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

Case Number 5702/2022

In the matter of:

OOSDEEL SAALPERDSTOET 2 (PTY) LTD **Applicant**

and

JACOBUS JOHANNES BERNARDO **First Respondent**

ELIZABETH BERNARDO **Second Respondent**

ANY AND ALL UNIDENTIFIED OCCUPIERS, OCCUPYING PORTION 1 AND THE REMAINDER OF THE FARM MERIBA 1042, DISTRICT BLOEMFONTEIN, FREE STATE PROVINCE **Third Respondent,**

MANGAUNG METROPOLITAN MUNICIPALITY **Fourth Respondent**

CORAM: **NAIDOO, J**

HEARD ON: **23 MARCH 2023**

DELIVERED ON: **5 OCTOBER 2023**

JUDGMENT

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[1] This is an application for the eviction of the first, second and third respondents from a farm owned by the applicant. The applicant applied in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Leave was granted by this court on 24 November 2022 to serve the papers in this matter upon the respondents. This was done, and the respondents opposed the application. Before me is Part B of the application, seeking the eviction of the first, second and third respondents. Adv S Grobler SC represented the applicant and Adv J Els represented the first to third respondents. I will refer to the first and second respondents individually as the "first respondent", "the second respondent" or collectively as "the respondents". The third respondent appear to be the two adult sons of the first and second respondents, who are allegedly students. The fourth respondent, which was established in terms of the constitutionally mandated Local Government: Municipal Structures Act 117 of 1998, did not participate in these proceedings as the application was served on it merely to give it notice thereof.

[2] As a preliminary issue, I deal with the application for condonation brought by the respondents for the late filing of their Answering Affidavit. The notice to oppose the application was filed on 14 December 2022. Given the *dies non* which ran from 21 December 2022 to 7January 2023, in terms of the provisions of Uniform Rule 6, the respondents should have filed their Answering Affidavit on 25 January 2023. The respondents allege that due to a miscalculation by their Senior Counsel as to the date for filing of the Answering Affidavit, the latter was not drafted timeously. They

were only able to file the said affidavit on 15 February 2023. The respondents applied for condonation for such late filing and sought an order extending the date for filing it to 15 February 2023. There was no opposition to the condonation application. The court considered it to be in the interests of justice as well as the expeditious finalisation of the matter to grant condonation, as sought by the respondents. The respondents are to pay the costs of such condonation application.

[3] The applicant's case is that it concluded a written agreement with the respondents, in October 2020, for the sale of a farming entity as a going concern, which conducted business from the properties known as Portion 1 of the Farm Meriba1042, district Bloemfontein, Free State Province, and Remainder of the Farm Meriba 1042, district Bloemfontein, Free State Province (collectively referred to as "the property"). The agreement included the sale of the property, pivots and irrigation system, and the full purchase price of R5 350 000.00, excluding VAT, was payable within five years from the date of signature of the agreement. It was agreed that the first and second respondents would take occupation of the property on 1 November 2020.

[4] The further agreement between the parties was that the respondents would pay occupational rent to the applicant on 1 December 2020 in the amount of R 6 010.23 and on 1 December 2021 in the amount of R345 184.93. Thereafter occupational rent would be paid annually until date of transfer and registration of the

property in the names of the respondents. Upon taking occupation, the respondents would be liable for payment of all

expenses in relation to the property, which expenses included property taxes, water and electricity consumption charges.

[5] The parties also agreed that the respondents would provide the applicant with a certificate of compliance, issued by an accredited electrician, in respect of the electrical connections on the property, before 30 November 2020. In the event of the respondents breaching any term of the agreement and failing to fulfil their obligations in terms of the agreement, the applicant would be entitled to give the respondents seven days' notice to remedy such breach. Should they thereafter fail to remedy the breach, the applicant would be entitled to cancel the agreement forthwith and obtain an order for the eviction from the property, of the respondents and any person or persons occupying the property through them.

[6] The applicant complied with the agreement and gave the respondents occupation of the property on 1 November 2020, and they are still in occupation thereof. The respondents failed to pay the occupational rent due on 1 December 2021 and to provide the electrical certificate in terms of the agreement. The applicant's attorneys, consequently, addressed a letter of demand to the respondents in March 2022, giving them seven (7) days to remedy the breach. The respondents did not remedy their breach of the contract but instead, responded by demanding that the applicant remedy its breach of the agreement and stating that any cancellation of the agreement is disputed. The applicant avers that it had by this stage already complied with all its contractual obligations in terms of the agreement.

[7] The respondents failed to respond to further communication to the respondents pointing out that the agreement contained a “Voetstoots” clause which was binding on the respondents. The applicant set out a detailed exposition of the communications and negotiations between the parties where the terms of the agreement were re-negotiated, leading to the signature of the agreement between the parties in October 2020. The applicants thereafter cancelled the agreement in writing addressed to both the respondents and their attorneys, and demanded that the respondents vacate the property. When they failed to do so, the applicant launched court proceedings for the eviction of the respondents and all who occupy through them.

[8] The respondents’ case is that they entered into the agreement for the purchase of the property because of the misrepresentations made to them by the agents/representatives of the applicant, with regard to electrical connections and supply to the property, as well as the water capacity of the boreholes in relation to the irrigation systems on the farm. They further allege that the infrastructure on the property was so poor that they spent in excess of R1 000 000.00 in repairs to get the property into some semblance of working order. As a result, they have a right of retention, as they acquired a salvage and improvement lien on the property. The respondents attached certain documents to their Answering Affidavit which they allege to be the expenses they incurred in restoring the property, the content of which is disputed by the applicants. I will deal further with this aspect later.

[9] With regard to the cancellation of the agreement, the respondents admit receipt of the letter notifying them of the cancellation, but deny the content thereof, namely, that the agreement is cancelled, that they do not have a right to occupation of the property or to continue farming activities thereon, and are required to vacate the property within thirty days. They advance the reason for such denial, in the Answering Affidavit, to be what they believe to be their right of retention on account of the substantial amount of money they spent to repair the property. They allege further that they have the right of occupation while the contractual dispute is being resolved.

[10] The issues for this court to decide are whether:

10.1 the contract between the parties has been cancelled;

10.2 the respondents have a right of retention over the property;

10.3 the respondents should be evicted from the property.

[11] It is common cause or not in dispute between the parties that

11.1 the parties entered into the contract of purchase and sale in respect of the property;

11.2 the respondents took occupation of the property on 1 November 2020;

11.3 the respondents were liable in terms of the contract to pay occupational rent as set out in the contract;

11.4 the respondents paid occupational rent for December 2020

but failed to pay any occupational rent from December 2021 to date.

11.5 the contract contains a “voetstoots” clause.

[12] The law relevant to this matter has been comprehensively dealt with in our case law over many decades. I will mention those matters which succinctly deal with issues relevant to the present matter. The matter of Business *Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd 2006(6) SA 605 (SCA)* dealt with the issue of leases in respect of urban properties and also made pronouncements concerning rural or agricultural land. The case of *Business Aviation* concerned a lease of urban property where the lessee made improvements to the property. When the lessor attempted to evict the lessee, the latter relied on an enrichment lien as a result of money it had expended on necessary and useful improvements to the property. The lessor countered the lessee’s defence by contending that the lien relied upon by the lessee had been abolished by the two *Placaeten* promulgated by the Estates of Holland in the 17th century.

[13] The court in *Business Aviation* meticulously traced the history of our law in respect of urban and rural leases, and found that certain principles of the *Placaeten* were incorporated into our law. Article 10 of the *Placaeten* was most relevant for the matter considered by the court, which cited the translation of article 10 by W E Cooper *Landlord and Tenant* 2 ed p 329 note 3 thus:

> ‘Provided, nevertheless, that whenever the owner of any lands, takes them for himself, or lets them to others, he is bound to pay the old lessee, or his heirs, compensation for the structures, which the lessee had erected with the

consent of the owner, as well as for ploughing, tilling, sowing and seed corn, to be taxed by the court of the locality, without, however, the lessees being allowed to continue occupying and using the lands, after the expiration of the term of the lease, under the pretext of (a claim for) material or improvements, but may only institute their action for compensation after vacating (the lands).'

[14] Therefore, the principle applicable in our law, in terms of the *Placaeten*, does not allow for a retention lien in respect of rural land. However, the lessee may claim compensation for improvements after he vacates the property. With regard to improvements, it is well established in our law that such improvements must have been necessary and useful and were incurred to preserve the property. The lessee may be compensated in the amount by which the value of the property had been increased. It goes without saying therefore, that the lessee must prove such expenses and give a detailed account thereof.

[15] In the matter of *Rhoode v De Kock and Another 2013(3) SA 123 (SCA),* which both parties referred to in their Heads of Argument, the court dealt with an enrichment lien. The respondent sold a property to the appellant. The latter made payment in terms of the contract, which later turned out to be void. The appellant also claimed to have made certain improvements to the property and sought to enforce an enrichment lien against the respondent when the latter tried to evict him from the property. The appellant did not properly quantify his claim for enrichment. The court held at para 17 that:

"The present is not a case where it is common cause or cannot on the papers be disputed that the property has been increased in value, and there is a

disagreement as to the amount. In such a case an owner seeking possession of his/her property would usually tender security such as a guarantee from a financial institution for the amount by which the property will in due course be found to have been increased in value, up to the amount claimed by the person asserting the lien (or such lesser amount as the court might be able to determine on the papers as being the maximum amount for which the lien is maintainable), and ask a court to exercise its discretion to order delivery of the property to him/her against provision of such security: *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* **1968 (1) SA 571** (A) at 582C-F and cases there quoted. Here, there is not even a prima facie case for the respondents to meet. The appellant's case amounts to this: 'I have made alterations and additions to the respondents' property. I have produced no acceptable evidence to establish whether the property has been improved in value, nor have I disclosed what I expended in money or materials. But I wish to resist an application for ejectment until compensated for an amount that I have not begun to quantify.' To enforce a lien in these circumstances would in my view be to allow an abuse of the process of the court.

[16] In the present matter, I earlier indicated that there were protracted negotiations between the parties in connection with the terms of the contract, before it was finally signed by all parties at the end of October 2020. The respondents were, at the time, represented by a different firm of attorneys (Graham Coetzee Attorneys) to the firm currently on record (Lovius Block Inc). The letter I mentioned earlier was dated 28 March 2022 and was sent from the applicant's attorneys (Roussouws Attorneys), then representing the applicant, to Lovius Block Inc, setting out a detailed exposition of the negotiations between Graham Coetzee and Roussouws Attorneys, which led to the signing of the agreement. In a letter dated **24 March 2022**, Lovius Block Inc responded to the letter from Roussouws Attorneys dated **28 March 2022,** and refers to a letter of demand sent to the applicant's attorney, calling on the

applicant to remedy its breach of the contract between the parties and stating that the

respondents elect to enforce the agreement. No explanation was tendered for this discrepancy in the dates of the respective letters. It is only in Answer that a letter dated **24 March 2022**, made an appearance as an annexure to the Answering Affidavit, setting out the alleged misrepresentations made by the applicant, the cost of repairs to infrastructure, and demanding payment of such amounts to the respondents.

[17] The respondents elevate the alleged misrepresentations to fraudulent misrepresentations and allege that they have a right to occupy the property until the contractual dispute between the parties is resolved. No mention of such misrepresentations was made at any stage prior to the letter written by Lovius Block Inc allegedly on 24 March 2022. It is also noteworthy that the respondents allege that due to such misrepresentations they found it impossible to perform in terms of the contract. Yet the respondents took no steps at any stage after these defects were discovered, to complain to or draw it to the attention of the applicant, or to attempt to cancel the contract on the ground of impossibility to perform in terms thereof. The respondents also seem to have paid the negotiated reduced occupational rent for approximately one year before they ceased payments in December 2021.

[18] The correspondence between Roussouws Attorneys and Graham Attorneys demonstrates that the respondents were well aware that there would be large costs involved in repairing the pivots

necessary for irrigation, as such had not been used for nine months or more. As a result, Coetzee proposed that the occupational rent be reduced

and the occupational rent for the succeeding years were re-negotiated accordingly. It is also clear that the issue of electricity to the pivots and the delivery of water from the boreholes were recognised as problems which required attention and required the necessary certificates, which certificates the applicant was required to provide. The negotiations in connection with the various items for repair and payments spanned the period 9 to 28 October 2020. It was also clear that more than one inspection of the property was undertaken by the first respondent. The costs of various repairs to the pivots as well as the possible shortage of water from certain

boreholes were discussed. The costs of certain repairs were discussed and the question was asked whether the purchase price would accordingly be reduced. Such negotiations continued, from which it is evident that the respondents and their attorney at the time, were fully aware of the non-functioning pivots, the problems with the boreholes, electricity and other infrastructure problems, which required attention. The respondents were also fully alive to the costs involved and negotiated the terms of the contract accordingly, as the first respondent was present and fully aware of what the problems were and what needed to be done.

[19] The respondents also accepted that they would pay the costs involved in repairing the property. It bears mention that after the testing of the boreholes, Graham Attorney said the following

in one of the letters dated 28 October 2020:

"Die sertifikate vir waterlewering van die boorgate wat wel getoets is word verlang. Die res van die probleme rakende boorgate wat skoongemaak moet word, word aanvaar en sal die koper daarna omsien. Die feit dat daar nie voldoende waterkwota is om die spilpunt by die huis te bedryf word voorgestel dat die koopprys net verlaag word na R5 350 000.00. Loosely translated it reads:

"The certificates for water delivery from the boreholes that have already been tested are awaited. The rest of the problems with regard to boreholes that must be cleaned are accepted and will be attended to by the purchaser. As a result of the fact that there is insufficient water to run the pivots at the house, it is proposed that the purchase price be reduced to R5 350 000.00".

[20] That same day, the applicant's attorney wrote to Graham Coetzee enquiring if he (the applicant's attorney) understood correctly the various proposals made by the respondents, namely:

- The purchase price is reduced to R5 350 000.00 plus VAT
- The occupational rent be reduced by an amount equal to the quotation for the CoC plus the costs of the stolen cable
- Then Kobus (first respondent) will purchase voetstoots with everything in the condition in which it is now
- The certificates for the (bore) holes which have been tested will be given to the purchaser but they play no role. The seller does not guarantee that the boreholes will yield the water as reflected on the certificates.

  (my translation)

[21] Graham Coetzee responded the same day advising that the matter as set out by the applicant's attorney is accepted. The latter then forwarded on the same day (28 October 2020) to the first

respondent and his attorney the revised contract, with the request that they read the whole contract. The contract was signed by the parties the next day, 29 October 2020. The contract contained the voetstoots clause, which was also mentioned in the negotiations and which was accepted by the first respondent. In terms of the voetstoots clause, the respondents acknowledged, *inter alia*, that they inspected the property and were given the opportunity to familiarise themselves with the nature and condition thereof, they are satisfied therewith and purchase the property voetstoots. The respondents further acknowledged that no representations were made by the applicant which induced them to purchase the farming operation.

[22] In my view, the respondents, particularly the first respondent, signed the contract with his eyes wide open and after negotiating terms to suit them. He was fully aware of the condition of the property and that it had not been operated for approximately nine months prior to his purchasing same. He was aware of and accepted responsibility for all rehabilitation that was needed for him to farm the land. On his own version, he commenced farming operations and speaks of the farm yielding a smaller crop than he anticipated. He has made no mention whatsoever of the income he has derived from the property. He has acknowledged that he has not paid any amount towards occupational rent, as he was obliged to do in terms of the contract, and is effectively occupying the property free of charge, while earning an income from it. He moves for the court to permit him to continue doing so. This flies in the face of the well-established principle that a person is not permitted to use the asset or property over which he has a lien. The

respondents are clearly using the property and making a living from it.

[23] I deal now with the purported expenses that the respondents allegedly incurred to rehabilitate the property, and based on which, they claim to have a right of retention over the property. There are two documents attached to the Answering Affidavit as annexure JJB3 and JJB4. JJB3 is a quotation from an entity called P & R Pumps CC and is dated 26 September 2022, almost two years after the respondents took occupation of the property. There is no further evidence or explanation in respect of the items listed on the quotation. It is also not clear whether the work quoted for was actually done. The respondents rely on this document to support their contention that they had to undertake extensive repairs to infrastructure as a result of misrepresentations made by the applicant or its representatives. I am constrained to attach any significance to this document. It is a quotation for items and labour for repairs to what appears to be a dam and pivots. It is not certain if this quote relates to the property which is the subject matter of this case. If it is, then it is also entirely possible that such repairs were necessitated by the respondents' farming activities for almost two years since they took occupation of the property, and not for repairs to infrastructure when they took occupation in November 2020.

[24] JJB4 is purportedly a calculation by the accountant of the respondents indicating the amounts spent by the respondents in order to get the infrastructure on the property semi-operational. It is a thirteen-page typed document, which does not indicate who

the author is or where it emanates from. While the items and expenses listed thereon span the period October 2020 to December 2022, the entries do not follow chronologically, the first entry on the document

being for 18 December 2020, while later in the document appear entries for November 2020. It is also evident that many entries for 2021 appear before items dated 2020. A perusal of the document, especially for the period November 2020 to December 2021 appear to be running expenses associated with farming. There are items listed as “Repairs and Maintenance”, but it is unclear what such items relate to. There are also numerous items listed as “General Farming Expenses”. There is no explanation of these expenses, either from the respondents or the accountant who purportedly compiled the document.

[25] There were other items that do not appear to be related to farming or infrastructure rehabilitation, for example a listing itemised on 24 June 2021as “Entertainment Expenses” and the service provider is listed as “Dischem Langenhoven”, which is known as a franchise chain store in South Africa. Another item listed as “Repairs and Maintenance” on 19 March 2021, names the service provider as “Tochnell”, which is known as a jewellery store in the Bloemfontein area. These and numerous other items were items brought to the court’s attention in the applicant’s Heads of Argument, and by Mr Snellenburg during his oral argument when he asserted that this is a document which does not advance the case of the respondents. He made the point that it is impossible to determine what expenses the respondents incurred, if any, in rehabilitating or repairing the property. I agree. It appears, on the face of it, that whatever expenses were incurred were largely day-to-day running

expenses related to the respondents' farming activities. I am unable to place any reliance on this document as substantiation for the respondents' contention that large amounts of money were spent to improve the

property. This latter assertion is not apparent from the papers

[26] If the respondents were able to substantiate and show that they did, in fact, expend monies in a particular amount, it may have enabled the court to exercise its discretion and direct that the applicant furnish security in that amount before it took possession of the property. I also mention that the respondents did not react or respond to the letter dated 28 March 2022 sent to their attorney, in which the applicant sets out the details of the negotiations leading to the signing of the agreement. It was well within their power to have done so and to have raised the issue of the applicant's misrepresentations. The respondents, however, failed to do so and have not grappled with the issues regarding the re-negotiation of the terms of the agreement set out in the letter of 28 March 2023. It would have assisted the court greatly if they had. As it stands, it is difficult to avoid the perception that the respondents opportunistically raise the issue of misrepresentations by the applicant, in order that they may delay their eviction from the property.

[27] It is clear that the respondents were actively involved in re-negotiating the terms of the contract in view of the costs of rehabilitating the property. They confirmed the applicant's query and exposition of what it understood to be the terms the

respondents sought in order for them to sign the agreement. In my view, it its clear that no warranties or misrepresentation were made by the applicant and such of the expenses that may have been incurred by the respondents, are costs they were aware of before they signed the agreement and accepted that they would have to pay those costs. I reject the assertion that such costs arose as a result of misrepresentations by the applicant.

[28] It is well established in our law that in order to prove a lien, the essential requirements are that the possessor must show that his possession is lawful, that the expenses he incurred were necessary for the preservation of the property, or were useful for improving the property. He must prove his actual expenses and show the extent of the owner's enrichment. He must also show that such enrichment is unjustified. The respondents in the present matter have not met these requirements. They breached the agreement by failing to pay the occupational rent as agreed upon. The applicant complied with the provisions of the agreement by giving the requisite notice to the respondents to remedy their breach, which the respondents failed to do. The applicant cancelled the agreement as it was entitled to do in terms of the agreement. The claim of the respondents in respect of a salvage and improvement lien has not been established. Such a defence, in fact, flies in the face of the agreement between the parties as indicated in the applicant's letter dated 28 March 2022. From the papers, it appears that such expenses that may have been incurred by the respondents were what they had contracted for, alternatively were running expenses in respect of the respondents' farming activities, and were not incurred as a result of misrepresentations made by the applicant.

[29] I pause to mention that the respondents denied they were lessees and argued that they were purchasers. Therefore, the case of *Business Aviation* did not apply in this matter, as that case dealt with a lessee. Where a purchaser of property agrees to pay occupational rent pending registration of transfer of the property into his name, he can only logically be regarded as a lessee for the period that he pays occupational rent. It is common cause that the payment of occupational rent was a term of the purchase and sale agreement, and that clause 21 of the contract makes provision for the consequences of the breach of any term of the contract. The principles expounded in the *Business Aviation* case would in my view apply to the respondents where they had failed to pay occupational rent. The respondents would not have acquired a lien over the property, which is rural or agricultural land,

[30] It is further well established in our law that a lessee may claim compensation for improvements he had made to the property, after he vacates the property. The respondents allege that they have already instructed their attorney to issue summons against the applicant for repayment of the expenses they allegedly incurred in improving the property. It would then be best for the court hearing that matter to deal with the issue of expenses. The respondents cannot in the interim expect to continue in their occupation of the property pending the resolution of that dispute.

[31] The respondents re-negotiated various terms of the agreement to suit them during the three weeks preceding the signing of the agreement. One of the terms they agreed to was the voetstoots clause. This was communicated to the applicant's attorney by the

Graham Coetzee, who represented the respondents at the time. I have set out the import of the voetstoots clause, and even if I am wrong on the aspect of the lien, the voetstoots clause, considered in the light of all the evidence before me, puts paid to the allegations of misrepresentation on the part of the applicant, and much less fraudulent misrepresentations. The respondents are bound thereby and, from what I have set out, it is clear that the reason the respondents agreed to the voetstoots clause is that they had thoroughly familiarised themselves with the nature and condition of the property and its infrastructure, and re-negotiated the payments terms, taking into account the capital they would have to outlay in order to farm on the property.

[32] The dictum of the court in the Rhoode matter in respect of a lien, which I set out in para [15] above is apposite and I align myself therewith. The remarks of the court at para [73], in *Gouws and Another NN) v BPH Petroleum (Pty) Ltd 2020 (4) SA 203 (GP)* succinctly describes the situation that pertains to the present matter:

> "It follows that the respondent has not established that it has a lien over the property. Indeed, the claim of lien in my opinion is of the same character as the other defences raised by the respondent: not sincerely advanced but merely intended to use the law's delays to the respondent's own commercial advantage."

[33] In summary therefore, my view is that the applicant validly cancelled the agreement between it and the respondents, effectively rendering unlawful the latter's continued occupation of the property. The respondents have not quantified the amounts incurred by them to support their claim to have acquired a lien over

the property, nor have they specified that those amounts were necessary to preserve the property or useful in improving the property. As I alluded to earlier, it has become a principle of our law that no right of retention exists over rural land, If the respondents persist in their claim for compensation, they are at liberty to pursue such claim after they vacate the property. The voetstoots clause further militates against the success of the defences raised by the respondents.

[34] In the circumstances I make the following order:

34.1 The first and second respondents are declared to be unlawful occupiers of Portion 1 and the Remainder of the farm Meriba 1042, district Bloemfontein, Free State Province;

34.2 The first and second respondents and all other persons occupying the property through them are ordered to vacate the property by no later than 12h00 on 30 November 2023;

34.3 The first and second respondents and all other persons occupying the property through them are ordered to remove all movable property belonging to them from the property by no later than 12h00 on 30 November 2023;

34.4 In the event of the first and second respondents or any of the occupiers occupying through them, failing to comply with this order, the Sheriff of the court is authorised and directed to evict them, and remove any movable property belonging to them from the property forthwith;

34.5 The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

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S NAIDOO J

On Behalf of the Applicants:	Adv S Grobler SC
Instructed by:	Peyper Attorneys 101 Olympus Drive Helicon Heights Bloemfontein (Ref: Ms S Pienaar)

On Behalf of the Respondents:	Adv J Els
Instructed by:	Lovius Block Attorneys 31 First Avenue Westdene Bloemfontein (Ref: JG Keyl/evd/J01823)