COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No's: **017194 – 017269, 017319 – 017376, 017384**

In the matter between:

South African Local Government Association	**1st Applicant**
Gauteng Provincial Government	**2nd Applicant**

And

The Competition Commission	**1st Respondent**
Murray & Roberts Ltd	**2nd Respondent**
WBHO Construction (Pty) Ltd	**3rd Respondent**
Stefanutti Stocks Holdings Ltd	**4th Respondent**
Aveng (Africa) Ltd	**5th Respondent**
Basil Read Holdings (Pty) Ltd	**6th Respondent**
Haw & Inglis Civil Engineering (Pty) Ltd	**7th Respondent**
Giuricich Bros Construction (Pty) Ltd	**8th Respondent**
Vlaming (Pty) Ltd	**9th Respondent**
G Liviero & Son Building (Pty) Ltd	**10th Respondent**

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) Takalani Madima (Tribunal Member)
Heard on	:	17 July 2013
Order issued on	:	17 July 2013
Reasons issued on	:	19 September 2013

Reasons for Decision and Order

Introduction

1. This is an opposed application brought by the South African Local Government Association ("SALGA") and the Gauteng Provincial Government (the "Province"), (together referred to as the "applicants")

to intervene in nine consent order applications brought by the Competition Commission ("Commission") in respect of firms in the construction industry in terms of section 49D of the Competition Act, Act 89 of 1998, (the "Act"). They are:

1) Murray & Roberts Ltd
2) WBHO Construction (Pty) Ltd
3) Stefanutti Stocks Holdings Ltd
4) Aveng (Africa) Ltd
5) Basil Read Holdings (Pty) Ltd
6) Haw & Inglis Civil Engineering (Pty) Ltd
7) Giuricich Bros Construction (Pty) Ltd
8) Vlaming (Pty) Ltd
9) G Liviero & Son Building (Pty) Ltd

2. Note that during this process the Commission also submitted six other consent agreements concluded with construction firms for approval, but the applicants do not seek to intervene in respect of those.

3. SALGA was the first to file its applications to intervene, on the 9th of July 2013. Although constituting separate applications in respect of each of the nine consent agreements, they all involved the same material allegations. Three days later the Province did the same, bringing similar, but slightly more elaborate applications. Then on 15 July SALGA filed amended papers in respect of its nine applications, the effect of which was to bring its set of papers in line with those of the Province. Both applicants are represented by the same attorney and counsel. It is thus appropriate to consider the eighteen separate applications holistically, as they raise identical legal and factual issues, insofar as they may be material to our decision. This was also the approach adopted by the applicants and all the respondents in this matter.

4. The relief the applicants seek is divided into two parts. In terms of Part A, which is the form of relief we were asked to consider first, the applicants sought:

    1) To be admitted as intervenors in the respective consent proceedings;
    2) Access to the record of any investigation of the Commission undertaken before the conclusion of the respective settlement agreements, including all the documents submitted by the respective respondents to the Commission;
    3) Leave to supplement their (meaning the applicants) applications;
    4) To be granted directions for the hearing of relief sought in terms of Part B.

5. In terms of Part B they then sought the following orders:

    1) An order declaring that the particular consent agreement was not appropriate in terms of the Act;
    2) Refusing to confirm the settlement agreement as a consent agreement in terms of section 49(2)(c) of the Act.

6. The Commission, Basil Read, WBHO Construction, Stefanutti Stocks, Murray and Roberts and Aveng opposed the applications to intervene. The respondents, variously, defended the appropriateness of the agreements, whilst some also challenged the *locus standi* of the applicants to bring this type of application, the nature of relief sought in Part A and the lateness of the applications.

7. In order to understand the issues we have to decide, it is necessary to provide some background as to how the consent agreements, which are now before us, came into being.

Background

8. On 10 February 2009, the Commission initiated a complaint concerning alleged collusive tendering in the construction of the World Cup soccer stadia for the 2010 Soccer World Cup.[1] Following this the Commission received several applications for immunity in terms of its Corporate Leniency Policy ("CLP") which related to collusive tendering in respect of construction projects, across different sectors of the economy, which extended beyond the scope of the February 2009 complaint.

9. It soon became apparent to the Commission that bid rigging was rife in the construction industry, involving many of the same firms and over the same period. In light of these revelations the Commission decided to take an unusual step. In February 2011, it invited competitors in the industry to come forward and to engage in settlement talks with it.

10. The Invitation took the form of a policy document which was sent to prominent firms in the industry. [2]

11. The document is lengthy and need not be repeated in any length here. The essential elements are that it constituted an offer to firms to settle with the Commission, on the terms of consent orders, which would later become consent agreements that would be referred to the Tribunal. The document sets out what steps the firms would have to comply with in order to be eligible for consideration, what information would have to be supplied and how penalties would be calculated.

12. Two issues require specific mention. The Commission indicated that its CLP would apply to firms that requested leniency. This effectively means that the first firm to apply for leniency in respect of a project would receive

[1] Collusive tendering is a horizontal prohibited practice in terms of section 4(1)(b)(iii) of the Act and for which an administrative penalty is competent in terms of section 59(1)(a) of up to 10% of the offending firms annual turnover in the Republic during the firms' preceding financial year.

[2] The document was dated 1 February 2011 and entitled "Invitation to Firms in the Construction Industry to engage in Settlement of Contraventions of the Competition Act" (hereafter referred to as the 'Invitation').

provisional immunity from being prosecuted. Secondly, the Commission indicated how it would approach projects which a firm accepting the invitation had not disclosed. The Commission stated that if it became aware that an applicant had omitted projects in its application, it would, depending on the reasons given for the omission, decide to include the omitted project as part of the consent agreement, request further information or reject the application in its entirety.[3] As it happened, the Commission was able to ascertain evidence of several projects from some applicants that other firms, which were implicated, had omitted. Indeed part of the strategy of the Invitation appears to have been to achieve just that – by putting pressure on a large number of firms, who, while in the process of attempting to obtain leniency for themselves, implicated other firms.

13. The process, despite its name[4], took some time before it reached the stage when the Commission was in a position to apply for the approval of the fifteen consent agreements. This is not to say that the process was unsuccessful.[5] On the contrary, as a result of the process the Commission eventually reached settlements with 15 firms in respect of 140 projects.

14. On 24 June 2013 the Commission applied to the Tribunal to have the consent agreements approved. All the matters were set down for hearing on 17 and 18 July 2013 and the Tribunal invited interested parties to make submissions at the hearing.

15. The Tribunal decided to have all the agreements considered at the same time since firstly, they were the fruit of the same process, namely the

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[3]Paragraph 45 of the Invitation

[4] It was referred to as the 'fast track settlement process'.

[5] In reaction to this invitation 21 firms in the construction industry filed applications with the Commission. These applications covered 300 rigged projects worth an estimated R47 billion. Of these 300 projects, 160 had been rigged more than three years prior to the Invitation and thus in the Commission's view the prohibited practice had prescribed because of the provisions of section 67(1) of the Act. Of the 21 firms that applied for settlement, 18 firms were liable to settle, as three qualified for conditional leniency and were not implicated in any further projects. Subsequent to its investigation, the Commission negotiated consent agreements with 15 construction firms. The three remaining firms that did not accept the Commission's offer to settle were Group 5, Construction ID and Power Construction.

Invitation, and secondly, the agreements themselves, whilst implicating different respondents, took the same form and frequently overlapped in respect of projects alleged to have been the subject of collusive activities.

16. On 15 July, the Tribunal, following enquiries from a number of the respondents, directed that the applicants would be given an opportunity at the hearing, to make a short submission on why the relief they sought, was relevant to the question of whether the consent orders in question, should be approved by the Tribunal; and whether the applicants had *locus standi* in relation to the relief they sought. It also gave directions as to how the proceedings would be conducted.

The intervention application

17. The applicants seek permission to intervene in terms of sec 53(1)(a)(iv) of the Act.

18. This section states as follows:

> *53(1)The following persons may participate in a hearing, in person of through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:*
>
> *(a) if the hearing is in terms of Part C –*
>
> *(i).....*[6]
>
> *.....*
>
> *(iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented;...* (Our emphasis).

[6] Those omitted include the Commission, the respondent and the complainant

Note: the underlined portions are more fully discussed below.

19. Three aspects of this provision are important for this decision. Firstly, an applicant must demonstrate a 'material interest' in the subject matter of the hearing. Secondly, the applicant needs to demonstrate that its material interest is not adequately represented by another participant. In this case, given that the Commission is the only participant which is not a respondent, it would mean demonstrating that the material interest was not adequately represented by it.[7] Thirdly, even if an applicant crosses these two hurdles, this right may be constrained in terms of the scope of participation in relation to what is required to represent its interest. In other words, even if a participant in terms of this provision is recognised, its procedural entitlement is not unlimited and can be constrained by the presiding member to what is required.

20. We go on to consider the applications in the light of this analysis of section 53(1)(a)(iv).

21. Neither of the applicants has suffered a direct financial loss as a result of any of the contraventions contained in the consent orders. In the case of SALGA, its closest connection is that it is an umbrella body for local authorities and local authorities have suffered direct financial loss, as a result of the admitted bid rigging, in respect of the stadium tenders. In the case of the Province, the link is even less direct, and is alleged to be based on its duty as an organ of state to deliver infrastructure, in the process of which it makes use of the services of construction firms, such as the respondents. It contends that if such services are provided in contravention of the Act this has an adverse effect on public funds.[8]

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[7] Typically in past cases this has occurred when an applicant to intervene seeks different relief from the Commission or seeks to rely on different provisions of the Act to those relied on by the Commission – expressed differently, a different theory of harm based on the same facts. This has usually occurred in complaint proceedings and not consent order proceedings. See by way of example the approach taken in *Barnes Fencing (Pty) Ltd v Iscor Limited* 08/CR/Jan07 paragraph 39.

[8] See by way of example paragraphs 33-34 of the Province's founding affidavit in the application to intervene in the consent agreement with Basil Read Holdings.

22. If the test in section 53(1)(a)(iv) were to be *'financial interest'* as opposed to *material interest*, it might well be that neither would have *locus standi* to qualify as having an interest. For instance, section 10(8), which deals with rights to appeal exemption decisions, provides for a test of *substantial financial interest*. However, *material interest* is a wider notion than *financial interest* and is often interpreted as meaning "important or essential". As such there is an argument that a public interest, even though not entailing a direct financial interest, is sufficient to constitute a material interest. We will assume in the applicants favour, without deciding this point definitively, that they have, as public bodies concerned, established a compelling public and hence *material interest*, taking into consideration the issue of *inter alia*, public expenditure, specifically by local authorities, who in all the impugned applications are alleged victims of bid rigging by construction firms which regularly tender for public service work.[9]

23. We now go on to consider the concerns that they raise with the consent agreements to examine whether they have established an interest not adequately represented by the Commission.

24. The applicants, in their paper, raise two concerns. In the first place they argue that the penalties provided were too lenient and did not vindicate the public interest. Secondly, they argue that the Commission erred by allowing firms to settle on the same terms as they settled for disclosed projects, in respect of projects that were not disclosed to the Commission, in terms of their applications pursuant to the Invitation.

25. However, both these concerns are ones addressed by the Commission and in our view, adequately.[10]. They therefore represent an interest already represented by another participant in these proceedings, namely

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[9] SALGA represents the interests of all municipalities, a legal right which is recognised by the Organised Local Government Act. Since SALGA is the sole representative of local government it alleges it has a constitutional mandate to protect the interests of local government and to enable local government to fulfil its developmental role.

[10] These issues are discussed further when we deal with the request for documents below.

the Commission. The fact that the Commission did not represent the interest in the manner in which the applicants might have preferred, does not make their interest one not adequately represented.

26. The applicants spent much time arguing that they were not attempting to usurp the function of the Commission as the guardian of the public interest in these matters. But as we go on to discuss below, the two grounds for concern that they raise in their papers go to the heart of exactly what constitutes the Commission's function and what it considered when it entered into this process. What the applicants are in essence arguing is that they are not confident that the Commission has extracted enough from the respondents in the form of penalties and if they only had access to the record they would be able to demonstrate this. They offer nothing concrete to justify this criticism and indeed seem uncertain that they would necessarily find this, even if they obtained access to the record. Participation rights conferred by the Act cannot be used to allow outside parties to usurp a function specifically entrusted to the Commission, simply because they assert that they could do a better job at vindicating the public interest. The same criticism can be levelled in respect of their second concern, *viz* the treatment of non-disclosed projects. As we go on to demonstrate later, the Commission considered this issue specifically and hence again, this is not an interest not already adequately represented.

27. We conclude that the applicants fail to make out a case for *locus standi* as they have failed to demonstrate that their material interest is not adequately represented by the Commission in these proceedings.[11]

[11] One of the respondents argued a further point of *locus standi* in terms of section 53(1)(a)(iv)and asserted that as neither applicant was a *complainant* in this matter – it is common cause that all the complaints were initiated by the Commission – there was no interest of a *complainant* to be recognised and that on this basis as well, the applicants must fail. The reference to *complainant* in 53(1)(a)(iv) is confusing as the rights of a *complainant* are already dealt with in similar terms in sub-paragraph (ii) and it seems that (iv) is intended to address the position of a party who may have a material interest but is not a *complainant* otherwise (iv) would be redundant a repetition of (ii)(bb) or nonsensical. We need not decide this point, however, given our findings and we will assume that this reference to complainant was a drafting error and was meant to be a reference to the "...any other person". This interpretation also makes more sense given the logic of the provision.

28. However, rather than deciding this matter on this point alone, we will still go on to consider whether they have made out a case for rights to a postponement, on the basis of a right to receive the documents, sought in Part A. As we have observed, even if a party is admitted as a participant, it does not follow from the language of section 53 (1)(a)(iv) that this entitles it to all the rights an ordinary litigant in a contested proceeding might enjoy. The sub-section makes it clear that the right of participation is a relative one – i.e. it extends only so far as required for the material interest to be adequately represented. This entails an examination of the right the applicant wishes to assert and its nature to the proceeding in which it is sought to assert it.

29. Consent hearings differ markedly from complaint hearings; the latter are akin to trial proceedings, where evidence is tendered and witnesses are led and cross-examined. The Act makes it clear in section 49D(1) that in consent hearings, if the Commission and respondent have agreed on the terms of an appropriate order *"...the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order..."*

30. The *chapeau* to section 53(1), which we underlined earlier, does admittedly refer to a participant, *inter alia*, having rights to documents. This might suggest that a participant, once admitted, has rights to documents and that section 49(D) and section 53(1) are in conflict. However, a proper reading of section 53(1), which applies generally to all proceedings in terms of the Act, shows this right is expressly qualified by the words "... *presented at the hearing.*" The documents sought in this application have not been presented at the hearing. Nor is there any obligation on the Commission and the respondents to do so. The Tribunal only has the respective consent agreements before it. Thus the provisions of sections 49D and 53(1), insofar as they relate to the hearing of consent agreements, are not in conflict.

31. In consent hearings, as noted, the Tribunal hears no evidence and decides whether or not to approve an agreement on the basis of the application

before it and the content of the agreement. As the Competition Appeal Court (CAC) has held in the leading case on the subject, *Netcare*:

> *"Section 49D(i) envisages that the Tribunal "without hearing any evidence" may confirm the agreement. To my mind that appears to envisage that the Tribunal will not embark on its own independent inquiry, that is to say, it will not hear the evidence of witnesses to determine the suitability or otherwise of the agreement."*[12]

32. This limitation on proceedings means that even a complainant in a matter would not be entitled to the record, if settled with the Commission by way of a consent agreement. Even less so would a putative participant, such as one of the applicants, neither of which was a complainant in this matter. Thus as matter of law given that these are consent order proceedings governed by section 49D of the Act and for which there is no record before the Tribunal, the applicants have no such right to claim the record. Once they have no right to claim the record, which was their basis for seeking the postponement, there is no reason for the proceedings to be postponed. Indeed such a decision would have been highly prejudicial to the respondents all of whom were ready for the consent applications to be heard.

33. The applicants' case therefore fails on this ground as well.

34. The final issue we must consider is if the applicants retain some residual right of participation and hence access to the record to prevent a consent agreement being confirmed that is "... *shockingly inappropriate*"

35. That test is the one enumerated in the same *Netcare* case as setting the standard on which the Tribunal might "interfere" with a consent order. As the Court put it:

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[12] See *Netcare Hospital Group v Manoim N.O.* 75/CAC/April 08 paragraph 26, hereafter referred to as *Netcare*.

"What then are the circumstances under which the Tribunal can interfere? As indicated above it is not a mere rubberstamp. It is not a court of appeal in the sense that it can embark on a re-hearing of the matter and substitute its own views for that of the Commission. The Tribunal of course plays a most important role in the Competition hierarchy. In exercising its discretion whether to approve a consent order it must obviously be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement. An agreement which imposes an inordinately low penalty for a serious contravention will obviously bring the objects of the Competition Act into disrepute and will be against public policy. It seems to me that the true inquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute. As indicated the Tribunal cannot hear any evidence but it can surely make such inquiries at the hearing as it deem fit in order to satisfy itself that the abovementioned objectives are properly met. If thereafter the Tribunal forms the view that it ought not to approve the agreement for various reasons, particularly those not canvassed during the consent hearing, in my opinion, the dictates of natural justice require that it apprise the parties of its difficulties and afford them an opportunity to deal with same." [13] (Our emphasis.)

36. In order to succeed with their prayers in Part A, the applicants would have to show that access to the documents sought, should form part of the inquiry that the Tribunal may make in order to decide whether or not the order was shockingly inappropriate.

37. This is a very generous reading of the above passage in the applicants favour. But let us assume that it may be correct.

[13] *Netcare* supra paragraph 29.

38. However, in order to succeed in persuading the Tribunal to do so, the applicants should make out the basis for such a case in their papers that the agreements are shockingly inappropriate. Recall that the two objections were that the penalties were too low and that the Commission had allowed parties to settle on the same principles of leniency on the projects that were not disclosed.

39. **Penalties too low**: Although contending that the penalties are too low, the applicants conceded that they had no difficulty with the terms of the Invitation and the methodology set out therein for the calculation of the penalty.

40. This means that the applicants, had to lay before the Tribunal, additional facts to substantiate this contention, which did not relate to the methodology set out in the invitation. In other words, the applicants had to show that it was not the Invitation itself which was either irrational or shockingly inappropriate, but the manner in which it was applied by the Commission in the course of concluding the agreements.

41. SALGA in its replying affidavit in one of the applications stated that it believed:

> *"'... that the total fines imposed on WBHO are not appropriate. The fines are disproportionately small when regard is had to the harm to the public interest as a result of the conduct of WBHO."*[14]

42. But the mere assertion that a penalty is "disproportionately small" is not sufficient to substantiate a contention that they are shockingly inappropriate. The applicants argue that they need access to the record in order to be able to do so. But this is to get things back to front. One cannot make allegations without foundation and then seek access to documents later to make it. Indeed it was not clear from the founding papers what

[14] See paragraph 6 of replying affidavit in WBHO matter.

documents they thought might be in the record, which would, if revealed for inspection, possibly substantiate their point.[15]

43. As opposed to the case advanced by the applicants, the Commission has given a satisfactory account of how it approached the penalties. The Commission concedes that the penalties are lower than might otherwise have been the case had the firms not settled, but that does not make the level of the penalties inappropriate. The test is not whether the penalties are low in relation to what the maximum might have been imposed under the Act, but whether they are too low in relation to a penalty that was appropriate to the circumstances of the case. The Commission argued persuasively why the factors it took into account as mitigating the respondents conduct, including co-operation and the information supplied to the Commission to assist its investigation, justified a lower penalty. These are relevant factors that the Commission is entitled to take into account in terms of the Act and there is nothing inappropriate in the manner in which they arrived at the penalties agreed on.[16]

44. Thus even on this most benign of approaches to the applicants' case – that assumes they have *locus standi* and a possible right to seek documents - they fail.[17]

45. The second basis for the applicants' criticism of the consent agreements is admittedly more specific than the first. Here the applicants argue that the Commission has failed to follow its own Invitation, in that it has accepted settlements in respect of projects that were not disclosed, as part of the invitation and has thus treated disclosed and non-disclosed projects in a

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[15] In argument, counsel for the applicants suggested that the base turnover should be provided. The base turnover is the affected turnover of the respective respondents on which the Commission has calculated the penalties. Counsel did not suggest that there was any error in the Commissions' calculation – it just seemed to be suggested as a possible justification for their document request. Although these amounts did not appear in the consent agreements they were, on request of the Tribunal, provided by the Commission. On inspection by us the penalties settled upon have been correctly calculated.

[16] See section 59(3) for a list of these factors.

[17] Note, as explained earlier, we have held above that they have neither *locus standi* nor even if they did, a right to the record.

similar way, when in terms of the Invitation they should not have done so. It is correct that in several of the agreements under consideration, the Commission has accepted non-disclosed projects as constituting part of the settlement agreements and treated them similarly for the purpose of settlement. However, this does not constitute irrational conduct or render the agreements shockingly inappropriate. This is because the contentions of the applicants are wrong both at the level of principle and as a matter of fact.

46. At the level of principle the Invitation constitutes an offer. There is nothing to suggest that the Commission is bound by the terms of its initial offer to negotiate. Indeed the whole nature of the consent agreement presupposes a negotiation between the Commission and the respondent. The fact that the Commission may have moved from an initial starting position is not a matter for impugning the order. The test is whether the agreement finally arrived at is appropriate, not whether the Commission moved from an initial starting position to a final position that might be more favourable to a respondent. Indeed to hold otherwise would make the consent order process impossible.

47. But secondly, the applicants are wrong on the facts. The Invitation makes it clear that the Commission will include non-disclosed projects as part of the fast-track process, if a proper reason has been given for their non-disclosure. The Commission has addressed this pertinently and states that in each case it sought explanations from the relevant respondents and found them to be satisfactory. In most cases it appears the firms' present managements did not have knowledge of the activities that were not disclosed because relevant people were no longer employed by them; in others, firms said they would agree to accept the Commission's contentions that their firms had been involved in projects they were not aware of, and hence did not disclose, in order just to settle.[18]

[18] For instance this was the approach of Aveng.

48. Thus there is no basis to this allegation as it is based on a misconstruction of the Invitation and the facts.

49. In fact contrary to the assertions made by the respondents, the Commission has conducted an admirably fair, transparent and rational process, properly balancing the public interest in the enforcement of the Act, with the rights of the respondents to have mitigating circumstances concerning their conduct taken into account.

Conclusion

50. We thus find that no basis has been advanced to grant the relief sought and in summary, it fails because the applicants:

1) have not made out a right to participate in terms of section 53(1)(a)(iv) because they have no distinctive interest not already represented by the Commission; and
2) Even if they had a right to participate, they have no right to the documents sought in Part A and without such right, they have no basis to seek a postponement; and alternatively
3) Even if, as a matter of law, such a right to the documents sought, might in certain instances be granted, if it could be shown that the agreements were shockingly inappropriate, on the facts of this case, no such basis has been made out.
4) Since Part A of the application fails, Part B, which is contingent on the granting of Part A, also fails.

The applications are therefore dismissed. We make no order as to costs.

Norman Manoim **19 September2013**
DATE

Yasmin Carrim and Takalani Madima concurring.

Tribunal Researcher:	Rietsie Badenhorst
For the Applicants:	Hamilton Maenetje S.C. and by Tembeka Ngcukaitobi instructed by Ngcebetsha Madlanga Attorneys
For the Commission:	David Unterhalter S.C., Gcobani Ngcangisa and Pumulani Ngcongo instructed by the Commission.
For Aveng Africa:	Arnold Subel S.C. and Jerome Wilson instructed by Cliffe Dekker Hofmeyr Incorporated
For Basil Read:	Michelle le Roux, instructed by Fasken Martineau
For Stefanutti Stocks:	Mike van der Nest S.C. instructed by Webber Wentzel
For WBHO:	Max du Plessis and Andreas Coutsoudis instructed by Nortons Incorporated
For Murray and Roberts:	Bowman and Gilfillan