REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

30/5/2017
DATE .SIGNATURE

CASE NO: 36801/2015

In the matter between:

JOBURG MARKET SOC LTD	**MARKET**
and	
AURECON SOUTH AFRICA (PTY) LIMITED	**1ST RESPONDENT**
PROJECTS AND INDUSTRIAL ENGINEERING JOINT VENTURE	**2ND RESPONDENT**
SVA CONSORTIUM	**3RD RESPONDENT**
LIDWALA UMUHLE JOINT VENTURE	**4TH RESPONDENT**
ROYAL HASKONING DHV (PTY) LIMITED	**5TH RESPONDENT**
THEMBAKELE CONSORTIUM	**6TH RESPONDENT**
TMTJ CONSULTING GAUTENG	**7TH RESPONDENT**
ARUP (PTY) LIMITED	**8TH RESPONDENT**
IKEMELENG ARCHITECTS	**9TH RESPONDENT**

TLOU INTEGRATED TECH CC	**10TH RESPONDENT**
SKETCH DESIGN AND CONSORTIUM	**11TH RESPONDENT**
WORLEY PARSONS RSA (PTY) LIMITED	**12TH RESPONDENT**
BVI RHOSE CONSULTING ENGINEERS CONSORTIUM	**13TH RESPONDENT**
IGS CONSULTING ENGINEERS	**14TH RESPONDENT**
MAHLATSI TUMELO COST CONSULTANT	**15TH RESPONDENT**
DELTA BUILT ENVIRONMENT CONSULTANT	**16TH RESPONDENT**
SML PROJECTS (PTY) LIMITED	**17TH RESPONDENT**
TAKGALANG CONSULTING JV	**18TH RESPONDENT**
SMEC SOUTH AFRICA (PTY) LIMITED	**19TH RESPONDENT**

J U D G M E N T

FISHER J

[1] During March 2014 the applicant, the Market published an invitation to bid for technical assistance and support to the Market for what was known as its "Market of the Future Project". The first respondent, Aurecon submitted a bid as did the other respondents. On 4 October 2014 Aurecon was appointed as the successful bidder. However, in November 2014, the board of directors of the Market appointed a firm of auditors to investigate the legality of the tender process.

[2] On 21 January 2015 the board took the decision to apply to review the tender process, after considering the report produced by the auditors. On 19 February 2015 the Market advised Aurecon of this decision.

[3] On 23 October 2015, more than a year after the award, this application was brought. In terms thereof the Market seeks to have its own decision reviewed. Aurecon is the only respondent that opposes the relief.

[4] Central to the case is the Market's application for condonation of its failure to bring the application within a reasonable period. The Market raises the question whether the matter should be adjudicated within the framework of PAJA or the principle of legality. This distinction potentially has some importance to the assment of the delay. When assessing whether delay is unreasonable under PAJA, courts may have reference to a legislatively prescribed outer-limit of 180 days as set out in section 7(1), however no prescribed limit exists under a legality review.

[5] The way in which reviews under PAJA and legality reviews operate and intersect has given rise to differing interpretations and views by our courts (see: *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC), *Khumalo v MEC for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 CC. The position in our law on this question is presently uncertain.

[6] In *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5 ("*Aurecon CC*") the Constitutional Court in an appeal from the SCA in Aurecon *South Africa (Pty) Ltd v City of Cape Town 2016 (2) SA 199* ("*Aurecon SCA*") dealt with this issue on facts similar to those in this case. (It bears mention that the same respondent is the litigant in this case and those cases.) In *Aurecon CC* it was held that it was not necessary for this question to be decided, in that the time period which had been allowed to elapse was unreasonable both under PAJA and legality review. In this regard Nkabinde ACJ stated as follow at para [37] of *Aurecon CC* :

" While it is so that the case cannot be decided on an assumption of the appropriateness of PAJA as a regulatory framework if legality review might yield a different result, this need not be an insurmountable hurdle to disposing of the present matter within the confines of PAJA. It may well be that there are differences, even significant differences, between condonation in terms of section 9 of PAJA and unreasonable delay under legality review in some cases, but this is not so here. In the present matter, for reasons set out below, the delay is found to be both unreasonable and outside of the 180-day time limit. The practical implication is that, on these particular facts, it is essentially the same enquiry conducted by the Court as would be the case if assessing the application for condonation within the framework of legality review."

The same considerations hold sway in this matter as is set out in more detail below.

[7] The impugned decision was taken on 4 October 2014. The Market contends, however, that its board only found out about the decision on 23 October 2014 and that furthermore, its board only gained knowledge of the irregularities when it received the auditors' report on 22 January 2015. It thus argues that, to the extent that PAJA applies, the 180 day period should run

from the date that the board obtained knowledge of the decision and, in any event, from the date on which it gained knowledge that the process was irregular. Aurecon contends that as the Market itself is the decision-maker it follows that it acquired knowledge of the decision and the reasons for it the moment the decision was taken.

[8] In *Aurecon CC* it was held *per* Nkabinde ACJ in relation to knowledge by the City at para [39]:

> *"The distinction that the City attempts to draw between what is within its own knowledge and what is within the knowledge of its committees is superficial. It is common cause that the BEC and the BAC are committees mandated by the City for purposes of the tender procurement process. These committees form part of an internal arrangement by the City. Accordingly, it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC, may be deemed to be within the City's knowledge. In my view, that is a weak attempt by the City to deny knowledge of what it ought reasonably to have known."*

[9] In *Aurecon SCA* at para [16] the court *per* Maya ADP held as follows in relation to the second aspect of the submission, being that the period should run from date that the irregularities become known:

> "The *decisions challenged by the City and the reasons therefor were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court a quo, ie that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved Market to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had*

been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions."

[10] In the same vein on this point, in *Aurecon CC,* the Court held as follows at [40] – [41] :

"*The City also attempted to distinguish its knowledge of "reasons" from its knowledge of "irregularities". In this regard, the City was of the view that the reference to "reasons" in section 7(1)(b) of PAJA does not refer to formal reasons furnished in terms of section 5 of the Act but merely to "the relevant events giving rise to the particular decision and which render it susceptible to review".*

On a textual level, the City's contention confuses two discrete concepts: reasons and irregularities. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an Market."

[11] Thus the time period, if counted under PAJA, must run from the date of the decision (i.e. 4 October 2014). Whilst, in any given case, there may have been internal difficulties which could serve to explain and perhaps excuse a delay for the purposes of seeking condonation, this should not affect the time from which the period will run.

[12] The explanation for the delay in bringing the review application given by the Market in its founding affidavit lacked detail in relation to salient aspects. The excuse proffered amounts to this: After the award came to the attention of the board on 23 October 2014 it sought the auditor's investigation

and report; the report was only produced on 22 January 2015 and placed before the board the following day. Having considered the report the board resolved to appoint attorneys to consider whether the award should be reviewed and to draft the application . The drafting of the application was only completed on 8 October 2015, as the legal team took some 9 months to finalize the application because of the complexity of the matter. There is scant information as to why this process took so long. This is particularly so as reference to the auditors' report confirms that almost all of the investigative work had already been performed by the auditors at the time the meeting of board was convened on 23 January 2015.

[13] In my view, regardless of whether the matter falls to be dealt with under the principle of legality or under PAJA, the explanation for the delay is not satisfactory and I find that the delay in all the circumstances cannot but be found to be unreasonable.

[14] The enquiry does not, however, end there. In *Gqwetha v Transkei Development Corporation Ltd* [2005] ZASCA 51; 2006 (2) SA 603 (SCA), the majority of the Court held that, when considering a plea of undue delay, the Court should assess: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.

[15] The SCA in *Aurecon SCA*, relying on *Van Wyk v Unitas Hospital [2007] ZACC 2008(2) SA 472 at para [20] and eThekwini Municipality v Ingonyama 2014 (3) SA 240 (CC) at para[28] set out the factors that need to be considered when granting condonation at para [17] as follows:*

"Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[16] The Constitutional Court placing reliance on *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para[28] took a similar approach, in *Aurecon CC* wherein it was held at para [49]:

> *"Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success. In this case, that means considering the significance of the alleged procedural irregularities that were raised in the Ernst & Young report. It should be borne in mind that, when carrying out a legal evaluation a court must, where appropriate, "take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision."* (the quoted portion is from *Allpay supra* at para [40])

[17] Whether the interests of justice require the granting of condonation entails the exercise by the court of a discretion and the factors to be considered in that enquiry will depend on the nature of each case. (see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333*

(SCA) at para 82; City of Cape Town v South African National Roads Agency Ltd and Others (2165/2013) [2015] ZAWCHC 135 (30 September 2015) at paras [21] and [22]).

[18] The interests of justice test thus requires due consideration of all relevant factors. Condonation may be granted where the sufficiency of the reasons for the late filing may, when viewed in isolation, not be deemed to be particularly strong if the merits of the application have strong prospects of success and if the application determines a question of fundamental importance. A prime example of this reasoning is the case of *Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC)*. While the Court differed on the merits, it was unanimous in relation to the granting of condonation. It held as follows at para [49]:

"The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favor of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success"

[19] It is thus important in the assessment to have reference to the nature and effect of the irregularities relied on by the Market.

[20] The Market's version is that none of the bids should have been accepted in that all had deficiencies which should have disqualified them.Two bidders however made it through to the final evaluation phase – Aurecon and the second respondent, Projects and Industrial Engineering Joint Venture

("PIE JV"). Of these two bidders PIE JV was initially the bidder recommended by the Bid Evaluation Committee of the Market *("BEC")* to the Bid Adjudication Committee *("BAC")* for appointment. Such recommendation of the BEC was later revisited and Aurecon was then recommended. This change in recommendation occurred as a result of the. BAC instructing the BEC to reassess its evaluation by taking into account factors which were not part of the criteria as stipulated in the Request for Proposals *("RFP")* and to re-evaluate criteria that had already been scored. This conduct is dealt with in more detail below.

[21] The Market contends that there are two grounds on which Aurecon's tender should have been disqualified by the BEC. The first relates to tax clearance certificates submitted by the Aurecon in respect of itself and its proposed sub-consultants. The second relates to the first respondent's failure to sign one of the prescribed returnable documents (Form MBD8).

[22] In relation to the tax clearance certificates the RFP provided that *"an original and valid tax clearance certificate must be submitted"* and that failure to do so would result in the disqualification of the bid. The Market contends that the tax clearance certificates submitted by the Aurecon were non-compliant. Aurecon argues that this has not been established by the Market on the papers and that the version of Aurecon, which is to the effect that it indeed furnished such certificates, must be accepted. The argument of Aurecon is on the face of it, compelling.

[23] Form MBD8 is a questionnaire, which requires bidders to answer questions about matters that might affect their suitability for appointment. Its submission was also compulsory. At the end of the form there is a declaration which bidders are required to make to the effect that the information provided therein is correct and in which they acknowledge that the provision of false information may result in the cancellation of any contract awarded or other appropriate action. This part of the form provides space for the declarant's name, a date, the name of the bidder and the declarant's position with the bidder to be inserted. It also provides for the signature of the declarant to be appended.

[24] The first respondent's tender was accompanied by a completed MBD8 form but it was not signed. It is contended by the Market that, on the basis also of this lack of signature, the bid of Aurecon should have been disqualified. I am urged by Aurecon in relation to this aspect to take a purposive approach along the lines taken in *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA)* where under similar circumstances – i.e. failure to append a signature to a peremptory document, it was held that this omission could and should have been condoned. In this regard it was held *per* Jafta JA as follows at para [17]:

"*Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (SA Eagle Co Ltd v Bavuma). In this case condonation of the appellant's failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee*

would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217."

[25] A complaint which is related to those advanced by the Market is that Aurecon was treated differently from other tenderers, whose tenders were disqualified as a result of their non-compliance with formal requirements which from a qualitative perspective were on *par* with these formal irregularities. This preferential treatment is alleged to have been arbitrary or capricious.

[26] If these aspects were all that were raised, I would have been inclined to enter into an analysis of these short-comings on the basis that the interests of justice appeared tilted in favour of not allowing the condonation of the late bringing of the application for review.

[27] However, the manner in which the adjudication of the matter by the BAC took place is a more profound problem. After having obtained a recommendation from the BEC to the effect that PIE JV was the best qualified bidder, the BAC referred the matter back to the BEC, on 3 October 2014, with instructions that the BEC reconsider its recommendation of PIE JV as opposed to Aurecon on the basis of issues such as subcontracting, BBBEE credentials, financial capacity, and other functionality criteria. It emerges from the transcribed record of this meeting, that this was done on the basis that the CEO, who also participated in the BAC as its Chair, had expressed reservations as to the ability from a financial and operational perspective of PIE JV to carry out a project of the size proposed. It appears clear that the

BAC, with the CEO at its helm, had decided prior to the referral back to the BEC that it wished thereby to contrive the rejection of PIE JV as preferred bidder and the recommendation of Aurecon in its stead.

[28] This contrivance resulted in Aurecon being appointed at a price which was nearly R11 million higher than the price which was proposed by PIE JV. Aurecon was also awarded the contract on *inter alia* the basis that its bid contained "value added incentives" whilst the RFP did not include such incentives in the evaluation criteria.

[29] The fact that these reconsiderations were embarked upon for the stated purpose of securing the recommendation of Aurecon in all the circumstances, is an irregularity which is material when one takes into account the purpose of the tender process and the requirements in relation thereto.

[30] Regardless of whether PIE JV or Aurecon should have made it through to the recommendation round, the fact that the reconsideration of the matter by the BEC at the instance of the CEO had the effect that a bidder was accepted at a price which was nearly R11 million more than the alternative bidder - which had initially been recommended, is cause for concern. The interference with the process, whatever its motive, strikes at the very heart of the tender process. On the face of it, public interest was compromised. The SCA has held in Minister of Social Development and Others v Phoenix Cash

'n Carry [2007] SCA 26 (RSA) para [2] *"that public interest is served by the selection of the tenderer who is best qualified by price"*

[31] Due regard must be given to the importance of the issue that is raised and the prospects of success. As held in Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para [1]:

"In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure a procurement process is fair, equitable, transparent, competitive and cost-effective. Where a procurement process is shown not to be so, courts have the power to intervene."

[32] An organ of state, such as the Market, must procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

[33] As held by the Constitutional Court in *Allpay at para [40].*

" Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the

*system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair" (*Footnotes omitted)

[34] Section 217 seeks to ensure that when public funds are disbursed to procure services, there must be proof that the process is transparent, competitive and cost effective. In other words, the state must get value for money. Furthermore, by being open and transparent, there is some assurance that the process will be fair and equitable as other competent bidders will have a fair opportunity to put in competing bids.

[35] Aurecon argues that there is no evidence of fraud or corruption or to suggest that Aurecon is any way to blame for the unfairness of the process and any of the irregularities raised. It garners some fortitude in the approach taken by the Constitutional Court in *Aurecon CC* and the *SCA in Aurecon SCA*. I was urged to adopt the same approach and to hold that notwithstanding the fact that there were admitted irregularities in the process the failure to properly explain the delay should mean that the Market's application should fail for this reason alone. This submission, however, loses sight of the fact that the court in those cases found that there were no irregularities of any real substance. The Constitutional Court went further in this regard and held at para [50]:

"*If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this Court might look less askance in condoning the delay. The interests of clean governance would require judicial*

intervention. However, this is not such a case and a weighing of factors leans decidedly against granting condonation."

[36] This does not, in my view, mean that it would only be in instances of proof of corruption, collusion, or fraud where a court in weighing a clearly unreasonable delay would be more inclined to condone such a delay in the interests of justice. It is the type of infraction and its possible impact on the public interest and the fairness component as a whole which must be considered in applying the test. In *Allpay* it was held at para [27]:

"...deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."

[37] Hence one does not need to prove corruption *per se* before the interests of justice will operate against the granting of condonation in circumstances such as these . To my mind, the manipulation of the process was such that it was a deviation of the type that may bring risks of corruption. Whether this interference with the process itself amounts to a "corruption" is something that is not necessary for me to decide.

[38] Aurecon argues that condonation should be refused as there is no evidence to suggest that it is, in any way, to blame for the unfairness of the process and the disregard of the Constitution and procurement legislation.

Indeed, by the Market's admission, its own officials are solely to blame therefor and nobody other than the Market itself has ever complained about the unfairness of the tender process. However this fails to take account of the public interest. In the end, with a failure of the process at this fundamental level it matters not that the fault lies with one or the other of the parties or with both.

[39] Thus, in summary: I am in agreement with counsel for Aurecon that the delay is unreasonable. However, the irregularity complained of is such that the process is deviated from and interfered with in a manner which could denote or lead to corruption. Furthermore, the interference with the process, in fact, led to the award of the tender at a price which was significantly higher than the recommended tender. Price is a central issue in the procurement process and the fact that it is directly impacted on by the irregularity in cause for concern. I am of the view that in this case the interests of justice dictate that the delay in bringing the application should be condoned. Whilst it is so that the public has an interest in the finality of administrative decisions, there is an equally deserving public interest in ensuring that a tender is awarded in a fair and transparent manner and after establishing what the best available solution is. It is also in the public interest to ensure that goods and services are secured for the best and lowest price possible.

[40] The deficiencies complained of are such that the award to Aurecon falls to be set aside.

[41] I thus come to the matter of the remedy. Section 8 of PAJA provides as follows in relevant part:

" (1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs."

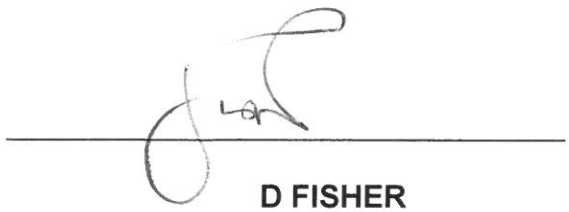
[42] There exist no circumstances which exceptionally justify the granting of one or other of the unusual remedies in sub-paragraph (c)(ii) in lieu of the usual remedy of remittal in sub-paragraph (c)(i) (see: *Gauteng Gambling Board v Silver Star Development Ltd & Others 2005 (4) SA 67 (SCA) para [28]; De Jong and Others v The Trustees of the Simcha Trust and Another 2014 (4) SA 73 (WCC) at paras [19] to [24]; Simcha Trust v Madeleine de Jong [2015] ZASCA 45.* I was urged on behalf of Aurecon to remit with

detailed directions which would, in essence, serve to give some advantage to Aurecon. There is, to my mind, no basis for the suggested or any directions.

[43] As to costs, had the application not been opposed, the Market would have been liable for its own costs of the review application in any event. I also take into account that it is not established that the fiasco that this process became, was the fault of any party other than the Markets's officials.

I thus order as follows:

1. Condonation is granted to the applicant for the late bringing of the application;
2. The tender process and the award of the tender to the first respondent is set aside;
3. The tender is remitted for reconsideration by the applicant;
4. Each party shall pay its own costs.



D FISHER

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 16 March 2017

Judgment Delivered: 30 MAY 2017

APPEARANCES:

For the applicant: Adv T Motau SC with L Kutumela, instructed by Ningiza Horner Inc

For the Respondent: Adv J Van Der Westhuizen, instructed by Weavind and Weavind Inc.