

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case No. DA4/04

In the matter between:

UNITED NATIONAL BREWERIES (SA)LIMITED Appellant

And

PIUS KHANYEZA

First respondent

URMILLA PATEL NO

Second respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third respondent

JUDGMENT

ZONDO JP

INTRODUCTION

[1] This appeal concerns the interpretation of sec 189(1)(a) of the Labour Relations Act, 1995 (Act 66 of 1995 (“**the Act**”) with regard to when an employer who contemplates the dismissal of an employee who is a member of a registered trade union for operational requirements is entitled not to consult with such employee’s union before he can dismiss such employee. In the view I take of this matter, it is not necessary to set out the full background to the matter. It will suffice to set out only those facts that are strictly necessary for a proper understanding of the issues in this judgment. I do so in the next two paragraphs.

The facts.

[2] The first respondent was employed by the appellant at its Khangela plant in Durban as a sales representative of its product. He was a member of the Food and Allied Workers Union (“**the union**”) with which the appellant had a collective agreement which the two parties had concluded in 1993. At that time the Labour Relations Act, 1956 (Act 28 of 1956) (“**the old Act**”) was in operation. Indeed, clause 1.1 of the collective agreement provided that “**Act**” in the agreement would “**mean the Labour Relations Act No 28 of 1956 and any promulgated amendments thereto.**”

[3] The first respondent was dismissed from the appellant’s employment on or about the 3rd March 2001 for operational requirements as defined in sec 213 of the Act. The appellant had purported to consult the first respondent before dismissing him but had not consulted the union despite the fact that the first respondent was a member of the union. Subsequent to the first respondent’s dismissal, a dispute arose between, on the one hand, the appellant and, on the other, the first respondent and his union on whether such dismissal was procedurally fair in the light of the fact that the appellant had not consulted the union before it could dismiss the first respondent. It was common cause that the dismissal was for a fair reason.

Arbitration

[4] The dispute was referred to conciliation. Conciliation failed to produce a resolution of the dispute. Although ordinarily a dispute such as this one would have had to be referred to the Labour Court for adjudication in terms of sec 191 of the Act, the parties referred

it by mutual consent to arbitration which was to be conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”). That is permissible in terms of sec 141(1) of the Act. In due course the second respondent, a commissioner of the CCMA, arbitrated the dispute. She found that the appellant had been under an obligation to consult with the union before it could dismiss the first respondent. She found that, as the appellant had failed to consult with the union, the dismissal was procedurally unfair. She awarded the first respondent compensation equivalent to the remuneration that he would have been paid for the period from the date of dismissal to the last day of the arbitration hearing - which she gave as the 7th May 2002. She calculated such compensation to be a sum of R 45 390,77. Apparently the first respondent’s monthly salary at the time of his dismissal was R 3 200,00.

Review proceedings

- [5] The appellant was aggrieved by the second respondent’s award. Accordingly, it brought an application in terms of sec 145 of the Act in the Labour Court for an order reviewing and setting aside the second respondent’s award. The first respondent opposed the review application. In due course it came before Ndlovu AJ who, after hearing argument, dismissed it. He made no order as to costs. He subsequently granted the appellant leave to appeal to this Court. This then is the appeal against Ndlovu AJ’s judgment and order.

The appeal

- [6] According to the second respondent's award the basis upon which the appellant sought to justify its failure to consult with the union before it could dismiss the first respondent was that the first respondent **"did not belong to the bargaining unit as in terms of their recognition agreement, sales representatives were not covered by the recognition agreement."** That was the second respondent's stance as taken in the founding affidavit of the review application as well. The union insisted that, as the first respondent was one of its members, he was entitled to be represented and assisted by the union in the consultation process when his dismissal for operational requirements was contemplated.
- [7] The second respondent held that in terms of sec 189(1)(c) of the Act the appellant was required to consult with any registered trade union whose members were likely to be affected by the proposed dismissals if there was no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals were employed. She expressed the view that an examination of the recognition agreement **"shows no reference at all to bargaining units nor does it identify or define any section/ s of employees as the bargaining units"**. She went on to observe that **"(t)he recognition agreement makes mention only of 'members' of the union who will be paid up members of the union."** A little later she said: **"(t)he recognition agreement (clause 1.11 ...) indicates that 'union members shall mean and**

include all employees who are paid up members of the Union as defined and that ‘employee’ shall mean all permanent employees engaged in Production, Distribution, Packaging and Engineering and shall exclude management”.

- [8] The second respondent stated that she understood clause 1.11 of the collective agreement to mean that **“the only employees excluded from the scope of this agreement were those involved in management and there is no indication that the sales representatives were part of management.”** She also said: **“Furthermore, with regard to the retrenchment procedure of the recognition agreement (pages 44-46 of applicant’s bundle states (sic) that the [appellant] will give the union written notification of the possibility of retrenchment, including the reasons, the number of employees likely to be affected and the date of the envisaged retrenchment, the procedure relating to consultation with the union is then fully outlined.”** The second respondent found that **“both section 189(1)(a) and (c) and the recognition agreement made it doubly mandatory upon the [appellant] to consult with the union as the [respondent] was a paid up member of a registered union and his union membership was never disputed by the appellant.”** The second respondent also relied on the decision of the Labour Court in **FAWU & Another v National Sorghum Breweries [1997] 11 BLLR 1410 (LC)**. She said that in that case the Labour Court had found that the current appellant had acted unfairly in retrenching

employees without informing the union in that case (which is the same union involved in this case,) of consultation meetings.

[9] In the founding affidavit which initiated the review proceedings in the Labour Court the appellant attacked the second respondent's finding that the appellant was obliged to have consulted with the union and that, therefore, the first respondent's dismissal had been procedurally unfair. It contended that the second respondent committed a gross irregularity and misconduct in making this finding. It also contended that the second respondent's findings were not rational or justifiable in the light of the evidence presented to her. The appellant contended that the second respondent misinterpreted sec 189(1)(c) of the Act as well as provisions of the collective agreement in coming to the conclusion that the first respondent was not excluded from the scope of the collective agreement or in finding that the appellant was obliged to consult with the union.

[10] In considering this appeal, it is, I consider, necessary to quote the provisions of sec 189(1) in their entirety. Sec 189(1) reads thus:

“189 Dismissals based on operational requirements

1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult –

(a) any person whom the

employer is required to
consult in terms of a
collective agreement;

**(b) if there is no
collective agreement
that requires
consultation –**

- i) a workplace forum, if the employees
likely to be affected by the proposed
dismissals are employed in a
workplace in respect of which there
is a workplace forum; and**
- ii) any registered trade union whose
members are likely to be affected by
the proposed dismissals;**

**(c) if there is no
workplace forum in
the workplace in
which the employees
likely to be affected
by the proposed
dismissals are
employed, any
registered trade
union whose
members are likely**

**to be affected by the
proposed dismissals;
or**

**(d)if there is no such
trade union, the
employees likely to
be affected by the
proposed dismissals
or their
representatives
nominated for that
purpose.”**

[11] In interpreting the relevant provisions of the Act, it is necessary to bear in mind both the constitutional and statutory interpretive framework within which such interpretation must occur. Sec 39(1) of the Constitution provides:

**“When interpreting the Bill of Rights, a court, tribunal
or forum –**

- (a) must promote the values that underlie an
open and democratic society based on human
dignity, equality and freedom;**
- (b) must consider international law; and**
- (c) may consider foreign law.”**

[12] It is also necessary to have regard to the purpose of the Act. The

purpose of the Act is **“to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects”** of the Act. The primary objects of the Act are set out in paras (a) to (d) of sec 1. They are:-

- “(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;**
- b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;**
- (c) to provide a framework within which employees and their trade unions, employers and employers’ organisations can –**
 - i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interests; and**
 - ii) formulate industrial policy; and**
- (d) to promote –**
 - i) orderly collective bargaining;**
 - ii) collective bargaining at sectoral level**
 - iii) employee participation in decision-making in the workplace; and**
 - iv) the effective resolution of labour disputes.”**

Of particular importance among these primary objects, within the context of this case, seem to me to be paras (a), (b), (d) (iii) and (iv). Furthermore sec 3 of the Act requires **“(a)ny person applying**

this Act to interpret its provisions-

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic.”

[13] There was no workplace forum in the workplace where the first respondent was based. I have already said earlier that the appellant and the union had a collective agreement which was applicable in the workplace where the first respondent was employed. That there was a collective agreement in such workplace is significant because that may be important in determining whom the appellant was required to consult in terms of sec 189(1) of the Act before it could dismiss the first respondent. In the arbitration proceedings the appellant’s contention was that it was not obliged to consult the union because the first respondent fell outside the bargaining unit which the union represented. In support of this proposition reliance was placed upon sec 189(1)(a) of the Act which is quoted above. It needs to be pointed out that the Act makes no reference to bargaining units in sec 189.

[14] As will have been seen above, sec 189(1)(a) of the Act provides that **“(w)hen an employer contemplates dismissing one or more employees for reasons based on the employer’s operational**

requirements, the employer must consult-

- (a) any person whom the employer is required to consult in terms of a collective agreement;”**

What sec 189(1)(a) means in effect is that, when an employer contemplates the dismissal for operational requirements of any employee who is based in a workplace where there is a collective agreement which requires the employer to consult with a particular person or body before such employee can be dismissed for such reasons, the employer must consult with such person or body before it can dismiss such employee. Once the employer has consulted with such person or body, it has discharged its obligation to consult provided for in sec 189(1). If the employer fails to consult with such person or body, the employer has not discharged its obligation to consult provided for in sec 189(1) of the Act. If, of course, there is a collective agreement but it does not have such a consultation requirement, then sec 189(1)(a) is of no application.

- [15] Sec 189(1)(a) does not and cannot mean that, as long as there is a collective agreement applicable in a workplace that has a provision requiring consultation, sec 189(1)(a) applies irrespective of whether or not the consultation required by the collective agreement relates to the contemplation of the dismissal of the employee sought to be dismissed. What I mean by this may be better illustrated by way of an example. If in a workplace there is only one union that has members but such union represents a minority of the employees in the workplace, for example 10% of the workforce, and, for some or other reason, such union has a

collective agreement with the employer which requires consultation when dismissals for operational requirements are contemplated, and the employer contemplates the dismissal of employees who are not members of such union, sec 189(1)(a) does not mean and cannot mean that the employer must consult with such union.

- [16] Another example would be where there are two registered trade unions, one representing 30% of the workforce and the other 70%. If the minority union had a collective agreement with a provision that required consultation but the majority union did not have a collective agreement but was recognised by the employer as the representative of the majority of the employees, sec 189(1)(a) does not mean and cannot mean that, if the employer contemplated the dismissal of employees who are members of the majority union (which does not have a collective agreement with such a requirement), the employer would be obliged to consult with the minority union and not the majority union simply because the collective agreement of the minority union has a provision requiring consultation. Accordingly, it seems to me that, if I am right with regard to the examples I have given above, sec 189(1)(a) must be purposively construed. Purposively construed, it means that the collective agreement envisaged therein is a collective agreement that requires the employer to consult with a particular person or union or body when it contemplates the dismissal of the employees in question for operational requirements.

[17] Once it has been established that there is a collective agreement in a particular workplace which requires consultation, the next question that must be answered before it can be said that sec 189(1)(a) applies is: does the collective agreement require the employer to consult with a particular person or body when it contemplates the dismissal of the employee or employees in question? If it does, then sec 189(1)(a) applies and the employer must consult with such person or body. If it does not, then sec 189(1)(a) does not apply. The next question for consideration is whether in this case the collective agreement required the appellant to consult with any particular person or body when contemplating the dismissal of the first respondent for operational requirements.

[18] In clause 2.1 to 2.3.4 of the collective agreement, provision is made for a consultation procedure and steps that the parties had bound themselves to take in dealing with dismissals for operational requirements. It is provided that the appellant is required to consult the union **“should it be necessary to retrench members of the union.”** Accordingly, the collective agreement appoints the union as the body that the appellant is required to consult when it seeks to dismiss **“members of the union”** for operational requirements. The word **“members”** in the phrase **“members of the union”** in clause 2 of the retrenchment procedure is not defined but what is defined is **“union member”**. In the collective agreement this phrase is defined thus: **“Union member shall mean and include all employees who are paid up members of the union as defined.”** The words **“as defined”** at the end of this definition

cannot refer to **“paid up members”** because in the collective agreement there is no definition for the term **“paid up members”**. The words **“as defined”** qualify the word **“employees”** in that definition because there is a definition of the word **“employee”** in the definition clause of the collective agreement. The word **“employee”** is defined thus: **“Employee shall mean all permanent employees engaged in Production, Distribution, Packaging and Engineering and shall exclude management”**. In the light of this it seems to me to be crystal clear that the word **“member”** in clause 2 of the retrenchment procedure means the same as the expression **“union member”** as defined in the definition clause.

- [19] If I am right, as I think I am, in saying the reference to **“member”** in clause 2 of the retrenchment procedure – which is part of the collective agreement – is a reference to a **“union member”** as defined, then it can safely be concluded that the collective agreement requires the appellant to consult with the union when it contemplates the dismissal for operational requirements of a union member (as defined) employed by it. That would mean that the collective agreement does not require the appellant to consult with the union when it contemplates the dismissal of an employee who is a member of the union but who falls outside the definition of **“union member”** in the collective agreement. Employees of the appellant who are not **“permanent employees engaged in Production, Distribution, Packaging and Engineering”** fall

outside the definition of the word “**employee**” in the definition clause. Indeed, employees of the appellant who fall within the designation of “**management**” are also excluded. Accordingly, the provisions of the collective agreement which require the appellant to consult with the union when it contemplates the dismissal for operational requirements of members of the union refers to members of the union who fall within the definition of “**union member**” in the collective agreement and not those who fall outside such definition. That means that it refers to members of the union who are permanent employees of the appellant engaged in Production, Distribution, Packaging and Engineering and not to any others who fall outside that category of employees.

[20] It is common cause that the first respondent was a sales representative. Accordingly, he was not engaged in “**Production, Distribution, Packaging and Engineering.**” This means that he fell outside the definition of “**employee**” in the collective agreement. As “**employee**” is part of the definition of “**union member**” and he was not an employee as therein defined, he was also not a “**union member**” within the meaning of that phrase in the collective agreement. In those circumstances I am of the view that the respondent fell outside the definition of “**union member**”.

[21] Going back to the appellant’s reliance upon sec 189(1)(a), the question that needs to be asked is: did the collective agreement specify the person whom or the body which the appellant was required to consult when it contemplated the dismissal of an

employee who fell outside the definition of “**union member**” as read with the definition of the word “**employee**” in the collective agreement? In this regard it must be borne in mind that the collective agreement could do so either expressly or by necessary implication. The collective agreement in this case does not do so expressly. However, counsel for the appellant submitted that, by necessary implication, it did. He submitted that it required the appellant to consult with the employees whose dismissal for operational requirements is contemplated and not the union. He submitted that by agreeing to limit the employees with regard to whose retrenchment the appellant was required to consult the union to only its members employed by the appellant in the departments specified in the definition of the word “**employee**” in the collective agreement, the union effectively waived its right to be consulted when the appellant contemplated the dismissal for operational requirements of its members falling outside the definition of employee in the collective agreement.

- [22] The answer to this contention is this: in so far as the contention is that the collective agreement provides in effect that the appellant should not or need not consult the union when it contemplates the dismissal for operational requirements of the union’s members falling outside the specified departments, it misses the point of sec 189(1)(a). What is required in order for sec 189(1)(a) to apply is not for the collective agreement to specify who should not be consulted but to specify who should be consulted.

[23] I am of the opinion that the effect of the collective agreement is to say to the appellant in this regard: the appellant is not required *in terms of this agreement* to consult the union in respect of a contemplated dismissal for operational requirements of union members who fall outside the specified departments. It does not say to the appellant that it does not have to consult the union *in terms of the Act*. Accordingly, on this approach, in so far as the collective agreement may not have contemplated that the appellant should consult the union when contemplating the dismissal for operational requirements of union members who are not permanent employees in the specified departments, that does not affect the rights or conferred upon such employees by the Act and the obligations imposed upon the appellant by the Act. In this regard it is important to bear in mind paragraph 34 of the judgment of the Constitutional Court in NUMSA & others v Bader Bop (Pty)Ltd & Another (2003) 24 ILJ 305 (CC). There, the Court, after referring to the Freedom of Association and Protection of the Right to Organise Convention 1948 (NO 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98), had this to say:

“Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first

principle is closely related to the principle of freedom of association entrenched in s 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in s 23(2)(a), and the right to trade unions to organize in s 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join."

(Underlining supplied).

The matter in respect of which consultation was required in this case had nothing to do with discipline nor was it a grievance. However, in my view, what is said towards the end of this passage applies with equal force to union representation in sec 189 consultations.

- [24] On this approach employees who are members of the union who fall outside the definition of the word “**employee**” are not entitled to union representation *in terms of the collective agreement* when the appellant contemplates their dismissal for operational requirements but they are still entitled to such representation *in terms of sec 189(1)(c) of the Act*. The contention advanced on behalf of the appellant would have the effect of depriving union members employed as permanent employees of the appellant outside the specified departments of their right in terms of the Act to union representation which they ordinarily otherwise have when

their employer contemplates their dismissal. A construction of the Act which has the effect of taking away employees' rights should not be lightly adopted. Indeed, if there is another construction of the statute which does not take away such rights, such construction is the one that should be preferred. The appellant's contention leads to a strange situation in terms of which a union member who has paid the union to protect and advance his interests in the workplace including representing him during sec 189 consultations is denied union representation precisely when union representation matters the most. Unions spend enormous time, energy and, sometimes, money on negotiating collective agreements. They do so because they seek to add to, and, improve upon, the rights – usually basic rights – that their members have in terms of legislation but not to take away from their members rights that such legislation has already conferred upon them. They would be surprised if they were told that through a collective agreement that they entered into with an employer, they took away their members' basic rights conferred by legislation such as the Act.

- [25] In my judgement the provisions of the collective agreement in this case seek to give union members covered by the agreement additional or better rights than those that they may already have in terms of the Act or some other legislation. The aim of the collective agreement is not to deprive union members who fall outside the collective agreement of the statutory rights that they already have such as their right to have their union consulted by the appellant in terms of sec 189 of the Act when the appellant

contemplates their dismissal for operational requirements. The purpose is not to disadvantage such employees and let them face the prospect of their dismissal due to no fault of their own without the benefit of the assistance and representation of their union. The purpose was to give the union members who fall within the collective agreement better rights and benefits in the knowledge that those union members not covered by the collective agreement would still be covered by the Act and not that they would be left to struggle on their own without union assistance and representation. In the light of the above I conclude that there is no person or body that in terms of the collective agreement that the appellant was required to consult when contemplating the dismissal of the first respondent. However, there is a person or body that in terms of the Act the appellant was required to consult. The next question is who that was.

- [26] It is common cause that there was no workplace forum in the appellant's workplace. It is also common cause that the first respondent was a member of the union. If there was no workplace forum, is it sec 189(1)(b)(ii) or sec 189(1)(c) that applies? Section 189(1)(b)(ii) seems to me to contemplate a situation where there is a workplace forum in the relevant workplace but the employees whose dismissal for operational requirements is contemplated or proposed are members of a registered trade union. In other words what sec 189(1)(b) seeks to achieve is that, where there is a workplace forum, the employer does not consult the workplace forum in respect of employees who are members of a registered

trade union but consults such union and that, in respect of employees who are not members of a registered union, the workplace forum is consulted where there is one. This regime must have been created in order to ensure that unions did not view workplace fora as competition or as their replacement. In the light of this it seems to follow that sec 189 (1)(c) is the provision that applies in a case such as this one where there was no workplace forum and the employee(s) proposed to be dismissed is or are members of a registered trade union. Accordingly, the appellant should have consulted the union in terms of sec 189(1)(c) of the Act.

- [27] The appellant also contended that, even if it was obliged to have consulted with the union which it did not do, it should be held to have substantially complied with the consultation requirement of sec 189 because it consulted with the affected employees themselves including the first respondent. The difficulty with this contention – even assuming that one can speak of substantial compliance with the requirements of sec 189 of the Act - is this. Mr Thiye, who was called by the first respondent as a witness, testified that what took place was not a proper consultation because Mr Dlamini and Mr Khathi, who represented the management in the meetings, came to the employees when the appellant had already taken the decision to retrench and only came to convey this fact to the employees and to tell them about other available positions.

[28] A reading of both versions of the minutes of the meeting of the 19th February 2001 – one version being that of the employees, the other being that of the appellant – lends credence to this evidence by Mr Thiye. The appellant does not appear to have ensured that evidence was given as to what was discussed in other meetings. Accordingly, it is not possible to conclude that the appellant held proper consultations with the employees before it made the decision to retrench. Since the union's representative made it quite clear in the arbitration that what was in issue was procedural fairness, one would have thought that the appellant would have made sure that full and proper evidence was led on what was discussed in all the meetings that related to the possible retrenchment of the employees. The appellant failed to do so and it had only itself to blame in this regard.

[29] The appellant also contended that certain positions had been made available to the employees. Once again the appellant's witnesses did not, in their evidence, give full information about such positions as the first respondent would have applied for or taken to enable one to conclude whether he had acted unreasonably in not applying for, or, taking up one of those positions. Nothing was said, for example, about what salaries were payable for such positions. Accordingly, this cannot assist the appellant. In these circumstances I conclude that the appellant's failure to consult the union when it contemplated the dismissal of the first respondent rendered his dismissal procedurally unfair.

[30] The appellant also contended that the commissioner failed to exercise her discretion against awarding compensation and, that, for that reason, her decision to award the first respondent the compensation that she awarded should be reviewed and set aside. There is no indication in the commissioner's award that she considered whether to award or not to award compensation. However, there is no indication in the record that in the arbitration the matter was argued on the footing that, if the commissioner found that the dismissal was procedurally unfair, she should, nevertheless, exercise her discretion against awarding the first respondent any compensation. A reading of the commissioner's notes of the argument presented by both parties represented before her suggests that she was not asked to do so. In those circumstances it seems to me that the matter was dealt with in the arbitration on the footing that, if the commissioner found the dismissal to have been procedurally unfair, she could go ahead and award compensation.

[31] In any event, if the matter had been argued on the basis that, if the commissioner found that the dismissal had been procedurally unfair, she should exercise her discretion against awarding compensation and I had found that she did not exercise her discretion, I would not have remitted the matter to the CCMA. I would have proceeded to deal with the matter myself after setting her award aside. I would also have exercised my discretion in favour of awarding the first respondent compensation.

[32] Finally, I need to point out that the amount of compensation that the commissioner awarded – which was 14 months' remuneration – falls outside the statutory maximum permissible in a case such as this one. The maximum is 12 months even if the period from the date of dismissal to the last day of the arbitration is more than 12 months. Accordingly, an amount equivalent to two months' remuneration should be deducted from the amount of compensation awarded by the commissioner. As to costs, the matter was argued on the basis that costs should follow the result. Accordingly, I shall give effect to this approach.

[33] In the premises I make the following order:

1. Subject to 3 below, the appeal is dismissed.
2. The appellant is ordered to pay the first respondent's costs of the appeal.
3. The amount of compensation awarded by the second respondent is hereby set aside and replaced with the following amount: R38 400, 00 being the equivalent of the first respondent's remuneration for 12 months at R3 200,00 per month.
4. The attention of the parties is drawn to the provisions of sec 143(2) of the Act with regard to interest on the amount payable to the first respondent.

Zondo JP

I agree.

Davis AJA

I agree.

Nkabinde AJA

Appearances:

For the appellant : Mr J Forster

Instructed by : Barkers Attorneys

For the respondent : Adv H Bounes

Instructed by : Brett Purdon Attorneys

Date of judgment : 30 September 2005