IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***20th NOVEMBER 2015*** Signature: _____

CASE NO: 2015/03470

In the matter between:

LIMBADA, IMTIAZ AHMED	First Applicant
CHOTIA, SALICK MAHOMADEE	Second Applicant
ISMAIL, AHMED ALLI	Third Applicant
ISCO TRADING (PTY) LTD t/a FRYPAN BAZAAR	Fourth Applicant
KESHAV, VINOD	Fifth Applicant
PATEL, SHEHAAZ CASSIM	Sixth Applicant
H D M WHOLESALERS CC t/a STARLIGHT FASHIONS	Seventh Applicant

and

JAZZ SPIRIT 101 (PTY) LIMITED	First Respondent
MOTLA UTILITIES (PTY) LIMITED	Second Respondent

JUDGMENT

ADAMS AJ:

[1]. The issue in this application is the legal entitlement of the applicants to declaratory and interdictory orders which are akin to orders for specific performance in terms of contracts. The applicants place in issue the legality of operational costs and other charges levied and invoiced for by the first respondent in terms of lease agreements in force at all relevant times between the applicants and the first respondent. These charges are an *'electricity service charge'*, *'operational costs'* and a *'municipal recoveries charge'*, and the issue is whether the first respondent was lawfully entitled to charge these costs to the applicants, regard being had to the lease agreements and the relevant legal principles.

[2]. The applicants allege that the levying of these charges is unlawful, and that this application was necessitated by the respondents' failure and/or refusal to respond to queries by the applicants regarding the basis of the charges.

[3]. The applicants claim declaratory and interdictory relief in respect of the different charges, and, in addition, claim repayment of certain unidentified amounts which were *'levied against the applicants'*.

THE FACTS

[4]. In this matter, there is a morass of facts and issues, some of which are common cause and others which are controverted. It was not always an easy task working through the quagmire, but in the end the facts turned out to be a lot less convoluted than initially meets the eye.

[5]. At all times material hereto, there was in existence between all of the applicants individually and the first respondent separate lease agreements in terms of which the applicants each let from the first respondent, which it leased to the applicants, business premises in a building in the Johannesburg CBD known as Gardees Arcade *('the leased building)*.

[6]. The lease agreements were individually constituted by the written agreements concluded between the applicants and the previous owners of the leased property. Over time, the lease periods of the original lease agreements had been extended and the terms and conditions of the individual agreements of lease governed the relationship between the parties in each of the individual leases. The last of the written lease agreements was concluded between the first respondent and the seventh applicant on the 15th September 2006, with a commencement date of the 1st September2006 and expiring initially on the 28th February 2007. For the rest, the lease agreements were initially concluded between the previous

owners of the leased property, being Mine Official Pension Fund & Mine Employees' Pension Fund *('the Landlord')* and the various applicants.

[7]. The first respondent became the owner of the leased property during or about 2004. Therefore, it is the case of the applicants that the lease agreements between the first respondent and the first 6 applicants came into existence in 2004 and remain in force to date as monthly tenancies, governed in the main by the terms and conditions of the original written lease agreements. According to the first respondent, these tacit monthly lease agreements can be terminated by either party by reasonable notice of one month in view of the fact that they are, for all intents and purposes, monthly tenancies.

[8]. All of the lease agreements, after expiry of the initial lease periods, became by implication, monthly tenancies governed by the terms and conditions of the original written lease agreements.

[9]. Of importance are the following provisions of the lease agreements:-

9.1 The net monthly rental would escalate annually by 12%.

9.2 The monthly operating costs would escalate annually by 15%.

9.3 The applicants would pay in respect of water and electricity, the amounts determined in accordance with a sub-meter if a sub- meter is installed in respect of the leased premises. If no sub-meter is installed, the applicants would pay an amount equal to the applicants' contribution ratios in respect of the total charges for water and electricity consumed or supplied to the Gardees Arcade.

9.4 The applicants would pay in respect of municipal charges that proportion of all municipal and local authority charges levied on or payable in respect of the Gardees Arcade that is equal to the applicants' contribution ratios.

[10]. I must hasten to add that there are some variations to these salient terms of the lease agreements which are, for purposes of this judgment, not relevant. For example, in some of the original lease agreements, the *'operating charges'* would be a set amount escalated annually and in others the amounts charged in respect of these costs are based on a formula related to the total space occupied by the individual lessee.

[11]. On the version of the applicants, there have been attempts by the first respondent since 2005 to cancel the lease agreements existing between first respondent and the various applicants and on a number of occasions, measures were put in place to have some of the applicants evicted from the leased premises. These attempts were seemingly resisted strenuously

by the applicants on each occasion. By all accounts, therefore, the relationship between the applicants and the first respondent at the best of times is strained.

[12]. Also, there have been numerous attempts to conclude new written lease agreements, but on each occasion, according to the applicants, *'the first respondent had proposed to incorporate a range of additional, unduly onerous clauses in their favour. As a result, it has not yet been possible for the parties to reach agreement on the terms of a new lease'.*

[13]. In the meantime, the parties stumble from one dispute and fight to the next. This, in my view, may explain the rationale and the motivation behind this application. The impression I have of these proceedings is that the court is required to act in a consultative or advisory capacity. As was pointed out in *Compagnie Interafricaine de Travaux v SA Transport Services*, 1991 (4) SA 217 (A), a court may in appropriate circumstances base a declaration of rights on assumed facts

[14]. This is the backdrop to this application. Ideally, the first respondent would like to extricate itself from the legal relationships with the applicants, hence the numerous previous attempts to cancel the lease agreements existing between them in whatever format. The applicants, on the other hand, believe that they are being treated unfairly by the first respondent, whom

they accuse of acting unlawfully, unfairly and unjustly in its dealings with them.

THE LAW

[15]. In deciding this matter I am alive to the principle that whilst it is necessary to recognise the doctrine of *pacta sunt servanda,* courts should decline the enforcement of provisions in a contract if it would result in unfairness or would be unreasonable. This approach requires the applicants to demonstrate that in the particular circumstances of this matter it would be unfair to insist on compliance with a particular clause. See *Barkhuizen v Napier,* 2007 (5) SA 323 (CC).

[16]. The Supreme Court of Appeal in the above matter made the following observation:-

> *'That intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on the parties' individual arrangements.'*

THE 'UNLAWFUL' ELECTRICITY SERVICE CHARGE

[17]. The applicants object being charged by the first respondent on a monthly basis an amount in respect of an *'electricity service charge'.*

[18]. The first respondent alleges that the *'electricity service charge'* is an accurate reflection of the costs associated with the rendering of the service in respect of the installation, maintenance and reading of the electricity meters.

[19]. At the time of the launching of the application, the first respondent was paying a single *'electricity service charge'* of R680.64 per month to the Local Authority and it then charged the exact same amount of R680.64 to each one of the individual applicants, thereby multiplying and replicating the single fee that it is required to pay to City Power. It is alleged by the first respondent that it is charging each of the applicants for its expenses in installing, maintaining and reading their electricity meters. Applicants submit that this justification is without merit.

[20]. Relying on a ruling by the Gauteng Housing Tribunal dated the 13th May 2013, which decision was based on the Rental Housing Act 50 of 1999 and the Unfair Practice Regulations, 2001 *('the Regulations'),* the provisions of and the tariffs the Local Government: Municipal Systems Act no. 32 of 2000 *('Municipal Systems Act'),* and the provisions of the

Consumer Protection Act 68 of 2008 *('CPA')*, the applicants submit that it is unlawful for the first respondent to levy the *'Electricity Service Charge'* as it has been doing since 2009.

[21]. I am not convinced that the provisions of any of the aforegoing pieces of legislation are applicable to the contractual relationship between the applicants and the first respondent. The Rental Housing Act 50 of 1999 and the Unfair Practice Regulations, 2001 *('the Regulations')* relate specifically to residential property, and the Local Government: Municipal Systems Act no. 32 of 2000 *('Municipal Systems Act')* has reference to Local Authorities and have very little, if any, bearing on contractual relationships between private individual or entities.

[22]. It is possible that, all things considered, the levying by the first respondent of this particular charge falls foul of the provisions of section 48 of the CPA in that it is unfair, unreasonable or unjust. I am, however, not ruling on this issue as it is not necessary for me to do so in view of my findings below based on the lease agreements.

[23]. However, importantly, if one has regard to the lease agreement, no reference is made to the liability by the applicants to pay to the first respondent amounts in respect of the *'Electricity Service Charge'*. Therefore, there appears to be no legal basis on which this charge is

levied and for that reason alone, it can be said that the levying of this charge by the first respondent is unlawful. I am strengthened in this conclusion by what was said by Coppin J in the matter of *Young Min Shan CC v Chagan N O*, 2015 (3) SA 227 (GJ). He had this to say at par [71]:

> *'It is reasonably conceivable that the levying of a separate service charge, such as that complained of, unless properly and effectively regulated, could be abused by landlords. The amount of the charge is not determined by agreement, nor is it fixed. The amount is entirely within the discretion of the landlord and may be determined at will by it. It could be used as a mechanism to generate profits, or to recover losses or expenses from all the tenants for which they otherwise would not be liable, such as those due to one or some tenants not paying their rent or electricity accounts. Such a practice would be inherently unfair to the paying tenants.*

[24]. Whilst the above matter related to a residential property and the principles enumerated in that judgment probably would not find application *in casu*, I am of the view that the above extract would be relevant when interpreting and applying the terms and conditions of the lease agreement, especially if regard is had to the fact that no provision is made anywhere in the lease agreement for the respondents being entitled to charge this *'electricity service charge'*.

[25]. I therefore accept and find that that the levying by the first respondent of the *'electricity service charges'* is unlawful. This then brings me to the entitlement of the applicants to the relief sought relative to this particular expense debited by the first respondent..

[26]. In respect of this charge, the applicants ask for the following relief:

26.1 A declaratory order that the levying of this charge is unlawful;

26.2 An order interdicting and restraining the first respondent from levying these charges in the future;

26.3 An order directing that the first respondent repay to the applicants all *'electricity service charges'* levied, with the quantum to be repaid to be referred to oral evidence.

[27]. The relief sought by the applicants is in the main in the nature of a declaratory order and also asking for specific performance. The applicants require me to, firstly, define their rights under and in terms of the lease agreement and then to order enforcement against the first respondent of these rights.

[28]. Section 21(1)(c) of the Superior Courts Act no 10 of 2013 empowers the court, in its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or

obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[29]. A person seeking a declaration of rights must set forth his contention as to what the alleged right is. See *ECA (SA) & Another v BIFSA (2)*, 1980 (2) SA (TPD).

[30]. In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd,* 2005 (6) SA 205 (SCA), the SCA confirmed that the subsection provides for a two-stage approach as follows:

30.1 During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an *'existing, future or contingent right or obligation'*, which is a condition precedent for the exercise of the court's discretion;

30.2 Then, if satisfied on the first point, the court must exercise its discretion by deciding either to refuse or grant the order sought.

[31]. In *Adbro Investment Co Ltd v Minister of the Interior and Others*, 1961 (3) SA 283 (T), it was held that:

> *'Some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory*

order sought before the court should exercise its discretion to grant the declaratory order sought.

[32]. *In casu*, I think that there can be very little, if any, doubt that the tangible and justifiable advantage for the applicants which would flow from the granting of the declaratory order is that they would have the right to claim from the first respondent a refund of this charge paid and levied. Additionally, the applicants would in future have the right to refuse to pay these charges even if levied by the first respondent.

[33]. I am accordingly of the view that, with reference to the first leg of the above enquiry, the applicants have demonstrated that they are persons interested in a right to claim a refund of amounts paid in respect of the *'electricity service charge'.*

[34]. I now turn to the exercise of my discretion to grant or refuse the order sought, and in doing so I have had regard to the following factors:-

34.1 At present, there exists a dispute between the parties relative to the issue in respect of which the order is sought. In particular, the first respondent is presently levying the charge and invoicing the applicants for this cost on a monthly basis, and has been doing so since 2009. The applicants believe that they are not liable for this

charge and are claiming a refund of the amounts paid by them to date to the first respondent.

34.2 This order will be binding on the first respondent who has been opposing this application.

34.3 Whilst I do not intend granting the further relief claimed by the applicants relative to the *'electricity service charge'*, the applicants are nevertheless entitled to pursue this claim further.

[35]. Accordingly, I intend granting an order in terms of prayer 1 of the Notice of Motion.

[36]. As regards the request by the applicants that I interdict and restrain the first respondent from levying the *'electricity service charge'* in future, I am not persuaded that a case has been made out for this relief.

[37]. The requisites for a final interdict were stated in *Setlogelo v Setlogelo*, 1914 AD 221, as follows:

> *'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'*

[38]. With regard to the request that the first respondent be interdicted from levying the *'electricity service charge'* against the applicants' electricity accounts in future, I am of the view that the first two requirements are met. I have already indicated that I am satisfied that the applicants are entitled and therefore have the right not to be charged the *'electricity service charge'* and that the first respondent has violated this right. Therefore, in my view, the applicants' right and that an injury has been committed are perfectly clear.

[39]. The only question is whether there are available to the applicants alternative courses of action which would afford them protection similar to that which an interdict would afford them. Mr Oosthuizen, Counsel for the first respondent, submitted that the applicants clearly have available to them a satisfactory alternative remedy in that they can simply refuse to make payment of the *'objectionable'* charges. My ruling that the first respondent's conduct in levying the *'electricity service charge'* is unlawful, fortifies this argument and I agree with the submissions made by Mr Oosthuizen. Furthermore, I am not persuaded by the counter arguments on behalf of the applicants that this would amount to self – help. As I indicated above, there have been numerous attempts to have some of the applicants evicted, which attempts have been resisted vigorously. This is so despite the fact that the first respondent would seemingly be well within its rights to cancel the lease agreements and proceed with eviction proceedings against them.

[40]. Accordingly, I am not persuaded that the applicants have made out a case for the relief which is sought in prayer 2 of the Notice of Motion and I am not inclined to grant such an order.

[41]. The applicants also ask for an order directing that the first respondent be directed to repay to them all amounts paid in respect of the *'electricity service charges'*.

[42]. In view of my finding that these charges were levied unlawfully, it may well be that the applicants have valid claims for refunds. However, this claim must be seen in the context of other possible claims by the first respondent based on a particular interpretation of the terms and conditions of the lease agreement. For example, the invoices from the first respondent to the first applicant dated 12/2014 and 01/2015 respectively seem to suggest that there is an outstanding balance of approximately R18,000.00 payable by the first respondent which is being carried on a monthly basis and which remains unpaid. In the answering affidavit, the first respondent alleges that a reconciliation of all amounts due and payable by the applicants indicates that the applicants owe the first respondent a total sum of approximately R3,000,000.00 in terms of the lease agreements.

[43]. There is therefore a factual dispute, firstly, relating to the quantum of the amount to be refunded and, secondly, relating to possible counterclaims which the first respondent may have against the applicants.

[44]. Accordingly, I think that it would be inappropriate and not in the interest of justice to direct the first respondent to repay the amounts.

OPERATIONAL COSTS

[45]. The applicants object to the first respondent charging them *'operational costs'* or *'operating costs'* as it is termed in the earlier written lease agreements.

[46]. In terms of the lease agreements between the applicants and the first respondent, *'operating costs'* (also referred to as *'operational costs'*) is defined as those costs incurred by the respondent in respect of:-

46.1 The cleaning and maintenance of the common area of the building and the property (but excluding the leased premises), the parking areas and the gardens;

46.2 Management and caretaker's fees;

46.3 All costs relating to the management / operations of the property including all common areas, internal and external but excluding the leased premises;

46.4 Maintenance of lifts in the common areas;

46.5 Maintenance of central air conditioning (plant and equipment) but excluding units specifically installed in the tenant's premises if applicable;

46.6 All premiums and stamp duty due or to become due in respect of the insurance referred to in this document;

46.7 All other expenses, costs and charges which may be incurred in respect of the lease and upkeep of the property (excluding the leased premises);

46.8 Electrical and plumbing repairs to the common areas in the course of general day to day upkeep of the building;

46.9 Pest control services to the common area and the property (but excluding the leased premises);

46.10 Servicing of fire equipment installed by the landlord;

46.11 Providing security for the general protection of the building and the property (but specifically excluding the leased premises);

46.12 The costs to the landlord incurred in respect of maintaining the gardens and common areas, including any landscaping and garden services and keeping those areas in a clean and tidy condition.

[47]. In terms of the Lease Agreement, the operating costs shall escalate at the percentage stated in the schedule, compounded annually in arrears from the commencement date.

[48]. The applicants' objection to being charged *'operational costs'* is in essence based on the fact that, according to them, the first respondent does, in fact, not supply the services in respect of which they pay these charges. For example, the applicants make the point that there are no lifts in the building and therefore the first respondent cannot possibly be maintaining *'the lifts in the common areas'* let alone charge for this service as part of the *'operating costs'*. There is also a factual issue with regard to the security provided at the building by the first respondent. Applicants allege that the security at the building is non – existent but the first respondent denies that and is adamant that a security guard has been placed at the property specifically to guard the Gardees Arcade.

[49]. In respect of the operational costs, the first respondent's ground of opposition appears to be that it is providing some of the relevant services

and that, in any event, the applicants are contractually obliged to pay the fee whether or not it provides the services.

[50]. It is submitted by the applicants that the first respondent admits that it does not provide any of the following services nor incur any cost for the rendering of such services:

50.1 Gardening services;

50.2 Painting of the premises;

50.3 There are no lifts or air-conditioning units operating in the building;

50.4 The first respondent removed but did not replace the security shutters on the windows, resulting in several break-ins and loss of property.

[51]. The first respondent takes issue with the claim by the applicants that it was not providing the full range of services for which operational costs are chargeable. It also relies on a clause in the lease agreement that requires the applicants to pay and not to withhold payment, notwithstanding any breach by the landlord.

[52]. The applicants accordingly seek an order for specific performance, directing the first respondent to provide the services listed and charged for as operational costs, namely:

52.1 Cleaning and maintenance of the common area;

52.2 Management and caretaker services;

52.3 Upkeep of the property;

52.4 Electrical and plumbing repairs to the common area;

52.5 Servicing of fire equipment;

52.6 Providing security for the general protection of the property and reinstating the shutters that were removed.

[53]. In addition, the applicants seeks an order directing the first respondent to repay the applicants all operational charges levied against them since February 2012, with the quantum of this claim to be referred to oral evidence.

[54]. There are a number of factual disputes relative to the *'Operating Costs'*. Notably, there is no agreement on which services are rendered by the first respondent and which ones are not. Also, in some of the original written lease agreements, a set amount was written into the contract with a

provision that this rate be escalated at, for example, 15% per annum. In some of the other written lease agreements, provision was made for a formula in terms whereof the amount payable in respect of *"Operating Charges'* was to be calculated.

[55]. Furthermore, there have been various attempts to conclude updated written lease agreements with a view to revising, I would imagine, issues such as this type of charge. This, in my view, suggests that there may very well be different interpretations and applications of the current legal relationships between the parties. Furthermore, it is the case of the first respondent that the applicants are in breach of the lease agreements, which presently are in the form of monthly tenancies, in view of the fact that they are in arrears with payment of the rental and other charges if calculated and based on the provisions of the written agreements. Therefore, at best for the applicants, there is a dispute which cannot be resolved on the papers relating to what amounts should be paid in respect of the charges levied.

[56]. Motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.

[57]. For this reason alone, I am not persuaded that a case has been made entitling the applicants to the relief sought in prayers 4, 5 and 6 of the Notice of Motion.

[58]. In any event, the relief sought in prayer 4 is in the nature of a declarator and I am not convinced that the applicants have made a proper case for this relief as per the requirements set out above.

MUNICIPAL RECOVERIES, SEWERAGE CHARGES & WATER CHARGES

[59]. The applicants also object to being charged and them paying *'municipal charges'*, which is defined in the Lease Agreement as:-

59.1 All charges in connection with the supply to the leased premises and to the common area of municipal facilities and utilities (such as, but not limited to, refuse removal charges or sanitary fees, water sewerage) but excluding charges for water, electricity or gas directly consumed by the tenant in the leased premises; and

59.2 The assessment rates payable in respect of the property and includes any other charges payable by the landlord to the local authority; and

59.3 Taxes and other statutory charges of whatever nature, payable in respect of the property to the local authority;

[60]. According to the Lease Agreements, the Municipal Charge in the individual lease agreement was a set charge, specifically provided for and based on a lessee's portion of all municipal and local authority charges levied on or payable in respect of the property.

[61]. The applicants' objection to being charged these *'Municipal Charges'* is based on the fact that, according to them, the first respondent has not demonstrated any lawful basis for these charges. This conclusion is drawn from the first respondent's failure to furnish them with copies of the accounts / invoices from the Municipality. In the alternative, applicants allege that these charges have been incorrectly calculated and unlawfully increased. The aforegoing aptly demonstrates the difficulty facing the applicants in bringing this application – the facts are not clear.

[62]. In respect of the municipal recoveries charge, the first respondent avers that the applicants are liable for municipal recoveries charges in respect of refuse removal and sewerage.

[63]. Water and Sewerage are being charged for separately but the first respondent states in answer that these also form part of municipal recoveries.

[64]. As with *'operating costs'*, there are factual disputes relative to these charges at such a fundamental level that it is near impossible to resolve these disputes on the papers. The first respondent, in its interpretation of the terms and conditions of the lease agreement and its application, has come to the conclusion that a total amount of approximately R3,000,000.00 is due and payable by the applicants to it in respect of rental, operating costs and other charges in terms of the agreements. In other words, taking the provisions of the written lease agreements and the subsequent developments into account, first respondent concludes that it is owed R3,000,000.00. The applicants conclude differently. This is the difficulty with this application – the parties have not been able to negotiate updated lease agreements, and there is an attempt by the applicants to use the court in a consultative or advisory capacity.

[65]. All the same, for the reasons given relative to the *'operating costs'*, I am similarly not persuaded that a proper case has been made out for the relief sought in prayers 7 to 11 of the Notice of Motion.

COSTS

[66]. Whilst the applicants have succeeded in obtaining 1 of the 11 Orders sought by them in the Notice of Motion, it cannot be said they have been substantially successful. By the same token, the fact that there is 1 order granted against first respondent in favour of the applicants does not mean

that the first respondent has been substantially successful in opposing the application.

[67]. Accordingly, I am of the view that, in the exercise of my discretion to make an appropriate cost order, a just and equitable cost order would be to the effect that each party should bear his own costs.

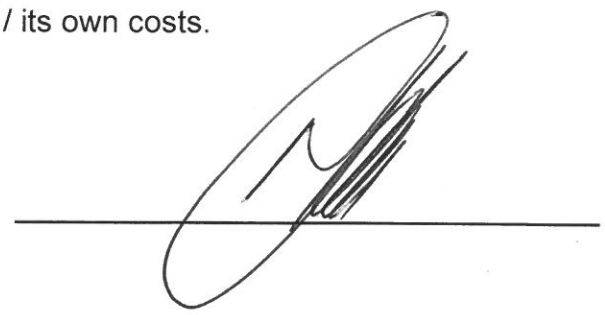
ORDER:

Accordingly, I make the following order:-

1. It is declared that the *'electricity service charge'* levied by the first respondent and invoiced to the applicants as part of their accounts due in terms of lease agreements in respect of the shops in *Gardees Arcade* at 20 Diagonal Street, Johannesburg, is unlawful.

2. The application for an order in terms of prayers 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the notice of motion is dismissed.

3. Each party shall pay his / her / its own costs.



L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	4th November 2015
JUDGMENT DATE:	20th November 2015
FOR THE PLAINTIFF:	Adv. J. Brickhill
INSTRUCTED BY:	Legal Resources Centre, Johannesburg
FOR THE DEFENDANT:	Adv. H.F Oosthuizen
INSTRUCTED BY:	Froneman Roux & Streicher