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

Not Reportable

Case no: 2025-127911

In the matter between:

JOHANNES JACOBUS VENTER	**FIRST APPLICANT**
KARI VENTER	**SECOND APPLICANT**

and

MARCO RAYMONDE HELFER	**FIRST RESPONDENT**
GAVIN BRIAN ROBERTSON	**SECOND RESPONDENT**
GEORG MARTIN HAAS	**THIRD RESPONDENT**
MELANIE JO DE OLIVIERA	**FOURTH RESPONDENT**
MURRAY SIMPSON EASTON	**FIFTH RESPONDENT**
KEVIN KRIEGE	**SIXTH RESPONDENT**
JACQUELINE NUTMAN	**SEVENTH RESPONDENT**

KEEGAN JAMES NICOL **EIGHTH RESPONDENT**

AUDREY MCNEAL NICOL **NINTH RESPONDENT**

Coram: **COOKE AJ**

Heard: **10 and 28 October 2025**

Judgment: **12 November 2025**

ORDER

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[1] The first, second, third, eighth and ninth respondents are interdicted and restrained from parking vehicles on the servitude area at 1[…] H[...] Road, Higgovale, Cape Town, in such a manner as to unreasonably obstruct the applicants from entering and exiting their property and exercising their right of way.

[2] The parties shall pay their own costs, save that the applicants shall pay the costs of the amendment application dated 28 October 2025, including the costs of opposition, on the attorney and client scale, with counsel's fees to be taxed on scale B.

JUDGMENT

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[1] This case is, in essence, a parking dispute between neighbours. The applicants, who own the property at 1[...] T[...] Road, Higgovale, Cape Town, and are referred to in this judgment as 'the Venters', enjoy a right of way over the neighbouring driveway at 1[...] H[...] Road ('the driveway'). The Venters complain that the respondents, who reside at 1[...] H[...] Road, park in a manner which impedes access to the Venters' property. The dispute raises questions regarding the interpretation of a right of way servitude, and the obligation of neighbours to act reasonably, and in accordance with the constitutional principle of ubuntu.

[2] On 31 July 2025, the Venters launched an application in terms of which they sought an order interdicting and restraining the respondents from parking vehicles on the driveway. In due course it became apparent that the fourth, fifth, sixth and seventh respondents were no longer owners of units at 1[...] H[...] Road, prompting the Venters to withdraw their claims against them. In this judgment I shall refer to the remaining respondents as 'the residents'. On 12 September 2025, Miller AJ postponed the application for a hearing scheduled on 9 October 2025. The hearing date was in due course changed to 10 October 2025.

[3] On 19 September 2025, the residents delivered an answering affidavit in which they opposed the relief sought by the Venters on the following grounds:

a. the Venters failed to cite the owner of the property over which the servitude is registered, namely the Kloof Heights Body Corporate ('the body corporate');

b. the requirements for an interdict had not been satisfied, and in particular the Venters do not have a clear right to prevent the residents from parking on the servitude area;

c. the right of way has, in any event, either become extinguished or falls to be cancelled because of the construction of a second driveway to the Venters' property from the opposite side of the property, via T[...] Road;

d. the Venters are building on their property, and the residents expect the servitude will be employed to cater for the additional traffic caused by their tenants which would be an abuse of the servitude;

e. the Venters failed to maintain the servitude road; and

f. the Venters alleged no facts from which the court could conclude that it would be just and equitable for the residents to be restrained from parking on the servitude and therefore the interdict, being a discretionary remedy, should not be granted.

[4] On the day of the hearing, an inspection of the driveway was conducted in terms of an agreement dated 9 October 2025. In this agreement, consideration was given to the judgment of Farlam AJ in *Rosevean Investments 0028 (Pty) Ltd v City of Cape Town and Others*,[1] and it was provided that the inspection shall not alter the evidential position of either party nor affect the application of the *Plascon-Evans* principle in relation to factual disputes. During the inspection, I observed the entire servitude area and the driveway in the configuration ordinarily used by

[1] 2025 (3) SA 616 (WCC).

the residents (save that certain of them were apparently in Johannesburg for work). The Venters' garage door was opened, and I was shown the interior layout and the spatial relationship between the garage and the servitude. In addition, counsel highlighted features relevant to access and parking, including the width of the servitude road and the position of existing structures or obstructions.[2]

[5] After hearing argument, and having regard to the claim that the body corporate ought to have been cited in the proceedings, I postponed the application to 28 October 2025, to allow the body corporate an opportunity to file such papers as it may consider necessary. The body corporate delivered a belated affidavit on 27 October 2025. This was the day before the matter was scheduled to be heard again. The body corporate protested that it should have been joined and reserved its rights to bring any application it may be advised to institute. The body corporate did not, however, address the substance of the application. It stated that it continued to manage access and parking on the servitude area consistently with the *civiliter modo*[3] principle. It further indicated that it had been considering / implementing practical measures pending the final determination of any variation or cancellation of the servitude. These measures included possible parking demarcation, to facilitate use by the residents and the Venters' reasonable access.

[2] It appears that inspections of this nature are not without precedent. See *Penny and Another v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C) at 488B.

[3] For a discussion of this phrase, see AJ van der Walt *The Law of Servitudes* (2016) page 247ff – the servitude holder must exercise the servitude entitlement with due regard for the interests of the servient owner, in other words *civiliter* or reasonably.

[6] During the resumed hearing on 28 October 2025, the Venters moved an amendment of their notice of motion in terms of which they sought to introduce the following alternative relief:

> 'the Respondents be interdicted and restrained from parking vehicles on the servitude area at 1[…] H[...] Road, Higgovale, Cape Town, in such a manner as to unreasonably obstruct the applicants from entering and exiting their property and exercising their rights of way.'

[7] After hearing argument, I decided to allow the amendment. I did so principally for the following reasons:

a. In my view, the amended relief was covered by the allegations made in the papers and could well have been sought under the rubric of 'further and/or alternative relief'.[4]

b. Furthermore, the proposed alternative relief accorded with the allegations made by the residents themselves. For instance, in the answering affidavit the residents accepted that they may not impede the Venters' reasonable access to their garage, and that the servitude contemplates that motor vehicles would be parked in such a way as to provide sufficient space for the Venters to enter and exit their garage.

c. In addition, although the Venters' original notice of motion sought an order interdicting parking altogether, the founding affidavit indicated a more nuanced approach, alleging that the residents

[4] See *Port Nolloth Municipality v Xhalisa and Others*; *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C).

should be interdicted from parking vehicles *or otherwise obstructing* the servitude right of way.

d. The residents dealt comprehensively with the issue of obstruction in their answering affidavit, and both heads of argument canvassed this issue.

[8] In the circumstances, I did not consider that there would be any prejudice to the residents if the amendment were to be allowed. As regards costs, the Venters sought an indulgence, and the residents' opposition was neither frivolous nor vexatious. Therefore, the Venters should bear the costs of the application, including the costs of opposition.[5]

[9] As to the scale of the costs, the amendment application was sought on the morning of the resumed hearing. In my opinion the amendment could and should have been sought much earlier. There was no need to wait for the body corporate's papers, if any. To the contrary, the Venters should have disclosed their intentions before the body corporate was required to deliver its papers. The belated application caused the hearing to be stood down until after lunch to allow the residents to file an opposing affidavit. The residents were placed under severe time pressure, and the hearing eventually consumed the entire day. The delay in delivering the amendment application was consequently disruptive, and prejudicial to both the residents and the court. It was, in effect, vexatious.[6] The residents should not be out of pocket for these costs. In my view it would

[5] *Grindrod (Pty) Ltd v Delport and Others* 1997 (1) SA 342 (W) at 347C-E.
[6] *In re Alluvial Creek Ltd v SADTC* 1929 CPD 532 at 535; *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607.

be appropriate if the Venters bear these costs on the attorney and client scale.

[10] I now turn to the merits of the application. There are two animating principles which arise in relation to servitudes. First, the owner of the dominant tenement (in this case the Venters) is entitled to 'effective use' of the servitude. Second, such use must be exercised by imposing the lightest possible burden on the servient tenement (in this case 12 H[...] Road).[7] In the context of this case, these principles mean that the Venters are entitled to effective use of the right of way, but they must exercise this right by imposing the lightest possible burden on the residents.

[11] The Supreme Court of Appeal noted in *Mannaru* that the relationship arising from the exercise of a servitude is fraught with tensions that may escalate into disputes, for the most part, between the user rights of the dominant owner and the rights of the servient owner. The approach adopted by our courts in resolving such disputes is reliance on the principle of *civiliter modo* – being a particular expression of the principle of reasonableness.[8]

[12] In my view the common law principles relating to servitudes should also be interpreted within the context and framework of the Constitution,[9] and with particular emphasis on the value of ubuntu.[10] In

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[7] *The Law of Servitudes* pages 412-3. See also *Mannaru and Another v McLennan-Smith and Others* 2023 (2) SA 150 (SCA) paras 12-18.
[8] Para 13.
[9] See in this regard *The Law of Servitudes* page 37ff.
[10] See *Sunset Ridge Estate Home-Owners Association v Van Deventer and Others* (035234/2022) [2024] ZAGPPHC 220 (5 February 2024) paras 50, 54 and 58.

this regard, I agree with the approach suggested by Kotzé and Boggenpoel:[11]

'In a constitutional context characterised by its insistence upon equality, freedom and human dignity, neighbour law can no longer be construed in terms of notions of the rights of competing but more or less equal property owners and property occupiers. From a constitutional perspective, the role of neighbour law should be to provide just and equitable solutions for conflicts arising from the fact that neighbours from different social, cultural, customary and religious backgrounds and with different rights and interests are living together in close proximity. To this end, broader constitutional values such as *ubuntu* may be infused in the common law reasonableness test to assist courts in balancing competing rights and interests in a principled way to "promote the constitutional vision of a caring society based on good neighbourliness and shared concern". *uBuntu* not only places focus on one's concern for one's fellow neighbour, communitarianism and social solidarity but also encompasses many "other values such as fairness, empathy, justice, sympathy, equity and compassion". In this way, the principle of reasonableness, and the concept of *ubuntu* may inform the exercise of rights and interests in a community, as these concepts emphasise sharing, co-responsibility and "the mutual enjoyment of rights by all".'

[13] Van der Walt expressed a similar idea in *The Law of Neighbours*: '… neighbour law embodies and represents an element of good neighbourliness, of citizenship, of community, that reflects the transformative intentions of the Constitution, instead of being just a purely private or economic relationship.'[12]

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[11] Kotzé T and Boggenpoel Z 'Living Together as Neighbours: Rethinking the Reasonableness Standard in Nuisance Law Under the Constitution' *PER / PELJ* 2021(24) - DOI http://dx.doi.org/10.17159/1727-3781/2021/v24i0a11169 page 6. Footnotes not included. These authors argue that the courts should apply the reasonableness test in neighbour law by considering all the relevant circumstances of the case, including the values (ubuntu) and ideals of the Constitution (page 25). In my view the same may be said for the application of the similar principles in the closely related field of servitudes.

[12] AJ van der Walt *The Law of Neighbours* (2010) page 6. See also the concluding views at pages 66-68.

[14] While the common law requires that neighbours act reasonably, the Constitution shows what a reasonable neighbour looks like. She is not only concerned with advancing her own private interests but cares also for the needs of her neighbours. She seeks mutually beneficial solutions. The mindset of the reasonable neighbour is one of collaboration, not competition. She sees herself not as an isolated individual, but a partner in an interdependent community of persons, all of whom are to be respected and valued.

[15] Against this backdrop, I now consider the relief sought by the Venters in this application. The Venters seek interdictory relief. The requirements for a final interdict are well-known. The Venters must show: (a) a clear right on their part; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy available to them. These requirements are addressed below.

[16] The notarial deed of servitude registered on 3 March 1966, confers upon the Venters' property, as the dominant tenement, 'a servitude right of way across the servient tenement in order to give the owner for the time being of the dominant tenement access to and from H[...] Road, Oranjezicht'. On 11 February 1987, the servitude was amended by way of a notarial deed. The relevant parts of the amendment are as follows:

> 'that the said NORMAN JOHN OSBURN as owner of the dominant tenement, agrees and undertakes that he and his successors in title shall be responsible for the maintenance and upkeep of the aforesaid roadway...

that save only for this right of way neither the said NORMAN JOHN OSBURN nor his successors in title of the dominant tenement shall have any rights of whatsoever nature over the servitude area, in particular the right to park a motor vehicle thereon, except that persons desiring access to the dominant tenement solely for the purpose of delivering goods or providing services shall be permitted to park their vehicles on the said servitude area for a reasonable period of time for such purposes...

that the servitude created in the said Notarial Deed of Servitude No. 157/1966 shall be extended in area...'

[17] The deed of servitude must be construed in accordance with the modern approach to the interpretation of legal instruments. It thus falls to be assessed 'holistically: simultaneously considering the text, context and purpose'.[13]

[18] The Venters initially sought an order that the residents be interdicted and restrained from parking vehicles on the driveway altogether. The servitude, however, does not expressly prohibit the residents from parking on the driveway. The amendment to the servitude did expressly prohibit the owners of the dominant tenement (ie the Venters) from parking on the driveway, save in certain specific instances. Had it been the intention to also preclude the residents from parking on the driveway, I expect the servitude would have expressly stated this. In my view it is implicit from the amendment that the residents are not so precluded.

[19] Furthermore, the servitude should be construed in a way which imposes the lightest burden on the servient property. This is consistent with the principle that where a route is undetermined on a right of way,

[13] *Huntrex 277 (Pty) Ltd v Berzack and Others* 2025 (4) SA 347 (CC) para 57.

the dominant owner may designate a specific route across the servient land, provided that this right is exercised with appropriate consideration for the servient owner's interests and does not impose an undue burden on the servient land.[14] This is also consistent with the constitutional imperatives discussed above.

[20] I am satisfied that the Venters have demonstrated a definitive entitlement to the effective use of the right of way over the driveway. However, having regard to the configuration of the driveway, it appears to me that it is possible for some vehicles to be parked on the driveway in a manner that does not obstruct the effective use of the driveway by the Venters. In these circumstances, to prohibit the residents from parking on the driveway altogether, would conflict with the lightest burden principle, and would impose an unnecessary burden on the servient land. It would also clash with the caring and communitarian philosophy underlying the value of ubuntu. In the result, I do not consider that the servitude created an absolute ban on parking on the driveway. It follows that the mere fact that the residents parked on the driveway was not a breach of the Venters' rights. Therefore, for this reason alone, the Venters are not entitled to the interdict sought originally in the notice of motion.

[21] I now turn to the alternative relief which was introduced by the amendment granted at the hearing on 28 October 2025. In my opinion, the effective use principle entails the Venters being entitled to drive a vehicle in and out of their garage in a single motion, without having to

[14] *Law of Servitudes* page 419.

execute multiple point turns.[15] Having regard to all the evidence placed before me, including the allegations in the affidavits, the photographs provided, as well as the video evidence, I conclude that there have been instances where the residents have parked in such a way as to obstruct the Venters' reasonable access to their property, including most particularly, vehicular access to the left hand (easterly) side of their garage. CCTV stills showed that this conduct persisted between the first hearing and the resumed hearing. In the circumstances, an infringement has been committed and, I believe, it may reasonably be apprehended that absent an interdict the residents will continue to infringe the Venters' right of way.

[22] To my mind, an interdict is the only satisfactory remedy available to the Venters. This is not the kind of case where a party may be expected to resort to a claim for damages. The injury constitutes an ongoing infringement of the Venters' rights, and the question of damages will be difficult to assess. Pursuing such a claim will be costly and protracted. To my mind, the Venters cannot justifiably be expected to wait for their rights to be determined at trial. I also disagree with the residents' contention that the Venters should limit themselves to accessing their property from T[...] Road. It is not possible to access the garage by a vehicle from T[...] Road. In any event, the Venters have a right to access their property from H[...] Road, via the driveway, and are entitled to use whichever access point they prefer. The requirements for an interdict have therefore been satisfied in relation to the alternative relief.

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[15] Compare *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) at 68C-D – a vehicle proceeding down the road should be able to do so unimpeded.

[23] Regarding the contention that the court should not exercise its discretion in favour of the Venters, the court does not have a general discretion to refuse a final interdict. Any discretion which the court has is bound up in the question of an alternative remedy (in which case, see above). As was pointed out in *Hotz,*[16] withholding the interdict would deprive the aggrieved party of a remedy for the injury. This would infringe the right to access the courts.

[24] With respect to the non-joinder defence, in my view the body corporate possesses very little, if any interest in the alternative relief.[17] Certainly, its interest does not constitute a 'direct and substantial interest' in the sense that it has a legal interest in this relief. Put differently, the order granted can be executed without prejudicing the body corporate.[18] In any event, the body corporate was served with a copy of the papers and was afforded an opportunity to file its own papers. It elected not to do so. In my view, adequate steps were taken to ensure that the court's judgment will not prejudicially affect the body corporate's interests.[19] If the body corporate was indeed in the process of finalising an application to annul the servitude agreement, as alleged by Mr Helfer on 19 September 2025 (which application has been mooted since 2008), the time afforded to it by the postponement order should have been adequate to launch such an application, if it wished to do so.

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[16] *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at para 29.
[17] Unlike *Vlakplaats Estates (Pty) Ltd v Geral* 1963 (3) SA 31 (T) (*Vlakplaats*), the alternative relief does not require the court to define the precise rights and duties of the owner whose property is affected by the servitude.
[18] *Roeloffze NO and Another v Bothma NO and Others* 2007 (2) SA 257 (C) para 42.
[19] See *Amalgamated Engineering Union v Minster of Labour* 1949 (3) SA 637 (A) at 659.

[25] In addition, in *Amalgamated Engineering*, the appeal court observed that the doctrine of *res judicata* may sometimes give valuable guidance as to whether a third party should be joined or not.[20] The common law rules on obligatory joinder seek to prevent a third party who has not been joined, and against whom the order of the court would not be *res judicata*, from approaching the courts again in respect of the same subject matter and possibly obtaining an order irreconcilable with the order that was made in the first instance.[21] The residents constitute the entire ownership of the body corporate. It seems to me that the residents are the alter ego of the body corporate. They are represented by the same legal team, and the chairman of the body corporate (Mr Helfer) deposed to the answering affidavit on behalf of the residents. It is also instructive that the special resolution dated 7 August 2025, annexed to the answering affidavit purportedly to substantiate the deponent's authority, was in fact a resolution by the body corporate.

[26] In the *Man Truck* case the court held that the sole members of the close corporations in question were sufficiently closely identified with the corporations to constitute the privies of the corporations.[22] Similar reasoning may be applied in this case. The residents are sufficiently closely identified with the body corporate, to be treated as being the same party. The body corporate would therefore be regarded in law as being the same as the residents for the purpose of the *res judicata* rule.[23] To my mind, if the body corporate were to bring proceedings against the

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[20] At 660.
[21] DE van Loggerenberg *Erasmus: Superior Court Practice* 10-5, citing *Watson NO v Ngonyama and Another* 2021 (5) SA 559 (SCA) para 53.
[22] *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC & Others* 2004 (1) SA 454 (W). See also *Ilima Projects (Pty) Limited (in liquidation) v MEC: Public Transport, Roads and Works* 2019 JDR 0567 (GJ).
[23] See Voet 44.2.5, discussed in *Amalgamated Engineering* at 654. For this reason also the present case is distinguishable from *Vlakplaats*.

Venters that gave rise to the same issues as have been ventilated in this matter, the principle of *res judicata* (at least in the form of issue estoppel) would be applicable, thereby binding the body corporate to this judgment. For all these reasons I do not consider that the non-joinder defence should be sustained.

[27] As to the allegation that the servitude has become extinguished or falls to be cancelled, as was pointed out by Van Zyl AJ in *Turnbury House*,[24] servitudes are in principle of unlimited duration and can only be terminated under specific circumstances, none of which are applicable in this case. Until the servitude in question is terminated, it remains in full force, and the Venters are entitled to enforce it. In my view, if the residents or the body corporate wished to advance this contention they should have brought a counter application.[25] Indeed, as indicated above, Mr Helfer stated in the answering affidavit that the body corporate intended to launch its own application to cancel the servitude agreement. It appears that no such application has been brought, despite the body corporate being afforded an opportunity to file papers in this matter. I therefore do not consider that the alleged deficiencies and shortcomings in the servitude constitute a defence to the interdict sought in these proceedings.

[28] With respect to the allegation that the servitude will be abused by tenants in the future, if that occurs the residents may seek relief at that point in time. Currently there is no evidence that the servitude is being abused.

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[24] *Turnbury House Properties (Pty) Ltd v Wallin and Another* 2022 JDR 1428 (WCC) para 11.
[25] Compare *Turnbury House* paras 41-43.

[29] Concerning the allegation that the Venters have failed to maintain the servitude, no evidence was adduced to support this allegation, nor was this point advanced in argument. The Venters, for their part, denied that they had refused to maintain the driveway and asserted that they remain willing to comply with any obligation imposed by the deed. In my view, even if the Venters had failed to discharge their obligation to maintain the driveway, that would not be a ground for the residents to breach their obligations.

[30] Finally, I turn to the question of costs. The Venters have only succeeded with relief that was sought belatedly at the second hearing. In my view, the residents were entitled to oppose the application to ensure that the primary relief was not granted. The Venters have, however, obtained some success in the application and most of the defences raised by the residents in their answering affidavit have been dismissed. It seems, furthermore, that even if the Venters had pursued the alternative relief at the outset, such relief would also have been opposed by the residents. In this regard, I note that the residents contended, wrongly, that they had not impeded the Venters' reasonable access.

[31] As to the correspondence which preceded the application, the Venters may be criticised for demanding a complete cessation of parking, but the residents also failed to engage meaningfully with the demands, until it was too late. The values of the Constitution require that neighbours seek solutions not through individualistic competition, but through a common desire to promote the mutual enjoyment of rights by all.[26] I am left with the impression that the Venters' aim was to deprive the residents of their

[26] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 224.

right to park on the driveway altogether, while the residents were intent on negating, or at least limiting, the Venters' right of way. The parties did not demonstrate concern for the interests of their fellow neighbours, nor did they adopt a community-oriented disposition. Instead, they pursued their own interests at the expense of their neighbours. In all the circumstances, I do not consider that either party should be awarded their costs and I therefore direct that the parties pay their own costs (save in relation to the costs of the amendment, as discussed above).

[32] During the initial hearing on 10 October 2025, I urged the parties to consider settling the matter. I pointed out that the interdict sought in the application is a blunt instrument for resolving a dispute of this nature. I am conscious that the order I intend granting may give rise to further disputes. It would be preferable if the parties agreed precisely where the residents may park their vehicles, and paint lines demarcating the acceptable parking spaces. To this end, consideration could be given to the kind of access required by the Venters to their garage. The allotment of parking spaces could be tailored accordingly. It appears that the demarcation of parking bays was agreed as a short-term solution between the Venters' predecessor in title, and the body corporate, as long ago as 13 December 2004. It appears further that this is an intervention now under consideration by the body corporate.

[33] I am not, however, competent to grant this kind of relief.[27] All I can do is urge the parties to engage with each other in a manner that promotes the

[27] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) paras 13-14.

spirit of ubuntu, and the constitutional vision of a caring society based on good neighbourliness and shared concern.[28]

Cooke AJ:

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DJ COOKE

ACTING JUDGE OF THE HIGH COURT

Appearances

For applicants:	D van der Linde
Instructed by:	Randall Titus Attorneys
For first to third and eighth to ninth respondents:	S Pitcher
Instructed by:	Lamprecht Attorneys

[28] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.