REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***1st September 2023*** Signature: [redacted]

CASE NO: 074606/2023

DATE: 1st September 2023

In the matter between:

MICROS SOUTH AFRICA (PTY) LTD	First Applicant
ADAPT IT (PTY) LTD	Second Applicant
ADAPT IT INTERNATIONAL LIMITED	Third Applicant

and

KLEYNHANS, ANEKE	First Respondent
HRS HOSPITALITY AND RETAIL SYSTEMS (PTY) LTD	Second Respondent
HRS HOSPITALITY AND RETAILS SYSTEMS GMBH	Third Respondent

Neutral Citation: *Micros SA and 2 Others v Kleynhans and 2 Others (074606/2023)* **[2023] ZAGPPHC ---** (01 September 2023)

Coram: Adams J

Heard: 22 August 2023

Delivered: 01 September 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date

and time for hand-down is deemed to be 15:30 on 01 September 2023.

Summary: Urgent application – enforcement of restraint of trade agreement – interdictory relief – enforceability – protectable interest - confidential information and trade connections - sufficient if shown that there was confidential information or trade connections to which respondent had access and which could be exploited by new employer – application succeeds.

ORDER

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(1) The applicants' non-compliance with the Uniform Rules of Court be and is hereby condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a) of the Uniform Rules of Court.

(2) The first respondent be and is hereby interdicted and restrained, for a period of one year from the date of this order, from: -

(2.1) Engaging in the establishment, within the Republic of South Africa, Botswana, Mozambique, Zimbabwe, Zambia, Angola, Malawi, Lesotho, and Swaziland ('the SADC region') and Mauritius, Seychelles, Reunion, Mayotte and Madagascar ('the Indian Ocean region'), of the second respondent's business;

(2.2) Engaging in the establishment of the business of any other firm within the Republic of South Africa, and the SADC and the Indian Ocean regions, that competes directly or indirectly with the business of the first and/or the second and/or the third applicant;

(2.3) Engaging with the second respondent as a shareholder, partner, director, or in any other capacity, including as an employee, within or providing any services in regard to the second respondent's business within the Republic of South Africa, and the SADC and the Indian Ocean regions; and

(2.4) Engaging in any other business that directly or indirectly competes with the business of the first and/or second and/or third applicant, whether as a shareholder, partner, director, or in any other capacity, within the Republic of South Africa, and the SADC and the Indian Ocean regions.

(3) The first respondent be and is hereby interdicted and restrained from disclosing, using or disseminating any information of the first and/or the second and/or the third applicant which has commercial or trade value, whether technical or non-technical information, including but not limited to pricing, margins, merchandising plans and strategies, customers, customer lists, purchasing data, sale and marketing plans, future business plans and any other information which is proprietary and confidential to any of the applicants for her own benefit or for the benefit of any third party, including the second and the third respondents.

(4) The second and/or the third respondents be and are hereby interdicted and restrained from:

(4.1) Employing the first respondent in relation to its business within the Republic of South Africa, and the SADC and the Indian Ocean regions for a period of a year from the date of this order; and/or

(4.2) Otherwise unlawfully competing with the applicants, including through:

(4.2.1) interfering with the first applicant's contractual relationship with the first respondent, whether by intentionally inducing the first respondent to breach her contract with the first applicant or otherwise; and/or

(4.2.2) misappropriating confidential information of the applicants received unlawfully through the first respondent to advance its own business interests and activities.

(5) The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the first, second and third applicants' costs of this Urgent Application.

JUDGMENT

Adams J:

[1]. The first, the second and the third applicants are all related companies and are part of a group of companies of which Adapt IT Holdings (Pty) Ltd is the holding company. The first applicant ('Micros SA') is the company responsible for managing the hospitality portfolio within the Group. Through this hospitality portfolio, the applicants provide software – including the distribution of software and software support services – to clients in the hospitality industry. The software distributed is *Oracle* software. Micros SA, the second applicant ('Adapt IT') and the second respondent ('HRS SA'), which forms part of an international group of companies under the HRS brand and which was incorporated in April 2023 to establish an office in South Africa from which to service local clients, are all *Oracle* Hospitality partners. Oracle is an international software developer, which develops and provides software solutions for a range of industries, one of which is hospitality. The management solution software used in the hospitality space is called 'Opera', through which hospitality clients manage the operations of their hotels. It is the system through which, *inter alia*, rooms are booked, customers are checked in, and invoices are generated. It is the expressed intention of HRS SA in the foreseeable future to commences operations in South Africa and to distribute Opera in the country.

[2]. From the aforegoing, it is abundantly clear that the applicants, on the one hand, and HRS SA and the third respondent ('HRS GMBH'), on the other, are direct competitors in the same market and in the same industry, providing software solutions to the hospitality industry. The first respondent ('Ms Kleynhans') has been employed by Micros SA since November 2017 as an executive and a senior manager in the position of Opera Operations Manager, in which capacity she was responsible for managing, advising and controlling all aspects of the business pertaining to Opera products. During July 2023, having accepted an offer of employment from HRS SA to be their 'Director of

Operations', Ms Kleynhans handed in her resignation and she is currently serving out her notice period, the intention being that she will commence her new employment with HRS SA on 01 November 2023.

[3]. This is an application for urgent interdictory relief in which the applicants seek to enforce a contractual restraint of trade and confidentiality undertakings made by Ms Kleynhans, as a consequence of her intention to take up employment with the HRS SA, a competitor. The applicants simultaneously ask the Court to restrain the second and/or the third respondents from unlawfully competing with the applicants through the employment of the first respondent. I am satisfied that the matter is urgent.

[4]. It is common cause that Ms Kleynhans agreed to a restraint of trade undertaking in her written employment contract with Micros SA, which provides as follows:

'**22 Restraint of Trade**

22.1 The employee [Ms Kleynhans] undertakes not to be engaged in the establishing of a business, or as a shareholder, partner, member of a close corporation, director of a company or in any other capacity that directly or indirectly competes with the business of Micros SA or Adapt IT or its subsidiaries. The restraint will endure for a period of one year from date of termination of your employment contract. The restraint is valid unless written confirmation is received from the company authorising any changes contrary to the above.

22.2 The employee, in acknowledging receipt of this contract of employment, agrees that the restraints set out are fair and reasonable in all respects.

22.3 The employee acknowledges that the company may recover any amounts and associated recovery amounts from the employee in the event of such breach.'

[5]. There is also a non-disclosure agreement ('NDA') that was concluded between Ms Kleynhans and Micros SA at the same time as the employment contract in which Ms Kleynhans gave detailed confidentiality undertakings to Micros SA.

[6]. The application is opposed by Ms Kleynhans and HRS SA primarily on the basis that the enforcement of the restraint of trade clause in the employment contract would be unreasonable and is therefore unenforceable. It is also contended by the respondents that the applicants have not proven that they have

a proprietary interest deserving of protection by the enforcement of the restraint of trade and confidentiality undertakings.

[7]. The case of the applicants, in a nutshell, is that, during the course of her employment with them, Ms Kleynhans acquired knowledge of the *Opera* products, confidential information concerning pricing and strategy, and, as one of the primary points of contact with the applicants' customers in respect of these services, developed close customer connections which are invaluable to any competitor. In her role with HRS, Ms Kleynhans will use her skills, knowledge and customer connections acquired during her tenure with Micros SA, to breach her restraint obligations in the territories in which the applicants do business, to their material detriment.

[8]. Therefore, the issues to be considered in this application is simply whether, in time and space, the enforcement of the restraint of trade agreement would be unreasonable and whether the applicants can validly lay claim to a proprietary interest deserving of protection by the enforcement of the restraint of trade and confidentiality undertakings. In considering these issues, regard should be had to the applicable legal principles, which are well established, and which I refer to briefly in the paragraphs which follow.

[9]. As a general rule, agreements in restraint of trade are valid and enforceable. Public policy under our constitutional dispensation requires that contracting parties honour obligations that have been freely and voluntarily undertaken – the principle of *pacta sunt servanda.* The exception to the general rule is that a restraint of trade undertaking will be contrary to public policy, and therefore unenforceable, where it is unreasonable. And, as was held in *Reddy v Siemens Telecommunications (Pty)* [1], it is unreasonable '… if it prevents a party, after termination of his or her employment, from partaking in trade or commerce without a corresponding interest of the other party deserving of protection'. Whether it is reasonable or not will be determined with reference to the circumstances of the case.

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[1] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA);

[10]. The onus to show that the enforcement of a restraint of trade undertaking is contrary to public policy is on the person who agreed to a restraint of trade and later seeks to object to its enforcement. (*BHT Water Treatment (Pty) Ltd v Leslie*[2]). In other words, it is the former employee who must prove the unreasonableness of a restraint if she does not wish to be bound. (*Flowcentric Mining Technology (Pty) Ltd v Smit and Others*[3]) and this burden of proof is not easily discharged. (LAWSA, Contracts in Restraint of Trade, at 253, relying on *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll*[4]).

[11]. *In casu*, the restraint undertaking must be read in the context that it appears in a contract of employment in which Ms Kleynhans is appointed as Opera Operations Manager and that the Opera software is provided by Oracle distributors such as Micros, throughout the world. This software is focused specifically on the hospitality industry and Micros is the entity within the Adapt IT Group which operates in that sector. Micros and Adapt IT operate within the SADC region and Indian Ocean region, with the majority of their clients in South Africa but also a large base of customers in these other regions. Micros' business is to distribute Opera software which is provided by Oracle. Micros provides support to customers who have purchased these products through it.

[12]. Furthermore. It is submitted by the applicants that the Opera products are complex software which are bundled together to meet particular customer needs, and the customers require and obtain the services of a distributor such as Micros precisely because they do not have the internal capacity to manage these products themselves. Therefore, what differentiates a distributor and provider of services such as Micros SA is primarily its understanding of customer needs and its ability to design and price an offering made up of Opera products to its customers. The purpose of the restraint of trade provision, so the case on behalf of Micros SA continues, is to protect its interest in requiring its employees who acquire the knowledge of its product and who must, as part of their employment,

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[2] *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) at 52E-F;

[3] *Flowcentric Mining Technology (Pty) Ltd v Smit and Others* (2023-059986) [2023] ZAGPPHC 544 (11 July 2023) at para 31;

[4] *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 1 SA 673 (O) 685-689;

develop strong customer relationships, from utilising that knowledge and those connections to offer the same Opera products acquired from Oracle to the same customer base in the areas within which the applicants operate.

[13]. There is, in my view, merit in these submissions on behalf of the applicants. The point is that Ms Kleynhans, in her capacity as Director of Operation, intends to be engaged in the setting up of HRS SA's business in South Africa. HRS SA is a direct competitor of the applicants in the hospitality industry and it intends to distribute Oracle Opera Cloud products to customers within the same areas in which the applicants operate. These Opera Cloud products are precisely the ones that Ms Kleynhans, on her own version, has focused intensely on in her role at Micros since 2020.

[14]. By all accounts, Ms Kleynhans, in her position as Opera Operations Manager, has built up close relationships with the applicants' customers and has been exposed to confidential information of the applicants in the form of pricing, margins and discounts for Opera products and strategy for the transition to Opera Cloud. On the probabilities, there can be little doubt that Ms Kleynhans's role at HRS SA will entail that she will be in a position substantially similar to the one she occupied at Micros SA. At a minimum, her role will include the management of HRS SA's customer operations in relation to Opera Cloud. As HRS SA is not yet operational, and Opera Cloud is not yet rolled out to larger hospitality clients, the management of customer operations inevitably includes, first, securing such clients and, second, managing their transition to Opera Cloud. Ms Kleynhans is perfectly placed to fulfil these objectives.

[15]. In these circumstances, I agree with the submission by Mr Franklin SC, who appeared for the applicants with Ms Van Heerden, that there is a substantial risk that, should Ms Kleynhans be permitted to take up employment with HRS SA, she will take to a competitor – providing the same product to the same target market in the same territory – proprietary interests of the applicants in the form of trade connections and confidential information. Ms Kleynhans's conduct therefore falls squarely within the scope of what the applicants sought to protect

against in the restraint undertaking. There can be no serious debate about this. The applicants are entitled to enforce the restraint to ensure this protection.

[16]. It is moreover inevitable that, if she should commence employment at a competitor in the same industry as Micros SA, in the same or a similar role, she would use the confidential information obtained during her employment as Opera Operations Manager at Micros SA in violation of her confidentiality obligations under the NDA.

[17]. As was held recently by this court in *Flowcentric*, insofar as confidential information is concerned, an applicant does not need to prove actual breach, but merely the risk that the information in the possession of the first respondent, if disclosed, could be used to the disadvantage of the applicant.

[18]. I am also of the view that the applicants do indeed have protectable interests in the form of customer connections and confidential information. As was held by this Court in *Experian SA v Haynes*[5] and *Sibex Engineering Services (Pty) Ltd v Van Wyk*[6], there are two kinds of proprietary interests that can be protected by a restraint of trade undertaking. The first is 'the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connections" of the business, being an important aspect of its incorporeal property known as goodwill'. And the second is 'all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a competitive advantage'.

[19]. On the basis of the facts in this matter, I am of the view that Ms Kleynhans has failed miserably to discharge the onus on her to prove the unreasonableness of the restraint. She has not established that she never acquired any significant personal knowledge of, or influence over, the applicants' customers, not that she had no access to confidential information, whilst in Micros's employ. By all accounts, she has, through her position as Opera Operations Manager, developed relationships with a number of the applicants' larger clients in the

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[5] *Experian SA v Haynes* 2013 (1) SA 135 (GSJ) at para 17;

[6] *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (20 SA 482 (T) at 502D;

hospitality industry. A business's customer connections is a proprietary interest that can be protected by a restraint of trade undertaking.

[20]. What is more is that Ms Kleynhans has developed relationships with customers of a nature that she could induce them to follow her to a new business. The applicants set out in some detail the strength of Ms Kleynhans's relationships with the customers of the applicants, developed in the exercise of her duties as Opera Operations Manager. All of this serves to show an employee with the knowledge of the identity and requirements of the applicants' customers and who had regular and repeated contact with the customers so as to build up a connection in the course of trade with them.

[21]. For all of these reasons, I conclude that there can be no doubt that customer contact exists and that Ms Kleynhans could exploit these connections if employed by a competitor. These customer connections form a part of the applicants' goodwill. It is this interest that the applicants are entitled to have protected by enforcing the restraint of trade. On this basis alone, the restraint should be enforced.

[22]. Additionally, the applicants, in my judgment, also have a protectable interest in their confidential information. In her position as Opera Operations Manager and as a member of the executive team in Micros SA, Ms Kleynhans has been privy to confidential information during her employment at Micros SA that is central to the applicants' hospitality business and known only by a few people within the business. The information categories include Micros's business strategy, pricing, margins and discounts for Oracle products.

[23]. I am persuaded and therefore find that, as does HRS SA by Ms Kleynhans's own admission, Micros SA has confidential information in the form of business strategies, internal processes and trade secrets. The fact that she does not intend retaining or downloading the applicants' information is irrelevant, both for establishing confidential information as a protectable interest and that she has breached her obligations in this regard. The mere fact that the information may be in a respondent's head and not in a document does not mean that its unlawful disclosure cannot be interdicted.

[24]. So, for example, Ms Kleynhans has been privy to how the applicants price their products, and the discounts and the margins that are applied. She is aware of precisely how the applicants price products to customers after a price has been negotiated with Oracle. The discounts that Micros obtains will not necessarily be the same as for other Oracle partners. This information would be useful for any competitor. In an industry where the products sold are identical, core differentiating factors for choosing one distributor over another are the relationships that one may have with that distributor and price differentiation for packages. A distributor who is able to give a client the package that best suits their needs, because it knows the intimate details of a client's requirements, and at a better price than anyone else (because it knows the margins and discounts that its competitor will be discounting), will be at a substantial advantage. Ms Kleynhans, through her position in Micros over the last six years, has this information at her fingertips. She would be in a position to go to an existing or a potential customer and quite easily price the very same product at a cheaper rate in order to lure the customer to HRS, with an identical service. She would know exactly how to ensure that HRS could (unlawfully) outbid Micros with each and every customer.

[25]. For all of these reasons, I come to the conclusion that the applicants have protectable interests that are threatened by the respondents and which should be protect by the enforcement of the restraint and confidentiality undertakings.

[26]. The next issue which I need to deal with relates to the contention on behalf of the Ms Kleynhans that the restraint is overbroad in relation to the period of restraint, the absence of a geographical area, and the scope of restraint.

[27]. The governing principle is that the extent of a restraint must be coextensive with the legitimate interests that the applicants seek to protect. Insofar as duration is concerned, in my view, a period of one year is on the face of it perfectly reasonable. The general rule of thumb is that the period should not be longer than is necessary to enable the applicant to place a new person in the position, to enable that person to become acquainted with the product and the customers

and to make it plain to the customers that this new person is now the one with whom they must interact. (*Den Braven SA (Pty) Ltd v Pillay and Another*[7]).

[28]. On the basis of this principle, I find that the period of the restrain is not unreasonably broad.

[29]. As regards the geographical area, the restraint does not specify a particular area in which it is to apply. That is not automatically fatal, as the respondents seem to suggest. In *BHT Water Treatment v Leslie*[8] the restraint was world-wide. The applicant sought an interdict restraining the respondent only in the areas in which it traded. The Court granted the relief, and held as follows: -

'The applicant, properly making a concession that the restraint is geographically too wide, does not in my view concede that the restraint is otherwise unreasonable, and I am of the view that the onus of showing that enforcement of the cut down restraint is unreasonable, remains on the respondent.'

[30]. This is precisely what the applicants seek here. The point is simply that, even where a respondent establishes that a restraint may be broader than is necessary or where an applicant seeks to narrow the extent of a restraint, a Court may, in the public interest, declare that only a part of the restriction on trade be enforced.

[31]. *In casu*, the applicants ask that the restraint should only apply in the geographical areas where they trade. That, in my view, takes care of the respondents' point that the restraint is overly broad from a geographical point of view.

[32]. As regards unlawful competition, it is as submitted by Mr Franklin, that the reasonable fear of unlawful competition on the part of the second respondent follows axiomatically now that I have found that the applicants are entitled to enforce the restraint and confidentiality undertakings. I find myself in agreement with this submission.

[33]. First, the sharing of confidential information among competitors is generally deemed anti-competitive and therefore contrary to our competition

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[7] *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at para 55;

[8] Footnote 2 *supra*;

laws. Where a competitor obtains confidential information from a rival, that competitor commits a wrongful act vis-à-vis its competitor if it uses the information in its business to the detriment of the rival. It is inevitable that, once in HRS SA's employ, Ms Kleynhans will use, disclose or disseminate Micros's confidential information, in breach of her confidentiality undertakings. HRS SA would therefore be guilty of the delict of unfair competition through the misappropriation or use of unlawfully-obtained confidential information of a competitor, including pricing, strategic documents, consumer information, in its business.

[34]. Second, it is unlawful for a party to intentionally and without justification induce or procure another to breach a contract with a third person. This can include an inducement to an employee to terminate their employment in breach of a restraint of trade. (*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[9]; *Wholesale Provision Supplies CC v Exim International CC and Another*[10]).

[35]. For all of these reasons, I am of the view that the applicants have made out a case for the interdictory relief sought in this application. In that regard, I am persuaded that the requirement for a final interdict are met, *to wit* (1) there is a clear right; (2) an injury is reasonably apprehended; and (3) there is no other remedy available to the applicants.

[36]. For all of these reasons, the applicant's urgent application should succeed and they should be granted the relief claimed herein.

Costs

[37]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[11].

[38]. I can think of no reason why I should deviate from this general rule.

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[9] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 202E-H;

[10] *Wholesale Provision Supplies CC v Exim International CC and Another* 1995 (1) SA 150 (T) at 157A;

[11] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[39]. I therefore intend awarding costs in favour of the first, the second and the third applicants against the first and the second applicants.

Order

[40]. Accordingly, I make the following order: -

(1) The applicants' non-compliance with the Uniform Rules of Court be and is hereby condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a) of the Uniform Rules of Court.

(2) The first respondent be and is hereby interdicted and restrained, for a period of one year from the date of this order, from: -

(2.1) Engaging in the establishment, within the Republic of South Africa, Botswana, Mozambique, Zimbabwe, Zambia, Angola, Malawi, Lesotho, and Swaziland ('the SADC region') and Mauritius, Seychelles, Reunion, Mayotte and Madagascar ('the Indian Ocean region'), of the second respondent's business;

(2.2) Engaging in the establishment of the business of any other firm within the Republic of South Africa, and the SADC and the Indian Ocean regions, that competes directly or indirectly with the business of the first and/or the second and/or the third applicant;

(2.3) Engaging with the second respondent as a shareholder, partner, director, or in any other capacity, including as an employee, within or providing any services in regard to the second respondent's business within the Republic of South Africa, and the SADC and the Indian Ocean regions; and

(2.4) Engaging in any other business that directly or indirectly competes with the business of the first and/or second and/or third applicant, whether as a shareholder, partner, director, or in any other capacity, within the Republic of South Africa, and the SADC and the Indian Ocean regions.

(3) The first respondent be and is hereby interdicted and restrained from disclosing, using or disseminating any information of the first and/or the

second and/or the third applicant which has commercial or trade value, whether technical or non-technical information, including but not limited to pricing, margins, merchandising plans and strategies, customers, customer lists, purchasing data, sale and marketing plans, future business plans and any other information which is proprietary and confidential to any of the applicants for her own benefit or for the benefit of any third party, including the second and the third respondents.

(4) The second and/or the third respondents be and are hereby interdicted and restrained from:

(4.1) Employing the first respondent in relation to its business within the Republic of South Africa, and the SADC and the Indian Ocean regions for a period of a year from the date of this order; and/or

(4.2) Otherwise unlawfully competing with the applicants, including through:

(4.2.1) interfering with the first applicant's contractual relationship with the first respondent, whether by intentionally inducing the first respondent to breach her contract with the first applicant or otherwise; and/or

(4.2.2) misappropriating confidential information of the applicants received unlawfully through the first respondent to advance its own business interests and activities.

(5) The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the first, second and third applicants' costs of this Urgent Application.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Pretoria

HEARD ON:	22nd August 2023
JUDGMENT DATE:	1st September 2023 – judgment handed down electronically
FOR THE FIRST, THE SECOND AND THE THIRD APPLICANTS:	Adv A E Franklin SC, together with Advocate E A Van Heerden
INSTRUCTED BY:	Garlicke & Bousfield Incorporated, La Lucia, Durban
FOR THE FIRST RESPONDENT:	Advocate Christo Van der Merwe
INSTRUCTED BY:	Vince Van der Walt Attorneys, Kempton Park.
FOR THE SECOND RESPONDENT:	Advocate A P Ellis
INSTRUCTED BY:	Minnie & Du Preez Incorporated, Kempton Park
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance