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

Reportable

CASE NO: 11289/2014

In the matter between:

SPEAKER OF THE BITOU MUNICIPAL COUNCIL	Applicant

And

MPAKAMISI MAC MBALI	First Respondent
HILDA PLAATJIES	Second Respondent
THELMA BESANA	Third Respondent
SANDISO GCABAYI	Fourth Respondent
NOLAN STUURMAN	Fifth Respondent
MONICA SEYISI	Sixth Respondent
ADAM VAN RHYNER	Seventh Respondent
CONGRESS OF THE PEOPLE (COPE)	Eight Respondent
BITOU MUNICIPALITY	Ninth Respondent
MUNICIPAL MANAGER OF THE BITOU MUNICIPALITY	Tenth Respondent
MEMORY BOOYSEN	Eleventh Respondent

And in the counter application between:

MPAKAMISI MAC MBALI	First Applicant
HILDA PLAATJIES	Second Applicant
THELMA BESANA	Third Applicant
SANDISO GCABAYI	Fourth Applicant
NOLAN STUURMAN	Fifth Applicant
MONICA SEYISI	Sixth Applicant
ADAM VAN RHYNER	Seventh Applicant

and

SPEAKER OF THE BITOU MUNICIPAL COUNCIL	First Respondent
MUNICIPAL MANAGER OF THE BITOU MUNICIPALITY	Second Respondent
BITOU MUNICIPALITY	Third Respondent
CONGRESS OF THE PEOPLE (COPE)	Fourth Respondent
INDEPENDENT ELECTORAL COMMISSION	Fifth Respondent
ROMEO KOEBERG	Sixth Respondent
EXECUTIVE MAYOR OF BITOU MUNICIPALITY	Seventh Respondent

JUDGMENT: 26 August 2014

DAVIS J

Introduction

[1] When should courts be drawn in to what are essentially political disputes? What is the demarcation between those forms of political disputes which are more appropriately resolved within the political domain as opposed to traditional intervention?

[2] These questions have increasingly vexed our courts as is evident by the comments made by Jafta J in **Mazibuko NO v Sisulu NNO** 2013 (6) SA 249 (CC) at para 83. Manifestly the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution') majestically asserts that all exercises of public power can only be legitimate when they are lawful. But can this doctrine be stretched so far as to blur distinctions between political warfare and the legitimate concerns with which courts are traditionally concerned?

[3] This application throws these questions into sharp relief. In the main application, the applicant (first respondent in the counter application) sought to prevent respondents (applicants in the counter application) from holding what the former contend to be an unlawful meeting on 1 July 2014 for the purposes of considering a motion of no confidence in certain political office bearers of Bitou Municipal Council. This application was set down for hearing on 30 June 2014. When the alleged anticipated council meeting did not transpire Rogers J ordered that the main application be postponed *sine die* and recorded that the respondents intended to bring an urgent counter application. That application was launched on 2 July 2014. In essence, the respondent sought a court to compel:

> 'The Speaker to convene a meeting of the Bitou Municipal Council (the "Council"), on Monday, 28 July, pursuant to applicants' request of 20 June in terms of section 29 of the Local Government Municipal Structures Act No. 117 of 1998 (the "Structures Act").'

[4] When this application came before Gamble J, a dispute arose regarding the urgency of this counter application and the failure of the applicants in the counter application to join sixth respondent (Koeberg) and fifth respondent (the Independent Electoral Commission). Accordingly, the counter application was further postponed to 29 July 2014 and thereafter to 13 August 2014.

The main application

[5] It is common cause that the main application has become moot and that the only issue before this court concerns the costs with regard to this application. The background to this application is however relevant as well to the counter application. It is common cause that the Bitou Municipal Council ('the council') consists of

thirteen seats of which the Democratic Alliance (DA) holds six seats, the African National Congress (ANC) holds six seats and the Congress for the People (COPE) one seat. It appears that DA and COPE formed a coalition and took control of the council after the last local government election. It also appears that the COPE councillor did not adhere to the coalition agreement; hence it is common cause that on 20 June 2014 the ANC councillors together with the COPE councillor, that is seven members of the council submitted a written request to the applicant calling upon her to convene a meeting of the council for the purposes of considering the motion of no confidence in the office bearers of the council. The Speaker refused to convene the meeting on the basis that she averred that the respondents had failed to comply with the provisions of s 33(2) of the Council's Rules of Order and that the motion of no confidence was not properly motivated, and had not been delivered to the Municipal Manager at least six working days prior to the date of the requested meeting. There are further questions raised by the Speaker concerning decisions of COPE regarding Mr van Rhyner (the COPE representative who is seventh respondent in the main application) to hold office as a councillor and / or to exercise the functions at his office. According to the Speaker it was 'clearly preferable that clarity be obtained regarding the status of Councillor van Rhyner before such a meeting is to be held.'

[6] The Speaker alleged that she feared that the respondents would take the law into their own hands and call the meeting she had refused to convene. What appears to be important with regard to the motivation for the main application was an exchange of emails. Mr Hardy Mills, on 27 June 2014, wrote on behalf of the respondents to the first applicant in the following terms:

'We await the written confirmation requested above in kind anticipation and wish to state that should for some or other reason the meeting not be convened for Tuesday our clients will act in terms of Rule 13.4 of the Rules Order and conduct a meeting as such.'

To this Ms Harker on behalf of the Speaker replied:

'Finally, our client is deeply concerned about what appears to be a threat in the last paragraph of your letter to resort to self-help by conducting a meeting without our client's consent and in her absence. We fail to understand the relevance of s 13 (4) of the Rules of Order. Counsel has considered this section and advised out client that it is irrelevant. In the circumstances of the present matter where the question is whether the notice to the Speaker on behalf of your clients and Mr van Rhyner, is proper. On the facts currently at our client's disposal, the request does not meet the requirements of the law.

Our client summarises that your clients and Mr van Rhyner will not bother too much about the legality of their notice and will proceed to hold a meeting on 1 July 2014, with or without the Speaker and other members of Council. At such a meeting, they will then purport to pass motions of no confidence in our client and the Executive Mayor and replace them with their own representatives, which will be followed by an attempt to physically, and, if necessary, violently, remove our client and the Executive Mayor from their offices. Thereafter, our client fears, an attempt will be made to get access to municipal coffers in order to fund litigation to defend what will, in effect, be a coup d'etat at local government level.

In the circumstances, we are instructed to request your clients' undertaking, by no later than 10h00, tomorrow, 30 June 2014, that they will not proceed to hold a meeting on 1 July 2014. If no such undertaking is received, our client may have no

alternative by to launch urgent High Court proceedings aimed at interdicting and preventing your client from executing the coup d'etat.'

Mr Mills replied on 30 June 2014 in which he stated:

'My client will comply at all times to the legislation prescribe in these procedures, the rule of law, as well as the democratic principles championed by the Constitution of South Africa. In return my client however expects the same conduct from your client ... Kindly give us the above undertaking before 14h00 today failure by which we will be left with no alternative but to approach the court on an urgent basis.'

[7] Mr De Waal, who appeared together with Mr Joubert on behalf of the applicant, submitted that this undertaking did not say that the meeting which the applicants sought to prevent would not proceed. In his view, read with the earlier email, the response could be interpreted to mean that the ANC councillors together with Mr van Rhyner would proceed with the meeting in terms of s 13.4 of the Rules of Order, if they considered that they were entitled to do so in law. Mr De Waal referred to photographs placed in the record which were taken on the morning of 1 July 2014 at the office of the Municipal Buildings and which showed members of the public converging on the building in anticipation of the meeting which they believed would take place at 10h00. Thus, although first applicant did not proceed with her application on 1 July 2014 when it became clear that the meeting did not take place she was, in her view, fully entitled to bring the application and was therefore entitled to her costs.

[8] There is some merit in this line of argument but I cannot discount the point made by Mr Vermeulen, who appeared together with Ms Ferreira on behalf of the respondent that Mr Mills' email indicated that the chosen course of action by the respondents was to proceed to court to compel a meeting to be held. For these reasons therefore, it does not appear to me that the argument that respondent were bent on taking the law into their own hands was justified. Hence it is not appropriate to order costs in this application which has now become moot.

[9] I turn therefore to deal with the counter application.

Counter application

[10] Before dealing with the contested aspect of the counter application, it is advisable to deal with those components of the relief which affect Mr van Rhyner, the seventh applicant in the counter application. I do so because much of the relief sought relating to the seventh applicant affects the fourth respondent, COPE, the fifth respondent (IEC), both of whom have chosen not to oppose the relief so sought. Briefly to the extent that it illuminates the nature of this relief the following facts are relevant: A letter generated by the Regional Secretary of COPE at George, Mr Nkosinkulu which was addressed to fifth respondent on 18 June 2014 advised that Mr van Rhyner had vacated office following 'a restructuring of the organisation' and that Mr Romeo Koeberg had been nominated to fill the vacancy (sixth respondent who also does not oppose these proceedings). On 24 June 2014, COPE in the Bitou Zonal Structure requested the first respondent in these proceedings together with the second respondent to ignore this instruction as the purported declaration and filling of the alleged vacancy was unlawful and in contravention of the

Constitution of COPE. A further letter of 25 June 2014 was generated from COPE's Western Cape secretary Mr Mjonondwana informing Mr van Rhyner that, as a result of his support of the ANC 's motion of no confidence, he was 'suspended with immediate effect from taking part in any council and COPE activities pending disciplinary processes of which he will be notified in due course.'

[11] A further letter from the Western Cape secretary of COPE Mr Xolela, confirmed that, at a meeting on 28 June 2014, a decision had been taken to summarily suspend Mr van Rhyner. This letter was then sent to second respondent by way of email on 29 June 2011 and, on the basis of this letter, second respondent purported to declare a vacancy in respect of Mr van Rhyner's seat.

[12] In correspondence addressed to both COPE and the IEC on 30 June 2014 applicant's attorney Mr Mills objected to the lawfulness of the summary expulsion on the basis, inter alia, that the constitution of COPE conferred disciplinary powers on its National Congress Committee exclusively. Accordingly, the Cape Secretariat had no authority to summary expel Mr van Rhyner. In response thereto the Cape Secretariat advised that the decision to expel Mr van Rhyner summarily was 'nullified... in favour of affording him a fair chance to present himself' in its disciplinary process.

[13] As a result, Mr Mills requested second respondent to withdraw his declaration of a vacancy in respect of Mr van Rhyner's seat and a further request was made to the Chief Electoral officer of the Western Cape for an undertaking that

no purported vacancy would be filled. Once this undertaking was not given within the specified period of ten working days, the counter application was instituted.

[14] In an affidavit of the 03 July 2014 Mr Mjonondwana the Provincial Secretary of COPE in the Western Cape confirmed that the current position is that that letter of expulsion has in the meantime been withdrawn and 'Councillor van Rhyner will be given an opportunity to present himself in a disciplinary process.' He warned that with regard to a disciplinary process that would be undertaken 'whilst no prediction can be made regarding the outcome of the disciplinary process, the charges are serious and Councillor van Rhyner certainly faces dire consequences including the possibility of expulsion if found to have contravened ...'

[15] Although not strictly necessary for determining this component of the relief sought, I am advised that the disciplinary hearing has been postponed on a number of occasions and that little progress has so far been made in this regard. However, given this evidence and the non-opposition by both fourth and fifth respondents, the relief sought by the applicants insofar as van Rhyner is concerned stands to be granted.

[16] I turn then to deal with the disputed component of the relief. This, as I have indicated, concerns an order directing the first respondent to convening a meeting of the Municipal Council of the Bitou Municipality, in terms of the amended notice of motion, on the 18th September 2014, for the purposes of considering the applicant's motion of no confidence of the first respondent.

[17] On 20 June 2014 first respondent's office received a request to convene a meeting of the Bitou council on 1 July 2014 which request was signed by the first to seventh applicants. The sole purpose of the request for a meeting was to place motions before the council to remove the speaker, the executive mayor, the deputy executive mayor and thereafter to elect new office bearers. It appears that first respondent became aware of this request on Monday 23 June 2014, although her office has signed for the acceptance of the request on Friday 20 June 2014.

[18] That requests read as follows:

'The majority of the undersigned members of the council of the Municipality of Bitou hereby request that you convene a meeting of council in 1 July of 2014, at 10h00, in accordance with s 29 of the Local Government: Municipal Structures Act (Act No. 117 of 1998) and in terms of Rule 8 (2) of the Rules of Order.

At the meeting the following attached motions will serve before the council:

- Motion of no confidence in the speaker;
- Motion of no confidence in the executive mayor;
- Motion of no confidence in the deputy executive mayor;

Upon acceptance of the above motions, the following attached motions shall serve before council:

- Motion to elect new speaker
- Motion to elect new executive mayor;
- Motion to elect new deputy executive mayor.'

[19] On 27 June 2014 first respondent received a second request. The request was in a similar form to the earlier request but this time a letter dated 26 June 2014

requested that first respondent convene a meeting on 27 June 2014. On that day Mr Mills, attorney for the applicants generated an email in which he stated that which he was acting for the "ANC caucus" and 'conceded (in respect of the second request) that proper notice required by the applicable legislation was not given and that motions of no confidence could be legally refused by the speaker'. Accordingly it appears to be common cause that the second request was then cancelled and Mr Mills attempted to revive the earlier request on 20 June 2014 for the meeting to be held on 1 July 2014.

[20] First respondent adopted the approach in her affidavit that when she became aware of the first request, she had already received a letter from COPE's regional structure of 18 June 2014 in which the latter had stated that Mr Koeberg had been 'nominated to fill the vacancy which occurred with the recall of Mr Adam van Rhyner due to the restructuring of the organisation of COPE councillor in Bitou Municipality'. She accepts that, shortly thereafter on 24 and 25 June 2014 as I have already indicated earlier in this judgment, she received further communications from COPE which appeared to contradict the instruction that Mr van Rhyner had been replaced by Mr Koeberg. She then writes as follows:

> 'At this stage, I wanted to obtain legal advice on what to do. To my mind, the status of van Rhyner, who is a proportional list representative of COPE, was unclear. Of course, if van Rhyner lost his membership of COPE then, by operation of s 27 (c) of the Structures Act, he ceased to be a Councillor. If van Rhyner is no longer a councillor, then the request for the meeting was not supported by a majority of the Councillors. Also, I wanted to find out what to make of the "suspension" of van Rhyner and the instruction that he may not participate in any council and COPE activities pending disciplinary proceedings.'

Insofar as the second request was concerned, she appears to have taken the same approach which was adopted by Mr Mills, namely that the second request was legally defective and accordingly she did not have to react positively thereto.

[21] Mr Vermeulen submitted however that where the applicant's constitute a majority of counsellors (at the time of the first request seven out of the thirteen councillors signed the letter) the Speaker is enjoined to convene a meeting in terms of s 29(1) of the Local Government : Municipal Structures Act 117 of 1998 ('the Structures Act'). According to Mr Vermeulen, once this requirement was satisfied the Speaker had no discretion to refuse to convene a meeting, even if the applicants had not complied with the provisions of Rule 33(2) of the Council's Rules of Order which reads thus:

> '33. Notices of motions
>
> (1) The Speaker may not accept any motion except a motion of exigency or a motion of course unless notice thereof has been given in terms of subsection (2).
>
> (2) Every notice of intention by a member to introduce a motion shall be in writing, motivated, signed and dated and delivered to the municipal manager at least six working days before the date of the meeting on which it is intended to be introduced.'

[22] Even if the first respondent held *bona fide* concerns regarding the motivations of the proposed motion or the applicants' failure to notify the second respondent of the intention to propose the motion, she was not authorised to ignore her duty in terms of s 29(1) of the Structures Act. To the extent that first respondent further relied upon Rule 33(2), Mr Vermeulen submitted that motions of no

confidence are by their very nature urgent. Accordingly, the first respondent is authorised to accept motions of exigency under Rule 33(1) notwithstanding noncompliance with Rule 33(2). Furthermore, these motions are by their nature political decisions. They therefore do not need to be motivated with the same level of detail as may be required of ordinary motions. Further, Mr Vermeulen submitted that the Rules regarding the introduction of a motion in the normal cause could not trump a statutory provision requiring the first respondent to convene a meeting upon the request of the majority of councillors. The wording of section 29(1) was clear: the Speaker "must convene a meeting at a time set out in the request".

[23] This line of argument of Mr Vermeulen is rendered somewhat problematic as a result of the concession by Mr Mills to the effect that the second request was defective and accordingly reliance should be placed on the first request because that request had been submitted pursuant to Rule 33(2). In other words, first respondent, faced with these two requests and the conflicting correspondence from COPE would have had to assume, at best for applicants, that there was no further pursuit of the second request and that the entire basis of the request for a meeting was dependent upon her response to the first request.

[24] Applicants' argument is, in summary, that s 29(1) provides no discretion to a Speaker regarding the holding of a meeting and that Rule 8 governs all meetings, including those designed to debate a motion of no confidence so that there is no requisite time requirement which has to be met reference. This submission needs to be analysed through the prism of the judgment of Moseneke DCJ in **Mazibuko NO v Sisulu MMO** 2013 (6) SA 249 (CC). In this case, the Constitutional Court

was concerned with the inherent urgency of a motion of no confidence in the President of the Republic of South Africa. To this, the Deputy Chief Justice said:

> 'Our approach to the urgency of a motion of no confidence in the President must be coloured by the consideration that the assembly has the constitutional authority to 'determine and control its internal arrangements, proceedings and procedures'. It is unnecessary to go as far as the high court, that a motion of no confidence in the President 'is inherently urgent' and must be debated and voted on in the assembly urgently. It is sufficient to state that the motion must be accorded priority over other motions and business by being scheduled, debated and voted on within a reasonable time given the programme of the assembly. Once sponsored in a manner prescribed by the rules, the assembly must take prompt and reasonable steps to ensure that the motion is scheduled, debated and voted on without undue delay.' Para 66

[25] In contrast to **Mazibuko**, *supra*, the rules in this case appear to provide for a time period of six days. Further, even if a motion of no confidence falls under the concept of a motion of exigency, which appears to mean a motion predicated on an urgent need or demand, which link therefore to a motion of no confidence is doubtful, as the Constitutional Court noted, it would appear that a motion of no confidence must be debated and voted on within a reasonable period, given the program of the legislature or in this case the Council. It would appear that this is the reason for Mr Mills correctly conceding the point about the second request in his email.

[26] It would lead to an absurdity if a request for a motion of no confidence would have to take place on demand. Thus even, if for example, the demand was made

at 15h00 on day one for a meeting to take place at 10h00 on the next morning, no matter the existing nature of the legislative program of the Council, the motion would have to be debated. That is surely not what Moseneke DCJ had in mind when he referred to 'reasonable time' and no 'undue delay'.

[27] There is a further difficulty which confronts applicants, in the event that somehow the first respondent was obliged, notwithstanding the difficulties confronting her with regard to the contradicting information regarding the possible vacancy of Mr van Rhyner's seat and that the second request which appeared to replace the first; that is the argument that the first request remained valid. It appears to be clear from the papers that the first request was not submitted six working days before the date of the meeting on which the motion was intended to be introduced as required by Rule 33(2).

[28] In **Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd** 2004 (1) SA 308 (SCA) the court was required to interpret a provision with regard to the submission of application forms; in particular the public notice provided 'the application form much reach one of the following addresses before the stipulated closing date and time... date 27 July 2001.'

[29] Brand JA held at para 31:

> 'As a general principle an administrative authority has no inherent power to condone failure to comply with the peremptory requirement. It only has such power if it has been afforded the discretion to do so.'

The learned judge of appeal then went on to deal with the general principles with regard to a peremptory requirement and said:

> 'The general principle is, of course, that language of a predominantly imperative nature such as 'must' is to be construed as peremptory rather than directly unless there are circumstances which negate this construction...' (para 32)

[30] The words used in the Council's Rule appear to be peremptory on this analysis; that is every notice of intention by a member to introduce a motion shall be in writing, signed, dated and delivered to the Municipal Manager at least six working days before the date of the meeting on which it was intended to be introduced. The purpose for this provision is that the order of business can be properly arranged. Accordingly, strict time limits are set out. There appears to be no discretion for the dates that fall outside those prescribed in the Rule. Thus, as the six day requirement was not met, this failure would form a further obstacle in the way of the applicants being granted the relief they sought.

[31] There is another aspect to this case which requires attention. As noted at the commencement to this judgment, the question raised forcibly by this dispute concerns the boundaries over which courts should cross in order to engage with what on the face of it appears to be a political dispute. In this case what makes the application more disturbing is the following: The reason why the applicants wish to now postpone the meeting, which will determine the outcome of a motion of no confidence, to 18 September 2014, notwithstanding the initial urgency averred in the papers, is that one of the six ANC councillors has subsequently resigned. The resignation necessitates the holding of a by-election. This by-election will take

place on 17 September 2014, according to the submission of counsel in open court. This means, as Mr de Waal correctly noted the entire purpose of a meeting to debate a motion of no confidence now depends upon the outcome of a by-election. If, for example, the DA wins the by-election it will have seven of the thirteen members in the council and a motion of no confidence is then doomed to fail. If the motion of no confidence is heard before 18 September, it is also doomed to fail because there will be six DA councillors, who together with the casting vote from the Speaker would be able to reject such a motion. The crisp question to be asked concerns whether it is appropriate to make any order at this stage, when the postponement is designed by the applicants to determine how the political landscape will lie after the by-election. In my view, this is not a case which requires the intervention of a court at this stage. That respondents attempted to alter the date that they wished the meeting held that is after the by-election illustrates the political pragmatism underlying this application.

[32] Accordingly, given its nature, this case is not one where a court should exercise a discretion in favour of granting any form of relief. Alternative relief is clearly available to the applicants. If, after the by-election, applicants genuinely constitute a majority of councillors, they can simply request another meeting. If first respondent refuses, notwithstanding that the notice has been brought within the framework of Rule 33 (2), the applicants will be free to approach this court for the kind of relief which they have now sought, on their papers duly supplemented.

Costs

[33] There was some debate about the costs of the two postponements of 04 July 2014 and 29 July 2014. On 04 July 2014 it appears that Gamble J, after hearing argument, declined to grant the counter applicants any relief on the basis that the respondents (save for the first respondents) who was the applicant in the main application were not properly before the court. This necessitated further legal work by the applicants in order to ensure that a counter application would be heard. It appears on 29 July 2014 the counter application could not be heard because the applicants had not taken certain steps to ensure that their papers were in order. This failure necessitated a further postponement. The respondents, in the counter application, are clearly entitled to their costs.

[34] Accordingly the following order is made:

1. There is no order as to costs insofar as the application is concerned.
2. The counter application, as contained in prayers 2 and 3 of the notice of motion is dismissed with costs, including the costs of two counsel.
3. The second respondent's decision to declare a vacancy in respect of the seat occupied by the seventh applicant as a proportional representative of the Council, as contemplated in item 18(1)(b), Schedule 1, read together with item 11(1)(b), Schedule 2, of the Structures Act (the "Second Respondent's decision"), is set aside.
4. It is declared that the second respondent's decision is unlawful and of no force and effect.
5. The decision of fourth respondent's regional secretary at George on or about 18 June 2014 to recall seventh applicant, thereby purporting

to create a vacancy in respect of seventh applicant's council seat, and nominating sixth respondent to fill such vacancy, is set aside and declared to be of no force and effect.

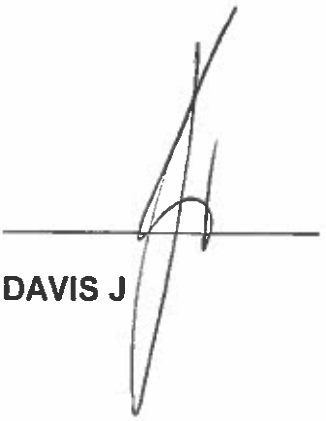
6. The decision of fourth respondent's Congress Provincial Committee (the "CPC"), on or about 25 June 2014 to suspend seventh applicant with immediate effect from taking part in any Council activities or activities of fourth respondent, pending disciplinary proceedings, is set aside and declared to be of no force and effect.

7. The decision of fourth respondent's CPC on or about 28 June 2014 summarily to expel seventh applicant from the party is hereby set aside and declared to be of no force and effect.

8. The decision of fourth respondent's CPC on or about 30 June that seventh applicant remains suspended and is prohibited from "taking part in any activities of council formal and informal as a representative of COPE pending the [disciplinary] process", is hereby set aside and declared to be of no force and effect.

9. The fifth respondent is interdicted and restrained from declaring another member of the fourth respondent ("COPE"), to be elected as a result of seventh applicant's purported recall and/or expulsion referred to in paragraphs 4 and 7 above, as contemplated in terms of s 18(1)(a) and 20(1), Schedule 1, read together with items 11(1)(a) and 13(1), Schedule 2, of the Structures Act.

10. The applicants are to pay the wasted costs of the hearings of 04 July 2014 and 29 July 2014.



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