IN THE LABOUR COURT OF SOUTH AFRICA

Held at Cape Town

Case Number: C 140/98

In the matter between:

CITY OF TYGERBERG	***Applicant***
and	
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	***First Respondent***
J P THERON N.O.	***Second Respondent***
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	***Third Respondent***

JUDGMENT

BASSON, J:

1 This is the review of an arbitration award in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA"). The arbitration award was issued under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in giving effect to the provisions of section 74(4) of the LRA.

2 In terms of section 65(1)(d)(i) of the LRA employees who are engaged in an essential service are precluded from participating in a strike or in any conduct in contemplation or furtherance of a strike.

3 These provisions of the LRA therefore constitute a limitation on the right to strike of workers who are engaged in an essential service. The right to strike is entrenched in the Bill of Rights in terms of section 23(2)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

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5 Section 74 of the LRA seeks to ameliorate the effects of this limitation on the right to strike. The provisions of this section provide that any party to a dispute that is precluded from participating in a strike because that party is engaged in an essential service may request that (if such dispute remains unresolved after an attempt to resolve the dispute through conciliation) the dispute be resolved through arbitration.

6 In other words, even though workers who are engaged in an essential service (such as the workers *in casu*) may not exercise their right to strike as a necessary corollary to collective bargaining over disputes with their employer, they obtain the right to refer such disputes to arbitration after an attempt at conciliation has failed.

7 The dispute in the present matter was referred to arbitration in terms of the provisions of section 74(4) of the LRA. The description of this dispute circumscribed the terms of reference for the arbitration. In my view, the terms of reference constituted a determinative part of the material in terms of which the arbitrator (the second respondent) had to make his award.

8 The arbitrator defined the terms of reference or the issues in dispute (correctly, in the submission of both the parties) as follows (at paragraphs 2.1.1 to 2.1.3 of the award at page 399 of the papers):

"2.1.1 Whether the introduction of a community-based refuse removal scheme in a part of Khayalitsha amounted to a unilateral change in terms and conditions of employment;

2.1.2 Whether the introduction of the above scheme amounted to an unfair labour practice;

2.1.3 Whether the introduction of the above scheme was in breach of national and local

agreements".

9 Accordingly, there were, in fact, three issues in dispute to be determined by way of arbitration. The issues in dispute were also referred to as the first, second and third questions to be determined.

10 In essence, the South African Municipal Workers' Union (the first respondent - "the union") objected to the introduction of the said scheme. The union was of the opinion that the introduction of the scheme amounted to the "privatisation" of the cleansing operation of the employer (the applicant) in Khayalitsha and thus impacted negatively on the terms and conditions of employment of its members who were employed as workers engaged in the cleansing of Khayalitsha. The applicant (the City of Tygerberg), a municipality, contended that the introduction of the said scheme did not amount to a unilateral change to the terms and conditions of employment of these workers as it intended to transfer them into existing vacancies and denied that it had acted unfairly in introducing the scheme.

11 The parties agreed that the proper standard of review of arbitration awards in terms of section 145 of the LRA was set out in the judgment of the Labour Appeal Court in the case of **Carephone (Pty) Ltd v Marcus NO and Others** (unreported judgment, case number JA 52/98).

12 It was held in terms of this judgment that the CCMA was an "organ of state" in terms of section 239 of the Constitution and as such was bound directly by the Bill of Rights as well as being subject to the principles governing public administration contained in section 195(2)(b) of the Constitution (at paragraphs [11] and [12] of the judgment).

13 In particular, the CCMA was bound to respect section 33 (read with item 23(2)(b) of schedule 6) of the Constitution, that is, the administrative justice section of the Bill of Rights. The Labour Appeal Court concluded (at paragraph [22] of the judgment) that

"there are no express or implied provisions in the LRA to suggest that the powers of a commissioner in compulsory arbitration under the LRA may **exceed the constitutional constraints on those powers** or may be given **in conflict with constitutional values**. It would have been surprising had there been any such provisions, given that the LRA is a piece of legislation emanating from the new constitutional order (under the interim Constitution) and that it seeks to promote the specific and general provisions of the new order (s 1(a) and s 3(b) of the LRA)" (my underlining).

14 The Labour Appeal Court noted that "[i]t appears from a number of decisions of the High Court that the effect of, particularly, the administrative justice section of the Bill of Rights is seen as **broadening the scope of judicial review** of administrative action (at paragraph [30] of the judgment, emphasis supplied).

15 The Labour Appeal Court then continued (at paragraph [31]): "The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (s 33 and item 23(2)(b) of schedule 6 to the Constitution). This provision introduces a requirement of rationality in the *merit or outcome* of the administrative decision. This goes beyond mere procedural impropriety as a ground of review, or irrationality only as evidence of procedural impropriety".

16 The Labour Appeal Court, however, made it clear that the distinction between appeal and review is not abolished and that the reviewing Court therefore does not have the power to perform the administrative action itself, which would be the effect if justifiability in review proceedings is equated to "justness" or "correctness" (at paragraphs [32] to [35] of the judgment).

17 The Labour Appeal Court then expounded a test for or standard of review of arbitration awards (at paragraphs [36] and [37] of the judgment):

"In determining whether administrative action is justifiable in terms of the reasons given for it, **value judgments** will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge determining this issue is aware that he or she **enters the merits not in order to substitute his or her own opinion on the correctness** thereof, but to determine whether the outcome is rationally justifiable, the process will be in order. Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers, such as 'reasonableness', 'rationality', 'proportionality' and the like ... Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: **is there a rational objective basis justifying the connection made by the administrative decision-maker on the material properly available to him and the conclusion he or she eventually arrived at**? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions of the LRA" (my underlining).

18 It is clear therefore that the arbitrator in the present matter was bound to dispense administrative justice in the sense of making a rationally justifiable award. Put differently, the arbitrator of the CCMA (the second respondent) was bound to respect these constitutional constraints. In the event of the arbitrator failing to do so such defect would render the award reviewable on the basis that the arbitrator was exceeding his powers within the meaning of section 145(2)(a)(iii) of the LRA.

19 Further, as an administrative organ of state, the arbitrator of the CCMA acted under the contraints also of the other relevant provisions of the Constitution that are applicable in the circumstances of the present matter.

20 One of the most important considerations in this regard is the fact that the arbitrator

was evaluating the decision taken by another organ of state, that is, a municipality.

21 Local government matters are defined in terms of part B of schedule 5 to the Constitution as being, *inter alia,* "cleansing", "refuse removal" and "solid waste disposal". A municipality has the executive authority in respect of and the **right** to administer such matters (in terms of section 156(1) of the Constitution).

22 Further, the objects of local government are defined as being, *inter alia*, "to ensure the provision of services to communities in a sustainable manner", "to promote social and economic development"; "to promote a safe and healthy environment"; and "to encourage the involvement of communities or community organisations in the matters of local government" (in terms of the provisions of section 152(1)(b) to (e) of the Constitution).

23 Moreover, the Constitution is explicit in its insistence upon a municipality's autonomy. Even the national and provincial governments are prohibited from compromising or impeding "a municipality's ability or **right to exercise its powers or perform its functions**" (section 151(4) of the Constitution, emphasis supplied).

24 In the same vein, the principles of co-operative government and intergovernmental relations require all spheres of government and **all organs of state** within each sphere to, *inter alia*, "exercise their powers and perform their functions in a manner that does **not encroach** on the geographical, **functional or institutional integrity** of government in another sphere" (section 41(1)(g) of the Constitution, emphasis supplied).

25 It follows that the arbitrator of the CCMA as an organ of state was bound to decide the dispute within the parameters set by these constitutional provisions and principles. In other words, the arbitrator was bound to respect the municipality's autonomy which is protected in terms of these provisions of the Constitution. In the event of the arbitrator

failing to do so he would be exceeding his powers within the meaning of section 145(2)(a)(iii) of the LRA, making the award reviewable on the basis of such defect.

26 *Mr Brassey* argued on behalf of the first respondent that arbitrators who are called upon to arbitrate essential services' disputes should be given more leeway in view of the fact that these employees do not have the right to strike over disputes with their employer but merely the right to have such disputes arbitrated (as is explained at paragraphs [2] to [5] above). Even if this contention has merit, given the constitutionally protected right to strike (referred to at paragraph [3] above), this does not mean that an arbitrator may exceed the constitutional constraints contained in the Bill of Rights (especially section 33 read with item 23(2)(b) of schedule 6) or the constraints contained in the other relevant provisions of the Constitution (identified at paragraphs [20] to [23] above).

27 Likewise, the fact that the arbitrator, in determining the second question pertaining to the alleged "unfair labour practice" (see the terms of reference quoted at paragraph [7] above), was giving effect to the fundamental right to fair labour practices contained in section 23(1) of the Bill of Rights, did not entail that the arbitrator was therefore free to do so without restraint.

28 After all, no fundamental right is absolute but all of the rights contained in the Bill of Rights are subject to the limitations contained or referred to in section 36 of the Constitution or elsewhere in the Bill (in terms of section 7(3) of the Constitution).

29 In fact, the arbitrator was also bound by the provisions of the LRA and had to take these provisions into account when making his assessment on the fairness of the employer's actions. For instance, the arbitrator was required to make an "appropriate" award in terms of section 138(9) of the LRA and the arbitrator had to bear in mind that it is an essential object of the LRA to promote the effective resolution of labour disputes (in terms of section 1(d)(iv) of the LRA).

30 I did not understand *Mr Brassey* to argue that the arbitrator was entitled to exceed the boundaries of the given legal constraints. In fact, he contended that the arbitrator had shown "deference" to the decision taken by the municipality in accepting a matrix in terms whereof he was merely to enquire into the reasons given by the municipality for its decision: "the employer must be able to provide reasons for its actions, and information on which those reasons are based" (at paragraph 5.1 of the award at page 407 of the papers).

31 However, even if this may have been the stated intention of the arbitrator, I am not persuaded that this was the quality of his deference or respect.

32 It is clear that the arbitrator, in determining the (second) question whether the municipality's decision to introduce the refuse removal scheme amounted to an **unfair labour practice,** placed a far more onerous duty on the municipality to convince the arbitrator of the so-called substantive fairness of this decision: "The employer should therefore be able to provide convincing reasons, substantiated by the facts, both as to why a drastic alternative was considered **necessary**, and as to why this particular alternative represents the **best option**. An ideological conviction in privatisation will not suffice" (at paragraph 5.4 of the award at pages 408 to 409 of the papers - emphasis supplied).

33 In other words, the arbitrator did not merely enquire into the reasonableness of the municipality's decision or whether it was rational or justifiable in relation to the reasons given for it but insisted that it be the best decision in his, that is, the arbitrator's opinion. The arbitrator thereby evaluated the correctness of the municipality's decision to introduce the scheme. In assessing the so-called substantive fairness of such decision in this manner, the arbitrator, in effect, denied the municipality the right to make such decision if it did not, in his opinion, amount to the best option available to it.

34 This remarkable lack of deference or respect for the decision taken by the municipality clearly infringed upon the functional integrity and constitutionally enshrined autonomy of the municipality to make decisions in regard to local government matters such as cleansing and refuse removal (see the constitutional provisions discussed at paragraphs [20] to [23] above). The arbitrator of the CCMA was, in fact, usurping the competence of the municipality to legitimately make a decision on these matters as a local government authority which is accountable to its electorate in terms of the Constitution to provide such community services. It therefore follows that the arbitrator exceeded his powers within the meaning of section 145(2)(a)(iii) of the LRA.

35 The arbitrator's terms of reference (discussed at paragraph [7] above), that is, to determine the (second) question or dispute whether the municipality had committed an unfair labour practice in introducing the said scheme, clearly did not justify the arbitrator's disregard for these constitutional constraints.

36 Further, the fact that the municipality appeared to have been open to consultations on the subject of what the "best option" was under the circumstances did not mean that the municipality had thereby abrogated its constitutional competence to legitimately decide on local government matters. It is incorrect to conclude that an employer's decision to consult with its employees in the interests of fairness would automatically entail that an employer is thereby abrogating its right, in a case such as the present, to exercise its constitutional functions as a local government authority.

37 In the event, the arbitrator was not justified in making the findings that "[t]he employer has not established the **necessity** to adopt an entirely new system of refuse removal" and "[t]he employer has not established that if it was necessary to change the system, the BH scheme represented the **best possible option**" (at paragraphs 5.11(b).1 and 5.11(b).2 of the award at page 413 of the papers - emphasis supplied).

38 It therefore follows that the arbitrator was not entitled to take these findings into account as part of the "relevant circumstances surrounding the introduction of the scheme" in order to determine the (second) question or dispute about the alleged unfair labour practice in the following manner: "that the introduction of the scheme was unfair" (at paragraph 5.11(b) of the award at page 413 of the papers).

39 Put differently, the finding that the applicant's actions amounted to an unfair labour practice was not justifiable in relation to the reasons **given for it** as these reasons given for determining the dispute in this manner should not and could not have been taken into account by the arbitrator.

40 For this reason alone, the conclusion that the implementation of the scheme by the applicant amounted to an unfair labour practice on the basis of the so-called substantive unfairness of the applicant's decision can not be rationally justified. In the event, this determination falls to be set aside on review.

41 The fact that the arbitrator of the CCMA exceeded the constitutional constraints also becomes clear when the award is evaluated in terms of the approach that the arbitrator adopted to, in effect, "review" the decision of the municipality. In this regard the arbitrator referred to section 33 of the Constitution (discussed in the **Carephone** judgment as it is set out at paragraphs [12] to [14] above) in the context that the municipality must give reasons for its decision and then proceeded to make a "value judgment" based on the relevant circumstances (paragraphs 5.1 and 5.3 of the award at pages 407 and 408 of the papers).

42 As was pointed out in the **Carephone** judgment (quoted at paragraphs [15] to [16] above), the constitutional requirement that administrative action must be "justifiable in relation to the reasons given for it" does not mean that the reviewing authority may usurp the functions of the administrative organ that is under review and enter the merits of the decision on the basis of the "justness" or "correctness" thereof. The reviewing

authority is limited (in terms of the administrative justice section contained in the Bill of Rights) to enter the merits of the decision only on the basis of the "rationality", "reasonableness" or "justifiability" thereof.

43 The arbitrator in assessing whether the decision by the municipality was the "best possible option" was not limiting himself to an investigation or value judgment to merely determine whether the outcome was rationally justifiable but entered the merits to substitute his own opinion on the correctness thereof. It therefore follows that the arbitrator exceeded his "reviewing" powers in doing so.

44 It may also be noted as a general observation in this regard that the enforcement of the employees' fundamental right to fair labour practices does not mean that the employer's interests can be totally overlooked. As is pointed out above (at paragraph [27]), no fundamental right is absolute. In fairness, also to the employer, the interests of the employer must therefore be balanced against the protection that employees deserve.

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46 In other words, in taking a decision based on its operational requirements, the employer retains its prerogative to legitimately make such decisions based upon its own assessment of its operational needs. The LRA itself contains prescriptions in regard to dismissals for operational requirements. Even though the consultation processes prescribed by section 189 of the LRA must be followed to ensure procedural fairness, it is trite that the Labour Court, in assessing the substantive fairness of such dismissals, will preserve the core prerogative of an employer to make legitimate decisions in connection with its operational requirements.

47 It was argued on behalf of the applicant that, should I decide that the determination stands to be be reviewed and set aside, I should substitute the decision of the arbitrator for my own.

48 The applicable principles in this regard are set out in the judgment of **Johannesburg**

City Council v Administrator, Transvaal 1969 2 SA 72 (T). The ordinary course for the reviewing Court to adopt is to refer the matter back to arbitration as a Court must be slow to assume a discretion which has been entrusted to another tribunal or functionary (such as the CCMA). The reviewing Court will only depart from the ordinary course in circumstances where the outcome of the review was such that "the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider this matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context" (at page 76E-G of the judgment).

49 In my view, the Court should not substitute the arbitrator's decision for its own in the circumstances of the present matter.

50 The determination that falls to be set aside on review is the conclusion that the introduction of the scheme amounted to an unfair labour practice on the grounds of the so-called substantive unfairness thereof (at paragraph [39] above). This is a complex question and the answer thereto requires the careful consideration of the competing interests of the employer and the workers *in casu*. The end result therefore does not readily spring to mind.

51 Further, the Court in making such substitution will be called upon to rely on the evidence as it appears from the papers. In this regard it must be noted that there was no duty on the arbitrator to keep a record of the proceedings and that only his notes are available. The "record" that is available is not an official record but a record that was kept by the applicant's representatives at the arbitration. The status of the documents in the Bundle is merely that these documents are what they purport to be, and no more.

52 In the event, even though I am very concerned that time is of the essence especially when it comes to the delivery of essential services by a local authority, this is clearly

not a case where the end result is a foregone conclusion and it would therefore not be appropriate to substitute the decision of the arbitrator for my own.

53 In fact, in exercising my discretion in terms of section 145(4) of the LRA, it is clear that this is a case where it will be appropriate to refer the dispute back to the CCMA for an arbitration anew before a different commissioner.

54 In coming to this conclusion, I take into account the important consideration that the LRA envisages the effective resolution of labour disputes (in terms of section 1(d)(iv) also referred to in paragraph [28] above).

55 The dispute about whether the actions of the employer in introducing the scheme amounted to an unfair labour practice (in regard to the so-called substantive fairness of such decision) still needs to be determined as a result of my finding that the determination of the arbitrator in this regard falls to be set aside on review (at paragraphs [38] and [39] above).

56 Both parties agreed that the substantive fairness or rationality of the municipality's decision is part and parcel of the dispute *in casu* that stands to be determined in terms of section 74(4) of the LRA. It is accordingly imperative that such dispute be determined as is required in terms of these provisions of the LRA (discussed at paragraphs [4] and [5] above).

57 It was argued on behalf of the first respondent that the finding of the arbitrator on the so-called procedural unfairness of the introduction of the scheme is severable from the finding on substantive unfairness. The contention was that such finding on the unfairness (relating mainly to the alleged inadequacy of the consultation process) should be allowed to stand. I do not agree.

58 First, it is clear from the terms of reference (quoted at paragraph [7] above) that the

(second) question which the arbitrator was to determine was whether the conduct of the applicant taken cumulatively constituted an unfair labour practice. The terms of reference did not contemplate separate findings as to the so-called substantive and procedural fairness of the introduction of the scheme. It is clear that the arbitrator, in my view correctly, also considered the cumulative effect of all the relevant circumstances that would justify the conclusion that such decision amounted to an unfair labour practice, including the fact that "[t]he process of consultation or negotiation adopted was inadequate" (at paragraph 5.11(b).3 of the award at page 413 of the papers).

59 Second, it would not be appropriate to refer only a part of the dispute about the alleged unfair labour practice back for arbitration anew as the arbitrator would find himself or herself in the intolerable position of having to determine such dispute in the face of a decision already taken by another arbitrator in regard to another part of such dispute. The only appropriate remedy is therefore to set aside the determination of the unfair labour practice dispute (the second question) as a whole and to allow this question to be arbitrated anew before another commissioner.

60 It follows that the submission of *Mr Gamble* to the effect that the appropriate remedy would be to refer the parties back to consult on the issue of the introduction of the scheme stands to be rejected as such remedy would not effectively resolve the dispute about the alleged unfair labour practice, particularly in regard to the so-called substantive unfairness thereof.

61 The first question, that is, the dispute whether the introduction of the scheme amounted to a unilateral change in the terms and conditions of employment of the workers concerned (see paragraph [7] above) must, in my view, also be referred back for arbitration anew on basically the very same reasoning.

62 Even though it may be argued that such dispute is somewhat distinct from the question

as to whether the introduction of the scheme amounted to an unfair labour practice, there is a definite link between such finding and the eventual determination of the second question. The arbitrator, correctly in my view, considered the fact that "[i]t ought to have been clear at all relevant times that the introduction of the BH scheme affected the terms and conditions of employment of workers" (at paragraph 5.11(b).4 of the arbitration award at page 413 of the papers) as part and parcel of the relevant circumstances that show "that the introduction of the scheme was unfair" (at paragraph 5.11(b) of the award at page 413 of the papers).

63 In the event, it is appropriate to send the matter back for arbitration anew also in regard to this question, that is, the so-called first question or dispute (quoted at paragraph [7] above).

64 It may cogently be argued that the third question or dispute to be determined was, indeed, a separate issue and that this part of the award should be allowed to stand. The question to be determined was whether the introduction of the said scheme was in breach of national and local agreements (see the terms of reference quoted at paragraph [7] above).

65 However, this finding of the arbitrator itself falls to be set aside on review on the basis that it was not objectively justifiable in relation to the reasons given for it.

66 First, it is clear that the binding nature of the resolution in question was highly suspect, especially on the basis of contractual principles, which was the only basis for it being binding in law. It is accordingly no wonder the arbitrator saw fit to enter into the question whether the resolution constituted a binding "collective agreement" in terms of the LRA, only to come to the unjustifiable conclusion that it did (at paragraph 5.15 of the award at pages 415 to 416 of the papers).

67 Second, it was clear from the terms of reference that the question to be determined was whether the applicant was in **breach** of such (national) "agreement". In this regard the

arbitrator merely stated (almost on the basis of *res ipsa locquitor*) that no one has suggested that the municipality adhered to the said resolution and added that in terms of paragraph (b)(v) of the said resolution it was clear that the municipality did not do so (at paragraph 5.13 of the award at pages 413 to 414 of the papers).

68 However, in order to properly make such assessment, the arbitrator had to consider the evidence in this regard, in particular (in the words of paragraph (b)(v) of the said resolution), whether the municipality was given "the opportunity to ensure effective functioning".

69 The inadequacy of the reasons given for the conclusion that the municipality was in breach of this resolution leads me to conclude that such finding was not justifiable in relation to the reasons given for it. This finding therefore falls to be set aside on review.

70 In the event, the arbitration award must be set aside as a whole and be referred back for arbitration anew before a different commissioner of the CCMA on exactly the same terms of reference, that is, the three questions or disputes contained in the terms of reference (quoted at paragraph [7] above).

71 I have a very wide discretion in terms of section 162(1) of the LRA to make an order as to costs, according to the requirements of the law and fairness.

72 The applicant has been substantially successful in obtaining the relief prayed for and the first respondent was accordingly not successful in opposing such relief. The principle that costs are to follow the result is a sound one although it needs to be balanced by the equally important considerations of fairness.

73 In the matter of **NUM v East Rand Gold & Uranium Company Ltd** (1991) 12 **ILJ** 1221 (A) at 1242F - 1243F it was held that circumstances such as the continuing relationship between the parties should be taken into account so as to avoid

unnecessary or punitive costs orders. A consideration that I have to take into account *in casu* is my finding that the arbitrator had, in effect, unjustifiably taken the view that the applicant could be prevented from implementing a reasonable or rational decision based upon its operational requirements to render essential services to the community. Such conclusion clearly had far-reaching implications for the institution of local government in South Africa. The applicant was accordingly fully justified in incurring the costs of bringing an application for review, also in the interests of the community that it serves. In the event, I regard it as fair that the first respondent is to pay the applicant's costs, including the costs of two counsel.

74 In the event, I make the following order:

1. The arbitration award is reviewed and set aside and the matter is remitted to the third respondent for an arbitration anew in terms of section 74(4) of the LRA on the same terms of reference before a different commissioner.

2. The first respondent is to pay the applicant's costs, including the costs of two counsel.

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Basson J

Dates of Hearing: 20, 23 and 24 November 1998

Date of Judgment: 27 November 1998

On behalf of applicant: Adv W Duminy SC and appearing with him

Adv A Breitenbach instructed by Jan de Villiers & Co

On behalf of first respondent: Adv M Brassey SC and appearing with him

Adv P Gamble instructed by Cheadle Thompson and Haysom