THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 218/13

Reportable

In the matter between

FINTECH (PTY) LTD	**APPELLANT**

and

AWAKE SOLUTIONS (PTY) LTD	**FIRST RESPONDENT**
ALAN LAWRENCE WALKER	**SECOND RESPONDENT**
CHOICE DECISIONS 162 (PTY) LTD	**THIRD RESPONDENT**
ALTRON ONE FINANCE SOLUTIONS (PTY) LTD	**FOURTH RESPONDENT**
PETER CHARLES BOTHOMLEY N.O.	**FIFTH RESPONDENT**
ENVER MOHAMED MOTALA N.O.	**SIXTH RESPONDENT**

Neutral citation: *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* (218/13) [2014] ZASCA 63 (15 May 2014)

Coram: Mpati P, Bosielo, Leach, Saldulker JJA and Swain AJA

Heard: 19 FEBRUARY 2014

Delivered: 15 MAY 2014

Summary: Company – Winding-up – validity of administrative act of final deregistration in terms of s 73 of Act 61 of 1973 when company already under winding-up order.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Van Oosten J sitting as court of first instance):

The appeal is dismissed with costs, which shall include those of two counsel where employed.

JUDGMENT

MPATI P (BOSIELO, LEACH, SALDULKER JJA and SWAIN AJA concurring):

[1] This appeal concerns the validity of a company's deregistration, in terms of the provisions of section 73 of the now repealed Companies Act 61 of 1973 (the previous Act), when the deregistration occurred whilst the company was under provisional or final liquidation. The appellant (Fintech) sought orders in the South Gauteng High Court, first, declaring null and void, alternatively setting aside, an order issued on 26 October 2010 in terms of which an earlier order provisionally winding up the respondent was set aside; second, declaring null and void, alternatively setting aside an order issued on 21 October 2011 in favour of the first respondent compelling Fintech to produce certain documentary evidence; and third, an order directing the second respondent to repay to Fintech a sum of R1 764 641,34, with costs on the scale as between attorney and client. The basis upon which the first two orders were sought was that the first respondent (to which I shall henceforth refer as 'Awake Solutions') had been deregistered on 16 July 2010 with the result that it had no legal status when the orders were granted. As to the third order sought (repayment of the amount mentioned above), the basis was that at the times the various payments were made by Fintech for the account of Awake Solutions the latter had no legal status as a consequence of its deregistration and the moneys paid were thus not due to it. The court below (Van Oosten J) dismissed Fintech's application with costs. This appeal is with its leave.

[2] Awake Solutions markets and distributes security and related equipment to its clients. During 2002 it concluded a written agreement (co-operation agreement) with a company known as Corporate Finance Solutions, which later changed its name to Altron One Finance Solutions (Pty) Ltd (the fourth respondent in this appeal, to which I shall refer as 'Altron'). In terms of the co-operation agreement Awake Solutions would refer its clients to Altron for purposes of financing the purchase of security equipment from the former. The co-operation agreement also provided for and regulated the sharing between its parties of profits generated by Altron from the business it would conduct with clients referred to it by Awake Solutions. During February 2004 Fintech, in terms of a sale and assignment agreement it concluded with Altron, acquired and assumed Altron's rights and obligations under the co-operation agreement.

[3] On 4 April 2008 Awake Solutions was placed under provisional liquidation by order of the South Gauteng High Court, returnable on 30 June 2008. The fifth and sixth respondents were duly appointed as the joint provisional liquidators. The question as to whether or not the provisional order was made final on the return day is in dispute. Upon becoming aware of the provisional liquidation of Awake Solutions, and by letter dated 28 May 2008, Fintech terminated that part of the co-operation agreement that related to the introduction, by Awake Solutions, of new clients to Fintech. Believing thereafter that the provisional liquidation order was made final, Fintech refused to have any dealings with Awake Solutions or the second respondent, Mr Alan Lawrence Walker, the sole director of Awake Solutions, in relation to the co-operation agreement.

[4] It is common cause that on 20 October 2010 the second respondent (Walker) instituted motion proceedings seeking an order setting aside the order in terms of which Awake Solutions was placed under provisional liquidation and discharging it from liquidation. The application was brought on the basis that no final liquidation order had ever been granted. The provisional liquidation order was set aside on 26 October 2010 and Awake Solutions was consequently discharged from liquidation as from that date. A meeting was subsequently held on 22 November 2010 between the parties to the co-operation agreement and their legal representatives and three days later Fintech furnished Awake Solutions with

information relating to client contracts. On 17 December 2010 Fintech made a payment to Awake Solutions' attorney in the sum of R1 186 196,39, being the capital amount of the profit share that was allegedly due to Awake Solutions in terms of the co-operation agreement. Following another application launched by Awake Solutions against Fintech and Altron in the South Gauteng High Court during March 2011 for payment of further sums of money and disclosure of certain information relating to the co-operation agreement, an agreement was reached in terms of which Fintech paid to Awake Solutions' attorneys the amount of R72 310 in respect of profit share and R251 920,31 in respect of arrear interest on 17 May 2011. Further payments were made but paid into the account of the third respondent (Choice Decisions). The total amount paid and now claimed by Fintech was R1 764 641,34. Although further information had been given to it by Fintech, Awake Solutions amended its notice of motion and sought an order compelling the respondents in that application to produce certain documents and deliver further information. The order sought was granted on 21 October 2011. It is one of the orders that Fintech unsuccessfully sought to have set aside by the court below. An application for leave to appeal that order is still pending.

[5] After the parties had exchanged some correspondence Fintech instructed its attorneys 'to investigate the merits of the further claims of Awake Solutions, with specific reference to the winding – up proceedings . . .' and the subsequent application to set aside the provisional order of liquidation. Meanwhile, Fintech decided to obtain a report from the Companies and Intellectual Property Commission (CIPC), established by s 185 of the Companies Act 71 of 2008 (the Act), which came into operation on 1 May 2011. As a result, it discovered that Awake Solutions was finally deregistered on 16 July 2010. This discovery was conveyed to Awake Solutions' attorneys by letter dated 28 March 2012. And on the strength of the investigations conducted by its attorneys, Fintech alleged in its founding affidavit that contrary to what was contended in the application for the setting aside of the provisional liquidation order – that no final liquidation order had ever been granted against Awake Solutions – it appeared that a final winding-up order was indeed granted on 1 July 2008. Fintech thus contended in the court below that the court orders obtained by Awake Solutions on 26 October 2010 and 21 October 2011 were both a nullity and of no force and effect, alternatively, they

were erroneously granted as contemplated in rule 42 of the Uniform Rules of Court. This is because (a) in respect of the first order, Awake Solutions was in deregistration, alternatively placed under final winding-up with the result that the application for the setting aside of the provisional winding-up order was not legally competent under the circumstances and, (b) with regard to the second order (of 21 October 2011) Awake Solutions was, at the stage the application was launched, already finally deregistered and the application brought in its name was not legally competent. It was submitted, in the alternative, that Awake Solutions was placed under final winding-up and the application in its name was not legally competent without the involvement of the liquidators.

[6] The fact that Awake Solutions was finally deregistered on 16 July 2010 is common cause. In the answering affidavit, deposed to by Walker in his capacity as sole shareholder and director of Awake Solutions as well as Choice Decisions, Walker testified that until Fintech brought the fact of the deregistration of Awake Solutions to his attention he was totally unaware of it. Upon becoming aware of the deregistration he 'immediately took steps to have [it] cancelled' by submitting an application to the CIPC together with Awake Solutions' outstanding annual returns.[1] Awake Solutions had failed to file annual returns as required in terms of s 173 of the previous Act, hence its deregistration. On 17 April 2012 the deregistration process was 'cancelled' and, as at 18 June 2012 the status of Awake Solutions as reflected on a copy of a CIPC Company Report annexed to the founding affidavit was 'In Business'. For all intents and purposes this means that the registration of Awake Solutions had been restored. It may be mentioned, for completeness, that the final deregistration of Choice Decisions for annual return non-compliance, which also occurred on 16 July 2010, was 'cancelled' on 1 March 2012.

[7] The effect of deregistration is that it 'puts an end to the existence of the company', its corporate personality ending 'in the same way that a natural person

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[1] Section 82(4) of the Act provides:
'If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company.'

ceases to exist at death'.[2] This position is made clear in the Act, where s 83(1) provides that a company 'is dissolved as of the date its name is removed from the companies register'. Regulation 40(6) of the Companies Regulations, 2011[3] provides that the Commission (CIPC) 'may re-instate a deregistered company . . . only after it has filed the outstanding annual returns and paid the outstanding prescribed fee in respect thereof'. It was submitted on behalf of the appellant that the Act and regulations do not provide for any cancellation process; that the CIPC is not authorised to 'cancel' any deregistration process and that 'any action to do so would be *ultra vires* its powers in terms of the [Act] and the regulations and therefore invalid and void *ab initio*'. It was further contended that Walker's intimation that he had applied to have the deregistration of Awake Solutions 'cancelled' was a clear fabrication which ought to have been rejected by the court below, because the respondents failed to provide documentary proof to substantiate this assertion. The premise relied on by Walker, so the argument continued, was opportunistic in that the recordal that a cancellation of the deregistration process had occurred after Awake Solutions (and Choice Decisions) had been deregistered, enabled him to postulate that the two companies had continued in existence after the cancellation of the deregstration as if they had never been deregistered. It was accordingly contended that the expression '*Cancellation of the Deregistration Process*' recorded in the CIPC Company Reports relating to Awake Solutions and Choice Decisions 'refers to re-instatement of registration [as provided for in the Act and regulations] and not cancellation or elimination of the entire process of and including the initial deregistration'.

[8] The case for the appellant on the issue of deregistration is that (a) as of the date of the removal of their names from the companies register, namely 16 July 2010, Awake Solutions and Choice Decisions were dissolved and thus ceased to exist as legal entities or juristic persons; (b) that being so, and as already set out in para 5 above, the institution of the proceedings on 20 October 2010 (to set aside the provisional winding-up order) and during March 2011 (for payment of further sums of moneys, later amended to compel production of certain documents and

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[2] *Miller & others v Nafcoc Investment Holding Co Ltd & others* 2010 (6) SA 390 (SCA) para 11.
[3] Companies Regulations, GNR 351, *GG* 34239, 26 April 2011.

delivery of further information) occurred when Awake Solutions was non-existent; and, consequently, (c) the orders subsequently granted were a nullity and of no force and effect. In addition, it was submitted that all the payments made to the attorneys of Awake Solutions and to Choice Decisions were made under the *bona fide* and reasonable belief that Awake Solutions was lawfully entitled to such payments when in fact there was no legal basis for Fintech to have made the payments, because Awake Solutions, as a deregistered entity, lacked any right or title to receive payments in terms of the co-operation agreement. It is for this reason that the order for payment of the sum of R1 764 641,34 is sought against Awake Solutions, alternatively against Awake Solutions, Walker and Choice Decisions jointly and severally, the one paying the other to be absolved, with *mora* interest and costs as against Walker on the scale as between attorney and own client.

[9] The court below stated in its judgment that it was common cause that the re-instatement of Awake Solutions was effected under the Act. As to the meaning of the expressions 're-instatement of registration' and 'cancellation of the deregistration process' the court said:

'The question arising is whether there is any difference in meaning between the two concepts. In my view there is this difference: the cancellation of the process connotes an elimination of the entire process, including the initial deregistration, as if it had never occurred, whereas re-instatement implies putting it back in its former position, prior to deregistration. On this construction I am driven to conclude that by the cancellation of the deregistration process Awake, at all times, remained a corporate entity which of course decides the fate of the application.'

In the event that this conclusion was wrong the court proceeded to decide the issue 'on the assumption that Awake [Solutions] was re-instated as provided for in the [Act]'. Having made the observation that there is a practical need for the Act 'to provide for the retrospective consequences of a re-instatement of a deregistered company', which the previous Act did, the court said:

'I can see no reason why the court should not be able to exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the [Act], on application or otherwise, to validate anything done by or against the affected company, between

deregistration and its re-instatement and to make such order it considers appropriate.' (Footnote omitted.)

The court dismissed Fintech's application with costs and, despite the absence of an application by Awake Solutions for any declaratory relief, it made an order declaring that 'all acts done by or against Awake Solutions (Pty) Ltd from the date of its de-registration until the date of its re-instatement were validly done and that those acts are of full force and effect'.

[10] Relying on the definition of the term 'company' in s 1 of the Act counsel for Fintech submitted that because Awake Solutions had been deregistered and thus ceased to exist by the time the Act came into operation, it had to be re-registered in terms of the Act in order to have its legal status as a juristic person restored.[4] Counsel accordingly argued that the finding of the court in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd & others* [2012] 3 All SA 183 (WCC) para 21 that the word 're-registered' used in paragraph (*c*) of the definition of 'company' relates to the 'reinstatement of registration' by the CIPC provided for in terms of s 82(4) of the Act, cannot be correct, regard being had to the meaning of the words 're-registration' and 're-instatement' in the context in which they appear in the Act. The words, according to counsel, should be interpreted to connote two different processes. In the view I take of the matter, it is not necessary to consider this issue any further.

[11] I have mentioned above that Awake Solutions was provisionally liquidated by order of the South Gauteng High Court on 4 April 2008, returnable on 30 June 2008. The provisional order was obtained at the instance of Norbain (SA) (Pty) Ltd (Norbain), a creditor, on the ground that Awake Solutions was unable to pay its debts (s 344(*f*) of the previous Act, read with ss 345(1)(*c*) and 345(2)). The deponents to the founding and answering affidavits both testified to intensive, diligent investigations conducted on behalf of Fintech and Awake Solutions

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[4] The relevant part of the definition reads:
'"[C]ompany" means a juristic person incorporated in terms of this Act . . . or a juristic person that, immediately before the effective date [being 1 May 2011] -
. . .
(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act.'

respectively, to establish whether a final winding-up order was subsequently made. No final winding-up order could be found from the registrar's office because the relevant court file could not be located. According to Walker, the latest investigations conducted by his attorney, Mr Kotzé, on 17 July 2012, 'revealed, and in fact confirm that according to the Registrar's records and computer records, no final winding-up order has ever been granted against Awake [Solutions]'. And he never received any confirmation that a final winding-up order had been granted.

[12] In his investigations Fintech's attorney, Mr Bekker, eventually made contact with a Mr Dos Passos, the attorney who acted on behalf of Norbain in the liquidation proceedings against Awake Solutions, who assured him that a final winding-up order had been granted against Awake Solutions on 1 July 2008. A copy of an e-mail from Dos Passos to Bekker dated 12 March 2012 is annexed to the founding affidavit. It reads:

'We confirm that we do not have a copy of the final winding-up order as the court file could not be located after the final winding-up order was granted.

The advocate who moved the application was advocate Tiny Seboko who was then practising out of Maisels Chambers.

The writer has not briefed advocate Seboko since then as such we do not know whether the aforementioned details of advocate Seboko are correct now.

Please note that the final winding-up order was granted on **1 July 2008** and not 30 June 2008. The judge was Mokgoatlheng J.

. . . .'

The papers further include a telefax communication dated 3 July 2008 from advocate Seboko to Dos Passos, confirming that a final winding-up order had been granted. In addition, annexed to the founding affidavit is a copy of a report of the joint liquidators (the fifth and sixth respondents), which, according to its heading, was to be submitted at a general meeting of creditors and contributories of Awake Solutions to be held before the Master of the High Court, Johannesburg on 15 October 2009. It is recorded in paragraph 3 of the report, which appears to have been signed by one of the liquidators, the fifth respondent, that the first meeting of creditors was held on 8 August 2008 and the provisional liquidators were appointed as the final liquidators under Certificate of Appointment dated 6 July 2009. A copy of that certificate is also annexed to the founding affidavit.

[13] The liquidators' report just referred to above was sent to Walker's attorney by the fifth respondent by way of facsimile transmission under cover of a letter dated 13 September 2010. The second paragraph of the letter reads:

'We acknowledge receipt of your letter dated 2 September 2010 and have noted the contents therein.

We transmit herewith a copy of the Liquidators report in terms of Section 402 of the Companies Act and advise that the First and Final Liquidation and Contribution Account has been withdrawn pending the application for the discharge of the liquidation order.'

Walker's response in the answering affidavit to the allegations in the founding affidavit relating to the communication between Bekker and Dos Passos, was that he was advised that the allegations constitute hearsay and were inadmissible and denied that a final winding-up order was granted. But Bekker deposed to a confirmatory affidavit, and confirmed as true and correct the contents of the founding affidavit insofar as it relates to him. He specifically confirmed the correctness of the allegations relating to his conversation with Dos Passos, which includes the assurance given to him by Dos Passos that a final winding-up order had been granted against Awake Solutions. What is puzzling about these enquiries is that none of the parties, or their legal representatives, thought of approaching the judge, who presided in court on the return day and who could easily have referred to his notes, to establish what actually occurred on that day.

[14] Although it was strongly mooted in the founding affidavit that a final winding-up order had been granted against Awake Solutions, in this court counsel for Fintech urged us to find that no final order was made. The court below did not consider the issue fully, but merely accepted that the provisional order of winding-up had lapsed 'in the absence of reliable evidence whether it was confirmed'. In my view, the probabilities clearly point to the fact that a final winding-up order was indeed granted. First, there appears to be no reason why Norbain would have abandoned the liquidation proceedings it had instituted against Awake Solutions. A settlement between it and Walker, on behalf of himself and Awake Solutions – he was sued by Norbain in his capacity as surety for Awake Solutions' indebtedness to Norbain – was reached only during 2009, in terms of which Walker purchased Norbain's claim against Awake Solutions. There is also no suggestion that the

provisional winding-up order granted on 4 April 2008 was discharged or that it lapsed, which it would have if not extended on the return day. Second, it is clear from the copy of the facsimile letter from the fifth respondent addressed to Walker's attorney, dated 13 September 2010 and covering the joint liquidators' report referred to above, the contents of which were not challenged, that a first and final liquidation and contribution account had been prepared by the joint liquidators. The preparation of a first and final liquidation and contribution account is a clear indication that at least the joint liquidators believed that the provisional winding-up order had been made final. Indeed, in the first paragraph of the report it is stated that Awake Solutions 'was placed under provisional winding up on 4 April 2008 and the Order was made final on 27 June 2008'. The second date is clearly wrong as the return date was 30 June 2008. There is no suggestion that the return date was anticipated.

[15] Third, s 364(1) of the previous Act provides, *inter alia*, that –

'As soon as may be after a final winding-up order has been made by the Court . . . , the Master shall summon –

(a) a meeting of the creditors of the company for the purpose of –

(i) considering the statement as to the affairs of the company lodged with the Master under s 363;

(ii) the proof of claims against the company; and

(iii) nominating a person or persons for appointment as liquidator or liquidators; and

(b) . . . .'

Section 402 of the previous Act imposes a duty on a liquidator to submit a report to a general meeting of creditors and contributories of the company 'not later than three months after the date of his appointment', except with the consent of the Master, as to certain matters. Among those matters are the amount of capital issued by the company and the estimated amount of its assets and liabilities (s402(*a*)); if the company has failed, the cause of the failure (s402(*b*)) and the progress and prospects of the winding-up (s402(*h*)). The liquidators' report sent to Fintech's attorney by the fifth respondent as referred to above dealt with the

matters listed in s 402. Clearly, such report could only have been prepared by the liquidators after their appointment, which would have occurred subsequent to the final winding-up order having been made and once the processes envisaged in s 364(1) had been followed. Considering all these aspects, the probabilities are in my view overwhelming that the provisional winding-up order issued by the South Gauteng High Court against Awake Solutions on 4 April 2008 was made final. And there is no reason to doubt the information given to Bekker by Dos Passos, who acted for Norbain, to the effect that the final winding-up order was granted on 1 July 2008. I hold accordingly.

[16] It will be recalled that Awake Solutions was finally deregistered on 16 July 2010, more than two years after the final winding-up order was made. In *Miller*'s case,[5] where one of the issues for consideration by this court was the competence or otherwise of the deregistration of a company after it had been finally liquidated, Cloete JA, writing for the court, said:

'Serveco was deregistered on 25 April 2008. The deregistration was effected by an official in the Companies and Intellectual Property Registration Office (CIPRO), purporting to act in terms of s 73 of the Companies Act and on behalf of the Registrar of Companies. Deregistration was incompetent inasmuch as Serveco had been wound up on 23 May 2006 – a fact which was pointed out to the official in a letter before Serveco was deregistered – and the consequence of a winding-up is not deregistration, but a dissolution in terms of s 419 of the Companies Act, ss (1) of which provides:

"In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator."

Deregistration, on the other hand, puts an end to the existence of the company.'[6]

Cloete JA went further and observed that once there has been deregistration 'there is obviously no purpose in a corporate post-mortem, and no one would have the authority to conduct one'.[7]

[17] The object of the provisions of the previous Act relating to winding-up, which continue to apply in terms of Item 9 of Schedule 5 to the Act, is to ensure a

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[5] Above, fn 2.
[6] Para 11.
[7] *Miller v Nafcoc Investment Holding Co Ltd,* above, fn 2, para 11.

due distribution of the company's assets among its creditors in the order of their preference.[8] The effect of a winding-up order is to establish a *concursus creditorum*,[9] and 'the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration'.[10] The company therefore remains in existence, albeit in liquidation, until its affairs have been completely wound up (s 419(1) of the previous Act). It follows that the final deregistration of Awake Solutions on 16 July 2010 was incompetent. The continued existence of Awake Solutions, in liquidation, resulting as it did from an order of court, could not be trumped by the deregistration, which was an administrative act performed by an official in CIPRO. Whether or not the official concerned was ignorant of the existence of the final winding-up order, 'the inescapable conclusion must be that he either failed to take account of material information because it was not all before him or if, in the unlikely event that it was before him, that he wrongly left it out of the reckoning when he should have taken it into account'.[11] To that extent, the deregistration of Awake Solutions was unlawful and invalid and susceptible to being set aside on review.[12]

[18] But the deregistration is now no more because the process of deregistration has been cancelled and Awake Solutions' name has been restored to the companies register. There is thus no administrative act of deregistration that can be set aside. Ordinarily, the setting aside of the deregistration would have meant that the *status quo ante* would have been restored and there would have been no argument about Awake Solutions having lost its corporate status at any stage. It could even have met Fintech's application in the court below with the defence that it never lost its corporate status and by raising a 'defensive' or 'collateral' challenge to the validity of the administrative act of its deregistration.[13] And were the challenge to be successful, the only order that would issue would be to declare the deregistration invalid. There would be no need for an order for the reinstatement or re-registration of Awake Solutions. I accordingly find that at the

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[8] *Walker v Syfret NO* 1911 AD 141 at 166.
[9] Ibid, at 166.
[10] *Ibid* at 160. See also *Nel & others NNO v The Master & others* 2002 (3) SA 354 (SCA) para 6.
[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 25.
[12] Compare *Oudekraal,* above paras 24, 25 and 26.
[13] *Oudekraal,* above para 32.

time relevant to this case Awake Solutions was vested with corporate status and could receive the payments made to it through its nominees. This conclusion renders it unnecessary for me to get into the debate as to whether Walker had the authority to launch Awake Solutions' application against Fintech during March 2011 for payment of further moneys and to compel Fintech to produce certain information and to deliver certain documents. What matters is that the moneys paid were due to Awake Solutions and what happened to those moneys is a matter between its liquidators and Walker. The application for the setting aside of the provisional winding-up order was clearly incompetent since that order had been made final. But that has no impact on the order I propose to make.

[19] In the result, the following order is made:

The appeal is dismissed with costs, which shall include those of two counsel where employed.

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L MPATI

PRESIDENT

APPEARANCES

For appellant	J H Dreyer (with him R Gründlingh)
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