IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 2010-10-04
SIGNATURE

CASE NUMBER: 70057/09
DATE: 5 October 2010

DFS FLEMINGO SA (PTY) LIMITED
APPLICANT

V

AIRPORTS COMPANY SOUTH AFRICA (PTY) LTD
1st RESPONDENT

BIG FIVE DUTY FREE (PTY) LIMITED
2nd RESPONDENT

THE TENDER BOARD OF ACSA
3rd RESPONDENT

Judgment:
Mabuse J

JUDGMENT

MABUSE J:

1. This is an application by the Applicant to compel the First and Third Respondents to produce for its inspection certain documents referred to in a record filed and to permit the applicant to make copies of such documents and certain ancillary relief. This application is brought under the provisions of Rule 35(12) of the Uniform Rules of Court.

2. The main application by the Applicant is for a review in terms of rule 53 and the reviewing and setting aside of the decision of the Third Respondent to award a tender for the operation Core Duty and Vat Free stores in the international departure and arrival terminals of O.R. Tambo, Cape Town and King Shaka International Airports.

3. Initially the First and Third Respondents had filed their notice of opposition to the application but have since withdrawn such opposition and indicated that they would abide the decision of this court. Consequently, although no relief is sought against it, it is only the Second Respondent that opposes this application. Pending the Review application the Applicant has successfully applied for an interim interdict which prevents the First and Second Respondents from concluding any lease agreement in respect of the said stores at the abovementioned International Airports.

4. The Applicant participated in a tender process for the award of a 10 year lease to the successful tenderer in respect of the Core Duty and Vat Free stores in the international departure and arrival terminals of the O.R. Tambo, Cape Town and King Shaka International Airports. The second respondent was, at the time of the process for the award of the tender, the incumbent and was, at the conclusion of the said tender process, the successful tenderer for the award of the 10 (ten) year lease which would have commenced from March 2010.

5. The Applicant, a private company with limited liability duly registered in terms of the company laws of the Republic of South Africa and having its place of business at 281 Jan Smuts Dunkeld West Centre, Hydepark in Johannesburg, has now launched a review application against the Respondents in which he challenges the First and Third Respondent's decision to award the said tender to the Second Respondent. The Applicant intends supplementing its founding affidavit as it is entitled to in terms of the provisions of Rule 53(4) and this can only be achieved if the Applicant is in possession of the full record of the process in which the Second Respondent became the successful tenderer. Accordingly, the purpose of the current application is to compel the First and Third Respondents to deliver to the Applicant outstanding documents of the complete record which will put it in a better position to augment its founding affidavit and to develop its grounds of review.

6. The history of this matter commenced with the applicant serving a notice in terms of Rule 35(12) on the Respondents on 18 December 2009. In the said notice the Respondent required the First and Third Respondents to produce for inspection, and

to permit it to make copies, of certain documents which have been fully set out in the said notice. In view of the fact that the said notice forms part of the papers I do not deem it necessary to repeat all the documents that have been listed by the Applicant in the said notice. According to the Applicant the said documents listed in the said notice form part of a record forming the subject matter of the review application. These documents are required by the Applicant for the purposes of the review application and are also referred to as part of the record filed on December 2008 but which have not been supplied. At the pain of repetition it is important to know that these documents are referred to as part of the record of the tender proceedings in which the Second Respondent became a successful tenderer. It is also important to know that certain documents which were referred to in paragraph 1.1 to 1.3 of the said notice was supplied to the Applicant on 15 January 2010.

7. On 18 January 2010 the attorneys acting for the Applicant sent a letter to the attorneys acting for the First and Third Respondents in which they acknowledged receipt of the documents that had been served on them on 15 January 2010 and in which furthermore they informed the said attorneys that the record that had been forwarded to them was incomplete. They undertook in the same letter to contact the office of the First and Third Respondents in order to make arrangements for the inspection of the bid proposal. It is clear from the application by the Applicant that the First Respondent had not filed any complete record and as a result the Applicant contended that the First Respondent did not only refuse the Applicant its right in terms of Section 5(1) of the Promotion of Administrative Justice Act No. 3 of 2000 but had also placed the court at disadvantage by reason of the fact that the court did not have a complete record before it and in that situation the court will not be in a position to determine exactly how the administrative action, the award to the tender to the Second Respondent was done.

8. Following the Rule 35(12) notice the Applicant's attorneys sent further correspondence on 8 January 2010 to the First Respondent's attorneys. In the said correspondence the Applicant's attorneys stated as follows:

"In terms of paragraph 1 of (Rule 35(12) notice), we requested the complete bid proposal of the Second Respondent, and indicated certain documents that were omitted from same (without derogating from the generality of our request). Over and above the documents listed in paragraphs 1.1 to 1.10 of the said notice, we point out that from V(10) – Method of operation / Management is incomplete, in that the document

pertaining to customer service philosophy, goals with regard to customer service staff, training programme and uniforms, is not provided, as well as the inventory and cash control systems are not provided.

We request you to furnish us with the omitted documents as referred to in our Rule 35(12) notice dated 18 December 2009, within 10 (ten) court days from date of receipt hereof, failing which we shall proceed with an application to compel."

9. On 14 January 2010 the First Respondent's attorneys addressed a letter to the Applicant's attorneys in which they acknowledged that they had received a letter from the Applicant's attorneys of 13 January 2010 and confirmed that they would forthwith attend to the request contained in the said letter. In addition they requested an indulgence until Wednesday 20 January 2010 to supplement the record. On 15 January 2010 the First Respondent's attorneys furnished the documents requested as per paragraphs 1.1, 1.2 and 1.3 of the notice and invited the Applicant to attend to their offices to inspect the complete bid proposals of the Second Respondent. It is only apposite to mention that the Second Respondent's complete bid proposals constitute part of the review application.

10. In a letter dated 18 January 2010 the Applicant's attorneys informed the First Respondent's attorneys that the record that they had received was still incomplete. Marius van Staden ("Van Staden"), who deposed to the Applicant's founding affidavit, attended upon the office of the First Respondent's attorneys on 18 January 2010 where he pointed out to the First Respondent's attorneys that, in further responding to Rule 35(12) notice of the Applicant. The First Respondent only had regard to the first page of the said notice. He furthermore indicated to the said attorneys that some of the portions of the Second Respondent's bid proposals were not made available, whereupon the First Respondent's attorneys undertook to supplement the record, take into account the second and third pages of the notice in terms of Rule 35(12) and also the letter dated 18 January 2010.

11. On 18 January 2010, that is the very same date on which Van Staden had visited the offices of the First Respondent's attorneys, the Applicant's attorneys wrote a letter confirming the aforementioned visit and also the undertaking made by the First Respondent's attorneys. On 21 January 2010 the Applicant's attorneys wrote a letter to the First Respondent's attorneys in which they complained that the First Respondent's attorneys still had not yet complied with their Rule 35(12) notice dated

18 January 2010 in as much as despite their undertaking as contained in their correspondence of 14 January 2010 that they would do so by 20 January 2010, they had not yet complied with such an undertaking. Once more they threatened that they would approach the court for an order compelling the First Respondent to comply.

12. The First Respondent's attorneys had on 20 January 2010 written a letter to the Applicant's attorneys in which, having referred to the documents requested by the Applicant in terms of Rule 35(12), they indicated that they had requested some of the documents that the Applicant had requested in their correspondence and notice from their client and would accordingly require more time in order to supplement the record. Once more they requested an indulgence in order to collate all the relevant documents properly. In the same letter they indicated that they anticipated that they would be in a position to transmit the outstanding documents and accordingly supplement the record before midweek of the following week. The Applicant's attorneys responded in a letter dated 25 January 2010 and indicated to the First Respondent's attorneys that they would grant them an extension until 27 January 2010 to comply with the Rule 35(12) notice. They furthermore indicated their aversion to granting any further extensions beyond 27 January 2010.

13. On 29 January 2010 the First Respondent's attorneys wrote a letter to the Applicant's attorneys and informed them that they wished to point out that they believed that the Applicant's notice in terms of Rule 35(12) was not the correct rule to employ in the circumstances. In the same letter they informed the Applicant's attorneys that they had sought the consent of the Second Respondent for the disclosure of the documents the Applicant had sought in part 1 of the aforementioned notice and undertook, in the same letter, to advise the Applicant's attorneys about the attitude of the Second Respondent to the disclosure of such documents. They had anticipated that they would revert to by not later than 8 February 2010.

14. On 9 February 2010 the Applicant's attorneys Van Staden spoke telephonically with one Ms Lekwane of the First Respondent's attorneys' office and during the said conversation indicated to her that the First Respondent still had not made available to the Applicant, and had omitted, portions of the record and still had not complied with the demands of Rule 35(12) notice. During the said conversation she undertook to revert to the said Van Staden. It would appear that up to the stage this application to compel was made she had not done so. The Applicant is of the view that, firstly, it is prejudiced by the fact that it does not have the complete record of the proceedings and

furthermore that this court will not be placed in a better position to decide on the matter. It is also of the view that the conduct of the First Respondent is not in the interest of justice.

15. On 19 April 2010 the Applicant then launched an application to compel and in that application sought the following order:

    1. *An order ordering the First and Third Respondents to comply with the Applicant's Rule 35(12) notice dated 18 January 2009, save in so far as paragraphs 1.1, 1.2 and 1.3 thereof are concerned, within 10 days of the service of the order and ordering the First and Third Respondents to pay the costs of the application.*

16. On 22 March 2010 the First and Second Respondents filed their notice of opposition to the Applicant's application to compel and on 8 March 2010 the Second Respondents also filed its notice of intention to oppose the Applicant's interlocutory application to compel.

17. In opposition to the application the Second Respondent has, through one of the directors one Christos Haralampos Harilaou, an affidavit which clearly sets out the grounds on which the Second Applicant opposes the application to compel by the Applicant. In the said affidavit he states that the application by the Applicant is fatally defective in that the provisions of Rule 35(12) do not provide for the bringing of this application nor does the general compelling provision of Rule 35(12) permit the bringing of such an application. He contends in his affidavit that the proper procedure in the event where a party who has been called to discover documents in terms of Rule 35(12) fails to hearken such a notice is by preventing such a party from using the said documents at the hearing of the matter. According to the Second Respondent the bringing of an application to compel the production of documents sought in terms of Rule 35(12) can only be competently brought under and in terms of the provisions of Rule 30A in terms of the Rules of the court. The said Rule 30A of the Uniform Rules of Court states as follows:

    "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other parties may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing complies within 10 days application may or notice be made to the court and the court may make such order thereon as to it deems meet."

18. The second ground on which the Second Respondent objects to the Applicant's application to compel is that Rule 35(12) notice upon which the application is founded is itself incompetent and thus renders the application itself incomplete. The Second Respondent contends that Rule 35(12) notice affords a remedy requiring production of documents referred to in pleadings or affidavits of the party upon whom such notice is given. It is only apposite at this stage to refer to the provisions of Rule 35(12). It states as follows:

"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such documents or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."

19. The Second Respondent applies that on these bases alone, the application to compel should be dismissed with cost by reason of the fact that the documents called for are not referred to in any pleading or affidavit of any of the Respondents.

20. In so far as the merits of the application are concerned, the Second Respondent opposes the application in respect of only three items of the notice which have been set out in paragraph 1.4, 1.5 and 1.6 of the said notice. According to the Second Respondent the aforementioned contested documents are: (a) the proposed minimum and well guaranteed rental and percentage; (b) the Second Respondent's financial statements and sureties; and (c) the Second Respondent's projected annual income and cash flow. The Second Respondent opposes the discovery of the aforementioned documents on the basis that; (a) none of this documents is in any way relevant to any of the grounds of complaint raised by the Applicant in the review application; (b) these documents are confidential to the Second Respondent and there is a very real apprehension of misappropriation of information contained therein if the documentation were to come into the hands of the Applicant whose shareholders are on a worldwide scale competitors GEBR Heinemann Beteilingungs and GmBH ("Heinemann"), who is the shareholder, business associate and supply of the Second

Respondent. In addition paragraph 23.3 of Section 2 (II) of the bid documents obliges the First Respondent to maintain the confidentiality of information designated as confidential by the Second Respondent. The information sought by the Applicant at paragraphs 1.4, 1.5 and 1.6 of its alleged Rule 35(12) notice is therefore confidential information of the Second Respondent and in addition is designated by the Second Respondent as such; and (c) the provisions of the documents particularly those in paragraph 1.4 and 1.6 would be unfair to the Second Respondent and would give the Applicant an unfair advantage in any future tender and in the event that the review application were to succeed and there were to be a retender.

21. According to the Second Respondent the Applicant's review application is founded on five grounds and these are, firstly, the failure of the First Respondent to disclose the Second Respondent's historic turnover figures; secondly, the failure of the Respondent to indicate with particularity how the components of each of the five main criteria will be waited in competing the score for each of the five main criteria; thirdly, the failure of the First Respondent to accord to the Applicant a notional value of the Second Respondent's existing staff of BBBEE proposes; fourthly, the failure of the Second Respondent to give the relative weights of the sub-criteria for the business plan that the tenderers have to submit and that the sub-criteria were themselves confusing and meaningless and, fifthly, the First Respondent's failure to accord the Applicant a score commensurate with the standing and experience of its primary shareholders.

22. The Second Respondent contends that none of the grounds referred to above is in any way relevant to what the Second Respondent proposed as its minimum and annual guaranteed rental and percentage rent to be paid. It contends furthermore that none of these complaints is in any way relevant to the financial statements and sureties of the Applicant; and that none of these criteria is in any way relevant to or has any connection with the Applicant's projected annual income and cash flow. According to the Second Respondent what those documents show is however financial information confidential to it which view is also shared by the Applicant. The Applicant, according to the Second Respondent, is on record to the First Respondent to the effect that it does not request of the First Respondent any financial or confidential information of any ******.

23. The Second Respondent contends that the proposed minimum and well guaranteed rental and percentage would disclose the operating margins of the Second Respondent

and in that manner would enable the Applicant to unfairly obtain a fairly accurate estimate of the Second Respondent's cost price and discount structures negotiated with international suppliers and as negotiated by Heinemann on the Second Respondent's behalf with international suppliers of goods which are commonly and almost universally sold in duty-free shops and around the world including those owned and/or operated by the Applicant's International Shareholders whom:

"Separately, ... have developed strong retail management expertise in major International Airports around the world. DFS operate 58 airport concessions across Asia Pacific, North America and the Middle East including San Francisco, Los Angeles, New York, Abu Dhabi, Mumbai, Singapore, Hong Kong, Auckland, Sidney, etc. Flemingo operates a portfolio of 16 airport concessions across India and Africa including Chennai, Ahmedabad, Trichy, Kolcata, Calicut, Goa, Bangalore, Mangalore, Trivandrum, Jaipur, Amritsav, Burundi, Malawi, Rwanda and Uganda, etc."

24. The origin of the above quote is the Applicant's bid document which for purposes of convenience was attached to the Respondent's affidavits as annexures. The information would also disclose to the Applicant, and in turn its shareholders, the superior bid price which the Second Respondent furnished with the First Respondent in order to win the tender.

25. The Second Respondent's objection to furnish the said information is that the Applicant would be vested with knowledge of the minimum price it would have to bid in order to make a superior competing bid. This can only happen off course if there should be a re-tender process. For the Second Respondent with any subsequent tender the Second Respondent would obviously not be in a position to repeat its bid price but would have to bid higher rental, not merely higher than the rental at which it has successfully won the bid but a rental higher proposed by the Applicant. Similarly the documents that are sought in item 1.6 of the Applicant's projected annual income and cash flow expose the confidential information of operating margins and the Second Respondent's bid price and would in the process give the Applicant an unfair advantage in any future tender process. The Second Respondent holds a view that its financial statements and sureties are not only irrelevant to the Applicant's grounds of complaint but are also confidential to it by reason of the fact that it is a private company. These ******* statements similarly would show margins and profitability which would give the Applicant an unfair advantage over the Second Respondent in any competing future bid. It is for these reasons among others that

the Second Respondent objects and does not consent to the documents referred to in items 1.4, 1.5 and 1.6 being disclosed to the Applicant. With regard to the founding affidavit of Van Staden the Second Respondent denies that items 1.4, 1.5 and 1.6 of the Applicant's notice in terms of Rule 35(12) should form part of the record performing the subject matter of this review application and furthermore that the Applicant requires the said documents for the purposes of the review application.

26. This court is called upon to decide the three objections which were raised by the Second Respondent. These three objections are, firstly, the point in *limine* raised by the Second Respondent in which it contends that the Applicant's application is fatally defective in that the provisions of Rule 35(12) do not provide for the launch of an application of this nature nor do the provisions of Rule 35(7) permit such an application; secondly, the court is called upon to determine whether or not the documents that the Applicant has called for in the aforementioned notice are relevant to the grounds of review as formulated in the pending review application; and thirdly, whether or not such documents are confidential and whether despite the fact that they are confidential they should still be produced.

27. With regard to the point in *limine*, it would appear that the Second Respondent's counsel was correct in his argument that the Applicant should have invoked the provisions of Rule 35(11) and not 35(12). In his argument in an attempt to show that the Applicant has, in terms of Rule of court 53(4), a clear right within seven days thereafter by notice together with affidavits, to amend or add to his notice of motion and to supplement his supporting affidavit, counsel for the Applicant referred the court to the authority of **Pieters v Administrateur Suidwes – Afrika en 'n Andere, 1972(2) SA 220 SWA at p. 228 A-E**. This is the same authority in which the court held that Rule of court 35(11) was in a suitable case also applicable to the applications and without any direction. The said authority dealt with an almost similar situation as the current one. After finding that a record of the proceedings concerned was incomplete, the court held that Rule 35(11) would have been applicable to the application to enforce production of the outstanding parts of the record. It must be noted that while Rule 35(12) deals with the production of documents and tape recordings, Rule 35(11) on the other hand deals with discovery of documents and tape recordings.

28. Accordingly, the Applicant should have approached this matter by way of Rule 35(11) and not Rule 35(12). The remarks by the court in the **Pieters v Administrateur**

Suidwes – Afrika en 'n Andere supra case were followed in **Seale v Van Rooyen N.O. and Others 2008(4) SA 43 at p. 48 paragraph 11**. In dealing with a similar situation as in the Pieters case above, the court stated as follows:

"*Counsel for Seale cavilled at the fact that resolutions of the annual general meeting at which trustees were elected, were not annexed; but had Seale entertained any doubt on this point, he could have obtained those minutes by invoking Rule 35(11) which applies to motion proceedings (**Pieters v Administrateur en Andere**).*"

29. Another reason why counsel for the Second Respondent holds the view that it was inappropriate for the Applicant to invoke the provisions of Rule 35(12), is that Rule 35(12) provides specifically that reference to the document or tape recording that one party seeks the other to produce, not to discover, should have been made in the pleadings or affidavit. What the Rule does is to create a *prima facie* obligation on a party who refers to a document in a pleading or an affidavit to produce such a document one called upon to do so in terms of the sub-rule.

"*In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document, you must produce it. Even more is it so in this case where the implication of paragraphs 19.4 and 19.6 is that, if the NTC had called for and looked at the financial statements of operations it might well have come to a different conclusion.*" See **Magnum Aviation Operations v Chairman, NTC 1984(2) 398 WLD at p. 400 C**. See also **Erasmus v Slomovitz 2 1938 TPD 242 at p. 244**.

30. It is clear that the Applicant requires the First and Third Respondents to produce a record. A record is neither a pleading nor an affidavit. The documents that the Applicant seeks have not been mentioned in an affidavit or a pleading.

31. Finally, on this point, counsel for the Second Respondent argued that, even if the Applicant had followed Rule 35(12) and the Respondents had failed to comply with such a request, the proper procedure in the event of failure to comply with the said notice would have been to invoke the provisions of Rule 30A. I already have referred somewhere hereinabove to the provisions of Rule 30A. According to him Rule 35(12) does not provide for the launch of an Application to compel. On the other hand counsel for the Applicant was adamant, in reply, that the provisions of Rule 35(12) could, in the circumstances of this case, be invoked and that the Applicant was correct to use the said rule. He relied on the authority of the Pieters case supra. The

provisions of Rule 30A apply to a failure by a party to comply with a notice under sub-rule 35(12) despite the fact that the said sub-rule itself provides a sanction for non-compliance.

"On behalf of the Respondents, it was accepted that the wording of Rule 30(5) as it stands, is wide enough to cover a failure to comply with a notice under Rule 35(12). The argument put forward on behalf of the Respondents in this regard was that Rule 30(5) could not be applied to a failure to comply with the notice under Rule 35(12), because of the fact that the latter Rule in itself provides a sanction for non-compliance with a notice given in terms of that Rule. It was submitted that, because sub-rule 35(12) provides for a sanction, there is no room for the application of a further sanction such as is envisaged in Rule 30(5).

32. In support of this argument, counsel for the Respondents relied upon **Norman & Co. (Pty) Ltd. v Hansella Construction Company (Pty) Ltd. 1968(1) SA 503 (T)** contending that "*the framers of the Rules could not have intended Rule 30(5) prior to non-compliance with the provisions of Rule 35(12), in view of the special sanction provide for in the latter Rule. In my view, the argument is not correct. The sanction provided for in Rule 35(12) is in my view, quite different in nature and in fact from the kind of sanction envisaged in Rule 30(5). The sanction of Rule 35(12) is of a negative nature, deem to the fact that the party failing to comply with the notice are not, say with the leave of the court, and view the documents in question, provided that any other party may use such documents. It is a sanction that comes into operation automatically upon non-compliance with the provisions of the Rule. Rule 30(5) on the other hand, operates in an entirely different manner. Under that Rule, a party making a request, or giving notice, as the case may be, to which there is no response by the other party, may give a further notice to the other party that after the lapse of seven days application will be made for an order that the notice or request be complied with or that the claim or defence be struck out, as the case may be. Failing compliance within the seven days mentioned, application may then be made to court and the court may make an appropriate order. That is a positive form of relief provided for and, as I have said, in my view it is quite different from the sanction contained in Rule 35(12).*" See **Moulded Components v Coucourakis and Another 1979(2) SA 457 at p. 459 D- 460 A.** See also **Universal City Studios v Movie Time 1983(4) SA 736 (D) at 746 A** where the court ***** Booysen J stated as follows:

*"I am afraid that the logic which gave rights to the conclusion that this course should be adopted escapes me.. It seems to me quite clear that the most obvious course for a respondent, desiring to contest an application on its merits, to adopt in circumstances where he has given a notice in terms of Rule 35(12) which has not been complied with, is to give notice, in terms of Rule 30(5), that intends, after the lapse of seven days, applying for an order that Rule 35(12) notice be complied with. (**Moulded Components and Rotomoulding South Africa (Pty) Ltd. v Coucourakis and Another 1979(2) SA 457 (W) at 460 H**).*

It is important to know that Rule 30(5) is now Rule 30A.

33. For the reasons which were clearly set out in the argument by counsel for the Second Defendant and with which I agree, I do not agree with the view expressed by counsel for the Applicant. There, is in the circumstances, sufficient authority on which one can rely to come to a conclusion that the Applicant has completely followed a wrong approach in this matter. In the circumstances there is no reason why the point in *limine* raised by the Second Defendant should not be upheld.

34. In view of the fact that the Applicant's application to compel the First and the Third Respondents to comply with its Rule 35(12) notice stood to be dismissed and was in fact dismissed on the point in *limine*, I do not deem it necessary to consider the merits of the Application.

35. Accordingly,

1. The point in *limine* raised by the Second Respondent against the application is upheld.
2. The Applicant's application to compel the First and Third Respondents to comply with the Applicant's Rule 35(12) notice is dismissed with costs.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys:	*Savage, Jooste & Adams Inc.*
Applicant's Counsel:	*Adv. E Labuschagne (SC)*
1st & 3rd Respondent's Attorneys:	*Mkhabela Huntley Adekeye Attorneys*
2nd Respondent's Attorneys:	*Fluxmans Inc.* *c/o Friedland Hart Solomon & Nicolson Attorneys*
2nd Respondent's Counsel:	*Adv. JP Slomowitz (SC)*
Date Heard:	*7 September 2010*
Date of Judgment:	*5 October 2010*