REPUBLIC OF SOUTH AFRICA

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

Case Number: 20055/2020

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

21/12/2020
DATE

SIGNATURE

In the matter between:

RECKITT BENCKISER PHARMACEUTICALS PROPRIETARY LIMITED Applicant

And,

THE ADVERTISING REGULATORY BOARD NPC First Respondent

COLGATE – PALMOLIVE PROPRIETARY LIMITED Second Respondent

JUDGMENT

FISHER J:

Introduction

[1] Reckitt Benckiser which is the producer of *Dettol* products and Colgate are competitors in the field of the supply of inter alia soap products. Their brands are household names.

[2] This is a review application brought by Reckitt Benckiser to set aside two decisions taken in terms of the complaint resolution process of the Advertising Regulation Board (ARB) and its enforcement of the Code of Advertising Practice, in respect of a complaint lodged by the second respondent (Colgate) against Reckitt Benckiser. The complaint centres on following claim on the packaging of one of the variant brands of the Dettol hygiene soap bar: '*PROTECTS AGAINST 100 ILLNESS - CAUSING GERMS'*. The applicant seeks to review and set aside the impugned decisions in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") alternatively the principle of legality.

[3] Colgate's rival hygiene soap brand *Protex*, claims to '*protect against 99.9%of germs*'. The one-upmanship is not difficult to recognise. But this is not the issue. The objection to the claim centres on the adjectival styling of the germs as being 'illness-causing.' The use of this styling and objections thereto by Colgate have a history which dates back to 2015.

[4] The upshot of the impugned decisions of the ARB is that Reckitt Benckiser was to cease sale and distribution of *Dettol* soap in the packaging which bears the claim. This would involve it having to withdraw the offending packaging which would obviously come at some cost to it. It thus applied in the urgent court for and was granted an interim suspension of the ARB decisions - which allows it to trade using the claim pending the determination of this review application. This application was set down as a special expedited application on the basis that a hearing in due course would create delay which would be unduly prejudicial to the parties. The litigation is, in the main, driven by Reckitt Benckiser and Colgate. The ARB has filed a notice to abide this court's decision on the review.

The Advertising Regulation Board

[5] The ARB is the successor organisation to the Advertising Standard Authority of South Africa ("ASA") which previously administered the Code but which recently went into liquidation. The ARB is a non-profit company, registered as such in terms of the company laws of South Africa and governed by its Memorandum of Incorporation (MoI). It is an independent body set up and financed by the marketing and advertising industry to self-administer the provisions of the Code on behalf of the South African advertising industry. Its stated purpose is to ensure that advertising in South Africa is informative, factual, honest, decent, and legal, and to ensure that advertising is prepared with a sense of responsibility to the consumer in that it does not seek to take advantage of consumers by misleading them about the characteristics, uses or benefits of any particular product or service.

[6] The decisions of the ARB constitute reviewable administrative action under PAJA.[1] The ARB's members agree to be bound by the Code. Members and non-members may lodge complaints against advertising with the ARB. Decisions of the ARB do not apply to non-members unless they submit to the jurisdiction of the ARB. Decisions of the ARB must be enforced by the ARB's members which must refuse to carry advertising which the ARB has ruled must be withdrawn. The ARB therefore works within a consensual contractual framework. In short, the Code sets out guidelines as to what constitutes unacceptable advertising. The Procedural Guide (the Guide) then sets out the procedures for dealing with a complaint, any subsequent appeals and the type of rulings which the ARB may make. Colgate is a member of the ARB whilst Reckitt Benckiser is not.

[7] The administrative scheme created by the Code and the Guide is made up of three tiers: first, the Directorate; second, the Advertising Appeals Committee (AAC) which deals with appeals of rulings of the Directorate; and third the Final Appeal Committee (FAC).

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[1] See: *Advertising Standards Authority v Herbex (Pty) ltd* 2017 (8) SA 354 (SCA) at paras 3-4. *Brandhouse Beverages (Pty) Ltd v Advertising Standards Authority of South Africa and Others* (2331/15) [2015] ZAGPPHC 243 (Brandhouse) at para 28. These decisions relate to the predecessor of the ARB but the principle holds good in relation to the ARB.

[8] Colgate's complaint is that the adjectival styling of the germs on the *Dettol* soap as 'illness – causing' conveys the impression that the product possesses medicinal properties which is in contravention of the Code[2]. It complains that, by incorporating the word 'illness' in its germ protection claim, Reckitt Benckiser shifted the communication from protection against germs/ bacteria (which is generally permitted for cosmetic products), to preventing the contraction of illnesses (which is not a permissible claim for a cosmetic product to make).

[9] As I have said, this adjectival use of the word 'illness' in connection with Dettol cosmetic soap is not a novelty and neither is the complaint that such use has evoked.

The history of the usage of 'illness-causing' by the applicant in its advertising over the past five years

[10] In April 2015 Reckitt Benckiser flighted a television commercial which had, as its central motif, a comparative characterisation of three types of mothers including a '*Dettol Mom*'. With respect to the '*Dettol Mom*' character the following claims were made 'She only Trusts Dettol to Protect her family from up to 100 illness causing germs' and 'Only a Dettol mom knows that ordinary soaps are not enough'.

[11] On 08 July 2015, Colgate made a formal complaint to the ASA Directive which complaint had as its gravamen the objection that the use of the words 'illness-causing' conveyed that the cosmetic soap product had medicinal properties.[3]

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[2] The introduction of Clause 5 of Appendix B provides, '... Claims that convey the impression that a cosmetic product possesses medicinal properties are not permitted'.
Clause 5.4 of Appendix B provides, 'An advertisement shall not claim or imply that a cosmetic product can cure or permanently prevent a specific condition that is a symptom of disease'.
Clause 3.2 of Appendix B defines the term 'cosmetic product'. This definition specifies six functions pertaining to cosmetic products, namely: 1. to clean; 2. to perfume; 3. to change the appearance; 4. to correct body odours; 5. to protect; 6. to keep in good condition. The definition provides that if a product does not have at least one of these as its primary purpose, it is not a cosmetic. It furthermore makes provision for 'primary cosmetics' to have and communicate secondary functions for example a body wash with an anti-bacterial/anti- fungal secondary function, where the primary purpose compiles with the six criteria listed above. The clause specifies further that "... claims for these secondary functions can only be made in a cosmetic sense.

[3] The present Code is a development of the Code which served under the auspices of the ASA and contains the identical prohibition.

[12] The decision of the Directorate was that the use of the descriptor 'illness - causing' in the advert was in contravention of clause 5.1 of appendix B. The rationale was stated as follows:

'The hypothetical reasonable person viewing the commercial would understand it to be reassuring parents not to worry about their kids getting ill because Dettol hygiene product protect against up to 100 "illness causing germs", Thus the inclusion of the word "illness" to the germ protection claim shifts the communication from protecting against dirt or bacteria, to preventing the contraction of illnesses. This is communicated as a primary claim, and goes beyond mere cosmetic claims as permitted in the Code. The overall message is therefore not cosmetic in nature, rendering the commercial in breach of Clause 5.1 of Appendix B.'

[13] The withdrawal of the advertisement was thus ordered.

[14] The making of this claim was obviously regarded as an advantageous marketing strategy because, despite the existence of the Directorate's order, less than two years later the offending claim raised its head again. Reckitt Benkiser made the claim again. This time on the internet in a *YouTube* advertisement which also used a comparative 'three mom' motif and claimed in a voice-over 'That's why she trusts *Dettol* to keep away dirt and protect her family from up to 100 illness causing germs…'

[15] Colgate complained to the Directorate that the breach constituted a flagrant disregard of the 2015 ruling and/or a serious and pre-meditated breach. It contended that the breach of the ruling warranted the imposition of a sanction.

[16] Ultimately, Reckitt Benckiser gave the following, somewhat obtuse undertaking, in which it was careful to reserve its position and make no admissions:

'…the advertisement in question has run its course and has been withdrawn. The respondent furthermore voluntarily undertakes that it will not use the advertisement in question in its current format in future.'

[17] In considering whether to impose a penalty in due course the Directorate stated as follows:

'The Directorate is uneasy about the substantial similarities between the two commercials. However, it acknowledges that there have been no adverse rulings against the respondent [Reckitt Benckiser] in a long time, and that the more recent commercial has been removed with permanent effect. As such, the Directorate is not convinced that additional sanctions are warranted at this time. However, the Respondent is cautioned to ensure that it does not create new advertising which contravenes the provisions of the Code or of existing ASA rulings in future.'

[18] The caution went unheeded. The latest infraction is the usage of the claim which has led to the decisions forming the subject matter of this application.

The decisions in issue.

The Directorate

[19] The Directorate made reference to the 2015 Decision and accepted that it involved 'that very claim'. It however sought to distinguish the 2015 Decision of the basis that the context created in the commercial rendered the usage of the claim different in that 'the commercial created a scenario[4] where a mother could effectively ignore the potential risks associated with dirt and /or injuries, because Dettol was said to provide protection from any potential germ infection.' It made the point that the decision was in any event, not-binding on it.

The AAC

[20] Colgate's appeal to the AAC succeeded. The AAC identified the question in the appeal to be 'whether the packaging on the Dettol hygiene soap "conveys the impression" that it possesses medicinal properties, i.e. that it acts as if it were a medicine.' It answered the question in the affirmative. It rationalised that 'The claim on the packaging is that the soap will effectively kill 100 germs that are known to cause illness'. And that '[by] using the soap, the hypothetical consumer will be able to feel

[4] The advertisement compares three different characterisations of mothers, being '*the Paranoid Mom*', ' '*the Cautious Mom*' and '*the Dettol Mom*'. While the *Paranoid Mom* and the *Cautious Mom* find excuses either to deny or delay their children's' playtime, the '*Dettol Mom*' is shown rolling around on the grass with her daughter. Afterwards, '*the Dettol Mom*' bathes her daughter using Dettol products. A voice-over states '... Only a *Dettol Mom* knows that ordinary soaps aren't enough. She only trusts *Dettol* to protect her family from up to 100 illness causing germs, which is why you can worry less and love more. Don't be just any mom, be a *Dettol Mom*. Dettol, be 100% sure.'

completely sure that he or she will not contract any illness that is known to be caused by the germs that the soap will destroy'. It thus concluded that claim conveys the impression that the soap possesses medicinal properties. AAC found that the Directorate had erred in its treatment of the descriptor 'illness -causing'. It rationalised as follows:

'The use of the word "illness" in the claim is what distinguishes this case from the cases relied upon by the Directorate. In our view, it is this word that crosses the line between acceptable claims and those that are unacceptable in terms of clause 5.' (emphasis added).

[21] It thus upheld the appeal on this basis. It is important for this review that the decision of the AAC focused in the first instance on the use of the word 'illness' independently of any limiting or qualifying context. Having determined that the use of the word itself was objectionable *per se* the AAC moved to substantiate this treatment of the word as being tendentious of conveying medicinal properties by reference to further evidence put foward on appeal of the placement and showcasing of the soap so as to endorse this position in some stores. It took note of the gondolas containing imagery of a man who appears to be a medical professional, wearing a white coat. I will say more about this additional information/evidence later in the context of this review.

The FAC

[22] Reckitt Benckiser appealed the decision of the AAC to the FAC. In the FAC hearing the doctrine of *res judicata* was raised for the first time. It was argued by Colgate that the issue had been finally decided by the 2015 Directorate decision. The FAC upheld this plea of *res judicata*. The FAC also considered the merits of the appeal. It upheld the reasoning of the AAC and agreed that 'it is one thing to protect (the epidermis) against germs, but quite another to protect (the body) against illness.' It found that the evidence considered as to the displaying of the product in store was properly accepted and found also that this served the purpose only of fortifying the impression to consumers that the soap was medicinal.

The Review grounds

[23] Reckitt Benckiser relies on the following grounds of review:

1. That the AAC acted outside of its powers when it admitted and considered the new evidence of the in-store displaying and showcasing of the product and thus also took into account irrelevant considerations in reaching its decision.
2. That AAC's decision is not rationally connected to the objectives and purpose of its powers under the Code, and is arbitrary.
3. That the FAC unfairly recast the complaint as if it were a breach complaint (ie of the 2015 Ruling) and, as a result applied the incorrect test to the appeal by deciding it on the basis of res judicata.
4. That the previous breaches were impermissibly taken account of in the determination of this matter by both the AAC and the FAC and that thus these bodies were motivated by improper purpose.

[24] Simply put - the contention is that before the AAC (new material) and the FAC (new complaint and new cause of action of *res judicata*), Reckitt Benckiser suffered 'an ambush' at each stage of the process making it procedurally unfair, and that the AAC and FAC were motivated by improper purpose (presumably anger, spite or the making of an example of Reckitt Benckiser) because of the previous breaches of the orders.

The grounds for review of the AAC decision

<u>The admitting of further evidence on appeal</u>

[25] Reckitt Benckiser argues that the decision by the ACC to take into account the evidence of the in-store placing and showcasing of the Dettol soap was beyond its powers in that the Code and the Guide do not provide for further evidence to be received by the AAC whilst the explicitly do so in relation to the FAC procedure. The

argument goes that, on an expressio *unious est exclusio alterious*[5] approach to the interpretation of the Guide, the AAC was not entitled to admit further evidence.

[26] The FAC found that the appeal was a 'wide' one, such that the court could in effect rehear the dispute on evidence that had not served before the Directorate when it took its decision. This is an application of the classic statement of Trollip J in *Tikly & others v Johannes NO & others*[6] as to the nature of statutory appeals where, in granting that an appeal could mean many things, drew a distinction between two main types of appeals being a wide appeal - which allowed for a complete re-hearing of, and fresh determination on the merits, with or without additional evidence or information[7] and an appeal in the strict sense which was limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong.[8]

[27] It seems to me that the FAC's determination of the nature of the appeal is correct. The Code and its Guide anticipates that advertising is an organic and dynamic enterprise and as such, flexibility is built into the rules to ensure that the ARB decision making bodies have all relevant surrounding circumstances and facts before them, as long as the principles of natural justice are adhered to. It is for this reason that clause 6.4 of the Guide provides that 'All relevant and/or necessary documents and/or material information should be circulated or made available to the other party and the ARB at least 5 five days before the hearing'.

[28] In any event, as I have said, an analysis of the AAC's judgment shows that the evidence of the in-store displays did not form part of the ratio of the decision. The decision was made on the basis of the use of the word 'illness'. The reference to the photographs showing the way in which the product was displayed and showcased in some stores was referred to for the purpose only of showing that the deliberate bent

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[5] The explicit mention of one (thing) is the exclusion of another

[6] 1963 (2) SA 588 (A) at 590F-591A. See also *Pahad Shipping CC v SARS* [2009] ZASCA 172.
[7] See for eg *Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) at 924;
[8] See for eg *Commercial Staffs (Cape) v Minister of Labour and another* 1946 CPD 632 at pp 638-641).

of Reckitt Benckiser was to capitalise on the medicinal meaning evoked by reference to illness, notwithstanding a feigned naivety as to the evocative effect of the word. This was relevant also to the imposition of penalty.

[29] Thus, in summary on this ground, the evidence was, to my mind, properly received but, even if it were not, the admitting of additional evidence did not materially influence the decision reached because the AAC had already found the claim to be unacceptable. There is accordingly no question of a material error of law.

The decision is not rationally connected to the code

[30] It seems the real compliant is that there is an illogicality in the reasoning which led to the AAC's conclusion because it found that a reasonable consumer would understand that *Dettol* hygiene bar soap is a cosmetic product; that germs cause illness; and that soap protects against germs but then concluded that the presence of the word 'illness' in the claim would cause a reasonable consumer to be misled into thinking that Dettol hygiene soap has medicinal properties in breach of Clause 5 of Appendix B of the Code, as opposed to merely a secondary germ protection function as permitted by the Code.

[31] Reckitt Benckiser seeks to fashion this alleged lack of logical reasoning into a complaint that the administrative action under review had no rational connection with the purpose for which the power of the AAC is granted. This is a misguided attempt to elevate an alleged non-sequitur or contradiction in factual reasoning to a lack of rational connection with the purpose of the power exercised. The fact that a consideration of the facts may be flawed (and here they were not) does not mean that there is no connection with the purpose of the power and the consideration of these facts. Put differently, the fact that an administrator may have erred in the manner of his consideration of that which he is called upon to determine as part of his power and function does not mean that the issue that he is considering is not connected with the purpose of the power and function.

[32] The ultimate enquiry in respect of complaints in terms of Clause 5 of Appendix B is whether the claim conveys the impression that a cosmetic product possesses medicinal properties. This is precisely the enquiry undertaken by the AAC.

[33] As I have said, in my view there is no illogicality. The fact that it is accepted that a reasonable consumer would understand that the soap was a cosmetic product which protected against germs, does not exclude the conclusion that there could be a confusion that it protected against 'illness' as well, if this word is used.

The grounds of review of the FAC decision

Res Judicata

[34] In essence the complaint is that the plea of *res judicata* was considered for the first time on appeal. From this Reckitt Benckiser seeks to extrapolate a further complaint to the effect that the FAC impermissibly recast the complaint as one of a breach of the 2015 Directorate's decision when the original complaint made was based on a contravention of the Code and specifically clause 5 of Appendix B.

[35] This is, to my mind, a studied and forced treatment of what is, in essence, a simple complaint: viz that the use of the word 'illness- causing' as descriptor in relation to the properties of the soap, creates in the mind of the reasonable consumer the impression that the soap is medicinal; which is in contravention of clause 5 of Appendix B; and which issue was already determined by the Directorate in 2015.

[36] Mr Michau SC for Colgate is correct in his submission that the basis of the complaint has always been, and remains, that the inclusion of the word 'illness' in the claim seeks to state that that the product goes further than germ protection and amounts to the protection against the contraction of illnesses.

[37] The 2015 decision was that the employment of the word 'illness' in the advertising of a cosmetic soap bar was prohibited in and of and in itself. Ms le Roux for Reckitt Benckiser, argued that the issue in the 2015 complaint must be seen as different to this complaint in that it was contextualised by the 'three moms' motif in the

television commercial and that this falls foul of the requirement that the issues be the same for a successful plea of res judicata.[9]

[38] I disagree. As I have said the dispute ultimately comes down to the use of the word 'illness' which the ARB has found is not the domain of cosmetics but that of the medicinal and neither the showcasing of the claim in a television commercial nor the in-store displaying is such that it changes this central issue and finding. In my view there can be no doubt that this dispute and the 2015 dispute are on all fours.

[39] In *Ascendis Animal Health Pty Limited v Merck Sharpe Dohme Corporation and Others*[10] Justice Cameron made the following apt pronouncement as to the doctrine of res judicata and its development and purpose in his judgment in the hung decision of the Court;

'The doctrine of res judicata has ancient roots as an implement of justice. It seeks to protect litigants and the courts from never ending cycles of litigation. Its strict terms applied when a later dispute involves the same party, seeking the same relief, relying on the same cause of action.

But the doctrine's roots lay in good sense and fairness. This demanded wider application that barred repeat cycles of litigation on less stringent exaction of the "same cause of action" requirement. And that happened. First, in Boshoff in the early twentieth century, and then through a line of more recent Appellate Division and Supreme Court of Appeal decisions.

And so it has become well accepted that enforcing the requirements of res judicata should yield to the facts in each case. Thus, the doctrine was enforced when a plaintiff demanded the same thing on the same ground, or (which is the same) on the same cause for relief, or further, where the same issue had been subjected to final previous judicial determination.'[11]

[40] There can be no doubt that doctrine of *res judicata* applies to decisions of the ARB.[12] I did not understand Ms le Roux to argue otherwise. The ARB's committees are not courts and the doctrine of stare decisis does not apply. Nevertheless, by agreement, the ARB respects its previous decisions and treats them as binding unless it considers a particular decision to be wrong. If it did not, inconsistency would reign,

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[9] See *National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distributors Pty Ltd* 2001 (2) SA 232 SCA at par 3.
[10] 2020 (1) SA 327 (CC).
[11] Ibid at paras 111 to 113.
[12] *Walker and another v Mosdel and another [2012] JOL 29479 (GSJ)* at para 11.

making any considered opinion on how to craft an advertisement so as to avoid infringement, impossible. It would undermine the very self-regulation function that inheres in the process.[13] Members of the ARB are obliged to adhere to the Code, which is the system that has been created for self-regulation within the industry. The ARB is obliged to consider and rule upon complaints that are made to it in accordance with the procedure contained in the Code. In the event that the ARB fails to comply with these obligations, it would be competent for a Court to order it to do so. The ARB has its own peculiar powers, functions and authority and only it is capable of ruling authoritatively on these issues.

[41] Reckitt Benckiser complains also that Colgate raised the *res judicata* argument in its heads and without proper pleading before the FAC and that it was irregular and unfair for the FAC to have dealt with it in these circumstances. I disagree, the plea of *res judicata* is a legal argument on an established set of facts. There was nothing to stop the FAC from considering the claim at that stage, subject to postponement if required in order to avoid prejudice. Indeed Mr Michau is correct that it was open for the FAC to have raised the plea *mero motu* in the interests of justice.[14]

[42] I am satisfied that there was no prejudice occasioned to Reckitt Benckiser by the manner and timing of the raising of the plea. Reckitt Benckiser had the opportunity to object to the raising of the plea at the FAC proceedings. It sought and was granted an extension of three days to deal with the point and did not argue the plea further.

[43] In any event, as I have said above the FAC was careful to decide the appeal on its merits also. Thus it cannot be argued that Reckitt Benckiser was the victim of a sharply and hastily taken technical point which deprived it of a hearing on the merits. The FAC's reasoning on the merits is faultless. It's treatment and those of AAC on the

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[13] See *Chicken Licken/KFC* I 11339(2 March 2009) where Justice King held that "the rulings of this Committee are followed in the industry as precedents and as a guide to enable business people to promote their products every minute of every working day in South Africa." See also Golden Fried Chicken / Sandile Cele (10 July 2019) where Justice Ngoepe held at para 23. 7, p 19, that 'The FAC is an instance of final resort; there is no further appeal beyond it. Secondly, it creates precedent for Directorate its ....'

[14] *Bakoni Platinum Limited v Moro ane* (HCA02/2017) [2019] ZALMPPHC 30 (7 June 2019)

use of the word 'illness' are findings made by a specialist tribunal and this court is enjoined to pay due regard and deference to its treatment of the matter.[15]

Improper purpose

[44] In regard to the argument that the previous breaches were impermissibly taken account of in the determination of this contravention, it is clear from both the AAC and the FAC Ruling that Reckitt Benckiser's recidivism had no bearing on their findings The FAC considered the Applicant's repeated non-compliance with the AAC decision only in support of the sanction that it imposed in terms of Clause 15.4 of the Guide, which was proper in all the circumstances.

Conclusion

[45] In my view, Reckitt Benckiser has been pushing the regulatory boundaries of the ASA and the ARB for some time. It seems that its strategy has been to capitalise on the use of the offending 'illness' descriptor for as long as possible and this has involved abusing the ASA/ARB processes and now those of this Court. The administrative scheme is founded on voluntariness and good faith in the public interest and if these principles are not respected, the scheme will not be sustainable for its purpose.

Costs

[46] There is to my mind no reason why the costs should not follow the result. The costs of the proceedings in the urgent court were reserved and these too should follow the result.

Order

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[15] *IBapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* 2014 ZACC 36 at para 79.

[47] I thus make the following order:

The review application is dismissed with costs, such costs to include the costs of the urgent proceedings before Lamont J.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 7 December 2020.

Judgment Delivered: 21 December 2020.

APPEARANCES:

For the Applicant : Adv M le Roux with Adv Y Ntloko.

Instructed by	: Herbert Smith Freehills SA Attorneys.
For the 2nd Respondent	: Adv R Michau SC with Adv L Harilal.
Instructed by	: Muhammed Vally Attorneys Inc.