IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

APPEAL CASE NO: JA69/09

In the matter between:

EDELWEISS GLASS AND ALUMINIUM (PTY) LTD APPELLANT

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA FIRST RESPONDENT

PIET NCHABELENG & 37 OTHERS SECOND and FURTHER RESPONDENTS

JUDGMENT

JAPPIE JA

[1] This is an appeal against a judgment of the Labour Court handed down on 5th June 2009, reported as *NUMSA & others v Edelweiss Glass & Aluminium (Pty) Ltd* [2009] 11 BLLR 1083 (LC). The Labour Court had found that the dismissal of the 38 individual respondents, or employees of the Appellant, was automatically unfair as provided in section 187(1)(a) of the Labour Relations Act 66 of 1995 ("the LRA"). The Labour Court reinstated the employees and ordered the Appellant to pay compensation.

[2] The Appellant, Edelweiss Glass and Aluminium (Pty) Ltd, is a company that was established in May 1985 and is in the business of the design, manufacture and installation of aluminum windows and doors for commercial buildings. Its employees, for the most part, are involved in skilled technical work. According to Ms Leana van der Walt, who is not only the managing director of the Appellant but also the founder of the company, it could take up to four years of employment with the Appellant to reach the level of skill required by the Appellant of its employees. According to Van der Walt, most of those employed by the Appellant were all skilled workers with the exception of a relatively small number who had been employed on fixed term contracts, which contracts were to expire in November 2003.

[3] The Appellant did not have a plant level recognition agreement or other collective agreement applicable in its work place. By the beginning of 2003, the bargaining council for the construction industry had ceased to function and this left a vacuum in the labour relations arena between the Appellant and its employees.

[4] Early in 2003, the National Union of Metalworkers of South Africa ("the Union") approached the Appellant to seek organisational rights and to establish a collective bargaining relationship. Van der Walt felt that she was ill-equipped to deal with the situation and therefore, called in the assistance of a labour consultant, Mr Lodewyk Pienaar. On advice from Pienaar, the Appellant decided that it would be willing to agree to grant basic organisational rights to the Union but the Appellant did not wish to engage in collective bargaining at plant level. The Appellant favoured participation in an informal industry bargaining forum.

[5] With regard to organisational rights, the Appellant was willing to grant stop-order facilities, access to its premises and the right to elect shop stewards. The Appellant was, however unwilling to grant all of the rights and facilities to the shop stewards which the Union was demanding.

[6] On 23rd May 2003 the Union referred a dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA"). The issue in dispute was the Appellant's failure to exceed to its demand in respect of organisational rights. At the same time, the Union made demands on a range of other matters of mutual interest.

[7] On 6th June 2003, while the organisational rights dispute was pending before the CCMA, the Union addressed a letter to the Appellant in which it set out a range of demands. The list of demands was prepared by Mr Modimoeng, a regional organiser of the Union who was based at its regional office. One of the demands the Union made was for the payment of a 13th cheque. The demand for a 13th cheque was phrased as follows:

> 'Since there are no other benefits the union demand 1 equal monthly payment once a year at shut-down.'

[8] On the same day the Union and the Appellant met to discuss the Union's list of demands. However, the meeting was adjourned on the basis that the Union would consult with its shop stewards in relation to the list of demands and provides some feedback to the Appellant. A further meeting was schedule for 23rd June 2003.

[9] However, before this meeting took place, the Union addressed a letter to the Appellant dated 17th June 2003. This letter was written by Mr Sihlangu and came from the Union's Tshwane local office rather than its regional office. In the letter the Union requested a meeting with the Appellant's

management to negotiate wage increases and working conditions. Once again the letter listed various demands. Under the heading *"Leave and leave enhancement pay"*, a demand was made that workers should qualify for twenty working days of leave and a 13th cheque after completing one year of service with the Appellant. This letter listed the Union's demands somewhat differently from those demands set out in the letter from the Union's regional offices dated 6th June 2003.

[10] On 18th June 2003 the Appellant responded to the letter of 17th June 2003. In its response, Pienaar on behalf of the Appellant took exception to this discordance as it appeared in the letters from the regional and local offices of the Union. Pienaar recommended that the parties proceed with the meeting that had been scheduled for 23rd June 2003. Pienaar further suggested that some of the demands set out in the Union's letter of 17th June 2003 should stand over for negotiations and be dealt with during the wage negotiations in 2004.

[11] Throughout July 2003 the parties attempted to negotiate on the demands that the Union was making. However, no agreement could be reached. While the Appellant was willing to attempt to resolve the organisational rights dispute and to conclude an organisational rights agreement, the Appellant was reluctant to conclude an agreement at plant level on the terms and conditions of employment. The Appellant wanted to refer matters relating to conditions of employment to a voluntary bargaining forum which was in the process of being established.

[12] The Union's response to the Appellant's position was set out in a letter dated 28th July 2003 which read as follows

> 'The contents of your letter imply that you or your clients are not prepared to meet with the union to negotiate wages and working conditions. This therefore leaves us with no other option but, to declare a dispute with you. Should you fail to indicate your willingness to negotiate with us within five

> days from the date hereof, the union will declare a dispute against your client.'

[13] On 30th July 2003 and at the CCMA, the parties attempted to conciliate the dispute in regard to organisational rights.

[14] Before the conciliation meeting, Pienaar had prepared a document which, on the face of it, was intended to provide the foundation for a collective agreement between the Appellant and the Union. The document set out the parties' respective positions on the various matters which were the subject of negotiations between them. It dealt with both organisational rights and the other demands being pressed by the Union.

[15] Under the heading *"13th cheque"* the document recorded the Appellant's position as follows:

> 'The company does not pay a 13th cheque, but provides leave pay and leave bonus as per above.'

[16] In the document Pienaar recorded the Union's position as follows:

> 'It seems that the union wants leave pay, leave bonus and a 13th cheque, but no clear mandate has been received in this regard.'

[17] At the conclusion of the conciliation process on 30th July 2003, the Union agreed to send to the Appellant and the Appellant agreed to receive a consolidated set of demands dealing with the latest position of the Union on organisational rights and with the further demands relating to conditions of employment.

[18] Although the conciliation process before the CCMA narrowed the gap between the parties, nevertheless, substantial differences remained. The Commissioner nevertheless further ordered the parties to continue negotiating and the conciliation period was extended until 7th August 2003.

[19] On 1st August 2003 the Union addressed a letter to the Appellant setting out its consolidated demands. It set out the Union's latest position in relation to its demand for organisational rights. It further set out, separately, its demands on *"substantive issues"*. Among the various demands on *"substantive issues"*, was a demand that was referred to as *"leave and leave enhancement pay"*. Here the letter set out the demands previously made in the letter of 17th June 2003 that workers qualify for twenty working days of leave per annum and a 13th cheque after completing one year of service with the Appellant.

[20] Following the aforesaid letter, the parties again met to attempt to resolve the outstanding issues between them. They were however unable to conclude an agreement before the expiry of the conciliation period. On 7th August 2003 the Commissioner issued a certificate of non-resolution of the organisational rights dispute that had been referred to the commission.

[21] On the same date, the Union gave notice of the intention of its members to embark on strike action. The strike notice read as follows:

> 'Please be advised that in terms of section 64(1) (b) we will be resuming with the legal strike on the12th August 2003 as from 07:00.
> The strike pertains to unresolved dispute on collective agreement on organisational rights. We would further want to meet with yourself on Monday, the 11th August 2003 to discuss proposals on picketing rules.'

[22] On 11th August 2003, the day before the strike commenced, the parties met to discuss picketing rules. In addition, the Appellant called a general meeting of its employees. The purpose of this meeting was to communicate in clear terms to the employees what the Appellant's attitude was to the impending strike. In particular the Appellant communicated its view that the strike action was permissible only in support of the Union's

organisational rights demands and that workers were not entitled to strike in support of the Union's demand in respect of the so called *"substantive issues"*.

[23] The Appellant's position was explained by Pienaar and was set out in a document distributed to the employees. The document took the form of a letter written by Van der Walt and was dated 11th August 2003. The letter read as follows:

> 'To whom it may concern:
> Reason for strike
> Herewith the only reasons why the union members may strike without intimidation:
>
> 1. Shop stewards' time off.
> 2. Book and stationery cabinet.
> 3. Monthly shop stewards' meeting.
> 4. Monthly general meeting.
> 5. See attachment A.
>
> Members
> 1. Only union members may strike.
> 2. Union members have the choice to strike or not.
> 3. Union and non-union members may not be intimidated because of the strike.
>
> Further arrangements
> 1. If you strike for any other issue than the above *you may be dismissed*.
> 2. The *no work no pay* rule will count.
> 3. Deductions for outstanding loans may be made to a maximum of 25% of your pay.
>
> Assuring you of our closest attention at all times.'

[24] On 12th August 2003 the employees went on strike. Sometime between 9am and 10am Van der Walt met with the shop stewards. No progress was made as neither party was willing to yield any ground in relation to the organisational rights issue.

[25] At about noon, the shop stewards once again approached Van der Walt. According to Pienaar, when he testified, he said that around noon he received a telephone call from Van der Walt. She told him that the shop stewards were with her. They had told her that the Appellant could *"forget about the organisational rights issue and what the workers really wanted was a 13th cheque".* She then handed the telephone to one of the shop stewards, Shadrack Mahlangu, who was with her. According to Pienaar, Mahlangu informed him that the workers were no longer interested in the organisational rights issues and that what they actually wanted was a 13th cheque. Pienaar then formed the view that the attitude of the employees was that even if the Appellant capitulated in relation to the organisational rights demands the strike would continue until the Appellant agreed to pay a 13th cheque. Pienaar's interpretation of his conversation with Mahlangu was that the employees were abandoning their demands for organisational rights and replacing these demands with a demand for a 13th cheque.

[26] Van der Walt in her evidence stated that when the shop stewards arrived at noon on 12th August 2003 they appeared excitable. They said to her words to the following effect:

> 'Don't worry about that little union office on the factory floor, just give us a 13th cheque and this will all go away.'

[27] Mahlangu, when he testified, said that after the initial meeting on the first morning of the strike failed to yield any progress, he and his fellow shop steward had reported back to the striking employees that there was no movement on the organisational rights issue. The employees then mandated the shop stewards to raise with the Appellant the possibility of paying a 13th cheque. This is what he then did at the noon day meeting. Under cross-examination, however, Mahlangu was insistent that if the Appellant had agreed to pay a 13th cheque this would not necessarily have resolved the strike, since the employees might still have insisted on

resolving some of the other outstanding issues in relation to organisational rights before the strike could be brought to an end. He nevertheless testified that an agreement on the 13th cheque that could have assisted in the resolution of outstanding issues.

[28] After Mahlangu had raised the issue of a 13th cheque, Pienaar advised the Appellant that the strike was from that point onwards unprotected and that the appropriate cause of action was to discipline Mahlangu and his fellow shop steward on the grounds that they had led the employees into an unprotected strike.

[29] The Appellant suspended the shop stewards with immediate effect and instituted disciplinary proceedings against them for leading the employees into an unprotected strike.

[30] The disciplinary hearing against the shop stewards took place on Friday 15th August 2003. The decision of the disciplinary hearing was that the shop stewards should be summarily dismissed. The dismissal of the shop stewards was challenged in separate proceedings before the CCMA.

[31] On the following Monday, 18th August 2003, the Appellant decided to issue ultimatums calling upon the striking employees to return to work. On the same morning Van der Walt went out to a group of striking employees and addressed them requesting them to return to work and informed them that the strike had become unprotected. She was somewhat taken aback by the fact that the mood of the striking employees had changed since the decision to discipline and dismiss the shop stewards.

[32] The employees failed to respond positively to Van der Walt's request and did not return to work. At approximately 10am that morning, Van der Walt

distributed an ultimatum to the striking employees. The terms of the ultimatum had been prepared by Pienaar. The ultimatum read as follows:

> 'ULTIMATUM
> TO: ALL STRIKING EMPLOYEES OF EDELWEISS GLASS AND ALUMINIUM
> FROM: MANAGEMENT
>
> You are hereby informed that the strike, which you have embarked on since 12 August 2003, is in contravention of the New Labour Relations Act, 1995 . . . In terms of the certificate issued by the CCMA a protected strike is only allowed in terms of organisational rights. In this regard you have not conducted yourself in line with organisational rights. From negotiations with the Shop Stewards it is clear that you attempted to address substantive issues (ie. 13th cheque) with your industrial action. The Shop Stewards were reprimanded in this regard and their failure to advise you properly resulted in their dismissal after a disciplinary hearing.
>
> Your continued strike (without newly elected Shop Stewards) is still being conducted on the basis of substantive issues and is in this regard an unprotected strike.
>
> You are herewith instructed that you should return to work by *10h30 on 18 August 2003* as per your conditions of employment. Any employee refusing to work, and thereby embarking on an unprotected strike, will face disciplinary action, which may include summary dismissal.
>
> You therefore have ample time to reconsider your possible breach of your contract of employment with Edelweiss Glass & Aluminium. You must however take notice that you will not be paid for the days on which you have taken part in this unprotected strike.'

[33] The ultimatum gave the employees approximately half an hour in which to comply. The ultimatum did not achieve the desired affect. At about 10:45am a final ultimatum was issued calling upon the employees to return to work by 11:30am. The ultimatum made it clear that:

> 'You are hereby informed that should you not return to work and tender your services, the company would have no option but to consider the possibility of terminating your services. Employees that return to work will receive a final written warning.'

[34] No engagement with the Union took place before the issuing of these ultimatums. However, in each case the ultimatum was faxed to the Union's office at around the same time that they were issued to the group of striking employees. At noon none of the striking employees had complied with the final ultimatum and they were then dismissed. A notice of termination was distributed to all the striking employees which read as follows:

> 'Further to the first Ultimatum (of 18 August 2003), that you should resume work at 10h30 and the final ultimatum (of 18 August 2003), that you should resume duty at 11h30, you have failed to comply with such Ultimatums.
> The Ultimatums were issued to yourselves and faxed through to your Union with no positive results.
> The company has no option but to terminate your services with immediate effect.
> Employees who feel that they were intimidated or harassed to participate in the strike may request an investigation in the form of a disciplinary hearing on or before end of business at *16h00 on 18 August 2003*.'

[35] No hearing of any kind was given to any of the employees. None of the employees who received the "*notice of termination of employment"* took up the invitation in the notice to request a disciplinary hearing.

[36] The Union, on behalf of 38 of the employees instituted proceedings in the Labour Court in which it sought an order declaring the Appellant's dismissal of the employees procedurally and automatically unfair. The relief sought was that the Appellant be ordered to pay the employees just and equitable compensation, alternatively, compensation equal to that which the employees would have been paid but for their dismissal from the date of dismissal to the last date of the hearing. The Union also sought an order directing the Appellant to reinstate the employees on the same terms and conditions that applied prior to their dismissal.

[37] It was the Union's contention that the employees had embarked on a protected strike and that the Appellant's dismissal of the employees was consequently automatically unfair. In the alternative, if the strike was unprotected, then the dismissals were in any event unfair on the grounds that they were not for a fair reason and that a fair procedure was not followed.

[38] The Appellant contended that the strike was unprotected, that the dismissals were fair in the circumstances, and that a fair procedure was followed in affecting the dismissals.

[39] The primary argument advanced on behalf of the Appellant was premised on the view that the employees were precluded from demanding a 13th cheque in the course of the strike. When the demand for the 13th cheque was made the strike, which had been protected until that point, was from that point onwards unprotected and the Appellant was, therefore, entitled to dismiss the employees.

[40] The Labour Court rejected this contention and found that the strike for which the employees were dismissed was in fact a protected strike. Consequently their dismissal was automatically unfair.

[41] The Labour Court came to the aforesaid conclusion for the following reasons:

- The evidence did not support the Appellant's contention that employees had abandoned their organisational rights demands and the Appellant could not reasonably have reached that conclusion merely on what was communicated by Mahlangu to Van der Walt at the meeting at noon on 12th August 2003.

- The Appellant did not communicate to the Union that it understood the employees to have abandoned the organisational rights demand. Further it did not record this in the ultimatums where it chose to set out its specific contentions as to why the strike was unprotected.

- The Labour Court found that it was clear from the letters from both Union representatives, TSOGA and MODIMOENG, dated 18th and 19th August 2003, that as far as the Union was concerned the organisational rights demand had not been abandoned and in the view of the Union, the employees were entitled to press a demand for a 13th cheque in the course of the strike as well. There was no indication in either of the letters that the organisational rights demand had been abandoned.

- Even if the Appellant was correct in the contention that the employees were not permitted to demand a 13th cheque during the course of the strike but nevertheless did so, this by itself was insufficient to render the strike as an unprotected strike merely by reason of the employees articulating such a demand.

[42] The Labour Court expressed the view that it would be unrealistic in the context of the strike to insist that in any engagement that is aimed at resolving the strike the parties were limited to pressing only those demands that have specifically been formulated in the run up to the strike. The parties were entitled to adopt a much broader problem solving approach to resolving a collective bargaining dispute. This may include introducing proposals or issues that have not even been thought of, let alone presented at the bargaining table if this might lead to breaking the deadlock that exists. In support of this view the Labour Court referred to the decision of *National Union of Metalworkers of South Africa and others v Bader BOP (Pty) Ltd and another* 2003 (3) SA 513 (CC) para 52.

[43] The Labour Court further expressed the view that the dismissal of the employees was in any event unfair both because there was no fair reason to dismiss them and because no fair procedure was followed. The Labour Court concluded that the Appellant ought to have engaged with the Union as to the protected or unprotected nature of the strike. The Appellant ought to have further approached the Labour Court on an urgent basis to determine whether the strike was protected or unprotected. Todd AJ expressed the view that for an employer who had accepted that the strike at its inception was protected to then dismiss employees in the

circumstances of this case was *"folly of the highest order"*. The Labour Court then made the following order:

> '1. The respondent [the Appellant] is ordered to reinstate the second to thirty-ninth applicants [employees], with the exception of applicant 23, within 20 court days of the date of this order. The reinstatement is, in the case of applicants 7, 8, 18, 24, 25, 26, 34 and 38, to be effective from 1 June 2008, and in the case of the remaining applicants, to be effective from 1 June 2007. The reinstatement is subject to the provisions of paragraph 2 of this order.
>
> 2. All applicants who wish to be reinstated in terms of paragraph 1 of this order shall give notice of this to the respondent or its attorneys of record, in writing, within 20 court days of the date of this order, and in that notice shall tender their services. The amount of back pay due to applicants who tender their services must be paid within 10 court days after they recommence employment in terms of the order of reinstatement.
>
> 3. All applicants who do not give the notice contemplated in paragraph 2 of this order shall be entitled to be paid compensation by the respondent. In the case of applicants 7, 8, 18, 24, 25, 26, 34 and 38, that compensation will be an amount equal to 12 months' remuneration, and in the case of the remaining applicants, an amount equal to 24 months' remuneration, in each case calculated at the rate of remuneration applicable at the date of dismissal. The compensation must be paid within 10 court days of the expiry of the period referred to in paragraph 2.
>
> 4. The respondent is ordered to pay to the heir or executor of applicant 23 compensation in an amount equal to 24 months' remuneration calculated at the rate of remuneration applicable at the date of dismissal.
>
> 5. The respondent is ordered to pay the applicants' costs in these proceedings.'

[44] On 9th September 2009, the Labour Court granted the Appellant leave to appeal against the whole of the aforesaid order.

[45] The essence of the Appellant's argument was that when the shop steward, Mahlangu, informed Van der Walt that the employees were no longer interested in the organisational rights issue and what they now wanted was a 13th cheque, the protected strike transmuted into a strike where the

primary concern now was for a 13th cheque. As the issue of a 13th cheque was not a subject of the conciliation process, the strike was from this point on unprotected. It was submitted, on the facts found by the Labour Court, that the Court had erred in coming to the conclusion that the strike was protected and the dismissal of the employees on the grounds of their participation in the strike was automatically unfair.

[46] It seems to me that the crisp question is, does a change to a demand not made during the conciliation process, but made in the course of a protected strike; nullify the protected status of that strike?

[47] In *City of Johannesburg v SAMWU* [2009] 5 BLLR 432 (LC) the following was stated at 435:

> 'The general rule, of course is, that the issue in dispute over which a strike may be called must be the same as that referred to conciliation. But this is not a rule to be applied in a literal sense. To hold a union to the terms of a dispute or the formulation of a demand, as articulated in a referral to conciliation, would defeat the purpose of collective bargaining which is, after all, a process of engagement designed to persuade one's adversary to modify positions previously adopted and views previously expressed. The flexibility that must necessarily be adopted here was recognised by the Labour Appeal Court in the *TSI* case where Zondo JP said the following:
>
> > "One accepts that in a conciliation process a party may make a demand which he is prepared to later moderate and that a party may sometimes put up a demand that it is aware the other party will not agree to.'"

[48] The court *a quo* took the view that the demand for a 13th cheque was an attempt on the part of the employees to break the deadlock and in that way perhaps end the strike. The court *a quo* further expressed the view that the Appellant was wrong to characterise the demand for a 13th cheque in the course of the strike as impermissible and rendering the protective strike unprotected.

[49] It is common cause on the evidence that at no stage did the Appellant approach the Union or the employees directly to establish as to whether the employees were abandoning their demand for organisational rights.

[50] At best for the Appellant, when Mahlangu articulated the demand for a 13th cheque, the situation became doubtful as to whether or not the employees had completely abandoned the issue on which the strike had been called and that the continuation of the strike was now only for the purpose of persuading the Appellant to agree to the payment of a 13th cheque.

[51] The Appellant's haste in concluding that the strike was not protected and then issuing the first ultimatum was unjustified and perhaps further confused the situation.

[52] In my view, the articulation of the demand for a 13th cheque did not cause the protected strike to transmute to an unprotected strike. Such a transmutation, as contended for by the Appellant, would only occur if it is shown that the employees had used the protected strike as leverage to achieve other objectives in respect of which no strike action could be taken. In this regard see *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union* (2) (1997)18 ILJ 671 (LAC).

[53] In my view, the court *a quo* correctly came to the conclusion that on the facts of the present case, this was not the position.

[54] The court *a quo* cannot be faulted in its conclusion that the strike was, therefore, protected and the dismissal of the employees on the grounds of their participation of the strike was automatically unfair.

[55] Moreover, the two *ultimata* issued by the Appellant failed to give the employees sufficient time to properly consider the situation and consult with the Union for its input into the assessment of the situation.

[56] The Appellant has also criticised the relief granted by the court *a quo*. It was argued that the court *a quo* was not influenced by the belief that the Appellant had acted grossly highhanded and in a foolish way. It was submitted if the decision to dismiss was unfair in the circumstances, the unfairness is not egregious and the employees appear to have suffered, if at all, only slightly in consequences. It was further argued that the Appellant was a small firm trying to do its best in the circumstances and the compensation ordered by the court *a quo* would be a severe financial strain on the Appellant.

[57] Section 194(3) of the LRA provides for compensation in respect of an automatically unfair dismissal. The section reads as follow:

> 'The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.'

It is clear that the section limits the amount of compensation that may be awarded to an employee whose dismissal is automatically unfair to the equivalent of 24 months remuneration. The section further provides that the compensation must in all the circumstances be "just and equitable". This in my view left the amount of compensation to be awarded in the discretion of the court *a quo*. This court is only entitled to intervene with the discretion of the court *a quo* if it takes the view that there has been a misdirection or that the court *a quo* had not exercised its discretion

judicially (see *Dr D.C Kemp t/a Centralmed v Rawlins* [2009] 11 BLLR 1027 (LAC). It seems to me that the court *a quo* was fully cognizant of all the material facts before it. It weighed carefully the circumstances of each individual employee. There is nothing in the court *a quo*'s reasoning which suggests that it committed a misdirection or that it exercised its discretion improperly in determining the issue of compensation. There are thus no grounds for this Court to interfere with the award regarding the issue of compensation.

[58] In the result the appeal is dismissed with costs.

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Jappie JA

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Waglay DJP

_____

Davis JA

DATE OF JUDGMENT 03 August 2011

APPEARANCES

APPELLANT:	Adv Bassey SC Bornman & Mostert Inc
FIRST RESPONDENT:	Adv Rengane History Matukane Attorneys