide* ground to oppose in execution of their duties as liquidators.

8. The Court *a quo* erred in finding that Phumelele Dlamini and Lucky Howe were properly authorised to act on behalf of the first and second applicants respectively.

[4] The first and second appellants filed a supplementary notice of appeal on 3 December 2013 within the time provided by Rule 8 of the Rules of the Court of Appeal. The notice contained grounds of appeal in respect of issues that were

never argued and determined by the Court *a quo*. In particular the first and second appellants argued that the respondents failed to establish any subordination agreement in respect of any loans made by the holding company to Peterstow Aquapower Swaziland (Pty) Ltd subsequent to the year ending 30 June 2011. It was argued that the amount of the loan account after the said date was substantial to the extent that the Holding Company would be a major creditor and its decisions binding over the other creditors.

[5] It was further argued that the judgment of the Court *a quo* was not competent in light of section 328 (2) (a) as read with section 350 of the Companies Act when considering that the authority of creditors and members was a pre-requisite to disposing property of a company under provisional liquidation. To that extent it was argued that the views of the third appellant as the major creditor should have been taken on board.

[6] It was also argued that the Court *a quo* failed to give due consideration to the contents of the written loan agreement between the third appellant and Peterstow Aqua power Swaziland (Pty) Ltd dated 17 April 2012 providing that the Loan would become due, owing and payable in full in the event the company committed an act of insolvency. To that extent it was argued that the Court erred in finding that the first and second respondents were the major creditors instead of the third appellant.

[7] It is clear from Rule 12 that a party desirous of amending the notice of appeal should file an application for leave to supplement and give due notice to the other party. The Court has to consider the application after arguments by the parties. Rule 12 provides:

> **"The Court of Appeal may allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under rule 11 upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit."**

[8] The first and second appellants did not file any application as required by Rule 12. In addition the supplementary notice of appeal largely constitutes new evidence on appeal. The grounds of appeal which we highlighted in the preceding paragraphs reflected in the supplementary notice of appeal did not form part of the issues before the Court, and, as such they were not argued let alone determined by the Court.

[9] We emphasise the argument that only a portion of the third appellant's loan was subordinated. It is common cause that the evidence relied upon by the 1st and 2nd appellants in support of this argument was not part of the exchange of affidavits in the Court *a quo*. It is contained in the liquidation application which was handed up at Court during argument in this case in the Court *a quo* by learned counsel for 1st and 2nd appellants. The sole purpose of handing up the liquidation application was to show the inconsistencies in the evidence of Mr Barrows who deposed to the affidavit in support of the liquidation application as well as the affidavit in support of the respondents case that the

3rd appellant's loan had been surbodinated. The whole exercise was to show up Barrows as a liar whose evidence could not be relied on. That is why the 1st and 2nd appellants applied to the Court for leave to call oral evidence to prove the alleged lie. It is common cause that no reference was made in argument to the later loan nor was there any argument in the Court below that only part of the loan was surbordinated. It is also common cause that a copy of the liquidation application was not given to the respondents.

[10] We agree entirely with learned Counsel Mr Edeling SC that it is trite that if a party to an application refers to annexures, specifically extensive annexures such as the full record of a different application (which is the situation we are faced with in casu) he must inform the Court and his opponent what parts thereof he intends to rely on. This is to remove the element of surpprise and give the opponent the opportunity to argue the issue raised and obtain in evidence in support of that argument. This principle of our law was succinctly stated by the Court in the case of **Diamond Mines (Pty) Ltd And Others v Government of The Republic of South Africa and Others 1999 (2) SA 279 (T)**, in the following terms:-

> **"Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portion thereof on which rehance is placed and an indication of the case which is sought to be made out on the G stregter thereof. If this were not so the essence of our established practice would be destroyed. What case must be met. See Lipschrtz and Schwarz NNO V Morkowitz 1976 (3) SA 772 (W) at 775H and Port Molloh Municipality V Xahalisa and Others; Luwalala and Others V Port Nolloh Municipality 1991 (3) SA 98 (C) at 111, B-C"**

11] This is however not such a case the 1st and 2nd appellants failed to comply this the established principle of the law in urging the evidence contained in the

liquidation application. The Court *a quo*, was in our view, correct to refuse to countenance it.

[12] It follows that the evidence in support of this issue constitutes new evidence in this appeal which cannot be allowed without the prior leave of this Court having been first sought and obtained. This is in compliance with Rule 33 (1) and (2) which provides

321. The Court may, on application by the Master or any interested person, remove a liquidator from his office on the ground.

(a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorized, special or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney;

(b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

(c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator,

(d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, wishes him to be removed.

(e) that there is other good cause for doing so.

[13] Rule 33 provides:

"33. (1) No party to an appeal shall have the right to adduce

new evidence in support of his original case; but for the furtherance of justice, the Court of Appeal may where it thinks fit allow or require new evidence to be adduced.

(2) A party may, by leave of the Court of Appeal, allege any facts essential to the issue that have come to his knowledge after the decision from which the appeal is brought and adduce evidence in support of such allegations.

(3) Even where the notice of appeal seeks to have part only of the judgment reversed or varied, the Court of Appeal may draw any inference of fact, give any judgment, and make any order which ought to have been made and may make such further or other order as the case may require, and such powers may be exercised in favour of all or any of the respondents or parties whether or not they have appealed from or complained of the decision under appeal.

(4) The Court of Appeal may make such order as to the whole or any part of the costs of the appeal as may be just."

[14] The third appellant filed its notice of appeal timeously on the 28 November 2013, with the following grounds of appeal:

"1.

1.1 The learned Judge erred in finding that the indebtedness of

Peterstow Aquapower Swaziland (Pty) Ltd (in liquidation) had been subordinated by the appellant for the benefit of other creditors of Peterstow Swaziland. Particularly:

1.1.1 The learned Judge erred in finding that the respective affidavits deposed to by Douglas Barrows ("Barrows") under case Nos. 1474/12 (the original application for liquidation of Peterstow Swaziland) and 1683/13 did not contradict each other on the issue of the subordination of the appellant's loan.

1.1.2 The learned Judge erred in attaching more weight to the evidence of Barrows than to the evidence of Reuben Miller, the deponent to the answering affidavit ("Miller").

1.1.3 The learned Judge erred in ultimately accepting the version of Barrows on this issue and rejecting the version of Miller.

1.1.4 The learned Judge erred in having regard to probabilities at all, alternatively by attaching too much weight to probabilities as a means of resolving factual disputes on the papers.

1.2 The learned Judge ought to have found that the versions of Miller and Barrows, insofar as it relates to the subordination of the loan issue, were mutually destructive and resulted in factual disputes incapable of resolution on affidavit evidence.

1.3 The learned Judge ought to have accepted the version of Miller against the background of the factual disputes, and specifically pursuant to the observance of the well established principles governing the resolution of factual disputes on affidavit evidence in application proceedings.

1.4 The learned Judge should accordingly have held:

1.4.1 That the debt of Peterstow Swaziland had not been subordinated by the appellant for the benefit of the creditors of Peterstow Swaziland; and resultantly.

1.4.2 That the appellant was a creditor of Peterstow Swaziland; and

1.4.3 That the appellant is the majority creditor in value of Peterstow Swaziland; and

1.4.4 That the applicant was entitled to vote at the general meeting of creditors of 8 October 2013 pursuant to section 52 of the Insolvency Act, 1936.

1.5 Against the aforesaid findings the learned Judge erred in making the following concomitant findings and orders:

1.5.1 that the claim of the applicant is expunged from the creditors' list of Peterstow Swaziland;

1.5.2 that the first and second respondents are removed as liquidators of Peterstow Swaziland by virtue of a decision

of the majority of the creditors entitled to vote at a meeting of creditors;

1.5.3 that Titus Mlangeni is declared the new liquidator of Peterstow Swaziland at the request of the majority of creditors of Peterstow Swaziland:

1.5.4 Directing the liquidator of Peterstow Swaziland to forthwith accept the written offer by of Mosegedi & associates (Pty) Ltd to acquire the assets of Peterstow Swaziland for a purchase price of E5 000 000.00 (five million Emalangeni) in accordance with the wishes of the majority of creditors having voting rights.

2.

2.1 The learned Judge erred in finding that the removal of the liquidators under section 321 (d) of the Companies Act 2009 did not require a vote of creditors at a meeting of creditors in order to determine the wishes of the majority of creditors.

2.2 The learned Judge ought to have found that the removal of the liquidators required, as a jurisdictional fact, a vote of creditors at a meeting of creditors as contemplated in section 52 of the Insolvency Act, 1955, pursuant to a conjunctive reading of sections 282 and 349 of the Companies Act, 2009

3.

3.1 The learned Judge erred in finding that the majority of the creditors desired the removal of the first and second respondents *a quo* as

liquidators of Peterstow Swaziland under circumstances where no direct evidence by the second and further respondents were placed before the Court.

3.2 **The applicant in this regard relied exclusively on the affidavit of attorney Lucky Howe ("Howe") as evidence of the wishes of the majority. No explanation for the failure to provide direct evidence by the second and further respondents has been forthcoming by the first respondent.**

3.3 **The evidence considered by the learned Judge constitutes hearsay evidence as contemplated in section 3 of the Law of Evidence Amendment Act 1988, and is inadmissible.**

4.

4.1 **The learned Judge erred in affording the Intervening Party insufficient time to prepare its answering affidavit.**

4.2 **The learned Judge ought to have found that the appellant should have been joined as a party to the proceedings by the respondents *ab initio* and should have been afforded a similar period than the other respondents *a quo* within which to consider its position and prepare affidavits.**

5.

5.1 **The learned Judge erred in directing the liquidator of Peterstow Swaziland to forthwith accept the written offer by Mosegedi & Associates (Pty) Ltd to acquire the assets of Peterstow Swaziland for a**

purchase price of E5 000 000.00 (five million Emalangeni). Particularly the learned Judge erred:

5.1.1 In finding against the existence of the higher offer of E17, 500 million alleged to have been on the table for the purchase of the assets:

5.1.2 in taking into consideration the so – called national interest in determining whether the offer should be accepted. In so doing the Court attached weight, alternatively too much weight, to factors irrelevant to the monetary interests of proven creditors;

5.1.3 in determining whether the offer of E5 million should be accepted at all under circumstances where such a decision lay within the prerogative of the liquidator, alternatively, the Master of the High Court. The decision ultimately has the effect of usurping the powers of both the liquidator and/or the Master, and contravenes, on proper interpretation, section 52 of the Insolvency Act, 1955, pursuant to a conjunctive reading of sections 282 and 349 of the Companies Act, 2009.

5.1.4 by directing the acceptance of a lower offer for the assets of Peterstow Swaziland and accordingly not acting in the interest of the proven creditors, including the appellant.

6.

6.1 The learned Judge erred in finding that the Master of the High

Court chose to abide by the decision of the Court under circumstances where the Master had not been served with the application, alternatively had not initially been served with the application.

6.2 The learned Judge ought to have found that the non-service, alternatively the defective service of the application on the Master constituted a fatal defect in the application.

6.3 The learned Judge erred in finding that the Master had been served at all under circumstances where no evidence had been placed before the Court substantiating the fact.

7.

7.1 The learned Judge erred in ordering the appellant to pay the costs of the application, jointly and severally, with the first and second respondents *a quo*.

7.2 The learned Judge ought to have dismissed the application and ordered the applicants to pay the costs thereof."

[15] On the 17th January 2014 the third appellant, lodged its supplementary notice of appeal. This was followed by the lodging of the application for leave to supplement the notice of appeal as well as a prayer condoning the late filing of the supplementary notice of appeal. The third appellant contends that it briefed Counsel after it had filed its notice of appeal and Counsel saw the need to file a

supplementary notice of appeal; to that extent the third appellant complied with Rules 12 and 33.

[16] Briefly the grounds as reflected in the supplementary notice of appeal are the following: firstly, that the Court *a quo* failed to give consideration to the fact that the alleged subordination of the loan advanced by the third appellant to the company only relates to the loan amount outstanding as at 30 June 2011; to that extent, it was argued that the Court *a quo* failed to give due consideration that additional funding had been advanced following the period 30 June 2011. Secondly, that the Court *a quo* erred in failing to give due consideration that the quantum of variance between the loan as at 30 June 2011 and the total outstanding amount due to the third appellant is sufficient to establish the holding company as the majority creditor in the liquidated estate of the company. To that extent it was argued that the respondents did not have sufficient voting rights to invoke the provisions of section 321 (d) of the Companies Act. Similarly, it was argued that the respondents lacked the necessary majority in voting rights to resolve that the offer of E5 000 000.00 (five million emalangeni) for the sale of the assets of the company should be accepted.

[17] Thirdly, that the Court *a quo* erred in directing the removal of the first and second appellants as liquidators of the company on a finding that this represents the wishes of the respondents who do not hold the majority voting

rights. To that extent it was argued that the Court failed to exercise its discretion as conferred by section 321 (d) of the Companies Act, and, in the alternative, in failing to exercise the discretion conferred judicially.

[18] Fourthly, that the Court *a quo* erred in failing to give consideration to the provisions of section 328 (2) (a) as read with sections 328 (3) (h) and 349 of the Companies Act. To that extent it was argued that the Court *a quo* could not dispose of the assets of the company in the absence of a resolution reached in a meeting of creditors and members.

[19] I should point out at the onset that the supplementary notice of appeal filed by the third appellant suffers from the same weakness as that of the first and second appellants; it contravenes Rule 33 which prohibits a party to an appeal from adducing new evidence in support of its original case. The issue relating to additional funding of Peterstow Aquapower Swaziland (Pty) Ltd, being not subordinated, constitutes new evidence on the basis that it was never argued in the Court *a quo* and certainly not determined by the said Court.

[20] Having stated as above, we now proceed to determine four (4) issues which we distil from the probic grounds of appeal, namely

1. Surbonation
2. Removal of liquidators
3. Sale of the assets of the company

4. Costs

[21] Having discount named the new evidence which the new evidence which the appellants sought to raise on this issue, we will deal with it in terms of the issues and evidence advanced in the Court *a quo*.

[22] It is common cause that the third appellant is the holding company for Peterstow Aquapower Swaziland (Pty) Ltd, which is its subsidiary company. It is further common cause that the third appellant gave several loans of various amounts of money to the subsidiary company in Swaziland prior to its own sequestration in Mauritius. Similarly, it is common cause that on the 21 September 2012, the High Court of Swaziland placed the subsidiary company under provisional liquidation at the instance of the third appellant as the holding company.

[23] The third appellant argues in the supplementary notice of appeal that there was additional funding after the said period which was advanced by the holding company to Peterstow Aquapower Swaziland (Pty) Ltd, and, that the additional funding is not subordinated. It is further argued that the additional funding suffices to make the third appellant a majority creditor in the liquidated estate of Peterstow Aquapower Swaziland (Pty) Ltd; hence, the respondents didn't have sufficient voting rights to invoke the provisions of section 321 (d) of the Companies Act, 2009 to remove the liquidators. It is also argued that as the

major creditor, the third appellant has to be involved in a meeting and to vote whether to accept the offer of E5 000 000.00 (five million Emalangeni) by Mosengedi & Associates (Pty) Ltd.

[24] It is not in dispute that on the 8 October 2013 a general meeting of creditors was held before the Master of the High Court at which certain creditors wished to vote on whether the offer made by Mosegedi & Associates (Pty) Ltd should be accepted. It is apparent from the founding affidavit that the said creditors wished to pass a resolution instructing the liquidators to accept the offer subject to the fulfilment of the condition precedent set out in the offer of all the assets currently owned by the subsidiary company. However, there was no vote on the resolution on the basis that the third appellant was not represented at the meeting. The Master as well as the first and second appellants argued that the third appellant should be recognised as a creditor entitled to vote at a meeting of creditors.

[25] The respondents on the other hand contend that the claim by the third appellant is subordinated, and, upon the liquidation of Peterstow Aquapower Swaziland (Pty) Ltd, the subordinated claim died a natural death, and, that the holding company had no claim that could be proved in insolvency. Consequently, that the claim by the third appellant should not have been admitted and that it has no right to vote at any meeting of creditors.

[26] The evidence of subordination of the third appellants' claim is made by Douglas Barrows who was a director of both Peterstow Aquapower Swaziland (Pty) Ltd as well as the third appellant. Needless to say that Mr. Barrows has had a long active association with both companies when compared to the first appellant who has deposed to the Answering Affidavit; Mr. Miller only came to the picture when Peterstow Aquapower Swaziland (Pty) Ltd was provisionally liquidated.

[27] In his evidence Mr. Barrows states that he was involved in the events leading to the issue of the audited financial statements in respect of Peterstow Aquapower Swaziland (Pty) Ltd for the year ending 30 June 2011 and signed by KPMG on the 17 October 2011. He contends that it was known long before 17 October 2011 that Peterstow Aquapower Swaziland (Pty) Ltd was technically insolvent in that its liabilities exceeded its assets. He further contends that the auditors of KPMG required that the problem be addressed by the third appellant as the holding company. He also contends that the only way to restore Peterstow Aquapower Swaziland (Pty) Ltd to solvency would be for the third appellant either to waive at least part of its claim or to subordinate its claim in favour of the other creditors until the assets of the company fairly valued, exceeded its liabilities.

[28] According to the evidence of Mr. Barrows, the third appellant subsequently, on 20 July 2011, informed KPMG in writing that it would support Peterstow

Aquapower Swaziland (Pty) Ltd by not demanding payment of the amount due for a period of twelve months from the date of signing the statutory accounts for the year ended 30 June 2011. The third appellant further undertook to provide financial support to Peterstow Aquapower Swaziland (Pty) Ltd in the form of additional loan funding to enable it to meet its commitments in the course of its operations should the need arise, for a period of twelve months from the date of signing the statutory accounts for the year ended 30 June 2011. However, KPMG was not satisfied and rejected the undertaking by the third appellant partly because it merely gave time to pay but did not waive any claims and partly because it did not subordinate any claims in favour of other creditors.

[29] Consequently, several meetings were held involving senior audit partners of KPMG from South Africa, Swaziland, Mauritius and England together with the directors of the third appellants as well as Peterstow Aquapower Swaziland (Pty) Ltd. A resolution was reached that the third appellant subordinates its loan to the company in favour of other creditors. It is against this background that KPMG agreed to sign the financial statements of the company 17 October 2011. At page 6 of the financial statements in the directors' report, they state the following:

> **"The holding company has agreed to subordinate its loan to the company in favour of the other creditors until the assets of the company fairly**

valued, exceed its liabilities and to provide additional working capital on an ongoing basis."

[30] At page 32 of the directors' report, they state the following:

"The loan due to the holding company has been subordinated by the holding company until such time as the company's assets, fairly valued, exceed its liabilities."

[31] It is apparent from the evidence that in October 2011, the third appellant agreed to subordinate its loan to the company in favour of the other creditors until the assets of the company fairly valued exceeded its liabilities. In addition the third appellant undertook and agreed to provide additional working capital to the company on an ongoing basis. It is clear from this agreement that the subordination relates to past and future loan funding on the basis that the same agreement encompasses additional funding. Accordingly, both past and future loans were subordinated; and, they were not due and payable until the assets of the company fairly valued exceeded its liabilities.

[32] It is common cause that subsequent to the said agreement reached in October 2011, the assets of the company never at any point exceeded its liabilities until the company was placed under provisional liquidation on 21 September 2012. In the circumstances the alleged written contract concluded between the third appellant and the company on 17 April 2012 cannot override the earlier contract concluded in October 2011 which is binding and enforceable. In the

circumstances, the third appellant is not a creditor to the company entitling it voting rights in the winding up of the company. The loan amount in its entirety died a natural death by virtue of the subordination agreement. The Court *a quo* did not, in the circumstances misdirect itself in holding as it did that the loan account was subordinated; hence, the first, second and further respondents remain the major creditors of the company.

[33] *Goldstone JA* in ex Parte *De Villiers & Another NNO*: In Re Carbon Developments 1993 SA 493 (A) at 504 -505 said the following pertaining to a subordination agreement:

> **"The essence of a subordination agreement, generally speaking, is that the enforceability of a debt, by agreement with the creditor to whom it is owed, is made dependent upon the solvency of the debtor and the prior payment of its debts to other creditors.**
>
> **Subordination agreements may take many forms. They may be bilateral, i.e. between the debtor and the creditor. They may be multilateral and include other creditors as parties. They may be in the form of a *stipulatio alteri*, i.e. for the benefit of other and future creditors and open to acceptance by them. The subordination agreement may be a term of the loan or it may be a collateral agreement entered into some time after the making of the loan.**
>
> **Save possibly in exceptional cases, the terms of a subordination agreement will have the following legal effect: the debt comes into existence or continues to exist (as the case maybe), but its enforceability is made subject to the fulfilment of a condition. Usually the condition is that the debt may be enforced by the creditor only if and when the value of the**

debtor's assets exceeds his liabilities, excluding the subordinated debt. The practical effect of such a condition, particularly where, for example, the excess is less than the full amount of the subordinated debt, would depend upon the terms of the specific agreement under consideration and need not now be considered.

In the event of the insolvency of the debtor, sequestration would normally mean that the condition upon which the enforceability of the debt depends will have become incapable of fulfilment. The legal result of this would be that the debt dies a natural death."

REMOVAL OF LIQUIDATORS

[34] The first respondent is represented in these proceedings by the Chief Executive Officer of the Swaziland Investment Promotion Authority, a statutory body established in terms of the Swaziland Investment Promotion Act No. 1 of 1998 with the main object being to promote and co-ordinate investment and implement government policy and strategies on investment. It is common cause that the first respondent is a proved creditor in the liquidated estate of the company by virtue of a written agreement of lease concluded with the company in respect of the business premises. The first respondent was represented during the conclusion of the said lease by the Swaziland Investment Authority who were duly authorised to act as agents of the first respondent, being the landlord; hence the challenge to the *locus standi* of the deponent of the founding affidavit in particular and Swaziland Promotion Authority in general is misconceived.

[35] Similarly, the challenge to the *locus standi* of Attorney Lucky Howe is misconceived. Indeed it was correctly not persisteat in before us. The Chief Executive officer of the Swaziland Investment Authority Phumelele Dlamini states clearly in the replying affidavit at paragraph 9 that Mr. Howe attended the meetings of creditors duly authorised by the second and further respondents; his authority to represent these creditors for purposes of the estate was accepted by the Master. Furthermore, the second and further respondents are reflected on the official list of approved creditors. In addition there was correspondence between the first appellant and the Law Firm of Attorney Lucky Howe, Howe Masuku Nsibandze Attorneys with regard to the winding up of the company.

[36] Furthermore, Mr. Howe deposed to an affidavit in which he states under oath that he is the duly appointed representative of the second and further respondents who are former employees of the company, and, that their claims against the estate have been proved and accepted. He states that he represented the second and further respondents at meetings of creditors; and that he has been instructed to institute the present legal proceedings.

[37] The Court *a quo* further ordered the removal of the first and second appellants as liquidators of the company in terms of section 321 (d) of the Companies Act. It is pertinent that for the purposes of this decision that we set out the full text of section 321. It states as follows:-

321. The Court may, on application by the Master or any interested person, remove a liquidator from his office on the ground.

(a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorized, special or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney;

(b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

(c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator,

(d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, wishes him to be removed.

(e) that there is other good cause for doing so.

[38] We agree fully with the Court *a quo* that section 321 (d) of the Companies Act is clear and unambiguous. The appellants did not allege let alone prove any ambiguity in the legislative provision. It is not required of the creditors to vote in order to demonstrate their wishes to remove a liquidator. The fact that the respondents being the majority creditors have instituted these proceedings signify their wishes to have the first and second appellants removed as liquidators. It suffices for purposes of this legislative provision that the respondents constitute the majority of creditors in number and in value to vote at a meeting of creditors. For these reasons the criticism made by the

appellants that the Court *a quo* failed to exercise the discretion conferred in the absence of good cause shown for the removal is misconceived.

SACK OF THE ASSETS OF THE COMPANY

[39] It is pertinent that we observe right at this juncture, that the third appellant did not file any affidavit in the court below. It chose to rely on certain facts contained in the affidavits filed of record by the applicants as well as 1st and 2nd respondents in that Court. The third appellant's contention is that since those facts support its case, it rendered the necessity of it filing any opposing affidavit nugatory. We are of the opinion that the third appellant was entitled in law to proceed in the way and manner that it proceeded. This is because in motion proceedings, a party on whom an affidavit is served, need not file an affidavit in opposition or in reply thereto, under the following circumstances:

(1) If he intends to rely on the facts in the affidavit served on him as true and other facts in the other records of the court in the substantive case as a whole; or

(2) If the affidavit served on him contains facts that are self contradictory and unreliable; or

(3) If he intends to oppose the application only on grounds of law.

[40] It follows from the above, that the mere fact that a party did not file an affidavit in opposition to an affidavit in support of a motion served on him should not be taken to mean that he has conceded the application. This is because the failure of a party to file an affidavit in opposition does not preclude him from relying on the facts contained in the affidavit in support of the application and other facts in the record in opposing the application.

[41] Having stated as above, we now proceed to consider and determine the points taken by the appellants in respect of the order for the sale of the assets of the company.

[42] The appellants challenged the order in para 96 (5) of the court decision directing the liquidator to forthwith accept the offer of E5,000,000=00 (Five Million Emalangeni) by Mosegedi & Associated Proprietary Limited for the assets of the company. The contention is that the court *a quo* erred and misdirected itself by not taking into consideration the provisions of section 328 (2) (h) read with section 328 (3) (h) and 349 of the Companies Act 2009 in making that order. Those sections make it abundantly clear that the sale of the assets of a company in liquidation in the peculiar circumstances of this case, requires the authority of both the creditors and members. The court's findings which were based on merely

the wishes of the creditors to the exclusion of the third appellant who is a member of the company in liquidation, was wrong and ought to be set aside, so argued the appellants.

[43] In seeking the relief contained in the notice of application in the court a quo, the respondents relied specifically on the provisions of section 328 (3) (h) of the Companies Act No. 8 of 2009 "(the Act)". Their case in the court below in respect of the sale of the assets of the company was predicated on the alleged wish majority of creditors reckoned in number and value, entitled to vote at a meeting of creditors (i.e the respondents *in casu*). If the meeting of the 8 October 2013 had voted, such resolution would have been adopted and the liquidators would have been under a legal duty to carry out such directions. [6] It was further the case of the respondents that the third appellant had subordinated its proved claim of E327 426 235.00 to the company, consequently, the third appellant was not a creditor as its debt was rendered unenforceable upon the grant of the order of winding up of the insolvent company. The respondents also advanced the contention that the acceptance of the offer was in the national interest of Swaziland and that the Government of Swaziland, as the landlord of the premises, enjoyed the right to approve or reject prospective tenants and it was satisfied with the said offer.

[44] It is also clear from the record that in para 29.1 of their founding affidavit, the respondents relied on the provisions of section 53 (3) of the Insolvency Act which states as follows

> **"(3) Every resolution of creditors at a meeting of creditors and the result of the voting on any matter as declared by the officer presiding at that meeting shall be recorded upon the minutes of the meeting and shall be binding upon the trustees in so far as it is a direction to him".**

[45] We agree entirely with the appellants that the procedure for the sale of the assets of a company in liquidation by the order of the court, which is the situation we are faced with in this case, is specifically provided for by section 328 of the Act. In these circumstances, the provisions of the Insolvency Act find no application by virtue of section 282 of the Act which provides as follows:-

> **"In the winding-up of a company unable to pay its debts, the law relating to insolvency shall, in so far as it is applicable, apply *mutatis mutandis* in respect of any matter not specifically provided for in this Act".**

[46] *In casu*, since the sale of the assets of the company is regulated by section 328 of the companies Act, which was in any case specifically relied upon by the respondents, that is the statute that should hold sway in these proceedings.

[47] Section 328 (2) (a) read with section 328 (3) (h) of the Act, state as follows:-

> **"(2) The liquidator of a company shall have the powers mentioned in subsection (3)**
>
> **(a) <u>in a winding-up by the court</u>, with the authority granted by meetings of creditors and <u>members.</u>**
>
> **(b) ----------**
>
> **(c) ----------**
>
> **(3) In relevant parts the powers referred to in subsection (2) are**
>
> **(a) ----------**
>
> **(b) ----------**
>
> **(c) ----------**
>
> **(d) ----------**
>
> **(e) ----------**
>
> **(f) ----------**
>
> **(g) ----------**
>
> **(h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof"**
>
> (our emphasis)

[48] It cannot be gainsaid from the aforegoing provisions that the liquidator is empowered to dispose of property in a winding up by the court, where both the creditors and members have agreed thereto. We cannot ignore such clear words of the statute.

[49] That is the ratio in the case of **Griffin and Others v The Master and Another (Commins and Another Intervening) 2006 (1) SA 187 SCA,** (referred to with approval by the appellants), where the Supreme Court of Appeal of South Africa adumbrated on the provisions of section 386 (3)

and (4) of the erstwhile South African Companies Act 61 of 1975, a statute which is identical to our section 328 (2) (a) and 328 (3) (h). For the avoidance of doubts that South African legislation provided as follow:-

> **"(3) The liquidator of a company**
>
> **(a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;**
>
> **shall have the powers mentioned in subsection (4)**
>
> **(4) The powers referred to in subsection (3) are**
>
> **(c) to compromise or admit any claim or demand against the company, including an unliquidated claim".**

[50] Interpreting the aforegoing legislation in paras [6] and [7] of the **Griffin case (supra), Zulman JA** made the following condign remarks:-

> **"[6] It is clear that s386 (3) specifies in terms that a liquidator may only exercise the powers given (with certain exceptions which are nothere relevant) if granted authority to do so. Furthermore, s386(3)(a), specifies from whom this authority must be obtained; namely, in the case of a winding-up by the court, meetings of creditors and members or contributories or on the directions of the Master.**
>
> **[7] The learned authors Blackman et al in their Commentary on the Companies Act (2002) vol 3 at 14 – 330 correctly state the position in these terms:-**
>
> > **'Section 386 (3) provides that with the required authority the liquidator 'shall have the powers mentioned in subsessions (4)' Thus it would seem that the authority is not merely a condition for the exercise of those powers, but, is rather, a necessary condition**

for their existence. Where the liquidator required such authority to exercise a particular power other than the power to litigate [a situation not of application here], it is open to a third party to raise the question of the liquidator's lack of 'authority'
(See also Ex parte Du Plessis 1965 (2) SA 438 (T) at 440D, Du Plessis v Protea Inryteater (Edms) BPK 1965 (3) SA 319 (T) at 320 A - B and Henochsberg on The Companies Act Vol 1 (5th ed) at 821)".

[51] We are persuaded by the aforegoing apposite pronouncement. We have no wish to depart from it.

[52] Now, it is clear from the tenure of the assailed decision, that in granting the impugned order, the court a quo proceeded on the premises that since the third appellant had subordinated its loan it was no longer a creditor of the company. The court also found that since it was the wish of the remaining creditors, (that is the Respondents *in casu*), that the offer should be accepted the order ought to be granted. We agree with appellants that by so holding the court a quo misdirected itself by failing to advert its mind to the fact that the third appellant though not a creditor, was still a member of the company. We say this because, the mere fact that the third appellant is not a creditor of the company by reason of having surbordinated its loan to it, did not detract from the status of the third appellant as a member of the company. It remained a member and as such legally entitled together with the creditors, to authorize the liquidators to sell the assets of the company pursuant to sections 328(2)(a) and 328(3)(h) of the Act. It is however, common cause that the third

appellant gave no such authorization. Nor did it participate in any meeting or meetings of the creditors and members of the company where a resolution was taken to accept the said offer of E5,000,000=00 (Five Million Emalangeni) for the assets of the company. This is the condition that would invoke the powers of the liquidators to carry out such sale. In fact, the established position, by the showing of the respondents as applicants in their founding affidavit *a quo*, is that the meeting of 8th October 2013 convened before the Master of the High Court where the creditors intended to pass such a resolution did not hold because of the absence of the third appellant. In these premises, there is no authority that exists which will empower the liquidators to embark on such a sale.

[53] Now, it is clear from the tenure of the assailed decision, that in granting the impugned order, the court *a quo* proceeded in the premises that since the third appellant had surbordinated its loan it was no longer a creditor of the company. The Court also found that since it was the wish of the remaining creditors, (that is the Respondents *in casu)*, that the offer should be accepted the order ought to be granted. We agree with the appellants that by so holding the court *a quo* misdirected itself by failing to advert its mind to the statutory requirement of the Companies Act which is to the effect that both the creditors and members of the company should authorize such a sale.

[54] It is imperative that we observe here that in terms of section 329 (a)-(c) of the Act, in the event of any disagreement between the creditors and members regarding the sale of the assets of the company or where they have failed to give any direction in relation thereto, then the matter is tabled by the liquidators before the Master directions. Where the Master has refused to give any direction, then the liquidator may apply to the Court for directions. This is however not the situation *in casu*. There is also no doubt that in terms of section 329 (d) of the Act that any person who is aggrieved by any act or decision of the liquidator may apply to the Court and the Court may make such order as it deems just. However, this is not the basis on which the application before the Court *a quo* was predicated, as we have hereinbefore abundantly demonstrated. The respondents are thus precluded from raising this issue in the fashion they have embarked upon in this appeal without the prior leave of this Court having been first sought and obtained.

[55] It follows irresistibly from the totality of the aforegoing, that there was no basis for the order of the Court *a quo* directing the liquidator to accept the offer of E5,000,000=00 (Five Million Emalangeni). The order of the Court *a quo* in paragraph 96 (5) of the assailed decision was thus wrong and ought to be set aside. The third appellant's appeal must accordingly

succeed on this point. As can be seen from the tenure of section 321 reproduced above that legislation is self contained. It enumerates different circumstances under which a liquidator can be removed one of which is if it is the expressed wish of the creditors pursuant to section 321 (d). That is the circumstance relied upon by the respondents in contending this issue in the Court *a quo*. That legislative provision suffices to invoke the Court's power to remove the liquidators.

[56] In any case, to have the liquidators removed, the respondents contend in paragraph 45 of their founding affidavit that they were aggrieved by the manner in which the liquidators administered the estate. In as much as they relied on section 321 (d) of the Companies Act, they disclosed that they had other reasons for their discontent with the liquidators. This becomes apparent at paragraphs 21 and 51 of the founding affidavit where the first and second appellants are alleged to have disclosed the existence of other offers which were not shown to the creditors because they were allegedly "commercially confidential"; and that these offers inclusive of the offer of E5 000 000.00 (five thousand emalangeni) made by Mosegedi & Associates were rejected by the liquidators without reference to the creditors. The first and second appellants do not dispute this evidence. This state of affairs in our view, clearly demonstrates that the liquidators were not acting in utmost good faith towards the creditors, members and the estate. They failed in the standard of duty and care required of them towards the company. This is a veritable ground for the

removal of liquidators and fortifies our conclusion that the Court ***a quo*** was correct to have ordered their removal.

[57] It is apparent therefore that a meeting of creditors and members should be held for purposes of considering the sale of the assets of the company. To that extent the liquidator appointed by this Court will cause a meeting of creditors and members to be convened for this purpose. In the event of a dispute between creditors and members, the Master intervenes with a view to resolve the dispute; if not, the dispute will be referred to Court for resolution.

COSTS

[58] Lastly, we agree with the Court *a quo* that the issue of costs lies within the discretion of the Court. However, there is no basis in law for the appellants to pay costs at a punitive scale or costs *de bonis propriis*. The ordinary rule with regard to costs is that the successful party is awarded costs as between party and party; and that attorney and client costs are awarded where special grounds for doing so exist. Such instances include proceedings which are vexatious and frivolous, the litigant is dishonest and fraudulent, reckless or malicious proceedings or where the conduct of the litigant towards the Court is deplorable. The basis for the Court's reluctance to award punitive costs is premised on the right of every person to bring his complaint before the Courts for a decision, and, that he should not be penalised if he is misguided in

bringing a hopeless case before the Courts; the exception is where the litigant is *mala fide* in bringing the proceedings.

See: The Law of Costs, A.C. Cilliers, Butterworths, Durban, 1972 at pages 62-69.

[59] Costs *de bonis propriis* are awarded where a person litigates in a representative capacity. The law requires good reason to be shown for such an order such as improper or unreasonable conduct, lack of *bona fide*. *Innes CJ* in *Vermaak's Executors v. Vermaak's Heirs* 1099 T.S. 679 at 691 stated the following:

> **"The whole question was very carefully considered by this Court in Potgieter's case, 1908 T.S. 982 and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity, his conduct in connection with the litigation in question must have been *mala fide*, negligent or unreasonable."**

[60] It is well-settled that the discretion of a trial court in awarding costs is not unlimited; the appeal court is entitled to interfere with that decision if it can be shown, for example, that the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought an unbiased judgment to bear on the question or has not acted for substantial reasons.

See Law of Costs (supra) at p. 303; *Letsitele Stores (Pty) Ltd v. Roets* 1959 (4) SA 579 (T) at p. 580.

[61] **CONCLUSION**

1. The appeal by the first and second appellants fail and is dismissed same for the issue of costs.
2. The appeal by the third appellant succeeds in part.

[62] **ORDER**

1. The Master of the High Court is directed to expunge the claim by Petersow Holding Ltd (in liquidation) from the creditors list.
2. The first and second appellants are hereby removed as liquidators of Peterstow Aquapower Swaziland (Pty) Ltd (in liquidation).
3. Attorney Titus Mlangeni is hereby appointed the liquidator of the estate of Peterstow Aquapower Swaziland (Pty) Ltd (in liquidation) upon furnishing the Master of the High Court with securityin terms of sections 311 (2) and 316 of the Insolvency Act.

[63] The order of the Court *a quo* in para 96 (5) of the impugned judgment to wit

> **"5 The liquidator of Peterstow Aquapower Swaziland (Pty) Ltd is hereby directed, in accordance with the wishes of the majority of creditors having voting rights, to forthwith accept the written offer by Mosegedi Associciates Proprietary Limited to acquire the assets of the company for a purchase price of E5,000,000=00 (Five Million Emalangeni)" is hereby set aside.**
> **(b) The liquidator of the company is hereby ordered to forthwith convence a meeting of the members and creditors of the company to deliberate on the sale of the assets of the company."**

[64] The costs order contained in para 96 (6) (7) and (8) of the impugned judgment are hereby set aside. In their place we substitute the following order.

ORDER

[65] The first and second appellants are ordered to pay costs of this appeal and proceedings before the Court *a quo*, on the ordinary scale in favour of the respondents including costs of counsel in terms of Rule 68 (2). Such costs are to be paid by the said appellants jointly and severally, the one paying the other to be absolved.

M.M. RAMODIBEDI
CHIEF JUSTICE

M.C.B. MAPHALALA
JUSTICE OF APPEAL

E. A. OTA
JUSTICE OF APPEAL

For First and Second Appellants	Advocate A.G. Sawma SC Advocate Patrick Flynn Instructed by Attorney Henwood
For Third Appellant	Advocate D. Smith SC Instructed by Attorney J. Waring
For First Respondents	Advocate Chris Edeling SC

	Instructed by Attorney General Chambers
For Second and Further Respondent	Attorney S. Masuku