IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20827/2008

In the matter of:

VENDOMATIC (PTY) LTD **Applicant**

and

JT INTERNATIONAL SOUTH AFRICA (PTY) LTD **Respondent**

JUDGMENT DELIVERED ON 1 JULY 2009

HJ ERASMUS, J:

Introduction

[1] The applicant seeks final interdictory relief restraining the respondent from approaching, inducing or persuading what are described in the papers as the applicant's venue owners, in order to secure the installation at the venues in question of the respondent's products, in breach of an exclusivity provision contained in the applicant's agreements with the venue owners.

[2] The applicant company is one of several companies which are utilised for the conduct and operation of a family business started by Mr A Zelezniak some 18 years ago. In recent years Mr Zelezniak caused the operation of the business to be housed in different companies. These are referred to in the founding papers as forming part of the Vendomatic "group" or "business".

[3] The Vendomatic business operates as follows: The applicant enters into agreements with the owners or operators ("the venue owners") of restaurants, clubs, pubs and the like, permitting the installation of cigarette vending machines or similar devices ("the machines") at the premises in question. The venue agreements are typically for a three year term subject to a further period of three years in the absence of the venue owner giving written notification as prescribed. The venue owner receives a payment, styled a commission, calculated either on the basis of a flat monthly rate or (more commonly) on the basis of the volume of cigarettes sold from the machines in each month. The Vendomatic group derives income from cigarette sales from the machines and from what it refers to as a distribution fee, paid by British American Tobacco SA (Pty) Ltd ("BAT") to the applicant for having BAT products identified and displayed on the machines. The applicant also had an agreement with the respondent whereby the respondent similarly paid the applicant a distribution fee in respect of the respondent's products housed and sold from the applicant's machines. This agreement was terminated at the end of May 2007 at the instance of the respondent.

[4] The present application is directed towards the protection of the applicant's contractual rights as embodied in the venue agreements. The

applicant contends that its contractual rights are of considerable value and that their erosion will cause the applicant significant damage.

[5] BAT enjoys a substantial market share which is considerably larger than that of the respondent. The respondent lodged a complaint against BAT with the Competition Commission (established in terms of the Competition Act 89 of 1998). The complaint was referred to the Competition Tribunal for determination. The applicant says that it was as a result of the proceedings before the Competition Tribunal that the respondent, to the extent that it did not already have such knowledge, obtained full knowledge of the nature of the Vendomatic business, the nature of the legal relationships with the venue owners and BAT, and the terms of the venue agreements.

[6] The applicant further contends that the respondent took aggressive action to expand its market share by approaching venue owners and inducing and persuading them to stock and sell the respondent's product on their premises, in contravention of the venue agreements. On 28 November 2008 the applicant's attorneys addressed a letter in the following terms to the respondent:

> **UNLAWFUL INDUCEMENT TO COMMIT A BREACH OF CONTRACT**
>
> We represent Vendomatic (Proprietary) Limited. Our client is the proprietor of cigarette vending machines installed in venues throughout the Western Cape and the Eastern Cape.
>
> Our client's installation of cigarette vending machines is pursuant to a standard contract with venue owners. In terms of the standard contract, our client has the sole and exclusive right to sell cigarettes on the premises.

You are well aware of our client's standard contract. At the very least, you became aware of its terms as a result of the proceedings involving British American Tobacco South Africa (Proprietary) Limited and yourselves before the Competition Tribunal, which proceedings have been ongoing for at least two years and have not yet been completed. Our client's standard contract was dealt with in evidence before the Competition Tribunal.

We are instructed that our client has recently discovered that you have been approaching venue owners who have contracts with our client and have been inducing them to stock and sell your cigarettes on their premises. Inducements, so we are advised, include providing free cigarettes to the venue owners and cash payments.

In doing so, you have been inducing such venue owners to commit a breach of their contract with our client. You have accordingly intentionally interfered with our client's contractual relationship with such owners. Your actions in this regard are ongoing.

Unless we receive an unequivocal undertaking from you within five days of date hereof to cease your intentional interference as aforesaid, we are instructed to institute proceedings urgently to interdict you from continuing with your unlawful conduct.

The letter elicited the following response from the respondent:

RE : ALLEGED UNLAWFUL INDUCEMENTS

We shall not be responding to all your client's allegations and our failure to do so should not be construed as an admission.

We deny engaging in any unlawful conduct vis-à-vis you client. If your client feels that its contract(s) with venue owners has been breached, then any

> remedies are required to be enforced against such venue owners. Our offices have no contractual relationship with your client.
>
> If your client proceeds with urgent proceedings, we shall vigorously oppose same and seek an appropriate costs order. We fail to see how this matter qualifies as urgent.

[7] The applicant launched its application for urgent interdictory relief on 15 December 2008. The respondent filed answering papers on 19 December 2008; the applicant filed its replying papers on 22 December 2008. The matter was argued before Davis J who on 24 December 2008, following the terms of the Notice of Motion, made the following order:

> That a rule nisi is issued calling upon the respondent to show cause as to why an order should not be made on 9 February 2009 as follows:
>
> 1. Interdicting and restraining the respondent from approaching, inducing or persuading the applicant's venue owners in order to secure the installation at the venues in question of the respondent's over-the-counter units or with a view to securing any right or arrangement for the distribution of the respondent's products at the venues in question.
>
> 2. Interdicting respondent from interfering in any way with the applicant's contractual arrangements with its venue owners.
>
> 3. Paragraphs 1 and 2 shall operate as interim order pending the return date of the rule.
>
> 4. Respondent is to pay the applicant' costs.

[8] On 9 February 2009 the matter was by agreement between the parties postponed for hearing in the Fourth Division on 11 May 2009 and

the rule *nisi* granted on 24 December 2008 was extended to that date. Provision was also made for a time-table for the filing of further answering and replying affidavits, and the filing of heads of argument. Lengthy supplementary answering and replying affidavits were in due course filed: the respondent's supplementary answering affidavit with annexures runs to 341 pages; the supplementary replying affidavit of the applicant with annexures runs to a modest 104 pages.

The founding papers

[9] In its founding papers, the applicant alleges that it has concluded agreements with venue owners which gave it the "sole and exclusive right to sell cigarettes on the premises", and attached a copy of a "typical venue agreement". The applicant thereafter refers to seven cases as –

> ..... examples of the Respondent's unlawful interference with the Applicant's contractual rights.

The applicant avers that the respondent's conduct in relation to the seven venue owners in question –

> ..... constitutes a brazen, intentional and wrongful interference with the Applicant's contractual arrangements with the venue owners in question.

[10] In its answering affidavit, the respondent raised preliminary issues relating to urgency and joinder, and further submitted that the applicant's case is in essence premised on inadmissible hearsay evidence. The respondent says that the applicant has not joined any of the venue owners to the application, nor has it produced copies of the contracts which relate

to six of the seven venue owners named in its application. The cornerstone of the respondent's defence set out in its answering affidavit is that the –

> ..... application is no more than an unlawful attempt to stifle legitimate competition and as such, constitutes an abuse of this Honourable Court's procedures.

In regard to the seven venue owners singled out in the founding affidavit, the respondent pointed out that (i) one of the venue owners did not have a contract with the applicant (this the applicant admitted); (ii) the agreement in one case may have expired; (iii) the person who signed the agreement in one case was allegedly not authorised to do so, and (iv) in the remaining four cases there was no evidence that the venue owners accepted that they were bound by the exclusivity clause upon which the applicant's case is premised. The respondent states that it was –

> ..... unaware that any of the listed venue owners had exclusivity agreements with the *[applicant]*[1]. The respondent accordingly denies that it has acted unlawfully in any way.

The respondent does not, therefore, deny that it had approached venue owners, but raises a defence of justification: it was indulging in nothing more than legitimate competition and it was, in any event, unaware that any of the listed venue owners had exclusivity agreements with the applicant.

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[1] The affidavit in fact reads "respondent", but this is an obvious error.

[11] In its replying affidavit, the applicant says that the respondent seems not to appreciate the proper nature of the applicant's case; namely, the protection of its contractual rights against unlawful interference by the respondent. The applicant in paragraphs 7 to 9 of its replying affidavit sets out essential nature of its case in the following terms:

> 7. Against this outright refusal to furnish the undertaking sought,[2] the Applicant launched these proceedings, aimed at preventing further unlawful conduct on the part of the Respondent. Hence, the principle *(sic)* focus is not on addressing those wrongs which have already occurred, but is rather on the prevention of the anticipated approaches by the Respondent to those venue owners who have as yet not been induced to commit contractual breach.
>
> 8. In this regard, relief is sought in respect of the Applicant's venue owners as a group. Venue owners are those who have concluded, whether now or in the future, a venue agreement with the Applicant, containing the standard terms, or in the typical form, as referred to in the founding papers. Given that this body changes over time, with fresh venue agreements being concluded and existing venue agreements being terminated on occasion, it is neither necessary nor appropriate that the relief granted should go further than referring to the Applicant's venue owners as a group or body.
>
> 9. In view of the Respondent's contention that it is unaware of those venues which have contracted with the Applicant, I have been advised that it is desirable for the proper efficacy of the relief sought by the Applicant that the interdicts framed in prayers 1 and 2 of the notice of motion should be ordered to operate in respect of any of the Applicant's venue owners subject to the Applicant having given the Respondent written notification that the venue/venue owner in question

[2] The reference is to the applicant's letter of 28 November 2008. See paragraph [7] above.

> is bound by the Applicant's standard venue agreement. The necessary adjustment to the formulation of the interdictory relief sought by the Applicant will be moved for at the hearing of the matter.

The proposed modification of the order sought set out above was, for reasons unknown to me, not embodied in the order Davis J made on 24 December 2008.

[12] In regard to the respondent's complaint in its answering papers that it does not know what the terms of the venue agreements are, the applicant states the following in its replying affidavit:

> 14.3 ..... The contention is, in its essence, disingenuous. The respondent is fully aware that the venue agreements contain standard terms. Those standard terms material for present purposes are referred to in paragraph 7 of the founding papers. Given the extent to which my cross-examination in the Competition Tribunal proceedings focused on the standard terms (in particular, the exclusivity provision), given the Respondent's previous marketing agreements with Vendomatic and given the knowledge and experience of the Respondent's Mr Orin Roesstorff[3] of the standard terms making up the venue agreements, it is quite remarkable effrontery on the part of the Respondent to deny knowledge of "any alleged exclusivity agreements".

I must confess that I find the respondent's disavowal of knowledge of the terms of the venue agreements and of the exclusivity provisions contained therein, to be "an allegation which stretches my credulity".[4]

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[3] Mr Orin Roesstorff is a former employee of the applicant, now in the employ of the respondent.

[4] The phrase is used by Cloete AJ (as he then was) in *Aetiology Today CC t/a Somerset Schools v Van Aswegen and Another* 1992 (1) SA 897 (W) at 813G.

[14] On the battle lines thus drawn, Davis J made his order on 24 December 2008. As indicated above, voluminous supplementary papers were thereafter filed prior to the hearing on 11 May 2009.

The supplementary papers

[15] In the supplementary answering affidavit the Regional Sales Manager of the respondent states:

> 9. I wish to make it quite clear that the respondent re-affirms that it has not acted, and will not act unlawfully. Not only that, but it has not induced or persuaded or attempt to persuade any venue owner who has informed the respondent that he is restrained by an exclusivity agreement with the applicant to breach his or her agreement with the applicant. Furthermore, the respondent has no intention to do this in the future. Moreover, it will not induce or persuade or attempt to induce or persuade any venue owner who the court finds is bound by an agreement pursuant to which the applicant has the exclusive right to install its cigarette vending machines at the venue in respect of the period during which such exclusivity right has application.

This, in effect, amounts to an undertaking in the form which the applicant sought in its letter of 28 November 2008. However, in the next paragraph of the affidavit it is stated:

> 10. This does not mean, however, that there is any basis to interdict the respondent from having contact with venue owners in order to do legitimate business with them, for example to install its cigarette over the counter units at their premises once the applicant's exclusivity arrangement has ended. Yet both the final interdict sought and the interim interdict granted, interdict such lawful conduct.

The applicant's purpose, if I understand its case correctly, has never been to stifle lawful conduct and legitimate competition. From the outset, the applicant's purpose, as reflected in paragraph 2 of the Notice of Motion, was to protect its contractual arrangements with its venue owners against unlawful interference. In paragraph 7 of its replying affidavit,[5] the applicant conceded that the relief sought in paragraph 1 of the Notice of Motion was phrased in too wide terms. At the hearing before me, the applicant proposed the following formulation of paragraph 1 of the Notice of Motion:

> 1. Interdicting the Respondent from inducing or persuading the Applicant's venue owners to act in breach or their venue agreements by (during the currency of such venue agreements):
>
> 1.1 permitting the installation at the venues in question of the Respondent's over-the-counter units;
>
> 1.2 permitting, in any other way, the distribution of the Respondent's product at the venues in question,
>
> subject to the Respondent having been advised (if otherwise not aware thereof) of the venue owner or owners concerned.

[16] In the supplementary answering affidavit, the respondent re-iterates its contention that the venue owners in question should have been joined in the application:

> 11. Furthermore, in the preliminary Answering Affidavit filed on behalf of the respondent on 19 December 2008, the point was taken that at the

[5] Cited above in paragraph [11].

> very least the venue owners in question had to be joined in the application before any rights which directly affected them could be enforced by the applicant. The respondent submits that the point was well taken and remains valid.

In support of this contention, Mr MacWilliam SC, on behalf of the respondent, submitted that before any relief can be granted, the applicant has to prove an enforceable contractual relationship between it and each of its venue owners who it wishes to interdict the respondent from approaching. Within the context of this contention, the issue of joinder is central to the respondent's case. Mr MacWilliam accordingly submitted that the application should be dismissed, and should have been dismissed by Davis J, by reason of the applicant's failure to identify the revenue owners in question by annexing copies of all the venue agreements to the papers, and by reason of the failure to join each venue owner to the application.

[17] In its supplementary answering affidavit, the respondent embarked upon an elaborate "verification exercise". The respondent obtained from the applicant copies of its venue agreements. During the period 5 March 2009 to 10 March 2009 the respondent's three Cape Town based Field Marketing Associates approached as many venues as they could. They were instructed to make enquiries as to the following:

1. Whether the owner/manager was aware of the agreement with the applicant;

2. if so, whether they consider themselves bound by the agreement;

3. if not, why not;

4. were they aware of the terms of the agreement, particularly the exclusivity clause.

A total of 101 venues were visited. Of these, 20 owners/managers were not aware that they had an agreement with the applicant; 38 were not aware that they have an agreement with the applicant which gives it exclusive rights; 4 had not received commissions from the applicant; "a few" wanted the applicant's vending machine removed from their premises, and 8 venues did not have the applicant's vending machines on their premises.

[18] In its supplementary replying affidavit, the applicant points out that "there are approximately 1145 agreements currently being implemented and honoured". To the respondent's verification exercise and the results thereof, the applicant responds as follows:

> The information gathered by *[the field marketing associates]* is of little or no relevance to the matter. The view expressed by certain owners or managers takes the matter no further. If twenty managers and owners were unaware of the existence of the venue agreements, this is of little relevance. Similarly, if particular managers or venue owners claim to be unaware of the exclusivity provision, this does not assist the Respondent. The remaining views and allegations in this paragraph, even if partially accurate (which on the evidence available to the Applicant, as reflected in the accompanying affidavits, appears unlikely) are irrelevant. The Respondent itself makes no attempt top point to the relevance of this material.

[19] The applicant further alleges that the respondent under the guise of the verification exercise continued with its unlawful conduct. Annexed to the supplementary replying affidavit are affidavits from a number of venue owners/managers in which allegations and findings of the respondent's verification exercise are refuted. For example, Mr RD Ely, the Food and Beverage Manager of a hotel in Cape Town, says that was aware of the agreement with the applicant and of the exclusivity provision and adds:

> I, therefore, deny the correctness of the affidavit of Orin *[Roesstorff]* insofar as he claims that I was unaware of the exclusivity clause.

Mr Ely further states –

> On Friday 6 March 2009 I was approached by "Orin", an employee of the Respondent who, notwithstanding the agreement, proposed that the Respondent install an over the counter unit (OTC unit) in our bar section forthwith.

[20] In his Heads of Argument, Mr Rosenberg, SC, who appeared on behalf of the applicant, says that the respondent's verification exercise, which is foundational to the respondent's case, "appears to have been an exercise in irrelevance and futility". The validity of this assertion needs to be evaluated in the light of the applicable law and the nature of the applicant's case.

Interference with contractual relationships

[21] The applicant relies on alleged wrongful interference by the respondent with its contractual rights. In *Van Heerden Neethling*

Unlawful Competition[6] it is said that interference with a contractual relationship is present –

> ..... where a third person's conduct is such that a contracting party does not obtain the performance to which he is entitled from the other party, or where a party's contractual obligations are increased by a third person.

Intentional interference by a third party with the contractual relationship of another in principle constitutes an independent delictual cause of action.[7]

The principle is also applicable within the context of commercial competition. In *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd*[8] Galgut J said:

> The wrongful interference by a third party in another's contractual relationship is closely allied to and, depending on the facts of a given case, is sometimes part of what is commonly called unlawful competition.

[22] The respondent does not deny its approaches to the venue owners set out in the founding papers. Its attempt to justify the approaches on the basis of legitimate competition and lack of knowledge of the exclusivity provisions does not, in all the circumstances alluded to earlier in this judgment, hold water. The respondent, with knowledge of the terms of the venue agreements, embarked on a campaign to increase its market

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[6] Second edition by J Neethling at 245.

[7] *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) at 395D—G; *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) at 384E. In both these cases the question whether there could be liability for the negligent interference with a contractual relationship was left open. See further Neethling *et al Law of Delict* 5th ed 282-284.

[8] 1993 (4) SA 378 (D) at 380E.

share by conduct which amounted to interference in the contractual relationship of the applicant and venue owners. The fact that the respondent wished to compete cannot justify its conduct. In *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd*[9] Corbett J (as he then was) said[10]:

> One of the "rights" comprehended in the general right to carry on a trade is the right to attract custom. Competition by a rival trader necessarily involves an interference with the exercise of this right in that it results, to some degree, in the diversion of such custom to the rival trader. As pointed out in the above-cited passage from *Matthews v Young, supra,*[11] such competition is no in itself unlawful. It may however, be rendered unlawful by the manner in which the rival conducts his trade and a trader damnified thereby is entitled to relief.

The respondent's conduct was in my view unlawful in that the general criterion of reasonableness, the *boni mores* as perceived by the public, will brand the respondent's interference in a rival trader's contractual relationships with third parties as unacceptable.[12]

[23] Moreover, the respondent's verification exercise and the results thereof set out in the supplementary answering affidavit, elicited further examples in the applicant's supplementary replying affidavit of unlawful conduct on the part of the respondent.[13] This interference took place with

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[9] 1968 (1) SA 209 (C).

[10] At 216E.

[11] The reference is to 1922 AD 492 at 507.

[12] See *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) at 384H, 389H—I; Neethling *et al Law of Delict* 5th ed at 284.

[13] Though this was new matter in a replying affidavit, it was a legitimate response to allegations in the answering papers.

knowledge of the terms of the venue agreements and in the face of the terms of the interim order. This conduct on the part of the respondent's representatives cannot but cast doubt on the *bona fides* of the verification exercise.

[24] It is apparent from the papers that there is a threatened invasion or infringement of the applicant's contractual rights which the applicant has every reason to believe will continue. The respondent in its supplementary answering affidavit "reaffirms" its intention not to induce or persuade or attempt to induce or persuade a venue owner to act in breach of his or her agreement with the applicant. The respondent initially refused to give any undertaking clearly because it intended to continue with its conduct in the belief that it was at liberty to do so. The "undertaking" now given in the supplementary answering affidavit is of questionable value. In the supplementary answering affidavit, the respondent reaffirms its intention to continue "having contact with venue owners in order to do legitimate business with them", and launches an attack on the validity of the venue agreements. Moreover, during the course of its verification exercise, it continued its unlawful conduct. Needless to say that such infringement or invasion of rights constitutes proof of reasonably apprehended injury.[14]

[25] The applicant says that given the respondent's conduct in the past, and its refusal to provide the undertaking sought in the letter of 28 November 2008, there is a reasonable apprehension that the respondent will continue with conduct that amounts to wrongful interference with its

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[14] *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at 258A.

contractual relations with others.[15] The applicant is not seeking to interdict the respondent from approaching named venue owners. The relief which is sought in respect of venue owners is sought by reference to them as a group or body. The body of venue owners changes over time with fresh agreements being concluded and existing venue agreements being terminated. I am in respectful agreement with the finding of Davis J that it is neither necessary nor appropriate that the relief granted should go further than referring to the applicant's venue owners as a group or body. There is therefore no reason in logic or law why the venue owners should be joined to the application, especially since the relief sought is to prevent an apprehended wrong. The rights of the venue owners are not affected.

[26] In regard to counsel's submission that the applicant has to prove an enforceable contractual relationship between it and each of its venue owners who it wishes to interdict the respondent from approaching, and that such venue owners should have been joined in the application, the case of *Aetoliogy Today CC t/a Somerset Schools v Van Aswegen and Another*[16] is instructive. The respondents, teachers formerly employed by the applicant at a private school (Somerset), set up a rival school which solicited pupils from Somerset. The applicant applied for an interdict, *inter alia,* to restrain the rival school from inviting, instructing or in any way causing teachers employed by Somerset to solicit or entice pupils enrolled at Somerset to leave it. Cloete AJ (as he then was) found that the inducing of teachers at Somerset, in breach of the contractual obligations they owed to their employer, to solicit pupils for the rival school,

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[15] See *Genwest Batteries (Pty) Ltd v Van der Heyden* 1991 (1) SA 727 (T) at 728I.

[16] 1992 (1) SA 807 (W).

constituted unlawful competition, and granted an interdict. He set out the position as follows:[17]

> It is clear that some teachers in the employ of the applicant went to join the third respondent. It is also clear that the second respondent distributed the pamphlet, annexure C, advertising the third respondent, and that she subsequently joined the employ of the third respondent, and that the third respondent has not distanced itself from these activities. There is therefore a distinct possibility that the third respondent might continue such conduct in the future. Such conduct is in my view unfair competition. It is one thing to solicit pupils from a rival school; it is quite another to use the teachers of the rival school; to do the soliciting. Such teachers would in any event be in breach of the obligations which they owed to their employer.

The order made by the learned Judge in part provides as follows:

> The third respondent is interdicted and restrained from inviting or instructing or in any way causing teachers employed by the applicant to solicit or entice pupils or parents of such pupils, enrolled at the Somerset School, to leave such school.

The order pertains to the teachers as a group and would include teachers employed subsequent to the making of the order.

[27] In my view, the applicant is entitled to an interdict to protect the rights it had obtained arising out of the venue agreements and which might be diminished in value by reason of the respondent's conduct in the past and which it reasonably apprehends may continue.

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[17] At 820D—E.

[28] I make the following order:

1. The Respondent is interdicted from inducing or persuading the Applicant's venue owners to act in breach of their venue agreements by (during the currency of such venue agreements):

   1.1 permitting the installation at the venues in question of the Respondent's over-the-counter units;

   1.2 permitting, in any other way, the distribution of the Respondent's product at the venues in question,

   subject to the Respondent having been advised (if otherwise not aware thereof) of the venue owner or owners concerned.

2. The Respondent is interdicted from interfering in any way with the applicant's contractual arrangements with its venue owners.

3. Respondent must pay the applicant' costs.

HJ ERASMUS, J