IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: DA7/2002

In the matter between:

ANTHONY FEUILHERADE First Appellant
FRANCOIS DAVIDTZ Second Appellant
ENFORCE SECURITY GROUP (PTY) LIMITED Third Appellant

and

DUMISANI MANDLENKOSI MTHIMKHULU Respondent

AND:

Case No: DA8/2002

In the matter between:

ENFORCE SECURITY GROUP (PTY) Limited First Appellant
ENFORCE SECURITY GUARDING (PTY) LTD Second Appellant
ANTHONY FEUILHERADE Third Appellant
FRANCOIS DAVIDTZ Fourth Appellant

and

DUMISANI MANDLENKOSI MTHIMKHULU Respondent

J U D G M E N T

GOLDSTEIN AJA:

[1] There are two appeals before us numbered DA7 and DA8 of 2002. The three appellants in case DA7 are Anthony Feuilherade, Francois Davidtz, and

Enforce Security Group (Pty) Limited and the respondent is Dumisani Mandlenkosi Mthimkhulu. I shall refer to them respectively as "Feuilherade", "Davidtz", "Enforce Security Ltd", and "Mthimkhulu" or the respondent. The appellants in case DA8 are Enforce Security Ltd, Enforce Security Guarding (Pty) Ltd, Feuilherade and Davidtz, and the respondent is Mthimkhulu. I shall refer to the second appellant as "Enforce Guarding". Mthimkhulu worked as a security guard for an entity called Enforce Security. On 15 May 2000 a written agreement of settlement was entered into in a document which describes the "employee party" as "D Mthimkhulu" and the "employer party" as "Enforce Security" and the body of which reads:

> "The respondent (Enforce Security) undertakes to resolve this matter by reinstating the applicant (Mthimkhulu) with full back-pay and in accordance with the original contract of employment. The applicant (Mthimkhulu) undertakes to report for duty at 8.00 am at Enforce Security. The applicant (Mthimkhulu) will see Mr Razani upon reporting for duty who will sort out this matter.
>
> This writing is in full and final settlement of the said dispute. No variation of the Agreement will be legal and binding unless reduced to writing." (9 and heads par 11 p 4 - 5)

Davidtz says that during December 1999, when the dispute arose which led to the agreement, Mthimkhulu was employed by Enforce Security Ltd. This amounts to saying that Enforce Security was Enforce Security Ltd at that time. Davidtz also says that on 26 February 2000 the business of Enforce Security Ltd including "all its employees" was transferred to Enforce Guarding.

[2] On 14 November 2000 Mthimkhulu launched an application served on that day on Enforce Security, in which he gave notice that he would seek an order in the Labour Court at Durban in the following terms (there are grammatical errors in the prayers and I omit the word "sic" in this regard):

> "1. That the Settlement Agreement dated the 15th May 2000 ... be made an

order of court in terms of Section 158 (1) (c) of the Act, in that –

a) The Respondent (Enforce Security) is ordered to pay the Applicant (Mthimkhulu) the back for the period between 24th November 1999 to the 15th May 2000 on the sum pf R9 336.60.

b) Payment of interest on the sum of R 9 336.60 at the rate of 15.5% per annum from the 15th May 2000 to the date of payment.

c) Payment of the monies due to the Applicant as a result of the Respondent's failure to re-instate the Applicant at a rate of R1 333.80 per month payable at the end of each and every month for the period starting from the 15th May 2000 to the date of final re-instatement.

d) Payment of interest on the said sums due to the Applicant resulting from the Respondent's failure to re-instate the Applicant at of 15.5% per annum as from the date of each and every amount becomes due and payable to the date of payment.

1. That the costs of this application be paid by the respondent (Enforce Security).
2. Further and or alternative relief."

The application was unopposed and on 26 February 2001 **Pillay J** gave an order "in terms of paragraphs 1 and 2 of the Notice of Motion", no notice of the hearing having been given to Enforce Security.

[3] The appeal with case number DA8/2002 relates to case number D1549/2000, which is the case number under which the order of 26 February 2001 was sought and obtained.

[4] By notice of application dated 4 July 2001, under case no D1549/2000, and served on the respondent's attorney on 5 July the four appellants in DA8/2002 gave notice of an application in the Labour Court at Durban in which inter alia the rescission of the order of 26 February 2001 was sought. The answering affidavit in this application is dated 19 July 2001 and the reply 26 July 2001.

[5] Meanwhile and on 28 March 2001 Mthimkhulu's attorneys signed a document headed "Notice of Application for Contempt of Court" under case no D1549/2000 directed against Enforce Security, Davidtz and Feuilherade in which an order was

sought that the three were in contempt of the order of **Pillay J**[1], that Enforce Security be sentenced to a fine, that Davidtz "as the Operations Director of (Enforce Security) in his personal capacity be committed to detention in prison for a period of .. 15 days .. by reason of his failure to secure compliance by (Enforce Security) with (the) order of ... Judge Pillay ....., in terms whereof (Enforce Security) was ordered to re-instate (Mthimkhulu) on the same terms and conditions that existed prior to dismissal". A similar order was sought against Feuilherade "as the Manager" of Enforce Security for the same reason as that sought against Davitdz. The remaining prayers read as follows:

> "5. That at the expiry of the above-mentioned ... 15 days .....(Davidtz) be brought before the Court again to show cause why a further period of committal should not be imposed.
>
> 6. That at the expiry of the above-mentioned ...15 days ..... (Feuilherade) be brought before the Court again to show cause why a further period of committal should not be imposed.
>
> 7. That in the event of the Respondents complying with the Order of Court or tendering to comply therewith, (Davidtz) and (Feuilherade) may at their instance, be brought before the Court at an earlier date than the expiration of the said period of .....15 ..... days.
>
> 8. That (Enforce Security, Davidtz and Feuilherade) are ordered to pay to the Applicant a sum of R9 336.60 for the period between 24th November 1999 and the 15th May 2000.
>
> 9. That (Enforce Security, Davidtz and Feuilherade) are ordered to make payment of interest on the said sum of R9 336.60 at a rate of 15.5% per annum ex tempora morae to the date of payment.
>
> 10. That (Enforce Security, Davidtz and Feuilherade) are ordered to make payment of the monies due to (Mthimkhulu) as result of (their) failure to re-instate Mthimkhulu at a rate of R1 333.80 per month.
>
> 11. That (Enforce Security, Davidtz and Feuihlerade) are ordered to make payment of interest on the said sums due to (Mthimkhulu) resulting from (their) failure to re-instate (Mthimkhulu) at a rate of 15.5% per annum as
> from the date each and every month becomes due and payable to the date of payment.

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1 The day of the order given in the notice is the clearly erroneous one of 29 instead of the correct one of 26. I shall refer to the application as "the contempt application".

12. That (Enforce Security, Davidtz and Feuilherade), jointly and severally, the one paying the other to be absolved, be ordered to pay the costs of this Application on the scale of attorney and client.
13. That (Mthimkhulu) be granted further and/or alternative relief."

Feuilherade says that the contempt application was served on Enforce Security Ltd on 29 March 2001. On 9 July 2001 Enforce Security Ltd, Davidtz and Feuilherade served a document headed "Notice of Application" under case no D1549/2000 on Mthimkhulu's attorneys in which they gave notice that at the hearing of the contempt application they would make application for the condonation of their "failure to deliver a Notice to Oppose and Answering Affidavit within the time limits prescribed in Rule 7(4)(b) of the Rules" of the Labour Court. Attached to the notice was an answering affidavit by Feuilherade supported by an affidavit of a woman who described herself as a secretary of Enforce Security Ltd. Thereafter Mthimkhulu filed an affidavit dated 20 July 2001 opposing the condonation and this was followed by a replying affidavit of Davidtz dated 30 July 2001.

[6] On 5 September 2001 under case number D1549/2000 **Ngcamu AJ** delivered a judgment which concluded with the following order:

"1. The application is dismissed with costs.
3. An order for Contempt of Court is granted as prayed but suspended for 30 days to enable the respondents to comply with the court order.
4. Should the respondents fail to comply with the order, the applicant is granted leave to approach the Registrar for the issue of the warrant of arrest."

Clearly paragraph 1 of the order deals with the application to rescind the order of **Pillay J and paragraphs 2 and 3 deal with the contempt application**

referred to in para [5] above. I turn to deal first with the appeal against paragraph 1 of the order of 5 September 2001.

[7] Section 165 of the Labour Relations Act 66 of 1995 (the LRA) reads as follows in so far as it is relevant:

> "The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order-
>
> a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;..."

The relevant portion of rule 16A of the Rules of the Labour Court reads as follows:

> "(1) The court may, in addition to any other powers it may have –
>
> a) of its own motion or on application of any party affected, rescind or vary any order or judgment –
>
> (i) erroneously sought or erroneously granted in the absence of any party affected by it;
>
> (ii) ....;
>
> (iii) ....; or
>
> b) on application of any party affected, rescind any order or judgment granted in the absence of that party.
>
> c) Any party desiring any relief under –
>
> 1. subrule 1*(a)* must apply for it on notice to all parties whose interests may be affected by the relief sought.
> 2. subrule 1*(b)* may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit."

Section 165 of the LRA and rule 16A (1)(a) are in substantially the same terms as rule 42 of the Uniform Rules of Court. The question is whether the order of **Pillay J** ought to have been set aside on the basis of these provisions.

[8] Mr Van Niekerk, who appeared for the appellants, referred us in this regard to

Rule 7(6A) of the Rules of the Labour Court which read as follows at the relevant time:

> "An application to make a settlement agreement ... an order of court which is unopposed must be enrolled by the registrar on notice to both parties. The court may make any competent order in the absence of the parties."

This sub-rule must be contrasted with rule 7(2)(e) which provides that a notice of application must advise the respondent

> "that if it intends opposing the matter, (it) must deliver an answering affidavit within ten days after the application has been served, failing which the matter may be heard in (its) absence ..."

There is also a practice direction issued by the then acting Judge President of the Labour Court on 24 November 1999 which reads as follows:

> "1. In the light of the uncertainty created by the provisions of rule 7(2)(e) read with those of rule 7(6A) with regard to whether or not it is necessary to serve a notice of set down of an application on a respondent who has not filed any answering affidavit as required by rule 7(2)(e) of the rules of the Labour Court, it is deemed necessary to issue the practice direction in paragraph 2 below.
> 2. With immediate effect, no notice of set down is required to be served on a respondent who has not filed an answering affidavit in application matters."

[9] Counsel argues that a practice direction cannot override a rule. He relies in this regard on **Western Bank Limited v Packery** 1977 (3) SA 137 (T) at 141B. In this case **Coetzee J** (as he then was) was concerned with the problem whether he should allow a defendant in provisional sentence proceedings to file a second affidavit in accordance with a practice in conflict with the applicable rule. At 141A-B the learned Judge said:

> "This practice developed under the umbrella of the Supreme Court's inherent power and is a typical example of its application. There are, however, clear and definite limits to this power, and the Court is not, merely in the interests of justice, at large to do or undo as it wishes in the field of adjectival law. The

> Rules of Court are delegated legislation, have statutory force and are binding on the Court."

I find it unnecessary to decide whether counsel is correct in contending that the practice direction ought to have been regarded by **Pillay J** as overriden by Rule 7(6A). In my view the following apt remarks made in respect of Rule 42(1) of the Uniform Rules of Court in Harms: **Civil Procedure in the Supreme Court** at B-299 are applicable:

> "In applying this provision it should always be borne in mind that the court cannot sit as a court of appeal on its own judgment and that it cannot review it. The sub-rule applies typically to *ex parte* applications or others cases where an affected party is absent, to bring the true facts to the court's attention ..."

If **Pillay J**'s attention had been drawn to the dictum in **Western Bank Ltd** it is by no means certain that she would have refused to follow the practice direction. If **Ngcamu AJ** had taken account of counsel's argument in the rescission application, this would have been tantamount to him sitting as a court of appeal.

[10] In his affidavit in support of the rescission, Davidtz says that when the application to have the agreement of 15 May 2000 made an order of Court was served on Enforce Security Ltd on 14 November 2000, he immediately prepared a letter to Mthimkhulu's attorney "setting out the background to the matter in some detail and advising that the application to the Labour Court would be opposed". The letter dated 14 November was despatched on 16 November. On 20 November, he says, he received from Mthimkhulu's attorney a letter dated 17 November 2000. The

latter letter, directed to Enforce Security, acknowledges receipt of the letter of 14 November, refers to the fact that it has 10 court days to file an answering affidavit and ends by saying that, if it wishes to oppose the application, the Rules of the Labour Court must be followed, failing which the matter would "be heard in your absence without further notice to you". Mr van Niekerk submits that Mthimkhulu's representative was obliged, at the hearing before **Pillay J**, to inform her of the letter of 14 November. I disagree. In any event, counsel concedes that, if **Pillay J** were informed of the letter of 14 November, she also ought to have been apprised of that of 17 November. If this had happened, she may well have continued to dispose of the application without further ado. It follows that the rescission ought not to have succeeded on the basis of either section 165 of the LRA or of rule 16A(1)(a).

[11] The next question which arises is whether the requirements of rule 16A(1)(b) read with sub-rule (2)(b) were complied with. One of these is that the applicant has to show “good cause”. In **Chetty v Law Society Transvaal** 1985(2) SA 756 (A) **Miller JA** dealt at 765A-C with the expression "sufficient cause" of the common law. The learned Judge equated it with that of "good cause", and stated that it had two essential elements, the first of which was that the party seeking relief must present a reasonable and acceptable explanation for his default and the second, that such party had to show on the merits that it had a bona fide defence which prima facie carried some prospect of success. At 765D-E the learned Judge went on to say:

> "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial

> process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

Davidtz says that in view of the circumstances reflected in his letter of 14 November 2000 he "did not believe that (Mthimkhulu) would pursue his application and (he) resolved that (he) would await receipt of a Notice of Set Down of the matter for hearing before instructing attorneys to oppose the matter". This explanation is not credible or acceptable. The letter of 17 November clearly states that the matter will proceed in the event of there being no opposition and that it would be heard in the absence of Enforce Security and without further notice to it. The Court a quo described the failure to give notice of intention to oppose and file an answering affidavit as clearly reckless. The learned Judge went on to say that there was no explanation why the attorneys were to be instructed only on receipt on the date of hearing and that Davidtz does not say that he did not understand the consequences of ignoring the papers served. In these circumstances the Court a quo, correctly in my judgment, refused to rescind the order of 26 February 2001.

[12] I turn now to the appeal against paragraphs 2 and 3 of the Order of 5 September 2001 referred to in para [6] above. Essentially the contempt arose from Enforce Security's failure to re-employ Mthimkhulu. The order to re-employ is one ad factum praestandum and therefore enforceable by contempt proceedings, whilst the rest of the order, apparently granted and involving the payment of money, is not enforceable in this way.

[13] In his answering affidavit Feuilherade says the following:

> "19. I am advised by (Davidtz) that on the 16th May 2000 (Mthimkhulu) reported to him but refused to commence work until all monies owing to him

in terms of the settlement agreement had been paid. I am further informed by (Davidtz) that at that time he explained to (Mthimkhulu) that the processing of that payment would take some time but that he advanced to him an amount of R300.00 to tide him over and instructed (Mthimkhulu) to report for duty on the following day.

20. Subsequently (Mthimkhulu) has failed to tender his service.

21. On the 18th May 2000 a further letter was dispatched to (Mthimkhulu) by registered post, informing him that unless he tendered his services on or before the 25th May 2000 he would be presumed to have deserted and his contract of employment would be terminated.

22. By reason of the Applicant's failure to subsequently tender his services, his contract of employment was terminated."

[14] Paragraph 19 contains hearsay evidence but the version reflected therein is deposed to by Davidtz in his affidavit in the application to rescind the order of 26 February 2001. Mthimkhulu has a different version . He says he did tender his services, but, in effect, that such tender was refused. In the event of the facts deposed to by Davidtz being correct, Enforce Security Ltd, Feuilherade and Davidtz are not in contempt of the order since Mthimkhulu is clearly required to tender his services before he can be re-employed. Thus, at the very least Enforce Security Ltd, Feuilherade and Davidtz – if Davidtz' version is true – did not have necessary intention to commit contempt of court.[2]

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2 I leave out of account the extent to which they may be prevented by the order of 26 February 2001 and the doctrine of issue estoppel from disputing that Mthimkhulu tendered his services, as he says he did in his affidavit in the application before **Pillay J** . Cf **Liley and Another v Johannesburg Turf Club & Another** 1983(4) SA 548 (W) at 552 A-B; **Custom Tariff Consultants CC v Mustek Ltd** 2002(6) SA 403 (W) at 407 C-E. Of course, issue estoppel cannot prevent parties from relying on their lack of intention to do wrong.

[15] In paragraph 27.1 of Feuilherade's affidavit at page 151 of the record he says that as a result of Enforce Security Ltd selling its business to Enforce Guarding Mthimkhulu's claim is against the latter company. No reason is given why the agreement of settlement of 15 May 2000 was concluded with the wrong entity, and the question why the settlement of 15 May 2000 was entered into under the name of Enforce Security is not addressed at all. I suspect that Enforce Security may well be the name under which Enforce Guarding trades and under which Enforce Security Ltd traded. Be that as it may, the defence raised here is one which cannot be determined on the papers. During argument before us Mr Van Niekerk said that he was not taking the point that the agreement of 15 May 2000 was with the wrong entity. However, it seems to me that the point may be relevant to disprove the intention to commit contempt of court, since Feuilherade seems to be saying that once Enforce Security Ltd was no longer employing any of the employees of its erstwhile business it could not employ Mthimkhulu.

[16] In my view the defences referred to in paras [13] and [15] above ought to have resulted in the contempt application being dismissed or referred to oral evidence in terms of Rule 7(7)(b) of the Rules of the Labour Court.

[17] It does not follow, however, for reasons which will become apparent, that the appeal against paragraphs 2 and 3 of the order of 5 September 2001[3] must succeed. Thusfar I have dealt with the appeal under Case No DA8/2002, and I turn to deal with the appeal under Case No DA7/2002.

[18] This appeal arises in the following way. On 1 October 2001 Feuilherade, Davidtz and Enforce Security Ltd brought an application for inter alia the rescission of paragraphs 2 and 3 of the order of 5 September 2001. This application to which I shall refer as "the second rescission application" failed and the three unsuccessful applicants appeal against such failure. In dismissing the application on 7 December 2001 **Ngcamu AJ** made no order as to costs. For reasons I shall indicate the appeal against the dismissal of the second rescission application ought to succeed. The question arises whether we ought to deal with the contempt application on the merits

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3 See para [6] above.

and uphold the appeal in regard thereto, making the appeal against the second rescission application academic or whether we ought to decide the latter appeal making a decision on the former redundant. In my view, we should take the second route because the contempt application has in fact not been adjudicated upon by the Court a quo, and questions such as a possible referral to oral evidence can best be dealt with by it.

[19] Mr Reardon, the appellants' attorney, states in his affidavit in support of the rescission that he had an arrangement with Mthimkhulu's attorney, Mr Jafta, that, when the application for rescission of the order of 26 February 2001 brought under case no D1549/2000 was argued before **Ngcamu AJ**, the contempt application brought under the same case number was not to be argued, but was to be postponed. He says the contempt application was not even called and that no argument was addressed in regard thereto. In support of his contention is a letter he wrote to Mr Jafta dated 24 August 2001 the second paragraph of which reads:

> "We confirm that on the 4th proximo our client's application for the rescission of the judgment will be argued and your client's contempt application will be adjourned by consent to be re-enrolled for hearing at a later, if necessary." (DA7/12)

Mr Jafta says that this was not the understanding. According to him the postponing of the contempt application "was only conditional should the Court be unwilling to deal with it at the time of the rescission application." He goes on to say: "Since the Court was willing and comfortable with dealing with both applications at the same time there was no point in adjourning the contempt of Court application." It is clear that no argument in respect of the contempt application was put to **Ngcamu AJ** who said at p 39 in para [11] of the judgment in the second rescission application:

> "The two applications were properly before the Court. The applicants decided to argue the application for rescission.4 They must have realised that the

4 This it will be recalled is a reference to the application for the rescission of the order of **Pillay J**.

> refusal of the application for contempt of Court would depend on the success of the application for rescission. They decided not to address the Court to oppose the application. They must have known that if the application for rescission was refused, the natural consequence was the granting of the application for contempt of Court which was left unopposed."

I have no hesitation in rejecting Mr Jafta's version on the papers. The fact that neither side argued or apparently even mentioned the contempt application during argument is entirely inconsistent with such version. Significantly **Ngcamu AJ** fails to deal at all in the body of the judgment of 5 September 2001 with the contempt application and simply grants the order in respect thereof "as prayed". In these circumstances it seems to me clear that the order was erroneously granted by the learned Judge and that he ought to have rescinded it in terms of section 165(a) of the LRA or rule 16A(1)(a)(i) of the rules of the Labour Court. The contempt application was in my view, not before him at all. It follows that although the parties were before the learned Judge for the rescission application they were not before him in the contempt application and the latter was decided in their absence.

[20] I proceed to deal with the question of costs. Mthimkhulu has succeeded to a substantial extent since the appeal against the dismissal of the rescission application has failed and thus the order 26 February 2001 survives. This order determines the central issue between the parties. The appellants, however, have succeeded in rescinding paragraphs 2 and 3 of the order of 5 September. The appellants briefed the same counsel in both appeals. Counsel for the appellants asks for the costs of the appeal in case DA 7/2002 to be paid by Mthimkhulu's attorney de bonis propriis

on the scale as between attorney and client since, so he argues, the attorney has made a false affidavit resisting the rescission concerned. Of course, Mr Jafta's conduct is quite unacceptable. It is a very serious matter for an officer of the court to mislead it. There are, however, weighty factors weighing against a costs order in favour of the appellants. Their success is after all limited to orders made consequentially on the vital order of 26 February 2001. That order stands and there is no reason why a writ in respect of the payment of money due in terms thereof should not issue at least for compliance with paragraphs 1(a) and (b) thereof. Furthermore, it is now more that two years since the settlement of 15 May 2000 and the issues between him and Enforce Security have never been properly ventilated due to the flagrant failure to oppose the application before **Pillay J** – a failure for which all the appellants are responsible. I initially thought, and put it to Mr Van Niekerk during argument that Mthimkhulu had received nothing despite the long lapse of time. After the hearing Mr van Niekerk informed us in writing that an amount of R6 023.16 was in fact paid to Mr Jafta on 6 August 2001. I accept that this is so, but, of course, this amount does not represent full compliance with **Pillay J**'s order. Counsel goes on in the letter to make submissions about the order of **Pillay J**. But that order is not on appeal. It seems to me that in all the circumstances there should be no order of costs of the appeal. Mthimkhulu's attorney has filed notices indicating that he does not oppose either of the appeals due to Mthimkhulu's lack of funds. I am not disposed to grant Feuilherade, Davidtz and Enforce Security Ltd the costs of the second rescission application in the Court a quo as a mark of this Court's displeasure of their conduct of the litigation.

[21] I make the following order:

2. The appeal against paragraph 1 of the order of 5 September 2001 is dismissed.

3. The appeal against the order of 7 December 2001 succeeds to the extent that paragraph (a) of the order is deleted and the following substituted therefor:

"(a) Paragraphs 2 and 3 of the order of 5 September 2001 are deleted."

3. No order is made in the appeal against paragraphs 2 and 3 of the order of 5 September 2001.

_____

E L GOLDSTEIN
Acting Judge of Appeal

I agree

_____
R M M ZONDO
Judge President

I agree

_____
D MLAMBO
Acting Judge of Appeal

For the Appellant:	G O VAN NIEKERK SC Heads drawn by M Pillemer SC
Instructed by:	Millar & Reardon
For the Respondent :	No appearance
Date of Hearing:	19 November 2002
Date of Judgment:	20 December 2002