



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

Case no: 14030/2012

In the matter between:

QUALITY LABELS SOLUTIONS CC	
t/a TAGTRON SOLUTIONS	First Applicant
THORNBIRD TRADE & INVEST 84 (PTY) LTD	
t/a REDDOTT	Second Applicant
ALTIUS TRADING 433 (PTY) LTD	
t/a LINOMTHA	Third Applicant
KEY ENCRYPTED PRINT TECHNOLOGY (PTY) LTD	
t/a KEPT	Fourth Applicant
TRIPLE SL TECH CC	Fifth Applicant

and

HEAD OF DEPARTMENT OF CULTURE, SPORTS AND RECREATION, MPUMALANGA PROVINCE	First Respondent
GOVERNMENT OF THE PROVINCE OF MPUMALANGA	Second Respondent
METROFILE (PTY) LTD t/a CSA CUSTOMER SERVICES	Third Respondent
JENNY AND THEMBI TRADING CC	Fourth Respondent
FOREK IT SERVICES CC	Fifth Respondent
TAZI INVESTMENT CC	Sixth Respondent
BATHO-PELE SECURITY SERVICES CC	Seventh Respondent
PHINDA MPUMI MULTI TRADING CC	Eighth Respondent
NDENDE INVESTMENT CC	Ninth Respondent

JUDGMENT: 1 AUGUST 2013

Schippers J:

[1] This is an urgent application for a declaratory order that an interim interdict is revived by the noting of an appeal; alternatively, for an order

granting the applicants a further interim interdict pending the determination of an application for leave to appeal and if such leave is granted, the determination of the appeal.

[2] The applicants are unsuccessful bidders in Tender No. CSR/070/11MP for the provision and installation of book anti-theft devices in 76 libraries in Mpumalanga (“*the tender*”). The closing date of the tender was 14 December 2011. The first respondent awarded the tender in respect of 10 libraries to Bell Oak Investments (Pty) Ltd (“*Bell Oak*”), and the tender for the remaining libraries, to the third to ninth respondents.

[3] In July 2012 the applicants brought an application to review and set aside the award of the tender to the third to ninth respondents; and an interim interdict restraining them from taking any steps to implement the tender, pending the determination of the review application. On 7 September 2012 this Court (per Louw J) granted an interim interdict restraining the respondents from taking any steps to implement the tender (including the conclusion of any agreements in respect of the tender or handing over any library sites to the fourth to ninth respondents), pending the determination of the application to review and set aside the award of the tender.

[4] On 4 June 2013 this Court (per Henney J) delivered judgment in the review application. It dismissed the application to review and set aside the award of the tender to the fourth, fifth, seventh, eighth and ninth respondents; and declared invalid and set aside the award of the tender to the sixth respondent, which was referred back to the first respondent for reconsideration.

[5] On 13 June 2013 the applicants noted an appeal to the Supreme Court of Appeal (SCA), alternatively, a Full Bench of this Court, against the order dismissing the application to review and set aside the award of the tender. The application for leave to appeal is pending before Henney J.

[6] During argument Mr. De Waal, on behalf of the applicants, informed me that they were no longer pressing the point that the interim interdict granted by Louw J was revived by the noting of the appeal. He handed up a draft order sought by the applicants, that the first and second respondents be restrained from concluding any agreements or handing over any library sites to the fourth to ninth respondents for the installation of anti-theft devices, until determination of the application for leave to appeal, with costs to stand over.

[7] The requirements for the grant of an interim interdict are settled law. These are: a *prima facie* right; a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;

a balance of convenience favouring the grant of interim relief; and the absence of similar protection by any other ordinary remedy.¹

[8] This is not a case in which a court has not yet been able to decide the parties' respective legal rights in the review application. Their rival positions have been considered and determined by Henney J, and a detailed judgment has been given.

[9] The question then is what the applicants must show in order to establish a *prima facie* right in an interdict pending an appeal.

[10] Mr Masuku, who with Mr Gcelu, appeared for the first and second respondents, on the authority of *Plettenberg Bay*,² submitted that the applicants did not establish a *prima facie* right – *prima facie* proof of facts which establish a right in terms of substantive law. In that case the applicant applied for an interim interdict to prevent the police from closing its casino pending the determination of an action for a final interdict to the same effect (the main application). The right asserted by the applicant was its right to operate a casino. The alleged basis of that right was a transitional provision in s 7 of the Gambling Amendment Act 144 of 1992. However, Brand J (as he then was)

¹ Joubert *et al* (eds) *The Law of South Africa* (2nd ed 2008) vol 11 p 419 para 403; *Setlogelo v Setlogelo* 1914 AD 221 at 227.

² *Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Orde en 'n Ander* 1993 (2) SA 396 (C).

found that the operation of a casino did not fall within the ambit of s 7 and dismissed the main application. The applicant then applied for an interim interdict pending an appeal. In dismissing the application, the court held that in the main application it had already decided that the applicant did not have a right to operate a casino, which was not a right in terms of substantive law required for an interdict.³ Consequently the court had no discretion to grant an interdict for the protection of a right which it had already found did not exist.⁴

[11] Mr de Waal countered with *Indwe*,⁵ in which the court granted an interim interdict pending an appeal. It held that the fact that the applicant in *Indwe* did not meet the requirements for a final interdict was an important distinction between that case and *Plettenberg Bay*; and that a finding that a court did not have a discretion to grant interim relief in the circumstances, would be at odds with our constitutional dispensation which did not exist when *Plettenberg Bay* was decided.⁶

[12] In my respectful view, the rules relating to the prerequisites for the grant of an interdict which includes an equitable discretion to be exercised by the court, founded on the common law,⁷ have not changed with the advent of the

³ *Plettenberg Bay* n 2 at 399E-F.

⁴ *Plettenberg Bay* n 2 at 401E.

⁵ *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd and Another* (2) 2012 (6) SA 110 (WCC).

⁶ *Indwe* n 5 para 24.

⁷ *LAWSA* n 1 p 413 para 391.

Constitution, although the common law has been subsumed under, and derives its force from, the Constitution.⁸ It seems to me that the decision in *Plettenberg Bay* is explicable on two grounds. The first is founded on the *Constantinides*⁹ decision in which Brand J found support for his viewpoint.¹⁰ It is that if an application for an interim interdict is refused on the basis of a finding that the applicant has not established a *prima facie* right, a court is not entitled to grant an interim interdict pending an appeal. The second is that the court decided a legal issue, namely that the alleged ground of the applicant's right to operate a casino did not fall within the ambit of s 7 of the Gambling Amendment Act 144 of 1992. Having already determined that issue, the court held that there was no substantive right for the grant of an interim interdict pending an appeal.

[13] In *Ismail*¹¹ Dowling J held that an interdict *pendente lite* was not revived by the noting of an appeal and that if a litigant desires further protection by way of an interdict pending the determination of an appeal, he must make application therefor.¹² However, *Plettenberg Bay* seems to point the other way - a court has no discretion to grant an interdict to protect a right which it already found does not exist. It is not necessary for present purposes to resolve this issue and I shall assume that the applicants are entitled to apply for an interdict pending the

⁸ *Pharmaceutical Manufacturers Association of S A and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 49.

⁹ *Constantinides v Jockey Club of South Africa* 1954 (3) SA 35 (C) at 53H.

¹⁰ *Plettenberg Bay* n 2 at 399G-400A.

¹¹ *Ismail v Keshavjee* 1957 (1) SA 684 (T).

¹² *Ismail* n 9 at 687H-688A; *Kelly Group Ltd and Another v Solly Tshiki & Associates (SA) (Pty) Ltd and Others* 2010 (5) SA 224 (GSJ) paras 19 and 21.

determination of an appeal, despite the fact that Henney J found that they did not establish a reviewable irregularity as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[14] To revert to the question at hand. As was said in *Ferreira*,¹³ trying to define the limits of a *prima facie* right is like trying to measure a shadow. The court referred to *Moosa*¹⁴ where it was said that it is impossible to describe with any precision the concept, “*a right prima facie established though open to some doubt*”. It is a flexible concept which enables a court to decide in an individual case whether the proof is sufficient, especially when it is closely coupled with the court’s discretion, which includes the consideration of the balance of convenience – the deciding factor in most borderline cases.¹⁵

[15] It is that flexibility, in my view, which has enabled the courts to determine the degree of proof required of an applicant for an interdict whose right cannot be said to be a “*clear right*”. The proper approach to the determination of a *prima facie* right in the context of an interim interdict decided in *Webster*,¹⁶ and qualified in *Gool*,¹⁷ has stood the test of time.¹⁸ In *Ferreira* Heher J (as he then

¹³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813 (W) at 831E.

¹⁴ *Moosa and Another v Knox* 1949 (3) SA 327 (N) at 333.

¹⁵ *Moosa* n 12 at 333-334.

¹⁶ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189. See also *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) at 228G.

¹⁷ *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688E-F.

¹⁸ The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant together with the facts set out by the respondent which the applicant cannot dispute and

was) considered that the “*serious question to be tried*” approach for an interlocutory injunction in English law enunciated in *American Cyanamid*,¹⁹ was in substance to be equated with the practical concept of a *prima facie* case open to some doubt.²⁰ In deciding whether the appellants in that case had established a *prima facie* right in an application for an interim interdict pending a determination of the constitutionality of statutory provisions by the Constitutional Court, the enquiry was whether they had shown that there was a serious question to be tried by the Constitutional Court.²¹

[16] However, in my opinion both these tests are inappropriate to determine whether an applicant has established a *prima facie* right in an application for an interim interdict, pending an appeal. In this regard, the case of *Novartis*,²² decided recently in the Court of Appeal (Civil Division) in the United Kingdom, is instructive. The appeal concerned the grant of interim injunctive relief pending appeal when a patent in suit had been held invalid. In the court of first instance Birss J held that different considerations apply to the grant or refusal of interim relief once a trial has taken place; and that once the court has given a

to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts put up contradiction by the respondent should then be considered and if serious doubt is thrown on the applicant’s case, he cannot succeed in obtaining temporary relief.

¹⁹ *American Cyanamid Company v Ethicon Ltd* [1975] 1 All ER 504 (HL).

²⁰ *Ferreira* n 11 at 836A-B.

²¹ *Ferreira* n 11 at 836E; 839J; *Law Society of South Africa and Others v Road Accident Fund and Another* 2009 (1) SA 206 (C) para 15.

²² *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583 delivered on 22 May 2013.

ruling on the merits, a party needs a good arguable case on appeal before the court would be at all likely to grant an injunction pending appeal.

[17] The Court of Appeal did not uphold the standard of a good arguable case. Lord Justice Floyd summarized the principles which apply to the grant of an interim injunction pending appeal where the claimant has lost at first instance, as follows:

- “i) *The court must be satisfied that the appeal has a real prospect of success.*
- ii) *If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.*
- (iii) *It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.*
- (iv) *The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other.*
- (v) *As in the case of the stay of a permanent injunction which would otherwise be granted to a successful claimant, the court should*

*endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.”*²³

[18] Bearing in mind the differences between the English law relating to injunctions and our law, I consider that the concept of a *prima facie* right is sufficiently flexible to accommodate the standard of “*a real prospect of success on appeal*”, as the degree of proof required of an applicant to establish a *prima facie* right in an interdict pending an appeal. This standard posits a higher threshold than a *prima facie* right although open to some doubt, and is likely to be more difficult to meet, mainly because different considerations apply to the grant or refusal of interim relief once a trial has taken place or an application has been decided.

[19] It follows that the requirement of a reasonable prospect of success on appeal which must be satisfied before leave to appeal is granted, must not be equated with the requirement of a real prospect of success on appeal. Otherwise it would mean that a party granted leave to appeal would automatically establish a *prima facie* right for the purpose of an interdict pending appeal.

[20] As in the case of an ordinary interim interdict, the establishment of a *prima facie* right – a real prospect of success on appeal – should not be treated as

²³

Novartis n 20 para 41.

a threshold requirement. Instead, it is related to the other requirements, such as irreparable harm, the balance of convenience and the absence of an ordinary remedy; and remains an element of the balancing process which a court undertakes in the exercise of its discretion whether or not to grant a temporary interdict pending an appeal, after considering the affidavits as a whole.²⁴

[21] I turn now to consider whether the appellant has met the requirements for the grant of an interim interdict pending appeal.

[22] In relation to the first requirement - a *prima facie* right - the founding affidavit states that “*the factual and legal issues before Louw J and Henney J were essentially the same and yet these two learned judges reached diametrically opposed findings and results*”. Then it is said that this demonstrates that there is at least a reasonable prospect that an appeal court would reach a different conclusion.

[23] This however does not demonstrate a real prospect of success on appeal. As is evidenced by his judgment, Louw J intended to grant an interdict *pendente lite* in the ordinary form, i.e. pending the determination of the application to review and set aside the tender.²⁵ At that stage of the proceedings, all the applicants had to show was a *prima facie* right, although open to some doubt;

²⁴ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691E-G.
²⁵ *Ismail* n 9 at 687F-G.

and it was uncertain whether their right to just administrative action under s 33 of the Constitution and the provisions of PAJA had been infringed. The enquiry by Louw J into the merits of the review application was preliminary and necessarily superficial. However, in the application before Henney J, the applicants had to establish, on a balance of probabilities, the grounds upon which they attacked the decisions sought to be reviewed and set aside. Henney J found that they failed to do so. Consequently their right to just administrative action was not infringed.

[24] Moreover, as was said in *Novartis*,²⁶ it does not follow that if an interdict has been granted pre-trial, that an interdict pending appeal should be granted. The court must assess all the relevant circumstances following judgment. As already stated, a reasonable prospect of success on appeal must not be equated with a real prospect of success on appeal required for an interim interdict.

[25] I have dealt with the only the grounds in the founding affidavit on which the applicants rely for the alleged establishment of a *prima facie* right and to which their argument on this aspect was confined. I must stress that my decision on the present application does not involve any assessment of the application for leave to appeal, more particularly whether the applicants have a reasonable prospect of success on appeal. In the light of this and the conclusion

²⁶ *Norvatis* n 20 para 41.

to which I have come, it is unnecessary to consider any further whether the applicants' have established a *prima facie* right in this case.

[26] As to the balance of convenience, the applicants contend that they will suffer considerable prejudice and irreparable harm if interim relief is not granted pending the application for leave to appeal and the appeal itself. They say that they will not be able to perform the work and that their appeal would be rendered moot unless an interim interdict is granted; and that the public will suffer harm if the tender is to be implemented by the respondents, rather than the first applicant. They also say that the first and second respondents will not suffer any prejudice if interim relief is granted, for the following reasons. It was never seriously disputed that anti-theft devices in libraries were neither urgent nor essential. For many years the libraries never had such devices. The theft of only five library books has been recorded by the Department of Culture Sports and Recreation, Mpumalanga Province ("*the Department*") in the last year. The anti-theft devices are not intended to provide any security for learners, staff or visitors. The fourth to ninth respondents have done shoddy work in respect of the libraries allocated to them.

[27] The first and second respondents' answer is that if an interdict were to be granted, it would create uncertainty in the resolution of disputes; and where, as here, the dispute involves the delivery of services to the public by a government

entity, it will frustrate development and progress. They contend that it is not the purpose of an interim interdict to bind parties until the resolution of a dispute by the highest court of appeal. The applicants, they say, “*are fighting for a right to be put back in the race*” for the tender, in respect of which there is no guarantee of success in the light of the judgment of Henney J, who found evidence of collusive bidding between the first applicant and Bell Oak. The tender was issued to curb prevalent theft of library materials. The delay in the installation of anti-theft devices in public libraries has a detrimental effect on the safety of library material and is prejudicial to the public for whose benefit the devices are installed. An interdict would suspend an important development in the protection of public libraries and frustrate service delivery in vulnerable communities.

[28] The fact that a successful appeal may be rendered nugatory, does not, in my view, per se justify the grant of an interdict pending an appeal. It is but a factor which a court takes into account in the exercise of its discretion when considering inter alia the balance of convenience. And in this case there is the further consideration that an appellate court may exercise its discretion not to set aside the award of the tender. Invalid administrative acts are not set aside for the asking: a court has a discretion whether to grant or withhold the remedy.²⁷

²⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36; *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) para 28.

[29] I do not think that the balance of convenience, which is different from that which prevailed prior to the judgment of Henney J, favours the applicants. The applicants overlook the importance of securing library books and materials - an administrative function of the Department. Public libraries, which support children, learners, students, the educational community and ordinary people by granting them access to books, information and knowledge, are a vital part of personal, educational and socio-economic advancement. Information is an essential part of a nation's resources and access to it is a basic human right. So too education. With declining budgets and higher costs of books and materials, it is becoming increasingly difficult to meet the needs of library users. Therefore public libraries must be safe from security threats and vulnerability.

[30] Public libraries in Mpumalanga have been without anti-theft devices for a long time. It is in the public interest that these anti-theft devices should now be installed. Library books and materials are public resources which should be preserved and protected. Public libraries play an essential role in promoting the culture of reading and building communities, particularly in poverty-stricken areas. In some places they are dynamic, versatile community centres.

[31] For these reasons, the applicants' claim that anti-theft devices are not urgently required or essential does not bear scrutiny.

[32] A factor which to my mind tips the scales in favour of the respondents is the period of time before an appeal is likely to be heard. Given the time that will be taken up by the compilation of an appeal record for the SCA or a Full Bench of this Court; the filing of heads of argument; the hearing of an appeal; and the potential of yet a further appeal to the Constitutional Court, the respondents will be severely prejudiced should an interdict be granted pending appeal. The closing date of the tender was 14 December 2011 – some 19 months ago. The applicants successfully halted its implementation pending the determination of their review application. That application has been decided. The applicants have had their day in court and lost. There is no guarantee, let alone any assurance that they will be awarded the tender should the appeal succeed. In the event of an appeal succeeding, given its nature, the tender is likely to be remitted to the Department to be awarded afresh. Again, there is the possibility of a disgruntled bidder taking that decision on review. And in all of this, public libraries in Mpumalanga will remain unsecured, contrary to the public interest.

[33] In the circumstances, I consider that it would be substantially unfair to deprive the respondents, particularly the successful bidders, of the fruits of their success.

[34] Then there is the prejudice to the fourth and eighth respondents. Henney J found that it would not be just and equitable to order that they should not complete the remainder of the work for which the tender was awarded. Both these respondents had incurred expenses and bought all the equipment for installation in the libraries. The prejudice that they will suffer if an interdict pending an appeal were to be granted, plainly outweighs any prejudice to the applicants.

[35] Finally, as regards the absence of an ordinary remedy, the applicants contend that a damages claim against the Department is not a viable alternative as it is not an easy task to demonstrate intentional wrongdoing. That may be so. But equally, the granting of an interdict pending appeal may very severely damage the respondents in such a way that they will have no remedy against the applicants if they, the respondents, succeed on appeal. Apart from this, having regard to the other requirements for interim relief and the weight to be given to them in the exercise of my discretion, I do not think that this is a case where an interdict should be granted.

[36] For the reasons advanced above and in the light of the particular circumstances of this case, an interim interdict pending an appeal against the judgment of Henney J, is refused.

[37] There is a further issue which stands in the way of granting the applicants the relief sought. It is that they failed to give the eighth respondent any notice of this application, and the notice to the fifth, seventh and ninth respondents was inadequate in the circumstances.

[38] It is trite that a party who has legal interest in the subject matter of litigation which may be prejudicially affected by the judgment of a court, must be joined in the proceedings.²⁸

[39] The application was launched on 8 July 2013 and served that day on the first and second respondents, care of the State Attorney, Cape Town. It was also served on the fourth respondent, care of Fairbridges attorneys, Cape Town. The notice of motion was addressed only to those respondents. The application was not served on the remaining respondents.

[40] In the answering affidavit, delivered on or about 12 July 2013, the applicants were alerted to the fact that it is not only the first and second respondents who have an interest in the application and that they were required to serve the papers on all the respondents. They failed to do so.

²⁸ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (A) at 804B-E; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) paras 64-66.

[41] On 17 July 2013 when the court file was handed to me as the duty Judge for urgent applications, the attention of the applicants' legal representatives was again drawn to the non-joinder of the respondents. The matter was postponed for hearing on 18 July 2013.

[42] On 18 July 2013 when the application was argued, there was no indication in the court file that the respondents who had to be joined were given notice of the application.

[43] It was only on 19 July 2013, after the application had been heard, that an affidavit of service made on 18 July 2013 by Mr Roos, a candidate attorney employed by the applicants' attorneys, was delivered to me under cover of a letter by the applicants' attorneys of even date. The affidavit states that on 16 July 2013, the founding papers were served on the fifth respondent's attorneys in Johannesburg via e-mail at 15:52 and that the attorneys confirmed receipt at 16:21 that day. On 17 July 2013 the founding papers were served on the third respondent via e-mail at 15:40; and a copy thereof was also sent to its Regional Director on 18 July 2013. The founding papers were served on the seventh respondent on 17 July 2013 via e-mail at 14:29 and receipt thereof was confirmed at 15:43 that day. On 17 July 2013 at 15:49 a copy of the founding papers was served via e-mail on the ninth respondent. In his affidavit Mr Roos

submits that “*there has been proper compliance with all requirements of service*”.

[44] But that is not so. The record shows that the eighth respondent was not given notice of the application. Furthermore, save for the fifth respondent, the founding papers were served on the respondents referred to in the affidavit by Mr Roos on 17 July 2013 – after the time for which the application had been enrolled, had passed. The notice of motion states that the application would be made on Wednesday 17 July 2013 at 10h00. Worse, it does not appear from either the record or Mr Roos’ affidavit that any of the respondents referred to in the affidavit were informed that the application had been postponed for hearing on Thursday 18 July 2013.

[45] Once again it is necessary to say that rule 6(2) of the Uniform Rules of Court is peremptory.²⁹ There is no rule that says that the requirement that notice must be given to a person against whom relief is claimed, does not apply to an urgent application. Although a court may in terms of rule 6(12)(a) dispense with the forms and service provided for in the Rules, it is enjoined by the subrule to dispose of an urgent application by procedures which shall as far as practicable be in terms of the Rules.

²⁹ Rule 6(2) reads: “When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such a person, otherwise it shall be addressed to the registrar only.”

[46] Despite the fact that the applicants' legal representatives were on more than one occasion advised to join parties who have a legal interest in the outcome of this application, they have not done so, or have done so improperly. No explanation has been furnished for the failure to serve the founding papers on the third to fifth and seventh to ninth respondents when the application was launched. Neither is there any explanation for the failure to inform those respondents of the hearing of the application on 18 July 2013. In effect then, respondents who have a legal interest in this matter were not given notice of this application, which is fatal to the applicants' case, and also warrants the dismissal of the application.³⁰

[47] I make the following order:

The application is dismissed with costs, such costs shall include the costs of only one counsel.

SCHIPPERS J

³⁰ *Transvaal Agricultural Union* n 28 paras 19 and 67.