IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case Number C359/2007

In the matter between:

THE SOUTH AFRICAN MUNICIPAL	
WORKERS'S UNION	**FIRST APPLICANT**
DAVIS TOYIS	**SECOND APPLIANT**

and

THE NELSON MANDELA METROPOLITAN	
MUNICIPALITY	**FIRST RESPONDENT**
GRAHAM RICHARDS (ADV)	**SECOND RESPONDENT**
NONDUMISO MAPHAZI (MS)	**THIRD RESPONDENT**
MIKE XEGO (MR)	**FOURTH RESPONDENT**

JUDGEMENT

BASSON, J

(1) This is an application for urgent relief in terms of which the Applicants are seeking an order to overturn the Second Applicant's suspension on full pay from the First Respondent's employment. An order is also sought to interdict the Respondents from giving effect to the Second Applicant's suspension. It was briefly the case for the Applicants that the suspension of the Second Applicant was unconstitutional, unlawful and unfair.

(2) The Second Applicant is the Assistant Manager: Housing Delivery in the Housing and Land Business Unit of the Nelson Mandela Metropolitan Municipality (the First Respondent – hereinafter referred to as the "Municipality"). He is also the provincial chairperson of the First Applicant (the South African Municipal Workers' Union – hereinafter referred to as "SAMWU"); an elected shopsteward and a member of the South African Communist Party (hereinafter referred to as the "SACP").

(3) Although the relief sought is couched in the form of a Rule *Nisi*, it is sought to be made operable with immediate effect and on confirmation is sought to be made final.[1] It is trite that in order to succeed with an

[1] The Labour Court will not issue declaratory relief on an interim basis where the effect of the declarator will be final in effect. See *NUMSA & Others v Alfred Teves Technologies (Pty) Ltd* [2002] 10 BLLR 995 (LC).

application for final relief the following three requirements must be present: -

(i) A clear right on the part of the applicant;

(ii) An injury actually committed or reasonably apprehended;

(iii) The absence of any other satisfactory remedy available to the applicant.

URGENCY

(4) An applicant who approaches this Court on an urgent basis must make out a case for urgent relief on the papers in sufficient particularity.[2] Only once an applicant has persuaded the Court that sufficient grounds exist which necessitate a relaxation of the Rules and ordinary practice, will the Court proceed to consider the matter as one of urgency. The extent to which the Court will allow parties to

[2] See in this regard Rule 8 of the Rules of the Labour Court which expressly states that a party that applies for urgent relief must file an application that complies with the requirements of Rule 7(1); 7(2); 7(3) and if applicable 7(7) of the Rules. Rule 7(2) expressly requires that the affidavit in support of the application must contain the reasons for urgency and why urgent relief is necessary and the reasons why the requirements of the rules were not complied with, if that is the case. See also *Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 *ILJ* 372 (W) at 387I: "*An applicant who seeks relief by way of notice of motion should put all the facts, in as much detail as possible, before the Court. The mere fact that an application is urgent and urgent relief is sought does not relieve an application of this duty*." See also *Luna Meubels Vervaardigers v Makin & Another* 1977 (4) SA 135 (W) at 137F - G

dispense with the Rules relating to time periods will depend on the degree of urgency in the matter.[3]

(5) It was argued on behalf of the Respondents that the Second Applicant's allegations in respect of urgency are scant, general and wholly lacking in particularity. It was further contended that the whole case of the Applicants rest on a far-fetched conspiracy theory that is based on newspaper editorial comment. I will return to this issue when I deal with the application to strike out certain paragraphs and annexures from the Second Applicant's founding affidavit.

SUPENSION OF THE SECOND APPLICANT

(6) The Second Applicant was first informed of the intention to suspend him on 6 June 2007. This letter sets out in fair detail the nature of the acts of misconduct that are currently being investigated by the Municipality. It appears that the Second Applicant was suspended pending investigations into acts of misconduct pertaining to, *inter alia*,

[3] See the well-known and often quoted decision in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) where the Court set out the principles in great detail: "*Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down*."

the fact that he had made certain remarks to members of the public during a SACP meeting which, according to the Respondents, undermined and/or brought into disrepute the Municipality; the Executive Mayoral Committee and the Municipal Manager of the Municipality and that he had acted in a manner unbecoming of an Assistant Manager: Housing and Land of the Municipality. More in particular, the Second Applicant is being investigated for exhorting and/or inciting members of the public to act in an unlawful manner with regard to, *inter alia*, the disconnection of water services by the Municipality to members of the public. A further reason stated for the suspension is the fact that on 4 June 2007 the Second Applicant issued a written instruction to staff members in the housing delivery silo, all of whom are his subordinates, not to cooperate with the external audit investigation underway in that silo. It was contended by the Respondent that this action by the Second Applicant constituted a major obstacle to the work of the external auditors aimed at identifying the serious managerial problems that exist in the Land and Housing Business Unit. Furthermore, it was contented that this action by the Second Applicant amounts to gross insubordination as the Municipal Manager had given a direct instruction to the staff in that department to co-operate with the investigation. The suspension letter further afforded the Second Applicant an opportunity until 12 June 2007 to make written representations as to why he should not be suspended

pending the finalization of the investigation into the various acts of misconduct detailed in the letter and any disciplinary enquiry which may follow the investigation. A meeting was held with SAMWU and the Second Applicant on 19 June 2007 during which the union made representations as to why the Second Applicant should not be suspended from his employment.

(7) On 26 June 2007 a letter was sent to both the Second Applicant and the offices of SAMWU confirming the suspension of the Second Applicant. In this letter reference is also made to the aforementioned meeting of 19 June 2007. The Second Applicant contends that he only received the letter on 2 July 2007 as he was out of town attending a National Executive Committee meeting of SAMWU. The matter was then taken up with the national structures of SAMWU in Cape Town and only on 11 July 2007 was the Applicants' attorneys instructed to institute the present application. The present application was finally served on 19 July 2007 which is more than three weeks after the final letter of suspension was forewarded to both SAMWU and the Second Applicant.

(8) On behalf of the Respondents it was pointed out that it is inconceivable that SAMWU had to wait until 11 July 2007 for a decision to launch the present urgent application particularly in light of

the fact that the Applicants had known since early June of the impending suspension. One of the reasons put foreward by the Second Applicant for the delay in bringing the application only on 19 July 2007 was because the Applicants were waiting to see whether the suspension of a certain Mr. Mapu would be extended *"in order to assess whether the content of such notification could impact on the present application in the sense of disclosing how the Second Respondent attempts to justify him disregarding the terms of a collective agreement."* I will return to the position of Mapu in paragraph (12) hereunder. On behalf of the Respondents it was contended that this is a complete nonsensical attempt to justify the delay in view of the fact that the extension of Mapu's suspension had no impact on the Second Applicant's suspension.

(9) An applicant seeking an indulgence from this Court must set out the facts which he or she avers render the matter urgent and also the reasons why it is claimed that he or she could not be afforded substantial redress at a hearing in due course.[4] It is trite that an applicant cannot create its own urgency by delaying bringing an application. This much is clear from the long line of cases in which this principle has been endorsed over and over again. See, *inter* alia, *Director of Public Prosecutions (Western Cape) v Midi Television (Pty)*

[4] See *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 493A – G.

Ltd t/a E TV 2006 (3) SA 92 (C) at paragraph 47; *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 *ILJ* 1081 (LC)[5] and *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T).[6]

(10) Although I am not persuaded by the explanation of the delay, I have nonetheless considered whether or not there may exist special circumstances which might warrant relief on an urgent basis.[7] I could

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[5] The Court held as follows: "*The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits or any time-limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court. For these reasons, I find that the union has failed to satisfy the requirements relating to urgency*." (At 1092 paragraph [39].)

[6] "*Volgens die gegewens voor die Hof wil dit vir my voorkom dat die applikant alreeds vir meer as 'n maand weet van die toedrag van sake waarteen daar nou beswaar gemaak word. Die aangeleentheid het slegs dringend geword omdat die applikant getalm het en omdat die tweede respondent, soos die applikant lankal geweet het of moes geweet het…. Al hierdie omstandighede in ag genome is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die Hof op hierdie stadium as 'n saak van dringendheid moet ingryp nie. Ek is dus, in die omstandighede, nie bereid om af te sien van die gewone voorskrifte van reël 6*." (At F11 – 12.)

[7] See *Koka v Director-General, Provincial Administratoin, North-West* Government (1997) 18 ILJ 1018 (LC). In this case Landman, J held that the employee had an alternative remedy available namely to refer the matter to the Public Service Bargaining Council. No referral had been done and the Court was of the view that the labour Court was not empowered to conciliate the dispute nor to arbitrate the dispute which was arbitrable without the consent of the parties and without the court itself exercising discretion on the grounds of expedience. The Court however, was of the view that the Court will only exercise this discretion in exceptional cases and cases of proven urgency. The Court concluded as follows on 1030: "*The respondent, in this case, did not consent to arbitration. It is possible, I would put it no higher than this, that in the case of exceptional circumstances and proven urgency this court may be prevailed upon to interdict the action of an employer resulting in the suspension of an employee pending the determination of an alleged unfair labour practice by the CCMA or the appropriate bargaining council. This case is definitely not a case where this court should intervene to provide relief. The applicant has not attempted to*

not find any such circumstances.[8] Consequently I am of the view that the matter is not urgent: SAMWU and the Second Applicant had known as early as 6 June 2007 of the impending suspension. They had an opportunity to make representations to the Municipality on 19 June 2007. When the decision to suspend was finally made on 26 June 2007 the decision was conveyed to both SAMWU and the Second Applicant. The reasons why the Applicants had to wait until 19 July 2007 before bringing the application are not persuasive. Furthermore, the Second Applicant has an alternative remedy at his disposal.[9] Consequently I am of the view that the Applicant has created its own urgency by the substantial delay and that the application falls to be struck of the role on this basis alone.

MERITS

(11) Although not strictly necessary to consider the merits in light of the aforegoing conclusion that the matter is not urgent, suffice to point out

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invoke the conciliation or arbitration jurisdiction of the Public Service Bargaining Council. He has also been paid half of this emolument at the present moment. For all that I know, the Public Service Bargaining Council may be able to deal with the applicant's case within days…. It follows that the applicant as not made out a case for relief, and in the premises, the application is dismissed with costs." See also Veary *v Provincial Commissioner of Police & Others* (2002) 23 *ILJ* 2330 (LC) at 2333 and *Zwakala v Port St John's Municipality & Others* (2000) 21 II 1881 (LC).

[8] The fact that an employee's name could be damaged by the suspension has not been held to be an adequate ground for setting aside a suspension on an urgent basis. See *Zwakala v Port St Johns Municipality & Others* [2000] 1 BLLR 117 (LC).

[9] See *Zwakala v Port St Johns Municipality & Others* [2000] 1 BLLR 117 (LC).

that even if I am wrong on the issue of urgency, I am of the view that the Applicants have, in any event, not established a clear right for the relief sought. The entire case of the Second Applicant rests on the allegation that his suspension is unlawful in that the decision to suspend him was motivated by political considerations namely to remove members from the South African Communist party from strategic and influential positions. In this regard the Second Applicant contended that the suspension was motivated by a high level political decision "*by certain individuals within the ANC to remove members of the South African Communist Party (SACP) from strategic and influential positions within the First Respondent's staff establishment and to replace them with persons who are "loyal to the ANC*". In support of his contention the Second Applicant refers to three other employees who have also, according to him, been suspended for political reasons. One of these employees is Mapu: the Manager: Housing Delivery in the Housing and Land Business Unit. It later transpired that one of these individuals was, in any event, never suspended and was in fact on sick leave.

(12) In respect of Mapu it is necessary to make a few remarks. Mapu was suspended on 19 April 2007. According to the Second Applicant Mapu's suspension was also politically motivated. Mapu also approached the Labour Court on an urgent basis to have his

suspension set aside. The Court held that the matter was not urgent and struck the matter from the roll. Apart from the fact that Mapu is also being investigated for certain remarks made during a SACP meeting which allegedly undermines the Municipality and its management team, the bulk of the reasons listed for the suspension of Mapu relate to various acts of misconduct and/or serious dereliction of his duties in respect of, *inter alia*, tender payments and procedures. It is also common cause that external auditors are assisting with the investigation.

(13) At the outset it should be pointed out that the Respondent strongly disputed the allegation that political motive had played any role in the decision to suspend. More in particular the Respondent pointed out that it employs over 6000 employees and the fact that three people may be on suspension and facing disciplinary action and who are also from the same political party is no more than coincidental. It was further pointed out that the municipality in any event does not keep record of its employees' party political affiliation. The deponent of the answering affidavit Mr. Graham Richards, who is the Municipal Manager of the Municipality, states that he took the decision to suspend both Mapu and the Second Applicant and that he took the decision without any political interference. As already point out, Mapu was suspended on 19 April 2007 pending investigations mainly into

various acts of misconduct relating to his position as the Senior Manager in the Housing silo.

(14) It is clear from the papers that a considerable dispute of fact exist in respect of the fundamental allegation made by the Second Applicant namely that his suspension was politically motivated. What is, however, undisputed is the fact that the Second Applicant partook in a march against the housing delivery policies and implementation thereof by the Municipality and that the Applicant had also associated himself with a vicious and personal attach upon the Third Respondent and the management of the Municipality. The Second Applicant also urged audience members that if their services were disconnected for non-payment that they ought to reconnect such services themselves. The fact that the Second Applicant had participated in these proceedings as a SACP member certainly does not diminish his responsibility towards his employer to always act in good faith and in the best interests of this employer. The Second Applicant cannot avoid the consequences of his actions upon the Municipality: By advising the public to act illegally constitutes, in my view, a fundamental breach of his duty to act in good faith towards his employer. I am accordingly of the view that the Respondents have demonstrated a sound and fair operational reason for the Second Applicant's suspension and I can accordingly find no basis upon which to conclude that any of the rights

of the Second Applicant have been infringed upon.[10] The fact that the Second Applicant has issued a letter to subordinates urging them not to co-operate with an investigation also constitutes misconduct which entitles an employer to investigate the matter and to consider an appropriate cause of action.

(15) As far as an alternative remedy is concerned, it is clear that the Second Applicant has an alternative remedy available to him in the form of a referral of a dispute concerning his suspension as an alleged unfair labour practice to the relevant bargaining council.[11] The Second Applicant does not offer any explanation for such failure. There is also ample authority for the argument that this is the correct procedure to follow.[12]

APPLICATION TO STRIKE OUT

[10] In a similar matter *Koka v Director General: Provincial Administration, North West Government* (1997) 18 *ILJ* 1018 (LC) the Applicant also alleged that his suspension was politically motivated and also alleged that the suspension constituted a breach of his constitutional right to a fair labour practice and a contravention of item 2(1)(c) of schedule 7 to the LRA 1995.

[11] *Koka supra;* See also *Veary v Provincial Commissioner of Police & Others* (2002) 23 *ILJ* 2330 (LC) at 2334: "*There is therefore an alternative remedy to challenge the fairness of the suspension and the transfer. Accordingly, the applicant may not claim through the back door a status quo order which is not authorized by the LRA. (See Ngwenya v Premier of KwaSulu-Natal (2001) 22 ILJ 1667 (LC); [2001] BLLR 924 (LC); Koka; UWC Academic Staff Asspociation Union & Others; Hultzer & Others; and Fordham v OK Bazaars (1998) 19 ILJ 1156 (LC).*"

[12] See in this regard, inter alia, *Kola v Director General: Provincial Administration, North West Government* (1997) 18 ILJ 1018 (LC) at 1030C; *NUMSA v Hendor Mining Supplies (a Division of Marschalk Beleggings (Pty) Ltd* (2003) 24 ILJ 2171 (LC) at 2178 para 29.

(16) This Court has held that the provisions of the High Court Rules apply in respect of striking out applications in this Court.[13] In terms of the Rules allegations that are scandalous or vexatious or irrelevant may be struck out. Rule 6(15) defines these terms as follows: *Scandalous matter* – allegations which may or may not be relevant but which are to worded as to be abusive and defamatory. *Vexatious matter* – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy. *Irrelevant matter* – allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."

Mapu application

(17) The Applicants annexed to the founding affidavit the entire urgent application launched in the Labour Court in Johannesburg in respect of Mapu's suspension. I have already pointed out that the application was struck off the roll. The Respondents filed an application to strike out the entire Mapu application on the basis that it is irrelevant and is an attempt to introduce inadmissible similar fact evidence purely in an attempt to prejudice the Respondents. The Mapu application runs into approximately 341 pages. It was argued that this Court has been unduly burdened by these papers and that a special cost order be

[13] See *Vita Foam SA (Pty) Ltd v CCMA & Others* [1999] 12 BLLR 1375 (LC) at para [5].

made in respect of striking out annexure A to the Applicant's founding affidavit.

(18) I have perused the Mapu-application and I am of the view that it is irrelevant for purposes of the present application and I can find no reason why it was necessary to burden these proceedings with such a voluminous application. As a result of this the Respondent had to deal with a voluminous application in a very short time period and had to prepare its papers in merely 4 working days and thereafter to present themselves in Court to oppose the present application and that whilst the Applicants have waited over 3 weeks before launching this application. I am accordingly of the view that the entire Mapu-application as contained in Annexure A to the founding affidavit should be struck out.

Press and conference report

(19) The Respondent also argued that the following annexures be struck out: Annexure B1 which is a press clipping reporting on the suspension of Mapu and the Second Applicant; Annexure B2 and B3 are press statements issued by SAMWU (the First Applicant) also reporting on the suspension of, *inter alia*, the Second Respondent and a march that was to take place. Annexures MM1, MM3 and MM4 are

press reports and MM2 is a regional conference organizational report of the ANC. In respect of these annexures it was argued that it contained inadmissible hearsay and opinion evidence.

(20) In this regard the Court was referred to the decision in *Mgobhozi v Naidoo NO &* Others (2006) 27 ILJ 786 (LAC) where it was held that the same rules of evidence apply in respect of this Court. Where a party relies on hearsay evidence, a basis for the reception of such evidence must be laid otherwise it is to be excluded.[14] Hearsay statements in affidavits can be struck out irrespective of whether or not there is prejudice.[15]

(21) It is clear from the founding affidavit that the Second Applicant relies on the truth of the contents of the clippings, press reports and conference reports in support of its case that he was the victim of a political conspiracy. If that is so, the facts contained therein must be proved by direct evidence which would require an affidavit by the author of the documents or someone else who can testify to the truth

[14] See *Southern Sun Hotels (Pty) Ltd v SACCAWU & Another* (2000) 21 *ILJ* 1312 (LAC at 1319 – 1320; *Chemical Workers Union & Others v Ebony SA* (200) 21 *ILJ* 2640 (LC); In *Mgobhozi v Naadoo NO & Others* (2006) 27 *ILJ* 786 (LAC) the Labour Appeal Court clearly accepted that in determining whether hearsay was admissible, the court had to take into account the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 and the factors enumerated therein.

[15] *Cultura 2000 v Government of the Republic of Namibia* 1993 (2)SA 12 (Nm) at 27H.

of such facts contained in the document.[16] In the event, I am of the view that these annexures should be struck out.

Allegations contained in the founding affidavit

(22) The Respondent also referred the Court to four paragraphs in the founding affidavit and argued in respect of these paragraphs that they are argumentative, scandalous and vexations in that it is without factual foundation and tendered purely for purposes of attempting to prejudice the Respondents. I do not intend repeating all those paragraphs here, suffice to point out that all of these paragraphs refer to an alleged concerted plan by "*high ranking ANC politicians who also have private business interests, to remove persons from office who are regarded as constituting an obstacle in the way of them advancing their personal business interest through contracts with the FIRST RESPONDENT municipality*."[17] Reference is also made to newspaper articles that confirm this plan.[18] The allegation is also made that the

[16] Ibid at 30.

[17] Paragraph 10.2.3 of the founding affidavit.

[18] In paragraph 10.2.1 of the founding affidavit the following is stated: "*Those of us who are involved in active politics of course knew about the political decision to remove members of the SACP from the First Respondent's staff establishment, for some time, without this knowledge having been part of the general public domain. However, as with all other political developments in the country, these political decisions and strategies to though phases of obscurity, to subjects of investigative reporting and concomitant denials by the perpetrators and then eventually it inevitably becomes part of general public knowledge that there are indeed such strategies and decisions. I have noted that the press has in fact commenced giving some recognition to the*

Municipality is abusing its political power in a blatant manner to such an extent that the "*very foundation of our Constitutional Democracy is under sever threat*".[19]

(23) I am of the view that these paragraphs are scandalous and vexatious and worded in a manner as to be abusive, defamatory and with the intention to harass and or annoy the Respondents. It is clearly suggested that the Municipality is being influenced by a conspiracy to get rid of SACP members and that this drive is influenced by individuals who have business dealings with the Municipality. These allegations are substantiated with reference to newspaper articles and conference reports all of which constitute hearsay evidence. A factor which aggravates the leveling of these allegations is the fact that the Second Applicant is and remains an employee of the Municipality.

(24) I have taken note of the decision In *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (NM) where the Court held that it is not sufficient that a matter is scandalous, vexatious or irrelevant, it must also be prejudicial to the other party. In this regard the court held that:

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existence of this political purge within the FIRST RESPONDENTS' structures. In this regard I attach as Annexure B-1 a copy of a report…."

[19] Paragraph 15 of the founding affidavit. See also paragraph 54 in which it is alleged that the Respondents are infringing on his constitutional rights.

"*The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."*[20]

(25) I am of the view that the fact that the allegations in respect of a conspiracy are based on hearsay evidence; the fact that they are made by an employee currently in the employ of the Municipality; and the fact that the Respondents already had taken great pains at dispelling the allegations of an alleged "*purge*" of SACP members from the employ of the Municipality in its answering affidavit in the Mapu-application, that the Municipality has been prejudiced. In the event I am of the view that these paragraphs should also be struck.

[20] At 566 – 567.

(26) COSTS

(27) In respect of the costs of the main application, I am of the view that the general rule namely that costs follow the event should apply. In respect of the striking out application I am of the view that a special cost order is warranted.

(28) In the event the following order is made:

1. The application is struck off the role with costs.
2. The Respondents' application to strike out succeeds with costs on an attorney client scale.

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BASSON, J

DATE OF HEARING: 3 AUGUST 2007

DATE OF JUDGEMENT: 7 AUGUST 2007

FOR THE APPLICANT:

Minnaar Niehous Attroneys

FOR THE FIRST TO THIRD RESPONDENTS:

TMG Euijen

Instructed by Gray Moodliar Attorneys