THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 444/2012
Not Reportable

In the matter between

PERAPANJAKAM NAIDOO	**FIRST APPELLANT**
REGINALD TOBIAS MARAIS	**SECOND APPELLANT**

and

EP PROPERTY PROJECTS (PTY) LTD	**FIRST RESPONDENT**
ANDRIES FRANCOIS MARAIS	**SECOND RESPONDENT**
REGISTRAR OF DEEDS, CAPE TOWN	**THIRD RESPONDENT**
P B HODES, SC	**FOURTH RESPONDENT**

Neutral citation: *Naidoo v EP Property Projects (Pty) Ltd* (444/2012) [2014] ZASCA 97 (31 July 2014)

Coram: Mpati P, Lewis, Ponnan, Bosielo and Willis JJA

Heard: **March 2014**

Delivered: **31 July 2014**

Summary: Arbitration – Arbitration Act 42 of 1965 – arbitration agreement made an order of court by mutual consent – court order not set aside – the legal effect thereof – whether arbitrator had jurisdiction to conduct the arbitration – review

of the arbitrator's award (s 33) – whether arbitrator's conduct constitutes reviewable misconduct which justifies the setting aside of the award – whether the court erred in awarding costs against the funder.

ORDER

On appeal from: The Western Cape High Court (Louw J sitting as a court of first instance):

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel where so employed.

JUDGMENT

Bosielo JA (Mpati P, Lewis, Ponnan and Willis JJA concurring):

[1] At the centre of this case is a dispute over the ownership of an undeveloped coastal property described as Portion 14 of the farm Sea View 28 in the Nelson Mandela Bay Metropolitan Municipality (the property). The second appellant, Reginald Tobias Marais (Tobias), and EP Property Projects Ltd (EP), duly represented by Gary Stevenson (Gary), one of its two directors, have staked rival claims to this property.

[2] During 1980, EP represented by Gerald John Blignault (Blignault), acquired ownership of the property. Blignaut was EP's sole shareholder until he sold all of his shares in EP to Alex Campbell Stevenson (Alex) for R400 000 during November 1990. These shares were subsequently transferred into the Alexander Campbell Stevenson Family Trust (the Trust). Pursuant to the purchase, all of EP's erstwhile directors resigned. Alex and Gary were registered with the Registrar of Companies as EP's

new directors. As a result, the Stevensons exercised control over EP, its assets and affairs until about 2005 (being some 15 years).

[3] In 2005, Blignaut, purporting to represent EP, attempted to convene a meeting of the members of EP in terms of s 220(2) of the Companies Act 61 of 1973 (the Companies Act) for 27 May 2005 to remove both Alex and Gary as directors of EP. In order to pre-empt this, EP, the Trust and both Alex and Gary acting as EP's directors, approached the Eastern Cape High Court for an order interdicting and restraining Blignaut from purporting to act on behalf of EP.

[4] On 26 May 2005, the parties reached an agreement which resulted in the meeting scheduled for 27 May 2005 not taking place. Blignaut undertook to desist from holding himself out as a member of or being entitled to represent EP in any manner. In an attempt to resolve this dispute between them finally, Blignaut agreed to institute proceedings for an order declaring him to be the sole member of EP by 6 July 2005. Importantly, the parties agreed that, should Blignaut fail to institute the envisaged proceedings as agreed, he would forthwith be barred from continuing to act as if he were still EP's sole member. This agreement was made an order of court.

[5] Pursuant to this order, Blignaut instituted proceedings in the South Gauteng High Court, then the Witwatersrand Local Division, which were subsequently set aside as irregular. As Blignaut never pursued these proceedings any further, he was, in terms of the court order of 26 May 2005, effectively barred from holding himself out as the sole member of EP. Ordinarily, this should have been the end of the matter.

[6] However, the matter did not rest there. Some five months later, in February 2006, Blignaut, in breach of the court order, once again purporting to act on behalf of EP, tried to transfer the property to Tobias. EP represented by the Stevensons then brought an application against Tobias and Blignaut challenging the validity of the purported transfer of the property to Tobias and interdicting him from dealing with the property, pending an action to confirm its title to the property. The application was heard by Bozalek J who made an order by consent between Tobias and EP postponing it to 6 October 2006, and interdicting Tobias from in any way dealing with, selling, disposing, transferring or encumbering the property pending the outcome of the proceedings.

[7] On 26 October 2006 the matter was heard by Moosa J. The parties agreed to submit their dispute to arbitration before Hodes SC, and, pending the arbitration, that Tobias be interdicted from in any way dealing with, selling, disposing of, transferring or encumbering the immovable property. This agreement for the referral of the dispute to arbitration was made an order of court with the consent of both parties.

[8] Pursuant to the court order, both parties attended a pre-arbitration meeting before the arbitrator (who was cited as the fourth respondent, but who has not participated in the litigation), on 5 February 2007, where they agreed, amongst other things, on the filing of a statement of claim and defence and ‘a formal submission to arbitration’. It is noteworthy that none of the parties raised any objection to the arbitrator’s jurisdiction or challenged the validity of the referral agreement or of the court order during the pre-arbitration hearings.

[9] The arbitration started in August 2007. The main issue was the determination of the identity of the lawful owner of the property. As already indicated EP alleged that the coastal property was its property, having acquired it by Deed of Transfer number T2725/1980 (the 1980 Deed). Tobias' rival claim under Deed of Transfer number T2565/2006 dated 16 January 2006 was based on a deed of sale allegedly concluded between himself and Blignaut.

[10] Although Tobias never attended the arbitration proceedings, his father, Andries Francois Marais (Dries), did. Each party was represented by a team of legal representatives. It is common cause that none of the parties raised any objection to the jurisdiction of the arbitrator or attacked the validity of either the agreement to refer the matter to arbitration or the court order. On 9 December 2008, Tobias' legal representative applied unsuccessfully for a postponement of the proceedings. After the arbitrator declined to postpone the proceedings, Tobias' legal team withdrew from the matter. The arbitrator proceeded with the arbitration to finality in the absence of Tobias and his legal team.

[11] In terms of his award of 18 December 2008, the arbitrator held that the written agreement of sale upon which Tobias relied to obtain transfer of the property as evidenced by the 2006 Deed of Transfer was a fraudulent document. Accordingly, he found that EP had never intended to transfer ownership of the property to anybody, including Tobias. His conclusion was that, absent a valid agreement to transfer the property, EP remained the real owner of the property and not Tobias.

[12] The arbitrator despatched the award by email to the parties through their attorneys, Mr Burger for Tobias and Mr Cohen for the first appellant Ms Naidoo (Naidoo), who subsequently came to be involved as Tobias' funder in this litigation, and to whose role I shall revert. There was some dispute as to whether it had been agreed that the arbitrator would send the award to Tobias' legal representative who would receive it on behalf of Tobias. It is noteworthy that although both Tobias and Burger, his attorney, filed affidavits, they failed to deal with this issue.

[13] Pursuant to the award, EP applied to the Western Cape High Court to have the arbitral award made an order of court. As a precautionary measure, EP obtained an urgent interim interdict on 9 February 2009 in the form of a rule nisi before Maqubela AJ preventing the Registrar of Deeds from effecting transfer of the property pending an application by it to have the award made an order of court. On 25 February 2010 Tobias and his father, Dries, once again purporting to act on behalf of EP, approached the Western Cape High Court to set aside that interdict. They contended that as directors and shareholders of EP they could lift all interdicts preventing them from dealing with the property. Not having served the application on EP, they succeeded before Riley AJ in having the interim interdict set aside on 1 March 2010. On fortuitously learning of the fraudulent uplifting of the interim interdict, on 3 March 2010 EP launched yet a further urgent application and was granted another interim order interdicting Tobias and the Registrar of Deeds from in any way dealing with the property pending the final outcome of the rescission application.

[14] EP's application to make the arbitration award an order of court, Tobias' counter application to review and set aside the arbitration award, EP's application for Naidoo to be declared liable for a portion of EP's costs and EP's rescission application, all came to be consolidated and argued before Louw J in the Western Cape High Court. It is the high court's decisions in respect of those applications that to a greater or lesser extent are the subject of this appeal.

[15] For his opposition to the award being made an order of court, Tobias relied, amongst other things, on the fact that the arbitrator lacked jurisdiction to enter into the reference and adjudicate the dispute referred to him; that the award was not properly published as envisaged by s 25(1) of the Arbitration Act 42 of 1965 (the Arbitration Act); that the arbitration proceedings and award were tainted by irregularities; and further that the arbitrator was guilty of gross misconduct.

[16] In respect of the review, the grounds relied on were, amongst other things, that the arbitrator lacked jurisdiction; alternatively that the agreement for referral to arbitration and the court order based on it were vitiated by a mistake of law common to the parties; that the arbitrator failed to consider all the issues which were raised and that therefore the award was not final; that the arbitrator permitted the evidence of Alex to be taken by video conferencing without resolving the issue of whether he was a fugitive from justice; that the arbitrator unlawfully refused Tobias a postponement on 9 December 2008 and continued with the proceedings in his absence; that the arbitrator conducted the arbitration in a manner which provoked an apprehension of bias; that the arbitrator was guilty of misconduct by entertaining a private communication from a third party;

and further, that the arbitrator exceeded his powers by ordering costs on an attorney and client scale as this was not provided for in the referral. Many of these grounds for opposing the application to make the award an order of court and for the review of the award (which overlapped to a considerable extent) were not pursued on appeal.

[17] Concerning the alleged lack of jurisdiction by the arbitrator, the court below found that this ground had no merit as the arbitration was based on a valid court order which was the result of an agreement by the parties. The court held further that, as this court order had not been rescinded, varied or set aside, it was still valid, and that it gave the arbitrator the authority to adjudicate the dispute between the parties. Regarding the alternative submission that the arbitral award should be rescinded under Uniform Rule 42(1) on the basis that the agreement for referral was void as it was based on a mistake of law common to the parties, the court below held that this ground had no substance as, at the time of the order, Marais knew that EP was represented by the Stevensons as its duly appointed directors who were registered as such. Accordingly, the court below held that there was no room for a mistake of law by the parties.

[18] Regarding the attack based on non-compliance with the provisions of s 25(1) of the Arbitration Act (as to the mode of delivery of an award), the court below found that the provision was essentially directory and not mandatory. Furthermore, it held that as the arbitration in this instance was consensual, the parties were free to make their own arrangements regarding any aspect of the arbitration. As a result it found this ground to

be without any substance. It is to be noted that this ground of attack was not pursued on appeal.

[19] Concerning the alleged irregularities or gross misconduct, the court found all the complaints raised by Tobias to be devoid of any merit. The court held that, having regard to the proceedings and their context, no reasonable, objective or informed person could reasonably have apprehended that the arbitrator was biased or prejudiced or unable to bring an impartial mind to bear on his adjudication of the issues.[1] The court thus dismissed this ground as being without any merit.

[20] On the issue of costs against Naidoo, the funder, it is common cause that the first appellant had entered into a funding agreement with Tobias on 31 July 2009. She was later joined as a party to the litigation. In terms of this agreement, Tobias had ceded all his rights, claims and obligations in respect of the arbitration and the litigation involving the property to Naidoo. In return Naidoo was set to receive a substantial portion of the property. Based on this EP had asked for costs on an attorney and client scale against both Naidoo and Tobias, jointly and severally.

[21] The court below held that ordinarily costs are a matter for the discretion of the trial judge. Importantly, the court found that, absent any exceptional circumstances, generally courts are averse to awarding costs against non-parties. However, it found that in the circumstances of this case, and given the terms of the funding agreement, Naidoo had

[1] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) para 48.

effectively acquired for herself the exclusive right to determine the course of litigation as well as appointing her own preferred legal team, which made her the *dominus litis*. It also found that the fact that she stood to benefit from funding this litigation made her a 'commercial' as opposed to a 'pure' funder. Thus the court held that it was just that she be ordered to pay the costs of the litigation incurred from 29 July 2009.

[22] Accordingly the high court granted all the relief sought by EP. Tobias appeals to this court with the leave of the court below.

[23] I turn to a consideration of those contentions that were persisted with before this court on appeal.

[24] As to the authority of the arbitrator to conduct the arbitration, the appellants' main contention is that the Stevensons, who purported to represent EP as its directors, did not have authority to do so with the result that the agreement purportedly concluded by the parties, which is foundational to Moosa J's order and, in turn, the arbitration by Hodes SC, is invalid. The contention therefore is that the arbitration award is invalid and cannot be made an order of court.

[25] It is common cause that this attack was not raised on the papers in the litigation preceding the order by Moosa J, nor in answer to the statement of case or in evidence before the arbitrator. Any complaint about the arbitrator's lack of jurisdiction being potentially dispositive of the matter should have been raised at the beginning of the arbitration as a point in limine. This was never done. Instead, Tobias participated in the

arbitration proceedings until December 2009 when he unsuccessfully applied for a postponement. It is common cause that Tobias was until then represented by an attorney and counsel. In those circumstances it is safe to infer that he participated knowingly and voluntarily in the arbitration proceedings. In this regard the following dictum by Gauntlett AJ in *Abrahams v RK Komputer SDN BHD* 2009 (4) SA 201 (C) at 210E-F is apposite:

'If, as her affidavit would have it, it is the latter, it does not avail her now – disgruntled by the results – to fossick in the procedural ashes of the proceedings and to disinter her perception when it suits. An attack based on bias – with its devastating legal consequences of nullity – is not to be banked and drawn upon later by tactical choice. As the Court of Appeal in England has put it,

"It is not open to [the litigant] to wait and see how her claims … turned out before pursuing her complaint of bias … [she] wanted to have the best of both worlds. The law will not allow her to do so." '

This is exactly what Tobias did in this case. Instead of objecting to the jurisdiction of the arbitrator at the beginning, he participated in this protracted arbitration until the proverbial shoe started to pinch.

[26] Confronted with a similar situation in *Purser v Sales; Purser & another v Sales & another* 2001 (3) SA 445 (SCA) para 14 this court held that:

'It is common cause, *in casu,* that the appellant never raised any objection to the jurisdiction of the English Court. Instead he filed a plea on the merits. When the respondent applied for the removal or transfer of the matter from the Queen's Bench Division to the Central London County Court the appellant moved for the striking out of the respondent's claim "for want of prosecution".'

The court held:

'The appellant thus participated fully in the proceedings.'

This Court held further, at para 22 that,

'- a defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of that court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claim. Should he succeed in his defence, the doctrine of *res judicata* will afford him that protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court which he asked to uphold it. In my view, the facts point overwhelmingly to the appellant having submitted to the jurisdiction of the English Court.'

[27] Not having objected to the jurisdiction of the arbitrator at the outset and thereafter having voluntarily participated in the arbitration until his application for a postponement was refused, Tobias must, in my view, be deemed to have acquiesced to his jurisdiction.

[28] It was further contended that the order by Moosa J should be rescinded in terms of Rule 42 on the basis that it was induced by a mistake of law common to the parties. As already indicated, it is common cause that the court order for referral was based on an agreement reached by the parties who were both legally represented. This very case was instituted by EP represented by the Stevensons as its directors. This fact was known to Tobias. There could therefore have been no for any mistake of law, certainly not one common to the parties, for the Stevensons evidently did not labour under any mistake. Notably the company's share register reflected the Trust as the sole member whilst the records of the Registrar of Companies reflected Alex and Gary as the duly appointed directors of EP. These are public documents which Tobias was free to inspect if he had wished to do so. In any event this defence was raised neither during the pre-arbitration hearings nor at the beginning or even during the arbitration. Suffice it to state that the defence has no merit.

[29] Another ground of attack was based on the failure to comply with s 25(1) of the Arbitration Act. As I have mentioned above, this ground was not pursued on appeal.

[30] Another complaint was that the arbitrator did not deal with all the issues raised in the arbitration, one of which was the allegation that Alex was a fugitive from justice who should therefore not be given a hearing by our courts, and, secondly that the arbitrator failed to decide the issue of whether EP was properly represented by the Stevensons. It suffices to state that the contention that Alex was a fugitive from justice lacked any factual foundation. During his evidence before the arbitrator Alex denied that he was a fugitive from justice. There was nothing to gainsay that.

[31] As to the issue of the representation of EP, as I have already pointed out, the records of the Registrar of Companies reflected Alex and Gary as the duly appointed directors of EP. These two grounds must thus also fail.

[32] I now turn to the review of the arbitral award. The correct legal approach to a review of an arbitral award was enunciated by Gardiner J in the dictum in *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77 as follows:

'The Court will always be most reluctant to interfere with the award of an arbitrator. The parties have chosen to go to arbitration instead of resorting to the Courts of the land, they have specially selected the personnel of their tribunal, and they have agreed that the award of that tribunal shall be final and binding. As *Halsbury, L.C.,* said in *Holmes Oil Co. v Pumpherston Oil Co.* (Court of Sess., R.18, p. 53):

"One of the advantages which people are supposed to get by a reference to arbitration is the finality of the proceedings when the arbitrator has once stated his determination.

They sacrifice something for that advantage – they sacrifice the power to appeal. If, in their judgment, the particular judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their difficulties to arbitration as they have here, you cannot set aside the award simply because you think it wrong. The parties have agreed that it shall not be subject to the ordinary modes of appeal and that it shall be final; and that is, in nine cases out of ten, the very object which they mean to attain by submitting their difficulties to arbitration." '

[33] It is clear from this statement that the rights of parties to have an arbitral award set aside are very limited. Our courts observe a high degree of deference to arbitral decisions in line with the principle of party autonomy. Hence the scope for intervention by the courts is very limited.[2] The circumstances under which an arbitral award can be set aside are set out in s 33 of the Arbitration Act as follows:

'(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.'

[34] Having had regard to the conspectus of the evidence, the high court found that the arbitrator's conduct complained of did not amount to misconduct or any gross irregularity that justified the award being set

[2] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC) para 28; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

aside. It is trite that the onus to prove a gross irregularity rests on the party who alleges it. Furthermore, proof of such gross irregularity is a pre-requisite for the setting aside of the award.[3] It suffices to state that there is no evidence or suggestion by Tobias to sustain any allegation of gross irregularity by the arbitrator. It follows that this ground must fail.

[35] Some allegations of misconduct in relation to his duties as an arbitrator were made against the arbitrator. The gravamen of this complaint is that he proceeded with the arbitration in Tobias' absence without enquiring if he had closed his case or whether he wished to participate further in the proceedings. It is alleged that this failure denied Tobias a fair hearing. The question is whether this amounts to an irregularity or misconduct as envisaged by s 33.

[36] As stated in *Total Support Management*, the grounds on which an arbitration award will be set aside on a complaint of misconduct are very narrow. This can only be done in instances of wrongful or improper conduct, dishonesty, mala fides or partiality and moral turpitude. As already indicated Tobias had instructed his legal representatives to withdraw from the arbitration should his application for a postponement be refused. The application for postponement was refused. His legal representatives then withdrew from the proceedings. This was a calculated decision on his part. He must have fully appreciated the logical consequences of his decision. Furthermore, neither he nor his legal representatives indicated that he wished to participate further in the arbitration. It was not for the arbitrator to compel him to participate further as he had made a conscious decision to terminate his participation.

[3] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) para 21.

This ground of alleged misconduct on the part of the arbitrator is therefore devoid of merit.

[37] It was submitted further that at some stage during the proceedings when Tobias was absent, the arbitrator suggested that Tobias did not exist. Tobias perceived this to be an unwarranted attack against him or scepticism by the arbitrator about him. Another complaint was that the arbitrator had misconducted himself when he put a series of leading questions to one witness designed to prove that EP's shareholding had been paid for by the Trust. The allegation was that by so doing, the arbitrator had abandoned all pretext to impartiality. The high court found that the evidence and the record did not bear these allegations out. I agree.

[38] The last complaint was that the arbitrator had received private correspondence from Blignaut during the arbitration. However, it is not in dispute that such communication was unsolicited, Blignaut having taken it upon himself to communicate with the arbitrator. Furthermore, the arbitrator disclosed this to the parties. Of importance, the arbitrator stated that he took no account of this correspondence and that therefore it did not influence him in his findings. This is borne out by the record. In my view, this complaint has no merit.

[39] I now proceed to deal with the order of costs made against Naidoo, the funder. It is common cause that Tobias and Naidoo had concluded a written agreement in the form of a *pactum de quota litis* on 31 July 2009. In terms of this funding agreement, Naidoo took cession of Tobias' 'rights, title, interest claim and demand in the arbitration proceedings and all associated actions or proceedings of whatever nature involving the

property'. Furthermore, she was appointed as 'the true and lawful attorney and agent for purposes of giving effect to all matters connected with the cessions and obligations contained in this agreement'. Evidently, she was not an impartial funder who left the management of the case to the real litigant. On the contrary, she had taken over control of this litigation and became a party to it although not cited as such. In addition, she stood to acquire a substantial shareholding in a company in which she and Tobias would be the only shareholders in respect of this property.

[40] In respect of two of the three applications that served before the high court, namely the application to make the arbitration award an order of court and the counter application to review and set aside the arbitration award, the court below held Tobias solely liable for those costs until 28 July 2009 on the scale as between attorney and client. From 29 July 2009 (being the date when she became involved in the litigation) it ordered Naidoo to pay the costs of EP jointly and severally with Tobias also on the punitive scale as between attorney and client. Insofar as the third application was concerned, namely, the one by EP to set aside the order that had been fraudulently obtained before Riley AJ, the court below ordered Tobias and his father, who was plainly a party to the fraud, to pay EP's costs jointly and severally once again on the punitive scale. I agree with the court below that, given the circumstances of this case and the critical role played by Naidoo in financing and controlling this litigation to the exclusion of Tobias, and the substantial benefits she stood to receive, it was only just and fair that an order should have issued against her.

[41] The manner in which Tobias conducted this litigation warrants condemnation. The record speaks volumes of the dishonourable manner in which Tobias conducted himself throughout this protracted legal battle. He instituted many applications which proved to be frivolous and which unfortunately took up much of the court's precious time. What is worse, he went to the extent of deliberately subverting some of the court orders. He obtained some orders through fraud. No doubt he did all this to obtain ownership of a property to which he knew he was not entitled. He had embarked on multiple proceedings which were vexatious. Such conduct was deserving of a punitive costs order.

[42] Something has to be said about the size and state of the appeal record. The first six volumes of the appeal record comprise the entire arbitration record which consists of pleadings, pre-arbitration notices, pre-arbitration minutes of two meetings, various interlocutory applications, heads of arguments, a transcript of the proceedings, the exhibits in the arbitration and the awards. According to the first respondent's Practice Note all of these were not relevant for a determination of the appeal. The appellants conceded, correctly in my view, that parts of the record in Volumes 1, 2, 7, 11, 15 and the whole of volumes 12, 13, and 14 are not relevant to the resolution of this appeal. Furthermore, it is not disputed that the record contains unnecessary duplication. This is a flagrant disregard of the rules of this court pertaining to appeals which is to be deprecated.

[43] In conclusion, I have not been persuaded that the trial judge erred in his judgment. The appeal must accordingly fail.

[44] In the result, the following order is made:

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel where two counsel were employed.

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	N Singh SC (with him K Yourden) Instructed by: Woodhead Bigby & Irving; Durban Lovius Block Attorneys, Bloemfontein
For Respondent	:	J Muller SC (with him G Rome) Instructed by: Eversheds; Johannesburg Matsepes Attorneys, Bloemfontein