REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO:12/38224

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

7/04/2014
DATE

SIGNATURE

In the matter between:

DEVLAND CASH AND CARRY (PTY) LIMITED	First Applicant
METCASH TRADING LIMITED	Second Applicant
METCASH TRADING AFRICA (PTY) LIMITED	Third Applicant

and

PILLAY, RAJOOGOPAL	Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The applicants seek an order evicting the respondent and all those claiming any right of occupation through him, from the immovable property situate at erven 143 and 148 Devland, at the corner of East and Piston Streets, Devland ("**the premises**"). The respondent opposes the relief sought.

[2] It is common cause that the respondent occupied the premises for commercial purposes.

[3] On 18 April 1996, the second applicant and the respondent concluded a written agreement of sub-lease ("**the first term agreement**") which expired by the effluxion of time on 30 April 2001.

[4] The second applicant and the respondent agreed to renew the sub-lease for a further period from 1 May 2001 to 30 April 2006 ("**the second term agreement**").

[5] During 2004, the third applicant acquired the business of the second applicant.

[6] The respondent remained in occupation of the sub-let premises after 30 April 2006. Since then the respondent continued to make payment of an amount of rental on a monthly basis.

[7] On 26 January 2011, the third applicant and Herriot Properties (South) (Pty) Ltd ('Herriot') concluded a written agreement of lease in terms of which the third applicant leased the premises from Herriot.

[8] On 31 August 2011, Herriot and the second applicant concluded an addendum to the written agreement of lease. The agreement of lease concluded between the third applicant and Herriot together with the addendum thereto are collectively hereinafter referred to as "**the head lease**".

[9] On 1 March 2012, the respondent was advised to vacate the premises by the end of March 2012.

[10] The head lease between the second applicant and Herriot came to an end on 1 August 2012 when an agreement of cession was concluded between the first applicant and the third applicant. In terms of this agreement of cession, the third applicant ceded all of its right, title and interest in the head lease to the first applicant. The first applicant also assumed all of the obligations and liabilities of the third applicant in terms of the head lease. The net result of this is that, as at 1 August 2012, the first applicant was the lessor in terms of the head lease.

[11] In the answering affidavit, the respondent contended that the first term agreement was concluded and that he had exercised the option to renew the lease agreement as provided for in terms of clause 1.2 thereof. Accordingly, the lease agreement was renewed for a further five years to run from 1 May 2001 to 30 April 2006 (the second term agreement).

[12] It is common cause that the first term agreement was renewed for this additional period although the manner in which it came about is not common cause. The applicants contend that an "*agreement of renewal of lease*" was concluded, whereas the respondent contends that he has never seen such document but that he had given written notice which had the effect of renewing the lease.

[13] The respondent in his answering affidavit explains that he remained on the leased premises form 30 April 2006 as he believed that he was entitled to stay there and that accordingly a third term period commenced on 30 April 2006 which would have ended on 1 May 2011. He states that this third term was not reduced to writing.

[14] He then explains that a fourth period commencing on 1 May 2011 came into existence which would endure up until 31 April 2016 ("**the oral lease agreement**"). The respondent says this happened as follows:

> *"Sometime around September 2011, the Chief Executive Officer of the second applicant, a Mr Peter Dodson, called me to a meeting. The meeting was held at the premises of the second applicant in Devland. Also present at that meeting was a Mr John Goodson, a manager in the employ of the second applicant. At that meeting Mr Dodson informed me that the lease agreement was to be renewed for a further period of five years on the same terms and conditions as previously entered into, he also at that meeting enquired as to whether I required additional space, as he had more space that he was willing to rent to me and that he would be able to prepare an addendum for the extra space should I so required (sic)."*

[15] The respondent's version in the answering affidavit also attempts to argue for a lease which might be renewed indefinitely for periods of five years at a time. The applicants argued that such an agreement

would fall foul of the provisions of section 1(2) of the Leases of Land Act, 18 of 1969. This question in turn was dependent on whether or not the first applicant had knowledge of the extended lease.

[16] The respondent thus contended for the existence of an oral lease agreement which governed the period commencing 1 May 2011 to 30 April 2016.

PROCEEDINGS BEFORE FOULKES-JONES AJ

[17] The matter was heard before Foulkes-Jones AJ and, pursuant to such hearing, the following order was granted by consent between the parties:

> *"1. The matter is referred for the hearing of oral evidence, at a time to be arranged with the Registrar, on these two questions, whether:*
>
> *1.1. an agreement of lease was concluded between the Second Applicant and the Respondent during or about September 2011 in terms of which the Respondent was entitled to occupy the premises in question up to 31 April 2016; and*
>
> *1.2. the First Applicant, had knowledge of the agreement of lease contended for by the Respondent.*
>
> *2. Save in the case of Messrs Peter Dodson, John Goodson, Marthinus Crafford and the Respondent, neither party shall be entitled to call any witness, unless:*
>
> *2.1. It or he has served on the other party at least fifteen (15) court days before the date appointed for the hearing (in the case of the witness to be called by the Respondent) and at least ten (10) court days before such date in case of a witness to be called by the Applicants, a statement wherein the evidence-in-chief to be given in chief by such person is set out; or*

2.2. *the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.*

3. *Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.*

4. *The fact that a party has served a statement in terms of paragraph 2 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.*

5. *Within twenty (20) court days of the making of this Order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in paragraph 1 thereof, which are or have at anytime been in the possession or under the control of such party.*

6. *Such discovery shall be made in accordance with Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.*

7. *The incidence of the costs incurred up to now shall be determined after the hearing of oral evidence."*

[18] The issues referred to in the Order granted by Foulkes-Jones AJ are hereinafter to as "**the referred issues**".

THE HEARING IN RESPECT OF THE REFERRED ISSUES

[19] I was charged with deciding the referred issues.

[20] The applicants adduced evidence first although contending that on the referred issues, the respondent bore the onus.

[21] Mr Peter Dodson testified on behalf of the applicant. He stated that he had been the Chief Executive Officer of the third applicant during or about 2011. He stated that the third applicant had embarked on an entire revamping and remodelling of their Cash and Carry outlets. He visited the Devland outlet. He noticed that in one corner of the

premises, there was a tenant and he asked the floor manager, one Mr Goodman, to arrange a meeting with the tenant. He testified that when he met the tenant, Mr Pillay (the respondent), he announced that he was pleased that the meeting had been convened as he wanted to resolve the lease issue. He stated that no lease was in existence and that he wanted to conclude a lease agreement. He also wanted more space. Mr Dodson said that they would consider concluding a lease agreement with him subject to two conditions: (1) the respondent taking extra space; and (2) renovating his existing space to the same standard as the rest of the building.

[22] Mr Dodson testified that the respondent had said that he would consider the proposal and that he would get back to him. He never did and that was the end of that.

[23] It was put to Mr Dodson that at the time of their meeting, a lease was in existence which commenced on 1 May 2011 and was to run until 30 April 2016. Mr Dodson disputed this quite vigorously, arguing that if the respondent had believed that a lease agreement was in existence, he would not have approached him to remedy the lease situation and would not have acknowledged to him that a lease agreement was not in existence. I must mention that Mr Dodson's candour and demeanour in the witness box impressed me.

[24] The applicant then called Mr Goodson, who at the time was the general manager of the third applicant at the Devland store. According to Mr Goodson, the September 2011 meeting was arranged to persuade the respondent to take additional space. He

denies that a lease agreement was concluded during such meeting as contended for by the respondent.

[25] The final witness called by the applicant was Mr Crafford who, at the relevant time, was a legal and property director of the third applicant. He explained that the Devland store was sold to the first applicant, that he was involved in the sale and that he had advised them that the respondent was a tenant on a month-to-month basis. This part of his evidence was not disputed and stands uncontested. That concluded the evidence presented on behalf of the applicants in respect of the referred issues.

[26] The respondent testified that he had been an employee of the second applicant and had purchased the business as the business was going to be shut down. A written agreement of sale was concluded and it was a condition of the agreement that a lease agreement be entered into for the leasing of the premises on which the business was situated. The first term agreement was accordingly concluded.

[27] He testified that he exercised the option to renew the lease and that in consequence thereof, the first term lease agreement was renewed for a further period running from 1 May 2001 to 30 April 2006 (the second term agreement). He had given notice to this effect in writing. He then testified that the lease was renewed on two subsequent occasions, each for five-year periods but that on no occasion did he give written notice. On his version thus, the rental was extended for a third term from 1 May 2006 to 30 April 2011 and for a fourth term, running from 1 May 2011 to 30 April 2016.

[28] The respondent then testified about the September 2011 meeting. He stated that he did not know Mr Dodson at all and that he was taken upstairs where he found Mr Dodson. He says that Mr Dodson introduced himself as the Chief Executive Officer and he advised him that he wanted to extend the lease for another five years. The respondent thought this was favourable to him as he would get an additional five or so months to his existing lease which at the time ran from 1 May 2011 until 30 April 2016. Mr Dodson's offer extended the lease to 30 August 2016. He was also offered additional space. He was advised that they would revert to him with regard to the proposed rental for the additional space but he had accepted the additional time offered for the lease.

[29] Two weeks later Mr Goodson came back and advised him that they could not give him all the space, only a portion. The respondent rejected the offer, saying that the additional space was too small and that he did not want it.

[30] On or about 28 February 2012, he had received the notice from the third applicant calling upon him to vacate the premises and recording his tenancy to be on a month-to-month basis. His attorneys had responded to this letter, denying the monthly tenancy basis and contending for the existence of an oral agreement.

[31] In the respondent's answering affidavit he had stated that the lease agreement would come to an end on or about 31 April 2016. Indeed, this was recorded in the order granted by Foulkes-Jones AJ. It was put to him that such a construction of the facts would be inconsistent

with the September 2011 agreement testified to by the respondent at the hearing i.e. that an agreement was concluded in terms of which the lease would run from September 2011 until September 2016 (and not 31 April 2016).

[32] His response to this was that "that never happened". The upshot of this concession is that he had conceded that no agreement had been concluded during September 2011 which had extended the lease to either September 2016 or 31 April 2016.

[33] At the conclusion of the respondent's evidence, it was clear that no agreement in relation to the lease agreement had been concluded at the September 2011 meeting. This is so for many reasons, I list but a few: (i) during re-examination, when the repsondent was expressly asked what had been agreed upon at the September 2011 meeting, he responded that what had been agreed upon, was the terms of the 1996 agreement (the first term agreement); (ii) initially he had testified that a proposal was put to him in respect of the conclusion of a rental agreement which would extend until September 2016. However, he testified that no consensus had been reached in respect of the rental amount; (iii) He also testified that he had rejected the composite offer which had been made to him which related to the additional space and the extension of the lease.

[34] The respondent bore the onus on this aspect. Mr Dodson had testified that the respondent had denied the existence of any lease agreement during their meeting in September 2011. No criticism against his evidence could be levelled. His evidence stands. The respondent

contradicted that which was contained in his answering affidavit and which was referred for the hearing of oral evidence. He failed to discharge the onus which rested upon him.

[35] My finding in respect of paragraph 1.1 of the referred issues is as follows: I find that no agreement of lease was concluded between the second applicant and the respondent during or about September 2011 in terms of which the respondent was entitled to occupy the premises up to 31 April 2016.

THE SECOND REFERRED ISSUE I.E. KNOWLEDGE ON THE PART OF THE FIRST APPLICANT

[36] It is clear from the evidence of Mr Crafford that the first applicant had no knowledge of an extended lease which ran from 1 May 2006 to 30 April 2011 and from 1 May 2011 to 30 April 2016. He only had knowledge of a monthly tenancy lease agreement. At the conclusion of all the evidence, this much was common cause.

HORNS OF A DILEMMA

[37] Counsel for the respondent, the respondent having conceded that no agreement in respect of the extension of the lease had been concluded during the September 2011 meeting, argued that the Court should find that an agreement was nonetheless in existence which ran from 1 May 2011 until 30 April 2016 ('**the tacitly relocated lease**").

[38] It will be recalled that the matter came before this court for the determination of limited issues (the referred issues). The Court was called upon to decide, essentially, whether an agreement of lease had been concluded between the second applicant and the respondent during or about September 2011 in terms of which the respondent was entitled to occupy the premises up to 31 April 2016. That being so, the question arose whether the Court was empowered to make findings which go beyond a consideration of the referred issues.

[39] The applicants argued that the court was precluded from going beyond the parameters of the referred issues and that this was particularly so, in a case where the parties had agreed to the content of the draft order (as was the case *in casu*).

[40] The applicants argued that all other issues were "*res judicata*" and that the outcome of the application depended on the findings in respect of the referred issues.

[41] Judgment was reserved. The Court then caused a note to be sent to counsel in which the following was recorded:

"The judge has determined that she will decide the matter in the following manner:

1. *She will rule upon the two questions formulated in paragraph 1 of acting judge Foulkes-Jones's order granted on 28 February 2013 ("the referred issues") applying the principles applicable to the adjudication of trial matters.*

2. *She will then decide the application afresh having regard to her findings on the referred issues, applying the principles applicable to the adjudication of motion matters.*

3. *Counsel were invited to provide written argument on whether or not the judge is entitled to make findings which go beyond a consideration of the referred issues.*

4. *Counsel are further invited to provide written argument on:*

a) the approach proposed by the judge; and

b) whether the outcome of the application will follow the result of the referred issues, and if not, the reasons and submission in that regard."

[42] The parties made written submissions in respect of the suggested approach which are incorporated in the discussion that follows.

[43] Essentially both parties contended that the court was empowered to go beyond the referred issues but should do so cautiously.

[44] I was referred to the learned authors, Erasmus, in Superior Court Practice, B-149, who caution as follows:

"Since the hearing of oral evidence is intended to be on specified issues only, it is desirable that the court states in its order which issues will be determined by the hearing of oral evidence and defines who may or must be called as witnesses.[3] *The court must be on its guard not to formulate its order in such a way that the hearing of oral evidence is, perhaps unintentionally, converted into a trial.*[4] *The fact that the court orders oral evidence does not enlarge the scope of the inquiry,*[5] *but the ambit of the inquiry may be extended by the terms of reference and, in special circumstances, also by the judge presiding at the hearing.*[6]

[3] *Standard Bank of SA Ltd v Neugarten 1987 (3) SA 695 (W) at 699F, and see the orders made in this case (at 708G-709E) and in Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA388 (W) at 396G-397B; Mbilase v Dimbaza Foundries (Pty) Ltd 1990 (1) SA 812 (Ck) at 815H-816D; see also Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Gwano 1978 (4) SA696 (T) at 698G; Combrinck v Rautenbach \ 951 (4) SA 357 (T) at 359F-H. In Chief Pilane v Chief Linchwe 1995 (4) SA 686 (BPD) the matter was referred to oral evidence and it was agreed to by counsel that they would submit a memorandum to the presiding judge within a reasonable time, dealing with the issues that they consider should be dealt with, and that the judge would then give a directive as to precisely what issues should be canvassed at the hearing of oral evidence (at 697E).*

[4] *Standard Bank of SA Ltd v Neugarten 1987 (3) SA 695 (W) at 699F.*

[5] *Wepener v Norton 1949 (1) SA 657 (W) at 659; Drummond v Drummond 1979 (1) SA 161 (A) at 170H.*

[6] *Drummond v Drummond*

[45] The referral for the hearing of oral evidence constitutes a non-appealable ruling. In *Wallach v Lew Geffen Estates CC 1993 (3) SA 258 (AD) (supra)*, Milne JA at 262J held the following:

> *"It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simple interlocutory order of the kind referred to in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 870A. Furthermore this is not a case where*
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> > *'. . . the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed ...'*
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> *as in Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 585F-G. The 'order' given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the Provincial Divisions. ..."*

[46] To argue that the ruling or anything that preceded it's granting, is to be considered "*res judicata*", is thus not correct.

[47] A departure from the order referring the matter to the hearing of oral evidence should not be undertaken lightly. (Wallach (supra) at 262I and 263H). In casu the qualification that a departure from the order should not be undertaken lightly applies with additional force as, during the leading of the respondent, an objection was raised to the leading of the evidence relating to the tacitly relocated lease and

respondent's counsel placed on record that such evidence was led for the sake of context only.

[48] Applicant also argued that this court should not depart from the order as the parties had agreed that the outcome of the application, would be dependant on the outcome of the referred issues. The order is silent about such an agreement. It does strike one as odd that the parties would have agreed to the matter being referred for the hearing of oral evidence on the referred issues, but that they would not have agreed that the referral would be dispositive of the matter.

[49] By virtue of the approach I adopt hereinafter, a finding in respect of the existence of an agreement relating to the consequences of a finding on the referred issues, is unnecessary.

[50] Whether or not the court makes findings on the oral evidence led which relates to the existence of the alleged tacit agreement which was to run from 30 April 2011 to 1 May 2016, is a bit of a proverbial 'red herring'. This is so because, if I disregard the oral evidence adduced at the hearing in respect of such tacit agreement, I am still confronted with allegations relating to such agreement in the answering papers. Insofar as it is necessary though, I hold that I am, by virtue of the specific circumstances of this case, in particular as the respondent specifically disavowed reliance on this evidence when the objection was raised, to ignore such evidence.

[51] I thus now turn to deal with the evidence contained in the affidavits filed in the application, as amplified by my factual findings in respect of the referred issues.

ADJUDICATION OF THE REMAINDER OF THE APPLICATION, THE REFERRED ISSUES HAVING BEEN DECIDED

[52] The position in the application papers which served before Foulkes-Jones AJ can be summarised as follows: The applicants contended that a monthly tenancy agreement was in existence at the time of the despatch of the notice of cancellation. The respondent contended that during September 2011, an agreement was concluded in terms of which he was to remain in occupation of the premises until April 2016. This oral agreement, according to the answering papers, entitled the respondent to remain in occupation of the premises. It now transpires that no such agreement existed.

[53] The respondent's fall-back position is that another tacit lease agreement had come into existence which entitled him to occupation until April 2016. Although I have found that I can not consider evidence beyond the ambit of the referred issues in respect of the oral evidence led, there is some factual foundation in the answering affidavit for this tacitly relocated lease (although just the bare bones thereof).

TACITLY RELOCATED LEASE - 1 MAY 2011 TO 30 APRIL 2016

[54] When a lessee stays on in rented premises after the end of the period of an express lease, and pays rent that the lessor accepts, then the

lease is tacitly relocated for an indefinite period, thus terminable on reasonable notice. In the absence of an indication to the contrary, a reasonable period of notice is equal to the periods over which rent is paid.[1] A tacitly relocated lease is not a continuation of the old lease. It is a new agreement.[2]

[55] The respondent made no allegations in the answering affidavit that would indicate any conduct on the part of the parties from which one could infer an intention that the lease should be regarded as having been tacitly relocated for periods of five years at a time. Such a case should have been made out in the papers. (See *Valentino Globe BV v Phillips,* 1998(3) SA 775 (SCA) 779 and *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd,* 1992 (1) SA 89 (W) at 92G- I.)

[56] The respondent's case on this issue is unsupported by fact. To make a case for this tacit contract, the conduct from which it's conclusion and terms are to be inferred, must be pleaded and proved. The respondent could not do so as it was relying on the oral agreement which had been concluded during September 2011 which, in it's original form, had novated any pre-existing agreement.

[57] A factor which weighs very heavily against a finding in favour of the respondent is the following: The first term agreement (which ran from 1 May 1996 to 30 April 2001) provided for an option to renew the lease '*upon 3 months notice....been given'.* This is the agreement

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1 *Pareto Ltd and others v Mythos Leather Manufacturing (PTY) Ltd*, 2000 (3) SA 976 (W) at 1004F

2 Cooper: Landlord and Tenant, 2nd edition, p 351, *Doll House Refreshments (Pty) Ltd v O'Shea* 1957 (1) SA 345 (T); *Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O) at 139-140; *Golden Fried Chicken (Pty) Ltd v Sirad Fast Food CC, 2002 (1) SA 822 (SCA).*

which, according to the respondent, was renewed from time to time. Thus, on respondent's own version and relying on the provisions of the first term agreement, he ought to have given notice of his intention to renew the lease. It is common cause that for the period 30 April 2011 to 1 May 2016, no notice, whether in writing or otherwise, was given. It follows that no renewal was agreed to by the parties.

[58] The respondent paid rental on a monthly basis. I find that as at 1 March 2012 when applicants gave notice of cancellation of the lease, a monthly tenancy agreement was in existence and a reasonable notice period would have been one month.

[59] Should the aforegoing construction be incorrect, the respondent should fail for another reason.

LEASES OF LAND ACT

[60] The second referred issue has a bearing on the application of section 2 of the Leases of Land Act, 18 of 1969 ("the Leases of Land Act") which section provides as follows:

> *"(2) No lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, shall, if such lease be entered into after the commencement of this Act, be valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after having been entered into, unless-*
>
> *(a) it has been registered against the title deeds of the leased land; or*

> *(b) the aforesaid creditor or successor at the time of the giving of credit or the entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof, as the case may be, knew of the lease."*

[61] It is common cause that the alleged agreements were not registered against the title deeds of the leased land and that the first applicant had no knowledge of the extended lease agreements.

[62] Thus, even if a factual basis existed for the enforcement of the lease agreement as contended for by the respondent, such lease agreements would span a period of more than 10 years and would thus fall foul of the formality requirements in respect of the Leases of Land Act. Such agreement would accordingly be unenforceable as against the first applicant.

EVICTION PERIOD

[63] The respondent's counsel has requested that should the court be inclined to the grant the relief, the respondent should be afforded a period of six months within which to vacate the premises. This, so the argument ran, would be just, fair and equitable having regard to the nature of the business i.e. that it is a large hardware and building material supplier, there is no evidence that the respondent is being evicted for a failure to pay rent and that the applicants will suffer no prejudice. The applicants contended that there existed no reason why the respondent should not be evicted forthwith.

[64] This application was initiated on 10 October 2012. On 28 February 2013 it was referred for the hearing of oral evidence which occurred

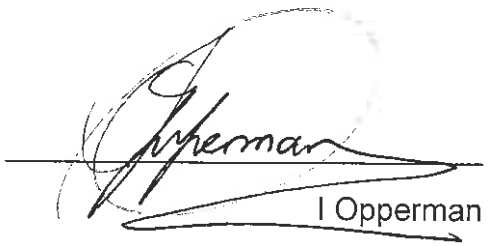
one year later, almost to the day, on 27 February 2014. The respondent has known for one and a half years, that the first applicant seeks the relief set out in the notice of motion. Having regard to all the circumstances, I conclude that the respondent must vacate the premises by no later than 30 June 2014.

CONCLUSION

[65] I accordingly grant the following order:

65.1. The respondent and all those claiming any right of occupation through him, is evicted from the immovable property situated at erven 143 and 148 Devland, situated at the corner of East and Piston Streets, Devland as from 30 June 2014;

65.2. The respondent is ordered to pay the costs of this application including the costs incurred on 28 February 2013 which were reserved.



I Opperman

Acting Judge of the High Court

Heard: 27 February 2014

Judgment delivered: 8 April 2014

Appearances:

For Applicants: Adv H A Van Der Merwe

Attorneys: Fluxmans Inc

For Respondent: Adv W Davel

Attorneys: Sven Pillay Attorneys