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**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE DIVISION, KIMBERLEY)**

**Case No: 1105/19**

**Heard on: 31/05/2019**

**Delivered on: 04/10/2019**

**In the matter between**

**FRANKEL ENGELBRECHT N.O.**

**Applicant**

**And**

**IZAK FREDERICK SPANGENBERG**

**1<sup>st</sup> Respondent**

**(ID Number: [....])**

**MARIA CORNELIA VAN DER WESTHUIZEN**

**2<sup>nd</sup> Respondent**

**(ID Number: [....])**

**CHRISTINA ALETTA W LA COCK**

**3<sup>rd</sup> Respondent**

**(ID Number: [....])**

**CJ WILLEMSE, MULLER & BABINSZKY ATTORNEY**

**4<sup>th</sup> Respondent**

**THE MASTER OF THE HIGH COURT, KIMBERLEY**

**5<sup>th</sup> Respondent**

**CHRISTINA GERTRUIDA SPANGENBERG**

**6<sup>th</sup> Respondent**

**(ID Number: [....])**

## JUDGMENT

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### PAKATI J

[1] The applicant, Mr Frankel Engelbrecht N.O., approached this Court on urgent basis seeking an order in the following terms:

"1. Directing that the applicant's failure to comply with the provisions of Rule 6(5) of the Uniform Rules of Court with regards to form and service and time periods be condoned and that this application be dealt with as one of urgency in terms of Rule 6(12) (a) and (b) of the Uniform Rules of Court.

2. That the First, Second, Third and Fourth Respondents be interdicted and prohibited from receiving any rental or other income due in respect of the buildings situated on the properties known as Plots 243 and 741, Jooste Islands, District Keimos, Northern Cape Province.

3. That the First, Second, Third and Fourth Respondents be ordered to inform all occupants of the buildings situated on the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province, that the First, Second, Third and Fourth Respondent will no longer receive the rental due in respect of the properties, and/or be responsible for the collection of the rental for the properties and supply them with the Estate's, Standard Ban, banking details.

4. That the First, Second, Third and Fourth Respondents be interdicted and prohibited from interfering with the administration of the estate and buildings situated on the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province, for as long as any of them are not duly appointed as executor/agent of an executor.

5. That the First, Second and Third Respondents be ordered to pay all estate money, which they received from the previous executors and/or collected while acting as executors, which they have in their possession and/or under their control, into the bank account of the Estate Late Spangenberg HH held at Standard Bank, account number [...], Kimberley Branch within 7 days of the order granted herein.

6. That the Fourth Respondent be ordered to pay all money due to and relating to the Estate as well as all rental income the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province that was Late Spangenberg HH held at Standard Bank, account number [...], Kimberley Branch within 7 days of the order granted herein.

7. That the First, Second, Third and Fourth Respondents be ordered to make full disclosure of all income of the Estate received by them in their capacity as executors and/or attorneys of the First to Third Respondents, together with substantiating documents, including all bank statements, within 30 days of the order.

8. That the First, Second, Third and Fourth Respondents be ordered to make full disclosure of any income received by them in their personal capacity from the

estate late Mr HH Spangenberg, together with substantiating documents within 30 days of the order.

9. That the First, Second and Third Respondents be ordered to make full disclosure of any express paid or incurred by them in their capacity as executors of the estate of Mr HH Spangenberg, together with substantiating documents within 30 days of the order.

10. That the First, Second, Third and Fourth Respondents be ordered to pay the costs of this application on attorney and own-client scale, jointly and severally, the one paying the other to be absolved;

11. That the applicant be granted such further and/or alternative relief as this Honourable Court may deem fit."

[2] On 31 May 2019 I granted the following order:

"1. That the First, Second, Third and Fourth Respondents are interdicted and prohibited from receiving any rental or other income due in respect of the buildings situated on the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province.

2. That the First, Second, Third and Fourth Respondents are ordered to inform all the occupants of the buildings situated on the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province that the First, Second, Third and Fourth Respondents will no longer receive the rental due in respect of the properties, and/or be responsible for the collection of the rental for the properties and supply them with the Estate's Standard Bank building details.

3. That the First, Second, Third and Fourth Respondents are interdicted and prohibited from interfering with the administration of the estate and buildings situated on the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province, for as long as any of them are not duly appointed as executor/agent of the executor.

4. That the First, Second, Third and Fourth Respondents are ordered to pay all estate money, which they received from the previous executors and/or collected while acting as executors, which they have in their possession and/or under their control, into the bank account of the Estate Late Spangenberg HH held at Standard Bank, account number [...], Kimberley branch within 7 days of the order granted herein.

5. That the Fourth Respondent is ordered to pay all the money due to and relating to the Estate as well as all rental income of the properties known as Plots 243 and 741, Jooste Island, District Keimos, Northern Cape Province that was held in its trust account, into the bank account number [...], Kimberley branch within 7 days of the order granted herein.

6. That the First, Second, Third and Fourth Respondents are ordered to make full disclosure of all income of the Estate received by them in their capacity as executors and/or attorneys of the First to Third Respondents, together with substantiating documents, including all bank statements, within 30 days of the order.

7. That the First, Second and Third Respondents are ordered to make full disclosure of any income received by them in their personal capacity from the estate of the late Mr HH Spangenberg, together with substantiating documents within 30 days of the order.

8. That the First, Second and Third Respondents are ordered to make full disclosure of any expenses paid or incurred by them in their capacity as executors of the estate of the late Mr HH Spangenberg, together with substantiating documents within 30 days of the order.

9. That the applicant is ordered not to pay any funds to the sixth Respondent pending the finalisation of the Application under Case Number 394/19.

10. That the costs of this application are reserved."

[3] On 10 August 2019 the first respondent, Mr Izak Frederick Spangenberg, filed a request for written reasons. Contained hereunder are the written reasons for the order dated 03 May 2019.

[4] The applicant and deponent to the founding affidavit is an attorney practising as a director of Engelsman Magabane Inc and is *nomino officio* in his capacity as duly appointed executor in the estate of the late Hendrik Hermias Spangenberg with Master's reference as 453/2010. Mr Izak Spangenberg (Mr Spangenberg), Ms Maria Cornelia Van der Westhuizen, Ms Christina Aletta W La Cock, is first to third respondents respectively. They are the biological children and heirs of the late HH Spangenberg and were previously appointed as co-executors in the estate until removed by the fifth respondent, the Master of the High Court (the Master), on 05 November 2018. The fourth respondent is CJ Willemse Müller & Babinszky Attorneys and attorneys of record of the first, second and third respondents in an application under case number 394/19 in which application the first to third respondents sought the review of the Master's decision to remove them as executors. The sixth respondent is Christina Gertruida Spangenberg (Ms Spangenberg), also the heir in the deceased estate and co-executor until she was also removed from the position by the Master. She is the second wife of the deceased and the step-mother of the first, second and third respondents. She is also a holder of a habitatio over the

property known as Erf 741 and 243 District Keimos, Northern Cape. No relief is sought against her.

- [5] Mr Engelbrecht was appointed by the Master on 29 November 2018 as the executor in the estate to administer and finalise it in terms of legislation and the Master's directions. The first respondent opposes the application.

### **BACKGROUND FACTS**

- [6] The deceased died on 15 January 2010 and his last will and testament is dated 02 July 1991. The Master accepted it. Ms Spangenberg brought an application under case number 792/2010 to have another will dated 26 November 2009 declared valid and to have the Master accept it. That application was withdrawn by Ms Spangenberg when the first to third respondents opposed it.
- [7] FNB Trust was initially appointed as the executor of the estate but resigned during September 2014. The first, second, third and sixth respondents were appointed by the Master as co-executors on 09 November 2015. They were again appointed on 02 November 2017 after they applied under case number 1474/2017. The Master removed them on 05 November 2018 in terms of section 54(1) (b) (v) of the Estates Act 66 of 1965<sup>1</sup>. The Master then appointed the applicant on 29 November 2018 as executor of the deceased estate.
- [8] On 21 February 2019 the first to third respondents brought an application under case number 394/2019 in order to review the Master's decision to remove them as co-executors of the deceased estate and to also remove the applicant as the executor and have

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<sup>1</sup> **54 Removal from office of executor**

(1) An executor may at any time be removed from his office-

(a)...

(b) *by the Master-*

(i) ...

(v) *if he fails to perform satisfactorily any duty imposed upon him by or under this act or to comply with any lawful request of the Master.*

them re-appointed as executors. In that application the fourth respondent represented the first to third respondents. The applicant did not oppose that application but alleges that he deposed to an affidavit on 05 March 2019 in his capacity as the executor to clarify certain aspects in order to assist the Court in arriving at a just decision. According to the applicant the said affidavit sets out the background facts of this matter as well as the position regarding the habitation that Ms Spangenberg has over the properties. It also deals with the failure to pay monthly rental income to Ms Spangenberg. He contends that the conduct of the first to third respondents was improper and contrary to the Act, the Master's direction and the will and testament of the deceased.

[9] The affidavit deposed to by the applicant was served on the fourth respondent and the Master on 15 March 2019. After receipt of same by the fourth respondent he removed the matter from the roll. The same date, the applicant addressed a letter to the fourth respondent requesting payment of rental for the month of March that was received in trust, into the bank account of the estate and requested him to provide a breakdown of what rental was received. He also asked him to inform the tenants that in future they should pay rental into the estate bank account. He further requested the first to third respondents to pay any monies that were in their possession to the estate bank account and provide a full breakdown of the origin of the said monies. The applicant sent an email to the fourth respondent on 26 March 2019 enquiring as to when the monies would be received and threatened with an urgent application if nothing was received. No monies were received from the respondents.

[10] The fourth respondent indicated that they would file their replying affidavit by 05 April 2019 which they did not do. No payment was made until April 2009 when rental was due. This, according to the

applicant, is intentional delay of the review application of the Master's decision.

[11] For various reasons the application could not be heard soon due to the problems that, according to the applicant, were not due to his own fault. On 14 May 2019 the applicant instructed Adv Van Tonder to proceed with the urgent application to compel the first to fourth respondent to pay the monies due to the estate and Ms Spangenberg.

[12] According to the applicant only a small portion of rental income from the property was paid to Ms Spangenberg by the first respondent until 2017. After that the first respondent stopped making payments. The applicant contends that the refusal of the first to fourth respondent to pay rental income to Ms Spangenberg amounted to unlawful conduct. He argues that he was unable to comply with his obligations of taking control and finalising the estate as an executor. He says that he is also unable to pay rental income to Ms Spangenberg that she is entitled to in terms of the will. He states that Ms Spangenberg only receives R1400 per month that is paid by one of the tenants into the estate bank account. He contends that Ms Spangenberg *"is in dire need of the rental income over the property, which she is entitled to receive, as a result of her habitatio over the property."*

[13] The applicant alleges that if the order is not granted urgently the first to third respondents assisted by the fourth respondent would continue to receive the rental income from the property to the detriment of the estate and Ms Spangenberg. The fact that the rental money is not paid into the estate bank account is in contravention of section 28<sup>2</sup> of the Estate Act. He also relies on section 46 of the Estate Act which provides:

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<sup>2</sup> Section 28 provides: "**Banking accounts**

#### **"46 Failure to pay over moneys**

Any executor who fails to pay over any money to the Master or to any other person or to deposit it in any banking account under section *twenty-eight* when required by or under this Act to do so, or who uses or knowingly permits any co-executor to use any property in the estate except for the benefit of the estate, shall pay into the estate an amount equal to double the amount which he has so failed to pay over or to deposit or to double the value of the property so used: Provided that the Master may, on good cause shown, exempt any executor, in whole or in part, from any liability which he may have incurred under this section."

[14] The applicant contends that he has a clear right to take control of all the assets and income of the estate in his capacity as the executor. According to him the first to third respondents have received a major portion of the rental income in respect of the properties for about seven years since 2017 without having any claim or title to it. He alleges that the first to third respondents took unilateral control of the property in that they entered into lease agreements in their personal capacities with new tenants despite not being co-executors. He alleges further that the estate and Ms Spangenberg could suffer irreparable harm if the first to third respondents would be allowed to continue to act with the assets and income of the estate as they like without having any right or authority to do so. He urges that I grant the order as prayed for in the notice of motion with costs as between attorney and own client jointly and severally the one paying the other to be absolved.

[15] Mr Spangenberg denies that the matter is urgent and that the applicant is abusing the process provided for in term of Rule 6(12)

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(1) An executor-

(a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R1 000, open a cheque account in the name of the estate with a bank in the Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate;

(b) may open a savings account in the name of the estate with a bank and may transfer thereto so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate;

(c) may place so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank."

(a) & (b) of the Uniform Rules of Court. He claims that the applicant only acts in the best interests of Ms Spangenberg and on her instructions. The second will and testament that was purported to be signed by the deceased on 26 November 2009 was not accepted by the Master because it did not comply with section 2(1) (v) (aa) and (bb) of the Wills Act 7 of 1953.<sup>3</sup> Ms Spangenberg launched an ex parte application under case number 792/10 seeking an order accepting the said will as the valid one. The first to third respondents were not notified of the said application. As soon as they had knowledge of same the application was opposed because according to Mr Spangenberg, Ms Spangenberg forged the said will in order to benefit herself. Subsequently Ms Spangenberg withdrew the application. Mr Spangenberg alleges that after submitting the purported second will Ms Spangenberg unilaterally and without authority sold the deceased's livestock for R350 000-00 and used the money for herself prior to the Master making a decision regarding its validity. A fraud case was registered with the South African Police Services and she and her son, being complicit

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<sup>3</sup> section 2(1) (v) (aa) and (bb) of the Wills Act, 7 of 1953: “**2 Formalities required in the execution of a will**

(1) Subject to the provisions of section 3bis-

(a) no will executed on or after the first day of January, 1954, shall be valid unless-

(i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and

...

(v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies: Provided that-

(aa) the will is signed in the presence of the commissioner of oaths in terms of subparagraphs (i), (iii) and (iv) and the certificate concerned is made as soon as possible after the will has been so signed; and

(bb) if the testator dies after the will has been signed in terms of subparagraphs (i), (iii) and (iv) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall as soon as possible thereafter make or complete his certificate, and sign each page of the will, excluding the page on which his certificate appears.”

with the fraud is on trial and is pending in the Magistrates Court, Upington under MAS 174 /04/2011. The conduct of Ms Spangenberg made the finalisation of the estate difficult.

- [16] According to Mr Spangenberg, Ms Spangenberg attempted to enforce a donation which she alleged the deceased signed prior to his death. That attempt also failed.
- [17] In terms of the first will, First National Bank (FNB) was appointed executor of the deceased estate. It disposed of a letter dated 15 December 2010 (Annexure "D"). In the said letter FNB had provided that the accepted will provided Ms Spangenberg with a *habitatio* over erfs 741 and 243 which was to start immediately after the deceased's death. The first to third respondents were also informed that she was also entitled to rental income from the two erven which was indeed paid to her after the deceased's death. Le Grange Carr & Wessels Inc forwarded a letter in response to FNB and drew FNB's attention to the fact that the "*habitatio*" was only a right to occupy, which reads thus from the will:

"...My perseel 243 en 741, olyvenhoudtsdrift, distrik Keimoes, onderhewig aan die reg van *habitatio* woonreg ten gunste van my eggenoot..."

- [18] Mr Spangenberg alleges therefore that the habitation only refers and is limited to the right to occupy the dwelling on either erven by Ms Spangenberg free of charge and does not entitle her to any rental income. After the withdrawal of FNB as executor the first to third respondents and the sixth respondent were appointed co-executors. Due to the complex issues surrounding the finalisation of the estate the first to third respondents and sixth respondent accepted a final distribution agreement on 05 March 2015. The respondents allege that Ms Spangenberg failed to comply with the conditions imposed in the said agreement and also failed her duties as co-executor. Mr Spangenberg alleges that she was obstructive and made various dilatory tactics making it very

difficult for them to finalise the estate. Due to the continued delay caused by Ms Spangenberg the Master removed all of them as co-executors, hence the application by the first to third respondents to be re-appointed as executors.

- [19] On 04 September 2018 the Master sent a letter to the first to third respondents stating that the final and distribution account had to be delivered in 30 days. CJ Willemse, Müller & Babinszky, on behalf of the first to third respondents, addressed a letter to the Master requesting for an extension of time, which was granted until 16 October 2018. On 15 October 2018 Mr Babinszky spoke to Mr Van Rensburg, the assistant Master, informing him that the final liquidation and distribution account would not be available the next day and explained the reason why, which was accepted by him. To their surprise, Mr Van Rensburg forwarded a letter to Mr Babinszky on 17 October 2018 and confirmed that they would issue a notice in terms of section 54(2) of the Estate Act<sup>4</sup> and that an extension of time could not be provided anymore. On 19 October 2018 the matter was referred to Mr Davids, the Master, who granted an extension until Monday 22 October 2018. Indeed on 22 October 2018 the final and distribution account was delivered to the Master by first to third respondents. On 05 November 2018 the Master removed the first to third respondents as co-executors in terms of section 54(1) (b) (v) of the Estate Act due to non-compliance with section 35(1) of the Estates Act<sup>5</sup> *via* a letter. The first to third

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<sup>4</sup> Section 54(2) of the Estates Act 66/65 provides: "Before removing an executor from his office under subparagraph (i), (ii), (iii), (iv) or (v) of paragraph (b) of subsection (1), the Master shall forward to him by registered post a notice setting forth the reasons for such removal, and informing him that he may apply to the Court within thirty days from the date of such notice for an order restraining the Master from removing him from his office."

<sup>5</sup> This section provides: "**35 Liquidation and distribution accounts**

(1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within-

(a) six months after letters of executorship have been granted to him; or

respondents received the said letter on 16 November 2018. On 19 November 2018 Mr Babinszky requested reasons for their removal. The Master replied in a letter dated 19 November 2018 thus:

"I refer you to the attachments and the contents thereof.

The said L & D account was due on or before 04 October 2018, after two registered final demands were sent to you. The final demand dated 04 September 2018, requested you to apply to court in terms of section 54(2) of the Estates Act, to prevent the executors of being removed. I can't recall or from the file contents that any extension was granted.

The executors were removed in terms of the provisions of section 54(1) (b) (v) of the Estates Act (*supra*). Hoping that the above mentioned information will assist you."

[20] Mr Spangenberg states that it shows that the Master did not consider the communication forwarded to his office by Mr Babinszky. On 22 November 2018 Mr Babinszky sent another letter to obtain clarity on his statements in his letter and the Master responded in a letter on 27 November 2018 and indicated that the contents of his letter dated 19 November 2018 were clear and that if the first to third respondents were dissatisfied they could approach court for an order setting aside his decision of their removal.

[21] Mr Spangenberg insists that he, second and third respondents have prospects of success especially considering that the final liquidation and distribution account have been lodged. The first to third respondents approached court for the review of the Master's decision under case number 394/2019. The applicant is aware of the said application. Mr Babinszky and Mr Willemse had various discussions with the applicant and he was informed that all the amounts received would be paid into the trust account of the fourth respondent pending the outcome of the review application. He also indicated that there is an application to be heard under case

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(b) such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate."

number 394/2019 for the removal of the applicant as executor and reinstatement of first to third respondents. Mr Spangenberg states that the applicant was given assurance that if the review application is dismissed all the monies would be paid over to him and he would be given proper account of all the monies received. He states further that he has, for nine years, maintained the properties at his own cost.

- [22] Mr Spangenberg contends that the applicant's founding affidavit and reasons advanced for urgency of the matter shows that he enforces a claim on behalf of Ms Spangenberg. According to him if Ms Spangenberg wishes to enforce her right against the estate she should approach court as it is not the duty of the first to third respondents to do so.
- [23] Mr Spangenberg denies that the matter is urgent because the applicant was appointed as executor on 29 November 2018 but had been threatening them with approaching court on urgent basis for almost four months. He argued that if I found that the matter was urgent such urgency was self-created. He urged me to dismiss the application with costs.
- [24] Mr Spangenberg also applied for condonation of the late filing of his opposing affidavit. He explained that he received the application on 17 May 2019, a Friday afternoon. His attorney was out of town and had attended to another matter in Pretoria. On 23 May 2019 his attorney was in Cape Town to attend a meeting and returned on Saturday 25 May 2019. They were able to consult and instruct counsel for the first time on 27 May 2019.
- [25] The applicant seeks an order interdicting the first to fourth respondents from interfering with the administration of estate and the abovementioned erven for as long as they are not appointed

executors; that they pay all estate money received by them into the estate bank account.

26] Section 28(1) of the Estates Act provides that an executor is obliged to open an account in the name of the estate and deposit therein the monies which he has in hand from time to time as he receives it from the estate. This section does not say that after he has received it he should hand it to someone else. The applicant argues that he is entitled to hand it over to Ms Spangenberg in compliance with the *habitatio* she has as provided for in the will. During argument it became clear that there was difference of interpretation as far as the *habitatio* was concerned. Mr Spangenberg contends that Ms Spangenberg is only entitled to occupation of either of the erven.

[27] In my view, the issue of the interpretation of *habitatio* was not before me and if Ms Spangenberg is of the view that her interpretation is correct she may approach court in order to enforce her right seeing that first to third respondents interpret *habitatio* differently.

[28] In terms of section 28 first to third respondents should not handle the estate monies as the Act provides. It is only the duty of the executor to open an estate account and deposit monies as he receives them in that account. Even if they were to be reinstated as executors they would have a duty to comply with section 28.

[29] The applicant did not file a replying affidavit thereby responding to the allegations stated by Mr Spangenberg in his opposing affidavit. Rule 6(5) (e) of the Rules of Court<sup>6</sup> is not peremptory but I considered that the allegations were quite serious and demanded a response taking into account that the applicant wanted first to third

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<sup>6</sup> Rule 6(5) (e) of the Uniform Rules of Court provides: "Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of sub-rule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits." My emphasis

respondents to hand over all the money to him, for him to hand it over to Ms Spangenberg in contravention of section 28 instead of depositing it in the estate bank account. Section 28 is peremptory and has no proviso. First to third respondents have also launched review proceedings and an application for the removal of the applicant as executor which were pending at the time. That application was later removed from the roll. In any event that review application has no effect as far as section 28 is concerned. The executor has a duty to fulfil in terms of section 28, hence I found that the matter was urgent.

[30] The above were the reasons why I granted the order in paragraph 2 *supra*.

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**BM PAKATI**  
**JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY**

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|------------------------------------|-------------------------|
| <i>On behalf of the Applicant:</i> | ADV VAN TONDER          |
| <i>Instructed by:</i>              | ENGELSMAN MAGABANE INC. |

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| <i>On behalf of the 1<sup>st</sup> Respondent:</i> | ADV RAUBENHEIMER |
| <i>Instructed by:</i>                              | VAN DE WALL INC. |