A the writ should not have been issued and it is void *ab initio*; it must therefore be set aside by this Court. He based this submission on two grounds, namely:

(1) As the applicant is still in possession of the vehicle in question, he has not suffered any damages and has failed to prove a *causa debiti*.

B (2) When the applicant applied for the writ of arrest the respondent was, on the applicant's own admission, outside Transkei, and the provisions of Rule 9(5) could therefore not be met.

Although inelegantly worded, the applicant is attempting in his affidavit to convey that he paid the respondent R9 250 for vehicle CE 70957, which he purchased from the respondent, and that it now transpires that the
C respondent is not the owner of the vehicle and that it belongs to Nedfin Bank. He has therefore, according to him, suffered damages of R9 250. As the said vehicle is still in his possession it is indeed doubtful whether it can be said that the applicant has at this stage suffered any damages. There is consequently a doubt whether the applicant has proved a *causa debiti*. The fact that another vehicle belonging to the applicant has been delivered to
D the Sheriff does not take the matter any further as the applicant can reclaim that vehicle at any time. It is, however, in view of the finding of the Court in respect of the second leg of Mr *Beukes*' submissions, not necessary for the Court to make a definite finding on the question of whether a *causa* has been proved.

E I turn now to the second leg of the submissions. Rule 9 provides a quick procedure for obtaining a writ of arrest *tanquam suspectus de fuga*. Before the writ can be issued all the requisites referred to in Rule 9 must, however, be met. These requisites are conveniently summarised in Joubert (ed) *The Law of South Africa* vol 3 ('Civil Procedure') para 126,
F and Harms *Civil Procedure in the Supreme Court* para I15. As the writ concerns the personal liberty of an individual, failure to prove any one of the prerequisites could well be fatal to the writ, either before or after its issue. As is the case with warrants of arrest *tanquam suspectus de fuga* under the common law, a writ of arrest can only be issued in terms of Rule 9 if the applicant believes that the respondent is about to depart from
G Transkei, which in turn implies that he is within Transkei at the time of the application. If he is outside Transkei, or has already fled Transkei, the writ of arrest cannot be issued—*Holland v Johnstone & Co Ltd* 1925 CPD 132. Rule 9(5), which determines this prerequisite, reads as follows:

'(5) In all cases the, affidavit shall contain an allegation that the deponent
H believes that the defendant is about to depart, or is making preparations to depart, from the Republic and shall state fully the grounds for such belief.'

In casu this prerequisite was not met. To the contrary, the applicant stated in his affidavit that the respondent was outside Transkei and would only arrive in Umtata on the following day. The writ of arrest should therefore not have been issued, is manifestly void *ab initio*, and must be set
I aside.

In conclusion, it will be appropriate for the Court to address a few remarks to both the Assistant Registrar and practitioners concerning Rule 9. Although it does provide a speedy and less expensive method of obtaining a writ of arrest, practitioners should be wary about making use ...ions unless they are certain that they can meet all the

A prescribed prerequisit... ...ipulated in the Rule. They must accept that, as a writ of arrest concerns the liberty of the debtor, there will almost inevitably be a subsequent attack on the writ and an application to set it aside. It seems that the preferable and safer procedure to follow would be to apply to Court for a writ of arrest *tanquam suspectus de fuga* under the
B common law, in which case any possible weakness in the application will be tested before the writ is issued. By following that procedure there is less likelihood of the writ being set aside after it has been executed, with the resultant escape of the debtor or claim for damages, etc.

The Court makes the following order:

C 1. The writ of arrest issued by the Assistant Registrar of this Court on 17 February 1994 in respect of the respondent (defendant) is declared void *ab initio* and is set aside.
2. The respondent (defendant) must be released from custody forthwith.
D 3. The applicant (plaintiff) is ordered to pay the costs of this application.

Applicant's (Plaintiff's) Attorneys: *Kwezi Nodada & Co*. Respondent's (Defendant's) Attorneys: *John C Blakeway & Leppan Inc*.

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F

MBEKENI v JIKA

TRANSKEI, GENERAL DIVISION

PICKERING J

G 1994 March 10 Case No 323/90

H *Costs—Party and party—Wasted costs—Such are additional costs incurred by party through fault of opponent or costs previously incurred which have become useless through fault of opponent —Trial set down for two days postponed on first day (no evidence having been led) and plaintiff ordered to pay wasted costs —Defendant entitled to counsel's fees for first day only as between party and party, whatever arrangement counsel may have made with attorney.*

I 'Wasted costs' are additional costs incurred by a party through the fault of his opponent or costs previously incurred which have become useless by reason of his opponent's fault. (At 424F.)

J Where a trial, which had been set down for two days, was postponed on the first day to a date to be arranged and the plaintiff ordered to pay the wasted costs, the Court held, in a review of a taxation of the defendant's bill of costs in which the Taxing Master had allowed counsel's fees for the first day only, that in the circumstances,

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A where no evidence had been led and where there had been no argument on the merits, the wasted costs occasioned by the postponement in respect of counsel's fees were those of the first day. (At 424G/H–H.) The Court went on to point out that, in general, whatever arrangements counsel might have made with his attorney relating to the payment of a fee for the second day of a trial upon which he does not in fact appear, the matter having been postponed at the outset of the first day, such fee cannot be allowed as between party and party. (At 424H–I.)

B

Review of the taxation of a bill of costs.

Pickering J: This is an application for review of taxation by the Taxing Master in terms of Rule 48 of the Supreme Court Rules.

Plaintiff instituted action against defendant for damages arising out of a
C collision between his vehicle and that of the defendant.

The case was set down for hearing on 14 and 15 October 1992. On 14 October 1992, without any evidence having been led, the matter was postponed to a date to be arranged and plaintiff was ordered by Hancke J to pay the wasted costs.

D The brief of defendant's counsel was marked as follows:

14.10.92	R1 500
15.10.92	R1 000

The Taxing Master disallowed the fee of R1 000 on the basis, firstly, that it related to a fee for the second day of the hearing which did not take
E place and, secondly, that his practice was 'only to allow, as between party and party, the wasted costs of the day on which the matter was postponed'.

In his written submission defendant contended that 'as the matter was set down for trial for 14 and 15 October 1992 defendant was obliged to engage counsel for those two days'.

'Wasted costs' are additional costs incurred by a party through the fault
F of his opponent or costs previously incurred which have become useless by reason of his opponent's fault. Compare Cilliers's *Law of Costs* 2nd ed para 8.08; Rubin *Law of Costs in South Africa* at 4, 311; Jacobs and Ehlers *Law of Attorneys' Costs and Taxation Thereof* at 67; Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 8th ed at 266.

G They are in principle the same as 'costs of the day'. *Craig v Kopermijn Ltd* 1926 TPD 63 at 66; *Delfos en Atlas Copco (Edms) Bpk v VV Bande (Edms) Bpk* 1972 (3) SA 907 (O) at 911B–C.

In my view, in the circumstances of this case, where no evidence was led and where there was no argument on the merits, the wasted costs occasioned by the postponement in respect of counsel's fees are those of
H the first day.

It seems to me also that, in general, whatever arrangements counsel may have made with his attorney relating to the payment of a fee for the second day of a trial upon which he does not in fact appear, the matter having been postponed at the outset of the first day, such fee cannot be allowed
I as between party and party.

In the result the decision of the Taxing Master is upheld and the application for the review thereof is dismissed.

Plaintiff's Attorneys: *R S Canca & Co.* Defendant's Attorneys: *D Z Dukada & Co.*

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S v SHANGASE , .D ANOTHER

DURBAN AND COAST LOCAL DIVISION

LEVINSOHN J

Case No CC124/94

1994 June 21 B

Criminal procedure—Evidence—Confession—Admissibility of—Presumption in s 217(1)(b)(ii) of Criminal Procedure Act 51 of 1977—Constitutionality of—Presumption striking at the very heart of the accused's rights in s 25(2)(a) and (c) of the Constitution of the Republic of South Africa Act 200 of 1993, viz to remain silent and not to be compelled to make a confession which could be used C *against him—Presumption unconstitutional—Onus on the State to prove the admissibility of the statement.*

Constitutional law—Human rights—Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993—Protection of—Challenge to validity of Act of Parliament D *—Jurisdiction of Supreme Court—Where parties consent thereto in terms of s 101(6) of Constitution Provincial or Local Division has jurisdiction to determine such matter even though matter falls outside the additional jurisdiction provided for by s 101(3)—Section 101(6) applicable to criminal as well as civil cases—Word 'parties'* E *in s 101(6) includes an accused provided that such accused is legally represented and fully advised of his rights.*

Constitutional law—Human rights—Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993—Right of accused to a fair trial in terms of s 25(3) of Constitution—Confession—Confession in terms of s 217(1)(b)(ii) F *of Criminal Procedure Act 51 of 1977—Onus of proof—Presumption in s 217(1)(b)(ii)—Effect of s 217(1)(b)(ii) was that mere production of document meeting certain criteria would give rise to presumption as to accused's state of mind and would cast onus on him to prove contrary—Presumption striking at the very heart of the* G *accused's right to a fair trial in s 25(2)(a) of Constitution—Presumption unconstitutional—Onus on the State to prove the admissibility of the statement.*

Constitutional law—Human rights—Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993—Right of arrested person to remain silent and not to be H *compelled to make confession—Section 25(2)(a) and (c) of Constitution—Confession in terms of s 217(1)(b)(ii) of Criminal Procedure Act 51 of 1977—Onus of proof—Presumption in s 217(1)(b)(ii)—Effect of s 217(1)(b)(ii) was that mere production of document meeting certain criteria would give rise to presumption* I *as to accused's state of mind and would cast onus on him to prove contrary—Presumption striking at the very heart of the accused's rights in s 25(2)(a) and (c) of the Constitution, viz to remain silent and not to be compelled to make a confession which could be used against him—Presumption unconstitutional—Onus on the State to prove the admissibility of the statement.* J