REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: P293/2009

PA7/12

In the matter between:-

RENE COLETT	**Appellant**
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER COMFORT	
ROBERT NIEMAND N.O.	**Second Respondent**
GENERAL MOTORS (SA) (PTY) LTD	**Third Respondent**

Heard: **28 November 2013**

Delivered: **13 February 2014**

Summary: Delay in prosecuting review application- principles restated- unreasonableness of the delay and unsatisfactory explanation. Appeal dismissed with costs.

CORAM: TLALETSI ADJP, C J MUSI *et* MOKGOATLHENG AJJA

JUDGMENT

C J MUSI AJA

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[1] This is an appeal against the judgment of the Labour Court (Molahlehi J) wherein it dismissed a review application, which was launched by the appellant, because the latter delayed in prosecuting the review within a reasonable time. The appeal is with the leave of the court *a quo*.

[2] The appellant was employed by the third respondent (General Motors (SA) Pty Ltd) as a warranty auditor. The appellant was charged and convicted, at a disciplinary hearing, of deliberately and dishonestly misrepresenting facts to dealers and his colleagues, in order to have his private motor vehicle repaired at the third respondent's costs. An internal appeal was unsuccessful.

[3] The appellant referred the matter to the Commission of Conciliation Mediation and Arbitration (CCMA). Subsequent to unsuccessful conciliation proceedings, the appellant referred the matter to arbitration. During the arbitration proceedings, the third respondent called numerous witnesses to prove that the appellant's dismissal was substantively and procedurally fair. The protracted arbitration proceedings culminated in the second respondent (the Commissioner) issuing an arbitration award on 14 May 2009 wherein he found that the appellant's dismissal was substantively and procedurally fair because the third respondent proved that he was guilty of dishonesty. The issues in this matter and my conclusion render it unnecessary for me to set out the evidence presented during the arbitration proceedings.

[4] On 24 June 2009 – within the six weeks period prescribed by section 145(1)(a) of the Labour Relations Act 66 of 1995 – the appellant launched review proceedings in the court a *quo* challenging the award of the Commissioner.[1] On 30 June 2009, the third respondent filed a notice of opposition.

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1 Section 145(1)(a) reads as follows: "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 within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption."

[5] On 2 July 2009, the appellant was advised by the registrar, by way of a directive, that the record is available. In terms of rule 7A(8) of the Labour Court Rules, the appellant had 10 days, after the record was made available, within which to either amend, add to or vary the terms of his notice of motion and supplement his supporting affidavit or deliver a notice that he stands by his notice of motion. The appellant did neither.

[6] On 12 August 2009, the Registrar issued a further directive wherein the appellant's failure to comply with the earlier directive was noted and the appellant was again directed to make the record available within 10 days and to thereafter comply with the provisions of rule 7A(8). This directive was ignored.

[7] On 4 September 2009, the Registrar warned the appellant that should he fail to comply with the earlier directive the matter would be archived. This directive was also ignored. The matter was archived on 9 October 2009.

[8] On 1 June 2011, the appellant filed an explanatory affidavit wherein he explained why he did not comply with the directives and the rules. The explanatory affidavit was not delivered to the third respondent, it therefore did not answer thereto. Van Niekerk J, as a result of the explanatory affidavit, directed that the file should be uplifted from the archives. The appellant was directed to comply with the provisions of rule 7A(8) within 10 days from 1 June 2011.

[9] On 9 June 2011, the appellant filed his supplementary affidavit, the transcribed record of the arbitration proceedings and the rule 7A(8) notice.

[10] On 23 June 2011, the third respondent filed its answering affidavit wherein it pertinently raised the issue of the delay in prosecuting the review. It prayed that the review be dismissed for want of timeous prosecution.

[11] On 13 July 2011, probably as a result of the issue of delay in prosecuting the review being raised by the third respondent, the appellant launched

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an application for the “condonation of the late prosecution of the review”. On 25 August 2011, the notice of motion in the condonation application was amended to read that the appellant would apply “for the condonation of the late prosecution of the review application and the condonation of the late application itself.” The application was strenuously opposed.

[12] The appellant’s explanation for the delay is as follows. Soon after the third respondent filed its notice of opposition his erstwhile attorney, Mr Forbes, informed him that he was closing his practice because he would be joining the CCMA on a full-time basis.

[13] During August 2009, he procured the services of his current attorneys, Wikus van Rensburg attorneys. He confirmed that he received the Registrar’s directives and that he did not comply therewith. During October 2009, his attorneys received the transcribed record. They requested him to peruse the record in order to give them further instructions, so that they could draft supplementary papers, as they were not his attorneys during the arbitration proceedings. After perusing the record, he consulted with his attorneys on 22 January 2010 and requested them to give him an estimate as to how much it would cost to proceed with the matter. He was told that it would cost between R25 000 and R30 000.

[14] He was impecunious and decided to sell his house. Although the deed of sale was signed in February 2010, the registration occurred in September 2010 as a result of which he had the necessary funds to proceed with the matter. He duly instructed his attorney to brief counsel in order to pursue the matter.

[15] In his replying affidavit, he stated that he applied for legal aid but his application was turned down. He was informed by a certain Ms Elaine van Staden that the reason for the refusal was because he was temporarily employed for three months at Key Body Panels where he earned R6 000,00 per month.

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[16] According to the appellant, it was not only his financial dire straits that caused the delay but also because he was, health-wise, in a bad way. He was undergoing treatment for depression from 2009 to 2011 when he recovered, fully. He attached a confirmatory affidavit by Dr Koch, a general practitioner, wherein the latter stated:

> 'I confirm that I was treating Rene Colett for severe depression from June 2009 and he fully recovered by the start of 2011. Furthermore, I confirm that it is my opinion that Rene Colett was not competent to manage his affairs, such as relating to his case. Rene's illness is attributable to his unemployment.'

[17] The Labour Court found that the appellant's approach and attitude towards the Registrar's directives should play a significant role in assessing the reasonableness of the delay. It also pointed out that the directive by Van Niekerk J, that the file should be lifted, does not mitigate or condone the delay. The court *a quo* correctly found that the appellant's explanation that his attorneys gave him the record to peruse does not make sense because it would mean that they left it to the appellant to determine whether there was a need to supplement the grounds of review.

[18] The court *a quo* criticised the appellant for not stating why he did not approach Legal Aid South Africa for assistance. The fact that the appellant only filed the explanatory affidavit on 1 June 2011 – nine months after he secured the necessary funds – was also frowned upon by the court *a quo*. It also found that the fact that no explanation was given as to why the condonation application was not brought sooner presented a serious challenge to the appellant's case.

[19] In its initial judgment, the court *a quo* referred to facts and circumstances of an unrelated case. At paragraph 37, of the judgment, it is stated that:

> 'The delay of about four years is excessive and therefore the applicant had an onerous duty of providing a satisfactory and convincing explanation for that delay. This is even so having regard to the fact that

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applicants were reminded not only once of their delay but on a number of occasions including giving their current attorney an opportunity to address the problem of the delay. It is in this context that I find the explanation tendered by the applicants to be so inadequate that it does not only stand to be rejected but it closes the door for the need to consider the prospect (sic) of success. It has to be noted that Mr Nichause conceded that the delay was excessive. His contention as indicated earlier is that the dictates of justice require that the delay should be condoned.'

[20] At paragraph 40, the court *a quo* said:

> 'Mr Nichause, persuaded this court to place the blame for the delay on the attorneys and not Mr Kalipa. He, however, conceded that he could not provide any explanation for the year long delay when the matter was handled by the first attorney. This does not assist the case of Mr Kalipa because there is no evidence as to what did he do to pursue his case (sic).'

[21] In the amended judgment paragraph 40 was excised but paragraph 37 was left intact.

[22] In his judgment relating to the application for leave to appeal the learned judge explained the situation as follows:

> 'It is greatly regrettable what happened in this matter. The first mistake that occurred in relation to the two judgments occurred when the first judgment was accidentally emailed in the morning the judgment was to be delivered. It transpired later that when the second judgment was send to Port Elizabeth from Johannesburg, the first judgment had already been delivered in court. The second problem relates to the erroneous copying and pasting onto the judgment paragraphs from *NUMSA obo Kalipa v National Bargaining Council for the Chemical Industries* case number P05/2012, a judgment which was delivered also on the same day.'

[23] Mr Nyondo, on behalf of the appellant, argued that the court *a quo* did not properly consider the extent and reasons for the delay because it allowed

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itself to be influenced by the evidence of another case which depicted a level of lateness which is twice that of the appellant. The court *a quo* therefore, so the submission went, did not exercise its discretion properly. Mr Nyondo submitted that the appellant was judged on the basis of evidence of another case or "foreign evidence" as he called it. With regard to the condonation application, he argued that the court *a quo* was wrong in not considering the prospects of success because the prospects of success must always be considered when an application for condonation is considered.

[24] Mr Partington, on behalf of the third respondent, submitted that on appeal it is the final order of the court *a quo* that matters and not its reasoning or evaluation. Therefore, so he argued, if the final order is unimpeachable then the court *a quo*'s errors in arriving at its order are neither here nor there. He further submitted that the court *a quo* was correct in not considering the prospects of success, although he pointed out that there were, in any event, no prospects of success in this matter.

[25] It is unfortunate that the copying and pasting by the court *a quo* led to this somewhat embarrassing situation which was undeservedly pounced upon the appellant as a get out of jail free card.

[26] In order to discern whether the error had an impact on the court *a quo*'s judgment and order one has to look at the entire judgment.

[27] It is clear that the transposition of the two paragraphs into the judgment was an error which the court *a quo* realised too late. In an attempt to rectify the situation the court *a quo*, *mero motu,* excised the one paragraph only. The ineluctable inference therefore is that paragraph 40 of the judgment had no bearing on the reasoning and conclusion of the court *a quo*, otherwise it would have amended instead of deleting it.

[28] It is clear that paragraph 37 of the judgment could not have led the court *a quo* to its conclusion that the condonation application of the appellant should fail. Paragraph 37 is amid other paragraphs dealing specifically with the appellant's reasons for the delay. The court *a quo*

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comprehensively dealt with the appellant's reasons for the delay and correctly criticised his version, as I will show presently. In my view the transposition of paragraph 37 into the judgment did not cause any transmutation of the court *a quo's* reasoning, evaluation or order. It was merely a technological mistake that had no bearing on the court *a quo's* thinking. It referred to many other damning acts and omissions to substantiate its conclusion. Paragraph 37 was an island in a sea of condemnation.

[29] A court of appeal will not lightly interfere with the exercise of a judicial discretion by a lower court. An appellant who challenges the exercise of a judicial discretion will have to show that such discretion was not exercised judicially. More specifically the appellant will have to show that the court *a quo* either:

29.1 failed to bring an unbiased judgment to bear on the matter;

29.2 did not act for substantial reasons;

29.3 exercised its discretion capriciously or arbitrarily;

29.4 exercised its discretion upon wrong principle;

29.5 committed a misdirection of such a serious nature and degree as to justify a conclusion that it acted improperly or unreasonably.

[30] The legal position was summarised as follows by the Constitutional Court:

> 'It is trite law that a court considering whether or not to grant condonation exercises a discretion. The discretion must, of course be exercised judicially on a consideration of all the facts and 'in essence it is a matter of fairness to both sides.' It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with the rules. Ordinarily, the approach of an appellate court to the exercise of such a discretion is that it will not set aside the decision of the lower court 'merely because the court of appeal would itself, on

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the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[2] [footnotes omitted]

[31] The court *a quo* correctly pointed out that it had to consider the following questions *viz* whether there was an unreasonable delay and if so whether it should be condoned.

[32] *In Associated Institution Pension Fund and Others v Van Zyl and Others*[3] it was said that:

> 'The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case …The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether the delay which has been found to be unreasonable, should be condoned…' [reference omitted]

[33] If an appeal is therefore aimed only against the finding that the delay was unreasonable then it is tantamount to an ordinary appeal against a factual finding that led to a wrong conclusion. The court of appeal would then be at liberty to set aside the decision of the court a *quo,* if the appeal court, on the same facts, would have arrived at a different conclusion. If the appeal is against the finding that the delay should not be condoned, then it is aimed at the exercise of a judicial discretion and the considerations mentioned in paragraphs 29 and 30 above will apply. In

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[2] See *Mabaso v Law Society of the Northern Provinces and Another* 2005 (2) BCLR 129 (CC) at para 20.

[3] [2004] 4 All SA 133 (SCA) at para 47 and 48.

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this matter both the finding that the delay was unreasonable and the finding that the delay should not be condoned are challenged.

[34] When assessing the reasonableness or unreasonableness of a delay sight must not be lost of the fact that labour disputes must be resolved without delay. The reasons for the expeditious resolution of labour disputes were set out by Ngcobo J, as he then was, as follows:

> 'The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years…'[4] [footnotes omitted]

[35] The first question does not have to detain us long because Mr Nyondo conceded not only that the delay was unreasonably long but also that the explanation therefor is bad.

[36] The review proceedings were launched on 24 June 2009. Nothing happened thereafter until the appellant filed an explanatory affidavit to have the file, which was archived for lack of prosecution, uplifted on 1 June 2011. The rule 7A(8) notice which was supposed to have been filed within 10 days after the record was made available, i.e. within 10 days from 2 July 2009, was only filed on 9 June 2011 in spite of numerous directives to comply with rule 7A(8). The concession was properly made. The delay was unreasonable.

[37] In deciding not to grant condonation for the delay, the court *a quo* found the explanation for the delay unsatisfactory and unacceptable. It did not deem it necessary to consider the prospects of success in view of the bad explanation. Mr Nyondo took issue with the court a *quo's* approach

[4] *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR (CC) para 62.

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and insisted that the failure to consider the merits amounted to misdirection.

[38] There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success.[5] In *NUM v Council for Mineral Technology* it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962(4) SA 531(A) at 532(C-D). should be followed but:

> '(T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.'[6]

[39] The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.

[40] The appellant admitted that he received three directions from the Registrar calling upon him to comply with rule 7A(8). He admitted that he ignored the directives. No explanation was given for his conduct. What is worse, is that after receiving the directives he had consultations (at least two i.e. October 2009 and January 2010) with his current attorneys and he did not inform them about the directives.

[41] In the directive of 9 September 2009, the Registrar informed the appellant as follows:

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[5] See *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A; *Darries v Sheriff, Magistrates' Court, Wynberg and Another* 1998 (3) SA 34 (SCA) 41C-D; and *Mabaso v Law Society of the Northern Provinces supra.*

[6] [1999] ZALAC 22 17 August 1998 at para 10; *Mgobhozi v Naidoo NO and Others* [2006] 3 BLLR 242 (LAC) at para 34.

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> 'NB: Late compliance with the directive without an explanatory affidavit for non-compliance does not warrant retrieval of the archives, therefore the file will remain in the archives until such affidavit is filed. The file will then be handed to a Judge in chambers for a directive.'

Notwithstanding this directive, the appellant only filed the explanatory affidavit on 1 June 2011 without an explanation as to why it was not filed earlier or why he ignored the directives of the Registrar.

[42] The directives of the Registrar are not only meant to assist in the management of cases in order to facilitate and enhance efficiency, but more importantly, they ensure that matters are expeditiously put through the system so that disputes may be resolved speedily and effectively. Litigants should know that they ignore such directives at their own peril.

[43] The appellant's over-arching explanation for the delay between 2009 and beginning of 2011 is his financial and medical woes. Although the court *a quo* found that he did not approach Legal Aid South Africa, the appellant stated that he was informed that he does not qualify for legal aid because of his salary. This explanation is very telling. In his explanatory affidavit to have the file uplifted he stated that he was employed at Key Body Panels from 1 September 2010 to 30 November 2010. In his replying affidavit, in the application for condonation, he stated that he was informed by the Legal Aid Board (Ms Van Staden) that the reason for declining his application was the temporary job that he had at Key Body Panels. It therefore means that the application for legal aid was only made between September 2010 and November 2010. There is no explanation as to why he did not approach the Legal Aid Board sooner. According to him he received the proceeds of the sale of his house in September 2010. It is strange, to say the least, that he waited until he had funds before he applied for legal aid.

[44] The opinion of Dr Koch that the appellant was not competent to manage his affairs relating to his case between 2009 and beginning of 2011 is a bitter pill that I am not prepared to swallow. On the appellant's own evidence he changed attorneys in August 2009, he consulted with his

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current attorneys in August 2009, October 2009 and January 2009. He perused the record of the arbitration proceedings from October 2009 to January 2010. He had two jobs during that period. He worked at Grey Stone from June 2010 to August 2010 and at Key Body Panels from September 2010 to November 2010. He decided to sell his house in February 2010. He gave his attorney full instructions in October 2010. It is therefore clear that he had the necessary competence to deal with his matter during that period.

[45] Even if I decide to swallow the bitter pill, according to the doctor and the appellant he recovered during the beginning of 2011. The appellant did not explain why he did nothing between the beginning of 2011 and June 2011. Likewise he did not explain why he only filed the explanatory affidavit in June 2011 when he already had funds in September 2010 and recovered fully in the beginning of 2011. He also did not explain why his attorneys did nothing between September 2010 and June 2011.

[46] In my view, the court *a quo*'s reasoning cannot be assailed. I am convinced that the court *a quo* exercised its discretion judicially when it decided not to condone the unreasonable delay without having regard to the prospects of success. The appeal ought therefore to be dismissed.

[47] This is probably one of the worst records I have ever seen. The record was not properly paginated. There was no consolidated index. Documents were bound out of sequence, for example, the third respondent's answering affidavit was bound before the appellant's founding affidavits. Documents were unnecessarily duplicated making the record voluminous. Where reference was made in the evidence of witnesses to documents contained in the appeal record no cross reference was made to the page number in the appeal record where such document or exhibit is. This made it extremely difficult to follow the evidence and comprehend the record. Parties should acquaint themselves with the rules of this Court when they prepare appeal records. Flagrant non-compliance with the rules will be met with appropriate costs orders.

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[48] In terms of section 179(1) this Court may make a costs order according to the requirements of the law and fairness. Section 179(2) sets out some of the factors and circumstances which this Court may consider before making costs orders.[7] The considerations set out in section 179(2) are not a *numerus clausus.* The considerations mentioned in *NUM v East Rand Gold and Uranium Co Ltd* are still relevant today as they were under the industrial court and old Labour Appeal Court system.[8] In that case Goldstone J said the following:

> ‘1. The provision that 'the requirements of the law and fairness' are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.
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> 2. The general rule of our law that, in the absence of special circumstances costs follow the event, is a relevant consideration. However, it will yield where considerations of fairness require it.
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> 3. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it, especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following passage from the judgment in the *Chamber of Mines* case *supra* at 77G-I commends itself to me:
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> 'In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The industrial court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his

[7] In terms of section 179(2) (b) When deciding whether or not to order the payment of costs, the Labour Appeal Court may take into account - the conduct of th parties in proceeding with or defending the matter before the court, and during the proceedings before the court.
[8] 1992 (1) SA 700 (AD).

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or her complaints or alleged wrongs before the court and should not be penalised unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is *bona fide*. . . .'

4. Frequently the parties before the industrial court will have an ongoing relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a *bona fide* one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.

5. The conduct of the respective parties is obviously relevant, especially when considerations of fairness are concerned."[9]

[49] The appellant in this matter was not *bona fide*. His version lacked candour. His approach to this Court was unreasonable if regard is had to the concessions that were made pertaining to the unreasonableness of the delay and the unsatisfactory explanation. Although this Court is loath to make costs orders against particularly individual employees, considering the peculiar circumstances of this case, the requirements of the law and fairness dictate that a costs order should be made.

[50] I accordingly make the following order:

(a) The appeal is dismissed with costs.

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C. J. Musi AJA

I agree.

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Tlaletsi ADJP

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[9] At pages 738 – 739.

I agree.

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Mokgoatlheng AJA

APPEARANCES

FOR THE APPELLANT:	Mr Nyondo
	Instructed by Wikus Van Rensburg Attorney Port Elizabeth
FOR THE THIRD RESPONDENT:	Mr Partington
	Instructed by Chris Baker and Associates Port Elizabeth

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