IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 28918/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 17/8/21

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In the matter between: -

ANDREA PIETER ANDREINI First applicant

ANDREINA GIOVANNA SCARAMAL Second applicant

NAMM (PTY) LTD Third applicant
(REGISTRATION NUMBER: 2019/559715/07)

and

KALULA MBUNU First respondent
(IDENTITY NUMBER: [….])

MKHULULI DUBE Second respondent
(PASSPORT NUMBER: [….])

LILLIAN NDLOVU Third respondent
(IDENTITY NUMBER: [….])

LIZNET SIBONILE LINDA Fourth respondent
(IDENTITY NUMBER: [….])

ALL OTHER OCCUPANTS OF ERF [….]
, JOHANNESBURG Fifth respondent

THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY Sixth respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 17 August 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The first and second applicants ("*the applicants*") seek an order evicting the first to fourth respondents ("*the respondents"*) and all persons occupying through and under them, the immovable property situated at [….] Johannesburg ("*the property"*) in terms of section 4(1) of The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE*").

[2] The third applicant was cited as an interested party by virtue of the fact that it has concluded an offer to purchase with the applicants with the intention of acquiring the property.

[3] The respondents opposed the application and filed an answering affidavit

together with a supplementary answering affidavit.

[4] Heads of argument on behalf of the respondents were filed late. In fact, it was filed shortly before the hearing of this application. An application for condonation was filed on my insistence. The applicants do not oppose the condonation application and wish to finalise the matter. I therefore condone the late filing of the heads of argument.

ISSUES FOR DETERMINATION

[5] Whether the eviction application should have been instituted in the Magistrate's Court because the parties agreed in terms of clause 17 of the lease agreement that any dispute that would arise out of the lease agreement would be instituted in the Magistrate's Court.

[6] Whether the applicants lawfully cancelled the lease agreement.

[7] Whether the applicants are entitled to remain in occupation of the property on the basis that they made payment of municipal charges on behalf of the applicants and have not been refunded.

[8] Whether the applicants complied with the provisions of PIE.

[9] Whether the applicants are entitled to an order for the eviction of the respondents.

[10] Whether the personal circumstances of the respondents preclude the court from granting an eviction order.

FACTS ADVANCED BY THE APPLICANTS

[11] The applicants are the registered co-owners of the property. This is not disputed by the respondents.

[12] The applicants concluded fixed term lease agreements with the respondents on different occasions. On each occasion the respondents agreed to pay monthly rentals and for water and electricity consumption charges. All four respondents remained in occupation of the property on the termination of the fixed term lease period with the consent of the applicants and as a result, the lease agreements continued to operate on a month-to-month basis, subject to the same terms and conditions as the original lease agreements.

[13] On 29 October 2019 the applicants concluded an offer to purchase with the third applicant for the purchase of the property. On the 7th of April 2019 the second applicant attended at the property and informed the first to fourth respondents that the property had been sold and that they were required to vacate by the 30th of June 2019. On the 13th of April 2019 the applicants addressed a notice to vacate to the respondents confirming that they were required to vacate the property by the 30th of June 2019. The respondents were specifically advised that the rental for the following three months would remain due and payable.

[14] On 12 June 2019 the second applicant was contacted by a Mr Makweng who advised that he was from the City of Johannesburg and that he was requested by the respondents to approach the applicants to discuss the

reasons for their eviction. The respondents informed Mr Makweng that they had made certain payments on behalf of the applicants and that they were being evicted notwithstanding the fact that they had been paying rent. This was not correct because the respondents had failed to pay rental for the remaining three-month period of the lease and therefore breached the terms of their respective leases.

[15] On the 19th of June 2019 the respondents were called upon in writing to remedy their breach and a letter was addressed to Mr Makweng by the applicants' legal representatives alerting him to the provisions of section 5(5) of the Rental Housing Act, 50 of 1999 which provides that if on the expiration of the lease the tenant remains in occupation, the parties are deemed to have entered into a periodic lease on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease.

[16] Despite demand, the respondents did not remedy their breach. Mr Makweng did not contact the applicants again.

[17] On 28 June 2019 the applicants' attorneys notified the respondents in writing that the leases were cancelled. The respondents were in terms of the cancellation notice required to vacate the property by no later than the 30th of June 2019.

[18] Despite affording the respondents a period of three months to vacate the property, they have failed to do so.

THE RESPONDENTS' CASE

[19] The respondents allege that they were never informed that the lease agreements were cancelled. They also allege that the applicants must refund them their deposits and the amounts they have paid to the municipality in order to assist the applicants.

[20] In their supplementary answering affidavit the respondents raise the issue of jurisdiction for the first time. They allege that in terms of clause 17 of the lease agreement the parties agreed that any dispute arising from the lease agreement would be instituted in the Magistrate's Court.

[21] The respondents also furnished details regarding the personal circumstances of the occupants. I will deal with this aspect in more detail later.

[22] In reply, the applicants aver that whilst parties may agree to the jurisdiction of a particular court, a party cannot be precluded from approaching any other court with competent jurisdiction. The applicants reiterate that written demands were addressed to the respondents to remedy their breach and when they failed to do so, written cancellation letters were sent them. Accordingly they maintain that the lease agreements were lawfully cancelled.

[23] In respect of the allegation that the respondents paid monies to the municipality on behalf of the applicants and that monies are owed to the respondents, the applicants explain that the respondents intermittently fell into arrears, not only with their rental payments, but with payments

towards the water and electricity consumption. As a result, the municipal account of the property accumulated a substantive arrear amount and as a consequence, the municipality threatened to terminate the electricity and water. In order to avoid this, the applicants informed the respondents of the position and provided them with a copy of the acknowledgement of debt that the applicants had signed, which reflects the amount outstanding. The applicants also advised the respondents to make payment of the arrears, water and electricity charges in order to avoid the termination of supply. It is for this reasons, the respondents started paying off the arrears, the applicants allege.

[24] In an attempt to mitigate the ever-increasing municipal account, the applicants installed prepaid meters to the property, however, the respondents illegally bypassed the meters and are receiving services to the property without paying for it.

FINDING

[25] I am satisfied that the lease agreements were lawfully cancelled. All that is contained in the answering affidavits is a bare denial. The respondents fail to deal in any way with the documentary evidence comprising the breach and cancellation letters attached to the applicants' founding affidavit. This is fatal to the respondents' opposition.

[26] In any event, on their own version the respondents stopped paying rental because they believe they are entitled to do so because of what is owed to them by the applicants. This is inherently a concession that they did in

fact breach the lease agreements.

[27] The respondents do not deny that they were liable to pay for water and electricity consumption. Therefore, what they paid to the municipality is simply what they contractually agreed to. They made no effort to refute the allegations made by the applicants that the respondents intermittently made partial payments in respect of the rental, as well as the water and electricity consumption charges. I therefore do not find any merit in this argument either.

[28] The jurisdiction point raised by the respondents does not assist them either in my view. I have already found that the lease agreements were lawfully cancelled. The respondents' reliance on the jurisdiction clause contained in the lease agreements is therefore misguided. Moreover, even if they were correct in their contention that the applicants were bound to the jurisdiction of the Magistrates' Court, it will merely delay the inevitable as the respondents have no disclosed any defence on the merits of the matter.

[29] As in all motion proceedings the trite principles enunciated in Plascon-Evans Paints (Pty) Limited v Van Riebeeck Paints (Pty) Limited[1] apply also in this matter:

> *"…where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent,*

[1] 1984 (3) SA p623

justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858)"

[30] Also in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd [2] the court stated that:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[31] The court held in Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd[3] that the crucial question is always whether there is a real dispute of fact and that it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination, nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence.

[32] Also:

"[I]n every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done, the lessee, against

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2 1957 (4) SA 234 (C) at 235E - G
3 1949 (3) SA 1155 (T) p 1163

whom the ejectment is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor." [4]

[33] Turing to the facts of the matter, the respondents have simply denied the cancellation of the agreements on the basis that they did not now that the agreements were cancelled. This flies in the face of copies of delivered written demands and cancellation letters attached to the founding affidavit. In addition, as already highlighted, the respondents are in terms of their agreements with the landlords obliged to pay rent and consumption charges. Yet they chose to pay the one, but not the other, with no convincing evidence in support.

[34] In the premises I find that the respondents opposed these proceedings without any *bona fide* defence and that they are in unlawful occupation of the property.

[35] In determining a just and equitable date contemplated in section 4(8) of PIE, the court must have regard to all relevant factors, including the period the unlawful occupier has resided on the land in question.[5]

[36] The legislature did not limit the circumstances the court should consider and neither did it arrange the circumstances in order of priority. It referred to *"all the relevant circumstances"* and left it to the court to determine which circumstances are relevant and to consider all those in conjunction. The fact that the legislature referred specifically to the rights

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4 *Peterson v Cuthbert & Co., Ltd*.1945 AD 420 at p. 428

5 Groen Gras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others 2002 (1) SA 125 (T).

and needs of the elderly, children, the disabled and households headed by women and, in certain instances, also the availability of alternative land, does not mean that the legislature intended to elevate these circumstances to absolute prerequisites which have to be met before an order may be granted. If the legislature intended such a consequence, it would have said so specifically.[6]

[37] The applicants suggested 30 (thirty) days as a just and equitable period within which to vacate the property. The respondents suggested a period of 60 (sixty) days.

[38] Therefore, what remains is to deal with the respondents' personal circumstances.

[39] Upon signature of the respective lease agreements, the respondents indicated and confirmed that they could afford monthly rental payments in the amount of R3,250.00.

[40] The first respondent in her application confirmed that she was employed as a doctor and that she earned a monthly income of R12,000.00. She also confirmed that her husband was a businessman. The first respondent apparently has a brother of 39 years old who is wheelchair-bound and disabled. However, it is also stated that the first respondent travelled to Cape Town and it is not clear whether the brother resides at the property. It is stated by the applicants that the first respondent sublets the unit, which is not permissible.

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6 Groen Gras Eiendomme (*supra*) paragraph [32].

[41] The second respondent is employed and earns a monthly income. The Third respondent is employed as a domestic worker and also earns a monthly income.

[42] All of the respondents earn an income except for the fourth respondent, who is alleged to have worked as a chef at a restaurant in Sandton, but due to the pandemic the restaurant owner had reduced staff. She has a 32-year-old son who lives with her and who used to sell sweets and small things, but has not done so since the lockdown. To the best of the applicants' knowledge the fourth respondent is employed as a waitress and similarly earns a monthly income.

[43] All of the respondents have minor children.

[44] The applicants on the other hand explain that they are dependent on the rental income received from the property and are suffering severe financial prejudice as a result of the respondents' failure to make payment and to vacate. As far as the utility services are concerned, all four tenants accumulated substantial amounts which the applicants remain liable to pay.

[45] As far as the personal circumstances of the respondents are concerned, the applicants point out a material discrepancy in the fourth respondent's personal circumstances. In the answering affidavit deposed to by her husband he confirmed that they have two children, whereas in the supplementary answering affidavit the fourth respondent alleges to have four. The fourth respondent also failed to mention that she is supported

by her husband.

[46] I cannot ignore the fact that the lease agreements have been lawfully cancelled and that the respondents remain in arrears and in unlawful occupation.

[47] The fact remains that the property has been acquired as an investment and is rented out with the sole purpose of generating a steady monthly rental income. This is unachievable whilst the respondents remain in occupation.

[48] I must also take into consideration that the respondents have been afforded an opportunity for almost a year now to remedy their breach.

[49] A material consideration in this matter is that of the evidential onus. Provided the procedural requirements have been met, the applicants are entitled to approach this court on the basis of ownership and the respondents' unlawful occupation. Unless the respondents oppose and disclose circumstances relevant to the eviction order, the applicants, in principle, would be entitled to an order for eviction. The relevant circumstances are without fail facts within the exclusive knowledge of the respondents and it therefore cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.[7]

[50] Also, the respondents were legally represented throughout the proceedings. They were afforded a second bite at the proverbial cherry by the filing of a supplementary affidavit where they set out their personal

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7 Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 193 (SCA).

circumstances. The respondents were no doubt assisted in preparing the supplementary answering papers and counsel was instructed to prepare heads of argument and to appear in court on their behalf. I have no doubt that the respondents would have been advised of the factual allegations they were required to make and the documentary evidence he had to furnish in order to discharge the evidentiary onus. I therefore accept that the best possible and available evidence was placed before the court.

[51] On the facts, all of the respondents earn an income or are married and have the financial support of a spouse or live with a family member who generate and income. The respondents will therefore not be homeless if evicted and would be in a position to financially afford alternative accommodation. For this reason also the intervention or a report from the City of Johannesburg is not required.

[52] Therefore, the only consideration is what period of time would be regarded as just and equitable to afford the respondents to vacate the property.

[53] In arriving at a just and equitable date upon which the respondents should vacate the property, I have taken the following facts into consideration: -

[a] The respondents and their families have been occupying the property for a number of years;

[b] The lease agreements were cancelled;

[c] The respondents earn income, but have dependents;

[d] Save for the first respondent's brother who does not seem to live at the property, none of the occupants are disabled;

[e] The respondents resorted to self-help and bypassed the electric metres installed by the applicants. In doing so, the municipal account is increasing day-by-day.

[f] The applicants continue to suffer damages as a result of the unlawful occupation, the non-payment of rental and the increase in utility services which similarly remain unpaid, as well as its inability to lease the property to a paying tenant;

[g] There are various properties within the area available for rental at a suitable rental rate.

[54] In the premises, having considered the factors advanced by both parties, I find that a period of 30 (thirty) calendar days afforded to the respondents to vacate the property, would be just and equitable.

THE DISASTER MANAGEMENT ACT, 2002

[55] Ordinarily, and having considered all the relevant factors, the determination of a just and equitable date upon which upon which the respondents are to vacate the property, would be the end of the matter. Nowadays, the position has been complicated by the onset of the worldwide COVID-19 pandemic. Various restrictions have been imposed upon residential evictions in terms of the Regulations issued under the Disaster Management Act, 2002.

[56] Since the hearing of this application, and due to a surge in infections, the country was moved to adjusted alert level 4 on 25 June 2021 and thereafter to adjusted alert level 3 on 25 July 2021.

[57] In Rathabeng Properties (Pty) Limited v Mohlaoli[8] this Court had occasion to consider the impact of the lockdown regulations on evictions. I agree with the Court's reasoning and therefore consider this judgment as binding on me.

[58] Under the present Regulations for adjusted level 3 a curfew is in place which requires persons to return to their residence by a specific time, otherwise risk being arrested.[9]

[59] Some assistance can be gleaned from a comparison of the Regulations in relation to each alert level provided for in the Regulations that were published on 29 April 2020[10] and which have been amended from time to time, the most recent amendment in relation to the hearing date being on 25 July 2021 which substituted Chapter 4 to provide for an "*Adjusted Alert Level 3*".

[60] Chapter 3 of the Regulations provides for alert level 4 and in regulation 19 provides for a *'prohibition on evictions'* as follows:

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8 2021 JDR 0275 (GJ)

9 Regulation 33; GN 650 and 651 of GG 44895

10 GNR 480 of GG43258, 29 April 2020.

"A competent court may grant an order for the eviction of any person from land or a home in terms of the provisions of the Extension of Security of Tenure Act, 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998: Provided that any order of eviction shall be stayed and suspended until the last day [sic] Alert Level 4, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 4 period." (my emphasis)

[61] This prohibition, as also found in Rathabeng, is clear enough in providing that such order of eviction as may be granted by a court shall be stayed and suspended until the end of Alert Level 4, unless the court decides that it is not just and equitable to so stay and suspend the order. The stay and suspension are linked to the end of Alert Level 4.[11] The severity of COVID-19 was sufficient that the Minister of Cooperative Governance and Traditional Affairs, in consultation with the relevant Cabinet members, promulgated a stay and suspension of an eviction order as the default position i.e. unless the court ordered otherwise.

[62] Chapter 4 of the Regulations, which introduced alert level 3 with effect from 1 June 2020 provided in regulation 36 that a person may not be evicted from his or her land or home during the period of Alert Level 3 period, however a competent court may grant an order for the eviction of a person from his or her land or home in terms of the provisions of the

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[11] See Anchorprops 31 (Pty) Ltd v Levin [2020] ZAGPJHC 183 (28 May 2020), para 40 as an example of the application of regulation 19.

Extension of Security of Tenure Act, 1997 (Act 62 of 1997) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998), provided that an order of eviction may be stayed and suspended until the last day of Alert Level 3 period, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 3 period.

[63] The default position under adjusted alert level 3 appears to be that a person may not be evicted from his home during the period of adjusted alert level 3, unless the court decides that it is not just and equitable to so stay and suspend the order.

[64] The introduction of Chapter 5 into the regulations providing for Alert Level 2, provides for more extensive regulations. The relevant regulation, Regulation 53, is no longer headed *"Prohibition on evictions"* but rather *"Eviction and demolition of places of residence"* and reads:

> *"53. Eviction and demolition of places of residence.— (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.*
>
> *(2) A competent court **may** suspend or stay any order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to—*
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> *(a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;*
>
> *(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these regulations;*
>
> *(c) the impact of the disaster on the parties;*
>
> *(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the person who will be subject to the order;*

(e) whether any affected person has been prejudiced in his or her ability to access legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including, but not limited to, payment arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing any application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of any emergency accommodation or quarantine or isolation facilities pursuant to these Regulations." (my emphasis)

[65] Ultimately the power whether to suspend or stay the eviction order remains discretionary.

[66] As the court stated in Rathabeng common sense should compel the conclusion that the restrictions provided for in Levels 1 and 2 should be less onerous than those for Level 3 and 4 where the risks posed by the COVID-19 pandemic are less than they would be under Level 3.

[67] Judicial notice in my view can be taken of the fact that since the 'third wave' of the pandemic arrived in South Africa, there has been some decline in new infections and that Government is making every effort to ensure that vaccinations are administered at a rapid pace. Nonetheless one cannot ignore the highly infectious Delta variant of the corona virus either.

[68] Based upon such relevant factors I am of the view that it would be just

and equitable to stay or suspend the eviction order until after the end of adjusted level 3. This means that the respondents and other occupants of the property will have two weeks after the end of adjusted level 3 to vacate the property, failing which the eviction order may be carried out a further two weeks thereafter. This effectively affords the respondents and other occupants a month to vacate the property once the present adjusted level 3 ends.

[69] The stay of the eviction order shall be a condition as envisaged in terms of section 4(12) of PIE, which will enable either of the parties to approach the court in terms of that subsection, on good cause shown, for a variation of the eviction order. This allows for the exigencies that may arise, such as a resurgence in the spread of the COVID-19 virus. "*The regulations themselves are in a state of flux and therefore too an order of suspension cannot be so cast in stone that it cannot be revisited should it be necessary to do so if a change in circumstances so requires.*"[12]

[70] As far as the question of costs is concerned, I find no special circumstances urging me to deviate from the normal principle that costs should follow the result.

ORDER

I therefore make the following order: -

[1] The first to fifth respondents and any person occupying through them the immovable property situated at [….], Johannesburg ("*the property*"), shall

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12 Rhatabeng par. 62

vacate the property within 30 (thirty) calendar days from date of service of this order on the first to fifth respondents.

[2] On condition, as envisaged in section 4(12) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, that the present adjusted level 3 under the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 ("the Regulations") has ended, the first to fifth respondents, and all those that occupy through, by or under them are ordered to vacate the property within fourteen days on the condition being fulfilled.

[3] The sheriff and/or deputy sheriff, assisted by such persons as he or she requires including the South African Police Services, are authorised and directed to give effect to paragraphs 1 and 2 above, including removing from the property the first to fifth respondents and any other occupants and/or their belongings, no earlier after the fourteen days after the period specified in paragraph 2 above, in the event the property is not vacated within the period specified in paragraph 2 above.

[4] The first to fifth respondents shall pay the costs of the application, jointly and severally, the one paying the others to be absolved.

F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING: **28 APRIL 2021**

DATE OF JUDGMENT: **17 AUGUST 2021**

APPEARANCES:

On behalf of applicants: Attorney C M Laurent
SSLR Incorporated
Cell: 076-478-2912
claire@sslr.co.za

On behalf of respondents: Adv N Sibanyoni
076-599-3529

Instructed by: Seloane Vincent Attorneys
(010) 109-6301
vincent@seloaneattorneys.co.za