IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **4375/2016**

In the matter between:

TRUWORTHS LIMITED	First Applicant
THE FOSCHINI GROUP LIMITED	Second Applicant
MR PRICE GROUP LIMITED	Third Applicant

and

THE MINISTER OF TRADE AND INDUSTRY	First Respondent
THE NATIONAL CREDIT REGULATOR	Second Respondent
THE SOUTH AFRICA HUMAN RIGHTS COMMISSION	Amicus Curiae

JUDGMENT - 16 MARCH 2018

ENGERS, AJ

[1] According to the Oxford Dictionary, 'credit' is defined as

> "the ability of a customer to obtain goods or services before payment, based on the trust that payment will be made in the future;
>
> money lent or made available under such an arrangement".

[2] Credit, used responsibly, enables a person to enjoy the benefit of goods and/or services which he might not otherwise be able to afford from his immediate means. Unfortunately, credit used irresponsibly can plunge a person into a spiral of debt from which he or she will be unable to extricate themselves.

[3] In order to promote the benefits of responsible credit, and to prevent, or at least minimise, the proliferation of irresponsible credit, various legislation has been enacted. The current framework for regulating credit is to be found in the National Credit Act, No. 34 of 2005, read together with regulations promulgated thereunder.

[4] Section 3 of the Act, headed "Purpose of Act" echoes and elaborates on the preamble to the Act. Section 3 begins:

> The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

(b) ensuring consistent treatment of different credit products and different credit providers;

(c) promoting responsibility in the credit market by-

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;...

[5] This Act regulated many aspects of the credit industry, including the granting of credit by a credit provider to a consumer, in an attempt to eliminate what is termed "reckless credit". One of the ways in which this was done was to place a duty on a credit provider to ascertain whether the consumer could afford the credit he was seeking.

[6] In this regard, section 81 of the Act, headed "Prevention of reckless credit" provides that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess

"(a) the proposed consumer's –

(i) General understanding...

(ii) Debt re-payment history as a consumer under credit agreements;

(iii) Existing financial means, prospects and obligations..."

[7] Section 82 deals with "Assessment mechanisms and procedures", and in its original form provided that

> "A credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment."

[8] According to the Minister, it became apparent to him that the assessment procedures being used by credit providers were not sufficient to reduce the level of reckless credit. For that reason he determined to, inter alia, prescribe in more detail how a credit provider should assess the prospective credit receiver. To this end, he promulgated amendments to the regulations, including some that set out how affordability assessments must be conducted. These are referred to as the "affordability assessment regulations". Section 82(1) was at the same time amended by adding the words

> "and must not be inconsistent with the affordability assessment regulations made by the Minister."

[9] It is one of these regulations that is the subject of the challenge made by the applicants in this matter. In particular the applicants challenge subregulations 23A (4), (5) and (7). Virtually the entire thrust of the challenge was directed at (4), with an almost perfunctory attempt to have the other two subregulations set aside

because they flow from (4). In my view, no case has been made out for setting aside subregulations (5) and (7), as will appear below.

[10] The applicants are three of the largest retail clothing companies in South Africa. Each has a multitude of stores operating nationwide. Their customers purchase for cash and on credit. Where a customer wishes to purchase on credit, he or she may apply for a card (known as a store card) which enables him or her to open an account, to purchase goods on account from that company up to a given limit, and pay for them later according to the terms governing the use of that card.

[11] The first respondent is the Minister who is responsible for the regulations in question.

[12] The second respondent is the National Credit Regulator ("NCR"), a body established in terms of Chapter 2 of the Act. Section 13 of the Act makes the NCR responsible to –

> "promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of –
> (i) Historically disadvantaged persons;
> (ii) Low income persons and communities; and
> (iii) Remote, isolated or low density populations and communities."

[13] The South African Human Rights Commission was granted leave to participate in the proceedings as *amicus curiae*, and presented written and oral submissions during argument.

[14] Before dealing with the main application, I need to deal with certain interlocutory matters.

[15] When the review was launched, The Foschini Group Limited ('TFGL') was cited as the second applicant in the notice of motion and in the description of the parties in paragraph 8 of the founding affidavit.

[16] In its answering affidavit in the review, the NCR raised, as one of its grounds of opposition to the review, the allegation that TFGL lacked *locus standi.* In essence, this ground of opposition was based on the fact that Foschini Retail Group (Pty) Ltd ('FRG') should have been cited as an applicant and not, as was the case, TFGL.

[17] Application was then made to substitute the correct second applicant, by joining FRG. Respondents opposed this, but notwithstanding their objections, it seems to me that this was a case of a simple mistake in identity in that FRG was always intended to be the applicant. It is the retail arm of the Foschini Group and as such is registered with the NCR. The allegations in the papers in fact related to FRG, and I can see no prejudice to the respondents in making the substitution. Indeed, it seems to me in the interest of all the parties that the correct applicant be cited. In

the circumstances I do not feel it was reasonable for respondents to have opposed the substitution/joiner. I accordingly grant leave to make the substitution.

[18] As far as costs are concerned, this aspect was a relatively minor one. I consider that the second applicant should be liable for the costs of an unopposed application, and the respondents, should be liable for the costs of opposition.

[19] Applicants have also brought a conditional condonation application. It is contended by the respondents that the applicants launched proceedings out of time, that is outside of the 180-day limit in PAJA, and that they in any event delayed unreasonably long in launching the application.

[20] By my calculation, the date on which the application was launched falls just inside the 180-day period from the coming into effect of the regulations. The 180-day period is of course a maximum, and even where proceedings commence within that period, the delay may have been unreasonable .

[21] In the present case, I do not consider that the applicants delayed unreasonably in bringing the application. The regulations in question were promulgated and were to take effect from 13 March 2015. However, industry representatives were in negotiations with the Minister regarding a moratorium to allow credit providers time to adapt their businesses, and the result was that the Minister, in August, granted,

as it were, a retrospective six-month moratorium from 13 March, so that the regulations came into effect on 14 September 2015.

[22] It was argued on behalf of respondents that the applicants should have already taken steps to review the regulations during the 6-month period from March to September. I do not agree. The effect of the Minister's moratorium was that the regulations were not in effect during that period, and for most of that period credit providers would not have fully complied with the new requirements. It would not have been possible for the applicants to begin to assess the effect the regulation was having.

[23] The respondents levelled criticism at the data put forward by applicants in support of their contention that the regulation has negatively affected their business. An important aspect of this is that insufficient time had elapsed when the application was launched, to make a meaningful comparison between the pre-existing requirements and the new affordability assessment regulations. It was submitted, and common sense tells us, that the least that one should have is a comparison between a trading quarter before, and after, the regulations came into effect. That being the case, one cannot fault the applicants for waiting to collect as much data as possible before commencing proceedings.

[24] It was submitted on behalf of the first respondent that the delay has caused or will cause prejudice to other credit providers who have already adapted their business

to conform to the new regulations. As I see it, there is nothing to stop those credit providers from continuing to implement whatever systems they have devised. Those systems may well comply with any replacement regulation (If the presently impugned regulations are set aside).

[25] To the extent that any condonation is necessary, I would grant it. The application was necessitated by the defence put up by first respondent, and I therefore consider that he should bear the costs.

[26] The documents in this case run to 15 full lever-arch files[1]. The main application contains several expert reports, by accountants and economists, filed by applicants and first respondent. Shortly before the hearing, the Minister sought to file yet another report as well as an affidavit dealing with "new matter" contained in the replying affidavits. The report was one by Hilton Greenbaum, an accountant.

[27] Applicants objected to the late production of these, and the Minister accordingly made a formal application to file the affidavit and the report.

[28] In terms of an order made by Papier AJ on 25 April 2017, the applicants were to provide certain documents by 3 May. The Minister was given leave to file additional reports, if considered necessary, by 12 June. Respondents were given leave to file a fourth set of affidavits, "addressing the new matter in reply", by 30 June.

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[1] The main application papers run to 4 files, and the interlocutory applications take up 1 file. There are 3 files containing the record of decision. Counsel were kind enough to provide copies of the authorities relied on, which took up another 6 files. The heads of argument were in yet another file.

[29] Both the affidavit and the report are dated 4 August 2017, three days before the hearing commenced.

[30] On the first day of the hearing, 7 August, counsel for the Minister advised the court that an application for the condonation of the late filing of the Minister's affidavit and Greenbaum's report would be brought. The hearing lasted three days until 9 August. However, it was only on 18 August that the condonation application was brought. The delay was partly due to the absence of the attorney who had been handling the matter, due to a family crisis.

[31] In the application for condonation, the Minister's attorney lays at least part of the blame for the late filing of the report on non-compliance by the applicants with the order of Papier AJ. Applicant's attorney deals with each of the categories of document, indicating that these were provided. Although it seems clear that applicants did not meet the deadline of 3 May, the delay was not such as to cause Greenbaum's report or the Minister's affidavit to be delayed until 4 August.

[32] There is clearly a dispute as to exactly by when all the documents had been provided by the applicants. There is also an email of 9 June which applicants' attorney says she sent, but first respondent's attorney denies having received.

[33] Whilst I am of the view that there may be potential prejudice to the applicants by admitting the report, it seems to me the preferable way to deal with the matter.

[34] As far as the Minister's further affidavit is concerned, the only explanation for its lateness is the Minister's unavailability during a particular week, and the necessity for various officials to check the affidavit before the Minister signed it. This is hardly a satisfactory explanation. I am thus inclined not to permit it to be filed. There will be little prejudice to the first respondent, since, as the founding affidavit points out, it deals largely with two aspects which were no longer being pursued.

[35] As far as costs are concerned, each party has achieved some measure of success. The opposition to the filing of the report was also not unreasonable. I consider that a fair order would be that each party bear their or his own costs of the application for condonation for filing these further documents.

[36] I now turn to the impugned regulations. They should perhaps be seen in the context of regulation 23A as a whole, which reads as follows:

23A Criteria to conduct affordability assessment

Application

(1) These Regulations apply to-

(a) current, prospective and joint consumers;

(b) all credit providers; and

(c) all credit agreements to which this Act applies, subject to Regulation 2.

(2) These Regulations do not apply to a credit agreement in respect of which the consumer is a juristic person...

Existing financial means and prospects

(3) A credit provider must take practicable steps to assess the consumer or joint consumer's discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.

(4) A credit provider must take practicable steps to validate gross income, in relation to-

(a) consumers that receive a salary from an employer:
  (i) latest three (3) payslips; or
  (ii) latest bank statements showing latest three (3) salary deposits;

(b) consumers that do not receive a salary as contemplated in (a) above by requiring:
  (i) latest three (3) documented proof of income; or
  (ii) latest three (3) months bank statements;

(c) consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income as contemplated in (a) or (b) above by requiring:
  (i) latest three (3) months bank statements; or
  (ii) latest financial statements.

(5) Where the consumer's monthly gross income shows material variance, the average gross income over the period of not less than three (3) pay periods preceding the credit application must be utilised.

(6) The consumer must accurately disclose to the credit provider all financial obligations to enable the credit provider to conduct the affordability assessment.

(7) The consumer must provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment.

Existing financial obligations

(8) A credit provider must make a calculation of the consumer's existing financial means, prospects and obligations as envisaged in sections 78(3) and 81(2)(a)(iii) of the Act.

(9) The credit provider must utilise the minimum expense norms table below[2], broken down by monthly gross income when calculating the existing financial obligations of consumers.

(10) The methodology in the table requires for:

(a) credit providers to ascertain gross income;

(b) statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments; and

(c) when existing debt obligations are taken into account, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.

(11) The credit provider may however on an exceptional basis, where justified, accept the consumer's declared minimum expenses which are lower than those set out in table 1 provided the questionnaire set out in the Schedule, as issued from time to time, is completed by the consumer or joint consumers.

(12) When conducting the affordability assessment, the credit provider must-

(a) calculate the consumer's discretionary income;

(b) take into account all monthly debt repayment obligations in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau; and

(c) take into account maintenance obligations and other necessary expenses.

[37] The assessment thus involves finding the consumer's discretionary income, and then taking certain specified obligations into account. Discretionary income is calculated by taking gross income and deducting expenses, either in accordance

[2] I have omitted the minimum expense norms table

with the table or otherwise. The starting point is gross income, and subregulations (3) and (4) set out what the credit provider must do to validate the gross income.

[38] The Minister has explained in great detail how he went about drafting the affordability assessment regulations. Included in the process was a public participation in which interested parties were invited to submit comments on the proposed draft. The record of decision contains these comments, which are voluminous.

[39] The original draft regulations were published for comment on 1 August 2014 and contained the following precursor of 23A (4):

> "... a credit provider is required to take practical steps to validate gross income by referring to:
>
> 1.1.1. recent three months' consumer's payslips;
>
> 1.1.2. recent three months' bank statements; or
>
> 1.1.3. any other similar credible information."

[40] As I stated, voluminous comments were received from a great number of organisations, businesses and people. Reading through these, I noted that many of the comments in relation to the above wording was that it would be too restrictive.

[41] The Minister says that he considered all the representations and produced the final version of the regulations. As far as the changes to 23A (4) are concerned, it is not difficult to see how those came about. One of the many comments was by Capitec Bank, and their proposed wording for the regulation was almost word for word what appears in the final regulations[3]. The only apparent (but not material) difference seems to be the replacement of the word 'recent' with 'latest'.

[42] This was taken, virtually verbatim, and incorporated in the revised regulations. These revised regulations were not circulated for further comment by stakeholders or interested parties.

[43] It was submitted, correctly, on behalf of the respondents, that the Minister is not obliged to re-advertise for comment. However, where the Minister changes the draft regulations in a material respect, calling for further comment might under certain circumstances be advisable.

[44] The applicants seek to impugn the regulation on various grounds:

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[3] Capitec's proposal reads: 23A(4) should be worded as follows: A credit provider is required to take practicable steps to validate gross income by referring to:-

(a) for consumers that receive a salary from an employer;
  (i) recent three (3) payslips; and/or
  (ii) recent bank statements showing recent three (3) salary deposits

(b) for consumers that do not receive a salary as contemplated in (a) above;
  (i) recent three (3) documented proof of income; and/or
  (ii) recent three (3) months bank statements

(c) for consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income as contemplated in (a) or (b) above;
  (i) recent three (3) months bank statements; or
  (ii) recent financial statements.

a. unfair discrimination and unreasonableness;

b. failure to take into account relevant considerations;

c. That they are *ultra vires* the Act;

d. procedural unfairness.

[45] The attack based on discrimination and unreasonableness centres on the fact that category (c) consists largely of the poorer and less privileged members of society. In respect of those persons, the regulations prescribe a form of validation which is inappropriate and, in many cases, impossible for them to comply with.

[46] In my view, the attack is well founded. If for example, a flower seller in Adderley Street does not have a bank account, it is unlikely in the extreme that they would have financial statements. This would then be an insurmountable obstacle to even obtaining credit in a relatively small amount, even if they are earning a reasonable amount each month. One thinks of a parent who needs to buy school uniform for his or her child in January, and would easily be able to pay the price over the next few months, but who cannot afford the entire amount in one go.

[47] In the light of the criticism that the regulation discriminates against those without bank accounts and who are informally or self-employed, the Minister in his answering affidavit said that in drafting the regulations he bore in mind the "unbanked", i.e. those people who do not have banking accounts[4].

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[4] *"I expressly applied my mind to the fact that a percentage of South Africans do not have bank accounts or receive regular payslips. For this reason I amended draft Regulation 23A(4)(c) to read that consumers who are self-*

[48] It is unfortunate that in doing so he removed from the draft a provision which would have enabled a flexible approach to such persons (any other similar credible information), and imposed a rigid set of requirements which on the face of it, could well exclude them from obtaining credit. No doubt Capitec Bank, from whom the inspiration for the final wording came, had in mind its own customers when putting forward the proposed wording. Its customers, by definition, have bank accounts, and hence bank statements, so it might not have been so aware of the impact of requiring financial statements.

[49] Respondents justified the regulation by contending that 'financial statements' did not necessarily mean audited financial statements. That seems correct[5]. But they further contended that a financial statement could be something else, such an affidavit by one's employer, or even a letter from one's employer.

[50] I fail to see that such an affidavit or letter could possibly be a financial statement. Financial statements are specific documents which are produced on a regular (usually annual) basis, usually by an accountant. The core financial statements are a balance sheet, an income and expenditure statement, and a statements showing the use and application of funds. The use of the term "latest financial statements" in the regulation is an indication that it refers to statements being produced from time to time, and not just a single document such as a letter or affidavit. It is even

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employed, informally employed or do not receive a payslip or proof of income had to either produce their latest three months' bank statements or their latest financial statements."

[5] Although an unaudited statement seems to me to provide hardly any validation or verification.

more difficult to understand the respondents' interpretation of financial statements in relation to self-employed people. Must they themselves write a letter to confirm their gross income? That hardly seems to serve the purpose intended by the regulation.

[51] It was argued by applicants that if the Minister's interpretation is correct, then the regulation is so vague as to be unreasonable. I consider that there is some merit in this submission although, in my view, the term 'financial statements' cannot support the Minister's interpretation.

[52] Respondents also pointed out that the regulations as a whole, including 23A (4), do promote the stated aim of preventing reckless credit. That may be so, but in my view 23A (4) frustrates another aim of the Act, namely promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions. In my view, the evidence shows that 23A (4) has the potential to eliminate any credit being granted to many in that category, instead of merely preventing reckless credit. As such, it is neither reasonable, nor rationally connected to the purpose which it is intended to serve.

[53] In my view, in discriminating against a section of the population that represents the less privileged, and probably also many previously disadvantaged persons, in a manner that is not fair, the regulation falls foul of s14(2) and s14(3) of the

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The applicants also submit that it contravenes section 9(3) of the Constitution, in that it effectively discriminates on the basis of race. It is clear to me that this could never have been the intention of the Minister, but it may well be an unintended result. If so, it would offend against section 9(3), but I make not finding on this point.

[54] Finally, the fact that it was taken virtually verbatim from one of the very many comments received from the public, suggests that it was arbitrarily inserted into the regulations.

[55] On all the above criteria, regulation 23A (4) falls to be set aside on the basis that it fails the test of legality, as set out by Ngcobo J in Affordable Medicines Trust and Others v Minister of Health and Others[6].

[56] The alleged failure to take relevant considerations into account is coupled with an allegation that the Minister did not in fact have regard to the public input, and the comments of the Department[7]. There are certainly indications in the Record of Decision ("RoD") that this might be the case. The RoD does not, for example, bear out that the consolidated comments of the DTI were placed before the Minister for his consideration. However, I feel it unnecessary to decide this issue in the light of my findings on the other grounds of attack.

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[6] 2006 (3) SA 247 (CC) at p272 - paras [48] and [49]

[7] The Department of Trade and Industry ("DTI"), i.e. the Minister's department

[57] As far as the regulations being *ultra vires* is concerned, the applicants submit that section 81 and 82 impose a duty on credit providers only to "assess" the relevant parameters of the consumer. Based on a dictionary definition of 'assess', namely 'to calculate and place a value on', they argue that this does not include validation or verification of those parameters. Regulation 23A (4) imposes in terms a duty to verify or validate, and is hence *ultra vires*.

[58] I do not agree. To my mind, the duty to assess implies that the assessor come to a correct or accurate assessment. Information provided by the consumer may not be accurate. It may be that the consumer makes a mistake, or it may be that the consumer, anxious to qualify for a loan or other credit, gives deliberately false information (despite this being in contravention of regulation 23A (6)). In order to avoid reckless credit being given (or obtained), I see no reason why the regulations should not contain provisions ensuring as far as possible that the assessment carried out by the credit provider is based on accurate information. This seems to me to be implicit in the sections, and hence is legitimate subject matter for the regulation.

[59] The attack on the basis of procedural unfairness centres on the failure of the Minister to seek and obtain further comment after amending the draft regulations.

[60] Respondents submitted that there is no statutory or other provision that required the Minister to subject the amended regulations to a further public participation process.

Once again, this is correct. However, there may well be situations where such a process is advisable, or even necessary.

[61] In the present case, the Minister changed what appeared to be a fairly flexible requirement into a far more rigid and stringent one. This must be seen against the background of the comment already received that the original formulation was already too stringent. In the light of my findings on the other grounds, I do not feel it necessary to make a final decision on this one, save to say that there may be merit in the applicants' contention in relation to subregulation (4).

[62] There is, predictably, a dispute on the papers regarding the effect of the impugned regulations. Once again, the thrust of the arguments is around subregulation (4).

[63] Each side has brought experts to bear on the matter. Some have analysed the effects from a macro point of view. Some have analysed the actual results of the applicants.

[64] I find it extremely difficult to weigh up the conflicting views. What is common cause, however, is that there is a significant portion of the South African population that does not have bank accounts[8]. They therefore would have to produce the alternative form of validation in whatever category they fall. Should they be, as many are, self-employed or in informal employment, they are going to be unable to obtain credit unless they produce their latest financial statements. Objectively, it

[8] The figure of 20% of the population is mentioned.

seems to me likely, as the applicants contend, that this will result in their having to decline many would-be credit-seeking ustomers who actually can afford the credit.

[65] In my opinion, the data for the limited period from the inception of the regulations until the application, do show a decline in the granting of credit by the applicants. This may well be due in part to factors other than the impact of the regulations, but on the probabilities I find that the regulations have had a detrimental effect on the business of the applicants.

[66] It has been said that one can prove virtually anything with statistics, and the present application is perhaps an illustration.

[67] While I am of the view that a good case has been made out for setting aside regulation 23A (4), the same cannot be said for (5) and (7). The elimination of (4) removes only the specific provisions for validating gross income. It does not do away with the need to ascertain gross income as a step towards calculating discretionary income. Accordingly, subregulations (5) and (7) will continue to have application.

[68] The court wishes to thank the *amicus curiae* for its contribution to the debate. Mr Magardie referred me to wide-ranging and extremely interesting material. However, the concerns of the *amicus* were postulated on the apprehension that applicants were seeking relief that would have the effect of allowing reckless credit to flourish.

As should appear from this judgment, that was not really the nature of the attack on regulation 23A (4). The costs incurred by applicants and respondents in respect of the application by the *amicus curiae* should be costs in the cause.

[69] Following on all the above, I make the following orders:

a. The joinder application

i. The Foschini Retail Group is joined, and substituted for The Foschini Group Limited as the second applicant;

ii. Second applicant is to bear the costs of an unopposed application;

iii. Respondents are to pay the costs occasioned by opposition.

b. Applicants' conditional applicant for condonation

i. This application is granted to the extent that may be necessary;

ii. First respondent is to pay applicants' costs.

c. First respondent's application to file further documents

i. Leave is granted to file the report of Hilton Greenbaum dated 4 August 2017;

ii. Leave is refused to file the further affidavit of the first respondent, also dated 4 August 2017;

iii. Each party is to pay its own costs of this application.

d. Regulation 23A (4) is reviewed and set aside;

e. Save as already provided for, first respondent shall pay applicants' costs.

f. All of the above costs shall include the costs of two counsel where two counsel were employed.

ENGERS A J