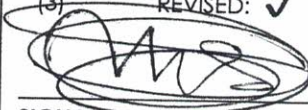




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ☒
	
SIGNATURE	16 May 2019 DATE

CASE NO:38909/2017

In the matter between:

GPCM

APPLICANT

and

**MINISTER OF HOME AFFAIRS
DIRECTOR GENERAL:
DEPARTMENT OF HOME AFFAIRS
DEPUTY DIRECTOR GENERAL: DEPARTMENT
OF HOME AFFAIRS: CIVIC AFFAIRS**

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] On 13 July 2017 I gave an order in the following terms;

- “1. The forms, service requirements and time periods provided for in the Uniform Rules of Court are dispensed with and this matter is treated as urgent.*
- 2. The Applicant is permitted to use her initials instead of her full names on all court documents filed that will be available to the public.*
- 3. The Applicant is permitted to file and provide the Court and Respondents with a confidential affidavit that contains the Applicant’s full name together with an unredacted version of the annexures that will not be made available publicly.*
- 4. The Director-General’s failure to make and communicate decisions in respect of the Applicant’s application for the alteration of the sex description/ marker on her birth certificate in accordance with her application in terms of section 2 of the Alteration of Sex Description Status Act 49 of 2003 (“the Alteration Act”) is reviewed and set aside.*
- 5. The Director-General must, within three weeks of the date of this order, alter the Applicant’s sex description/marker on the birth certificate/register and identity document, reflecting her sex description/marker as female.*
- 6. The Respondents must issue the Applicant’s passport on an expedited basis (by 21 August 2017), provided all other aspects of the passport application have been approved.*
- 7. The Respondents are directed to pay the Applicant’s costs, including costs of counsel, on an attorney and client scale.”*

[2] I indicated at the time that my reasons for the order will follow on request. What follows are the reasons for the order.

[3] I interpose to indicate that there has been a significant delay in the delivery of these reasons. My understanding was that an *ex tempore* judgment was delivered and a draft order made an order of court. I had not been aware that the respondents who were aggrieved at the order requested reasons for the order until it was brought to my attention by the Judge President in April 2019, some two years later. This is regrettable because the court was approached on an urgent basis and a finding was made to the effect that the matter was sufficiently urgent, on the facts that are set out below, to warrant the urgent attention of this court.

Urgency

[4] The application was brought on an urgent basis. The applicant describes the application as “manifestly urgent”. When the application was heard on 13 July 2017, the applicant was due to travel to Thailand on 21 August 2017 for purposes of gender reassignment surgery. Without an identity document and a passport the applicant would not be able to undertake such a trip. The applicant’s travel itinerary has been secured and he has managed to secure an appointment for the operation. Were the reassignment surgery not to take place, the applicant would have to wait more than a year to secure another appointment.

[5] The Thailand based surgeon who is to perform the surgery is said to have performed over 200 such surgeries and it is motivated that there is no surgeon with matching credentials in South Africa. In addition there are costs considerations. In South Africa the surgery costs an approximated amount of R500 000-00 whereas in Thailand the cost is down to R220 000-00.

[6] The applicant contends that the failure by the respondents to make a decision while his trip is imminent, makes this matter urgent. This however is not the only basis of urgency. The applicant not only applied for alteration of the respondents' records but also applied for a passport. At no point was the applicant informed that a passport could not be issued to him while the alteration application was pending.

[7] Urgency is contested by the respondents. They argue that the fact that the applicant made arrangements for surgery while his application for gender reassignment was receiving attention, means that urgency is self created. It is argued that the applicant has known for a long time that he can only use the form of identification issued to him by the Department of Home Affairs until such time that formal processes are completed. In this instance, that he shall be recognised as male until the alteration process is finalised. The respondents do not give or make any time commitments about the processing of the application.

[8] The respondents argue in the alternative, that the applicant has failed to exhaust all internal remedies available to him. In fact it is argued that in terms of section 2 of the Alteration of Sex Description and Sex Status Act 49 of 2003, hereinafter referred to as the "Alteration Act", where an application is refused, the Director General must furnish reasons for his decision, whereafter, the applicant may approach the Minister for an appeal. In the event the appeal is not upheld, the aggrieved applicant may approach the magistrate for relief. The urgency of the matter, the failure to exhaust internal remedies as well as the non-joinder of the applicant's wife, were raised as preliminary issues. The respondents further argue that the Promotion of Administrative Justice Act 3 of 2000, hereinafter referred to as "PAJA", is not applicable in that internal remedies have not been exhausted and further that there can be no review when the Director-General has not taken decision.

[9] All applications brought on an urgent basis must meet the requirements of Rule 6(12) of the Uniform Rules of Court, as a first hurdle before the matter can be enrolled and heard. Absent such satisfaction, the court will decline to entertain the application and will simply struck it from the roll. The applicant must set out in explicit terms, circumstances which he avers render the matter urgent and also why the applicant contends that he will not be afforded substantial redress at a hearing in due course.

[10] Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011)*, had occasion to say the following;

"[5] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6(12) of the Uniform Rules. The aforesaid sub rule allows the court or a Judge in urgent applications to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant "... shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter

were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.

[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the

matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.”

[11] The assertion that the applicant has known for a long time that his application was receiving attention but never took steps to institute these proceedings, and therefore, that this application is not urgent, falls to be rejected. As Notshe AJ said in ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others***, a delay is not on its own a ground for disposing of the matter as not being urgent. The court must still determine whether there is absence of substantial redress in due course. If there is absence of substantial redress, then the matter deserves to be considered urgent.

[12] There was, in my view, indubitably a short delay in launching the application. It seems clear however that the applicant engaged the respondents and was hoping that the applications made to the respondents, that of change of gender marker as well as for a passport would find traction. The assurances he received from the respondents did not suggest otherwise.

The fact that the applicant proceeded to make flight bookings and paid the surgeon to secure an appointment, knowing very well that the applications were pending, is in my view proof that the applicant was not derelict in his approach to the matter and had in fact received assurances that his application was receiving attention. I am of the view that were the applicant to take the option of approaching the court in due course, he would not be afforded substantial redress. I therefore ruled that the matter was urgent and it was enrolled accordingly.

Applicant's case

[13] The applicant sets out the following case in the founding affidavit;

13.1. That he was born on 1 February 1971 as a male person. Such gender status was allocated to him and he was accordingly issued with a birth certificate by the Department of Home Affairs and subsequently an Identity Document. From a young age the applicant felt trapped in a wrong body, that of a male person and in fact identified himself as a girl while growing up. Due to family and societal pressure, he conformed, dressed and lived like a male person. Even in terms of personal relationships, he tended to conform to what society considered "normal".

13.2. In line with societal expectations, on 10 July 1999 the applicant married a woman, whose details are not necessary for purposes of this application. No children were born of that marriage.

13.3. In early 2014 the applicant started living as a woman openly. Consequently, in June 2015 the applicant separated from her wife and since then they have not been living together as husband and wife. I hasten to add that divorce proceedings are pending in the Gauteng Division, Johannesburg, under case number 16673/2017.

13.4. The applicant underwent psychotherapy as well as hormonal treatment to prepare for the transition from being male to female. He also set up an appointment with a surgeon in Thailand for a medical procedure for the reassignment of his gender from male to female.

13.5. On 9 July 2015 the applicant applied to the Department of Home Affairs for alteration of her gender description on the population register. The application was brought in terms of section 2 of the Alteration Act as well as section 7(2) of the Birth and Deaths Registration Act 51 of 1992. The application was launched complete with medical reports of Ella Kotze a Counselling Psychologist as well as Dr Trimp as prescribed by the Alteration Act.

13.6. On 22 July, 19 August and in September of 2015, the applicant made inquiries with the Department of Home Affairs and was informed that the application was receiving attention. On the latter date an escalation reference number was given to him.

13.7. On 21 September 2015 the Department of Home Affairs informed him that the application he launched was deficient in that the Department required an additional doctor's report. Such a report,

prepared by Dr Adam Liebman was expeditiously obtained and transmitted to the Department the same day.

13.8. In December of 2015 when the applicant contacted the Department of Home Affairs to make inquiries again, he was informed that the application was in the process of being finalised. He was again provided with a tracking or reference number.

13.9. In May 2016 the applicant made further inquiries and was yet again given another tracking number after being informed that his application was being processed.

13.10. Seeing that a year had gone by, the applicant approached the Legal Resources Center who on 1 September 2016 took up the cause of the applicant and wrote a letter to the Department of Home Affairs. Soon thereafter the applicant was contacted and informed that the Department of Home Affairs was able to pick up on their system that he was married and that they had converted and registered the marriage as a civil union.

13.11. The applicant kept contact with the respondents and was at all times informed that his application was receiving attention.

13.12. On 17 January, 9 February and 8 March 2017, the applicant was contacted by the respondents and informed that his application was still being processed.

13.13. On 2 March 2017 the applicant applied for a passport and received confirmation of a booking. At the time the application was

made he was due to travel to Thailand on 21 August 2017. He was assured, whenever contact was made with the respondents, that his application was receiving attention.

13.14. On 12 April 2017 the applicant received confirmation of a booking to attend the offices of the Department of Home Affairs to process his passport application.

13.15. On 14 March the applicant, together with her legal representative had attended the offices of the respondents at Killarney to apply for a passport. On that day her biometrics were captured on their system. On 18 April 2017 he again attended their offices but was advised that his application for a passport could not be processed as his application for gender reassignment was still in process and/or pending.

13.16. Despite attending the offices of the respondents as aforesaid, the applicant received an email on 1 May 2017 berating him for failing to attend at their offices to process the passport application.

[14] The applicant takes the view that the fact that he is still married is irrelevant to his application for gender reassignment or alteration. Further, that his right to dignity is being violated as a result of the unexplained delay on the part of the respondents. He asserts that he struggles to function in a society where his physical appearance, that of a female person, does not match the gender description, that of a male person, which is contained in the identification documents. As a result he cannot travel by air to any

destination. One need only imagine how the applicant would be viewed by immigration officials when he presents himself as a woman at the airport and yet the travelling documents show that he is male.

Respondent's case

[15] The respondents in addition to the preliminary issues mentioned above, paint a picture of a government department, the Department of Home Affairs, that is bereft of any solutions to the challenges it faces in relation to gender alteration, birth registration details and the issuing of passports to persons who are in the same position as the applicant. For a passport to be issued, the respondents argue, information is sourced from their computer systems which have details, in the case of the applicant, describing his gender as male. The coding as male is carried over to the applicant's identity number. The sum total of this is that the birth register needs to be altered to reflect the new assigned gender and only thereafter can the applicant be issued with a new identity document and passport.

[16] The respondents point to another challenge, namely, the fact that the applicant is, according to their records, still married by civil rites. This, it is argued, presents a challenge on two fronts. The first challenge being the fact that the applicant's spouse has not been joined in these proceedings. To that extent, the respondents argue that there is non-joinder and that such non-joinder renders the application defective. The fact that the applicant has

instituted divorce proceedings, is according to the respondents, of no moment in that the records remain unaltered until a decree of divorce is issued, or until his status is altered by the death of his spouse.

[17] Lastly, the respondents believe that since they have not taken an administrative decision, there can be no review proceedings. In the alternative, the respondents take the view that should the court find that the failure to take a decision constitutes administrative action, then in that event they believe that the applicant has not exhausted all available internal remedies.

[18] To the factual allegations contained in the applicant's affidavit, the respondents have chosen to *"deny the correctness of the allegations as contained in these paragraphs, which are in conflict with my version, I (they) note the allegations as contained therein"*. The version which it is contended conflicts with that of the applicant, is not set out in the affidavit. The affidavit of the respondents is devoid of the factual matrix of the case. In so far as the facts are concerned this court has before it only the facts set out by the applicant.

Issues

[19] Other than the issue of urgency which I have dealt with above, the following are in my view issues for determination;

19.1. The defence of non-joinder;

19.2. Whether the delay or failure by the respondents in the alteration of the birth register, from male to female is reviewable administrative action;

19.3. Whether the applicant has made a case for the alteration of the birth register;

19.4. Whether the applicant has made a case for the issue of an identity document and passport, in line with his altered gender status.

[20] Whereas the respondents raised the non-joinder defence as a preliminary issue, it is closely tied to the reasons why the respondents believe that the law as it currently stands is not enabling to the alteration process, where the applicant is married. For that reason I shall deal with it below when I consider whether there is merit in that contention.

The law briefly and evaluation

[21] An action will fall to be reviewable under PAJA if it is an administrative action. Section 1 of PAJA defines an administrative action as;

“.....any decision taken or any failure to take a decision by -

(a) An organ of state, when

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) A natural or juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect..”

[22] An action qualifies as an administrative action and reviewable under PAJA provided it meets three requisites, namely; action taken by an organ of state exercising power, the action must adversely affect the rights of another person, and must have a direct and external legal effect.

[23] Section 6 (2) of PAJA provides as follows;

“A court or tribunal has the power to judicially review an administrative action if-

(a).....

.....

(g) the action concerned consists of a failure to take a decision;”

[24] Section 6 (3) (a) provides as follows;

“If any person relies on the ground of review referred to in subsection (2) (g) , he or she may in respect of a failure to take a decision, where-

(a)(i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(ii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision;"

[25] There are countless judgments in this and other Divisions, that deal with the failure/neglect of public officials to perform their functions in accordance with the law or where they are tardy in the performance of their functions.

(See Noupoot Christian Care Centre v Minister, National Department of Social Development 2005 (1) BCLR 1034 (T); Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others 2011 (2) BCLR 189 (CC); Intertrade Two (Pty) Ltd v MEC for Roads and Public Works Eastern Cape and Another 2007 (6) SA 442 (Ck)) Therefore, to the extent that the respondents argue that the application must fail, because there is no decision to review, that argument is wrong. It is my judgment that the failure by the Director-General to delay making a decision about the applicant's application for gender alteration is reviewable administrative action.

[26] Section 2 of the Alteration Act, sets out the approach to applications for alteration of sex description and sex status. What I consider to be relevant portions read thus;

“(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through development resulting engender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

.....

(3) If the Director-General refuses the application contemplated in subsection (1), he or she must furnish the applicant with written reasons for the decision.

(4) If an application contemplated in subsection (1) is refused, the applicant may appeal to the Minister of Home Affairs against the decision taken by the Director-General.

.....

(6) If an appeal in terms of subsection (4) is refused, the applicant may apply to the magistrate of the district in which he or she resides for an order directing the change of his or her sex description.”

[27] The respondents argue that the applicant has failed to exhaust all internal remedies in that he has failed to engage the Director-General, failing him, appeal to the minister and thereafter launch an application before a magistrate. My reading of the section is that it sets out the procedure to be

followed and provides certain specific remedies in the event of a particular outcome. Section (2)(2) of the Alteration Act sets out what information is to accompany the application for alteration of one's sex status on the birth register of the Department. In terms of the section, a report by a medical practitioner confirming the gender reassignment must form part of the application. The applicant has submitted all the required information and/or reports and the respondents do not contend otherwise. The applicant has in addition supplied a report by a qualified psychologist. This is undisputed.

[28] The respondents in turn have not made a decision on the outcome of the application except to raise before this court, as an obstacle, the fact that the applicant is married as well as the fact that the application presents certain challenges in relation to legislation governing marriages and civil unions. I take the view that the applicant cannot be expected to invoke the appeal process set out in section 2(3), 2(4) and (2)(6) of the Alteration Act, which essentially deals with the process after the Director-General has refused the application and supplied reasons. In *casu* the Director-General has simply failed to make a decision. Such failure is, in my view, reviewable under PAJA. Two years have passed since the applicant launched the application for alteration. No substantive assessment and pronouncement thereon has been undertaken by the respondents.

[29] In terms of section 7(2)(a) to (c) of PAJA, a court or tribunal may not review an administrative action unless internal remedies are exhausted. Where the court is not satisfied that internal remedies have been exhausted, it may direct that there be such internal procedural compliance before the matter is heard. The court however has a discretion, where exceptional circumstances are shown, to exempt the aggrieved person from exhausting available internal remedies. Even if I am wrong in my finding that the applicant can not invoke the appeal process in that his application has not been adjudicated upon and the Director-General has failed to make a decision, I consider the circumstances under which the applicant has been coerced to approach this court, to be compelling enough to warrant an approach to this court on review, in the interest of justice.

[30] Whereas the respondents emphasise the fact that the applicant is, according to their records married, and that this presents a challenge to the alteration of the birth register as sought by the applicant, in my reading of the Alteration Act, marital status is not a factor to be taken into account in the alteration process at all. The contention by the respondents therefore that *"the alteration of sex affects the identification profile of the applicant as whole including the new identity and passport numbers. It is further submitted that the relief sought is incapable of being implemented because his status cannot be changed to a female while being married as husband to someone in terms of the Marriages Act,* is one I do not agree with. I accept that the identification

profile on the registers of the applicant, on the records of the respondents will be affected, including the identity and the passport number. This however is but the effect of the alteration process and not an impediment or an obstacle thereto. An applicant who seeks gender reassignment need only meet the requirements of section 2(2) of the Alteration Act.

[31] Additionally, in support of the constraints which the respondents perceive they have, which in their view are an impediment to the alteration of the applicant's gender on their records, they make the following assertions;

31.1. Had the applicant been in a same sex relationship subsequent to the coming into operation of the Civil Union Act 7 of 2006, he would have been entitled to marry in terms thereof;

31.2. Had the applicant undergone a sex alteration prior to the marriage to her current wife, s/he would have ben entitled to marry under Civil Union Act;

31.3. That the current regulatory framework is not permissive of a couple married in terms of the Marriages Act 25 of 1961, in circumstances where the sex alteration by one partner has resulted in the marriage becoming a same-sex marriage;

31.4. That once a person alters his/her sex, the marriage remains "*a lacuna within the context of the current regulatory framework*". This is because on the register the applicant would remain married to a same sex partner notwithstanding the fact that he/she would not meet the

criteria for marriage under the Marriages Act, which does not permit same sex marriages.

[32] The respondents' approach to the inability or unwillingness to come to the assistance of the applicant is embodied in this extract from the opposing affidavit, which reads as follows; *"it is therefore on the basis of such a very grey area in our law that the DHA is unable to change a person's gender profile while the marriage in terms of the Marriages Act still subsists"*. From the extract, it is clear that the respondents elevate the applicant's marital status as a determinant whether or not to permit alteration. This flies in the face of the Alteration Act, or any of the Acts to which the respondents have made reference. None of those Acts list marital status as a factor to be considered or taken into account. Simply put, spousal consent or involvement is not a requirement in an application for alteration of the sex or gender description on the records of the respondents.

[33] The summary from the respondents' opposing affidavit set out in para 32 above, contains nothing but conjecture, hypothesis and postulations. I differ with the contention that *"...the current regulatory framework is not permissive of a couple married in terms of the Marriages Act 25 of 1961, in circumstances where the sex alteration by one partner has resulted in the marriage becoming a same-sex marriage."* It is the respondents' self created obstacles that inform such a position. The fact that the applicant is married or

that divorce proceedings are pending is in my view irrelevant to the applicant's gender alteration application. Given that an applicant's marital status is irrelevant, and that the spousal consent is not a requirement, the respondents have fallen short of showing why the applicant is not entitled to the relief he seeks, particularly when regard is had to the fact that all the requirements of the Alteration Act have been met.

[34] I find that there is no legal obstacle to the alteration of the applicant's gender from male to female. With the alteration comes the need to make compliant the gender markers on the Identity Document as well as the Passport to be issued to the applicant. The effect of the position taken by the respondents, that the law has tied their hands, means that it would serve no useful purpose to review the decision of the respondents and remit the matter to the decision maker with directives. It is my view that this court is better placed to make the decision.

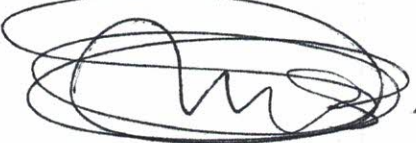
[35] It needs to be emphasised that the Department of Home Affairs can not extend its legislative tentacles into the privacy of homes of the public whom it serves. It must deal with administrative matters alive and sensitive to the fact that the public has rights. In the services it renders, it must not be prejudiced, must ensure self realisation of those who approach it, must uphold equality before the law, must protect freedom of choice and treat the public with requisite promptitude and dignity.

[36] The applicant has asked that due to the sensitivity of the issues dealt with in this matter, his identity be not made public. The respondents agree and so do I. I have also referred to the applicant as a male person in these proceedings simply because his altered status has not been formalised. I however accept that I am seized with an application launched by a female person.

Costs

[37] The applicant was hard done by the lax attitude which the respondents displayed in handling her application. The lapse of time in the alteration of the birth records in circumstances where, in my view, there were no legal obstacles in the way of doing so, is conduct to which the court takes a dim view. The applicant was placed under so much pressure to the extent that she was forced to approach this court for relief on an urgent basis. A punitive cost order is therefore warranted.

[38] These were my reasons for the order which I marked "X".



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Applicant's Attorneys : Clarks Attorneys
 c/o GJ van Zyl Attorneys
 1240 Starkey Road, Waverly
 Pretoria

Respondents' Attorneys: State Attorney Pretoria
 SALU Building
 Cnr Thabo Sehume & Francis Baard
 Pretoria