

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG SOUTH DIVISION)

Case No: 10945/2012

In the matter between:

ANALIZE VAN TONDER	First Applicant
WEMA BELEGGINGS (PTY) LTD	Second Applicant
PEGWA MINERALE (PTY) LTD	Third Applicant

and

FNB TRUST SERVICES (PROPRIETARY) LIMITED (Registration No. 1986/003488/07)	First Respondent
FIRSTRAND BANK LIMITED (Registration No. 1929/001225/06)	Second Respondent

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APPLICANT'S REPLYING AFFIDAVIT

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I, the undersigned,

ANALIZE VAN TONDER,

do hereby make oath and state:

1. I am an adult businesswoman and the First Applicant in this application. I am still residing at [REDACTED] United States of America.



2. The contents of this affidavit are within my personal knowledge, unless otherwise stated, and are true and correct. To the extent that legal submissions are advanced herein, they are made on the basis of legal advice received from my legal representatives, which advice I believe to be correct.
  
3. I refer to my founding affidavit *jurat* 1 March 2012, and confirm that I depose to this affidavit in my personal capacity, as well as my capacity as the director, sole shareholder and duly authorised representative of both the Second and Third Applicants.
  
4. I have read the answering affidavit deposed to by Barbara Catherine Botha on behalf of the Respondents, and respond thereto as follows.
  
5. Apart from raising a number of procedural issues (which I respectfully submit are without substance and do not detract from the Applicants' entitlement to the relief sought in terms of the notice of motion), the Respondents' main opposition to this application appears to be essentially based on the following contentions:
  - 5.1 The accounts as referred to in paragraphs 1.1 to 1.8 of the notice of motion, are not bank accounts as such but merely "*transaction history statements*" that have been created by the First Respondent.



- 5.2 The First Respondent has already provided all documentation of this nature to the Applicants.
- 5.3 The Applicants have in any event (in the founding affidavit) failed –
- 5.3.1 to properly identify which statements have not been made available by the Respondents;
  - 5.3.2 to identify the rights which the Applicants are seeking to exercise or protect, and why these statements are required for this purpose.
6. I respectfully submit that if the Respondents' *in limine* defence, as summarised in paragraph 5.1 above, should be taken at face value, they have clearly misconstrued the nature of the relief that the Applicants are seeking. In paragraph 13 of the answering affidavit, the Respondents complain that what has been requested by the Applicants and what has in fact been supplied (by the First Respondent) are not bank accounts, but merely "*an accounting*" from the First Respondent of "*what it has done*".
7. The Respondents then proceed to describe that each account in question is merely "*a transaction history*".



8. The Applicants accept that the documents in issue are in essence an accounting from the First Respondent of the transactions it had conducted on the various accounts, and do not relate to conventional bank accounts that are normally being conducted at a financial institution.
9. The fact remains, however, that if regard is had to the notice of motion, this is exactly what the Applicants are requesting, namely access to the First Respondent's records that would reflect the full transaction history of the relevant accounts. That such accounts have indeed been created by the First Respondent (for the purposes as explained in the answering affidavit), is not in issue.
10. To highlight the fact that these documents have (according to the Respondents, incorrectly) been described as bank accounts, is with respect merely to divert the attention from the real issue.
11. As is apparent from annexures "B1" to "B3" to the founding affidavit, the First Respondent, who created these statements, itself described them as "*Bank Statement/Bank Staat*". Annexures "B4" and "B5" are entitled "*Transaction Statement*" for the relevant period to which each document pertains.
12. In fact, as explained to Lombard and Fowle during the meeting of 4



February 2011, the First Respondent has for all intents and purposes always regarded these accounts as "*bank accounts*", for the following reasons:

12.1 Previously, the First Respondent - upon receiving instructions to administer a deceased estate - would have opened a current account for the estate at an appropriate FNB branch.

12.2 A cheque book would have been issued for such account, and all financial transactions (cash receipts and payments) that were conducted during the winding-up of the estate, would have been conducted by means of such account.

12.3 In due course, this procedure had been changed, in that no separate bank account would have been opened for a deceased estate. Instead, an "internal account" (also referred to as a "*sub-account*") would have been created by the First Respondent, which would be linked to the First Respondent's general trust banking account. The latter account would be used to conduct transactions on behalf of an estate. The transactions in respect of each estate would then be processed and reconciled on a daily basis, and approximately a day later be reflected on the internal account of each estate.

12.4 Whilst discussing the aforesaid procedure during the meeting of 4



February 2011, Lombard and the First Respondent's representatives were *ad idem* that the transaction statements in respect of such internal accounts were for all intents and purposes cash-flow statements, similar to bank statements in respect of a normal bank account.

(I shall for the sake of convenience continue to refer to each such transaction history, whether in electronic format or printed version, as an account.)

13. I respectfully submit that for the First Respondent to highlight the fact that these accounts have been incorrectly described as bank accounts, does not assist in resolving the issue.
14. The essential issue that falls to be determined is a factual one – has the First Respondent indeed provided the Applicants with a full and complete transaction history in respect of these accounts. The simple answer is no, as is apparent from the relevant passages in the founding affidavit, read with the Respondents' reply thereto.
15. In this regard, I draw attention to –
  - 15.1 paragraphs 27.1 to 27.8 of the founding affidavit, where I described



the various accounts at issue;

- 15.2 paragraphs 29 and 30 (particularly paragraphs 30.1 to 30.8) of the founding affidavit, read with annexures "C1" to "C6" thereto, that contain a full description of the statements (with reference to each account in question) that were initially found to be missing;
- 15.3 paragraphs 32 to 34 of the founding affidavit, read with annexures "D1" to "D4" thereto, where I described the statements that were still found to be missing, notwithstanding the receipt of a large volume of documentation from the First Respondent (on 13 October 2010), in response to annexures "C1" to "C6";
- 15.4 Lombard's further request in annexures "D1" to "D4", that a full set of statements in respect of all the accounts in question, be made available for the reasons as explained in the first and second unnumbered paragraphs of annexure "D4";
- 15.5 the fact that at the meeting of 4 February 2011 (which took place after the exchange of the aforesaid communication between Lombard and the First Respondent), the First Respondent's representatives indicated –



15.5.1 that they fully understood and appreciated why the Applicants required the missing statements; and

15.5.2 that the missing statements would be made available (notwithstanding certain practical difficulties that might be encountered in order to locate the statements prior to 1996);

15.6 the fact that, except for the subsequent production of a limited number of statements in respect of only four accounts (account numbers 0008780, 0008781, 0005803 and 0007709) and only for the period from 1 January 1996, the other accounts that had been found to be missing (as described in paragraphs 30.1 to 30.4 of the founding affidavit), were again not provided;

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Para 16

15.7 the fact that:-

15.7.1 although the First Respondent had, at that stage, first alleged that the microfiche films that contained the statements that were still missing, could not be located, it subsequently (on 23 May 2011) informed the Applicants that the "microfiche trust account records" that contained these missing statements, had been located;



15.7.2 notwithstanding the receipt of a further quantity of documentation from the First Respondent (on 14 July 2011), such documentation again did not contain the statements that the Applicants had previously indicated were still missing (as described in paragraphs 30.1 to 30.4 of the founding affidavit);

15.8 the fact that my assertion that the statements as referred to in the previous paragraph, have still not been provided, which assertion is supported by a detailed explanation of the relevant facts, has been met by a bald denial by the First Respondent (with no explanation as to when, where and how they had indeed been provided).

16. I emphasise that, as is evident from the foregoing summary of the material facts, the missing statements as described in paragraphs 30.1 to 30.4 of the founding affidavit, have still not been provided. With regard to the statements as described in paragraphs 30.5 to 30.8 of the founding affidavit, only a limited number of such statements have been provided. At the meeting of 4 February 2011, Lombard was told that these statements commenced in November 1994. However, no statements were eventually provided in respect of the period from November 1994 to January 1996. Moreover, the statements that had been provided, as referred to in paragraph 15.6 above, were patently incorrect and unreliable, for the reasons as already explained



in annexures "D4", "E2" and "E3" to the founding affidavit.

17. It was also impossible to reconcile the transactions that are reflected on these statements, with the statements in respect of the same accounts that had previously been provided to the Applicants. (I have explained the reasons for this in paragraphs 37 to 41 of the founding affidavit). Hence the Applicants' request to have access to the First Respondent's records that would show the full transaction history in respect of these accounts.
18. The Respondents further complained that the Applicants have failed to identify why they are entitled to request access to these records, and what the relevance is of such access to the rights that the Applicants seek to protect.
19. I submit that these aspects have been adequately dealt with in paragraphs 53 to 57 of the founding affidavit. I reiterate that –

19.1 as is evident from annexure "E3" to the founding affidavit, rental payments in an aggregate amount of at least R908 353-29, to which the Second and/or Third Applicants were entitled and that should have been paid into one or more of the accounts that had been created and administered by the First Respondent on their behalf, could not be traced by Lombard in the statements that had been



made available (I incorrectly included, in paragraph 41 of the founding affidavit, the amount of R1 617 337-92 in this calculation. I have recently recalculated the missing rental payments, and concluded that they in fact amount to R986 124-12);

19.2 only a proper reconciliation of all the issued rental statements on the one hand, with a complete transaction history of the relevant accounts on the other hand, would indicate a possible explanation for these missing funds (or perhaps an even greater discrepancy than has hitherto been revealed);

19.3 the Applicants and I stand to gain financially, directly and indirectly, in the event of these rental payments, alternatively damages in lieu thereof, being recovered. I submit that this aspect requires no further elaboration for present purposes and will be further addressed in argument at the hearing of this matter.

20. The Respondents further contend that –

20.1 it is impossible to establish why the accounts in issue (for example, Estate Late F J van Tonder) have any relation to the management and administrative functions in respect of the Second Applicant's business and the Second and Third Applicants' respective property



portfolios;

20.2 the Applicants have failed to set out with any clarity the history and background to the relationship between the Applicants and the Respondents.

21. I pause to emphasise that none of the above objections were previously raised by the First Respondent's representatives (as a reason why it was not able or obliged to comply with the Applicants' request for the production of statements), neither in the correspondence as referred to in the founding affidavit, nor during the meeting of 4 February 2011. This serves to illustrate the technical (and unfounded) nature of these objections.

22. The Respondents' contentions referred to in paragraph 20 above, are unfounded. I reiterate, as I have already explained in the founding affidavit, that -

22.1 my late father's property portfolio consisted of commercial properties that were registered in the names of both the Second and Third Applicants, whilst the business that was conducted by means of such properties (i.e. the leasing and maintenance thereof) was conducted primarily in the name of the Second Applicant (rental income was also derived by means of the letting of the Third Applicant's properties, but



not to the same extent as in the case of the Second Respondent);

22.2 after my father's death, the First Respondent continued to manage and administrate this business, initially in its capacity as the administrator of the testamentary trust created in terms of my late father's will, and subsequently (after the termination of the trust on 21 July 2003) on my behalf and for my personal interest;

22.3 when Lombard was appointed to conduct a full forensic investigation into the financial affairs of both the Second and Third Applicants, he required *inter alia* all the statements in respect of all the accounts that had been conducted in the name of the Applicants during the relevant period;

22.4 this included the period of November 1989 until 20 October 2006, during which time the First Respondent performed the management and administrative functions in respect of the Second and Third Applicants' respective businesses and property portfolios.

23. However, whilst performing the functions as referred to in paragraph 22.2 above, the First Respondent did not use the Second and Third Applicants' existing FNB current accounts. Instead, in managing the Second and Third Applicants' funds (receipt of income as well as payment of expenditure), the

First Respondent used its general trust banking account with the Second Respondent (as referred to in paragraph 21.23 of the answering affidavit) and, at the same time, created the accounts as described in paragraphs 1.2 and 1.3 of the notice of motion (read with annexures "B1" to "B3" thereto).

24. The First Respondent's aforesaid *modus operandi* was disclosed to the Applicants by the First Respondent's representatives during the meeting on 4 February 2011.

25. At this meeting, the First Respondent's representatives further explained that –

25.1 the accounts as referred to in paragraphs 1.2 and 1.3 of the notice of motion, were created in order that all monetary transactions on behalf of the Second and Third Applicants in relation to the day-to-day running of their respective businesses (these were in the first instance conducted by means of the First Respondent's trust banking account) could also be reflected (by means of journal entries) in a separate "estate account" that had been created for each entity (these are the "internal" or "sub" accounts that I have referred to in paragraph 12.3 above);

25.2 the accounts as referred to in paragraphs 1.2 and 1.3 of the notice of

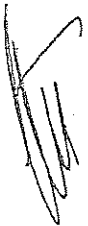


motion, were in due course (apparently during 1994) replaced by the accounts as referred to in paragraphs 1.5 and 1.6 of the notice of motion, and used for the same purpose;

25.3 the nett proceeds of the monetary transactions conducted on behalf of the Second and Third Applicants (as recorded in the accounts referred to in paragraphs 1.2 and 1.3 of the notice of motion), were from time to time allocated to me personally, by means of a journal entry in the account as referred to in paragraph 1.4 of the notice of motion. This account was also utilised to account for cash-flow transactions resulting from the distribution of capital from the testamentary trust, after the termination thereof. This account was later replaced by the account as referred to in paragraph 1.7 of the notice of motion;

25.4 the account as referred to in paragraph 1.8 of the notice of motion, was created to reflect the management of my personal assets/ investments, which were distributed to me from the trust;

25.5 the accounts as referred to in paragraphs 1.4, 1.7 and 1.8 of the notice of motion, were therefore created and utilised to manage the assets that I had received from the trust.



26. During his investigations Lombard established that, on various occasions, funds to which the Second and/or Third Applicants were entitled, had been paid into the estate account of the late F J van Tonder (the account mentioned in paragraph 1.1 of the notice of motion). Lombard further established that from time to time funds had flowed between the various accounts in question. This should not have happened and appeared to be an irregularity.
27. Transactions conducted on behalf of the estate of my late father (as part of the administration of his estate) should have been reflected (and accounted for) in the estate account only. The converse applies in respect of the transactions conducted on behalf of the Second and Third Applicants. Their existing bank account at the Second Respondent, or at best the accounts as referred to in paragraphs 1.2 and 1.3 of the notice of motion, should have been used for this purpose. There is no reason why funds should have flowed between the estate account on the one hand, and the accounts that were created in the names of the Second and Third Applicants (whose commercial activities were not ceased or interrupted when my father passed away) on the other.
28. During his investigations Lombard established a possible reason for the flow of funds between the various accounts, as referred to in paragraph 26 above. Rental payments that were received on behalf of the Second and/or





the Third Applicants, were sometimes (apparently inadvertently) paid into the estate account of the late F J van Tonder. This is merely one example why the flow of funds between the various accounts should be investigated.

29. The full extent and consequences of these irregularities can only be established and assessed once the full transaction history of all the accounts in issue have been made available. The fact that these accounts are all inter-related (having regard to the manner in which the First Respondent had conducted same) has never been in issue.
30. The First Respondent's representatives are well aware of the manner in which these accounts have been utilised and interfaced, and why they are all inter-related. I had no reason to expect (or to foresee), prior to the launching of this application, that the Respondents would oppose it, *inter alia* on the grounds as set out in paragraphs 14 to 18 of the answering affidavit. Insofar as my elaboration on this aspect, as set out in the preceding paragraphs, may be regarded as new matter (which I have been advised is not the case), the introduction thereof arises from the aforesaid grounds of opposition. Nevertheless, I would have no objection if the Respondents be given an opportunity, if necessary, to file a supplementary affidavit in response thereto.
31. I now turn to reply *seriatim* to the remaining allegations in the answering



affidavit, insofar as it may be necessary. I deny every allegation that is contrary to or irreconcilable with the allegations contained in the founding affidavit, and not specifically dealt with herein.

32. Ad paragraph 11

32.1 The Respondents' contentions in this paragraph are unfounded. I stand by my assertion that the records requested have been adequately identified.

32.2 With regard to the identification of the requestor, I submit that this is clear from the information contained in the formal request for access in terms of section 33(1) of the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA"), read with the annexures thereto (these include, *inter alia*, all the annexures to the founding affidavit). If regard is had to the latter, it is clear that the Second and Third Applicants and I, represented by Mr L S Joubert of Millers Incorporated, were the requestors.

33. Ad paragraph 14

33.1 I deny that there was non-compliance with the formal requirements for the request, with regard to the rights which the requestors sought



to be exercised or protected. If regard is had to section F, paragraph 1 of the request (annexure "J3" to the founding affidavit) read with the annexures thereto, these rights have been adequately identified.

33.2 I have already dealt with the fact that these rights have been adequately described in the founding affidavit.

34. Ad paragraph 15

I have already dealt with this complaint in the preceding paragraphs.

35. Ad paragraph 16

35.1 It is conceded that the description of the accounts in respect of the Second and Third Applicants in paragraphs 1.2 and 1.3 of the notice of motion, as well as in annexure "C3", is incorrect. The correct name of each company should have been stated.

35.2 However, as is apparent from annexure "C1", the Second and Third Applicants have been properly cited in the heading of this letter, which contained the detail of the requestors as well as the records requested.



35.3 If the contention in the last sentence of this paragraph is intended to pertain to all the documents as described in paragraphs 1.1 to 1.8 of the notice of motion, then this contention is, to the knowledge of the Respondents, untrue. I have already indicated above which statements (of those that were originally found to be missing) have still not been provided by the Respondents.

36. Ad paragraph 17

I deny the allegations contained in this paragraph. I have in any event clarified any uncertainty that may have existed in regard to this aspect, in the preceding paragraphs.

37. Ad paragraph 18

37.1 I deny the allegations contained in this paragraph.

37.2 I stand by my assertions in regard to this aspect, as set out in the founding affidavit.

37.3 I reiterate that any substantial damages that may be recovered from the persons and/or entities as referred to in paragraphs 55 and 65 of the founding affidavit (which include the First Respondent or any of its



related departments/divisions) will be to my financial benefit (arising from an increase in value of my shares in the Second Applicant, as well as dividends that I may be entitled to).

38. Ad paragraph 20

38.1 I deny that all the relevant statements that existed, have been produced.

38.2 This contention contradicts the position previously taken by the First Respondent in regard to the Applicants' request for statements. During the telephone conversation between the parties' respective representatives, as referred to in paragraph 60.4 below, Ms Barbara Botha (who represented the First Respondent) conceded that the Applicants had not been provided with all the transaction history statements.

38.3 However, her explanation as to why it would have been difficult to comply with this request, was that the First Respondent would have had to utilise its trust banking account with the Second Respondent for this purpose, and "black out" the transactions that related to other estates, which would have been an extremely difficult and arduous task to perform.



39. Ad paragraph 21.2

I deny the allegations in this paragraph. My late father's will merely provided that he bequeathed the relevant assets in his estate "... *aan my administrateur in Trust ...*", without naming (or describing) the trust.

40. Ad paragraph 21.9

40.1 I deny the allegations contained in this paragraph.

40.2 It has never been necessary for the First Respondent to attempt to "decipher" what records have been requested. This was made clear on many occasions. The alleged incorrect/incomplete description of the records and the First Respondent's inability to locate same as a consequence thereof, has never been raised previously.

40.3 The only issue (in the sense of merely a difficulty) ever raised by the First Respondent was in respect of the bank statements prior to 1996, in that they were stored on microfiche film, and that it was not at that stage known at which branch the microfiche film that would contain the missing statements, could be located.



41. Ad paragraphs 21.10 and 21.11

41.1 The description of the First Respondent's functions (after the termination of the trust) in these paragraphs, is incomplete.

41.2 The First Respondent also performed the function of managing and administrating the Second and Third Applicants' respective businesses, as well as the Second and Third Applicants' respective property portfolios.

41.3 Moreover, in addition to managing my own investment portfolio, the First Respondent also managed my personal bank accounts (i.e. a credit card account as well as a savings account).

42. Ad paragraphs 21.12 and 21.13

My understanding of the purpose of this account (as conveyed to Lombard during the meeting of 4 February 2011) was that it also reflected monetary transactions (capital, income as well as expenditure) that had been conducted on my behalf in respect of capital acquired from the trust and paid into (or out of) the First Respondent's trust banking account with the Second Respondent.



43. Ad paragraphs 21.14 and 21.15

I have not received, on a regular basis and chronologically, all the statements in respect of all the accounts. The Applicants therefore request access to the Respondents' records that contain the full transaction history of all these accounts.

44. Ad paragraph 21.16

The allegations contained in this paragraph are denied. I have already dealt with the First Respondent's failure to produce the missing statements, in breach of its undertaking to do so.

45. Ad paragraphs 21.18 and 21.19

45.1 I deny that all the statements in issue pertain to transactional histories only in respect of the estate of my late father.

45.2 I reiterate that the First Respondent also created –

45.2.1 accounts that reflected the daily operational transactions that were conducted in the course of the Second and Third Applicants' respective businesses (these have been identified





in paragraphs 1.2, 1.3, 1.5 and 1.6 of the notice of motion);  
and

45.2.2 accounts that reflect, apart from transactions pertaining to investments made on my behalf, also capital and income transactions that had been concluded on my behalf (this account is referred to in paragraph 1.8 of the notice of motion).

46. Ad paragraphs 21.20 and 21.21

46.1 There was no reason to create these accounts, in order to reflect the transactions that were conducted on behalf of the Second and Third Applicants.

46.2 The existing bank accounts of these companies with the Second Respondent, should have been utilised for this purpose.

47. Ad paragraphs 21.22 and 24.3

47.1 It is unclear to which "agreement" reference is being made in this paragraph.



47.2 I deny that –

47.2.1 I have received all the quarterly statements in respect of the various accounts;

47.2.2 these statements constitute a complete and satisfactory accounting by the First Respondent of the functions it had performed on behalf of myself and the First and Second Applicants.

48. Ad paragraphs 21.23 and 21.24

I reiterate that –

48.1 there was no reason for the First Respondent to utilise the trust banking account in respect of transactions that were concluded in the normal course of the Second or Third Applicants' respective businesses; and

48.2 Lombard's investigation has revealed that transactions had been recorded in the trust banking account (i.e. payments into or from this account) as well as the separate accounts that were created for the Second and Third Applicants (as referred to in paragraphs 2 and 3 of



the notice of motion), which transactions were concluded in the normal course of the Second and Third Applicants' respective businesses (and therefore unrelated to the administration of the deceased estate).

49. Ad paragraphs 21.25 and 21.26

49.1 As regards the incorrect use of the word "bank" account, I respectfully submit that it will serve no purpose to become involved in an exercise in nomenclature.

49.2 The Applicants request access to the First Respondent's records that contain the full transaction history in respect of the accounts at issue.

49.3 As demonstrated in paragraphs 6 to 12 above, the fact that these documents have been incorrectly described as "bank statements", could not have caused any uncertainty as to what has been requested.

50. Ad paragraphs 22 and 23

I deny the allegations in these paragraphs.



51. Ad paragraph 24.1

51.1 The only reason why I alluded to the question of prescription in paragraphs 58 and 59 of the founding affidavit, was to explain why any substantial delay in the prosecution of this application could be prejudicial to the Applicants.

51.2 However, as advised by my legal representatives, I pointed out that it would be premature to address the issue of prescription in the founding affidavit.

51.3 It is unfortunate that the Respondents now embrace this potential issue as a defence in what is in essence pre-trial litigation, without the Court having had the benefit of a full disclosure of all the relevant facts and circumstances.

51.4 I have been advised that PAIA was intended to foster a culture of transparency and accountability in public as well as private bodies, by giving effect to the right of access to information, and to promote a society in which people have effective access to information to enable them to more fully exercise and protect all of their rights.

51.5 I respectfully submit that the Respondents' ploy to raise prescription



in opposition to the application, is unwarranted, inappropriate and contrary to the objectives of PAIA.

51.6 Suffice it to say that, the reason why it has become necessary to investigate the transaction history of the accounts that form the subject-matter of this application, only came to my knowledge after Lombard had commenced his forensic investigation in July 2010.

52. Ad paragraph 24.2

52.1 I admit that I was in a position "*to take charge of my affairs*," after the termination of the trust. However, for the reasons as explained in the founding affidavit, I entrusted the conduct and management of the businesses that I have effectively inherited, to the First Respondent. In fact, the First Respondent strongly advised me that, given my personal circumstances, it would be in the best interests of myself as well as the Second and Third Applicants, that the First Respondent manage these businesses on my behalf.

52.2 I had no reason to expect that irregularities or mismanagement might occur in the execution of such duties by the First Respondent. I placed all my trust in the First Respondent and its employees to properly and effectively carry out the mandate I had given them.



53. Ad paragraph 24.4

I did not proffer my extensive travelling and absence from the country as a reason why prescription would be delayed.

54. Ad paragraphs 24.5, 24.6 and 24.7

54.1 The unacceptable and unprofessional manner in which the First Respondent handled the request for information from the tax authorities in the USA (as referred to in paragraph 22 of the founding affidavit) was the only reason why I had decided to sever all ties with the First Respondent.

54.2 At that stage I had no reason to investigate the Second or Third Applicants' financial affairs.

54.3 It was only in 2010, after Clasto Konsultante had notified the Second and Third Applicants that it would no longer act as management for these companies, which occurrence in due course led to the discovery of the unsatisfactory and disconcerting aspects relating to the Second Applicant's business (as explained in paragraph 25 of the founding affidavit), that I took the decision to conduct a full forensic



investigation into the financial affairs of both the Second and Third Applicants.

54.4 As stated above, the further inconsistencies and apparent irregularities with regard to the conduct of the Second and Third Applicants' business, to which I have alluded in the founding affidavit, were only disclosed during the subsequent forensic investigation which Lombard had commenced in July 2010.

54.5 I had no reason to suspect that irregularities, of the nature and extent that Lombard has discovered, had occurred during the time that I had entrusted the Applicants' as well as my own affairs, to the First Respondent.

55. Ad paragraphs 24.8 and 24.9

55.1 I deny the allegations and legal conclusions in this paragraph, for the reasons as set out in the preceding paragraph.

55.2 I have in any event been advised that this is a matter that could only be properly considered by this Honourable Court after a full disclosure of all the relevant facts and circumstances, especially having regard to the provisions of section 12(1), (2) and (3) of the



Prescription Act, No. 68 of 1969. It would therefore be premature to expect this Honourable Court to adjudicate on the issue of prescription at this stage.

56. Ad paragraph 24.10

56.1 I still have insufficient knowledge of the identity of the debtor, or the full facts from which the debt in question arose, to prosecute a claim against any debtor for the recovery of lost or misappropriated funds, as referred to in paragraph 55 of the founding affidavit. The fact that there appears to be grounds for the existence of a claim of this nature, only came to my knowledge after Lombard had commenced his investigation.

56.2 The First Respondent's recalcitrance in failing to comply with the request for access to its records, has prevented the Second and Third Applicants from becoming aware of such facts.

56.3 The implication of the Respondents' suggestion in this paragraph is startling – I should have investigated the manner in which the First Respondent had performed its duties, even before I terminated its mandate, and not have proceeded on the assumption that they would have performed such duties with the necessary care, skill and





professionalism as could be expected from a reputable institution such as the First Respondent.

57. Ad paragraphs 24.11 and 25

I deny the allegations in these paragraphs, for the reasons as set out above.

58. Ad paragraph 26

I deny the allegations contained in this paragraph, particularly the allegation that the Respondents have adopted a "*co-operative attitude*". The Applicants are fully entitled to seek confirmation that all the rental payments that had been collected on their behalf, had in fact been paid by the First Respondent into the various accounts it had created for this purpose, and to recover any missing and/or misappropriated funds.

59. Ad paragraphs 32.1 and 43

It was discovered that, during 1994, David Newham Properties had failed to pay to the Second and Third Applicants, significant amounts of rental it had collected on behalf of the Applicants. It was also discovered that Clasto Konsultante was never registered as an estate agent and could therefore not have accepted and retained deposits it had received from the Second and



Third Applicants' tenants.

60. Ad paragraph 33.2

60.1 As stated in paragraph 52 of the founding affidavit, no response had been received to the formal request for information (annexures "J1" to "J4").

60.2 I have been advised that as a consequence the Respondents are, in terms of the provisions of section 58 of PAIA, regarded as having refused the request.

60.3 Accordingly, section 78(2)(d) of PAIA which deals with a requestor who is aggrieved by a decision of the head of a private body, does not apply to the present matter.

60.4 In any event, during a telephonic conversation between Mr Joubert of Millers Incorporated and Ms Barbara Botha of the First Respondent, when the formalities that a requester had to comply with were *inter alia* discussed, an agreement was reached that the First Respondent would not raise "*technical points*" in opposition to the application. In confirmation of this agreement, I annex hereto marked "M" a copy of a letter dated 22 March 2012, which Mr Joubert had addressed to Ms



Botha.

60.5 After the application had been served on the Respondents, the First Respondent took the position that they had notified my legal representatives (Millers Incorporated) of their decision to refuse the request. However, Millers Incorporated had not received any such notification. Communications between Millers Incorporated and the Respondents' attorneys (Bezuidenhout Van Zyl & Associates Incorporated) ensued in this regard and culminated in an agreement that the Respondents would not rely on any alleged non-compliance with the prescribed formalities or any other technical defence.

61. Ad paragraph 33.3

I deny the allegations contained in this paragraph. In any event, as already indicated above, the First Respondent had agreed not to rely on any technical defence.

62. Ad paragraph 36

62.1 Audit procedures of the nature as referred to in this paragraph, are normally conducted on a "sample" basis. Not each and every bank statement would be analysed, in contrast to a forensic audit where



every bank statement is under scrutiny.

62.2 Lombard's investigation has already revealed that at least two significant amounts, being rental payments that the First Respondent should have received and paid into the Second (or the Third) Respondent's bank account, cannot be accounted for in the accounts that the First Respondent had created for the Second and Third Applicants. I refer in this regard to paragraph 41 of the founding affidavit.

62.3 I also draw attention to the fact that four of the accounts in question commenced with a nil balance on 1 January 1996. From an accounting/auditing point of view, this is totally unacceptable and indicative of the inaccuracy and unreliability of the statements. The Respondents' attempt to explain this (in paragraph 49.1 of the replying affidavit) is unconvincing and unacceptable.

63. Ad paragraph 37.1

I admit the allegations in this paragraph. Representatives of the First Respondent were previously appointed as directors of the Second and Third Applicants.



64. Ad paragraph 37.2

The managing agent was only responsible for the collection of rental. I stand by my assertion that the First Respondent continued to manage and administrate the Second Applicant's business, as well as the Second and Third Applicants' respective property portfolios.

65. Ad paragraph 37.3

65.1 I deny that I neglected my duties as a director of the Second and Third Applicants.

65.2 My personal circumstances at that stage was the very reason why I had instructed the First Respondent to continue the functions and duties it had already been mandated to perform in respect of the Second and Third Applicants, as referred to above.

66. Ad paragraph 39

I stand by my assertion that all the administrative and accounting functions previously performed by the First Respondent in respect of the trust, were outsourced to Clasto Konsultante.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

67. Ad paragraph 40.2

It is surprising that after the winding-up of the estate had been completed, the First Respondent continued to use the "*estate accounts*" it had created for the Second and Third Applicants, in the winding-up process, for the purposes of the subsequent day to day conduct of the respective businesses of these companies.

68. Ad paragraph 41

Visser Louw performed an accounting function, which is vastly different from a forensic audit. In any event, Visser Louw did reveal the unsatisfactory and disconcerting aspects in regard to the Second Applicant's business, as referred to in paragraph 25 of the founding affidavit.

69. Ad paragraph 45.2

69.1 It is significant that no account numbers in accordance with the "*Tams*" system have been allocated to the accounts as referred to in paragraphs 27.1 to 27.4 of the founding affidavit.

69.2 Even more significant is the First Respondent's silence in the answering affidavit in respect of this omission.



70. Ad paragraph 47

The arduous nature of the task to collate the statements is now raised for the first time in an attempt to exonerate the First Respondent for its patent failure to comply with the detailed request for statements, as set out in annexures "C1" to "C6". If this was in fact at that stage the reason for such failure, one would have expected the First Respondent at the very least to explain it to Lombard in the e-mail of 13 October 2010.

71. Ad paragraph 48.1

I deny the alleged attempt "*to have meetings*". The First Respondent had a proper understanding of what had been requested. This was made abundantly clear in the exchange of correspondence between Lombard and the First Respondent's representatives. There was no need to have such a meeting.

72. Ad paragraph 48.3

With hindsight, Lombard should have enquired as to the reason why the missing statements that were stored on microfiche film, were kept at branch level. This might have been the case with conventional bank statements in



respect of bank accounts that were conducted by clients at the Second Respondent's various branches countrywide.

73. Ad paragraph 49.1

73.1 I reiterate that, from an accounting and auditing perspective, this explanation does not make sense and is unacceptable.

73.2 In any event, the explanation now proffered by the Respondents was not apparent from the statements that had been provided by the First Respondent (which is still the case).

73.3 There is no indication whatsoever that closing balances have been transferred or brought forward from previous statements. The amounts that have been recorded after the zero opening balances, are rounded off and not what one would have expected from operational accounts. To illustrate this, I annex hereto marked "N" an example of a statement that commences with a zero balance.

74. Ad paragraph 49.3

I emphasise that, after receipt of Ms Botha's e-mail of 23 May 2011 (annexure "G" to the founding affidavit), it was never the First Respondent's





excuse that the missing statements did not exist. If the missing statements do not exist, one would have expected the First Respondent to state this unambiguously.

75. Ad paragraph 52.2

I deny that the recourse to the Second Respondent's trust banking account was suggested as an option at that stage. This was mentioned as an option at a later stage, after the microfiche films that contained the missing statements had been located. Moreover, it would only have been necessary to resort to this *modus operandi* in the event of the "reader" not being able to read such records.

76. Ad paragraphs 52.3 to 52.5

I stand by my assertion that the missing statements that Lombard had requested in terms of annexure "E" had not been made available.

77. Ad paragraph 53

I reiterate that there was no need for this request. At that stage, having regard to the meeting of 4 February 2011 as well as the subsequent exchange of communication, there could not have been any uncertainty on



the part of the First Respondent, in regard to which statements were still missing.

78. Ad paragraph 54.2 ..

I reiterate that no response was received to the formal request for documents. Annexure "AA2" to the answering affidavit was transmitted to Millers Incorporated for the first time after service of the application on the Respondents.

79. Ad paragraph 55.3

79.1 As explained above, the statements that were created in respect of the Second and Third Applicants should reflect all the monetary transactions that were concluded on their behalf, which is not the case.

79.2 There is a vast discrepancy between the rental statements that had been issued by David Newham Properties and, subsequently, Clasto Konsultante, in respect of rentals received on behalf of the Second and Third Applicants on the one hand, and the rentals received, as recorded in the statements created by the First Respondent, on the other.



80. Ad paragraph 56.1

I deny the allegations in this paragraph. The discrepancies have been described in paragraphs 37, 40 and 41 of the founding affidavit (read with annexures "E1", "E3" and "D4" thereto).

81. Ad paragraphs 60.3 to 60.5

81.1 I deny that the response from Millers Attorneys did not deal with the substance of the technical complaints that were raised by the Respondents in annexure "AA3".

81.2 It is surprising that the First Respondent failed to disclose the fact that the parties' respective attorneys met on 11 April 2012, when the material issues raised in annexure "AA3" were discussed. Unfortunately no solution could be reached, which I submit was solely due to the First Respondent's recalcitrant refusal to supply the missing statements.

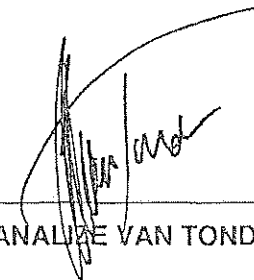
CONCLUSION

82. I stand by my assertion that the Second and Third Applicants and I are

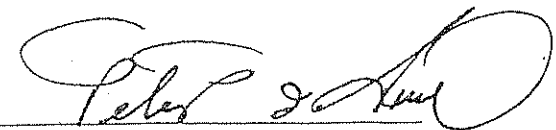
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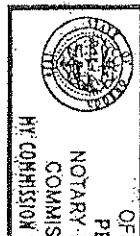
entitled to the relief sought in terms of the notice of motion, for the reasons as set out in the founding affidavit.

83. Lastly, I refer to the affidavits of Messrs Joubert and Lombard and Ms Fowle filed herewith, in confirmation of their involvement in the matters I have referred to in this affidavit.

  
ANALIZE VAN TONDER  
24 July 2012

I certify that the deponent acknowledged to me that ~~he~~<sup>she</sup> knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on ~~his~~<sup>her</sup> conscience. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God". The deponent signed this declaration in my presence at Beaverton, on this the 24<sup>th</sup> day of JULY 2012.  
Oregon, U.S.A.

  
COMMISSIONER OF OATHS



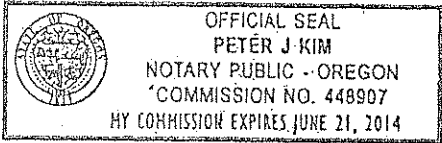
JURAT

State of Oregon  
County of Washington } ss.

Subscribed and sworn to (or affirmed) before me  
this 24<sup>th</sup> day of July, 2012, by  
Date Month Year

(1) Analyze Van Tonder  
Name of Signer(s)

(2) \_\_\_\_\_  
Name of Signer(s)  
Peter J. Kim  
Signature of Notary Public



OPTIONAL

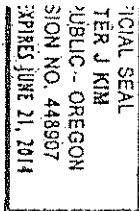
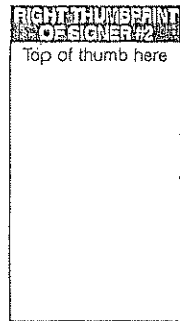
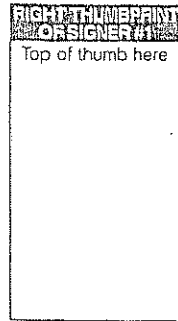
Though the information in this section is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_



COPY CERTIFICATION BY DOCUMENT CUSTODIAN

State of Oregon }  
County of Washington } ss.

I, Analyze Van Tonder  
Name of Custodian of Original Document

hereby swear (or affirm) that the attached reproduction of  
FNB Trust Service Bank Statement  
Title or Description of Original Document

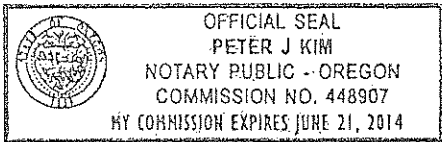
is a true, correct and complete photocopy of a document in my possession.

[Signature]  
Signature of Custodian of Original Document  
8690 SW Mulder Dr, Beaverton, OR  
Address

Subscribed and sworn (or affirmed) to before me on this

24<sup>th</sup> day of July, 2012  
Day Month Year

[Signature]  
Signature of Notary Public



OPTIONAL

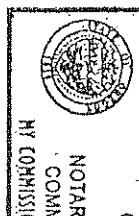
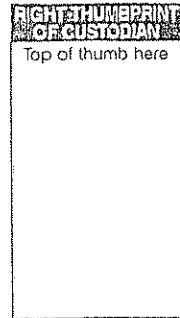
Though the information in this section is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

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Document Date: \_\_\_\_\_ Serial No.: \_\_\_\_\_ No. of Pages: \_\_\_\_\_

Signer(s) or Issuing Agency: \_\_\_\_\_



"N"

1100001

First National Asset Management and Trust Company  
Registration No 1986/003488/07  
Mrs E Y Antek  
Specialist  
Private Bag X5  
Menlopark  
0102

e-Mail fnbtrustho@fnb.co.za  
Web www.fnb.co.za

(012) 348 1843  
Fax (012) 348 0070  
Enquiries 0860 102 763  
An Authorised Financial Services Provider

FT  
FNB Trust Services, Pretoria  
Private Bag X5  
Menlo Park  
0102

Statement of account for account No. 0008760 : for the period 01 January 1995 to 28 February 2001

Date	Transaction Description	Debit	Credit	Balance
	Capital Transactions			
1995/01/01	Opening Balance			0.00
1996/04/02	Internal Tfr		342,100.00	342,100.00 C
1996/04/03	Inv IN Deposit First National Bank Money Market-M0	342,100.00		0.00
1996/04/17	Inv Withdrawn 342100. First National Bank Money Mar			0.00
1997/01/07	Internal Tfr		100.00	100.00 C
1998/06/30	Cash Introduced Claassen Stone Huurgeld Verskele Huurders		38,909.73	39,009.73 C
1998/08/18	Tax Payment Eerste Tydperk 1999	39,009.73		0.00
	Income Transactions			
1995/01/01	Opening Balance			0.00
1996/02/29	Pay Obo A Amis To Firstcard	9,888.75		9,888.75 D
1996/03/12	Cash Introduced Claassen Stone - Huurgeld Verskele Huurders		3,499.53	6,389.22 D
1996/03/12	Interest Recd 453600. First National Bank Money Mkt		4,865.32	1,523.90 D
1996/03/15	Admin Fee VAT @ 14,00 %, R 652.54	5,313.54		6,837.44 D
1996/03/28	Cash Introduced Claasson Stone Huurgeld - Verskele Huurders		32,360.61	25,523.17 Cr
1996/03/29	Int On Inc Cash		2,354.55	27,877.72 Cr

OFFICIAL SEAL  
PETER J KIM  
PUBLIC - OREGON  
MISSION NO. 448907  
EXPIRES JUNE 21, 2014

**COPY**



IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

Case No: 10945/2012

In the matter between:-

**ANALIZE VAN TONDER**

First Applicant

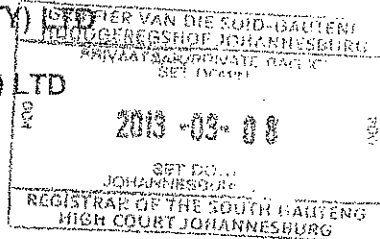
**WEMA BELEGGINGS (PTY)**

Second Applicant

**PEGMA MINERALE (PTY) LTD**

Third Applicant

And;



**FNB TRUST SERVICES (PROPRIETARY) LIMITED**  
(Registration No. 1986/003488/07)

First Respondent

**FIRSTRAND BANK LIMITED**  
(Registration No. 1929/001225/06)

Second Respondent

---

**NOTICE OF SET DOWN**

---

BE PLEASED TO TAKE NOTICE THAT the abovementioned matter has been set down for hearing in the above Honourable Court, to be heard on the 26<sup>th</sup> day of March 2013 at 09h00 or as soon thereafter as the matter may be heard.

DATED at Johannesburg on this the 7<sup>th</sup> day of March 2013.

  
ERASMUS DE KLERK INC

Applicant Attorneys  
Ground Floor, Block 6  
Pendoring Office Park  
299 Pendoring Road  
Blackheath





2195  
PO Box 7007  
Cresta, 2118  
Docex 29, Northcliff  
Tel: 011 678 1988  
Fax: 011 678 7022  
Ref: Louis Venter // M.076

TO:

THE REGISTRAR  
HIGH COURT  
JOHANNESBURG

AND TO: FNB TRUST SERVICES (PTY) LTD

First Respondent  
4 Merchant Place  
Fredman Drive, Sandown  
Sandton, Joahnesburg

AND TO: FIRSTRAND BANK LTD

Second Respondent  
4 Merchant Place  
Fredman Drive, Sandown  
Sandton, Johannesburg

Received without Prejudice of Rights	
FirstRand Bank Limited - Reg. No. 1929/001225/08	
FirstRand Banking Group Legal Services	
2nd Floor, 4 Merchant Place, 1 Fredman Drive, Sandton	
Name:	<i>G. MENAGHE</i>
Date:	<i>8/03/13</i> Time: <i>10.30</i>
Signature:	<i>[Signature]</i>

10945/2012	Case No. (year first e.g. 92/1236)
26 March 2013	Date of hearing
0	U (unopposed)/OP (opposed)
	Case type (see OPTIONS)
ANALIZE VAN TONDER WEMA BELEGGINGS (PTY) LTD PEGMA MINERALE (PTY) LTD	FIRST APPLICANT SECOND APPLICANT THIRD APPLICANT
NAMES OF PARTIES	
Versus FNB TRUST SERVICES (PROPRIETARY) LIMITED (Registration No. 1986/003488/07)	First Respondent
FIRSTRAND BANK LIMITED (Registration No. 1929/001225/06)	Second Respondent
N/A	Pigeon hole no.

- OPTIONS**
- |             |                        |                 |                              |
|-------------|------------------------|-----------------|------------------------------|
| E Divorce   | D Default Judgment     | T Interlocutory | R Rehabilitation             |
| N Rule 43   | S Summary Judgment     | I Interdict     | B Surrender                  |
| C Custody   | P Provisional Judgment | II Review       | PS Provisional Sequestration |
| F Interdict | O Other (specify)      | V Declaratory   | FS Final Sequestration       |
|             |                        |                 | FL Final Liquidation         |

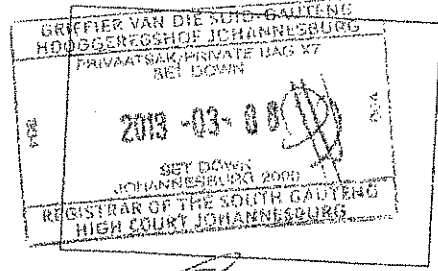
**NOTICE OF SETDOWN**  
**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

To The Registrar:

Kindly set the above matter down in accordance with the above information.

Signed at JOHANNESBURG on the 7<sup>th</sup> day of March 2013.

To: The Registrar South Gauteng High Court, Johannesburg



**ERASMUS DE KLERK ATTORNEYS**  
 Attorneys for Applicant  
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