

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A17/2007

In the appeal between:-

JOHANNES LODEWIKUS PRETORIUS

Appellant

and

THE COMPENSATION COMMISSIONER

1ST Respondent

THE COMPENSATION FUND

2ND Respondent

CORAM:

C.J. MUSI, J *et* Van Zyl, J

HEARD ON:

5 NOVEMBER 2007

JUDGMENT BY:

C J MUSI, J

DELIVERED ON:

15 NOVEMBER 2007

[1] This is an appeal in terms of section 91 (5) (a) (i) and (iii) of the Compensation for Occupational Injuries and Diseases Act, No 130 of 1993 (the Compensation Act).¹

1. Section 91 (5)(a) (i) and (iii) of the Compensation Act reads as follows:

“Any person affected by a decision referred to in subsection (3) (a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding-

i) the interpretation of this Act or any other law;

ii) ...

[2] The appellant was employed by Lewis Stores (Pty) Ltd when he met with an accident and sustained an injury on 20 October 2001 (a garage door dislodged and fell on his head, neck and shoulders).²

[3] The appellant lodged a claim and the Compensation Commissioner (the Commissioner) declared him 10% permanently disabled. He objected to the award, subsequent to which the Commissioner increased the percentage permanent disablement to 15%. An objection against the 15% award led to a tribunal consisting of a presiding officer assisted by two assessors and a medical assessor hearing the objection. The objection was dismissed by the court a quo (tribunal). The appellant now appeals against the decision of the tribunal.

iii) The question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;...”

2. Accident is defined by section 1 of the Compensation Act as

“an accident arising out of and in the course of an employee’s employment and resulting in a personal injury, illness or the death of the employee”. He is therefore entitled to Compensation in terms of section 22 (i) which reads “if an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.”

[4] The appellant and Dr Relling – a neurosurgeon testified at the tribunal. Reports compiled by Sunè Minnaar – an occupational therapist – and Prof. C L Odendaal – the head of the Pain Control Unit at the Faculty of Health Sciences, University of the Free State – in relation to the appellants’ condition were also placed before the tribunal.

[5] The appellant confirmed – without giving detail – that he sustained an injury on 20 October 2001. He testified that although he had previous operations he was a 44 year old physically fit sportsman at the time of the accident. Subsequent to the injury he had a neck operation that was performed by Dr Relling. He denied that he had a neck operation prior to this one. The operation was successful and he reported for duty; still in pain and wearing a neck brace. As part of his job as a credit controller he had to visit defaulting clients at their homes. This meant that he had to

drive around in a bakkie. It was not always a smooth ride and he experienced extreme pain whilst driving. The pain became unbearable and he consulted Dr Relling again. Another operation was done. Subsequent to the second operation he had constant headaches, twinging on his neck, visual impairment, a lame right hand, persistent neck and shoulder muscle spasms, pain in the lower back and loss of memory. He also could not sit for more than 20 minutes neither could he walk for 500 metres without resting. As a result of the excruciating pain he regularly consulted Prof Odendaal. A hearing was held on 24 February 2003, by his employer, and he was dismissed for incapacity. Although he looked for other suitable employment he did not get any because of his condition.

- [6] Dr Relling testified, on 16 August 2006, that the last contact he had with the appellant was on 1 October 2003. He first examined the appellant on 22 October 2001. The appellant complained of severe pain in the head and neck area with radiation of symptoms down the right-hand side and to a

lesser extent to the left-hand side. After a clinical evaluation he suspected a disc or nerve injury to the neck. A CT Scan was done and brain injury was excluded. After doing diagnostic tests a fusion at the C5/6 level of the neck was done. He noted that a previous fusion at the C6/7 level was done on the patient. He was informed that it was done six years before October 2001. The C6/7 fusion was good and no complications in relation thereto were noted.

- [7] After the operation the appellant complained about pain due to muscle spasms as well as pain from the joints adjacent to the current and previous surgical levels progressing higher up the neck to the C3/4 levels. He was treated on several occasions with physiotherapy; injections inside the joints between the vertebrae to relieve the chronic inflammatory process. Nothing helped. During March 2002 a radio frequency lesion was performed i.e. high heat treatment – with little success. When he saw the appellant on 12 June 2002 he presented clinical changes in that he had symptoms of spasticity in his hands and legs which, to him, related to

either a spinal cord problem or low inter –cranial brain problem. A MR Scan was done which did not show any severe changes in the spinal cord causing lameness or spasticity. These symptoms progressed. He referred the appellant to Prof Abe Kruger who was attached to the Department of Neurology at Universitas Hospital but he could also not see any clinical signs pointing to injury to the spinal cord or brain. There was progressive degeneration and progressive pain in the appellant's neck. On 12 August 2002 Dr Steve van Niekerk did an EEG on the appellant but it was 100% normal. Dr Beverley Peens a psychiatrist also saw the appellant and concluded that he has major depression and anxiety related to his work and financial condition. When X rays were done, Dr Relling saw that he was getting worse because there were changes at the 3rd and 4th vertebrae. The appellant was referred to Prof Koert de Vries, the head of the Radiology Department at Universitas Hospital. Prof de Vries noticed severe degeneration at C3/4 level. After consulting with colleagues it was decided that a fusion at the C3/4 level should also be

done. Motion of the appellant's neck was therefore impaired from C3 to C7. This long fusion is normally accompanied by post operative symptoms such as pain, which the appellant exhibited. Although this operation was also a success the appellant complained about severe neck pain. Normal doses of potent analgesics, anti-inflammatory and physiotherapy did not relieve his symptoms to such an extent that he could go back to work. The appellant had chronic pain with spasms which diminished concentration and the ability to function physically. He had weakness of the right arm to such an extent that he was unable to do proper work. Dr Relling could not give any reason for the visual impairment as well as the memory loss because there were no clinical signs which could lead to those symptoms. He concluded his testimony by stating that:

"I have not seen the patient since 2003 and I do not know what improvement or deterioration happened since then but at the point when I saw him last, I did not think that he was able to perform in the open market sector to go and be productive and be able to work without severe discomfort."

He was further of the view that the appellant's clinical condition was due to the accident on 20 October 2001. During cross examination he conceded that he seldom uses the American guides in relation to disablement and that he normally refers patient to Dr Repko for medico-legal opinions of an objective kind. He conceded that Dr Repko would be in a better position to give an objective medical opinion in relation to the appellant's disablement because he (Dr Relling) does not have proper knowledge of the whole system as he is not trained to do so. He also said that as far as he was concerned

“the appellant was not able to continue the work or his sport activities that he up to that point was able to do; he was unable to continue the work or the situation he was in previously”.

According to him, the appellant was not ready to go back to work at that stage.

- [8] Prof Odendaal whose report is dated 25 May 2005 confirmed that he saw the appellant on numerous occasions at the Pain

Control Unit. He states the following:

“Sy huidige toestand is presies die van ‘n jaar gelede naamlik dat hy hierdie spasma aanvalle kry wat vir hom baie pynlik is en normale bewerings van die kop en nek totaal ONMOONTLIK maak. Die spasma veroorsaak dat dit vir hom bykans ONMOONTLIK is om ‘n normale lewe te voer want sy totale psige word inbeheer geneem deur die pyn.

Dit is my opinie dat die toestand steeds teweete is aan die OORSPRONKLIKE BESERING van nek fraktuur en beserings aan die nekwerwels en die gevolglike twee operasies wat hy moes ondergaan as gevolg van die beserings...

Hy vind wel verligting na ‘n sessie in die hospital waartydens hy intensiewe behandeling ontvang met lokale infiltrasies, fisioterapie, arbeidsterapie, gesprekke met sielkundiges, gesprekke met maatskaplike werkers en dieëtkundiges.”(Prof Odendaal’s emphasis)

- [9] In a comprehensive and impressive 20 page report dated 9 January 2004 Sunè Minnaar (occupational therapist), inter alia, states the following. When she saw the appellant for the first time he walked approximately 2.5 to 3km to her consulting rooms. He did not look exhausted. She tested

the appellant in order to quantify his pain level and she concluded as follows:

“Ek is van mening dat mnr. Pretorius wel pyn ervaar wat sy funksionering beïnvloed – die omvang van die pyn, is soos reeds genoem baie subjektief en nie kwantifiseerbaar nie. Die resultate van die pyn vraelyste dui op ‘n baie hoë vlak van pyn wat ‘n persoon se funksionering maksimaal sal beïnvloed. Die kliniese observasies ten opsigte van pyn gedrag (aangepaste bewerings, fiksasie van die beseerde liggaamsdeel, gesigsuitdrukkinge wat pyn weerspieël ens) wat gedoen is tydens die evaluasie proses dui wel ‘n mate van pyn ervaring, maar korreleer nie met dit wat verwag sou word van iemand met die hoë tellings wat behaal is in die vraelyste nie”.

In relation to his impairment she states that:

“Ek is dus van mening dat mnr. Pretorius as gevolg van genoemde inperkinge, nie op hierdie stadium op die ope arbeidsmark kan meeding nie tensy hy volledige rehabilitasie ondergaan en indien sekere toegewings gemaak kan word vir sy toestand. Volgens JAN (“Job Accommodation Network”) wat aanpassing by die werksplek bespreek spesifiek ten opsigte van sekere patologieë, kan ‘n persoon nog produktief wees ten spyte

van inperkinge...”

[10] The tribunal made no factual or credibility findings in its unanimous judgment. Notwithstanding the provisions of Rule 51(1)(a) and (b) of the Magistrates’ Court Rules the presiding officer did not, in his written judgment, show which facts they found to be proved.³ His reasons for judgment are at best, at least to me, a mystery. He just regurgitated, without digesting, the evidence of the witnesses.

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3. In terms of section 91(5)(b) of the Compensation Act an appeal in terms of section 91(5)(a) is noted and prosecuted as if it were an appeal against a judgment of a magistrate’s court in a civil case.

Rule 51 (1) of the Magistrate’s Court Rules reads as follows:

“Upon a request in writing by any party within 10 days after judgment and before noting an appeal and upon payment by such party of a fee of R70, which shall be affixed to such request in the form of a revenue stamp, the judicial officer shall within 15 days hand to the clerk of the court a written judgment which shall become part of the record showing-

- (a) the facts he found to be proved; and
- (b) his reason for judgment”

His regurgitation culminated, inexplicably but expectedly, in a finding that they could find no fault with the Commissioner’s award because:

“the Act is a social grant based on that. It is not pain and suffering, it is not an Act that compensates for pain and suffering or a loss result or whatever. It is solely a grant, a social grant Act, so under those

circumstances we have to stick to what the Act provides.”

[11] In Grobbelaar v Workmen’s Compensation

Commissioner 1978 (3) SA 62 (TPD) at 64 A it was said, with reference to section 25 (7) (b) of the Workman’s Compensation Act 30 of 1941, that:

“an appeal to this Court lies only on the limited grounds relating to any questions as to the interpretation of the Act. All findings of fact must be accepted as final...”⁴

The factual findings of the tribunal would ordinarily be final but in a case such as this, where no factual findings were

4. See also Odayar v Compensation Commissioner 2006 ILJ vol 27 7 – 9 page 1477 at 1480 D.

made we would be at large to make own factual findings.

Our conclusion however renders it unnecessary for us to make any substantial factual findings.

[12] Mr Cilliers, on behalf of the appellant, argued that the tribunal misinterpreted the Act and that the amount of the compensation award is so inadequate that

the award thereof could not reasonably have been made. Ms Eloff, on behalf of the respondent, attacked the credibility of the appellant as well as the expertise of Dr Relling and argued that the ruling of the tribunal was correct irrespective of the absence of factual findings.

[13] The task of the tribunal is set out in section 91 (3)(a) of the compensation Act which reads as follows:

“After considering an objection the presiding officer shall, provided that at least one of the assessors, agrees with him, confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable.”

In considering the objection the tribunal is enjoined by the Compensation Act to apply with the necessary alterations, sections 6, 7, 45 and 46 of the Compensation Act.⁵ The relevant portions of these sections reads as follows:

6. **Powers of Director-General regarding witness and subpoenas.**—(1)(a) The Director-General may subpoena any person who in his opinion is able to give information concerning the subject of any inquiry in terms of this Act, or who is suspected to have or in the opinion of the

Director-General has in his possession or custody or under his control any book, document or thing which has a bearing on the inquiry, to appear before him at a time and place specified in the subpoena, to be interrogated or to produce such book, document or thing, and the Director-General may retain such book, document or thing for further investigation...

7. **Powers of authorized person.** – (1) The Director-General may authorise any assessor, any office or employee referred to in section 1 of the Public Service Act, 1984 (Act No. 111 of 1984), or any medical practitioner to investigate any matter that he may deem necessary for the performance of his functions.

(2) A person authorized under subsection (1) (in this section referred to as an “authorized person”) shall be furnished

5. See section 91 (2)(C) of the Compensation act.

with a certificate to that effect signed by the Director-General.

(3) An authorized person may-

- (a) without previous notice, at all reasonable times enter any premises, and take an interpreter or other assistant or a police officer with him onto the premises;
- b) while he is on the premises, or at any time thereafter, question any person who is or was

on the premises, either alone or in the presence of any other person on any matter to which this Act relates;

- c) order any person who has control over or custody of any book, document or thing on or in those premises to produce to him forthwith, or at such time and place as may be determined by him, such book, document or thing;
- d) at any time and place order any person who has the possession or custody of or is in the control of a book, document or thing relating to the business of an employer or previous employer, to produce forthwith or at such time and place as may be determined by him, such book, document or thing;
- e) seize any book, document or thing which in his opinion may serve as evidence in any matter in terms of this Act;
- f) examine or cause to be examined any book, document or thing produced to him or seized by him, and make extracts therefrom or copies thereof, and order any person who in his opinion is qualified thereto to explain any entry therein;

g) order an employee to appear before him at such time and place as may be determined by him, and question that employee...

45. **Consideration of claim.** – (1) The Director-General shall consider and adjudicate on a claim for compensation, and for that purpose may carry out such investigation as he may deem necessary or he may formally hear the claim.

(2) If the Director-General decides upon a formal hearing, he shall in the prescribed manner give notice of the date, time and place of the hearing to the claimant and employer.

(3) If the Director-general considers it necessary that any person, including the claimant and the employer, should be present at a formal hearing to be interrogated, he may issue a subpoena for the appearance of such witness.

(4) Upon application by a person who in the opinion of the Director-General has a sufficient interest in the subject of a formal hearing, the Director-General shall issue a subpoena for the appearance of a person except if he is of the opinion that such person cannot further the investigation, in which case the Director-General shall issue a subpoena only if the party applying therefore deposits with the Director –General a sum sufficient to cover the necessary expenses to be incurred by the witness as well as the witness as well as the cost of the service of such subpoena.

46. **Appearance of parties.** – (1) (a) Every party to a claim for compensation or his representative may appear before the Director-General at a formal hearing.

(b) The Director-General may designate any person to investigate a claim, attend a formal hearing, cross-examine witnesses, adduce rebutting evidence

and present argument...”

[14] It is clear from these sections that the role of the tribunal is more inquisitorial than adversarial. The members of the tribunal in this matter were either not aware of their role or they forsook it. A few comments in relation to the role of a tribunal will be apposite. The tribunal is given extensive powers in relation to the gathering of evidence and summoning of witnesses to give evidence or produce any books and or documents in their possession. The tribunal's role is not that of an impartial referee. It is neither a partisan nor a dispassionate spectator. It ought to participate in the proceedings to such an extent that an equitable decision or award can be made. The tribunal is enjoined to play an active and meaningful role before and during the hearing of the objection.

[15] In its quest to arrive at an equitable decision it should take all the relevant information and evidence into consideration. The statutory limits on compensation imposed by the legislature for a particular injury or disease should also be

considered. Although the guidelines should be considered, the tribunal should be mindful of the fact that guidelines are not cast in stone neither are they the laws of the medes and the persians. The tribunal should not, like in this matter, follow a mechanistic approach. An equitable award need not be an award equal to that stipulated in the guidelines. The medical evidence, consisting of signs, symptoms and medically acceptable clinical and laboratory diagnostic techniques, as well as the subjectively quantifiable complaints of the individual should be considered. The subjective complaints of the individual must however be in synch with the medical evidence. The tribunal should exercise its discretion judiciously and not arbitrarily. It should not approve the Director-General's decision without proper consideration and thereby reducing itself to a body that rubber stamps the Director General's decisions. It should set out its reasons in sufficient detail to enable the employee and if necessary the court of appeal to discern the principles used in making the assessment. The Compensation Act should not be interpreted restrictively so as to prejudice an

employee if it is capable of being interpreted in a manner more favourable to him or her. See **Davis v Workmen's Compensation Commissioner** 1952 (3) SA 105 (C) at 109 C; **Workmen's Compensation Commissioner v Van Zyl** 1996 (3) SA 757 (AD) at 764 E – F.

- [16] Ms Eloff correctly argued that an employee may not claim for pain and suffering under the Compensation Act because an award under the Compensation Act relates only to patrimonial loss. See **Senator Versekeringsmaatskappy BPK v Bezuidenhout** 1987 (2) SA 361 (A) at A – C.⁶ She argued that the appellant's claim is nothing but a claim for pain and suffering. This argument however misses the point. Mr Cillier's argument was that the fusions as well as the chronic pain that the appellant suffers render him 100% disabled to perform any work. The appellant should, the way I understand his argument, not be compensated for past, present or future pain and suffering but, if he has made out a case for such, he should be compensated because due to the accident of 20 October 2001 he underwent a long fusion

and he experiences post operative chronic pain which renders him unable to work. I agree with Mr Cillier's argument.

[17] Ms Eloff argued that pain is subjective and granting compensation for pain would open the flood gates and deplete the compensation fund. To this I say the following, firstly pain is quantifiable as Sunè Minnaar points out in her report, secondly, each case must be viewed on its own

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6. See also *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2)SA 1 (CC) paragraphs [13] to [15].
 merits, thirdly, it was done in **Kirtley v Compensation Commissioner and Another** (2005) 26 ILJ 1593 (E) without the heavens opening and lastly as was said in **Kirtley** *supra* at 1598 H it would, given the purpose of the Compensation Act,
 “unfairly discriminate against the appellant and those in his position”.

In **Kirtley** *supra* it was said that

“(T)he first respondent’s contrary finding evinces a failure properly to consider the import of the medical evidence that pain can be as debilitating as any physiological impairment thereby rendering a claimant 100% permanently disabled.”⁷

The appellant’s chronic pain in so far as it is quantifiable and debilitating should be considered during the assessment of his disablement.

7. At 1598 G – H.

[18] Mr Cilliers argued that the tribunal should have found that the appellant is 100% permanently disabled. I disagree. Disablement is defined as

“temporary partial disablement, temporary total disablement, permanent disablement or serious disfigurement as the case may be;”⁸

Permanent disablement is defined as follows:

“in relation to an employee and subject to section 49, means the permanent inability of such employee to perform any work as a result of an accident or occupational disease for which compensation is payable”⁹

8. Section 1 of the Compensation Act.

9. Section 1 of the Compensation Act.

Section 49 reads as follows:

Compensation for permanent disablement.- (1) (a) Compensation for permanent disablement shall be calculated on the basis set out in terms 2,3,4 and 5 of Schedule 4 subject to the minimum and maximum amounts.

(2)(a) If an employee has sustained an injury set out in schedule 2, he shall for the purpose of this Act be deemed to be permanently disabled to the degree set out in the second column of the said Schedule.

If an employee has sustained an injury or serious mutilation not mentioned in Schedule 2 which leads to permanent disablement, the Director-General shall

b) determine such percentage of disablement in respect thereof as in his opinion will not lead to a result contrary to the guidelines of Schedule 2.

Section 49 read with schedules 2 and 4 envisages degrees of permanent disablement. An employee may therefore be partially permanently disabled, for example an employee who meets with an accident and loses an eye is rendered 30% permanently disabled.¹⁰ Such employee would in character be partially disabled but permanently in quality. He or she can still see but has permanently lost the quality of seeing with

both eyes. The question that arises is whether the appellant was correctly found to be partially permanently disabled or is he 100% permanently disabled as Mr Cilliers contended.

[19] In order to be 100% or totally permanently disabled the employee must be unable to perform any work. The appellant in this matter did not regard himself as totally permanently disabled. He looked for employment but could not find suitable employment. Dr Relling's evidence is that he is not an expert and could therefore not make an assessment in relation to the degree of permanent disability. He was also unable to testify in relation to the appellant's state on the date of the inquiry or immediately prior to that.

10. See Schedule 2 of the Compensation Act.

Sunè Minnars report unambiguously states that the appellant is not totally permanently disabled and that he can be rehabilitated. She also states that his test scores (for pain) does not tally with what he said and what she observed. There is no medical evidence or explanation for the loss of memory and the deteriorating eye sight. The appellant

informed Prof Odendaal that he suffered a cerebral concussion – which was not true. During Mr Pienaar’s argument, on behalf of the appellant at the tribunal, the presiding officer said the following:

“Here is another aspect, do not dwell too much into it, okay?

Today all that we know is that Mr Pretorius is seeing somebody, we do not have any evidence of the nature of whatever treatment that he receives and everything. Of course we do not

say we reject that. Dr Relling’s evidence is the last time I saw him was in 2003. Can you address me on that one because no evidence as to his present status is before us now except what Mr Pretorius says.” (My underlining).

[20] All this points, in my judgment, to the fact that the presiding officer could not make a finding of 100% disablement. Neither can we. But more seriously it points to the fact that the tribunal did not apply its discretion judiciously. Faced with such terse evidence it was incumbent on the tribunal to call for more and better evidence in order to place it in a position where it could properly apply its mind to the facts and make an equitable award.

[21] In my view the general approach adopted in compensation

cases should also be applied in an appeal from a tribunal established in terms of the Compensation Act. In compensation cases a court of appeal will not easily upset the discretion exercised by the court of the first instance if it has properly considered all the relevant factors. In AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A) at 809 Joubert JA said:

“It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. It follows that this court will not, in the absence of any misdirection or irregularity, interfere with a trial Court’s award of damages unless there is a substantial variation or a striking disparity between the trial Court’s award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court.”

This however does not mean that a Court of appeal will defer to the estimate or award of the court a quo. When considering a compensation award the court of appeal will

consider all the relevant aspects and if it is of the view that the award of the court a quo differs substantially from the award it arrives at it will be justified to alter the award of the court a quo. See **Sandler v Wholesale Coal Supplies Ltd** 1941 AD 194 at 200, **Mentz v Simpson** 1990 (4) SA 455 (A) at 457 A – C.

[22] In this matter we are in no position to make an equitable award. The parties and the tribunal did not call relevant witnesses. Dr Relling saw the appellant approximately three years before he gave evidence. He conceded that he is not an expert when it comes to determining the degree of disablement. Ms Sunè Minnaar was not called to testify. Her report is also inconclusive. It seems like the appellant embellished his evidence as to his actual condition. An equitable award can only be made after all the relevant evidence is canvassed and properly considered by the tribunal. The current award seems to me to be a mere rubber stamping of the Director-General's decision. The tribunal did not apply its mind properly in this matter. With

this scanty evidence before us we are also not in a position to make a fair award. Difficulty would attend any effort by this Court to endeavour to make an equitable award. All the circumstances of this matter considered, it is my view that this matter should be remitted to the Compensation Commissioner.

[23] I accordingly make the following order:

- (a) The appeal succeeds.**
 - (b) The decision of the court a quo (tribunal) is set aside.**
 - (c) The matter is remitted to the 1st respondent for the determination of an equitable and appropriate award, after an enquiry, along the lines indicated in this judgment.**
 - (d) The 1st respondent is ordered to pay the appellant's costs.**
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C.J. MUSI, J

I concur.

C. VAN ZYL, J

On behalf of the appellant:

Adv. H.J. Cilliers
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the respondents:

Adv. Z. Eloff
Instructed by:
The State's Attorneys
BLOEMFONTEIN

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