IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: **3974/2022**
Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

In the matter between:

PETER JACQUES VAN WYK (Identity number: [....])	1st Applicant
JANINE VAN WYK (Identity number: [....])	2nd Applicant
and	
ABSA BANK LIMITED (Registration no: 8604794/06)	1st Respondent
SHERIFF, BLOEMFONTEIN	2nd Respondent
REGISTRAR OF DEEDS	3rd Respondent
FREDERIK JOHANNES BREDENKAMP N.O.	4th Respondent
SUNE BREDENKAMP N.O.	5th Respondent
DAL KRUGER N.O.	6th Respondent

CORAM: JP DAFFUE J

HEARD ON: 29 MARCH 2022

ORDERS GRANTED ON: 29 MARCH 2022

These reasons were handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 31 May 2022.

REASONS

I INTRODUCTION

[1] During the recess and on Tuesday, 29 March 2022 I heard an alleged urgent application which was on 17 March 2022 postponed by agreement between the applicants and the first respondent. There was absolutely no reason why I as the judge on duty had to be confronted with an opposed application during the recess whilst it could have been postponed to the first available opposed motion court roll of 12 April 2022. Notwithstanding an enormous work-load I decided to deal with the matter and after having heard legal argument by the parties, the following orders were issued:

> "1. The application is dismissed with costs on a party and party scale.
>
> 2. Reasons shall follow in due course."
>
> These are my reasons.

II THE PARTIES

[2] The first and second applicants are Peter Jacques van Wyk and Janine van Wyk respectively, a husband and wife and the registered owners of Portion 2 of the farm S[....] R[....] [....], district Bloemfontein, Free State Province, also known as [....]

T[....] A[....], [....] , Bloemfontein, held by deed of transfer number T[....] ("the immovable property"). The applicants were represented by Adv PC Ploos van Amstel, instructed by Bokwa Inc. In fairness to Mr Ploos van Amstel, he received instructions at the eleventh hour and was not involved with the drafting of the affidavits or the filing of heads of argument on behalf of the applicants.

[3] The first respondent is ABSA Bank Ltd, an authorised retail bank and financial services provider, who was represented by Adv J Els, instructed by EG Cooper Majiedt Inc.

[4] The second and third respondents, the Sheriff of Bloemfontein and the Registrar of Deeds respectively, did not oppose the application.

[5] The fourth, fifth and sixth respondents are Mr FJ Bredenkamp, Mrs S Bredenkamp and Mr DAL Kruger, cited in their capacities as trustees of the Willows Trust, registration number IT1633/05. I shall forthwith refer to them as the trustees, unless it is necessary to refer to any of them in particular. The trustees were represented by Adv GSJ Van Rensburg, instructed by Willie J Botha Inc.

III THE RELIEF CLAIMED

[6] The applicants sought the following relief in their notice of motion:

> 6.1 that the Registrar of Deeds be interdicted and restrained from registering transfer of the immovable property in the name of the Willows Trust, alternatively any third party or entity nominated by the trustees thereof;
>
> 6.2 that the deed of sale concluded between the Sheriff of Bloemfontein on behalf of the first respondent and the Willows Trust be declared null and void;
>
> 6.3 pending finalisation of the application, that the interdict to prohibit registration of transfer shall operate as *interim* interdict;

6.4 That the respondents are directed to pay the costs of the application on an attorney and client scale only in the event of opposition.

[7] On 17 March 2022, when the application was heard for the first time, orders were granted pertaining to the filing of answering and replying affidavits. It was also recorded that the respondents had given an irrevocable undertaking not to proceed with registration of transfer of the immovable property pending finalisation of the application. The costs of that day stood over for later adjudication.

IV THE FACTUAL MATRIX

[8] The following is a summary of the common cause facts, alternatively the evidence presented by the first respondent and the trustees that were not disputed and/or evidence presented by them that could be accepted bearing in mind the case law and the test applicable to the adjudication of applications for final relief as summarised by the Supreme Court of Appeal as follows:[1]

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

[1] *National Director of Public Prosecutions* v Zuma 2009 (2) SA 277 (SCA) at para 26, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 - 5

8.1 five mortgage bonds are applicable *in casu*, to wit on 7 October 2003 a mortgage bond with registration number B11346/2003 was registered over the immovable property in favour of first respondent in the amount of R800 000.00; a year later, on 27 August 2004 a further mortgage bond number B12893/2004 was registered in favour of the first respondent in the amount of R600 000.00; on 9 February 2006 a further mortgage bond with registration number B2567/2006 in the amount of R600 000.00 was registered in favour of first respondent; the same year, on 21 September 2006 yet another mortgage bond was registered in favour of first respondent with registration number B19933/2006 in the amount of R400 000.00; and finally, on 30 May 2007 a fifth mortgage bond was registered over the immovable property in favour of first respondent, being mortgage bond number B10984/2007 in the amount of R600 000.00;

8.2 on 4 October 2013 first respondent issued summons against the applicants under case number 3974/2013 in which summons it claimed payment in the amount of R3 179 278.55 with interest from 20 September 2013 in respect of a mortgage bond loan account number 805 7965 285 secured by the above mortgage bonds, the arrears on the loan account being in the amount of R141 512.41;

8.3 on 14 May 2014 judgment by default was granted in respect of the amount due and payable whilst the prayer to declare the immovable property specially executable was referred to open court;

8.4 on 10 September 2015 the immovable property was declared specially executable whereupon the first respondent applied for a warrant of execution against the immovable property and as a result whereof the Sheriff attached the property;

8.5 although the first respondent intended to proceed with a sale in execution, rule 46A was introduced in terms whereof judicial oversight was required and a reserve price had to be set by the court, consequently the first respondent was advised to bring an application in accordance with rule

46A which it did, the application having been served on both the first and the second applicants on 21 October 2021, whereupon the first applicant confirmed receiving the documents, writing an email to first respondent's attorneys and enquiring whether the arrears were to be paid in at the attorneys, why he had not received any correspondence, whether he had an opportunity to defend his case and whether the case was to be heard in the High Court;[2]

8.6 on 18 November 2021 the property was again declared specially executable and a reserve price in the amount of R3 million was set and although the applicants alleged that they had not been served with the notice of set down for the hearing of 18 November 2021,[3] they were apparently not advised that no notice of set down was required as they failed to oppose the application which was duly served on them on 21 October 2021;

8.7 a sale in execution having been advertised to take place on 16 February 2022 at 10h00, the first respondent was presented a few days before the sale, to wit on 11 February 2022, with a deed of sale pertaining to the sale of applicants' immovable property in terms whereof it was sold to a certain Mr Meyer for R2.3 million;

8.8 telephonic conversations and correspondence ensued between the parties which I shall deal with during the evaluation of the evidence, but fact of the matter is that the applicants could not raise the amount requested by the first respondent before it would be inclined to cancel the auction.

8.9 the auction continued and the trustees purchased the property for the amount of R3 million;

8.10 on 16 March 2022, a month after the auction, the applicants issued the present application, *inter alia* alleging urgency, which application was set

[2] Founding affidavit: Annexure "PJ2"
[3] Founding affidavit: para 29

down for hearing the next day and as indicated above, was then postponed by agreement to 29 March 2022 when I considered arguments.

V THE APPLICANTS' CASE

[9] The applicants are of the view that they are entitled to relief based on the following averments:

9.1 firstly "at approximately 09:40 on the 16th February 2022, I (the first applicant) was advised that the First Respondent would accept the payment of R174 000.00 (hundred and seventy four thousand rands) and stay the sale. Whilst arranging the payment I was called and advised that if the First Respondent didn't receive the proof of payment by 10h00 then the sale would proceed. I advised that I was attending to same."[4] Consequently it is apparently the applicants' case that an agreement was reached that the auction would be cancelled. Fact of the matter is that no payment was received as undertake before the start of the auction;

9.2 the notice of sale is materially defective insofar as the immovable property and in particularly the improvements thereon were incorrectly described and/or not as contemplated in rule 46(7)(b) of the Uniform Rules of Court;

9.3 the first respondent had suffered no potential loss or prejudice as the equity in the immovable property is approximately R5.8 million, whilst it was sold for the sum of a mere R3 million;

9.4 the applicants rely on compliance with the four requisites for *interim* interdicts, but failed to accept that they were asking final relief. The balance of convenience on which they relied was not applicable.

VI THE DEFENCES RAISED

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[4] *Ibid*: para 35

[10] The first respondent confirmed that it issued summons for the amount mentioned above, that it obtained judgment by default and that the immovable property was declared specially executable whereupon it was sold in execution on 16 February 2022. Should the order as prayed for by the applicants be granted, the first respondent will not obtain payment of the judgment debt due to it. Furthermore, it was pointed out by the first respondent that if the sale is to be cancelled, the trustees will also suffer prejudice in that they will not be able to obtain transfer of a property that they validly purchased.

10.1 insofar as the applicants contested the valuation of the immovable property in the amount of R4.5 million presented to the court when the application to declare the property specially executable, the first respondent responded in pointing out that this valuation was in line with the report of the Mangaung Metropolitan Municipality as well as the valuation report filed as annexure “PJ10” to the applicants’ founding affidavit;

10.2 insofar as the applicants tried to rely on one email of 25 October 2021 by first applicant to EG Cooper Majiedt Inc, a series of emails sent and received during the period 11 October 2021 to 15 November 2021 were attached as annexures “OA1” to “OA7” and it was the first respondent’s case that no agreement could be reached pertaining to payment and consequently the attorneys of record were instructed to proceed with the application to execute at a stage when the arrears were in excess of R400 000.00;

10.3 it is also pointed out that the applicants never opposed any of the steps taken against them since the issuing of summons in 2013 and although the valuation report was raised on 31 October 2021, the first applicant also raised payment proposals in his email;[5]

[5] Answering affidavit: Annexure “OA8”

10.4 the first respondent also pointed out that the applicants sold their property in February 2022 for an amount as low as R2.3 million which makes a mockery of their version that the property is worth much more;

10.5 it was placed on record that on 16 February 2022 at 09:33 Me Gerda Kotze of EG Cooper Majiedt Inc spoke to first applicant and informed him that the offer of R175 000.00 in respect of arrears was accepted but that payment had to be made before 10h00 and that the sale in execution would not be cancelled if proof of payment was not received by then; this was followed up by a further telephone call as well as Whatsapp messages, but no payment was forthcoming; only on 10h13 the first applicant contacted the offices of EG Cooper Majiedt Inc when he was informed that the property had been sold;

10.6 it is denied that rule 46(7)(b)(i) stipulates that anything more than a short description of the attached immovable property and its improvements, the magisterial district and the physical address shall be provided in the notice of sale. Therefore, it is denied that it was necessary to describe or advertise the property in such detail as alleged by the applicants;

10.7 the first respondent also took the point that notwithstanding the sale in execution, the applicants took a month to file their application on 16 March 2022.

10.8 the trustees also filed an answering affidavit wherein they relied on the following defences:

10.8.1 a default judgment was granted lawfully against the applicants on 14 May 2014, ie nearly eight years ago;

10.8.2 the applicants did not oppose the application to have the property declared specially executable and a reasonable reserve price of R3 million was set on 18 November 2021, being about three months before the date of the auction;

10.8.3 although the applicants were provided a further opportunity to pay the outstanding arrears on 17 February 2022, two days after the sale in execution in order to stop the sale, they failed to do so;

10.8.4 rule 46(7)(b)(i) states that a notice of sale shall contain a short description of the property, where it is situated and the street number, if any, the place where the auction will be held and that the conditions of sale may be inspected at the office of the sheriff and that the applicants' contrary averments are incorrect and misleading;

10.8.5 the property is two hectares in extent and not two thousand hectares or anything else and consequently, the information contained in the conditions of sale is correct;

10.8.6 they will suffer harm if they are not entitled to obtain registration of transfer of the property.

VII THE STATUTORY BASIS FOR THE RELIEF SOUGHT

[11] The applicants rely on the peremptory wording of rule 46(7)(b), reading as follows:

> *"(b)*(i)The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale containing a short description of the attached immovable property, its improvements, magisterial district and physical address, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff conducting the sale.
>
> (ii) The execution creditor must furnish the sheriff with as many copies of the notice of sale as the sheriff may require."

[12] Reliance was placed on several judgments. It is perhaps apposite to refer to two judgments, to wit *Messenger of the Magistrate's Court, Durban v Pillay*[6] and *Kaleni v Transkei Development Corporation and Others.*[7] Both these judgments as well as the others referred to in the applicants' heads of arguments are distinguishable from the facts in *casu*. In *Pillay* the Deeds Office description of the property was provided and nothing more. There was no indication as to where the property was situated with reference to a street address and/or whether it contained any improvements. In that case a four-roomed house and outbuildings were erected upon the property. I quote from the judgment:[8]

> "Although the invalidity of the advertisement was admitted in this case, it is expedient briefly to discuss it. It contains no description of the property nor of its precise situation; at most it contains a reference to the records of the Surveyor-General and the Registrar of Deeds. To the man in the street it might reasonably convey that a piece of unimproved land situated outside any built-up area was going to be sold in execution."

[13] Mr Ploos van Amstel referred to a further judgment, to wit *Chasfre Investments (Pty) Ltd v Majavie and Others.*[9] Again, this judgment is totally distinguishable from the facts *in casu*. In that case the notice of sale as advertised in the newspapers did not even mention that a dwelling was erected on the immovable property. The court correctly held that the notice was defective.

[14] I quote from the judgment in *Ramgobin v ABSA Bank Ltd* which I came across:[10]

> "[16] Having found that there was justification for the exclusion of the second dwelling house from the notice of sale what remains to be considered is whether or not the omission to reflect the swimming pool on the notice of

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[6] 1952 (3) SA 678 (A)
[7] 1997 (4) SA 789 (TkS) at 719 B-C
[8] *Pillay loc cit* at pp 683H - 684A
[9] 1971 (1) SA 219 (CPD)
[10] 2008 (JDR) 0947 (D) at paras 16, 17 & 18

sale as an improvement falls short of providing a short description of the property within the contemplation of Rule 46(7)(b).

[17] The requirements of Rule 46(7)(b) are peremptory and "(d)isobedience to its directions may cause the debtor to be despoiled without corresponding reduction of his liabilities and satisfaction of his creditors", (see *Messenger of the Magistrate's Court, Durban supra);* and in regard to the Rule's requirement of a short description it was, in *Kaleni v Transkei Development Corporation and Others,* stated:

> *"The notice of sale and advertisement should contain a reasonable description of buildings and other improvements on the property (see Cummins v Bartlett N O) and Another …. for the obvious purpose of attracting bidders so as to obtain as high a price as possible."*

[18] <u>I have said that in this matter the notice of sale was defective to the extent of not reflecting the swimming pool as an improvement feature on the land</u>. The present matter is distinguishable from the case of the *Messenger of the Magistrate's Court, Durban supra* in that in that case the only description of the property was no more than the following:

> *"Sub-division No. 6 of Lot 42 of Lot 107 of Mid-Wentworth of the Farm Wentworth No. 860, situate in the County of Durban, Province of Natal, in extent 1 rood 3.37 perches"*

<u>In the present case a substantial description of the material improvements on the land was furnished. Accordingly I am of the view that the advertisement was sufficiently compliant to attract bidders. Not any omission irrespective of materiality would, in my view, invalidate a notice of sale and a subsequent sale in execution to which it relates</u>. What Rule 46(7)(b) does require is a description sufficiently reasonable to attract bidders. <u>There is no requirement in the Rule for a full description. I do not find the omission to reflect the swimming pool on the notice of sale to constitute a material defect in the notice of sale</u>. I am of the view that the notice of sale contained a short

description of the property as contemplated in Rule 46(7)(b) of the Uniform Rules of Court, and contentions to the contrary must fail." (Emphasis added)

[15] Insofar as there is no allegation that the trustees were aware of any negotiations between applicants and first respondent and/or that they acted in bad faith, it is apposite to refer to *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere*[11] where the following was stated although it is accepted that *in casu* the registration of transfer of the property has not been completed:

> "Waar eksekusiestappe gedoen word en dit nog nie volvoer is nie, is daar geen twyfel dat die Hof in gepaste gevalle ter wille van geregtigheid daarmee kan inmeng nie. Waar die eksekusieproses alreeds volvoer is, is die posisie egter anders. Ander persone se regte kom dan ook op die spel. Die Hof sal dan slegs daarmee inmeng as daar 'n hersienbare onreëlmatigheid in die proses was wat die skuldenaar benadeel het, met ander woorde waar die proses nie ooreenkomstig die toepaslike voorskrifte uitgevoer was nie."

VIII EVALUATION OF THE EVIDENCE AND SUBMISSIONS ON BEHALF OF THE PARTIES

[16] I have referred to the *Zuma* and *Plascon-Evans* judgments above. During my evaluation of the factual disputes I shall keep the test to be applied in opposed motion procedure in mind.

[17] Various submissions were made during the application on behalf of the applicants pertaining to s 26(3) of the Constitution of the Republic of South Africa which states that no one may be evicted from their home without an order of court and after considering all relevant circumstances. The statutory requirement in rule 46A that a reserve price be placed on the primary residence of a debtor is to protect the home owner in default to ensure that the immovable property is not sold significantly below its market value. Firstly, this is not an application for ejectment

[11] 1997 (2) SA 411 (T) at 413 I; the case went on appeal, but the judgment of the High Court was confirmed: *Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* 1999 (3) SA 389 (SCA)

and secondly, the applicants had sufficient knowledge of the application to declare their immovable property specially executable, but failed to present to that court any relevant facts in order to possibly convince the court not to make an order against them.

[18] It cannot be disregarded that the applicants are in serious financial trouble since 2013, nine years ago. They have apparently been thrown life lines along the way. It appears from the application papers that notwithstanding the arrears payable to the first respondent, they are also in serious financial trouble pertaining to their accounts with Mangaung Metropolitan Municipality as well as Centlec. On the date of the auction they owed these two entities the amounts of R459 232.38 and R233 329.06 respectively as is apparent from the deed of sale annexed to the first applicant's supplementary affidavit.[12]

[19] The applicants knew that the first respondent obtained an order to declare the property specially executable as long ago as 2015 and that no execution could take place as a result of the introduction of rule 46A which necessitated the first respondent to apply again for an order declaring the property specially executable on 18 November 2021.

[20] Notwithstanding the steps taken against them, they waited until the week before the auction to take steps in an effort to prevent the auction to continue.

[21] The applicants have only themselves to blame for the predicament in which they find themselves. The first respondent as the money lender is entitled to finality and to obtain payment of the judgment.

[22] I am satisfied that there was never an agreement between first applicant and the first respondent, acting thought its attorneys and their personnel, that the auction would be cancelled without proof of payment of the amount of R175 000.00. The first applicant, who waited to the eleventh hour, indicated that he would make payment of the agreed amount of R175 000.00 (not R174 000.00 as alleged by him), but he was

[12] See also the accounts of these entities attached to the first respondent's application to have the property declared executable which application is attached to the first applicant's founding affidavit

warned to ensure that proof of payment was provided before the auction.[13] It is apparent from first applicant's version that he did not have this amount available and had to rely on a friend, one Mr Andre Fourie, to pay this amount on his behalf.[14] This did not eventuate and the auction proceeded. He was in breach of his undertaking, but tried to blame first respondent, its attorneys and the two ladies for not cancelling the auction. Bearing in mind the applicable test enunciated in *Plascon-Evans* and *Zuma* no order can be granted in favour of the applicants as the first respondent's version must be accepted as it cannot be rejected as far-fetched and/or implausible. The first respondent's version is supported by the Whatsapp messages.

[23] The trustees, the innocent purchasers of the immovable property on the auction which was duly held after being properly authorised and advertised, are entitled to their bargain and there is no reason why they should be prejudiced by an order cancelling the sale.

[24] Finally, it is recorded that the applicants failed to attach the notice of sale as advertised in a local newspaper and the Government Gazette to their application papers. All submissions in this regard should be rejected without even considering them in the absence of the notice of sale. The closest that the first applicant came to this burning issue was the following testimony:[15]

"42.

<u>DEFECTIVE NOTICE OF SALE</u>

I place on record that even though I dispute that the First Respondent is entitled to proceed with the sale of the property, I am advised that the property must be properly described in the notice of sale in order to attract bidders to a sale in execution.

43.

This was brought to my attention whilst consulting with my present attorneys to draft this Application on or about the 08th of March 2022, and whilst perusing the Notice of

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[13] Answering affidavit: paras 24.9 – 24.19; confirmatory affidavits of Me GP Kotze and Me TM Van Lingen, read with the Whatsapp messages attached as annexure "OA13"

[14] Replying affidavit: para 29

[15] Founding affidavit: paras 42 - 45

Sale. I was advised to peruse the notice of sale carefully in order to ensure that the property had been **fully and properly described**.

44.

This is the first real instance that I had come to realise that the notice of sale was seriously and materially defective. I submit with respect that there is no wilful or deliberate oversight on my part.

45.

A copy of the Notice of Sale was compiled by the Second Respondent."

[25] After dealing with his alleged inspection of the notice of sale in the presence of his attorney, who did not submit a confirmatory affidavit, the first applicant proceeded to deal with the conditions of sale as set out in the deed of sale. The deed of sale was not attached to the founding affidavit, but to a supplementary affidavit filed the morning before the matter was to be heard. Although reference was made to a notice of sale in the founding affidavit, the applicants' heads of argument as well as during the oral argument of Mr Ploos van Amstel. I am still looking for a notice of sale. No such document forms part of the documentation before the court.

[26] The applicants averred that a much more detailed description of the immovable property and improvements thereon should have been provided. As said, no notice of sale was placed before the court, but for purposes of the argument I accepted that the notice of sale contained same description as set out in the conditions of sale.

[27] The applicants went so far to state that a detailed description of the improvements on the immovable property should have been given and failing which, the notice of sale should be held to be defective. The details to be provided according to the applicants reminded me of a full page advertisement by a leading estate agency in one of the prestigious magazines to attract the attention of affluent and wealthy investors. Details such as[16] "Stucco Plaster finish, Calcote Aluminium wood grain finished windows and doors, Zimbabwean Teak & Rosewood floors,

[16] Founding affidavit: para 50

Patio area with enclosed spa bath & built-in braai", to name just a few finishes do not belong in a notice to advertise a sale in execution.

[28] The property description contained in the conditions of sale, referring to improvements such as the two houses, cottage, workshop and outside area consisting of a servants room, swimming pool and stables to mention just some of the details, was more than sufficient to comply with rule 46(7)(b)(i). The street address of the property was provided, as well as the extent of the property, to wit 2,0000 hectares, or put otherwise, two thousand square metres. The first applicant's version that the property size is 2 200 hectares is misleading, incorrect and stands to be rejected as false.[17]

IX CONCLUSION

[29] Consequently, I made the orders contained in paragraph 1 above based on my evaluation of the evidence and the submissions of the parties.

JP DAFFUE J

On behalf of the Applicant:	Adv PC Ploos van Amstel
Instructed by:	BOKWA INC
	BLOEMFONTEIN
On behalf of the 1st Respondent:	Adv J Els
Instructed by:	EG Cooper Majiedt Inc
	BLOEMFONTEIN
On behalf of the 4th, 5th & 6th Respondents:	Adv GSJ van Rensburg
Instructed by:	Willie J Botha Inc
	BLOEMFONTEIN

[17] Founding affidavit: para 48