IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	~~YES~~/NO
Of Interest to other Judges:	~~YES~~/NO
Circulate to Magistrates:	~~YES~~/NO

Case number: 733/2022

In the matter between:

OPEN SPACES MEDIA (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM: AFRICA, AJ

HEARD ON: 05 MAY 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 15h00 on 01 June 2022.

JUDGMENT

INTRODUCTION

[1] This matter came before court for the first time by way of an Urgent Application, in terms of Rule 6(12) on Monday 21 February 2022 at 14h00. Applicant's heads of argument at paragraph 3 states that *"...Service by Sheriff was effected on 21 February 2022 at 08h44"*

[2] On 21 February 2022, the Honourable Justice Daniso, made an order in the following terms:

1. Condoning the Applicants non-compliance with the requirements prescribed in the Uniform Rules pertaining to form, process and time periods for service and permitting this application to be heard as one of Urgency as provided under Rule 6(12) of the Uniform Rules of Court.
2. A rule *nisi* is issued, which shall be returnable on Thursday 7 April 2022 at 9h30 or on such a date and time as the Court may determine, calling upon the Respondent to show cause, if any, why the following orders should not be made final:
   2.1 The Respondent is ordered and directed to restore possession to the Applicant of 2 (two) outdoor advertising signs or billboards belonging to it, alternatively in its possession, which were respectively located on Dr. Selemela Street, Bloemanda, Bloemfontein and Raymond Mhlaba Street (formerly Andries Pretorius Street) Noordhoek, Bloemfontein, prior to being removed by Respondent through its officials or at their behest on or about 8 and 11 February 2022, respectively;
   2.2 The Respondent is ordered and directed to return the abovementioned outdoor advertising signs or billboards to their original locations and positions prior to being removed by the Respondent's officials or at their behest, as aforesaid, and to erect, install and position them substantially the same manner they had been prior to their removal, at Respondent's sole cost;

2.3 The Respondent must ensure compliance with the above orders within a period of 48 (forty-eight) hours after receiving service of this order.

3. The order in terms of prayer 2 above shall operate as an interim order with immediate effect, pending the return date.
4. The Applicant (is granted) leave to supplement these papers as may be necessary in anticipation of the return date of the rule *nisi.*

[3] Prior to the anticipated return date[1], the Respondent served a Notice in terms of Rule 6 (12)(c) of the Uniform Rules of Court for a Reconsideration of the Urgent order granted on 21 February 2022, in the absence of the Respondent. The said Application was set down for hearing on Friday the 11th of March 2022 at 10h00.

[4] On 11 March 2022, the honourable Acting Justice Ramlal, granted an order **by agreement**, in the following terms:

1. The Respondent will restore the display of the two Billboards with its artwork into the original position on or before Friday 18th March 2022.
2. The Applicant undertake to withdraw the Contempt of Court Application set down for 14th March 2022 under the above-mentioned case numbers.
3. The Application for Reconsideration currently being heard by the above Honourable Court is postponed to the 7th of April 2022.
4. On the 7th April 2022 the matter will be finalized on the pleadings before court.
5. Costs of today will be costs in the main Application.
6. The contractor employed by the Respondent to restore the Billboards will issue an indemnification against the Applicant until 7th April 2022 for the re-erection of the signage.

[5] On the 7th of April 2022, the matter appeared before the Honourable Justice Daffue, who made an order in the following terms by Agreement:

1. That the rule *nisi* is extended and the application is postponed to the opposed roll of 5 May 2022. No order as to costs.

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[1] 7 April 2021.

[6] From the outset, it is prudent for this court to deal with the issue raised by Counsel for the Applicant, who argues that in light of Judge Ramlal's order, the rule *nisi* granted has become moot as the following questions begs answering.

[4.1] What is the effect of Judge Ramlal's order;

[4.2] Under what circumstances was the order made; and

[4.3] Did that order deal with the rule *nisi* and the extension thereof.

[7] In the matter of *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 267E-269 I, it was stated as follows:

> "A court that **reconsiders** any order in terms of this subrule should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in the affidavits filed by all parties."[2]

Also in the matter of *The Reclamation Group (Pty)(Ltd) v Smit*, the following was stated:

> "The result of this is that the **reconsideration** needs to be done on the basis of a set of circumstances quite different from that under which the original *ex parte* order was obtained. The consequences of this are twofold: First, the issues are to be reconsidered in light of the fact that both sides of the story are now before the court. Secondly, the execution of the original order may have had the effect that those issues are not exactly the same as the issues the court had to deal with in the original application"[3]

[8] It is a fact that in terms of the rule *nisi*, (with the return date of 7 April), the Respondent was ordered and directed to restore possession to the Applicant of the 2 (two) outdoor advertising signs or billboards to their original locations, within a period of 48 (forty-eight) hours after receiving service of the order. Evidently, the respondent failed to comply, prompting the applicant to launch an application for contempt of court proceedings. On the day[4] that the reconsideration application had to be argued, the parties came to an agreement, which was made an order of court. The respondents were ordered to restore the display of the two Billboards with its artwork into its original position on or before 18 March 2022 (in compliance with the rule *nisi*) and the

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[2] Oosthuizen v Mijs 2009 (6) SA 266 (W) at 267E-269 I.
[3] The Reclamation Group (Pty)(Ltd) v Smit 2004 (1) SA 215 (SE) at 218 D-F.
[4] 11 March 2022.

applicant undertook to withdraw the contempt of court application set down for 14 March 2022. The reconsideration application was thus postponed for hearing to 7 April 2022, which was also the return date for the rule *nisi.* On 7 April the rule *nisi* was extended, and postponed together with the *(reconsideration)*[5] application, to the opposed roll of 5 May 2022.

[9] By then, the relief that was sought in this case was not final, but merely interim. It may be corrected or reversed at a later stage, and is invariably granted *pendente lite.*

The rule *nisi* procedure must be considered in conjunction with the provisions of Rule 6(12) (c). In the present matter, the respondents still had to show cause, why the rule *nisi* issued, should not be made final. The argument raised on behalf of the applicant, that the order of Judge Ramlal, renders the rule *nisi* moot, is without merit, because that order was not definitive in respect of the rule *nisi.* Judge Ramlal's order seeks to address by agreement between the parties, the respondent's failure to comply the with the rule *nisi*, giving the respondent an extended period, within which to comply. Judge Ramlal's order is clearly still interim. The respondent also by then, had not been afforded an opportunity to redress the imbalances, which was set in motion by the rule *nisi.* The rule *nisi* by then was not confirmed nor discharged.

[10] Counsel for the respondent argued that the reconsideration application can be seen as a form of anticipation of the Urgent application or rule *nisi.* This court is of the view that the rule *nisi* is not disjointed from the reconsideration as the issues (urgent application) must be reconsidered, in light of the fact that both sides of the story is now before court.

[11] Counsel for the respondents assail the Urgent application on the following grounds:

11.1 Lack of Urgency

11.2 Defective affidavit

11.3 Lack of *locus standi* or non-joinder

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[5] My emphasis.

[12] On behalf of the respondents it is argued[6] that on a close perusal of the founding affidavit, the applicant fails to set out any grounds as to why the current application was brought on an extremely urgent basis, as applicant fails to provide any documentation or facts to support and corroborate any extreme urgency in this matter. Further, applicant fails to provide any detail of losses and prejudice which the applicant would suffer in the event that the urgent relief is not granted. The respondents deny that any unlawful spoliation has taken place and that applicant should have taken legal steps as early as November 2021 to have prevented this current application for spoliation. Further, that the applicant has delayed in taking any legal steps to prevent the removal of the billboards, such as interdicting the respondent from removing same. Thus, is the urgency in this matter self-created.

[13] In assessing the objective facts, it is evident that as early as 18 November 2021[7] the applicant received notice of compliance in terms of section 25(2) read with section 12(2) of the By-law[8] regarding the erection of the billboard structures and the display of unauthorised signs on them. Therein, the applicant was requested to immediately cease to display the signs by removing them and the billboard structures on which the signs are affixed. In the event of failure to comply within a period of 7 days, the municipality is empowered to invoke the provisions of section 25 (4), (6), (7) and (8) of the By-law, entitling the municipality amongst other things, to remove a sign without a court order authorising it to do so.

[14] In response hereto, an email was send dated 25 November 2021, wherein on behalf of applicant, its right was asserted to display the said billboards, referencing a letter dated 9 September 2019, where KP Young Designers (Pty) (Ltd) was awarded a contract to commence marketing in various spaces for outdoor advertising.

[15] It is not in dispute that a further notice was dispatched to the applicant, where the same issues highlighted in the initial letter were raised. It is a fact that the billboards were removed on 8 and 11 February 2022, respectively. Further correspondence was addressed to the respondent in a letter dated 14 February

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[6] Paragraph 5 of respondents' heads of argument.
[7] Page 92 Index and pagination.
[8] Mangaung Metropolitan Municipality Outdoor Advertising By-law.

2022, requiring an undertaking that the signs shall be returned and erected at its original position or failing which, applicant will launch a *Mandament van Spolie,* application. The said application was filed on 18 February 2022 and served on the respondent on 21 February 2022, set down for hearing on an Urgent basis, at 14h00, on the same day.

[16] It is opportune at this stage of the judgment to pause in order to address a bone of contention as raised by the applicant that because this matter was enrolled and entertained as one of urgency by Judge Daniso, when the interim order was granted on 21 February 2022, the issue of urgency should not detain this court any further.

[17] The general principle of our law, as I understand it, is that on the return day of a rule *nisi*, the court has the power and authority to consider all aspects of the rule. In other words, the court considering the matter on the return day has an independent discretion to exercise and is not bound by the finding of fact or law made by the court that granted the interim order.
The issue of urgency was considered on the return day in the case of *Van Wyk Von Ludwig and Hanekom Inc v Ferguson*[9]:

> "The court which granted the provisional order also granted condonation and permitted the applicant to proceed with the application as a matter of urgency on the basis of the allegations contained in paragraph 10 of the founding affidavit and which are set out above. There is no reason for this Court to interfere with the discretion exercised by that court in respect of condonation and urgency." In this respect, the court found that the respondent had skirted the issue dealing with the important issues related to urgency.

In *Fourie v Uys*[10], the court held that:

"The rule *nisi* would be discharged if there were insufficient ground for granting the interim order and this in my view, includes also insufficient grounds for urgency."

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[9] [2001] JOL 7967 (C) at para 9.
[10] 1957 (2) SA 125 (C) at 129 A-F.

[18] The basis for the principle[11] that on the return day, the court has the discretion to consider all aspects of the interim order as well as urgency, was well and correctly summarised in the case of *Polyoak (Pty) Ltd v Chemical Workers Industrial Union and Others*[12]

[19] It is on the basis of the above principle that this court decided to examine the case of the applicant, and I respectfully agree with counsel for the respondent, that the issue of urgency can be entertained at this level.

[20] At the very least, by the 8th of February 2022, when the first board was removed, it should have been abundantly clear that the respondent was not prepared to accept the assertions made by the applicant to their right to display the billboards in question, despite communicating and informing respondent of the following:

i. A letter dated 9 September 2019, confirming the awarding of a contract to KP Young Designers;
ii. An agreement which applicant concluded with the director of KP Young Designers dated 16 March 2020;
iii. Further correspondence regarding the matter on behalf of applicant and the municipality's GM: Legal Services

[21] By the 11th of February 2022, in the absence of any legal steps taken by the applicant, the 2nd billboard is removed by respondent, as it was denied that applicant was in peaceful and undisturbed possession of the relevant billboards. One would assume, that upon learning of the 2nd removal, applicant would have there and then taken serious steps to launch an urgent application

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[11] "Many, but by no means all of these shortcomings are excusable when an application is brought as a matter of urgency. In the press of circumstances, the court may be quick to grant interim relief when it does so, when it does no more than oblige the respondents to refrain from doing what, in any event, they should not do. By the time the return day arrives, however, the dust is settled, and then it becomes necessary for a court to consider whether a case has been made out for the relief sought. That an interim order has been granted in no way prevents this process, for, being interlocutory, it serves to dispose of none of the issues that arise in the case. The absence of opposition moreover, cannot cure deficiencies in the papers. Being uncontroverted, the allegations in the founding affidavit can be accepted unless they are baseless or fanciful and they must still embody evidence on which the court can act. Failure to oppose an application, in no way, constitutes an act of submission to the relief sought. On the contrary, respondents in an application that makes out no case have a right to assume that the court will arrive at this conclusion without the aid of argument from them. On the return day, in short, the court must be satisfied that a proper case has been made out for each facet of relief sought."

[12] (1999) 20 ILJ 392 (LC) at 394H–395B.

as expeditiously as possible, to stop any further harm or prejudice, but alas not. The presumption that if an applicant delays in filing its application, then the prejudice or harm being suffered is not of such a serious nature, in the present case is well-founded.

[22] Further to this, as argued by the respondent,[13] the allegations with regard to urgency made by the applicant in its founding affidavit contained in paragraphs 7.15, 7.16, 7,17, 7.18, and 7.19 appears to be bald and unsubstantiated allegations.

[23] It is for the reasons set out above that the applicant's case should fail, essentially on the basis of lack of urgency.

[24] A further ground raised in assailing the Urgent Application, is the defective affidavit. In argument, on behalf of the applicant, Counsel requested this court not to follow an over technical approach in the absence of any evidence that the deponent of the affidavit, was not the author thereof. Further, that the Absa Bank case[14] that this court was referred to dealt with the issue of prejudice where it related to summary judgment and that dismissal on this ground alone, will not only amount to a misdirection but a failure of justice. It is argued that this is a technical objection raised by the respondent and that this court should at the very least afford the applicant an opportunity to remedy the defect.

[25] Counsel for the respondent hasten to point out that at paragraph 12 of the *Absa Bank* case, it reads that "It is a basic requirement of an affidavit that it must be signed by the deponent in the presence of the commissioner of oaths"[15] Further, that the applicant has known as far back as 8 March 2022 of the defective affidavit, but failed to seize the opportunity to remedy the situation.

[26] Indeed, in the *Absa Bank v Botha* matter, an objection was lodged in terms of Rule 30 of the Uniform Rules of Court, to the use of the incorrect pronoun "he or she" by the commissioner of oaths when attesting a founding affidavit in a summary judgment application.

[27] In urgent applications the court or a judge may dispense with the forms and service provided for in the Uniform Rules and may dispose of such matter at

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[13] Paragraph 26.9 respondents answering affidavit.
[14] Absa Bank Ltd vs Botha NO and Others 2013 Vol 5 SA 563 GNP.
[15] Absa Bank case *supra*.

such time and place and in such manner and in accordance with such procedure, which shall as far as practicable be in terms of the rules, as it deems fit. Such application must be supported by an affidavit which sets out explicitly the circumstances which the applicant avers render the matter urgent and the reasons why the applicant claims that he or she could not be accorded substantial redress at a hearing in due course. The court will essentially be called upon to give preference to the applicant to prevent the prejudice and harm that may materialise or continue if the respondent's behaviour complained of, continues unabated. The speed with which the matter (urgent application) is dealt with and the time of filing, should, of course, never compromise the matter and the quality of the papers filed at court.

[28] In the *Absa Bank v Botha* matter, Kathree-Setiloane J, clearly and ultimately exercised her judicial discretion in refusing to allow the affidavit which in her view did not comply with the Regulations for Commissioners of Oaths when regard is had to paragraph 8 of the judgment:

> " ... Subject to whether there has been substantial compliance with the Regulations, the court has a discretion to refuse an affidavit which does not comply with the Regulations. Should a commissioner of oaths not certify that the verifying affidavit in a summary judgment application had been sworn to or affirmed, the court will be reluctant to apply the maxim *omnia praesumuntur rite essa acta donec probetur in contrarium,* also known as the 'presumption of regularity', for purposes of making the assumption that the document had, in fact, been sworn to (or affirmed) and signed in the presence of the commissioner of oaths."

[29] The commissioner will ask the deponent to recite the words pertaining to either the oath/affirmation, and then the regulation requires that 'the deponent shall sign the declaration in the presence of the Commissioner of Oaths'. As is practice, the deponent's identity should be evidenced to the commissioner by providing an acceptable identity document.

In *Gulyas v Minister of Law and Order*[16] Baker J...

> ... "equated 'in the presence of' to be analogous to 'within eyeshot'. We submit that the reason for a commissioner and the deponent to be within eyeshot of one another is for the commissioner to ascertain the identity of the deponent by examining the identity document provided and comparing it to the deponent, and to ensure that the correct papers are properly deposed to". (my emphasis)

[30] As already stated above, the speed with which an Urgent matter is dealt with and the time of filing, should, of course, never compromise the matter and the quality of the papers filed at court. In *casu*, the words "I certify that the deponent has acknowledge and understands the contents of this affidavit...", clearly creates the impression that the deponent was present when the oath was administered. However, notably, the oath, refers to the pronouns she and her, no less than five times. These pronouns appear to have be pre-typed, as part of the affidavit, as it does not allow the commissioner the choice of deleting either he/she, raising the question around the deponent's presence at the time of the commissioning of the affidavit. The regulation requires that 'the deponent shall sign the declaration in the presence of the Commissioner of Oaths. In the absence of any explanation for this inaccuracy of specifically using the pronouns she and her on numerous times, under circumstances where the deponent was allegedly present, this court in exercising its judicial discretion; Upholds the ground of objection raised by the respondent in this regard.

[31] Lack of *locus standi* (non-joinder) is a further ground of objection raised, by the respondent, as its argued that the applicant has failed to discharged its *onus* on a balance of probabilities that the applicant who was allegedly involved in a partnership with KP Young Designers (Pty)(Ltd), were jointly in peaceful and undisturbed possession of the billboards. In the same vein, the court was referred to a written lease agreement, concluded between the KP Young Designer (the lessee) and the respondent. It's the respondent's contention that the lessee, not the applicant, were authorised and entitled to erect and display the billboards. The court will revert to this issue momentarily.

[32] The Applicant at the onset of proceedings argued that the requirements for spoliation were satisfied, in that it was in peaceful and undisturbed possession; but was unlawfully deprived of such possession. However, during the hearing

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[16] [1986] 4 All SA 357 (C)

of arguments, it was conceded that the respondent's interpretation of section 25(4) of the Mangaung Metropolitan Municipality Outdoor Advertising By-law ("the By-Law") is correct, but the applicant contends nonetheless that the bone of contention remains whether the provisions of section 25(4) have ousted the common law remedy of mandament of spolie?

[33] This court was referred to the case *Ngqukumba v Minister of Safety and security.* In that matter, so the applicant argues, the constitutional court held that for a remedy of spoliation, it matters not if a government entity may be purporting to act under the colour of law, statutory or otherwise. The real issue is whether it is properly acting within the law. If not, its actions are unlawful and a spoliation order may follow in the circumstances.

It is therefore still incumbent on this court to consider if section 25(4) does not operate in a manner that oust the mandament van spolie or operate as a self-help mechanism by the respondent. In the circumstances therefor, if this court finds that section 25(4) oust common law, then the rule *nisi* must be confirmed.

[34] Counsel for the respondent argues that at no stage was the constitutionality of section 25(4) challenged, therefore the provisions of section 25(4) stands. It is further argued that the *Ngqukumba* case is irrelevant to this case, because the legislation the police relied on in the *Ngqukumba* case, never authorised the police to act without a court order, whereas section 25(4) herein, specifically utilises the words:

> "If a person fails to comply with a notice served by the municipality on him or her, the municipality may enter upon the land upon which the sign to which the notice relates is being displayed and remove, confiscate and destroy the sign. For purpose of enforcement of this subsection, the Municipality is entitled to enter upon its own property or private property to remove a sign without a court order.

[35] Further, in the matter of *Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd*[17] the court held that:

[17] 2013 (5) SA 521 (WCC)

> "The mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status *quo ante*, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for a mandament van spolie has to show. (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor). The underlying principle is expressed in the maxim "*spoliatus ante omnia restituendus est*".

[36] The applicant at paragraph 9.7 of the founding affidavit, submits that the dispossession by the municipality was unlawful and unconstitutional based on the applicable right(s) in the Bill of Rights, which lends protection against self-help and arbitrary deprivation of property.

[37] However, based on the concession made, it is commonplace that the dispossession was neither arbitrary nor unlawful. It is correctly argued on behalf of the respondent that in the absence of any challenge to the constitutionality of the provision of section 25(4), the said By-Law, withstands constitutional scrutiny. On what basis then is this court expected to consider whether the operation of section 25(4) does not operate in a manner that oust the mandament of spolie, thus operating as a self-help mechanism, by the respondent? It is the considered view of this court that the mandament of spolie as a robust remedy directed at restoring the status *quo ante* and a disincentive against self-help, is <u>not</u> ousted by the operation of the provision of section 25(4) of the By-Law, under the circumstances.

[38] Reverting back to the issue of *locus standi*, the respondent argues, referring to the <u>"agreement"</u> alluded to in paragraph 8.6 of the founding affidavit, that it is vague in the following terms:

[38.1] It fails to specify what agreement the applicant the applicant and lessee entered into;

[38.2] When the agreement was concluded;

[38.3] The exact nature of the terms of the agreement;

[38.4] The exact rights that flowed from the said agreement.

[39] In defence of applicant's asserted right to display the billboards, it was stated at paragraph 8.7 of the founding affidavit, that the municipality's legal services incorrectly characterized the nature of the applicant's relationship with KP Young Designers as one of lessee and sub-lessee, whereas the true and correct nature of the relationship between the two entities was that of a partnership.

[40] Further to this the respondent submits that the alleged agreement[18] with the heading "Contractor Agreement" is irrelevant as applicant was obliged to make out its case in its founding affidavit.

[41] This court clearly has difficulty in grasping what the true and correct nature of the relationship between applicant and KP Young Designers Pty Ltd is. If it is accepted as appearing from the founding affidavit, that a partnership existed, then the same questions arises as in respect of the agreement[19] referred to. What was the exact nature and terms of this partnership, which applicant relies on in asserting his rights?

[42] Therefore, if KP Young designers appears to have a real and substantial interest in these proceedings, is stands to reason that KP Young designers Pty Ltd, at the very least, should have been joined to these proceedings. Likewise, on this score, the application is rendered defective.

[43] Very basically, the two requirements that a dispossessed person needs to prove in order to succeed in court, is firstly that there was actual dispossession and that the dispossession was unlawful denoting it was not done with consent; a court order or authorizing legislation. As it was conceded that respondent's interpretation of section 25 of the By-law was correct, in authorising the respondent to remove the billboards without a court order, this court finds that the respondent has shown cause why the rule *nisi* should not be made final.

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

[44.1] The rule *nisi* is discharged with costs.

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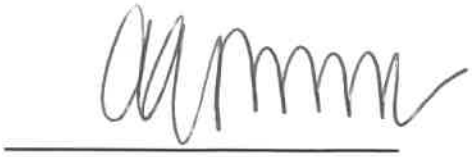
[18] Annexure A4

[19] paragraph 8.6 of the founding affidavit



A. AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE APPLICANT:	Adv. Mazibuko Instructed by: LG Fixane Attorneys
COUNSEL FOR THE RESPONDENT:	Adv. Ress Instructed by: S Suleman Attorneys