THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 774/2022

In the matter between:

JAMES R LINDSEY	**FIRST APPELLANT**
THE LINDSEY FAMILY TRUST	**SECOND APPELLANT**
WILLIAM BUCK JOHNS	**THIRD APPELLANT**
MARC VAN ANTRO	**FOURTH APPELLANT**
WYMONT SERVICES LIMITED	**FIFTH APPELLANT**

All acting derivatively and on behalf of

AFRICAN WIRELESS INCORPORATED	**SIXTH APPELLANT**

and

ALIEU BADARA MOHAMED CONTEH **(substituted by BRIGETTE VAN GEESBERGEN CONTEH** **in her capacity as *Curatrix Bonis*)**	**RESPONDENT**

Neutral citation: *Lindsey and Others v Conteh* (774/2022) [2024] ZASCA 13 (6 February 2024)

Coram: SALDULKER, HUGHES, MABINDLA-BOQWANA and MATOJANE JJA and UNTERHALTER AJA

Heard: 1 September 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 6 February 2024 at 11h00.

Summary: Private international law – enforceability of foreign judgment – civil procedure – provisional sentence – liquidity.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Siwendu J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Hughes JA and Unterhalter AJA (Saldulker, Mabindla-Boqwana and Matojane JJA concurring):

Introduction

[1] The central issue in this appeal is whether a series of orders and two writs, one of possession and another of execution, granted by the Superior Court of California in the State of California, United States of America, cumulatively, constitutes a liquid document and may be enforced by way of provisional sentence in South Africa. The Gauteng Division of the High Court, Johannesburg (the high court), after analysing these documents, dismissed the appellants' application for provisional sentence. The high court concluded that, 'the judgment does not constitute *prima facie* proof of a debt enforceable by provisional sentence', as it did not comprise a liquid document. It is with the leave of the high court that we are seized with the appeal before this Court.

The parties

[2] African Wireless Incorporated (AWI) is a corporation registered in terms of the laws of the State of Delaware in the United States of America and is cited as the sixth appellant. The first to fifth appellants are the shareholders of AWI, and, in terms of the Laws of the State of Delaware and the State of California, they act derivatively on behalf of AWI. The shareholders are as follows: James R Lindsey, a trustee of the

Lindsey Family Trust; William Buck Johns and Marc van Antro, both businessmen; and lastly, a company registered in the British Virgin Islands, Wymont Services Limited.

[3] The respondent is a businessman and citizen of the United States of America, Alieu Badara Mohamed Conteh (Mr Conteh), who now resides in Bryanston, Johannesburg. Mr Conteh is duly substituted by Brigitte van Geesbergen Conteh, in her capacity as *curatrix bonis*.

Background

[4] On 12 August 2014, the appellants, in the Superior Court of California, County of Orange (the Californian Superior Court), filed a complaint against Mr Conteh. The lawsuit is a shareholder derivative suit, similar to a derivative action in terms of s 165 of the Companies Act 71 of 2008 in our law. In essence, this is when '[a] shareholder may bring a derivative suit on the corporation's behalf where management (or any third party) breaches a duty *owed to the corporation* and the corporation *fails to assert* its cause of action. The shareholder is merely a nominal plaintiff in such an action'.[1]

[5] The basis of the complaint was that Mr Conteh allegedly transferred 51 shares of Resotel SPRL (Resotel) to Odessa Capital incorporated (Odessa) and 2 shares of Congolese Wireless Network SPRL (CWN) to two companies OOA One LLC and OOA Two LLC, without the required permission of AWI. The transfer of these shares was to companies wholly owned by Mr Conteh.

[6] The appellants obtained an order of judgment by default on 13 May 2016. The potential difficulties with this default order, under Californian law, were highlighted to the appellants, who were invited to correct the deficiencies by either filing an amended complaint or continuing by way of a default prove-up hearing. They chose the default prove-up hearing, which was held on 10 June 2016. Judge Servino presided, and on 6 July 2016, the Californian Superior Court ordered a 'constructive trust on behalf of AWI over the 51 shares of Resotel that were transferred to Odessa Capital, Inc. on

[1] Order of the Superior Court of the State of California, County of Orange, per Servino J, dated 6 July 2016.

December 12, 2001 and the 2 shares of CWN that were transferred to OOA-One, LLC and OOA-Two, LLC in 2010'.

[7] On 29 August 2016, the appellants returned to the Californian Superior Court and obtained an order against Mr Conteh, which instructed him, forthwith, to turn over the 51 shares of Resotel and 2 shares of CWN to the appellants. In terms of the law of the State of California, Code of Civil Procedure section 662, the same court also made an order placing a value upon the shares 'for bond purposes only', which would equate to a value for security in South African law. The court found the value of the 51 shares of Resotel to be US$84 963 329 and the value of the 2 shares of CWN to be US$8 329 738.

[8] On 15 September 2016, and again in the Californian Superior Court before Servino J, the appellants approached the court on an *ex parte* basis seeking to convert the amended 29 August 2016 judgment to a monetary judgment; and to appoint a collections receiver to assist in the execution of the judgment. Servino J dismissed these two applications. In order to safeguard the shares, she decided to impose a stay upon AWI 'from taking corporate actions that would adversely impact the transfer or "turnover" of the stock shares'. Pertinently, during argument, the judge clarified the position of the order of 29 August 2016, stating that '. . . the minute order of August 29 is indeed a supplemental order pursuant to the code section to be relied upon, which is 714.010, 030'. In addition, she explained that the amount for bond purpose allocated to the shares was of sufficient value to be included in the writ of execution under the Californian Civil Code of Procedure, and that the 29 August 2016 order constituted a supplementary order for value.

[9] Mr Conteh, in turn, brought an application on 15 December 2016 before Servino J, to recall and quash the writ of possession, which application was dismissed. The three grounds for the application were as follows:

(a) The writ should be quashed as the judgment had been satisfied;

(b) The writ does not contain the last known address of the respondent, as is required by the Code of Civil Procedure section 712.020 subsection (c); and

(c) The writ contains a value for the property that the judgment does not contain.

[10] Notably, from Servino J's ruling handed down on 16 December 2016, the court reaffirmed that, '[t]he writ properly reflected the intentions of this Court with the valuation being provided in a supplemental order and further clarification at the hearing on an ex parte application'. Hence, a value having been placed on the shares resulted in the dismissal of the respondent's application to quash the writ of possession issued on 11 October 2016. This writ of possession was converted to a writ of execution on 28 February 2017 with the judgment value assigned as US$93 million.

[11] In one of the appeals heard in the matter, the Court of Appeal of the State of California, Fourth Appellate District, Division Three, granted an order staying the judgment enforcement proceedings filed on 29 January 2018. The court reasoned that 'the [appellants] were not entitled to an actual money judgment in the default proceedings' and it was the appellants who by opting for the default prove-up hearing, had declined to amend their pleadings when they were given an opportunity to do so.

[12] Mr Conteh sought to appeal the default judgment, which failed. The appeal court reasoned that:

'[The respondent] request[ed] for the first time in their reply brief that we determine whether the judgment may be enforced as one for money. Such an issue is not before us as it concerns post-judgment enforcement matters which postdate the default judgment from which [the respondent] appealed. It is proper for adjudication in the trial court in the first instance.'

Before the high court

[13] In the provisional sentence proceedings in the high court the appellants pleaded as follows:

'8. Under the Laws of the state of California, County of Orange, Code of Civil Procedure ("CCCP") Subdivisions 714.010 – 714.030, the August 29, 2016 Ruling and Order; the August 29, 2016 Judgment, the September 15, 2016 Supplemental Order, and the December 16, 2016 Order ("the Judgments"), read cumulatively, constitute a final and binding Judgment executable upon the Defendant according to the following procedure *inter alia*:

8.1 714.010(a): A judgment for possession of personal property may be enforced by a writ of possession of personal property issued pursuant to Section 712.010;

8.2 714.020(a): To execute the writ of possession of personal property, the levying officer shall search for the property specified in the writ and, if the property is in the possession of the judgment debtor or an agent of the judgment debtor, take custody of the property in the same

manner as a levy under a writ of execution on such property in the possession of the judgment debtor;

8.3 714.020(b): If the property specified in the writ of possession cannot be taken into custody, the levying officer shall make a demand upon the judgment debtor for the property if the judgment debtor can be located. If custody of the property is not obtained, the levying officer shall so state in the return. Thereafter, the judgment for the possession of the property may be enforced in the same manner as a money judgment for the value of the property as specified in the judgment or a supplemental order.'[2]

[14] Simply put, the appellants' case is that the foreign default judgment together with the post judgment enforcement orders, read cumulatively, constitute a final and binding money judgment. They contended that, by operation of law, the judgment was enforceable in the same manner as a 'money Judgment for the value of the Shares', as it was converted into a liquid and executable money judgment under the laws of California. In the result, the writ of execution issued to enforce the judgment constitutes a court order and as such the non-payment thereof enabled the appellants to seek provisional sentence.

[15] In the provisional sentence proceedings before the high court, an affidavit by the US attorney for the appellants, Mr Dillion, was placed before the court. Mr Dillion proceeded to clarify the procedural law and enforcement procedures in respect of the relevant parts of the Californian Civil Code of Procedure (CCCP) which were applicable. He stated:

'Pursuant to the Judgments the Plaintiffs caused to be issued under CCCP 712.010 and executed by the Court, a writ of possession requiring the levying officer to take possession of the shares from the Defendants and to turn over the shares to the Plaintiffs. The writ was duly served. The Defendants failed to turn over the shares to the Plaintiffs. The Sheriff sought to make demand upon [the Defendants] who evaded service. The shares could not be taken into custody, the levying officer so stating in his return.

. . .

Such endeavours of evasion of service "NOT FOUND" under California Law satisfy the requirements of Code 714.020(b) in that the Defendant, Mr Conteh, could not be found, and custody of the shares could not be obtained.

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[2] The Subdivisions fall under Division 3 titled Enforcement of Nonmoney Judgment (Title 9 Enforcement of Judgments).

Thereupon, as aforesaid by operation of the law the Judgments become enforceable in the same manner as a money Judgment for the value of the shares as specified in the supplemental order . . . according to CCCP 3289(b).
As it was entitled to do, on February 28, 2017 the Plaintiffs procured that the Court issue a Writ of Execution . . . for the enforcement of the money Judgment against the Defendant . . .'

[16] Mr Conteh's case was simply that the foreign judgment, whether individually or collectively comprised, did not constitute a money judgment and, hence, not a liquid document. What was before the courts was merely a judgment for the delivery of shares.

[17] The high court found that the foreign judgment did not constitute *prima facie* proof of a debt enforceable by provisional sentence and dismissed the application for provisional sentence. The high court reasoned that extrinsic evidence on Californian law was required to demonstrate that there was a conversion of the order to turn the shares over into a debt in monetary terms, which would constitute a money judgment. The high court found that because resorting to such extrinsic evidence was needed, it was contrary to the courts' typically strict compliance with the requirements for the grant of provisional sentence.

Provisional sentence

[18] A foreign judgment is not directly enforceable in South Africa, but, as *Jones v Krok* (*Jones*) has held, it constitutes a cause of action and will be enforced by our courts provided:

'(i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign state; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended. Apart from this, our courts will not go into the merits of the case

adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law.'[3]

[19] Provisional sentence is a summary remedy that speedily enables a creditor armed with a liquid document to attain relief without bringing a trial action.[4] In addition, provisional sentence is one of the recognised procedures for the enforcement of a foreign judgment in our courts. This remedy is provisional in nature, and a final judgment may still be rendered in the principal case.[5] A further feature of this procedure is that although this remedy advantages a creditor, the debtor/defendant is afforded an opportunity to insist on security being paid, pending the final judgment.[6]

[20] In *Harrowsmith v Ceres Flats (Pty) Ltd*, the court elucidated the provisional sentence proceedings as follows:[7]

'The theory behind provisional sentence is that it is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court. The Court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the documents must therefore be unconditional and liquid (zuiwer en klaar of liquid).'

[21] The proof that the plaintiff relies upon a liquid document rests with the plaintiff; it must be a written instrument signed by the defendant acknowledging indebtedness unconditionally for a fixed amount of money. The debt must be fixed, definitive, sounding in money and evident on the face of the document relied upon. The document ought to 'speak for itself' and there must be an unequivocal or unconditional acknowledgement of indebtedness.[8]

[22] Generally, the need for extrinsic evidence nullifies liquidity. However, the situation has evolved over time, and there has been a move away from the stringent

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[3] *Jones v Krok* 1995 (1) 677 (A) 687at 685B-D.
[4] *Oliff v Minnie* [1952] 4 All SA 235 (A); 1952 (4) SA 369 (A); *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; [2009] 3 All SA 407 (SCA); 2009 (5) SA 1 (SCA).
[5] *Ndamase v Functions 4 All* [2004] ZASCA 32; 2004 (5) SA 602 (SCA) para 11.
[6] *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* [2011] ZACC 2; 2011 (5) BCLR 505 (CC); 2011 (3) SA 1 (CC) para 16.
[7] *Harrowsmith v Ceres Flats (Pty) Ltd* [1979] 4 All SA 45 (T); 1979 (2) SA 722 (T) at 728C-D. This decision was confirmed by this Court in *Wollach v Barclays National Bank Ltd* [1983] 2 All SA 17 (A); 1983 (2) SA 543 (A) at 567D-F.
[8] *Barlow Rand Ltd t/a Barlow Noordelik Masjinerie Maatskappy v Self-Arc (Pty) Ltd* 1986 (4) SA 488 (T) at 490E-F.

principle of 'the document must speak for itself'.[9] As *Jones*[10] made plain, provisional sentence is one of the recognised procedures by recourse to which the enforcement of a foreign judgment in our courts may be effected. In order to make out a cause of action, the summons may need to traverse aspects of the law of the jurisdiction in which the judgment was given. There may thus be a need for some greater flexibility as to what evidence extrinsic to the foreign judgment itself may be permissible.

A foreign judgment for the grant of provisional sentence

[23] Our law recognises a judgment of a court as being *prima facie* proof of a debt due and an acknowledgement of indebtedness of the amount sought in the judgment.[11] The basis of such recognition was stated long ago in *Williams v Jones*,[12] where the court said:

'[W]here a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action for debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.'

[24] The onus lies with the plaintiff to establish the jurisdiction, finality and conclusiveness of a foreign judgment, if so challenged. Once armed with a *prima facie* final and conclusive judgment the plaintiff is entitled to the relief sought in our courts and the onus then falls on the defendant to demonstrate that the enforcement of the foreign judgment in our country would be 'contrary to the principles of natural justice and public policy'.[13]

[25] Lastly, in *Richman v Ben-Tovim* the following is to be found:

'In addition, it is now well established that the exigencies of international trade and commerce require ". . . that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto." This court (albeit in a slightly different context) said in *Mayne v Main* that a "common-sense" and "realistic approach" should be adopted in assessing jurisdictional requirements because of ". . . modern-day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly among business people. And

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[9] Ibid.
[10] *Jones* fn 3 at 687-688.
[11] Ibid at 686.
[12] *Williams v Jones* (1845) 13 M&W 628 at 633; 153 ER 262 at 265.
[13] *Jones* fn 3 at 692D and the cases cited therein.

because not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for the wrongful actions".' [14]

Discussion

[26] The recognition and enforcement of foreign judgments is a matter of importance in a world of ever greater international commerce. On appeal is the determination of the true character of the Californian judgment for purposes of provisional sentence. The appellants contended that the foreign judgment relied on, cumulatively, constitutes a liquid document[15], even though the initial judgment was for the turnover of shares. An attempt was made to retrieve the shares by way of a writ of possession. This was unsuccessful. A monetary value was ascribed to the shares and a writ of execution for the monetary value of the shares was issued. This suffices, the appellants submit, to secure provisional sentence.

[27] In *Jones*,[16] as we have explained, this Court made it plain that a foreign judgment is not directly enforceable, but constitutes a cause of action. It then set out the requirements that must be met for a foreign judgment to be enforced by our courts. Those requirements are not sought to be qualified by the parties to this appeal. Nor is there any dispute that a final judgment was rendered by the Superior Court of California, County of Orange (the California Court). What is in issue is this: what judgment debt did the orders of the California Court give rise to that are enforceable in our courts by way of provisional sentence?

[28] Ordinarily this should pose little difficulty. The judgment of the foreign court provides proof of the debt due by the party identified in the court's order, and, as *Jones* made plain,[17] it is *prima facie* the clearest possible proof of that debt. What debt was owed by the Respondent, Mr Conteh, arising from the orders of the California Court?

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[14] *Richman v Ben-Tovim* [2006] ZASCA 121; 2007 (2) SA 283 (SCA); [2007] 2 All SA 234 (SCA) para 9.
[15] As is evident in the writ of execution (money judgment) issued 2/28/2017 by the clerk of the court in the amount of US$93 293.067.00.
[16] *Jones* fn 3 at 685.
[17] Ibid at 686A.

[29] The appellants plead in their summons that the California Court made a Ruling and Order dated August 29, 2016; issued a Judgment on the same day; made a supplemental order date September 15, 2016; and rendered a further supplemental order dated December 16, 2016. The summons proceeds to claim that these orders, read cumulatively, constitute a final and binding judgment executable upon Mr Conteh. We shall refer to these orders, collectively, as the California Court Orders. The appellants then rely upon the relevant provisions of the laws of the State of California to explain how the judgment obtained against Mr Conteh was enforced. In essence, a judgment for the possession of personal property of the kind obtained in terms of the California Court Orders may be enforced by a writ of possession of personal property, thereby taking custody of such property in possession of the judgment debtor or his agent. If custody of the property is not obtained in this way, the levying officer shall reflect this in the return, and thereafter the judgment for the possession of the property may be enforced in the same manner as a money judgment for the value of the property, as specified in the judgment.

[30] The judgment debt contained in the California Court Orders was for the possession of property. That is, for Mr Conteh, among others, to turn over to the appellants 51 shares of Resotel Sprl, and 2 shares of Congolese Wireless Network Sprl. In addition, the California Court Orders determined that the value of these shares was $84 963 329 for the Resotel shares, and $8 329 738 for the Congolese Wireless Network shares. The California Court Orders do not order Mr Conteh to pay an amount of money, they require Mr Conteh to deliver up (to use our terminology) specified shares.

[31] We do not understand the appellants to argue otherwise. What they contend is that under Californian law, the California Court Orders for the possession of property may be enforced in the same manner as a money judgment for the value of the property, which value the California Court had determined. Two important features of the relevant provisions of Californian law bear emphasis. First, court orders for the possession of property cannot be enforced as a money judgment immediately upon being made. The enforcement of such an order requires the steps by way of enforcement, outlined above, to be taken. The levying officer must have failed to take custody of the property; made demand of the judgment debtor, if the debtor can be

located; the levying officer must then make a return that the property cannot be obtained. Only then may the judgment for the possession of property be enforced 'in the same manner' as a money judgment. As the matter was put by the Court of Appeal of the State of California that heard an appeal arising from the California Court Orders, 'respondents were not entitled to an actual money judgment in the default judgment proceedings', being proceedings brought by the appellants before the California Court.

[32] The second feature of note is that the relevant provisions of Californian law permits the enforcement of the Californian Court Orders 'in the same manner' as a money judgment. These provisions do not render the California Court Orders a money judgment. This is not a semantic quibble. The California Court Orders remain unchanged. Their enforcement however is made possible, once the return of the property cannot be obtained, as if they were a money judgment. Thus, by operation of law, if the property cannot be obtained, a means of enforcement is secured to execute upon the value of the property. However, if the shares could have been obtained under writ, there could have been no election to enforce the California Court Orders as a money judgment. This demonstrates that the California Court Orders do not constitute a money judgment, even though they may be capable of enforcement as such, under specified conditions.

[33] The question that then arises is this: even if the California Court Orders are not a money judgment, is there any reason why the enforcement of these orders as a money judgment in terms of the law of California should not be recognised and enforced by a South African court? The difficulty is that a South African court will not generally apply foreign rules of procedure in the exercise of its own adjudicative functions.[18] This is a matter of sovereignty.[19] South African courts are not merely instruments by which the law of California secures the enforcement of court orders made by the courts of California. Put differently, the process of the California Court does not run through the territory of South Africa. How such process may be given effect to is regulated under statute. Section 40 of the Superior Courts Act 10 of 2013

[18] *Society of Lloyds v Price; Society of Lloyd's v Lee' [2006] ZASCA 88;* 2006 (5) SA 393 (SCA) para 22.
[19] *Ex parte Registrar, Supreme Court, Bophuthatswana* 1980 (1) SA 572 (B) at 578.

sets out the basis upon which letters of request in connection with any civil proceedings received from any state, territory or court outside of South Africa may be given effect to.

[34] The summons issued by the appellants for provisional sentence relied upon a cause of action for the recognition and enforcement of a foreign judgment. It did not seek the assistance of our courts to give effect to the procedures of the law of California in terms of which the enforcement of a foreign judgment may be rendered in the same manner as a money judgment. As this Court observed in *Society of Lloyd's*[20] provisional sentence proceedings for the enforcement of a foreign judgment may be a step towards eventual execution, but cannot be regarded as part of the process of execution. The foreign judgment relied upon in the summons is constituted by the California Court Orders. The California Court Orders do not comprise a money judgment, even though, under the law of California, the California Court orders may be capable of enforcement as a money judgment. The summons does not ask a South African court to execute the enforcement procedures of the law of California. It is doubtful that such a cause of action is good in law.

[35] But it suffices that, for the purposes of deciding this appeal, the summons sought provisional sentence based upon a foreign judgment that is not a money judgment, as we have explained. Once that is so, provisional sentence cannot be granted, on the cause of action set out in the summons. The California Court Orders do not constitute a liquid document evidencing an unconditional acknowledgement of indebtedness, in a fixed sum of money. The appeal must accordingly fail.

[36] The high court was correct to refuse provisional sentence. However, we reach this conclusion for different reasons. In our view, it is not the recourse of the appellants to extrinsic evidence that rendered provisional sentence unavailable to them. Rather, the foreign judgment they relied upon is not a money judgment, and hence not a liquid document. The appeal must accordingly fail, and there is no reason why costs should not follow the result.

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[20] *Society of Lloyd's* fn 18 above para 30.

[37] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

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W HUGHES

JUDGE OF APPEAL

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D N UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	A Bham SC and N Alli
Instructed by:	Knowles Husain Lindsay Incorporated, Sandton
	McIntyre Van der Post, Bloemfontein
For the respondent:	John Peter SC and R Stevenson
Instructed by:	Clarks Attorneys, Johannesburg
	Webbers Attorneys, Bloemfontein