IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

JR 917/06

REPORTABLE
In the matter between:

ZACHARIAS FRANCIOS STEYN **APPLICANT**

and

MIDDELBURG FERROCHROME

(A Division of Samcor Limited) **FIRST RESPONDENT**

TOKISO **SECOND RESPONDENT**

COMMISSIONER PAUL KIRSTEIN **THIRD RESPONDENT**

JUDGMENT

Introduction

1. This is an application to review and set aside an arbitration award which the third respondent issued in February 2006, in his capacity as an appointed arbitrator of the second respondent. The applicant filed the review application outside of the six weeks period and now seeks to be granted condonation for its late filing. Both applications are opposed by the first respondent in its capacity as the erstwhile employer of the applicant.

Background Facts

2. The applicant commenced his employment with the first respondent (the company) on 1 November 1985. In 2005 he held the position of an Administration Accounting Manager. As such, he was in charge of the company's finances for which he was a custodian in Middelburg. One of his responsibilities was the Management of Middelburg Ferrochrome's creditors.

3. The company had a standing practice of paying its creditors after 30 days of the payment becoming due. One of such creditors was a company called ACD. It granted trade discounts to the company whenever the company paid for its debts within 30 days. Towards the end of 2000, the Procurement Council of the company resolved that all its creditors would henceforth be paid after 60 days of such payment becoming due. The

underlying reason was that of ensuring that it had a better cash flow positioning in its books. A M Leon Lombard who was in the employ of the company and the applicant's colleague devised a scheme which ensured that ACP would still receive payment to it within the 30 days' period in return for the same discount which ACP had initially given to the company. The company would thereafter reimburse the scheme with the same amount as was disbursed by the scheme to the ACP in terms of its new policy which was without the discount. The scheme operated as an entity called "Litau" or "Litau Investments." Litau appropriated the trade discount on behalf of its investors and for their benefit. The scheme became known as a "debt factoring."

4. The company had a policy which prohibited any action in which personal interests or benefits were derived in conflict with its interests. Therefore its employees had a duty to disclose any actions from which such conflict could arise.

5. The General Manager of the company at the time, Mr Brian Gibson was informed of the existence and operation of the Litau Scheme. It was reported to him that Mr Lombard's family had provided the necessary finance for the Litau scheme and he approved of the arrangement on the understanding that no employee of the company was benefitting from the investment scheme.

6. There was a stage when the cheque account of the applicant was used in the running of the Litau investment scheme. Investors paid money into his cheque account and he would thereafter transfer it electronically to Litau. He did not inform the company of the transfer of the monies into and from his account for the Litau transactions.

7. A stage was reached when management of the company was not happy with the debt factoring exercise by Litau. Management decided that the exercise was to come to an end. According to the company, the debt factoring exercise did not stop but continued with a Barkhuizen arrangement instead. The applicant's version was that it stop. When it did, the applicant had money of investors in his account. He refunded those who wanted their money. There are those who had hoped for a longer investment. They agreed to keep their money with the applicant who then used it in his cash loan investment business. He had previously run a similar cash loan business. He had declared the business to the company and the company had not raised an objection to it as being in conflict with its business.

8. The applicant transferred the money of those investors who preferred to keep it with him, into his bond account. A question arises then as to whether the applicant derived any indirect benefit from this money and

whether he was therefore in contravention of the company's policies and procedures as he had a fiduciary duty to act in the best interests of the company.

9. In respect of the transactions between the company and ACP, the applicant decided to revert to a 30 days payment arrangement through a direct payment from the company's bank account, in direct contravention of the 60 days payment policy. The applicant thereafter revived a debt factoring scheme in the same fashion as he had done with Litau investment scheme, but this time it was with one of Litau investors, a Mr Barkhuizen. The investment scheme became the Barkhuizen arrangement. Mr Barkhuizen was not an employee of the company. The revival of the debt factoring scheme took place some two months after the termination of the Litau investment scheme.

10. The company decided to prefer 9 charges of misconduct against the applicant. He was convicted of them and was dismissed. He referred an unfair dismissal dispute which had arisen for conciliation and later for arbitration. A private arbitration was held by virtue of a collective agreement entered into between National Union of Mineworkers of South Africa (NUMSA) and the second respondent, in terms of which the second respondent had been elected to adjudicate disputes between employers and employees in the mining industry. The third respondent was

appointed to arbitrate the dispute. He found the applicant to have committed five of the nine charges which he had been initially charged with. He then found that the dismissal of the applicant on 3 June 2005 was substantively fair. The procedural fairness of the dismissal had not been placed in dispute. The applicant seeks to have the findings made on substantive fairness reviewed and set aside.

The charges of misconduct

11. The five charges of misconduct which the third respondent found the applicant to have committed were described as:

> "Charge 1
>
> Failure to abide by bona fide business practices in your relationship with the company in that you failed to disclose that you had a direct and/or indirect interest in or derived benefits from Litau Investments, and or your association with J.G. Barkhuizen.
>
> Charge 2
>
> Failure to abide by bona fide work and business practices in your relationship with the company in that you failed to act in the best interests of the company in your dealings with suppliers.

Charge 3

Gross misconduct in that by having a personal interest in and/or deriving benefits from Litau Investments and/or you association with J.G. Barkhuizen; you engaged in practices and pursued private interests which were in conflict with the company's interests.

Charge 5

Dishonesty, alternatively, misrepresentation, alternatively making false statements in that on 15 March 2001, 18 April 2005 and 19 April 2005, you misrepresented and/or lied about your interest in and association with Litau Investments and/or J.G. Barrkhuizen.

Charge 8

Gross dishonesty, alternatively negligence, alternatively not acting in the best interests of the company in that you instructed Ms Duvenhage to use J.G. Barkhuizen as a debt factoring agent. The company was prejudiced by such instruction as they did not obtain the benefit of the settlement discount."

Grounds for review

12. In both the founding and supplementary affidavits, the applicant submitted that the third respondent:

- did not appreciate the complexity of the facts and the matter and subsequently misapplied the law in adjudicating upon the alleged misconduct on his part.
- misunderstood the facts and that his reasoning was flawed.
- misapplied the facts in coming to his conclusion in respect of charge 1.

The chief findings by the third respondent

13. What follows are findings discussed by the third respondent.

Charge 1

14. The crux of the charge relates to the failure to disclose. At no stage did the applicant declare the practice that his bank account was used as a conduit for the contributions made by the investors. He accepted that the applicant in his position as Administrative Manager had the authority to introduce the concept of debt factoring, which did not excuse him from fully disclosing his interests or involvement in debt factoring arrangement. He therefore accepted that the applicant failed to fully disclose his involvement in the Litau arrangement, in the disciplinary hearing transcript

there was no indication that it was only the applicant's cheque account that was used as a conduit but that the applicant's bond account was actually used and therefore the applicant saved interest on his bond account, which interest was the benefit. The applicant declared his involvement in the micro lending business one year after the bond account was utilized as a conduit. At no stage did the applicant declare the savings on his bond account as a benefit. The failure to declare the benefit was contrary to the *bona fide* work and business practices. The applicant's version that he verbally canvassed the Barkhuizen arrangement with Mr Gibson was accepted. There was no indication that the applicant had a direct or indirect interest or benefit from the Barkhuizen arrangement. The bank statements attached to the respondent's heads of argument did not form part of the evidence presented at the arbitration and were therefore not taken into consideration. The applicant was correctly found guilty of the non-disclosure of an indirect interest and benefits derived from the Litau arrangement.

Charge 2

15. This charge pertained to a failure to abide by *bona fide* work and business practices in his relationship. The introduction of the concept of debt factoring up to the point when the Litau arrangement was terminated could not be criticised as it had Mr Gibson's approval. The applicant did not act

in the best interest of the company when the Barkhuizen arrangement with ACP was introduced.

Charge 3

16. The crux of this charge related to the personal and/or private interest of the applicant in the Litau and Barkhuizen arrangements. The applicant's personal interest in recruiting investors in the Litau arrangement was declared and approved by Mr Gibson. The private interest pursued by the applicant in that the applicant accepted investors monies into his bond account was not disclosed. That only friends of the applicant participated in the debt factoring arrangement was a valid concern from which an inference could be drawn that the applicant pursued his personal interest. The applicant willfully pursued his own interest in the Litau and Barkhuizen arrangements in conflict with the Company's interest.

Charge 5

17. The crux of this charge related to alleged acts of dishonesty or misrepresentation about applicant's interest in and associated with Litau Investments and or J.G. Barkhuizen. In the statement of the applicant dated 15 March 2001, he failed to disclose the use of his account as a conduit and the subsequent benefit. The failure of the applicant to disclose

his indirect involvement in the debt factoring arrangement constituted misrepresentation. An inference could be drawn that the misinterpretation was done to hide the pursuing of personal interests in the debt factoring arrangements.

Charge 8

18. This charge pertained to the allegation of gross dishonesty or negligence or not acting in the best interests of the company by instructing Ms Duvenhage to use J.G. Barkhuizen as debt factoring agent, depriving the company of the benefit of the settlement discount. It could not be determined that the applicant acted grossly dishonest. That he did not act in the best interest of the company by introducing the Barkhuizen arrangement constituted negligence. The company did not obtain the benefit of the settlement discount. The Erasmus instruction to stretch creditors was not formally withdrawn.

The condonation application

19. I consider it appropriate to now deal with the condonation application as the further consideration of the review application depends on it. In his condonation application the applicant dealt with:

(a) the degree of lateness

(b) reasons for lateness

(c) importance of the matter

(d) factual background and grounds for review

The degree of lateness

20. The applicant said that he received the arbitration award on 8 February 2006. He ought to have launched the application for review of a private arbitration award within a reasonable period of time, which has been construed as constituted by a period of six weeks. He submitted correctly that the application ought to have been filed on or before 22 March 2006 but was filed on 19 April 2006 which is a period of delay of about 26 days. He said that the degree of lateness was not excessive in the circumstances. The submission by the company is that the period was excessive under the circumstances.

Reason for the lateness

21. He said that he considered the arbitration award and then forwarded a copy thereof within a week to his attorney for his consideration. He had some delay in communicating with his attorney based in Johannesburg while he (the applicant) resided in Witbank and seldom traveled to Johannesburg. He regarded the matter so complex that it could not simply

be discussed over the telephone call or by email correspondence. He said that attempts to find mutually suitable dates for their meeting were frustrated by a constant clash of their schedules. When eventually his attorney, Mr van Wyk was available to meet him, he was unable to attend the meeting as a result of an urgent medical operation he had to undergo on 10 March 2006. He was only able to meet Mr van Wyk at the end of May 2006, after recovering from the operation.

22. Pursuant to their meeting, Mr van Wyk insisted that counsel be approached for legal advice on the prospects of success of the review application. A further delay of several days was occasioned.

23. In response, the company submitted that the applicant had a period of over a month to consult with his attorney prior to the operation. It said that if this matter was of utmost importance to the applicant, he was to have done his utmost to submit the review application timeously. It pointed out that it was almost two months after receiving the award, that the applicant finally met his attorney and yet no explanation was proffered for the delay in pursuing this matter. It referred to the incompatibility of the schedule of the unemployed applicant with his attorney and pointed out that the applicant should have had enough time to meet with his attorney, if he considered the matter of utmost importance to him. It averred that the

applicant failed to proffer a detailed explanation of the delay when the period was excessive.

Importance of the Matter

24. The applicant said that, as a result of his dismissal he has been unable to find alternative employment, especially in the light of his tarnished employment record. He has been employed with the company for approximately twenty years, during which time he said he had proven himself to have been an exceptionally reliable employee with an unblemished employment record. He stated his age to be fifty one years which fact he said added to his difficulty in securing alternative employment. He submitted that since his dismissal, he applied for numerous positions but to no avail. That, he said, was exacerbated by the fact that he did not meet with the present employment practices and requirements within the business sector. Should this court find that his dismissal was substantively fair, he shall be in a better position to secure employment and or be reinstated with his former employer. As far as the company was concerned, he said that the nature of the award did not in any way prejudice it. He said that in terms of the award the company was not suffering any prejudice either financially or in any other manner whatsoever. He averred that the lateness of the review application has not given rise to any prejudice on the part of the company.

25. According to the company the applicant rendered himself as an unreliable employee who failed to work in the best interest of the company. It was denied that the company would not suffer any prejudice were the applicant to be granted condonation for the late filing of the review application. It was submitted that the rules of this court had to be adhered to and that no proper explanation had been proffered by the applicant for his delay in pursuing the matter. It was pointed out that the applicant failed to deal with prospects of success and that no such existed in the application. The award of the third respondent was said to be correct and that there were no reasons to interfere with it.

26. The applicant proceeded to deal with factual background and grounds for review without separately dealing with the prospects of success. The earlier part of this judgment identified such factual background and the grounds for review.

27. In the decision of *Moila v Shai NO and Others* (2007) 28 ILJ 1028 (LAC) the court considered at least two cases pertaining to those principles that apply when a condonation application ought to be considered. It then had the following to say:

> "[35] In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F Holmes JA set out the factors that need to be taken into

account in considering an application for condonation where sufficient cause-which is the same as good cause-must be shown before condonation can be granted. One of the principles he set out is that, although the factors he set out therein are interrelated and are not individually decisive, 'if there are no prospects of success there would be no point in granting condonation.' In *Chetty v Law Society*, Transvaal 1958 (2) SA 756 (A) Miller JA, on behalf of a unanimous court, dealt with the term 'sufficient cause' or 'good cause' when used in the context of an application for the rescission of a judgment. At 765D-E he said:

'For obvious reasons a party showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation for his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.' (Emphasis added.)

[36] Although the italicized part of this passage was said in respect of an application for the rescission of a judgment, I can see no reason why as a matter of principle it cannot or should not hold good in respect of an application for condonation such as the one the appellant made to the CCMA in this case. Although I do not think that it can be said that the reason for the appellant's failure timeously to request that his dispute be arbitrated was his

> disdain for the relevant provisions, I do not think that Miller JA meant to lay down disdain for the rules or statutory provisions as an essential requirement before the principle he enunciated could apply. I think that was simply an example he used to illustrate the point. I am sure it would apply in a case where there was no disdain but negligence or carelessness." *(sic)*

28. In this matter the period of delay is just about four weeks which is less than the reasonable period of six weeks in which the application ought to have been brought. The delay in the *Moila* case was found to have been over three times the prescribed period set and therefore amounted to an excessive delay. In the present matter I am not of the view that the delay, which is material, is of an excessive nature. See also: *National Union of Mineworkers and Another v CCMA and Others* (2007) 28 ILJ 402 (LC) and *Ruijgrok v Foschini (*1999) 20 ILJ 1284 (LC), for the periods therein discussed.

29. In essence two reasons were proffered for the delay, being that the time schedule for the applicant and that of his attorney were constantly clashing and that he had to undergo a medical operation and thereafter to recuperate. The second explanation for the delay is acceptable and understandable. The first is not, as correctly pointed out by the company. The statement he made is bold and unsubstantiated. He was unemployed and yet had so tight a schedule that it clashed with that of his attorney. He

has not explained what it is that kept him busy at a time when he was unemployed. He has not explained what else could have been so important as to rank supreme over the review of an arbitration award that rendered him unemployed. None of the factors thus far considered are however, individually or collectively decisive.

30. I entertain no doubt that to the applicant, this matter is of great importance. He was a senior employee of the company and spent a considerable working period of his life in the company. He had attained seniority in his working environment. Similarly, the company is entitled to finality in the matter as it has a business to run. I have already found in favour of the applicant that the delay was not excessive.

31. The applicant ought to have also shown this court that he had good prospects of success. In paragraph 7.4.4 of his founding affidavit, the applicant stated that the matter was complex and that an evaluation had to be done beforehand, in order to consider the prospects of success of the review application. He however did not separately deal with the prospects of success. In his favour I will adopt an approach that the grounds for review together with the factual background constitute not only the merits of the review application but also his outline of the prospects of success.

The nature of the arbitration award

32. In paragraph 4.1 of the founding affidavit and in his initial heads of argument reliance was places on the Labour Relations Act 66 of 1995 ("the Act") for the review of the arbitration award of the third respondent, in this matter. In paragraph 5.4 of his founding affidavit, the applicant correctly states the position that:

> "5.4 The Second Respondent presided over the arbitration relevant hereto by virtue of a collective agreement entered into between NUMSA and the Second Respondent in terms of which the Second Respondent had been elected to adjudicate disputes between employers and employees in the mining industry."

33. The second respondent is a private arbitration body distinct for instance from a Bargaining Council or the Commission for Conciliation, Mediation and Arbitration ("the CCMA'). The applicant was indeed obliged to submit to the arbitration as a consequence of the applicability of section 23 (1) (c) of the Act which makes collective agreements binding on persons who are neither parties to the agreement nor members of parties.

34. When this matter was heard before me, Mr M.S.M Brassey SC appeared for the applicant and MR A.I.S Redding SC appeared for the company. Both filed supplementary heads of argument. In their submissions both parties highlighted a difference between a statutory arbitration award and

a private arbitration award. The salient features of a private arbitration award were succinctly stated in the decision in *Total Support Management (Pty) Ltd and another v Diversified Health Systems (SA) Pty Ltd* 2002 (4) SA 661 (SCA) thus:

> "[24] Arbitration does not fall within the purview of 'administrative action.' It arises through the exercise of a private rather than public power. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed…"

35. In respect of a statutory arbitration award, the court held in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) *inter alia* that:

> "[45] ……..administrative justice is concerned with the exercise of a public power or the performance of a public function, something

with which consensual arbitration is not concerned. Smalberger ADP said in this regard (para 24):

> "Arbitration does not fall within the purview of "administrative action." It arises through the exercise of a private rather than public power. This follows from arbitrator's distinctive attributes, with particular emphasis on the following……' "

36. Mr Brassey argued that in the present case, the arbitration was not consensual but statutory because of s 23 (1) (c) of the Act and because in *Telcordia* the court held that the position with statutory arbitrations is different, having stated the four features of a private arbitration. He submitted that private arbitration in the labour sphere operates as a substitute for statutory arbitration under the auspices of the CCMA or a bargaining council as the case might be. That being so, he said, the process takes its character from the character of the statutory process. He averred that the parties, in submitting to the arbitration, can never be taken to have intended to limit the scope of review of an ensuing award. He submitted that the intention of the parties in submitting to private arbitration is of paramount importance in determining whether a party intended to waive a right under the common law or otherwise. That, he said, flew from the fact that the application of the Arbitration Act and the scope of its application derive from the subjective intention of the parties.

In respect of the content of the review test he argued in favour of the reasonableness and rationality standard of review in the present matter.

37. Upon reflection, I find the submissions by Mr Redding, to whom I am indebted, to be highly persuasive in this regard. Firstly, no case is made out in the founding affidavit that Tokiso performed an administrative function in arbitrating the dismissal dispute. It is an afterthought and accordingly not the applicant's pleaded case. Secondly, the reasonableness standard of review derives from the constitutional guarantee of the fair administrative action. The functions performed by Tokiso are not administrative in nature. Tokiso functions on the basis that those that elect to refer their disputes to it consent to its jurisdiction. In this case, the applicant too did not contest the validity of the agreement extended to him and he voluntarily decided to refer the dispute to Tokiso. Tokiso is certainly not a creature of statute-see *Chirwa v Transnet Ltd and Others* 2008 2 BLLR 97 (CC). The third respondent indeed performed a private arbitration and not an administrative function. Thirdly, the applicant's submission is certainly at odds with the purpose of s23 (1) (c) of the Act, which permits plant level collective agreements made by the majority to be extended to the minority. This does promote democratization of the workplace and it ensures workplace consistency. If the applicant is correct, these fundamentals would be undermined because it would mean that union members who refer their dispute to Tokiso would be restricted to the narrow test of review while those in the

applicant's position would rely upon a broad test of review. That would have a consequence of undermining collective bargaining and it would discriminate against union members on the basis of their freedom of association. Members of a minority union might position themselves with those in the position of the applicant. This would all undermine the purpose of section 23 (1) (c) and the whole Act.

38. It is my finding that the narrow review test finds application in the present matter. The grounds for review as postulate by section 33 (1) of the Arbitration Act 42 of 1965 exist:

> "where
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> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator; or
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> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration of the arbitration proceedings or has exceeded its powers; or
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> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

39. The applicant placed reliance for this application on the allegation that the third respondent committed a mistake of fact and/or of law in his

arbitration award. Paragraph 86 of the *Telcordia* decision becomes relevant. It reads:

> "[86] Likewise, it is a fallacy to label a wrong interpretation of a contract; a wrong perception application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible rightly or wrongly. [Armah v Government of Ghana (1966) 3 All ER 177 at 187 quoted in Anisminic Ltd . Foreign Compensation Commission (1969) 1 All ER 208 (HL) at 223D-F.] Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in this understanding of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd."

40. In paragraph 87, a reliance was placed on the decision of *Doyle v Shenker & Co Ltd* 1915 AD 233 where the following appears in relation to a review ground of gross irregularity:

> "Now a mere mistake of law in adjudicating upon a suite which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear."

41. It must follow from the foregone firstly that the ground for review relied upon by the applicant is bad in law. The third respondent was entitled to determine the applicable law, rightly or wrongly and to determine what evidence was admissible rightly or wrongly. The error, if any committed by the third respondent, was committed within the scope of his mandate.

42. Secondly, and in the event I had to examine the merits of the attack, the applicant alleged that there was no evidence showing that he benefited in either the Litau or the Barkhuizen scheme. The record of the arbitration reveals that he admitted during the disciplinary hearing that

> "And that's my benefit between 1 and 2 million….½ % on R1 ½ million is a couple of thousand rand that I was saving on my bond interest."

43. This was an admission against self interest, made consciously by him in a hearing where it was relevant to the charges he was facing. There is no

subsequent sufficient explanation why the admission should not be upheld against him. The applicant did not testify to there being any erroneous circumstances under which the admission was made. An admission is part of evidential material that may be utilised in the determination of the guilt of any employee charged with an act of misconduct. The third respondent utilized it in reaching his decision. In my view, he had no reason not to utilize it in the circumstances of this case.

44. A submission which suggests that there are good prospects of success in this matter is therefore, erroneous. The absence of good prospects is very decisive in this matter over the other issues.

45. Accordingly the following order will issue:

(1) The application for condonation for the late filing of the review application and that application for the review of the arbitration award dated February 2006 and issued by the third respondent, in this matter are both dismissed.

(2) The applicant is ordered to pay costs of the application.

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Cele J

Date of Hearing: 8 May 2008

Date of Judgment: 22 December 2008

APPEARANCES:

For the Applicant: Adv M.S.M Brassey SC instructed by Cliffe Dekker Inc

For the Respondent: Adv A.I.S Redding SC instructed by P.S & N Attorneys