COUNCIL FOR DEBT COLLECTORS
COUNCIL IN TERMS OF ACT 114 OF 1998

Case number: 8/6PHO 001/04
Case number:8/6PHOL 03/06

In the matter between:

COUNCIL FOR DEBT COLLECTORS THE COUNCIL

and

PHOLOSA ASSET MANAGEMENT

(PTY) LTD FIRST RESPONDENT

As represented by Mr. J Meiring

JOHAN MEIRING

(ID 6604075030083) SECOND RESPONDENT

LYNNE COLLEEN O'FLAHERTY

(ID 6701300060008) THIRD RESPONDENT

ALAN DAVID VAN HEERDEN

(ID 7209295019087) FOURTH RESPONDENT

PAULOS SELLO MAHLANGU

(ID 6203255588083) FIFTH RESPONDENT

DOMINIC BUTI NTSELE

(ID 6610305692089) SIXTH RESPONDENT

NOTICE IN TERMS OF REGULATION 7(8)(a) TO THE DEBT COLLECTOR

WHEREAS the Council received a complaint from Me. Marumagae and Adv. Maisela against the Respondents.

AND WHEREAS the First Respondent is a registered debt collector in terms of Section 8(1) of Act 114 of 1998 with Council for debt collector's registration number 0002392/03.

AND WHEREAS the First Respondent is herein represented by Mr. J. Meiring a director of the Respondent and the Second Respondent with Council for debt collector's registration number 0002405/03

AND WHEREAS the Third Respondent is a director of the First Respondent with Council for debt collector's registration number 0002406/03

AND WHEREAS the Fourth Respondent is a director of the First Respondent with Council for debt collector's registration number 0002416/03

AND WHEREAS the Fifth Respondent is a director of the First Respondent with Council for debt collector's registration number 0014632/05

AND WHEREAS the Sixth Respondent is a director of the First Respondent with Council for debt collector's registration number 0013548/05

NOW THEN TAKE NOTICE THAT the Council for Debt Collectors (hereinafter called the COUNCIL) as per decision of the Full Council on 24 July 2006, decided to charge the Respondents with the following improper conduct:

CHARGE 1:

That the debt collectors acted in contravention of Section 19(1)(a) and (b) of the Act, Act 114 of 1998, and Section 5(3)(a) of the code of conduct by attempting to recover from the abovementioned debtors fees, to which the debt collector was not entitled in that:

During the period March 1998 to February 2004 you attempted to recover from Me. D.M. Marumagae fees and charged not provided for by the Debt Collectors Act. The statement reflecting those charges is attached as Annexure "A"

CHARGE 2:
That the debt collectors acted in contravention of Section 19(1)(a) and (b) of the Act, Act 114 of 1998, and Section 5(3)(a) of the code of conduct by attempting to recover from the abovementioned debtors fees, to which the debt collector was not entitled in that:
During the period January 2006 to February 2006 you attempted to recover from Adv. L.A. Maisela fees and charged not provided for by the Debt Collectors Act. The statement reflecting those charges is attached as Annexure "B"

TAKE NOTICE FURTHER that –

a. In terms of Regulation 7(9) you must within 14 days of receipt hereof deny or admit, in writing the charge herein;
b. Provide the Council, together with the above mentioned notice, with an address were you will accept service of process and notices in this matter.
c. That failure to respond as requested above will not prohibit the Council from continuing with the process as set out in Regulation 7.

INVESTIGATION IN TERMS OF SECTION 15(2), ACT 114 / 1998
ONDERSOEK i.g.v ARTIKEL 15(2), WET 114/ 1998

1. Held at **Pretoria** on **17/10 /2007**, **various dates until 12/06/2009**.
Gehou te _____ op ___ / ___ / 20 ___

2. Investigating Committee (Sect 15(2) and Reg 7(1)(a)
Ondersoek Komitee (Art 15(2) en Reg 7(1)(a))
Chairman / Voorsitter **Adv. J. Noeth SC**
Member / Lid **S. Machaba**
Member / Lid **H. van Rooyen**

3. Particulars of Debt Collector(s) charged /
Besonderhede van Skuldinvorderaar(s) aangekla
(a) Pholosa Asset
(b) Management (Pty) Ltd 1st Respondent
(c) Johan Meiring 2nd Respondent
(d) Lynn O'Flaherty 3rd Respondent
(e) Allan van Heerden 4th Respondent
(f) Paulus Sello Mahlanga 5th Respondent
(g) Domini Buti Ntsele 6th Respondent

4. Person appointed to lead evidence (Reg 7(8)(b))
Adv. A. Cornelius
Persoon aangestel om getuienis te lei (Reg 7(8)(b)) _____

5. Particulars of person(s) appearing on behalf of Debt Collector(s) /
Besonderhede van persone wat namens Skuldinvorderaar(s) verskyn
(a) Adv Barry Roux SC from the Johannesburg Bar

6. Charge(s) / Klagte(s)
As per chargesheet annexed hereto /
Soos per klagstaat hierby aangeheg.

7. Plea / Pleit:
Not guilty all respondents. Changed plea on 12/07/2009 as per Annexure "A" in respect of Respondent no. 1

8. The proceedings are recorded by mechanical means/
Die verrigtinge word meganies opgeneem

9. Finding/Bevinding:
Guilty Respondent 1 as per plea Annexure A.

10. Sentence / Vonnis:
1. In terms of section 15(3)(e) of the Debt Collectors Act, 1998 Respondent 1 is ordered to pay the Council an amount of R 100 000.00 in respect of the costs incurred by the Council in connection with this
2. disciplinary investigation. This amount must be paid to the Council on or before 15 July 2009.
3. In terms of section 15(3)(c) of the Act, Respondent 1 is fined as follow:
(a) Charge 1
(b) R 25 000.00
(c) Charge 2
(d) R 25 000.00

These fines must be paid to the Council on or before 15 July 2009.

JUDGMENT POINT IN LIMINE

The respondents were on 17 October 2007 charged before a committee of three members of the Council appointed in terms of section 15(2) of the Act read with regulation 7(1). The Chairman of the committee is advocate Noeth and he is assisted by Me Shirley Machaba a qualified auditor from the firm Price Waterhouse Coopers and Mr Henri van Rooyen a practicing attorney.

The Council is represented by Adv A Cornelius who was appointed in terms of regulation 8(b) to lead the evidence in the investigation.

Adv C Oldwage instructed by JM Attorneys represented by Mrs Lynn Mathisen appeared at that stage for the respondents.

The three members of the Committee were specifically brought to the attention of Adv Oldwage at the start of the proceedings and he had no questions in regard to any of the three.

Adv Oldwage indicated that his senior in the matter is Adv Barry Roux SC from the Johannesburg Bar.

None of the respondents were present at this hearing.

In view of the fact that the respondents were drawn into other proceedings before the Law Society and that Adv Roux was not available due to other prior committals the matter was postponed to 17 November 2006.

On 17 November 2006 the charges were withdrawn against the 4th Respondent, Paulus Mahlangu.

Adv Barry Roux SC, assisted by Adv Oldwage on this occasion appeared for all the respondents.

The three mentioned members of the committee established by the Council to hear the matter as well as the nomination of Adv Cornelius to lead the evidence was on this occasion again canvassed with Adv Roux and he had no questions in this regard.

The charge sheet was read in which it was stated that in terms of the decision of the full Council on 24 July 2006 the respondents were charged with two charges that they attempted to recover from two debtors fees to which the debt collector was not entitled as reflected in Annexure A and B.

Adv Roux tendered a plea of not guilty to both charges in respect of the respondents.

Adv Cornelius then proceeded to lead the evidence of the first complainant. For the purpose of this judgment it is not necessary to deal with the details of the evidence which has been tendered. This witness was duly cross-examined by Adv Roux.

The second complainant also testified and she was also duly cross-examined by Adv Roux.

Adv Cornelius then closed the Council's case. Adv Roux called the 2nd Respondent, Mr Johan Meiring and he also testified under oath. He was in turn cross-examined by Adv Cornelius. The matter was remanded to 12 January 2007 for the continuation of Mr Meiring's evidence.

On this date the matter continued with the cross-examination of Mr Meiring by Adv Cornelius.

At page 283 of the record the following is indicated by Adv Cornelius:

"Now as far as this agreement with Truworths is concerned, that we are going to leave for a later stage. I have been in contact with Truworths and as soon as I get that information back from them we will take that question up further."
At page 289 the following is said by Adv Cornelius:
"The rest of this is all the same that I have, there are no other documents in this than what you gave me this morning but I will have a look through it. Mr Chairman thank you, there are certain matters that I need to look at, but I am sure I can address that once this matter comes up to argument with regards to the documents that I have received this morning. I am also not sure what witnesses they intend calling further, I will probably be able to take it up with them as well, so there is no real need to have the matter stand down to go through all these documents, I will go through them in due course. Therefore I conclude my cross-examination of Mr Meiring."
Mr Meiring was re-examined by Adv Roux.
The matter was remanded for heads of argument to 3 April 2007. The hearing continued on 9 May 2007.
On this date at the start of the hearing Adv Cornelius made an application to call a further witness on behalf of the Council. The details of this application is reflected on page 309 and onwards of the record.
This application was opposed by Adv Roux on behalf of the respondents. He handed in a letter dated 20 April 2007 as exhibit Q and which was read into the record. The application was then duly argued before the Committee.
The Committee ruled that the matter can be re-opened and that Adv Cornelius can call the relevant witness.

The reasons for the Committee's ruling is set out on pages 326 to 331 of the record.
It was, however, done on the clear understanding that Adv Roux will after the witness testimony be granted an opportunity to consult with the respondents or any other witnesses. He will also be granted the opportunity to rebut the evidence which was presented by the witness.
The witness testified on the same day and the matter was in the light of the conditions for the re-opening of the matter remanded to 13 July 2007.
The matter eventually resumed on 19 September 2007. On this date Adv M Baslian appeared with the other legal representatives. Adv Baslian explained that he appeared for Pholosa for purposes of applying for a postponement of the hearing. Adv Roux explained that Adv Baslian attends the hearing for purposes of a constitutional point.
It then emerged that documents were late on the previous afternoon served on the Council informing the Council of an application launched in the Transvaal Provincial Division to inter alia declaring certain provisions of the Act and regulations unconstitutional. Application is also made for the staying alternatively postponement of the proceedings before this Committee.
It's also an application for an order, inter alia reviewing and setting aside the decisions by the Council to appoint the Committee that presided over the proceedings.
It is stressed that the point raised in the application to the Transvaal Provincial Division is a constitutional point. Mr Baslian also states "it's not an issue that is taken against any one of the four of you on a personal level".
As a result of the fact that the application was only served on the Committee the previous day, the matter was postponed

to give the Committee an opportunity to consider the matter. The matter was remanded to 19 October 2007.
The matter resumed on 13 November 2007.
The Chairman then informed the Council for the respondents that the Honourable the Minister of Justice and Constitutional Development has appointed Council to deal with the constitutional aspect of the matter in the application before the High Court. Counsel for the respondents were also informed that the Committee intends to continue with the disciplinary hearing but that the Committee is open for conviction to the contrary.
Adv Baslian then proceeded to argue the request for a stay of the disciplinary proceedings before the Committee. He dealt with the provisions and declaration sought as set out in paragraph 2 of the heads of argument. He stated that paragraph 17 of the Transvaal Provincial Division application deals with the purpose of the application and the relief sought which read as follows:
"This is an application for an order inter alia:
(1) Reviewing and setting aside the decision of the council to appoint the committee that presided over the proceedings (it should be presides over the proceedings) and;
(2) Reviewing and setting aside the decision of the council to appoint Advocate Andries Cornelius to investigate and lead evidence on behalf of the council in the proceedings and;
(3) Declaring that the relevant provisions of the Act and regulations and a proper interpretation under the constitution require the appointment of an independent person with no connection to the council or any committee of the council, to lead evidence at the proceedings, alternatively;
(4) Declaring that otherwise the relevant provisions of the Act and regulations are
(5) unconstitutional and invalid to the extent of that inconsistency."

In paragraph 19 of the application reference is made to the unreported case, a copy of which was annexed, of the Islamic Unity Convention v The Minister of Telecommunications and others. This case is used as an example of a similar situation where the applicant attacked the constitutionality of the provisions of a similar Act, with similar provisions. He then continued as follows:
"Now as indicated a bit later in the heads of argument, it's not for this council to decide whether or not there is merit in the application or to decide on that application. The question that this council, for purposes of this postponement needs to consider, is whether having regard to that application the proceedings currently before this committee should be proceeded with or be postponed pending the final outcome of that matter."
He then continued to argue the merits why the proceedings before this committee should be stayed pending the outcome of the TPD application. The Committee also heard the arguments of Advocate Cornelius on behalf of the Council.
The Committee duly considered all the arguments advanced and refused the request for the stay of the proceedings.
The 13th and 14th of February 2008 was then set for the continuation of the disciplinary enquiry before this Committee.
When the matter was remanded for these dates a specific request was made to the parties that the matter be proceeded with on these dates. In view of the fact that the witness who is still to be cross-examined was from Cape Town and if it

would assist to expedite proceedings the Committee was even prepared to continue with the matter in Cape Town.
The Chairperson then made the following remarks:

"All right, consider this aspect, but at this stage I remand it to the 13th and 14th February here in Pretoria, but if there is really a need to reconsider that aspect, I would appreciate if the counsel come to the committee in advance and discuss it with us. I just want us to finalise this matter as soon as possible now, because it's gone a long way and it has been dragging on for some time now. I think the sooner we finish it the better. Thank you."
"We set it down now for the 13th and 14th February. I just don't want us to arrive on the 13th again and say I haven't got these documents. If there is a hiccup perhaps you could meet with the committee and see if we are going to resolve that."
Notwithstanding the specific request by the Committee that the disciplinary request be proceeded with on 13 and 14 February 2008 and that the Committee in advance be informed of other developments it was only on the morning of the 13th February 2008 that the Committee was advised by Adv Baslian, immediately before the start of the proceedings, of a further application to the Committee to the following effect:
"Be pleased to take notice that the First to Fifth abovenamed Applicants will at the resumed hearing of the above enquiry make application to the committee entertaining the disciplinary enquiry for an order in the following terms:
1. Declaring that the committee (comprising the Second, Third and Fourth Respondents) hearing the disciplinary enquiry under the above enquiry/case numbers is not properly constituted by virtue of the Third Respondent, a member thereof, having resigned as a member of the Council of the First Respondent;
2. An order declaring the committee (comprising the Second, Third and Fourth Respondents) entertaining the disciplinary enquiry against the Applicants not to be properly constituted by virtue of the Fourth Respondent not having been properly appointed by the Council of the First Respondent to act as a member of the said committee;
3. That the committee entertaining the disciplinary enquiry comprising Second Respondent, Third Respondent and Fourth Respondent recuse itself;
4. Alternatively to prayer 3, that the Second Respondent and/or the Third Respondent recuse himself/themselves and that in consequence thereof the committee (comprising Second, Third and Fourth Respondents) entertaining the disciplinary enquiry be declared to be not properly constituted;
5. Setting aside the disciplinary enquiry against the First to Fifth Applicants as First to Fifth Respondents under the above enquiry/case numbers;
6. Alternatively to prayers 1 to 5 above, that the disciplinary enquiry be postponed pending the final determination of Applicants' application against the First, Second and Fifth Respondents out of the High Court of South Africa, Transvaal Provincial Division, under case number 58355/07;"
On enquiry from the Committee why the Committee was not timeously informed of this further application no satisfactory explaining was offered.
Adv Baslian then proceeded to argue the application at length for the full day and also a large part of the next day by inter alia reading various judgments verbally into the record. On a question why the references to the various cases cannot just be referred to he insisted to read the detail. This was of course a

very time consuming process which resulted that the hearing could not be proceeded with on the days for which it was set down.

During the course of his lengthy argument it emerged that an urgent application was brought to the High Court in Pretoria to set aside this Committee's previous decision to proceed with this hearing. This application was refused due to the fact that urgency could not be proved.
This application by way of a motion has now been placed on the roll for the stay of these proceedings pending a decision on the constitutional application. This matter has been set down for argument on 8 May 2008.
Part of this application concerns the composition of the Council and of this committee. That is a matter for the High Court to decide. There is apparently also a review application in which certain aspects of the proceedings are attacked. These matters are for a decision by a higher authority to wit the High Court.
In paragraph 1 of the new application now before the Committee it is alleged that this disciplinary committee is not properly constituted by virtue of the fact that the Third Respondent, Mr van Rooyen, having resigned as a member of the Council. This allegation is incorrect. Mr van Rooyen is still a full member of the Council as is clearly reflected in paragraph 6.4.1. of the minutes of the Council dated 5 February 2007.
It is also alleged in paragraph 2 of the application that the Fourth Respondent, Ms Shirley Machaba, has not been properly appointed by the Council to act as a member of the Committee. This allegation is also incorrect as Ms Machaba was duly appointed a member of this Committee as reflected in paragraph 5.4.1. of the minutes of the Council dated 24 July 2006.
In paragraph 3 it is requested that Second Respondent (The Chairman), Third Respondent (Mr van Rooyen) and Fourth Respondent (Ms Shirley Machaba) recuse themselves as a result of bias as inter alia reflected on the case record.
This aspect of the matter is rather astonishing as Mr Baslian who is bringing this application was not involved in the matter when the evidence on record from which he is quoting was lead.
Adv Barry Roux S.C., a very honourable and distinguished member of the Johannesburg Bar was then in charge of the matter and Adv Baslian was not involved in the proceedings at all. As is clear from the record of the proceedings Adv Roux never made any remarks or any insinuation that any of the three committee members was biased in any respect. Apart from this the record speaks for itself and if the selective quotes of Adv Baslian is read in their proper context it will be noted that no bias exists at all.
When Adv Baslian on 19 September 2007 applied for a postponement of the matter for an application to declare certain provisions of the Act and the Regulations unconstitutional he inter alia stated "it's not an issue that is taken against any one of the four of you on a personal level".
As is clear from the record since this date no further evidence was lead in this matter. It is therefore seriously questionable how the evidence now suddenly became proof of bias by the three committee members.
Each of the committee members have individually considered all the arguments advanced by Adv Baslian as well as all the relevant authority quoted by Adv Baslian at length and in particular also the remarks in S Shackell 2001(4) SA 1 to the following effect:
"The approach thus formulated in the SARFU case was refined in the SACCAWU case. I do not propose to restate all the principles that were articulated by the

Constitutional Court in those two cases. I will only highlight those that are of particular relevance in this matter. First, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial.
Secondly, the test is an objective one. The requirement is described in the SARFU and SACCAWU cases as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial.
Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus of rebutting the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ in the SACCAWU case (para [15]) the purpose of formulating the test as one of 'double-reasonableness' is to emphasise the weight of the burden resting on the appellant for recusal.
Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel."
Each of the Committee members has also considered their own conscience and is convinced that any allegation of bias on the part of each of them individually or jointly is devoid of all truth. Each of us still has an open mind to persuasion by the evidence and the submissions of the counsel and is even prepared to assist counsel to obtain the evidence which may be material for the presentation of their case. The application for the recusal of the Committee is therefore not acceded to.
The decision in the Islamic Unity Convention case which Adv Baslian relied on his arguments on 13 November 2007 has since then been reversed by the Constitutional Court.
In this regard attention is drawn to the decision of the Constitutional Court on 7 December 2007 in the matter of Islamic Unity Convention versus Minister of Telecommunications and others. The following statements from this decision is in our view also relevant as far as the inquiry before this Committee is concerned.
"To "investigate" or inquire into "a complaint means more than simply to set back and decide on the complaint on an adversarial basis in the same way as a criminal court. The term "investigate" means to "search or inquire into" or "examine" while "inquire" means to "seek knowledge of (a thing) by putting a question" or to "request to be told". As counsel for the second respondent suggested the BMCC was required to play an active and inquisitorial role in determining matters before it." (paragraph 47)
"The inquisitorial role is an inherent aspect of regulatory authority" (paragraph 48)
"In this case we are not concerned with a court of law or with the fair resolution of social conflict, but with a regulatory body that performed an administrative function." (paragraph 53)
"The writers Currie and De Waal submit on this issue that before an administrative agency has taken a final decision, there is no "dispute" that can

be resolved by an application of law. This view is indeed persuasive." (paragraph 55)

"Section 33 of the Constitution guarantees everyone the right to administrative action that is reasonable, lawful and procedurally fair. As stated earlier in this judgment, the BMCC is and administrative tribunal performing an administrative function. In Zondi this Court held that PAJA, which was enacted to give effect to section 33 "governs the exercise of administrative action in general". The Court stated that all decision-makers entrusted with the authority to make administrative decisions by any statute are required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorize administrative action must now be read together with PAJA, unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA. The Court held further that – "where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of s 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the Constitution. If they are capable, they will ordinarily pass constitutional muster." (paragraph 59)

The applicant's arguments under this head are no different to those advanced under the section 34 attack. It was submitted, though, that the standard of procedurally fair administrative action laid down in section 3 of PAJA does not, and indeed cannot, cure a decision-making structure that is inconsistent with section 34 of the Constitution. As will have become clear from the discussion on section 34, there was nothing unconstitutional in the performing, by the BMCC, of investigative and adjudicative functions. And the prescribed procedure has not been shown to be at odds with PAJA. The standard of procedural fairness in section 33, at the minimum, entrenches the common law right to natural justice. The content of this right to procedural fairness must be determined with reference to the context in which it is asserted. As has been mentioned above the impugned provisions of the IBA Act In fact ensured procedural fairness. The submissions on behalf of the applicant under the section 33 attack can therefore not be sustained." (paragraph 60)

In considering and deciding the application now before the committee the committee also took note of these remarks and is particularly convinced that the provisions of PAJA have been fully complied with up to the stage of the hearing.

This matter has now been dragging on for a long time and as will be seen from the record the Committee has offered its assistance to help the Counsel of the defendants to obtain whatever they may need to cross-examine the witness which was called after the re-opening of the matter. The Committee is of the view that it is in the interest of all concerned that this inquiry be finalized without delay and that a final judgment be given in the matter. This will assist the respondents should there be a conviction to consider the matter as a whole and take all matters simultaneously on review. This will also enable the Chairperson personally to submit a replying affidavit in respect of the matter which is to be heard on 6 October 2008.

Attention in this regard is drawn to the decisions in:

i) Van Wyk v Midrand Town Council and Others 1991(4) SA 185 at 188

ii) Ivger (Pty) Ltd and Others v Engelbrecht NO and Another 1980 (4) SA 81 at 86 paragraph D.

The Committee will therefore proceed with the enquiry as arranged with councel.

JUDGMENT POINT IN LIMINE 2

The four relevant paragraphs set out in the letter dated 17 July 2008 from Pholosa deals with documents which are allegedly in the possession of Truworths. In addition to this there is the request by Adv Roux during his address to the Committee for a copy of the opinion referred to by Mr Henegan, the Chief Executive Director of the Council in his opposing affidavit in a matter pending in the Supreme Court. This Committee has no recollection of seeing that affidavit and is not aware of the contents thereof. The Respondents can be assured that this Committee is not relying on the opinion referred to as they at this stage has no recollection of the contents of the opinion. As far as this Committee is concerned this opinion is not at all relevant as far as the present request is concerned. Adv Cornelius in his argument gave some indication as to the background of this opinion. The members of this Committee has no clear recollection of these facts and considered it wise not to go into these facts at this stage of the proceedings in case there are matters which should not be seen by the members of the Committee.

Adv Cornelius stated that the Respondents has approached the Supreme Court in this matter for an order declaring that the opinion should be made available to them. That application is still pending in the Supreme Court. In view of this the Committee is of the view that the decision of the High Court must be awaited in the matter.

On a close scrutiny of the facts and arguments advanced the main problem in regard to the other four requests before the Committee is the fact that there is no specific and direct identification of the documents the respondents require. It would furthermore appear that the requests contained in paragraphs 10, 11 and 14 are concerning documents which must on the face of it also be on the records of Pholosa and / or JM Attorneys. Adv Roux admitted that they have some of the documents on their files but that fact alone does not prove that Truworths received such letters. It would, however, be of assistance if these documents could be identified by the Respondents and then submitted to Truworths to establish whether they are in possession of the documents. Adv Cornelius would appear to be quite prepared to assist if the specific documents which are required could be identified. He stated in this regard the following to the Committee. The easiest way to solve the matter is "to identify the documents and we can ask Truworths to produce" the documents.

It must be an enormous task for Truworths to search for the documents even when they are identified in view of the multitude of matters which they handed to Pholosa. To go on a search of unidentified documents would virtually be like searching for a needle in a haystack especially where what is searched for is not known. This is the reason why the Chairman asked at the end of the proceedings whether the Respondents cannot identify certain files which are in their possession with the documents alleged so that the Committee can at least consider that and if justified direct Truworths to produce those files. Adv Roux undertook to come back soon to see if they can specify these documents. No such information has been received.

Adv Roux indicated to the Council that they do not require "all" the documents as indicated in the letter of 12 June 2007. They only need 10 or 15. The request for less documents does not make the task for searching for them over a period stretching from 2003 to date less onerous.

Adv Roux argued that he needs the specified documents to be able to meaning fully cross-examine Mr Pieters. He is of the view that Truworths are in possession of certain documents which will prove to the Council that what Mr

Pieterse is saying is not true. It is to be noted that Adv Roux states that he is "of the view" that Truworths are in possession of these documents there appears to be no certainty in this regard. This notwithstanding the fact that Pholosa and / or JM Attorneys must be in possession of the documents. It would therefore appear that the existence of all these documents are not certain.

In the matter of Premier Freight (Pty) Ltd v Breathetex Corporation 2003(6) SA 190 in respect of discovery it was stated:

"Fourthly the Respondent's application for a direction that the Rules of discovery apply is relatively well directed: it cannot be ascribed as a fishing expedition and discovery is unlikely to result in an extension of the issues."

In view of the fact that the documents required cannot be specifically identified it cannot in the Committee's view be said that the application is relatively well directed. In view of the uncertainty regarding the documents and the fact that the Respondents must be in possession of most of the documents requested in paragraphs 10, 11 and 14 and no mention of specific documents are made the Committee must guard against the possibility of a mere fishing expedition in respect of the documents which are sought.

In Swissborough Diamond Mines and Others v Government of the Republic of South Africa 1999(2) SA 279 (T) the following was set in respect of discovery of documents.

"Clearly reference to an identifiable bundle of documents, even if not consecutively numbered, would be an adequate description enabling both the party who is required to produce it for inspection and the Court which may ultimately be required to enforce compliance therewith to identify the documents. Although the Full Bench judgment clearly disapproves of the dictum in Richardson's Woolwasheries Ltd v Minister of Agriculture (supra) that Rule 35(3) is designed to extract specific documents, it did not hold that the documents required for inspection must not be described in such a manner that they are identifiable. Likewise a Court would not grant an order in terms of Rule 35(7) compelling compliance with a notice in terms of Rule 35(3) unless the documents were identifiable.

As appears from the judgment in SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd 1968 (3) SA 381 (W) and Maxwell and Another v Rosenberg and Others 1927 WLD 1, the Court ordered additional discovery of documents by referring to the genus of the documents. Although the genus may be wide, the documents are determinable within it."

The main problem in this application is that the documents required were not specifically identified to enable the Committee to consider the merits of the request in respect of each of the documents.

The application can in view of the above not be acceded to.