THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 701/2012

REPORTABLE

In the matter between:

Andre Herholdt	Appellant
and	
Nedbank Limited	Respondent
and	
Congress of South African Trade Unions	*Amicus Curiae*

Neutral citation: *Herholdt v Nedbank Ltd* (701/2012) **[**2013] ZASCA 97 (5 September 2013)

Coram: Nugent, Cachalia, Shongwe, Wallis JJA and Swain AJA.

Heard: 23 August 2013

Delivered: 5 September 2013

Summary: CCMA arbitration – review – s 145(2)*(a)* of the Labour Relations Act 66 of 1995 – grounds of review restated.

ORDER

On appeal from: Labour Appeal Court (Murphy AJA, Mlambo JP and Mocumie AJA, concurring, sitting as court of appeal from the Labour Court).

The appeal is dismissed with costs such costs to include those attendant upon the employment of two counsel.

JUDGMENT

CACHALIA and WALLIS JJA (NUGENT, SHONGWE JJA AND SWAIN AJA concurring):

[1] Nedbank Limited dismissed Mr Andre Herholdt, who was employed as a financial planner, for dishonestly failing to disclose a conflict of interest arising from his being appointed a beneficiary in the will of a client, Mr John Smith. He successfully challenged his dismissal in arbitration proceedings before the CCMA in terms of s 138 of the Labour Relations Act (the LRA).[1] Gush J, in the Labour Court, upheld a review of the arbitrator's award and set it aside. This is an appeal, with the leave of this court, against the decision of the Labour Appeal Court (the LAC) dismissing an appeal against the judgment of Gush J.

[1] Act 66 of 1995.

[2] It is only necessary to refer briefly to the facts. Two wills were relevant to the charge against Mr Herholdt. The first was executed on 28 December 2007 and nominated him as a legatee to the proceeds of an investment valued at £92 000. The second, executed on 27 May 2008, appointed Mr Herholdt and his life partner as the sole heirs to Mr Smith's estate. Neither will was disclosed to Mr Herholdt's line manager, Mr Snyman, as required by Nedbank's policy on conflicts of interest. That is so notwithstanding that, on either 22 or 23 May 2008, Mr Herholdt had asked his regional manager, Ms Esterhuizen, what he should do if he was made the beneficiary of a client's will and was specifically told that in that event he had to disclose the details in full to his line manager.

[3] In those circumstances the only issue for the CCMA arbitrator to decide was whether the failure to disclose the existence of the wills, and the fact that a client had made Mr Herholdt a beneficiary, was dishonest. Mr Herholdt faced two difficulties in this regard. When Mr Smith had first mooted making him a beneficiary, he was, on his own version, 'uncomfortable' with the notion and sought advice from Mr Williamson, an employee of an associated company that prepared wills for Nedbank customers at the instance of financial advisers such as Mr Herholdt. Mr Williamson advised him that there were possible issues of a conflict of interest and the potential for a complaint of exercising undue influence over the client. He told Mr Herholdt that a letter should be prepared and signed by Mr Smith confirming that he made this bequest of his own free will. He also told Mr Herholdt that the fact of the bequest should be disclosed to his manager. The letter was prepared and signed in accordance with this advice but left, together with the will, with

Mr Williamson. A similar letter was prepared and signed and left with Mr Williamson after the second will was executed.

[4] It was therefore undisputed that Mr Herholdt did not bring the two wills and their terms, so far as they conferred benefits upon him, to the attention of his line manager or any other appropriate person in the hierarchy of the bank. It could not be disputed that he was aware of the need to do this in the light of the unchallenged evidence of Mr Williamson and Ms Esterhuizen. That left him with the explanation that he thought Mr Williamson would furnish the letters to his manager on his behalf. No factual foundation was laid for him to entertain such a belief. He did not even say that he had asked Mr Williamson to do this nor, when the issue arose as a result of an investigation by the bank following a query from the Financial Services Board, did he respond by saying that he had done what was necessary to make a disclosure because he had requested Mr Williamson to make it on his behalf. Mr Williamson was clear that he undertook no such responsibility.

[5] The Labour Court and the LAC held that the only inference that could be drawn from the evidence was that Mr Herholdt deliberately chose not to disclose the existence of the two wills to his employer when he knew that he was obliged to do so. As he had not said why he did this, preferring to advance several spurious excuses, including the proposition that the wills did not give rise to a conflict of interest between the bank and its customer and that he was not aware of the obligation to disclose, their conclusion was that his non-disclosure was dishonest.

[6] The arbitrator had reached a contrary conclusion. This Court would ordinarily have been disinclined to entertain the appeal because the

appellant principally attacked the factual findings of the LAC. And this court has made it clear that it will not interfere with a decision of the LAC only because it considers it to be wrong. Incorrect factual findings fall into this category. There must, in addition, be special circumstances that take it out of the ordinary.[2]

[7] The appellant, however, submitted that in setting aside the commissioner's award the Labour Court approached its task on review by embarking on an in depth analysis of every disputed factual issue and then substituted its view for that of the commissioner ie by employing a methodology appropriate to an appeal. It is submitted on the appellant's behalf that even if aspects of the commissioner's reasoning were incorrect there was no basis to impugn the award; all that was required was to ascertain whether or not the evidence reasonably supported the commissioner's decision. The LAC, it was submitted, not only erroneously confirmed the approach by the Labour Court, but proceeded to question the utility of maintaining the distinction between appeals and reviews for CCMA awards.

[8] Moreover, the Congress of South African Trade Unions (Cosatu) intervened and was admitted as *amicus curiae* by order of this court, in view of its concern that the labour courts have unduly relaxed the grounds for challenging CCMA awards. This relaxation appears from the judgment of the Labour Court initially and thereafter the judgment of the LAC, where it was indicated that the ground of review of gross irregularity in respect of CCMA arbitrations under s 145(2)*(a)*(ii) of the LRA involves the consideration of what the LAC termed 'latent

[2] *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 *ILJ* 1618 (SCA) para 14.

irregularities' and 'dialectical unreasonableness' and that these provide a basis for review more extensive than the level of unreasonableness identified as a ground of review in *Sidumo*.[3] Cosatu's view appears to be supported by a recent article concerning the effect of three recent judgments of the LAC, including the one in the present case, which poses the question whether the test for review of CCMA awards enunciated in *Sidumo* is in decline.[4] There are thus clearly special circumstances that require us to entertain the appeal.

[9] It is unnecessary to traverse in detail the history of reviews of CCMA arbitration awards under the LRA. Those responsible for drafting the LRA deliberately chose arbitration on a relatively informal basis as the preferred option for dealing with most issues arising in the context of labour relations and under the LRA. In particular this was to be the means for resolving disputes over dismissals, which constitute the bulk of the work of the CCMA.[5] They were also deliberate in rejecting the possibility of appeals and selecting the narrowest possible grounds of review as the basis for challenging arbitration awards.[6] They did so, not because review is an inexpensive or speedy way of reconsidering the award of an arbitrator, but because it sets an extremely high standard for setting aside an award and, together with the cost and delays inherent in reviews, it was thought that this would act as a deterrent to parties challenging arbitration awards and thereby support the overall aim of a speedy and inexpensive resolution of such disputes.

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[3] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC).
[4] A Myburgh 'The LAC's Latest Trilogy of Review Judgments: Is the *Sidumo* Test in Decline?' (2013) 34 *ILJ* 19.
[5] The current annual workload of the CCMA is around 160 000 arbitrations a year of which 80 per cent are dismissal disputes.
[6] The grounds were copied from those in s 33(1) of the Arbitration Act 42 of 1965.

[10] The height of the bar set by the provisions of s 145(2)*(a)* of the LRA[7] is apparent from considering the approach to reviews of arbitral awards under the corresponding provisions[8] of the Arbitration Act 42 of 1965.[9] The general principle is that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a 'gross irregularity' is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. Where the arbitrator's mandate is conferred by statute then, subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law.

[11] Since the inception of the CCMA various courts have sought to construe those provisions to provide a more generous standard of review, that is, one more easily satisfied. That culminated in this court, in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for*

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[7] '145 Review of arbitration awards
(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –
(a) . . .
(b) . . .
(1A) . . .
(2) A defect referred to in subsection (1), means –
(a) that the commissioner –
(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers . . .'

[8] Section 33(1) of the Arbitration Act 42 of 1965 provides:
' (1) Where—
(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
(c) an award has been improperly obtained,
the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[9] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA); (2007 (5) BCLR 503; [2007] 2 All SA 243 (SCA).

Conciliation, Mediation and Arbitration,[10] holding that PAJA[11] applied to CCMA arbitrations and had, by necessary implication, extended the grounds of review in respect of their awards.[12] This meant that a reviewing court could, in addition to the requirements under s 145(2)*(a)* of the LRA, review the award for reasonableness. It would do so by examining the 'substantive merits' of the award, not to decide whether the decision was correct, but to determine whether the award was rationally related to the reasons given by the arbitrator. Once it was found that the award was appreciably or significantly infected with bad reasons it fell to be set aside irrespective of whether it could otherwise be sustained on the material in the record.[13]

[12] That decision was taken on appeal to the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*[14] and overruled in two respects. First it was held that although a CCMA award involved administrative action it did not fall within PAJA.[15] Second the court enunciated an unreasonableness test that differed from the test adopted by this court, namely, whether the award was one that a reasonable decision-maker could not reach.[16] That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the

[10] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA).
[11] The Promotion of Administrative Justice Act 3 of 2000.
[12] Para 23.
[13] Paras 31-34.
[14] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 110. The decision was followed and affirmed in this court in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* 2009 (3) SA 493 (SCA) para 27.
[15] Para 104.
[16] Para 110.

arbitrator.[17] On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.

[13] The distinction between review and appeal, which the Constitutional Court stressed is to be preserved,[18] is therefore clearer in the case of the *Sidumo* test. And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'.[19] The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that … awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result.[20] The *Sidumo* test will, however, justify setting aside an award on review if the decision is

[17] The test is whether the decision is one that could *not* reasonably be reached, which is a more stringent test than asking whether the decision is one that the arbitrator could reasonably reach. It is concerned primarily with the result rather than the process of reasoning of the arbitrator. *Fidelity Cash Management Service v CCMA & others* (2008) 29 *ILJ* 964 (LAC) para 103.
[18] *Sidumo* para 108.
[19] *Sidumo* para 109 approving a passage from Professor Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) 318. The passage is repeated in the second edition (Juta, Cape Town, 2012) 352. It is an approach that has been consistently followed in this court. *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (3) SA 494 (SCA); *Edcon Ltd v Pillemer NO & others* (2009) 30 *ILJ* 2642 (SCA); *Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others* (2011) 32 *ILJ* 2916 (SCA). It follows that the proposition by Murphy AJA in the court below at para 55 that 'few decisions that are wrong are likely to be upheld as reasonable' cannot be supported.
[20] *Fidelity Cash Management Service v CCMA & others* (2008) 29 *ILJ* 964 (LAC) para 100.

'entirely disconnected with the evidence'[21] or is 'unsupported by any evidence' and involves speculation by the commissioner.[22]

[14] After *Sidumo* the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145(2)*(a)* and *(b)* of the LRA. The latter had not been extinguished by the Constitutional Court[23] but were to be 'suffused' with the constitutional standard of reasonableness. What this meant simply is that a 'gross irregularity in the conduct of the arbitration proceedings' as envisaged by s 145(2)*(a)*(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case. Beyond that there was no reason to think that their meaning had been significantly altered provided they were viewed in the light of the constitutional guarantee of fair labour practices.

[15] Although this should not have been the case after *Sidumo,* there has been a development in a different direction, aimed, as were the pre-*Sidumo* cases already referred to, at providing a more generous standard for review of CCMA arbitration awards. It is unnecessary to trace this development through the cases.[24] It suffices to deal with its formulation in the present case, which represents its culmination. Counsel for COSATU

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[21] *Transnet Ltd v CCMA & others* (2008) 29 *ILJ* 1289 (LC) para 27.
[22] *Karan Beef (Pty) Ltd v Mbovane NO & others* (2008) 29 *ILJ* 2959 (LC) paras 22 and 25.
[23] *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 *ILJ* 1618 (SCA) para 5.
[24] Anyone interested can follow it in a series of articles by Anton Myburgh in the Industrial Law Journal. See 'Sidumo v Rustplats: How have the courts dealt with it? (2009) 30 *ILJ* 1; 'Determining and reviewing sanction after Sidumo' (2010) 31 *ILJ* 1; 'Reviewing the review test: recent judgments and developments' (2011) 32 *ILJ* 1497; and 'The LAC's Latest trilogy of review judgments: Is the *Sidumo* test in decline?' (2013) 34 *ILJ* 19.

made submissions under the two heads of 'latent irregularity' and 'dialectical unreasonableness' and it is convenient to adopt that nomenclature.

[16] A latent irregularity, sometimes referred to as process related unreasonableness , is one arising from the failure by the arbitrator to take into account a material fact in determining the arbitration. It includes the converse situation of taking into account a materially irrelevant fact. If that occurs, it is said to be a latent irregularity justifying the setting aside of the award. The LAC expressed it thus:

'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined.'[25]

The LAC went on to endorse the following passage in the judgment of van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*:[26]

'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[17] Two points flow from this approach. The first is that the threshold for interference with the award is lower than in terms of the judgment in *Sidumo*.[27] The second is that it is immaterial whether the result reached

[25] Para 36.
[26] *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* (2010)] 31 *ILJ* 452 (LC) para 17.
[27] Murphy AJA said as much in para 39 of his judgment in the LAC.

by the arbitrator is one that could reasonably be reached on the material before the arbitrator. The mere possibility of prejudice will suffice to warrant interference.

[18] The origin of this approach is a dictum in the minority judgment of Ngcobo J in *Sidumo*,[28] where he said in the context of a discussion of s 145(2) of the LRA that:

'Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.'

[19] Ngcobo J did not explain how material an oversight in regard to the facts would have to be to result in the award being set aside, nor did he seek to reconcile this approach with a long chain of authority, which he had cited and relied upon, that held that an error of fact or law by the arbitrator would not justify the setting aside of the award, unless it had the result that the arbitrator was diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination in the arbitration.[29] This did not relate to the outcome of the arbitration but to the conduct of the arbitration.

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[28] Para 267.

[29] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *Goldfield Investments Ltd & another v City Council of Johannesburg & another* 1938 TPD 551 at 560 and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras 52 to 78 and 85 to 88.

[20] It is unnecessary to analyse this dictum further because it results in an approach to the review of CCMA arbitration awards that is contrary to that endorsed by the majority judgment in *Sidumo*. This is apparent from examining the manner in which the two judgments dealt with the facts of that case. Ngcobo J analysed the award of the arbitrator and held that, although a little terse, it could be construed in a way that did not involve the arbitrator in making a material error in regard to the facts. By contrast the majority held that the arbitrator had erred in certain respects in making his award, in particular in holding that the relationship of trust between employer and employee had not been breached, but held that it was nonetheless an award that a reasonable decision-maker could make in the light of all the facts. In other words the approach of the majority was clearly inconsistent with the approach suggested by Ngcobo J. As we, and all courts, are bound by the majority judgment the development of the notion of latent irregularity, in the sense that it has assumed in the labour courts, cannot be accepted.

[21] That does not mean that a latent irregularity, as Schreiner J originally used that term in the *Goldfield Investments* case, is not a gross irregularity within the meaning of s 145(2)*(a)*(ii). It is, but only in the limited sense mentioned earlier, where the decision-maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner. That is well illustrated by the facts of that case. A magistrate seized with a valuation appeal was required under the relevant legislation to conduct a fresh enquiry into the question of the proper value of the property. Instead he refused to consider the evidence of value tendered by the appellant and approached the matter on the basis that he could only amend the valuation if it was clearly erroneous. In the circumstances he did not enter upon the correct enquiry and his decision was set aside.

[22] Turning then to 'dialectical unreasonableness' this is said to be unreasonableness flowing from the process of reasoning adopted by the arbitrator. The question facing a reviewing court, as expressed by the LAC in this case, is whether the decision 'is supported by arguments and considerations recognised as valid, even if not conclusive'.[30] And further that:

'Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense.'[31]

The LAC went on to say that:

'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of [the] enquiry. The threshold for interference is lower than that: it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different.'[32]

[23] This approach is also based on a dictum by Ngcobo J, this time in *New Clicks*,[33] that reads:

'There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decisionmaker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decisionmaker.'

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[30] Para 34.
[31] Para 36.
[32] Para 39.
[33] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 511.

[24] The first thing to note about this dictum is that it expressly relates to the provisions of PAJA and the manner in which they are to be applied. As PAJA does not apply to reviews under s 145(2) of the LRA it is of no application to CCMA awards. Second, if applied by considering the reasoning of a CCMA arbitrator and determining that the reasons given for making an award are not such as to justify that award, its effect is to resuscitate this court's decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration, supra*, even though that decision was expressly overruled in *Sidumo*. Once again that is not a permissible development of the law.

[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

[26] We return to this case. As we indicated earlier, the issue in dispute was whether Mr Herholdt had dishonestly failed to disclose a conflict of interest regarding the two wills. The Commissioner correctly stated in her award that this was the issue. She dealt exhaustively with the evidence and concluded that he had not been dishonest. Given the depth of her

treatment of the evidence it could hardly be said that she misconceived the nature of the enquiry. But it is clear from the judgments of both the Labour Court and of the LAC that her conclusion was not one that a reasonable decision-maker could have reached in the light of the evidence and the issues she was called upon to decide. The result was 'substantively unreasonable in the sense that no reasonable commissioner, acting reasonably, could have reached the decision on the evidence and the inferences drawn from it.' [34] So it is clear that notwithstanding its excursus on 'latent irregularities' and 'dialectical unreasonableness' the LAC was alive to *Sidumo* and applied it correctly. There is thus no basis for this court to interfere with its decision. The appeal is thus dismissed with costs, including the costs attendant on the employment of two counsel.

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A CACHALIA

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M J D WALLIS

JUDGES OF APPEAL

[34] Judgment of the court *a quo* para 51.

Appearances

For appellant:	A Findlay SC (with him R Ungerer) Instructed by: Weber Attorneys, Durban Azar & Havenga Attorneys Inc, Bloemfontein
For respondent:	A Myburgh SC (with him T Ngcukaitobi) Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton Phatshoane Henny Attorneys, Bloemfontein.
For *Amicus Curiae*:	W H Trengove SC (with him J Brickhill); (Heads of argument prepared by H Maenetje SC and J Brickhill) Instructed by: McIntyre & Van der Post, Bloemfontein.