

SOUTH AFRICA / JUDGMENT

Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg (30782/05) [2006] ZAGPHC 6 (27 January 2006) [2006] ZAGPHC 6

COURT

High Courts - Gauteng

BEFORE

Bertelsmann

CASE / FILE NUMBER

30782/05

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AFRICA(TRANVAAL PROVINCIAL DIVISION)

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IN THE HIGH COURT OF SOUTH AFRICA

(

TRANVAAL PROVINCIAL DIVISION

)

PRETORIACASE NO: 30782/05

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2006-01-27In the matter between

RITAMA INVESTMENTS Applicant

and

UNLAWFUL OCCUPIERS OF ERF 62 WYNBERG Respondents

J U D G M E N T _____

BERTELSMANN J: The applicants are property owners and developers. The first applicant owns Erf 62 Wynberg. The second applicant owns Erf 49 Wynberg. The third applicant owns Portion 1 of Erf 51 Wynberg and Erf 397 Wynberg. The fourth applicant has purchased these properties with an eye to development by erecting a shopping centre thereon. It has not yet taken transfer but is in the process of doing so. The first, second and third respondents are 839 individuals who occupy erven 62, 49, 15, Portion 1 of Erf 51 and Erf 397 Wynberg. They include elderly and infirm people, women, children, some who suffer from disabilities, some unemployed, families and single persons, citizens and possibly non-citizens. The fourth respondent is the Metropolitan Municipality of Johannesburg, duly established as such. The fifth respondent is the MEC for Housing of the Gauteng Province. The applicants seek the eviction of the first, second and third respondents from the aforesaid properties in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998, hereinafter called by the popular acronym of PIE. The applicants made an earlier attempt to evict the first to third respondents. On 30 March 2005 a similar application to the present was launched in the WLD. Fourth and fifth respondents were not joined as parties in those proceedings but were given notice in terms of section 4(2) of PIE. The first to third respondents claimed in the WLD application that they were lawful tenants. They were thereupon given notice to vacate the premises but refused to do so. The first eviction application was unsuccessful. It is common cause that the first to third respondents' occupation is unlawful since about June 2005. The properties concerned are all part of an area called The Pan African Triangle in the township known as Alexandra. Alexandra is of historical significance. The present occupiers are described by the principal deponent for the first three respondents as follows:

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unlawful since about June 2005. The properties concerned are all part of an area called The Pan African Triangle in the township known as Alexandra. Alexandra is of historical significance. The present occupiers are described by the principal deponent for the first three respondents as follows:

"Households 293. Occupants 839. Elderly (over 60 years) 11. Children (under 18 years) 252. Disabled 22. Households headed by women 96. Unemployed 95. Chronically poverty stricken (monthly income R800,00 or less) 201."

It is also common cause that the premises are one and all unfit for human habitation. They are dilapidated commercial structures that were never intended for use as dwellings. The existing conditions are abysmal. Municipal services have been disconnected, there is no sanitation and overcrowding is severe. All the properties are zoned for business. The first to third respondents cannot find housing in the open market because of their impoverished circumstances. Their housing needs must therefore be catered for primarily by the state. The duty to provide adequate housing is formulated in section 26 of the Constitution 108 of 1996 which reads as follows:

"Housing

1. Everyone has the right to have access to adequate housing; 2. The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right; 3. No-one may be evicted from their home or have their home demolished without an order of court, made after considering all the relevant circumstances. No legislation may permit arbitrary eviction."

Section 26(3) uses the word "home", not "property". The occupier of any home, whether palace or shack, is protected against arbitrary eviction. The protection is extended to owners and non-owners, lawful and unlawful occupiers. The constitutional protection against arbitrary eviction is given content and practical application in PIE. The relevant provisions of this statute are the following:

"Building or structure" is defined as "any hut, shack, tent or similar structure, or any other form of temporary or permanent dwelling or shelter". "Unlawful occupier" is defined as "... a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land ..."

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Eviction of unlawful occupiers

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"1. Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. 2. At least 14 days before the hearing of the proceedings

contemplated in subsection 1, the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction ...6. If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.7. If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state, or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."8. If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier and determine -

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).
- 9. In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors including the period the unlawful occupier and his or her family have resided on the land in question."

The Constitution and PIE have brought about a fundamental shift in the way evictions of unlawful occupiers dealt with. Prior to the advent of democracy, the critical jurisdictional fact that had to exist for a successful eviction was the unlawfulness of the occupation of the land. This is no longer the case. As Sachs, J has demonstrated in a seminal judgment in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) (SA) 217 (CC):

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Port Elizabeth Municipality v Various Occupiers

2005 (1) (SA) 217 (CC):

"The Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of overcoming (remnants of apartheid) the abuses and ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.[12] PIE not only repealed PISA (the Prevention of Illegal Squatting Act 52 of 1951), but in a sense inverted

it: Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus the first part of the title of the new law emphasised the shift and thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common law remedies while reducing common law protection was reversed so as to temper common law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgement of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.[13] Thus the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable. At the same time the second part of the title established that unlawful occupation was also to be prevented. The courts now had a new role to play, namely to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex and constitutionally ordained functions: When evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned."

The courts are thus given a new responsibility in dealing with evictions. Nobody may be made subject to an eviction order unless the eviction is carried out in accordance with the Bill of Fundamental Rights. All relevant circumstances to achieve an equitable solution of the clash of rights and interests between the private landowner and the homeless unlawful occupier, must be weighed up. As Sachs, J in his judgment says in 31 - 33 inclusive:

"The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case ..."[32] The obligation on the court is to 'have regard to' the circumstances, that is to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully appraised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant information available, technical questions relating toonusof proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under the new Land Law. The existence of unlawfulness is the foundation for the enquiry, not its subject matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution in upholding and enforcing land rights, is appropriate to issue an order which has the effect of depriving people of their homes. Of equal concern it is determining the conditions under which if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task

entrusted to it. In securing the necessary information the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs so as to enable it properly to have regard to relevant circumstances."

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This duty to establish all relevant circumstances demands that a court must act proactively in establishing all relevant circumstances if the parties before it fail, or are unable to place all the information that might be required to enable the court to achieve an equitable manner in which an eviction is to be effected. This new role the court must assume to ensure that the order it has to make is just and equitable, may demand an active enquiry by the court, and not only the parties before it, into the situation on the ground. Information that might affect the way the court may structure its order may have to be obtained by forcing the local authority and others to inform the court of the availability of suitable land or accommodation to which unlawful occupiers could be moved. This active role the court may be obliged to play may not appeal to some among us who were raised on the principles of the common law and the English judicial tradition, which demands reticent objectivity of the judge in deciding only those issues that the parties to the suit choose to place before the court for a decision. Taking an active part in not only seeking evidence but actually participating in the precise definition of the issues to be addressed, might be seen as a heretical descent into the arena where the dust of combat may obscure the hawk's eye vantage

conferred by judicial detachment. Small wonder that Mr Fourie SC, acting for the fourth and fifth respondent, expressed himself in terms of some distress while the future course of this matter was debated, and suggested that the court "appeared to be ganging up with the other parties against the state" and was "turning application proceedings into an inquiry". His reaction reflected the concerns which the court itself had in respect of the activist role that it found itself to be playing. The legal system and the courts are often, and rightly so, perceived to err on the side of conservatism to maintain and protect established practices and procedures and to stick to tried and trusted measures that have stood the test of time. But these procedures have, as demonstrated by Sachs, J and by Professor A J van der Walt in his various articles, notably *Transformative Constitutionalism and the Value of South African Property Law* 2005 (4) TSAR 655, in the past lent themselves to abuse and the support of institutionalised discrimination. Sections 7 and 8 of the Constitution decree the following:

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2005 (4) TSAR 655

"[7] 1. The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. 2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights; 3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill.

[8] Application -

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state; 2. A provision of the Bill of Rights binds a natural or a juristic person if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right; 3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 2 a court -
- (a) In order to give effect to a right in the Bill must apply or if necessary develop the common law to the extent that legislation does not give effect to that right; and (b) May develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1)."

These sections demand not only of all organs of state but also of the courts, by constitutional overlay of the common law or transformative adjudication, to reshape South African society in accordance with the foundational values of the Supreme Law. This constitutional imperative cannot always be realised by staying in the comfort zone of past practices. Where necessary the courts must become actively involved in giving substance and content to the Bill of Rights. This may involve the raising, *mero motu*, by the court of constitutional issues that have not been identified by the parties to civil litigation. See *Potgieter v Lid van die Uitvoerende Raad Gesondheid, Provinsiale Regering Gauteng & Andere* 2001(11) BCLR 1175 (CC), and *Matiso v Commanding Officer, Port Elizabeth Prison & Another* 1994 (4) SA 592 (SECLD). The court's active intervention may be required to protect the rights of those who are otherwise at risk, such as in the instant case. PIE expressly demands judicial vigilance in the framing of just and equitable eviction orders to ensure that the homeless and the poor are recorded respect and protection of their dignity and health even if they are unlawful occupiers. Such intervention from the bench may of course be seen at first blush to exhibit bias in favour of one or the other party, to be "ganging up" against the landowner or the state. If properly applied, the apparent bias in favour of the evictees will soon prove to be no more than the constitutionally decreed effort to arrive at a solution that is just and equitable to all concerned. While judicial activism is decreed by the Constitution, it is also clearly circumscribed and limited only to the extent that it is necessary to achieve the objects of the Constitution. The duty to give proper content to the foundational values of the Constitution and the Bill of Rights does not rest on the courts alone but on all organs of state. In practice that means that in an application under PIE the notice that has to be given in terms of section 4 to the local authority concerned is not just a notice to a party that may be interested in the outcome of the litigation between a landowner and an unlawful occupier of such land. The local authority, the organ of state primarily concerned with the housing of unlawful occupiers, should normally be in the best position to inform the court whether there is housing

or land available or a transit facility does exist in which the unlawful occupier could be accommodated if evicted. If no land or housing is available the court ought to be informed of whatever plans that exist to deal with the homeless in that area. If such information is not made available to the court as a matter of course, it must surely be made available at the court's specific request. Normally the information regarding available housing for the homeless will be critical to determine on what terms and conditions justice and equity would best be served if an eviction order has to be made. Provincial and local authorities are organs of state and are bound to assist the courts to ensure their effectiveness in terms of section 165(4) of the Constitution. Unfortunately the fourth and fifth respondents have so far singularly failed, or rather effectively refused, to come to the court's assistance. Alexandra falls within the jurisdiction of both the fourth and fifth respondents. The national government launched an integrated sustainable rural development and urban renewal programme in 2001. As part thereof President Mbeki announced the Alexandra Renewal Project ("the ARP"), designed to improve living conditions of the Alexandra community. An amount of R1,3 billion was earmarked for this project. The ARP, as administered jointly by the fourth and fifth respondents and according to its official website, intends to provide "a healthy housing environment with an upgraded and well integrated Alexandra that provides housing choice, is affordable, developed at manageable densities and is regulated". In a statement by the fifth respondent, Ms Nombula Mokonyane, dated 24 February 2005, she emphasised that 1 403 houses had been planned, among other projects, as part of the ARP for construction in 2005. The whole ARP project, including the upgrading of Pan Africa, is to be concluded by 2007. It is of course not only in terms of this renewal project that fourth and fifth respondents are obliged to provide housing to the poor. Section 2(1) of the Housing Act 107 of 1997 provides that:

These sections demand not only of all organs of state but also of the courts, by constitutional overlay of the common law or transformative adjudication, to reshape South African society in accordance with the foundational values of the Supreme Law. This constitutional imperative cannot always be realised by staying in the comfort zone of past practices. Where necessary the courts must become actively involved in giving substance and content to the Bill of Rights. This may involve the raising,

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poor are recorded respect and protection of their dignity and health even if they are unlawful occupiers. Such intervention from the bench may of course be seen at first blush to exhibit bias in favour of one or the other party, to be "ganging up" against the landowner or the state. If properly applied, the apparent bias in favour of the evictees will soon prove to be no more than the constitutionally decreed effort to arrive at a solution that is just and equitable to all concerned. While judicial activism is decreed by the Constitution, it is also clearly circumscribed and limited only to the extent that it is necessary to achieve the objects of the Constitution. The duty to give proper content to the foundational values of the Constitution and the Bill of Rights does not rest on the courts alone but on all organs of state. In practice that means that in an application under PIE the notice that has to be given in terms of section 4 to the local authority concerned is not just a notice to a party that may be interested in the outcome of the litigation between a landowner and an unlawful occupier of such land. The local authority, the organ of state primarily concerned with the housing of unlawful occupiers, should normally be in the best position to inform the court whether there is housing or land available or a transit facility does exist in which the unlawful occupier could be accommodated if evicted. If no land or housing is available the court ought to be informed of whatever plans that exist to deal with the homeless in that area. If such information is not made available to the court as a matter of course, it must surely be made available at the court's specific request. Normally the information regarding available housing for the homeless will be critical to determine on what terms and conditions justice and equity would best be served if an eviction order has to be made. Provincial and local authorities are organs of state and are bound to assist the courts to ensure their effectiveness in terms of section 165(4) of the Constitution. Unfortunately the fourth and fifth respondents have so far singularly failed, or rather effectively refused, to come to the court's assistance. Alexandra falls within the jurisdiction of both the fourth and fifth respondents. The national government launched an integrated sustainable rural development and urban renewal programme in 2001. As part thereof President Mbeki announced the Alexandra Renewal Project ("the ARP"), designed to improve living conditions of the Alexandra community. An amount of R1,3 billion was earmarked for this project. The ARP, as administered jointly by the fourth and fifth respondents and according to its official website, intends to provide "a healthy housing environment with an upgraded and well integrated Alexandra that provides housing choice, is affordable, developed at manageable densities and is regulated". In a statement by the fifth respondent, Ms Nombula Mokonyane, dated 24 February 2005, she emphasised that 1 403 houses had been planned, among other projects, as part of the ARP for construction in 2005. The whole ARP project, including the upgrading of Pan Africa, is to be concluded by 2007. It is of course not only in terms of this renewal project that fourth and fifth respondents are obliged to provide housing to the poor. Section 2(1) of the Housing Act 107 of 1997 provides that:

1994 (4) SA 592

Section 2(1)

Housing Act 107 of 1997

"National, provincial and local spheres of government must -

(a) Give priority to the needs of the poor in respect of housing development."

When the first application was heard Goldstein, J ordered the fourth respondent to report to the court what arrangements, if any, could be made to accommodate the first, second and third respondents in the event of their eviction. The reply was curt:

"The City of Johannesburg Metropolitan Municipality does not have any land and/or alternative accommodation available to accommodate respondents."

First and third respondents tell a sorry tale of the absence of any progress or change in their circumstances since the ARP was announced. Meetings arranged with the fourth respondent to discuss the lack of housing were arranged but not attended by the officials. The fourth and fifth respondents did not enter appearance to defend this application, nor did they file any affidavits concerning the present housing situation in Alexandra. Fourth respondent did, however, send a copy of the notice to the applicant's attorneys of record that had been sent to the court in the previous application. The first time that the court became aware of the fact that fourth and fifth respondents would be represented at the hearing at all, was when the proceedings commenced. I am of the view that the fourth and fifth respondents' failure to supply the court with any information regarding the ARP and any possibilities that might exist for the future accommodation of the first, second and third respondents is not only singularly impolite towards the courts but amounts to a failure to comply with their constitutional obligations to assist the courts and the homeless to ensure that the poor and homeless are treated with dignity and provided with housing as soon as possible. While Mr Fourie SC on their behalf informed the court that steps had been taken to prepare a report for the court, he did not advance an explanation for the failure to do so timeously. Having heard argument by counsel I informed the parties that I intended to order the fourth and fifth respondents to attend court in person at a date to be arranged in the near future, together with those officials that might be needed to assist them, to explain their failure to assist the court so far and to inform the court and the other parties of the present state of affairs in Alexandra. They should be prepared to subject themselves to examination and cross-examination. Mr Fourie SC suggested that an order to give oral evidence was more prejudicial to the respondents than ordering them to file affidavits as would be the normal procedure. I do not agree. Whatever fourth and fifth respondents may have to say can be said with as much ease under oath as in an affidavit. An oral hearing has the advantage of immediacy and allows any uncertainties in their evidence to be cleared up immediately. I have stated above why this matter falls outside the ambit of an ordinary opposed application. The plight of the first, second and third respondents is such that steps ought to have been taken a long time ago to alleviate their condition. The applicants are losing money with every day that their proposed development is delayed. There is more than enough reason to abridge the tedious exchange of paper and to cut as much of the red tape that encumbers the process as possible. Regarding the identification of potential witnesses, Mr Fourie was instructed to place on record that the fifth respondent had no personal knowledge of the matters that will be addressed at the hearing. I find it difficult to lend credence to this statement. In any event fifth

respondent must explain the repeated apparent failure to assist the court and the apparent failure to respect the first, second and third respondents' rights to the court. The issues to be addressed in evidence were identified as essential to enable the court to come to a just and equitable solution with the assistance of all the parties. I therefore make the following order:

1. The matter is postponed to 6 March 2006 for the hearing of oral evidence; 2. The costs of the hearing to date are reserved; 3. The following issues will be addressed in evidence and fourth and fifth respondents are ordered to be prepared to deal with them as far as they are able to do so:

A. What amount, if any, of the R1,3 billion earmarked for the Alexandra Renewal Project has been received by fourth and fifth respondents; B. What amount of any money received has been spent; C. The projects upon which such money has been spent; D. What money is still available for the ARP and what projects it is intended to be spent upon; E. What the present state of the ARP is; F. How priority is to be determined in regard to relocation and rehousing of people living in challenged urban environments in Alexandra; G. Whether there are any waiting lists for housing in Alexandra; H. Whether the names of the first, second and third respondents appear on any waiting lists for the allocation of housing; I. Whether the first, second and third respondents are entitled to any preference in regard to the allocation of housing; J. Whether suitable land is available to relocate the first, second and third respondents; K. If such land is immediately available, what time frame would apply to the first, second and third respondents' removal; L. If no land is currently available, the period within which it may be made available; M. Whether alternative accommodation or accommodation in a transit facility is presently available to the first, second and third respondents; N. What the effect of eviction would be if there is no land or other accommodation available at present; O. How the ARP can be expedited, if at all; P. Why fourth respondent did not comply with the order made by Goldstein, J and both respondents have not assisted this court so far; Q. What emergency accommodation could be made available to first, second and third respondents if an eviction order were to be granted at the next hearing; R. Any steps taken by fourth and fifth respondents since April 2005 to investigate the availability of alternative accommodation for the first to third respondents; and S. When the ARP is expected to be completed.

4. The following witnesses are ordered to appear on 6 March 2006 and to remain present until called or excused:

A. The MEC for Housing Gauteng, Ms Nombula Mokonyane; B. The HOD, Gauteng Housing; C. Mr Julian Baskin; D. Mr Neels Letter; E. The municipal manager of the fourth respondent; F. The director of emergency services of the fourth respondent; G. The member responsible for housing of the fourth respondent's executive committee; H. The author of fourth respondent's notice to the court referred to above; I. Ms Daleen Louw, director of department; J. Mr Rabaroku, chief director of the urban renewal programme; K. Mr W Odendaal, chief operating officer; L. Such other officers as fourth and fifth respondents may regard as essential.

5. Applicants and first to third respondents may only call witnesses with the leave of the court but may subpoena witnesses with an eye to approach the court for such leave; 6. Fourth and fifth respondents are ordered to file a statement reflecting the evidence to be given by them and the other witnesses identified above on or before 20 February 2006; 7. Fourth and fifth respondents are ordered to discover all documents relevant to the issues set out above under oath on or before 20 February 2006 and must facilitate inspection thereof by the other parties in terms of Rule 35 of the Rules of this court.

Rule 35

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Prepared on 12 October 2026 · Esheria