FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 85

LUNGISWA SNOWY KAMBULE	**Applicant**
And	
THE MASTER OF THE HIGH COURT	**1st Respondent**
HUGH ANTHONY WORMALD N.O.	**2nd Respondent**
NORAH KHUPELA BADUZA	**3rd Respondent**
TRUSTEES FOR THE TIME BEING OF THE BBZ INVESTMENT TRUST	**4th Respondent**
NOMONDE PATIENCE PILANE (born BADUZA)	**5th Respondent**
BIDEWELL TERRY TEMBA BADUZA	**6th Respondent**
FEZEKA PHYLLIS RACHEL BADUZA	**7th Respondent**
ZOLILE CYRIL MACEBO BADUZA	**8th Respondent**

CASE NUMBER: **1833/2006**

DATE ARGUED: 1 February 2007

DATE DELIVERED: 8 February 2007

JUDGE(S): Pickering J

LEGAL REPRESENTATIVES:
Appearances*:*
for the State/Applicant(s)/Appellant(s): Adv Breitenbach, Adv. Pillay
for the Accused/Respondent(s): Adv. M. Lowe

Instructing attorneys*:*
Applicant(s)/Appellant(s): Legal Resources Centre (Sarah Sephton)
Respondent(s): Wheeldon, Rushmere and Cole (MR. Brody)

CASE INFORMATION:

- *Nature of proceedings* :
- *Topic*:
- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: 1833/2006

In the matter between

LUNGISWA SNOWY KAMBULE	**Applicant**
And	
THE MASTER OF THE HIGH COURT	**1st Respondent**
HUGH ANTHONY WORMALD N.O.	**2nd Respondent**
NORAH KHUPELA BADUZA	**3rd Respondent**
TRUSTEES FOR THE TIME BEING OF THE BBZ INVESTMENT TRUST	**4th Respondent**
NOMONDE PATIENCE PILANE (born BADUZA)	**5th Respondent**
BIDEWELL TERRY TEMBA BADUZA	**6th Respondent**
FEZEKA PHYLLIS RACHEL BADUZA	**7th Respondent**
ZOLILE CYRIL MACEBO BADUZA	**8th Respondent**

JUDGMENT

PICKERING J:

Applicant seeks an order in the following terms:

> "*1. Setting aside the decision of the Master of the High Court (the above mentioned first respondent) not to take a decision in response to an objection lodged by applicant to the First and Final Liquidation and Distribution account of the Massed Joint Estate of the late Burton Baltimore Zitha Baduza who died on 21 June 2002 and Miss Norah Khupela Baduza;*
>
> *2. Directing Hugh Anthony Wormald N.O. (the above named second respondent) to amend the First and Final Liquidation and Distribution account by admitting the applicant's claim for maintenance in the amount R7927,00 per month from 21 June 2002 until her death or remarriage (less R2500,00 per month in the period from 21 June 2002 to the date of her vacation of 44 Longview Crescent, Queenstown);*
>
> *3. Directing that the costs of this application be borne by the Massed Joint Estate of the late Burton Balitmore Zitha Baduza*

and Norah Khupela Baduza."

The application was originally launched with reference only to the first and second respondents, the remaining six respondents being joined to the proceedings at a later stage after the issue of non-joinder was raised.

Central to this application is the issue as to whether or not applicant and the late Burton Baduza were parties to a valid customary law marriage. Before turning to deal with this issue it is necessary to set out the history to the matter.

It is common cause that Burton Baduza (to whom, with no disrespect intended, I shall hereinafter refer to as Burton as it was by this name that he was referred to throughout the proceedings) was divorced from his first wife, Mami, on 26 July 1956. On 3 October 1956 he married Norah Khupela Baduza, by civil rites in terms of the relevant provisions of the Black Administration Act no 38 of 1927. This marriage, being governed by the provisions of s 22(6) of that Act, was consequently out of community of property. She is now cited herein as third respondent. Their marriage subsisted until Burton's death on 21 June 2002. The four children born of their marriage are cited herein as fifth to eight respondents.

Applicant states that after the death of her first husband during 1984 she formed a close relationship with Burton. She alleges that during March 1985, when she and Burton were both living in the then so-called Republic of Transkei, he proposed to her. Thereafter, following certain customary rites including the payment by Burton of *lobola* to her parents, she and Burton married each other by customary law on 25 May 1985. She concedes that they failed to register this marriage despite the provisions of Part 2 of the Transkei Marriage Act no 21 of 1978, providing for the registration of customary marriages. According to applicant she retained her first husband's surname out of concern for her three sons born out of that marriage. She alleges that third respondent was well aware of her customary law marriage to Burton and that third respondent developed a jealous dislike for her in consequence thereof.

She states that durng 1987 Burton provided her with accommodation in a house owned by him at Ezibeleni, Queenstown, the ownership of which house he later transferred to her. Thereafter, during June 1998, a close corporation, the Burton Queenstown CC, of which Burton was the sole member, purchased a house in Milner Street, Queenstown and applicant moved into this house and resided there until September 2001. Burton then purchased another house at 44 Longview Crescent, Queenstown. According to applicant she took occupation of this house on 25 September 2001.

After Burton's death on 21 June 2002 second respondent was appointed executor of his deceased estate. The existence and the validity of applicant's alleged customary law marriage was, however, placed in dispute by, *inter alia*, third respondent. Second respondent thereafter attempted to claim rental from applicant in respect of her occupation of the Longview house. Applicant refused to pay such rental and eventually second respondent, in his capacity as executor of the deceased's estate, applied, together with the close corporation, for an order evicting applicant from the Longview house and for a declarator directing that the customary marriage alleged by her to have been contracted and consummated between herself and Burton on 25 May 1985 be declared void *ab initio* on the ground, *inter alia*, that it had not been registered in terms of the provisions of Part 2 of the Transkei Marriage Act. The matter came before Chetty J who, in dismissing the application, held, *inter alia*, that registration of the marriage in terms of the provisions of the Transkei Marriage Act was not an essential prerequisite for its validity. The judgment of Chetty J is reported as Wormald N.O. and others v Kambule [2004] 3 All SA 392 (E). This judgment was, however, overturned on appeal and the applicant was ordered to vacate the Longview house within 12 months of the date of the judgment. The appeal judgment is reported as Wormald N.O. and others v Kambule [2005] 4 All SA 629 (SCA). In upholding the appeal, however, Maya AJA (as she then was) writing for the majority, declined to deal with the application for a declaratory order concerning the validity of the customary marriage inasmuch as such order was superfluous to the appellant's claim for eviction (Wormald N.O. and others *supra* at 635d). The appeal was, however, upheld on the ground, *inter alia*, that no right to occupy the property

accrued to the respondent (the present applicant) as a result of her alleged customary marriage and that her occupation thereof therefore had no legal basis.

At 637 c-d Maya AJA stated further that:

> "*…it must be emphasised that if the respondent is able to establish that she was indeed married to the deceased by customary law, that fact would be a valid basis for a maintenance claim against the estate. In that case, even if the estate, through the executor, has evinced a negative attitude towards her intended maintenance claim, nothing precludes her from pursuing this option in an appropriate forum.*"

In a minority judgment Combrinck AJA (as he then was), however, upheld the appeal on the basis that registration of the customary marriage was indeed an essential prerequisite for its validity. It followed in his view that because appellant's alleged customary marriage had not been registered it was invalid.

It was no doubt in the light of the above cited remarks by Maya AJA that applicant thereafter lodged a claim against the estate in terms of s 2 of the Maintenance of Surviving Spouses Act no 27 of 1990. On 6 December 2005, however, second respondent advised applicant that he had discussed the matter with the heirs in the estate and had "decided to refute the claim."

On 6 March 2006 applicant's attorneys addressed a letter to second respondent taking issue with the fact that, *inter alia,* applicant's claim for maintenance in terms of the Maintenance of Surviving Spouses Act had not been included as part of the liabilities in the Liquidation and Distribution account. In response hereto second respondent advised applicant's attorneys that he had consulted with the heirs in the estate and had been instructed to repudiate any claim for maintenance in terms of the said Act which might be made against the estate by applicant.

On 13 March 2006 applicant's attorneys lodged an objection to the Liquidation

and Distribution account. On 20 March 2006 the second respondent advised the first respondent that on the instructions of the heirs of the estate he had decided to repudiate any claim by applicant against the estate for maintenance, adding that on the information at his disposal "*no marriage existed between the deceased and Mrs. Kambule under customary law or any other law.*"

Applicant then launched these proceedings in terms of s 35(10) of the Administration of Estates Act no 66 of 1965. At the hearing of this application both Mr. Breitenbach, who with Ms. Pillay appeared for the applicant, and Mr. Lowe who appeared for the respondent, were agreed that there was a material dispute of fact as to whether Burton had married applicant by customary law or whether they had merely had a casual relationship. This dispute, counsel were agreed, could not be resolved on the papers. Both counsel were further agreed, however, that the Court should deal with the crisp legal issues arising from the papers, firstly as to whether or not the failure by applicant and Burton to register their alleged customary marriage resulted in the invalidity thereof, and, secondly, in the event of this issue being determined in favour of applicant, whether applicant was to be considered a "*survivor*" in terms of the provisions of the Maintenance of Surviving Spouses Act. Counsel were agreed that should both these issues be resolved in favour of applicant the matter should then be referred for the hearing of oral evidence on the issue of whether or not applicant and Burton were married by customary law from 1985 until his death in 2002.

I turn then to consider the first of these issues namely that of the validity of the alleged customary marriage.

As was stated by Combrinck AJA in the second Wormald case *supra* at 638 e-f there are conflicting decisions in the Transkei Division as to whether registration under the Transkei Marriage Act no 21 of 1978 is a prerequisite to the validity of a customary marriage. The learned Judge stated in this regard as follows:

"*The one is Kwitshane v Magalela 1999 (4) SA 610 (Tk) and the other*

> *a judgment of Jafta AJP in Shwalakhe Sokhewu and another v Minister of Police (unreported – Transkei Division case no 293/94). In the former case it was held that registration was essential to a valid customary marriage whereas the later decided the contrary. The court* a quo *considered both judgments and concluded that Kwitshane* supra *had been wrongly decided and that the Sokhewu's judgment* supra *was correct and should be followed*."

Mr. Breitenbach referred to a further judgment in the Transkei Division in the matter of Feni v Mgudlwa and others, unreported case no 21/02 dated 5 December 2003, in which Pakade J also declined to follow the decision in Kwitshane's case *supra,* and approved the decision of Jafta AJP in Sokhewu's case *supra*.

In a matter not referred to by counsel, namely Nomaza Mvunelo v Minister of Home Affairs and others, unreported Transkei Division case no 744/2002, dated 20 July 2005, van der Byl AJ also declined to follow the decision in Kwitshane's case, *supra* and stated that he agreed with the conclusion reached by Jafta AJP in Sokhewu's case, *supra*. In this regard he stated as follows at p17 of the judgment:

> "*I do not intend to deal fully with my reasons for agreeing with that conclusion. Broadly, I wish to merely point out that in my view the intention of the Legislature in that Act was to recognize the values and boni mores of, particularly, the Xhosa people who have from time immemorial accepted customary unions as a valid marriage. An attempt has already been made under the previous dispensation to acknowledge such marriages in the Black Administration Act, no 1927, and to regulate certain consequences of such marriages. The requirement that such marriages be registered has in my opinion merely as its aim to exercise control over such marriages so as to ensure legal clarity for the existence of such marriages in the event of perhaps disputes whether such marriages in fact exist. The failure to register any such marriage cannot in my view affect the validity of any*

such marriage if it had taken place in accordance with the customs followed by the community in solemnizing any such marriages. Should the validity depend on registration the question arises as to what the status of the customary marriage will be until such time as it is registered. If this is correct the question arises as to what the consequences of any such marriage will be until it is registered. The failure to register is not given as a ground for a declaration of nullity as envisaged in section 49 of that Act. Furthermore, the question arises as to when a marriage must be registered since no period is prescribed within which it must be registered.

In my view the failure to register a customary marriage does not affect the validity of the customary marriage."

There was considerable debate before me between counsel as to the effect of the non-registration of the marriage in terms of the Transkei Marriage Act and as to the correctness of the conclusion reached in this regard by Combrinck AJA.

In the view that I take of the matter it is not necessary to determine what the effect of the non-registration of the customary marriage was in terms of the Transkei Marriage Act because, in my view, whatever perceived impediment there may be to the validity of the marriage because of the fact of non-registration under that Act, the marriage has been validated by the Recognition of Customary Marriages Act no 120 of 1998 ("the Recognition Act"). I reach this conclusion despite what was stated by Combrinck AJA at 640 f in the second Wormald case *supra*, namely:

"*In conclusion I need to mention that s 4(9) of the Recognition of Customary Marriages Act no 120 of 1998 provides that registration of a customary marriage is not essential to its validity. Counsel were however (correctly in my view) agreed that the Act only applies to marriages concluded after 15 November 2000 (the commencement date of the Act)*."

Counsel who argued the second Wormald case *supra*, before the Supreme Court of Appeal were the same counsel as appeared before me. They advised me that the statement by Combrinck AJA to the effect that counsel were agreed that the Recognition Act only applied to marriages concluded after 15 November 2000 is unfortunately incorrect. I was advised by Mr. Lowe, who appeared for the appellant in that matter, that, whilst he had contended in argument before the Supreme Court of Appeal that the Act only applied to marriages concluded after the commencement date thereof, Mr. Breitenbach and Ms. Pillay, who had appeared at the hearing of the appeal for the then respondent, had not conceded that this was so. This was confirmed by Mr. Breitenbach who further confirmed that he had argued before the Court to the contrary.

Apparently because of his erroneous belief that counsel had been agreed on the issue Combrinck AJA unfortunately did not set out his reasons for the conclusion reached by him. Furthermore, his judgment, being a minority judgment is not binding on me. Nevertheless, emanating as they do from a learned acting Judge of Appeal, now Judge of Appeal, the views expressed in the judgment as to the applicability of the Recognition Act are persuasive and must be accorded due deference. I am satisfied, however, with respect, that the conclusion reached by him is wrong.

There is no suggestion that the customary marriage allegedly entered into by applicant and Burton was prohibited by any provision of the Transkei Marriage Act. The marriage between Burton and third respondent, being a marriage in terms of the provisions of Act 38 of 1927, produced the legal consequences of a marriage out of community of property. Such being the case Burton was entitled, in terms of the provisions of s 3(1)(a)(iii) of the Transkei Marriage Act, to contract a customary marriage with applicant. S 3(1)(a)(iii) reads as follows:

> "*3(1) Nothing in this Act or any other law contained shall be construed as prohibiting –*
> *(a) any male person from contracting -*
> *(i) …*
> *(ii) …*

> *(iii) a customary marriage with any female person during the subsistence of any civil marriage which produces the legal consequences of a marriage out of community of property…*"

Mr. Lowe referred, however, to the provisions of s 10(1) and (4) of the Recognition Act and submitted that those provisions were such as to preclude the recognition of a customary marriage which was entered into during the subsistence of a civil marriage albeit that such marriage had been sanctioned by the provisions of the Transkei Marriage Act .

Section 10(1) provides:

> "*A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.*"

Section 10(4) provides:

> "*Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.*"

It is clear, however, in my view, that those provisions are prospective and not retrospective in effect. In Mvunelo v Minister of Home Affairs, *supra*, van der Byl AJ, in dealing with an argument that the provisions of s 10(4) were retrospective in effect, stated as follows at p13 -14:

> "*In my opinion it is the aim of section 10(4) of the Act to prohibit a party who is a spouse in a marriage entered into under the Marriage Act, 1961, to enter into any other marriage, which includes a customary marriage, obviously as from the commencement of that Act, ie., as from 15 November 2000. It could never have been the intention to*

render customary marriages entered into before the commencement of the Act invalid. As far as I could ascertain no provision existed before the commencement of the Act in terms of which a spouse who is a party to a marriage in terms of the Marriage Act, 1961, was prohibited from entering into a customary marriage. In so far as no person was prohibited, it is simply unimaginable that the Legislature would have intended to render any such customary marriages to be invalid. The retrospective invalidity of a customary marriage will most certainly have serious prejudicial consequences on the parties to such a marriage and the children born out of such marriage, such as, the right to claim damages from any person who has unlawfully caused the death of the other partner to the marriage (section 31 of the Black Laws Amendment Act, 1963 (Act 76 of 1963)), to have his or her customary marriage to be recognised as a marriage as provided in section 2 of the Act, to be acknowledged as a marriage in terms of section 10A of the Civil Proceedings Evidence Act, 1965, to be regarded as a dependant in terms of section 4 of the Workmen's Compensation Act, 1941, and the Pension Funds Act, 1956, the Government Employees pension Fund Law, 1996, etc. Such an interpretation is contrary, specifically, to the presumption of the interpretation of laws against retrospectivity."

I respectfully agree.

It is also of significance that s 3 of the Transkei Marriage Act has now been repealed by s 13 of the Recognition Act, read with the Schedule thereto. Further, and in any event, the marriage between Burton and third respondent was not entered into under the Marriage Act, 1961, but under the Black Administration Act, no 38 of 1927.

Mr. Lowe's submissions in this regard can therefore not be sustained.

I turn then to consider the relevant provisions of the Recognition Act.

Section 2(1) thereof provides as follows:

> "*A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.*"

"*Customary law*" is defined in s 1 of the Act as follows:

> "'Customary law' *means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples*."

"*Customary marriage*" is defined in s 1 as meaning "*a marriage concluded in accordance with customary law.*"

Section 4(1) of the Recognition Act provides that the spouses of a customary marriage have a duty to ensure that their marriage is registered.

Section 4(3)(a) provides as follows:

> "*(3) A customary marriage –*
>
> *(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the* Gazette*.*"

Despite the requirements as to registration the Act further provides, in s 4(9) thereof, that the "*failure to register a customary marriage does not affect the validity of that marriage.*"

It is clear, in my view, from the provisions of s 2 (1) and s 4(3)(a), that the Recognition Act applies to customary marriages entered into before its commencement. The sections say as much in plain language.

It is also immediately noteworthy that neither the definition of "*customary law*" nor the provisions of s 2(1) contain any reference to the requirement of registration. All that is required in terms of the Act for a customary marriage entered into prior to the commencement thereof to be recognised as valid is that such marriage should have been concluded in accordance with the

customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. In the circumstances I am satisfied that any customary marriage which was properly concluded in accordance with customary law as defined in s 1 of the Act, prior to the commencement of the Act, is valid regardless of whether such customary marriage was required to be registered in terms of any other law.

To interpret s 4(3)(a) in such a way as to impugn the validity of a customary marriage which was concluded in full accordance with customary law, merely because it was not registered in terms of the provisions of the Transkei Marriage Act, would, in my view, be not only to ignore the definitions of "*customary marriage*" and "*customary law*" contained in the Recognition Act but would also serve to undermine the dignity of the partners to the customary marriage and offend against the guarantee of equality contained in the Constitution.

In Sokhewu's case, *supra*, Jafta AJP stated at page 8 as follows:

> "*As a social institution marriage is as important to black people as it is to white people. The significance attached to a customary marriage in communities where such marriages are still concluded is by no means less than the one attached to a civil marriage. Nor is the dignity of parties to a customary marriage less than of the parties to a civil one.*"

See too: Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC).

In my view therefore a failure by parties to a customary marriage to register such marriage in terms of the Transkei Marriage Act would not affect its validity . The first issue must accordingly be decided in favour of applicant.

The second issue which arises for decision is whether or not applicant is a "*survivor*" in terms of the Maintenance of Surviving Spouses Act no 27 of 1990. Section 2(1) of that Act provides:

> "*2(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide therefore from his own means and earnings.*"

"*Survivor*" is defined in terms of s 1 of the Act as "*the surviving spouse in a marriage dissolved by death*"

The Act does not define "*spouse*" or "*marriage*".

Mr. Breitenbach referred to a number of cases relevant to the determination of this issue.

In Daniels v Campbell N.O. and Others 2004 (5) SA 331 (CC) the Constitutional Court dealt, *inter alia*, with the meaning to be attributed to the word "spouse" in terms of s 2(1) of the Maintenance of Surviving Spouses Act. The majority of the Court held that the ordinary meaning of the word "*spouse*" extended to a party to a monogamous Muslim marriage. Such a reading, said Sachs J, was not linguistically strained but rather corresponded to the way the word was generally used and understood (at 341E). The learned Judge stated further, at 343C that "*the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word* 'spouse' *a broad and inclusive construction*." At 343D-E Sachs J stated that an important purpose of the statute was to provide relief to a particularly vulnerable section of the population, namely, widows.

In Robinson and Another v Volks N.O. and Others 2004 (6) SA 288 (C) Davis J, dealing with a claim for maintenance in terms of the Maintenance of Surviving Spouses Act, held that the definition of "*survivor*" was to be read as including a reference to the "*surviving partner of a permanent life partnership*".

In Bhe and others v Magistrate, Khayelitsha, and Others, (Commission for Gender Equality as Amicus Curiae) 2005 (1) SA 580 (CC) the Court dealt with

the constitutional validity of both s 23 of Act 38 of 1927 and of the principle of primogeniture in the context of the customary law of succession. Both were held to be unconstitutional. At 629G – 630G Langa DCJ (as he then was) considered the applicability of the order of the Court to polygynous marriages and held that "*the exclusion of spouses in polygynous unions from the order would prolong the inequalities suffered by those subject to the customary law of succession …. An appropriate order will therefore be one that protects partners to monogamous and polygynous customary marriages ….*"

Whilst Mr. Lowe recognised in the light of the above decisions that a discriminatory interpretation of s 2(1) of the Maintenance of Surviving Spouses Act was unsustainable, he submitted that there was no warrant for the extension of the meaning of the word "spouse" to include the surviving partner of a polygynous customary marriage entered into during the existence of a civil marriage. This, he submitted, would allow for a succession of widows, one under the provisions of the relevant Marriage Act and one or more under the customary law, to become surviving spouses in terms of s 2(1).

I am unable to uphold his contentions in this regard. The argument is, in my view, self-defeating. Once the concession has been made that there is no room for any discriminatory interpretation of the section it cannot be contended that the surviving partner to a valid customary marriage, which in terms of s 2(1) of the Recognition Act is to be "*for all purposes*" recognised as a marriage, is not a "*spouse*" within the meaning of s 2(1) of the Maintenance of Surviving Spouses Act. There can be no doubt whatsoever, in the light of the provisions of s 2(1) of the Recognition Act and on a proper, constitutionally acceptable interpretation of s 2(1) of the Maintenance of Surviving Spouses Act, that, if applicant can establish that she was validly married at customary law to Burton at the time of his death, she would fall within the definition of "*survivor*" in terms of s 2(1) of the Maintenance of Surviving Spouses Act.

This issue must therefore also be decided in favour of applicant.

As both issues have been decided in applicant's favour an order must issue referring the matter for the hearing of *viva voce* evidence on the issue as to whether or not applicant was the customary law wife of Burton from 1985 until his death in 2002 and for adjudication upon the remaining issues between the parties.

Accordingly the following order will issue:

1. The two issues raised for decision in these proceedings are determined in favour of applicant.

2. The application is postponed to a date to be arranged by the parties with the Registrar of this Court for the hearing of *viva voce* evidence and for adjudication upon the remaining issues between the parties.

3. The issue to be resolved by the hearing of oral evidence is whether or not the applicant was the customary law wife of Burton Baltimore Zitha Baduza from 1985 until his death in 2002.

4. Save in the case of any persons who have already deposed to affidavits in these proceedings, no party shall be entitled to call any person as a witness at the aforesaid hearing unless:
   4.1 he or she has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or
   4.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respects of his evidence.

5. Any party may subpoena any person to give evidence at the aforesaid hearing, whether such person has consented to furnish a statement or not.

6. The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned at the aforesaid hearing.

7. Within 45 days of the making of this order, each of the parties shall make discovery on oath of all documents relating to the issues referred to above, which documents are or have at any time been in the possession or under the control of such party.

8. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

9. The costs of the applicant's application in terms of Uniform Rule 6(5)(g) and all other issues of costs in relation to the proceedings in this application to date shall be reserved for later determination.

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT