***FORM A***
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

PARTIES: **OFFIT ENTERPRISES (PTY) LTD** First Applicant

**OFFIT FARMING ENTERPRISES (PTY) LTD** Second Applicant

and

**THE PREMIER OF THE EASTERN CAPE GOVERNMENT** First Respondent

**COEGA DEVELOPMENT CORPORATION (PTY) LTD** Second Respondent

**THE MINISTER OF PUBLIC WORKS** Third Respondent

**THE MINISTER OF TRADE AND INDUSTRY** Fourth Respondent

- Registrar CASE NO:
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE HEARD:
DATE DELIVERED: 9 May 2006

JUDGE(S): **EBRAHIM J**

LEGAL REPRESENTATIVES -
*Appearances:*
- for the State/Applicant(s)/Appellant(s): **Mr R G Buchanan SC**

for the accused/respondent(s): **Mr P J De Bruyn SC**
-

*Instructing attorneys:*
- Applicant(s)/Appellant(s): **Rushmere Noach Incorporated**
- Respondent(s): **Le Roux Inc**

CASE INFORMATION -
- *Nature of proceedings*: **application for leave to appeal)**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(SOUTH EASTERN CAPE LOCAL DIVISION)**

**CASE No. 1764/05**

In the matter between:

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| **OFFIT ENTERPRISES (PTY) LTD** | First Applicant |
| **OFFIT FARMING ENTERPRISES (PTY) LTD** | Second Applicant |

and

| | |
|---|---|
| **THE PREMIER OF THE EASTERN CAPE GOVERNMENT** | First Respondent |
| **COEGA DEVELOPMENT CORPORATION (PTY) LTD** | Second Respondent |
| **THE MINISTER OF PUBLIC WORKS** | Third Respondent |
| **THE MINISTER OF TRADE AND INDUSTRY** | Fourth Respondent |

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**JUDGMENT**
**(in an application for leave to appeal)**

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**EBRAHIM J:**

1. This is an application by the first and second respondents for leave to appeal against the whole of the judgment delivered and the order made by this Court on 31 January 2006. The first and second applicants oppose the application. For the sake of convenience the parties are referred to as set out in the main application.

2. It is apparent from the judgment delivered by the Court that the applicants

challenged the validity of the notice of expropriation on various grounds. In order to determine the validity of the notice of expropriation the Court was required to interpret various provisions of the Expropriation Act, 63 of 1975 ('Expropriation Act'), the Eastern Cape Land Disposal Act, 7 of 2000 ('Land Disposal Act'), and the Companies Act, 61 of 1973.

3. Mr De Bruyn SC, who appeared with Mr Pienaar for the first and second respondents, submitted this Court had erred in respect of the findings it had made and, as a result, in declaring the notice of intended expropriation invalid and setting it aside. He contended there were reasonable prospects of success on appeal and the first and second respondents should therefore be granted leave to appeal.

4. Mr Buchanan SC, who appeared for the applicants, submitted that there were no reasonable prospects of success. He contended that the respondents had to persuade this Court that there was a reasonable prospect of success in respect of most, if not all, the substantive grounds on which this Court found the notice to be invalid. Failing this, it was an academic exercise to grant leave to appeal. In any event, another Court would not reach a different conclusion in respect of any of the findings made by this Court and the first and second respondents should not be granted leave to appeal.

5. In his submissions, Mr De Bruyn stated that this Court had erred in concluding that the Department of Trade and Industry ('DTI') was the shareholder of the "A" class share that the second respondent had allotted to the DTI. He contended that

not only was there no agreement to transfer the “A” class share but the DTI had also refused to accept delivery of the share and therefore never became the owner thereof. In respect of a movable ownership did not pass unless the transferee accepted delivery even if the refusal to accept delivery was unlawful. In support of this Mr De Bruyn referred to what was said in *Ex Parte Smith* 1956 (1) SA 252 (SR) at 254A. Mr De Bruyn submitted further that in *Weeks and Another v Amalgamated Agencies Ltd* 1920 AD the Court had stated that there had to be an intention on the part of both parties that *dominium* must pass.

6. Mr De Bruyn contended therefore that there was a reasonable prospect that another Court would conclude that the “A” class share was not transferred to the DTI and it was not the owner thereof. The conclusion by this Court that the second respondent was not a subsidiary of the Eastern Cape Development Corporation (Pty) Ltd was of vital importance as this permeated the whole judgment. He submitted that if this finding were to be reversed a large portion of the judgment dealing with public interest would be affected.

7. I accept there is a reasonable prospect that another Court may place a different construction on the relevant provisions in the Companies Act and hold that the allotment of the “A” class share to the DTI was void. If so, this would have an affect on the Court’s findings on various other issues. Accordingly, I am of the view that the first and second respondents should be granted leave to appeal the Court’s finding in this regard.

8. Mr De Bruyn submitted, further, that this Court erred in finding that the provisions of s 7(1) and 7(2) of the Expropriation Act were peremptory and not merely directory. He contended that the application of a strict interpretation to these provisions resulted in a grave injustice to the respondents. The respondents' contentions were supported by the decision of Galgut J in *Maharaj v Verulam Town Council and Another* 1988 (3) SA 777 (D & CLD) that the provisions of s 7 of the Expropriation Act were directory and not peremptory. That decision had not been overturned and was direct authority against the finding to the contrary by this Court.

9. Mr Buchanan contended that the Court's finding in the *Maharaj* case related to s 7(2)(d) of the Expropriation Act. In terms of this provision, the attention of the owner of the property is to be drawn to the fact that, if any person has a right as contemplated in s 9(1)(d)(i), (iii) or (iv), the Minister may withdraw the amount offered in compensation. The Court had therefore not expressed an opinion on the other sub-provisions of s 7 and the *Maharaj* case was not authority for the proposition that the other provisions predicated by the word 'shall' were all directory.

10. While Mr Buchanan's submission regarding the *Maharaj* case is valid, I nevertheless accept that there is a reasonable prospect that another Court may conclude that the relevant provisions of s 7 are directory and not peremptory. Accordingly, in respect of this issue, too, the first and second respondents are to be granted leave to appeal.

11. In relation to the Land Disposal Act, I similarly accept there is a reasonable

prospect that another Court may place an interpretation different to that of this Court on the applicable provisions. In so doing, such Court may conclude that the said Act empowers the first respondent to expropriate the applicants' immovable properties in order to transfer the properties to a third party and that the notice of intended expropriation is therefore valid.

12. I have taken cognisance of Mr Buchanan's submission that the respondents must persuade this Court there is a reasonable prospect of success in respect of each of the grounds that this Court held the notice to be invalid. However, even though Mr De Bruyn did not specifically address argument in relation to the Court's interpretation of s 2(1) of the Expropriation Act, the respondents stated in the notice of appeal that they seek leave to appeal the Court's findings in this regard.

13. In my view, the challenges directed at the validity of the notice are interconnected with the result that a finding in respect of one ground has consequences in respect of another. Moreover, the thrust of the respondents' arguments throughout have been that the first respondent was empowered, in terms of the Expropriation Act and the Land Disposal Act, to expropriate the immovable properties of the applicants. In addition, I agree with Mr De Bruyn that this matter raises novel and complex issues of law. I consider it prudent, therefore, that the findings of this Court be ventilated fully on appeal and that the respondents not be denied the right to do so.

14. The parties are *ad idem* that should this Court grant leave to appeal that such

leave should be to the Supreme Court of Appeal. I agree.

15. In relation to costs the parties are in agreement, and I consider it proper, that costs should be costs in the appeal.

16. In the result there is an order as follows:

(a) The first and second respondents are granted leave to appeal against the whole of the judgment this Court delivered and the order it made on 31 January 2006.

(b) It is directed, in terms of s 20 (1) of the Supreme Court Act, 59 of 1959, as amended, that the appeal be heard by the Supreme Court of Appeal.

(c) The costs of the application for leave to appeal shall be costs in the appeal.

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**Y EBRAHIM**
**JUDGE OF THE HIGH COURT** **Date: 5 MAY 2006**

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| Judgment handed down on | : | 9 May 2006 |
| Counsel for the first and second applicants | : | Mr R G Buchanan SC |
| Attorneys for the first and second applicants | : | Rushmere Noach Incorporated<br>21 Chapel Street<br>Central<br>PORT ELIZABETH |

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| Counsel for the first and second respondents: | Mr P J De Bruyn SC<br>with Mr B J Pienaar |
| Attorneys for the first and second respondents: | Le Roux Inc<br>25 Cuyler Street<br>Central<br>PORT ELIZABETH |