REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 12/31887

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

21 FEBRUARY 2014 **EHD VAN OOSTEN**

In the matter between

CAPENSIS INVESTMENTS 352 (PTY) LTD	**FIRST APPLICANT**
CAPENSIS INVESTMENTS 322 (PTY) LTD	**SECOND APPLICANT**
and	
THE CITY OF JOHANNESBURG	**FIRST RESPONDENT**
ENGEN PETROLEUM LTD	**SECOND RESPONDENT**
INVESTEC BANK LTD	**THIRD RESPONDENT**
TREVOR JOSEPH GLASS	**FOURTH RESPONDENT**
JACQUES PIENAAR	**FIFTH RESPONDENT**
TUMI MOTSITSI	**SIXTH RESPONDENT**
JHI REAL ESTATE (PTY) LTD	**SEVENTH RESPONDENT**
REGISTRAR OF DEEDS	**EIGHTH RESPONDENT**
KOPANO KE MATLA INVESTMENT COMPANY (PTY) LTD	**INTERVENING PARTY**
REGISTRAR OF DEEDS (JOHANNESBURG)	**FIRST THIRD PARTY**
TSEPO DEVELOPMENT CORPORATION (PTY) LTD	**SECOND THIRD PARTY**

J U D G M E N T

Contract - sale of immovable properties - validity and enforceability - non-fulfillment of suspensive condition – waiver of - requirements of waiver – insufficient evidence in support thereof – repudiation - purchaser's inaction to perform over substantial period of time – nature of performance required - clear and unequivocal intention to repudiate proved - tender of payment of purchase price to seller by third party on behalf of purchaser – requirements for a valid tender - failure to prove - held: contract lapsed or duly cancelled due to purchaser's repudiation.

Costs – liability for payment of - multiple parties - main application and counter applications - considerations arising in court's exercise of a wide discretion - success obtained relevant but not always decisive - funding of party's costs by another – provider's exposure to liability for payment of costs - considerations discussed and applied.

VAN OOSTEN J:

[1] This application consists of a main application, a counter application by the first respondent (the COJ) and a counter application by the second respondent (Engen). The main application was brought by the applicants (Capensis 352 and Capensis 322 respectively) against the first to eighth respondents. At the time of launching the application Tsepo had been deregistered and for that reason the fourth and fifth respondents as its directors, the sixth respondent, an erstwhile director and the seventh respondent as its secretary, were cited as such. Of these respondents only the COJ and Engen entered the fray. During the exchange of affidavits, and by way of third party notice issued by the COJ, two further parties were joined to these proceedings: the Registrar of Deeds (Johannesburg), as the first third party and Tsepo Development Corporation (Pty) Ltd (Tsepo), having been re-instated, as the second third party. Lastly, Kopano Ke Matla Investment Company (Pty) Ltd, a shareholder of Tsepo, intervened as intervening party (Kopano). Kopano made common cause with Tsepo in opposing the main application, the COJ's counter application as well as Engen's counter application.

[2] The application broadly stated concerns competing claims to an entitlement to ownership by the applicants, the COJ and Tsepo, in relation to two immovable properties, being Erf 2979 and almost adjacent thereto, Erf 2981, both situated in the suburb of Alexandra, in Johannesburg. Erf 2979 is registered in the name of the COJ . Erf 2979 was earmarked for development which was commenced with by Tsepo but suspended when the building forming part of a proposed shopping centre was partly constructed. The building, not having been attended to for many years, is

in a dilapidated and vandalised state. Erf 2981 was previously registered in the name of the COJ but, as will become apparent, was sold and transferred to Capensis 352 and it is still registered in its name. Engen has a direct and substantial interest in erf 2981. Two mortgage bonds are registered over the property, one in favour of the third respondent (Investec) and the other in favour of Engen. Engen erected and is operating a petrol filling station on erf 2981, in terms of a registered notarial deed of lease and a notarial deed of servitude. As for the rentals payable by Engen it is not in dispute that those were paid directly to Investec in terms of a cession of rent by Capensis 352 to Investec.

[3] There are three transactions concerning the properties relevant for present purposes: the first was on 31 March 1999 when the COJ sold both properties to Tsepo in terms of an agreement of sale for a purchase price of R 2 069 920-00 (the first transaction). Transfer of the properties into the name of Tsepo however, for the reasons that will become apparent, did not occur. On 31 January 2001 Tsepo undertook to cede its rights and obligations under the first transaction to Capensis 352, in the event of the COJ agreeing thereto. It is common cause that the cession lapsed. The second transaction occurred on 18 May 2001, when in terms of two separate agreements of sale, the COJ sold Erf 2979 to Capensis 322 and Erf 2981 to Capensis 352 (the second transaction). Pursuant to the second transaction Erf 2981 was registered in the name of Capensis 352 together with the encumbrances I have referred to.

[4] In 2003 Tsepo launched an application in this court against *inter alia* the present applicants as well as Investec and Engen, as the third, fourth, fifth and sixth respondents respectively. At issue in that application was the validity of either the first or the second transaction. On 14 November 2003 Cassim AJ (incorrectly referred to in the order as Cassim J) granted an order in terms of which in essence the agreement underlying the first transaction was declared 'valid and enforceable' subject to the implementation orders to which I shall presently refer, and secondly, the second transaction was declared 'null and void' (the order). The implementation provisions of the order were the following: the transfer of Erf 2981 from the COJ to Capensis 352 was 'cancelled'; the existing notarial deed of lease and servitude in favour of Engen as well as the mortgage bonds in favour of Investec and Engen

were to be registered against the title deed of the COJ; Tsepo was to 'assume' the debts of Capensis 352 in respect of the mortgage bonds; Tsepo was 'entitled and obliged' to take transfer of Erf 2981 from the COJ only against payment of the purchase price and subject to the two mortgage bonds and the notarial deeds of servitude and lease already referred to and finally, Engen was to continue payment to Investec of rentals in terms of the cession of rental until cancellation of Investec's bond. It merely needs to be mentioned that the declarator concerning the validity of the transactions was granted on the basis of *qui prior est tempore potior est jure*.

[5] It is common cause that Tsepo failed to exercise any of its rights pursuant to the order or to perform in terms thereof. The deed of transfer in favour of Capensis 352 was moreover never cancelled with the result that Erf 2981 is still registered in the name of Capensis 352, although it contains an endorsement to reflect the terms of the order. As for implementation of the terms of the order nothing in fact happened from either Tsepo's or the COJ's side for a number of years. Tsepo was finally deregistered on 16 July 2010 on account of its failure to lodge annual returns but re-instated on 12 October 2012. On 16 February 2012 the COJ cancelled the first transaction on the basis of Tsepo's repudiation thereof subsequent to the order being issued. The attorneys acting for Tsepo in their response dated 12 October 2012 refused to accept the COJ's cancellation and further advised that Tsepo's 'Managing Director and Chief Executive Officer and the said shareholder hereby tender full payment of the purchase price in the amount of R2 069 920.00' (the tender). On 26 February 2013 the COJ sold Erf 2979 in terms of an agreement of sale to the Alexandra Chamber of Commerce and Industries (Galxcoc) for the purchase price of R10 650 000-00 (the third transaction). Galxcoc, although an interested party, has waived its right to be joined to these proceedings.

[6] Against this somewhat chequered background the present application was launched on 23 Augustus 2012, which is almost 9 years after the granting of the order.

THE MAIN APPLICATION

[7] In the main application the applicants seek an amendment of the order by way of a declarator that the second transaction is valid and enforceable and that in

consequence thereof Erf 2979 be registered in the name of Capensis 322, on condition that it complies with all its obligations to such entitlement. The further relief concerns payments made by Engen which is no longer relevant as it is common cause that Engen has duly paid all amounts claimed. The main application is opposed by the COJ and Tsepo. Although Engen has formally adopted a neutral approach as to the merits of the main application and merely seeks to protect its interests in Erf 2981, it nonetheless supported the contention advanced by both the COJ and Tsepo that the relief sought by the applicants is legally unsustainable.

[8] The only issue I am accordingly required to determine is whether it is competent for this court to grant an order for the amendment or substitution or better put, reversal of the order. The basis on which the amendment of the order is sought is an alleged impossibility of performance by Tsepo of its obligations pursuant to the order. The applicants readily and correctly concede that no legal foundation exists for granting the relief sought. The reasons therefore are apparent: the order is *res judicata* and a period of more than 10 years has by now expired since the granting thereof. A reasonable time for performance on any possible construction has expired. No sustainable grounds for resurrecting the second transaction, which in the order was declared null and void, have been advanced either in the application or in argument before me. The applicants implored on this court 'purely on the basis that it is inherent in the interests of justice' to come to their assistance. The present uncertainty and unacceptable state of affairs concerning the properties are clearly matters of concern. The powers of this court to interfere and ensure that justice is done however, are limited and circumscribed by legal principles. This court is not a court of equity. It is for one not for this court to write an agreement for the parties: the fate of the properties is a matter for consensus to be reached in the form of an agreement between the parties concerned. The quantum leap now contended for by the applicants, for this court to simply substitute the second transaction for the first transaction, particularly in the face of the competing claims of the other parties, has no legal foundation and accordingly cannot be sustained. Nor has a case been made out for the second transaction automatically superseding the first transaction in the event of it lapsing. It follows that the main application cannot succeed.

THE COJ'S COUNTER APPLICATION

[9] This brings me to COJ's counter application in which, in essence, a declarator is sought that the third transaction is valid and enforceable. The validity of the third transaction was attacked by Tsepo on the grounds firstly, that the COJ's cancellation of the first transaction was improper, as there had not been repudiation and secondly, that Tsepo's rights have not been extinguished by prescription as alleged by the COJ. This brings to the fore the grounds relied on by the COJ for contending that the first transaction no longer exists: firstly, that the first transaction has lapsed due to non-fulfillment of a suspensive condition contained in the 31 March 1999 agreement (the agreement), secondly, that Tsepo repudiated the agreement which was accepted by COJ and followed by a valid cancellation of the agreement and, thirdly, that Tsepo's rights in terms of and pursuant to the agreement and order have become prescribed. In the view I take of the matter only the first two grounds, each of which on its own is decisive to the issue at hand, need to be considered.

FULFILLMENT OF SUSPENSIVE CONDITION

[10] The suspensive condition we are here concerned with is contained in the agreement and reads as follows:

> '17 Condition
>
> > This agreement is conditional upon signature by the EMLC (the Eastern Metropolitan Local Council, now the COJ) and the Gauteng Government of Annexure "B" hereto within 14 (fourteen) days of date of signature of this agreement.'

As a starting point it bears mentioning that fulfillment of the suspensive condition has neither been alleged by Tsepo nor been shown on the facts of this matter. Counsel for Tsepo at the outset pointed to the reliance by the COJ in its counter application on prescription as opposed to lapsing due to non-fulfillment of the suspensive condition, as the basis for seeking a declarator that the agreement no longer exists. The contention is short-lived: it is for the court to decide the validity and enforceability of the agreement on all the facts of the matter and the court is accordingly not bound by the selection of a party of one of several legal conclusions that can be made. Counsel further submitted that the issue concerning fulfillment of the suspensive condition was not raised by the COJ in this application and that it therefore ought not to be decided. The argument is misconceived. The principle applicable to a party relying on a contract is well-entrenched: that party must allege

and prove performance of all the conditions in order to successfully claim on the agreement (see *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Ltd* 1963 (1) SA 632 (A) 644H-645). Tsepo has failed either to allege or prove such fulfillment. The issue was pertinently raised in this application and Tsepo in fact dealt with it in alleging that the COJ, referring to fulfillment 'is mischievously raising a speculative red herring' and further that the COJ 'does not know what was contained in Annexure B (referred to in clause 17 of the agreement)' and moreover alleging 'whatever condition it was had been waived by all parties to the agreement of sale'. The reliance on waiver by Tsepo has this significance: waiver presupposes non-fulfillment of the suspensive condition. The allegation concerning waiver is vague and unsubstantiated and therefore fails to adequately prove waiver (*Borstlap v Spangenberg* 1974 (3) SA 695 (A) 704; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para [16]-[17]) Tsepo being one of the parties to the agreement would have been in the best position to provide the required detail to properly prove waiver which it has failed to do (see *Laws v Rutherford* 1924 AD 261 at 263; *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) 777G). There is not the slightest shred of evidence before me that the suspensive condition was fulfilled, on the contrary, the facts of this matter prove exactly the opposite.

[11] A peculiar anomaly arising from the non-fulfillment of the suspensive condition is the declaration of validity and enforceability of the agreement in the order. As the order stands, the agreement notwithstanding the lapse thereof due to non-fulfillment of the suspensive condition, was declared valid and enforceable. The question arising is whether this aspect was raised in the application or considered by Cassim AJ? Had it been raised and considered the order clearly should have provided for a declarator to the effect that the suspensive condition was deemed to have been fulfilled. Having said that, I do not consider it necessary to further delve into this aspect, as this is not an issue I am required to pronounce on. On the facts of this matter I find that the agreement has lapsed due to non-fulfillment of the suspensive condition.

[12] This brings the validity and enforceability of the Galxcoc agreement to the fore. Some comments were made in the papers concerning the timing of the agreement being concluded, which was after the launching of the main application. I am unable

to find anything untoward in this regard. The agreement contains a resolutive condition to the effect that its enforceability is subject to this court's approval thereof in this application. Again, there is nothing before me to challenge the validity of the condition. It follows that the COJ's counter application must succeed together with ancillary relief which is necessary to properly implement the order I propose to make. The ancillary relief is set out in a draft order prepared by the COJ's legal representatives and was duly circulated to all parties. In the absence of any objections I propose to incorporate the terms of the draft order into the order at the end of this judgment.

REPUDIATION

[13] Next, I turn to Tsepo's alleged repudiation of the agreement. The contention in essence is that Tsepo's inaction over a substantial period of time constitutes unequivocal repudiation of the agreement. The contention in my view is unassailable. Tsepo's actions in commencing building activities on the properties as part of the development, as it was required to in terms of the agreement, do not, as counsel for Tsepo would have it, constitute performance of its obligations in terms of the agreement. The development is defined in the agreement as 'the commercial retail development including a petrol filling station to be constructed on the land (erven 2981 and 2979) at the sole expense of Tsepo and which will be used firstly to provide facilities for the 7th All Africa Games 1999 by agreement between Tsepo and the AAG Committee and thereafter as a commercial retail development' which Tsepo was to complete 'by no later than mid-August 1999', which was not complied with. Its obligation in terms of the agreement as for the sale of the properties was to pay the purchase price, which it failed to do. The agreement provides in clause 2.2 thereof for the delivery of guarantees within 45 days of signature and payment *simul ac* transfer. Tsepo did not deliver guarantees nor was it placed in *mora* as provided for in clause 10 of the agreement. In terms of the order Tsepo was 'entitled and obliged' to take transfer against payment of the purchase price. It is moreover true that the COJ cannot be exonerated of all blame: it likewise took no action to enforce the provisions of the agreement. But this does not avail Tsepo: on all the facts before me an inability to pay has been shown, not only by its inaction extending into a period of 13 years but also its deregistration and re-instatement only more than two years later

seemingly for the sole purpose of intervening in this application. There is nothing before me to counter the inevitable conclusion that Tsepo clearly and unequivocally repudiated its obligations in terms of the agreement and the order (see *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

[14] Counsel for Tsepo addressed the legal position concerning Tsepo's existence and competence to perform in the period between Tsepo's deregistration and its re-instatement in support of the contention that Tsepo was entitled to tender performance as it did on 12 October 2012 and that the COJ was bound by it. The argument is untenable and falls to be rejected. I have already dealt with the validity of the COJ's cancellation of the agreement which occurred prior to the tender that was made. By the time Tsepo was deregistered it had already by its inaction evinced a clear and unequivocal intention not to perform its obligations in terms of the first transaction.

[15] The tender in the terms I have already referred to, in any event, did not constitute a valid tender as it was neither timeous nor made 'met opene beurse en klinkende gelde' (*Boland Bank Bpk v Steele* 1994 (1) SA 259 (T) 266A). Applied to this case it means that for the tender to be valid it should have provided the COJ with sufficient information to enable it to properly consider it and decide whether to accept it or not. The tender made on behalf of Tsepo plainly fails to meet this requirement. The finding on this ground likewise decides the fate of the agreement.

ENGEN'S COUNTER APPLICATION

[16] One aspect of this case was at the hearing thereof readily and properly conceded by all parties: Engen is entitled to the protection it seeks in its counter claim, whatever order is granted in this application. As I have alluded to Engen has adopted a neutral stance to the issues concerning the validity of the various agreements but counsel for Engen, in any event, assisted the court in addressing those issues in helpful heads of argument as well as in argument before me. In view of the common ground regarding Engen's protection concerning Erf 2981, and the terms thereof to be incorporated in the order I propose to make, having been agreed upon by the parties in the draft order presented to me, it is not necessary for me to comment any further.

COSTS

[17] It remains to deal with the costs of this application. In the exercise of my discretion I have considered a variety of factors. As for the main application, the applicants have not achieved success. But, the main application at least generated this progressive result: it served as a wake-up call in particular to the COJ and Tsepo to get their house in order. And this is exactly what happened: both entered the fray and actively became involved in this application asserting their perceived rights to the properties. The need for these disputes to be determined by a court, whether in this application or otherwise, was a given fact. The end result now is that a final pronouncement by this court untangling and regularizing an undesirable state of affairs concerning two properties that ought to be developed in the interests and to the benefit of the Alexandra community, has been obtained. The main application was doomed to failure right from the outset: as much was spelled out in the affidavits filed in response thereto. The argument concerning the merits of the main application was of short duration and the arguments proceeded mainly on the merits of the COJ's counter claim and Tsepo's opposition thereto. In all these circumstances I consider it in the interests of justice and fairness for each party to pay its own costs in regard to the main application.

[18] The draft order I have referred to provides for a costs order jointly against Tsepo and Kopano. This aspect was not addressed at the hearing on behalf of the COJ or Engen. I shall nevertheless assume that the they are seeking a costs order against Kopano as well. In response to the draft order counsel for Tsepo submitted supplementary heads of argument in opposing the costs order sought against Kopano, to which counsel for the COJ and Engen have responded. It has accordingly become necessary to focus on the role Kopano has played in this application. Kopano is a shareholder in Tsepo. Kopano's involvement arose as a result of Tsepo's deregistration. Kopano formally intervened as I have already alluded to, which was not opposed. Tsepo, having been re-instated and joined as the second third party, proceeded to participate in the proceedings on its own. Kopano neither appeared nor was it represented at the hearing of the application. The question rightly posed by counsel for Tsepo, is whether Kopano's intervention in the proceedings was on its own or in its representative capacity as shareholder of

Tsepo. Although, as I have mentioned, they made common cause in opposing COJ's counter application, I am inclined to agree with counsel for Tsepo that the latter prevails. The possibility mentioned by counsel for the COJ that Tsepo may well be 'a man of straw', in my view, is irrelevant in considering Kopano's liability for costs. Finally, it is true that Kopano funded Tsepo's opposition in the circumstances I have dealt with, and therefore exposed itself to an a potential adverse cots order, as was held in in *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and another, and four related applications* 2014 (1) SA 141 (WCC) para [79], where the funder of a nominal party, who was held to have been the 'real party' to the litigation, was ordered to pay costs as she had associated herself with and funded the promotion and defence of conduct which she knew was fraudulent and *mala fide*. The present matter is clearly distinguishable. I accordingly, in the exercise of my discretion, decided against holding Kopano liable for costs.

[19] Engen has fairly and properly in its counter application asked for costs only in the event of opposition thereto. Tsepo opposed Engen's counter application and should therefore pay its costs.

[20] Finally, the costs relating to the counter application of the COJ and Tsepo's opposition thereto. Again, a number of considerations apply. Both parties by their inaction caused the undesirable state of affairs to arise. Substantial sums of money have been spent in the development of the properties: the applicants allege their expenditure to have been some R14m. Tsepo has caused the development of an athlete's village and commenced with the erection of the shopping centre. The partly erected building in the proposed shopping complex, or what has been left of it, I was informed, has no commercial value. The COJ has succeeded in concluding the third transaction, on seemingly favourable terms even considering inflation. As against this, the COJ's success in asserting its rights to the properties is of considerable importance. Having carefully weighed all relevant circumstances and in fairness to the parties, Tsepo, in my view, should bear the COJ's costs relating and limited to the COJ's counter application. The employment of two counsel by the COJ was not challenged and was clearly warranted.

[21] In the result the following order is made:

1. The applicants' application (the main application) is dismissed.

2. The agreement of sale concluded between the first respondent (the City of Johannesburg) and the second third party (Tsepo Development Corporation (Pty) Ltd) in respect of Erf 2979 and 2981, dated 31 March 1999, is declared no longer of any legal force or effect.

3. The agreement of sale concluded between the first respondent (the City of Johannesburg) and The Alexandra Chamber of Commerce and Industries in respect of Erf 2979, Far East Bank, Ext 4 Township ("Erf 2979"), dated 26 February 2013, is declared valid and enforceable.

4. In terms of section 6 of the Deeds Registries Act, 47 of 1937, the eighth respondent (the Registrar of Deeds, Pretoria) is authorised and directed to:-

4.1 cancel Deed of Transfer T78657/2002, and the endorsements thereon, in terms of which ownership in respect of Erf 2981, Far East Bank Extension 4 Township ("Erf 2981") was transferred from the first respondent (the City of Johannesburg) to the first applicant (Capensis Investments 352 (Pty) (Ltd); and

4.2 simultaneous with the cancellation of Deed of Transfer T78657/2002, to make an endorsement on the title deed of the first respondent (the City of Johannesburg) under which the first respondent (the City of Johannesburg) held Erf 2981 immediately prior to the registration of Deed of Transfer T78657/2002, in order to restore the first respondent (the City of Johannesburg) as registered owner of Erf 2981 and to record the following against the first respondent's title deed in respect of Erf 2981:-

4.2.1 Notarial Deed of Lease K003582/02L, registered on 1 July 2001 and renewal thereof with effect from 1 May 2013, in favour of the second respondent (Engen Petroleum Ltd) in the Deeds Registry, Pretoria (inclusive of all the rights to future rentals accruing in favour of the first respondent (the City of Johannesburg) for the duration of the lease);

4.2.2 Notarial Deed of Servitude K003583/02S, registered on 1 July 2002 in favour of the second respondent (Engen Petroleum Ltd) in the Deeds Registry, Pretoria;

4.2.3 Mortgage Bond 55271/02 registered on 1 July 2002 in the Pretoria Deeds Registry in favour of the third respondent (Investec Bank Ltd)

4.2.4 Mortgage Bond 55272/02 registered on 1 July 2002 in the Pretoria Deeds Registry in favour of the second respondent (Engen Petroleum Ltd); and

4.3 to cancel Caveat I16842/2004C and to cancel the endorsement thereof insofar as such endorsement appears on the Deeds referred to in paragraph 4.2 above.

5. In regard to the order issued by Cassim J, under case number 12390/2003, on 14 November 2003:

5.1 paragraphs 2 (declaring the sale in respect of erven 2981 and 2979 from the City of Johannesburg to Capensis Investments 352 (Pty) Ltd and Capensis Investments 322 (Pty) Ltd, dated 18 May 2001, to be null and void) and 3 thereof (cancelling the transfer deed by which ownership of Erf 2981 was transferred from the City of Johannesburg to Capensis Investments 352 (Pty) Ltd) are revived and confirmed; and

5.2 paragraphs 1, 4, 5 and 6 thereof are set aside.

6. The rights and obligations exercised by the second respondent (Engen Petroleum Ltd) in accordance with the Notarial Deed of Lease with the first applicant (Capensis Investments 352 (Pty) Ltd) (referred to in paragraph 4.2.1 above) are not affected by the terms of this order inasmuch as the first respondent (the City of Johannesburg) is substituted as the Lessor.

7. It is declared that the second respondent (Engen Petroleum Ltd) has duly paid all rentals due under Notarial Deed of Lease K003582/02L, insofar as they accrued after the debt due to the third respondent (Investec Bank Ltd) was settled in full to the first applicant (Capensis Investments 352 (Pty) Ltd), as per the instruction of the first respondent (the City of Johannesburg) set out in its letter dated 23 February 2012, but the second respondent (Engen Petroleum Ltd) is ordered to pay to the first respondent (the City of Johannesburg) rentals that fall due after the date of this order.

8. As to costs:

8.1 the second third party (Tsepo Development Corporation (Pty) Ltd) is ordered to pay the first respondent's (the City of Johannesburg) costs pertaining and limited to the first respondent's (the City of Johannesburg) counter application, such costs to include the costs of one day hearing in court and the costs consequent upon the employment of two counsel by the first respondent (the City of Johannesburg).

8.2 the second third party (Tsepo Development Corporation (Pty) Ltd) is ordered to pay the costs pertaining and limited to the second respondent's (Engen Petroleum Ltd) counter application, such costs to include the costs of one day hearing in court and the costs consequent upon the employment of counsel.

8.3 each party is to pay its own costs in respect of the remainder of the costs of this application not specifically dealt with in paragraphs 8.1 and 8.2 above.

EHD VAN OOSTEN
JUDGE OF THE HIGH COURT

ATTORNEY FOR APPLICANTS	***BOITUMELO LESOMO***
APPLICANTS' ATTORNEYS	***SEOKANE LESOMO INC***
COUNSEL FOR FIRST RESPONDENT	***ADV CHJ BADENHORST SC*** ***ADV JG BOTHA***
FIRST RESPONDENT'S ATTORNEYS	***JH MALHERBE INC***
COUNSEL FOR SECOND RESPONDENT	***ADV PL CARSTENSEN***
SECOND RESPONDENT'S ATTORNEYS	***KRITZINGER & CO***
COUNSEL FOR SECOND THIRD PARTY	***ADV S KUNY*** ***ADV TJ MOKOENA***
SECOND THIRD PARTY'S ATTORNEYS	***TSHISEVHE GWINA*** ***RATSHIMBILANI INC***
DATE OF HEARING	***17 FEBRUARY 2014***
DATE OF JUDGMENT	***21 FEBRUARY 2014***