**REPORTABLE**

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG**

**REPUBLIC OF SOUTH AFRICA**

**Case No: AR468/2013**

In the matter between

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| **THE OCCUPIERS OF OMPAD FARM** | **APPLICANT** |
| and | |
| **GREEN HORIZON FARM (PTY) LTD** | **FIRST RESPONDENT** |
| **ADDITIONAL MAGISTRATE: CAMPERDOWN** | |
| **MR MJ TALJAARD** | **SECOND RESPONDENT** |
| **SHERIFF: CAMPERDOWN** | **THIRD RESPONDENT** |

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**JUDGMENT**

Delivered on: 23 May 2014

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**OLSEN AJ (MOODLEY J Concurring) :**

[1] By notice of motion dated 14 January 2013 Green Horizon Farm (Pty) Ltd launched an application out of the Magistrates' Court for the District of Camperdown seeking an order for the ejectment of 36 respondents (37 names were cited, but 1 featured twice) who were occupying premises on Ompad Farm, Ingomankulu District Road, Camperdown. Ejectment orders were granted in respect of 26 of the respondents, 23 by an order of the learned magistrate made on 27 February 2013, and three by an order he made on 5 March 2013.

[2] Fourteen applicants have joined forces in an application to this court for an order reviewing and setting aside the ejectment orders granted by the magistrate. They do so upon the basis that there was gross irregularity in the proceedings. The applicants are represented by the first applicant, Ntombifuthi Mbele.

[3] Before proceeding further I should mention that there has been something of a muddle as regards parties. I have already mentioned that one occupier was cited twice in the magistrates' court. The seventh and thirteenth applicants before us were not respondents in the magistrates' court. The thirty-seventh respondent in the magistrates' court was listed as a party upon whom service had not been effected, and against whom an ejectment order was accordingly not sought; but one was nevertheless erroneously granted. For the sake of convenience I shall ignore these aberrations, and indeed the fact that not all of the respondents in the magistrates' court who were affected by the ejectment orders feature as applicants before us. It is convenient simply to refer to the respondents in the magistrates' court and the applicants before us as the "Occupiers". (In the heading to the papers before us the applicants are described collectively as "The Occupiers of Ompad Farm").

[4] The founding affidavit upon which Green Horizon relied in the magistrates' court made the following case.

(a) Green Horizon had bought Ompad Farm from its former owners, Mr and Mrs Buthelezi in July 2011. It was a suspensive condition of the sale that Mr and Mrs Buthelezi would ensure that the Occupiers vacated Ompad Farm.

(b) They did not do so, and despite the suspensive condition, the farm was nevertheless transferred to the applicant in November 2011.

(c) None of the Occupiers who were residing on the property at the time of the sale had been employed by Mr and Mrs Buthelezi (the deponent to the founding affidavit said that he had been informed of this); and they were accordingly classified as illegal occupiers. None of them had since been employed on the farm. Some of them were employed on a neighbouring property.

(d) As they had failed to vacate the property notwithstanding oral requests made on behalf of Green Horizon that they should do so, each of the Occupiers was served with a letter in November 2012 requiring the occupier to vacate the property by no later than 31 December 2012. The Occupiers did not respond to the letters.

(e) Green Horizon was prejudiced as it could not house its own employees. But the principal form of prejudice lay in the fact that Green Horizon wished to sell the property, but a prospective purchaser would not take transfer whilst the Occupiers remained in residence. This had caused Green Horizon financial difficulties. The founding affidavit suggested that in the light of that the case was of an urgent nature.

[5] These allegations were made in support of a notice of motion which was addressed to the clerk of the court, the Occupiers and the Mkhambathini Municipality. The notice of motion purported to give notice of the fact that an application would be made on 16 January 2013 in terms of sections 4(1) and (2) of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 1998 ("PIE") for the issue of a rule *nisi* calling upon all respondents to show cause on 27 February 2013 "why an order in the following terms should not be confirmed". In summary what was sought to be confirmed were orders:

(a) that any occupier still in residence on 31 January 2013 should be evicted on 31 March 2013;
(b) that the Occupiers should pay the costs of the application;
(c) that "this notice" should be served upon the Occupiers; and
(d) that "this notice" should be served upon the municipality.

[6] The notice of motion required any occupier intending to oppose the application to notify the applicant's attorneys of that intention on or before 30 January 2013, and to deliver any answering affidavits within ten (10) days of such notice. It indicated further that if no such notice of intention to oppose be given, the application would be made on 27 February 2013.

[7] The form of notice of motion employed was a mixture of a standard long form of notice of motion and the short form usually employed when a rule *nisi* is legitimately sought as a means of initiating proceedings.

[8] By way of acknowledgement of the requirements of PIE, the notice of motion was endorsed further as follows:

"The Respondents are hereby informed that: -

1. The Application is brought on the grounds that the Respondents are in unlawful occupation of the premises situated at Ompad Farm, Ngomakulu District Road, Camperdown, KwaZulu-Natal;
2. The Respondents are entitled to appear before the above honourable Court on the 27th day of February 2013 at 09h00 or so soon thereafter as the matter may be heard to oppose the proceedings;
3. They have the right to apply for legal aid in opposing the proceedings;
4. The Respondents are entitled to present before this honourable Court all relevant circumstances (including the rights and needs for the elderly, children, disabled persons and households headed by women as set out in Section 4(6) of the Act to show why an order for the eviction of the Respondents should not be granted and, in this regard the Respondents bear the onus of proof);
5. The grounds for the ejectment/eviction of the Respondents is that the Respondents are in unlawful occupation of the Plaintiff's property details of which are fully set forth in the affidavit of JOHN ALLAN LEWIS annexed hereto;
6. The Applicant has suffered and will continue to suffer prejudice and damage as a result of the Respondents unlawful occupation of the Applicant's property."

[9] On 16th January 2013, and without any notice having been given to the Occupiers or the municipality, and at the request of Green Horizon, the magistrate granted the rule *nisi* as prayed.

[10] There was then an attempt at service on the Occupiers, a subject to which I will revert. On 27th February 2013 only three occupiers were present at court. They were the first, twelfth and fourteenth applicants before us. (The first applicant has attested to the principal founding and replying affidavits in the application before us).

[11] On 27 February 2013 the rule *nisi* was "confirmed" in respect of those Occupiers who were held to have been served, and who had not put in an

appearance at court. The three occupiers who had put in an appearance were, according to the magistrate's record, "referred to Legal Aid – Pinetown if they wish to oppose". As far as they were concerned the matter was adjourned to 5th March 2013 "for Legal Aid". Those three occupiers failed to repeat their appearance on 5th March 2013, and in the result ejectment orders were granted against them on that day.

[12] A little more clarity regarding how these events unfolded can be obtained from the first applicant's founding and replying affidavits in this application, and from certain comments made by the learned magistrate when providing his reasons for the decisions which he made. The first applicant explains that the Occupiers approached the Department of Rural Development and Land Reform during January 2013 as a result of their receipt of the letters which had required them to vacate by 31st December 2012. They were informed that the department was unable to render assistance at that time and that they should return on a later non-specified date. Some of the Occupiers then received what the first applicant calls the "eviction papers". Some of the Occupiers received these papers on the 8th February 2013 and others on the 11th. The first applicant confirms that the three of them who were at court on 27th February 2013 were told to apply for legal aid. But they were not given precise information as to where that could be done and she says they were confused. The first applicant also says that whilst they were told in court that their matter was adjourned to 5th March 2013 "for legal aid", outside the court room the attorney acting for Green Horizon had told them to return to court on 7th March 2013. (Green Horizon has not had an opportunity to answer the last mentioned allegation which was made in reply). Be that as it may on 7th March 2013 the Occupiers again approached the department in order to obtain legal assistance which was approved on 8 March 2013, as a result of which their first consultation with their attorney was on 10th March 2013. The first applicant (apparently in the company of others) did return to court on 7th March 2013 as well, when they were told that the eviction orders against the first, twelfth and fourteenth applicants had in fact been confirmed on 5th March 2013. The learned magistrate confirms in his reasons that the three respondents did return, whereupon he informed them of the outcome and advised them to

approach legal aid as a matter of urgency. (He says that if his memory serves him correctly that happened on 8th March 2013. Nothing seems to me to turn on the disparity regarding dates, especially because the magistrate is not certain of his recollection.)

[13] On 22nd March 2013 this court granted an order interdicting execution of the eviction orders which had been granted on 27th February and 5th March 2013 pending the determination of an application to review the decisions of the learned magistrate at Camperdown, who was cited as second respondent in the review proceedings.

[14] The Occupiers present a case for an order reviewing and setting aside the eviction orders along the following lines.

(a) Firstly, they were and remain "occupiers" as defined in the Extension of Security of Tenure Act No. 62 of 1997 ("ESTA"); which means that the magistrate considered the application under an entirely incorrect legal regime.

(b) Secondly, and in the alternative, the Occupiers were deprived of a right to be heard, in the main because of the fact that the procedure mandated by PIE was not properly followed.

I will deal with these two grounds of review separately, concentrating, for reasons which will become apparent, on the alternative ground as the basis for deciding this application.

**ESTA**

[15] PIE governs the eviction of unlawful occupiers. Section 1 of that Act defines an "unlawful occupier" as a person occupying land without consent and without any other right in law to do so, but excludes from the definition a person who is an occupier in terms of ESTA.

[16] The first requirement to qualify for protection in terms of ESTA is that the land occupied should not be township land. (Section 2 of ESTA provides a more technical account of that requirement, but there is no need to go into it

here as there is no dispute that the land in issue in this case is agricultural land.) The second is that one should fall within the definition of "occupier" set out in ESTA, which in its part material to these proceedings provides that one should be:

> "a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, ….".

[17] It is obviously common cause on the papers before us that the Occupiers resided on the property when it was owned by the Buthelezi family. There is a dispute on the papers as to when the first applicant first came to reside on the property. That need not be resolved. What is clear is that the Occupiers make the case that before Green Horizon acquired the farm they lived on it with the consent of Mr Buthelezi, having been required to pay monthly rental. Green Horizon denies those allegations (i.e. the allegation that there was consent and rental paid) merely upon the basis that Mr Buthelezi had said (presumably at the time of the sale) that the Occupiers were on the land illegally. Green Horizon failed to produce an affidavit by Mr Buthelezi supporting this contention. The denial accordingly had a somewhat shaky foundation, and if we had found ourselves bound to decide this issue, especially in the absence of a request for a referral to oral evidence so that Mr Buthelezi could be subpoenaed, I might very well have concluded that the dispute was not properly raised and that the Occupiers had established that they had been given consent to reside on the land; as a result of which the provisions of ESTA governed the question as to whether such consent had been properly terminated, and as to whether and in what circumstances the Occupiers might be required by law to depart.

[18] This issue also worried the magistrate. This is what he said when providing his reasons for the orders that he made.

> "At the time when respondent's/plaintiff's lawyer applied for the interim order on 16/01/2013 I *mero motu* raised the issue of ESTA but was informed by Mr Reed that ESTA does not apply because all the applicants are employed by Early Bird Poultry and that Early Bird have apparently

undertaken to supply accommodation to the applicants. He was adamant that PIE as opposed to ESTA applied."

[19] Nevertheless, none of the material now before us (disputed or otherwise) served before the magistrate. The reason for that is that the Occupiers were not heard. It is clear that the magistrate, notwithstanding his misgivings, decided to proceed upon the basis that PIE applied. It seems overwhelmingly probable, when one has regard to the first applicant's attempts at obtaining assistance for the Occupiers once she realised that they were in trouble, that there would have been time for the Occupiers to secure legal representation and a hearing, had more time been allowed to them in the magistrates' court; and the magistrate would have been in a position to make a just order, one way or the other, whether under ESTA or PIE.

[20] It seems to me in the circumstances that if, as I think, this case can be decided by considering the irregularities which occurred in the process followed under PIE, then that is what should be done.

**PIE**

[21] Before considering the structure of the process which was employed in the magistrates' court, there are one or two irregularities in the process which need to be mentioned. Whilst they were not specifically raised by the Occupiers in their papers in the review application, in my view these irregularities cannot be ignored. They were debated with counsel for Green Horizon who was unsurprisingly not able to advance any argument in support of the proposition that these matters can be overlooked.

[22] Such returns of service as were rendered recorded in each case that what had been served was the notice of motion. The founding affidavit which is described earlier in this judgment is not reflected as having being served. There is no reason to suppose that it was served. In her founding affidavit the first applicant provided a copy of the notice of motion which on the face of it is a service copy, and it does not have the founding affidavit annexed to it.

[23] It is not clear to me what the Occupiers were supposed to make of the primary statement in the notice of motion, that it was intended to give notice of the applicant's intention to approach the court on 16 January 2013 (nearly a month before the Occupiers received the notice) to seek an order of court. They would have been able to discern from the provisions of the proposed rule *nisi* set out in the notice of motion that if there had been a hearing on 16th January, and the rule *nisi* had been granted as prayed, then it would be wise to be at court on the appointed day set out in the notice of motion, that is to say 27 February 2013. That presumably accounts for why three of the Occupiers did appear on the appointed day. A further matter has struck me, after we heard argument in this matter, and that is that the rule *nisi* itself (as it was set out in the notice of motion and as it was granted) suffers from an internal contradiction. It spoke to four orders which would be confirmed on 27 February if the respondents did not show cause why that should not be done. The first two were final orders vitally affecting the rights of the Occupiers. They were orders for their ejectment and orders as to costs. But the second two were that "this notice" should be served upon the Occupiers and the municipality, respectively. The "notice" was presumably intended, and would be read, as a reference to the notice of motion itself. What would the point be of serving the notice of motion after the final relief had already been granted?

[24] The rule *nisi*, as it was set out in the notice of motion, was properly rendered in the form of a court order which we find in the record. That court order was not served. That is a fundamental irregularity. It is the court order, and not the notice of motion, which alerts a respondent to the fact that a final order against the respondent will be granted without further ado if the respondent does not take steps to show cause on or before the appointed date why that should not be done. The proposition that service of a rule *nisi* can be dispensed with altogether, when it was granted in the absence of a respondent, and on terms which, if confirmed, affect the rights of the respondent, only needs be stated in order to be rejected. The point of granting such orders in the first place (aside from the fact that they are a convenient vehicle for the conveyance of interim relief) is that the respondent should be informed:

(a) that the court has already determined that a *prima facie* case has been made for the grant of the relief sought; and

(b) of what the outcome will be, and when that outcome will eventuate, if the respondent does not answer that *prima facie* case.

The fact that a court asked to confirm a rule *nisi* may, even where there is no opposition, revisit the question as to whether the relief should be granted does not in my view detract from the intended mode of operation of such orders.

[25] Although the founding papers in the review application made the complaint that there was late service in this matter (that contention being based upon the apparently incorrect proposition that the fourteen days notice period spoken to in section 4(2) of PIE is fourteen court days, a proposition which Green Horizon accepted as correct in its answering affidavit), neither the record of proceedings in the magistrates' court nor the papers in this application contain any explanation as to why such service as did take place was delayed until the 8th and 11th February 2013 when the rule *nisi* was granted on 16th January 2013.

[26] In my view these irregularities in the proceedings in the magistrates' court on their own justify an order reviewing and setting aside the orders which were granted on 27th February and 5th March 2013. If any of them was not on its own grossly irregular, cumulatively they were. (As to the legitimacy of viewing them cumulatively, see *De Vos v Marquard and Co*. 1916 CPD 551 at 554).

[27] Counsel for the Occupiers argues, correctly in my view, that the structure of the proceedings adopted in the magistrates' court was not in compliance with PIE. He refers in this regard to the decision in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA). In *Cape Killarney* the court had to consider a procedure which had been followed in an application made in the High Court to secure the eviction of certain respondents from land which they occupied. The proceedings had been initiated in a manner not dissimilar to that adopted in the magistrates' court in this case. Without notice to the respondents, and in their absence, an order was granted

for the purpose of initiating the proceedings. Paragraph 1 of it contained a rule *nisi,* in essence calling upon the respondents to show cause why they should not be evicted and ordered to pay the costs of the application. Paragraph 2 conveyed to the respondents the information which is required by section 4(5) of PIE. Paragraph 3 of the order contained directions as to service. Paragraph 4 told the respondents who intended to defend that they should deliver notice of their intention to do so by a stipulated date, and paragraph 5 directed the applicant to make copies of the notice of motion and supporting affidavits available to the opposing respondents within a week of the final date set for delivery of notice of intention to oppose. The Supreme Court of Appeal had to consider whether an order subsequently made by the High Court setting aside that process was correct. It held that it was. The following features in the *Cape Killarney* judgment are relevant in the context of these proceedings.

(a) Section 4(1) of PIE makes it clear that the provisions which follow the subsection are peremptory. They apply to proceedings for the eviction of unlawful occupiers and section 4(2) requires notice of such proceedings to be effected on unlawful occupiers (and the relevant municipality) at least fourteen days before the hearing of those proceedings. The notice has to be effective and it must contain the information referred to in section 4 (5).

(b) The content and manner of service of the notice required by section 4(2) must be authorised and directed by an order of court.

(c) Section 4(3) of PIE requires notice of the proceedings to be served in accordance with the rules of court. Notice in terms of the rules of court is required in addition to notice in terms of section 4(2).

(d) A rule *nisi* cannot be described as a ruling on procedure only. A rule *nisi* directing respondents to show cause why they should not be evicted constitutes substantive relief and is properly described as "an eviction order in the form of a rule *nisi*". In the light of the peremptory procedural requirements of sections 4(1)-(5) such an order cannot be granted on an *ex parte* basis.

(e) The notice contemplated by section 4(2) of PIE is not intended as a substitute for notice required by the rules of court. This is both

because such a conclusion would "render the provisions of s 4(3) meaningless"; and because such a conclusion would afford respondents in eviction proceedings less notice and less time to put their case before the court than is the case in ordinary motion proceedings. That could not have been intended.

[28] In the light of the decision in *Cape Killarney,* a full court of this division in *Ubunye Co-operative Housing (Association Incorporated under Section 21) v Mbele and Others* 2005 JDR 1055 (N) reviewed the standard procedure then followed in this division in applications under PIE, and altered it. It is now necessary that applications under PIE be commenced by way of an application on notice of motion, the form being the long form contemplated by rule 6(5)(a). The form must be modified so that it informs the respondent that if notice to oppose is not delivered, an application will be made on a given date for directions in terms of section 4(2) of PIE. Those proposed directions must be annexed to the notice of motion. Commencing the application proceedings by way of a rule *nisi* is no longer permitted. The notice of motion (disclosing the proposed direction under section 4(2)) must be served on both the unlawful occupier and the municipality. The directions under section 4(2) will of course incorporate notification to the respondent as to when the application for the substantive relief (i.e. the eviction) will be heard if no notice to oppose the grant of it is received. Service is accordingly effected twice; initially of all the papers (notice of motion, founding affidavits and draft directions under section 4(2)) in accordance with the rules of court, and following the timetable for applications laid down in the rules of court; and subsequently in compliance with section 4(2) of PIE. In cases of urgency contemplated by rule 6(12) the time periods set out in the notice of motion can be shortened, but of course a case for that must be made out in full.

[29] It is clear that the structure of the procedure adopted in the magistrates' court in the present matter did not meet any of these requirements.

[30] The court in *Ubunye Co-operative Housing* made it clear that it was not dealing with proceedings in the magistates' court, as that issue was not before

it. The question as to whether a process in accordance with *Cape Killarney* had to be followed in the magistrates' court was however considered in the matter of *Theart and Another v Minnaar NO*; *Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA). The Court in *Theart* concluded that because of the difference between the provisions of rule 55 of the Magistrates' Court Rules (which deals with applications) and rule 6 of the Uniform Rules of the High Court, the essential elements of the procedure laid down in *Cape Killarney* were not requirements in the magistrates' court. In the magistrates' court, the court concluded, two notices containing two separate documents were not required. One would do as long as the content of the document and the manner of service are approved by the magistrates' court in a preceding *ex parte* application.

[31] The decision in *Theart* (or certainly the decision in *Theart* on the issues I have summarised immediately above) was based upon what the court called "the fine but crucial distinction" between procedures for applications in the High Court and the magistrates' court. (See [8] at 331.) At that time rule 55(1) of the Magistrates' Court Rules read as follows.

> "Except where otherwise provided, an application to the court for an order affecting any other person shall be on notice, in which shall be stated shortly the terms of the order applied for and the time when the application will be made to the court. Delivery of such notice shall be effected in the case where the State is the respondent, not less than twenty days and in any other case not less than ten days before the date of hearing."

[32] The Magistrates' Court Rules were subsequently repealed and replaced by a new set incorporating a new rule 55 which is, in all respects material to the present enquiry, to the same effect as the High Court rule relating to applications. The premise upon which *Theart's* case was decided is accordingly no longer valid. Rule 55 (1) now provides that every application shall be brought on notice of motion supported by an affidavit, and addressed to the party or parties against whom relief is claimed, and to the registrar or

clerk of the court. The notice of motion must be in a form similar to form 1A which is the equivalent of the long form of notice of motion employed in the High Court. The notice of motion must set a day not later than five days after service on the respondent by which the respondent must notify whether the application will be opposed and stipulate a day upon which the case will be set down for hearing in the absence of such notification. There is no material distinction to be drawn between rule 55(1) and rule 6 of the Uniform Rules.

[33] In paragraph [15] of the judgment in *Theart* the court was at pains to point out that what had been decided in that case with regard to the procedure in the magistrates' court should not be understood to detract from the explanation given in *Cape Killarney* of the combined effect of the provisions of PIE and the Uniform Rules of the High Court. In the circumstances one can only conclude that the combined effect of the new Magistrates' Court rule 55 and PIE must be as set out in *Cape Killarney,* with the result that magistrates' courts in this province should in applications under PIE follow a regime consistent with that laid down by the full bench of this division in *Ubunye Co-operative Housing*. The procedure followed in this case in the magistrates' court did not meet that standard and was accordingly not in compliance with PIE. That was a gross irregularity which caused substantial prejudice to the Occupiers. The objects of sections 4(1)-(5) of PIE were not achieved. (*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 at [22] – [23].)

**THE RELIEF**

[34] Counsel for Green Horizon informed us during the course of argument that as the irregularities in the process which were being debated affected not only the applicants before us, but all of the persons against whom eviction orders had been granted in the single application, if we were inclined to grant relief for the reasons we have set out above the order should be made with respect to all of the respondents in the magistrates' court. I am in respectful agreement with that view. It holds a particular advantage for Green Horizon, as, if any of the respondents in the court below who are not applicants before us are still in occupation, this judgment has the potential to generate further

review applications in which costs orders would be sought against Green Horizon.

[35] The notice of motion before us only seeks relief in respect of the orders made by the magistrates' court on 27th February and 5th March 2013. If we were to confine ourselves to those orders the rule *nisi* granted on 16th January 2013 would notionally still exist. If it is correct, as this judgment holds, that the rule *nisi* had no place in a legitimate procedure for the eviction of the respondents, then for the sake of clarity and to achieve certainty the order made on 16th January 2013 must also be reviewed and set aside. The effect of this judgment is that the eviction proceedings will have to be commenced afresh. There is accordingly nothing to be remitted to the magistrate.

[36] There is no reason why the costs of this review application should not follow the result.

The following order is made.

1. The orders granted in favour of the first respondent in the proceedings in the Magistrates' Court for the District of Camperdown under Case No. 2/2013 on 16th January 2013, 27th February 2013 and 5th March 2013 are reviewed and set aside.
2. The first respondent is ordered to pay the costs of these proceedings.

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Olsen AJ

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Moodley J

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| Date of Hearing: | 5 May 2014 |
| Date of Judgment: | 23 May 2014 |
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| Counsel for the applicant: | MM Chithi |
| Instructed by: | Dludlu Attorneys<br>c/o Austin Smith Attorneys |
| | |
| Counsel for the first respondent: | JA Van Heerden |
| Instructed by: | Groenewald & Reed<br>c/o WHA Compton Attorneys |