IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

D 426/07
Reportable

In the matter between

SOUTH AFRICAN REVENUE SERVICES **APPLICANT**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **FIRST RESPONDENT**

MATHE NHLANHLA N.O. **SECOND RESPONDENT**

BESS PILLEMER N.O. **THIRD RESPONDENT**

E.A. JANSE VAN RENSBURG **FOURTH RESPONDENT**

CHANELLE OOSTHUIZEN **FIFTH RESPONDENT**

JUDGMENT

Cele J

Introduction

1. The applicant seeks to have two orders issued under the auspices of the first respondent reviewed and set aside in terms of sections 158 (1) (g) and 145 of the Labour Relations Act 66 of 1995 ("the Act"). The first

application is directed against a jurisdictional ruling dated 24 March 2007 issued by the second respondent. The second is directed against the arbitration award dated 21 June 2007, issued by the third respondent. Both orders were issued in favour of the fourth and fifth respondents who opposed both applications.

Background Facts

2. The fourth and fifth respondents are in the employ of the applicant. They commenced their employment as Typists. The fourth respondent joined the applicant on 1 July 1992 while the fifth joined sometime in 1996. There are two other employees of the applicant whose circumstances are relevant in these proceedings. They are Ms Gouws who commenced employment with the applicant on 8 September 1997 and Ms Moodley who joined the applicant on 25 September 1996. They too were employed as Typists and all four are on a permanent employment.

3. The applicant is a statutory body established in terms of the provisions of section 2 of the South African Revenue Services Act 34 of 1997. On 1 January 1999 the applicant introduced a process called the Hay Grading System ('the grading system'). The purpose of the grading system was to determine all the employees' grades within the applicant's employment.

   Certain of the applicant's employees received back pay in March 2002 as a result of the placement system. The news of such back pay came to the attention of the fifth respondent through a news flash that was issued concerning such back pay. She took the matter up with the applicant, by lodging a grievance. In 2002 all grading results were reviewed in order to ensure consistency, fairness and equity across the board. A National Review Committee (the "Review Committee") was established. An employee who had lodged a grievance but was not satisfied by the appeal

process was to complete a prescribed questionnaire for consideration by the Review Committee. In terms of the questionnaire, the employees had to give a description of the job he or she performed after 1 January 1999. The fourth and fifth respondents gave a description of their employment prior to and after 1 January 1999.

4. As a consequence of the review process, the fourth respondent was placed on grade 3B, in the minimum salary level, with effect from 1 October 2000. the fifth respondent was similarly placed but this was with effect from April 2000. However, Ms Gouws and Ms Moodley although also placed in 3B grade, it was with retrospective effect from 1 January 1999. All four were in grade 3A as on 7 December 2001. The consequence of the differential treatment was that Ms Gouws and Ms Moodley were placed at grade 3B which was payable on the mid-level backdated to 1 January 1999 whereas the fourth and fifth respondents were appointed on the minimum level of grade 3B and without a backdated payment. In terms of work experience, Ms Gouws had less years of service than both respondents. Ms Moodley had the same years of service as Ms Oosthuizen and four years less service than fourth respondent.

5. The applicants grading system provided *inter alia* that:

    - to be remunerated at the grade 3B mid-level, an employee needed to be in the position as at 1 January 1999.
    - any movement after 1 January 1999 qualified for payment at the minimum level.

6. A Mr A Wybenga, a Manager within the employ of the applicant, considered the representations made by the fourth and fifth respondents

and he made submissions dated 31 January 2005 to the applicant recommending that the fourth and fifth respondents' positions be adjusted to the mid-point of grade 3B retrospectively, to the date of grade allocation. He found that a number of personal assistants in the KZN region of the applicant were on the mid-point or higher although they were not performing that job on 1 January 1999. The applicant did not accept his recommendation. The rejection of his recommendation did not go down well with him. He then wrote and issued an e-mail dated 27 February 2003. It reads:

> "I accept that my submission was not approved, but what about the cases in that area (KwaZulu-Natal) that were appointed at mid and even max though we for a fact know that there was no proper motivation for the cases. We cannot recover from them as they were physically made that job offers and signed contracts. Why are some people appointed above the minimum and others not. Are we starting to become a corrupt organisation?
>
> Two wrongs do not make a right, but ten wrongs are starting to become a right (tendency).
>
> What is good for the goose is good for the gander."

7. The recommendation to move the earnings of the fourth and fifth respondents to the midpoint of the grade were not approved by the applicant in that:

> 1. According to the Hay Grading Policy (HGS), no employee of the Applicant including the fourth and fifth respondents could automatically move to the midpoint value of the grade. Only employees who were already in the job with effect from

01 January 1999 were taken to the midpoint of the grade as part of the implementation of the HGS. If an employee moved to a different job after 01 January 1999, the employee would be placed on the minimum value of the grade.

2. *Ad hoc* salary adjustments can only be considered if exceptional performance can be motivated or as a retention strategy.

3. As both the fourth and fifth respondents were Personal Assistants, it is submitted that their skills or knowledge cannot be classified as key skills within the Applicant.

4. Any motivation for a salary adjustment must be made by the branch or centre manager and recommended by the relevant general manager.

8. On 8 March 2002 the Human Resources Department of the applicant released a newsflash on the Hay grade update. The first page of the newsflash reads:

" Hay grading process

- The Hay grading system was introduced in 1999 to replace the Public Sector grading system.
- The initial grades allocated to employees was based on the grading of selected benchmark jobs within SARS (sic)
- A review of the grades was conducted during 2000 under the banner of the 'Woodmead Exercise'
- Due to concerns raised with the grades an appeals process was undertaken during 2001 and culminated in

the National Grading Review which was finalised in January 2002.

- The National Review resulted in at least 3171 jobs being upgraded and 1206 being downgraded with the balance retaining their grades.
- All employees were advised in writing of their final grade applicable for the period 1 January 1999 to 1 October 2000 incorporating any changes.
- Employees have the option to consider arbitration as the final determinant of their grade. The terms of reference for the arbitration process will be finalised with the trade unions.

a. Back pay

Eligibility for backpay

- The following category of employees will receive backpay:
- Employees whose grades have gone up relative to the orginal exercise and/or the 'Woodmead exercise' and who were earning less than the midpoint for their grade from 1 January 1999 or the applicable later date before 1 October 2000. This excludes all categories of employees who are considering arbitration.

Process followed to determine Backpay

- Following the issuance of letter to all employees stating their final grade, detailed lists were forwarded to all offices specifying the January 1999 starting position to determine and incorporate any grade changes that may have occurred during the period 1 January 1999 to 1 October 2000.
- Managers and empoyees were required to sign off and confirm the information on the list.

- The actual current pay for every month in the review period was extracted from the payroll system to establish a basis for comparison.

……

…..”

9. The fourth and fifth respondents challenged the applicant’s failure to place them on the mid-point of grade 3B. They referred an unfair labour practice to the first respondent, the CCMA, for conciliation and arbitration. An arbitration award dated 6 March 2005 was issued in their favour. The applicant applied for the review and setting aside of that arbitration award. At least three grounds of review appear to have been relied upon, namely:

   (i) that the CCMA had no jurisdiction to arbitrate the dispute,

   (ii) that the arbitrator misdirected himself by disregarding the explanation proffered by the applicant on why it differentiated the case of the two respondents from that of Ms Moodley and Ms Gouws.

   (iii) That the arbitrator went beyond the terms of his reference, which were confirned to determining the fairness of the practice with effect from 1 April and 10 October 2000.

10. This court per Pillay J, found that the CCMA had the requisite jurisdiction to arbitrate the dispute and that the arbitrator did take into account the fairness of the practice as he was entitled to, due to a request by the fourth and fifth respondents. However the court found that the arbitrator misdirected himself by disregarding the explanation given by the applicant on why it treated the fourth and fifth respondents differently from their two colleagues by not applying its grading policy consistently. The arbitration award was reviewed and set aside with the matter remitted to the CCMA to be arbitrated anew by a different commissioner. Five issues were

identified by court in relation to which the arbitrator should have, but did not apply his mind to, namely:

1. the nationality of the applicant's differentiated pay policy;
2. the reason for appying the policy to the circumstances of the employee;
3. whether the application of the policy to the circumstances of the employees was consistent with is application to other similarly situated employees;
4. whether the reasons for refusing to pay the employees the higher remuneration were rational and factually substantiated;
5. whether the employees met the criteria for back-pay as set out in the news flash.

11. When the matter resumed for the arbitration hearing, the applicant raised the jurisdictional objection again. The matter was before the second respondent who found that the CCMA had the necessary jurisdiction to arbitrate the dispute. The third respondent was subsequently appointed to arbitrate the dispute. He declared the applicant's failure to deal with the fourth and fifth respondents in the same manner as it dealt with Ms Gouws and Ms Moodley, to place them on the midpoint of grade 3B, to be unfair. He directed the applicant to amend the grading of the fourth and fifth respondents so that they were reflected as being on the midpoint of grade 3B retrospective to 1 January 1999. The applicant had to pay them the difference between the remuneration they would have earned had they been so graded and the remuneration they have in fact earned since then, the fourth respondent until October 2005 and the fifth respondent until the date of the award. The applicant was aggrieved by the finding and the order and hence the present applications.

The review of the jurisdictional ruling

12. The applicant abandoned the review application launched against the second respondent's ruling of 24 March 2007 in its replying affidavit. It stated that it was therefore no longer necessary for this court to entertain issues pertaining to the aforesaid arbitration ruling. In the applicant's heads of argument the jurisdictional ruling issue was also not canvassed. However when Mr Lengane presented the case of the applicant before me, he revived the issue.

13. The backdating of the placement of Ms Gouws and Ms Moodley led to them getting backpays. This alone meant that their placement from grade 3A to 3B mid-point effectively raised their positions at work. Their placements brought with it, a differentiation in the remuneration they had been receiving prior to such placement. The only reasonable conclusion to draw from these facts is that they were indeed promoted. The fourth and fifth respondents were aggrieved by this differential treatment. Their case is therefore that when the applicant promoted them, it treated then differently than it had done when promoting Ms Gouws and Ms Moodley. Their dispute accordingly falls within the ambit of an unfair labour practice as it relates to a promotional issue. The ruling of the second respondent should therefore stand.

The review of the arbitration award

Chief findings by the third respondent

14. The third respondent found three reasons rendered by the applicant to explain the distinction in how it treated the fourth and fifth respondent from Ms Gouws and Ms Moodley as being:

    1. The decision of the grading committee was based on information supplied by line management.

2. The applicant was unable to place the fourth and fifth respondents in mid point of grade 3B because to do so would not accord with the Hay Grading System, which required that they be in the positions on 1 January 1999.
3. The grading committee's decision was based on the questionnaire completed by the employee.

15. The third respondent pointed out, in respect of the first reason, that the applicant's representative only mentioned the reason in his opening adress but that the reason was not persued further in the closing argument. She found the third reason to be an arbitrary approach tendered for the first time, that the applicant was relying on questionnaires completed by the respondents and not upon the actual factual situation. Her further findings are that:
    1. The respondents were regarded as typists, grade 2 on 1 January 1999, and only promoted to Grade 3 some time thereafter. On the agreement with the Trade Unions and on the implementation of the Hay Grading System a person promoted after 1 January 1999 moves into the minimum of the new grade. On that basis they were put on the minimum. This is all well and good, seen in isolation, but the real issue is why they were treated differently from others in an identical position where the employer is adamant they have been dealt with properly.
    2. No evidence was led on what evidence was placed before the grading committee that considered whether employees should be placed on the midpoint or on the minimum scale. The fact that managers did not sign or perhaps even scrutinise the questionnaires of

the employees who were successfully placed on the midpoint underscrores the arbitrary nature of the process if it was based solely on the employee's response to the questionnaire. It was also not clear what information had been entered by the employees themselves or what was added later. Ms Gouws and Ms Moodley did not complete the questionnaires fully (signatures were also not obtained by their managers) and there were unexplained manuscript inserts.

3. The factual situation is that all were typists in the typing pool in 1999 and subsequently became PAs. If the differentiation in teatment was based on questionnaires apparently not completed properly then this is arbitrary and unfair. The format of the questionnaires, the record to which Mr Nkwana representing the applicant refers, confused the situation further. The questionnaire does not ask what the employee's position was before and until 1 January 1999, but asks for a description of the job perfomed after that date. The Respondents gave a description of their employment prior to and after 1 Janaury 1999, while Gouws and Moodley made reference only to positions after that date, giving rise perhaps to the false assumption that they were in those positions prior to 1 January 1999. The date of appointment was another confusing element of the questionnaire. Did the question mean the day the employee was initially employed by the Applicant, or the commencement date of new position held by the employee after 1 January 1999?

4. Since it is accepted that Ms Gouws and Ms Moodley will be retained in the position of midpoint Grade 3B, i.e, they will not be moved to the minimum grade, justice and fairness dictate that their colleagues, the two respondents, in an identical position, but who perhaps filled in the forms more accurately, should not be prejudiced for having done so, and as a matter of fairness should be treated in the same way as their colleagues.
5. The applicant had not provided a “rational and consistent” reason for the different treatment of the four. [She referred to the e email issued by Mr Wybenga on 27 February 2003.] From the e mail it appeared that the applicant had made mistakes during the regrading process, a huge undertaking, at the time, and that is probably what happened in this instance. The “Report on Hay Grading Process in SARS” mentions that a total of 6500 jobs were reviewed.
6. The behaviour of the applicant in refusing to place the two respondents on the midpoint of grade 3B, having placed Ms Gouws and Ms Moodley on that level, when there was no proper basis for differentiation, constituted an unfair labour practice. The applicant provided no rational explanation as to why it treated the two respondents differently to Ms Gouws and Ms Moodley.
7. Although the outcome might create an anomaly, in the peculiar circumstances of this case, where four people were in exactly the same position, and two received unduly favourable treatment, fairness

dictated that the two who did not, should also be treated in the same way as their more fortunate colleagues.

Grounds for review

16. The third respondent is said to have committed misconduct and/or gross irregularity and/or exceeded her powers and or failed to appreciate the true nature of the dispute before her and/or misconstrued evidence and/or reached a decision or finding which is irrational or unjustifiable and/or committed a reviewable irregularity in terms of the Act. Various submissions were made by the applicant to substantiate its grounds for review. A number of these submissions tend to overlap with one another. Some of the submissions will be outlined hereafter.

17. The Third Respondent's criticism of the format of the questionnaire is unjustifiable in that the questionnaire is a product of collective bargaining and the (National Grading Review Committee) NGRC did not find it difficult or complicated, as the commissioner finds it, to deal with respective information received and that was the issue for the NGRC to consider and decide upon, which they did.

18. The finding is unjustifiable in that Ms Gouws and Ms Moodley were not appointed to any post after 1/1/99 but the applicants were. The decision by NGRC to confirm Ms Gouws and Ms Moodley to be on 3B minimum was based on the HGS policy which required that any move after 1/1/99 an employee should be placed on the minimum of the salary band. The third respondent miscomprehended the enquiry the HGS policy and this resulted in an unfair finding being made by the second respondent.

19. The Third Respondent further failed to appreciate that the HGS was the product of collective bargaining in terms of which the unions and the applicant's representatives agreed to regrade employee's jobs. If the parties to the HGS agreed, as they did, that any appointment after 1/1/99 should be placed on minimum of the salary band that cannot be held to be unfair in that, as stated above, it was by agreement with the unions which also represented the third and fourth respondents.

20. There is therefore no basis for the third repsondent to require similar treatment for the third and fourth respondents and Ms Gouws and Ms Moodley in that their situation is not the same. Overwhelming evidence had been placed before the third respondent that the two groups did not have similar situations.

21. The finding that the applicant did not provide a rational and consistent reason for the treatment of the two groups is unjustifiable and unsupported by evidence. The Third Respondent failed to comprehend the issues before her. The primary determination in terms of the HGS, was whether an employee was moved to any position after 1/1/99 and if so, that employee would be placed on the minimum of the grade. This the third respondent failed to do in that, had she made such a proper determination, in terms of the HGS whether an employer was moved to any position after 1/1/99, she would have to find that that employee would be placed on the minimum of the grade. This the third respondent miscomprehended in that had she made such a proper determination, she would have established that the two groups' circumstances were not similar.

22. There was no evidence nor submissions made that Mr Arri Wybenga was appointed to investigate any grievance. The findings by the third respondent that Mr Arri Wybenga was so appointed is unjustifiable and not

supported by evidence. She failed to comprehend that Mr Arri Wybenga was merely stating his personal views on the matter and there is no proof to support any conclusion that the email contained correct information.

23. For the third respondent to conclude on the basis of the email of Mr Arri Wybenga that the applicant made mistakes during the grading process is irrational. The mistakes, if any, can only be attributed to the HGS committees which, as submitted, included the unions, including one that represented the third and fourth respondents.

24. Again the finding that the fourth and fifth respondents' grading retrospectively be amended so that they are reflected as Grade 3B retrospectively to 1 January 1999 is unjustifiable. The third respondent overlooked evidence to the effect that at the time of the declaration of the dispute the respondents were already on Grade 3B. The award that the fourth and fifth respondents be paid the difference between remuneration they would have earned had they been so graded is reviewable in that the third respondent ignored evidence that the grading is not referring to the salary payable but merely the employee's level within the applicant. The issue which the third respondent failed to deal with is whether applicant committed an unfair labour practice in placing the fourth and fifth respondents on minimum salary band due to their appointment after 1/1/99 and not whether the applicant committed an unfair labour practise in placing the third and fourth respondents on grade 3B. This failure renders the entire arbitration award reviewable in that such determination was primary to the third respondent's findings and award.

25. The third respondent exceeded her powers in ordering that the fourth and fifth respondents be placed on Grade 3B retrospective to 1/1/99 in that the parties agreed in the pre-trial minutes that the two respondents accept

their grades as 3B. I am advised that the Commissioners are bound by the pre-trial minutes agreed to between the parties.

26. The third respondent misdirected herself in determining the issue of promotion in that the proper approach was to ask herself whether the applicant failed to promote the fourth and fifth respondents when it had to do so. Put differently, whether the applicant failed to promote the fourth and fifth respondents where they merited promotion. This she failed to do.

Fourth and fifth respondents' submissions

27. The submissions of the applicant made in support of the grounds for review were placed in dispute. It was submitted that the applicant failed to produce any fair, rational or lawful explanation for why Ms Gouws and Ms Moodley should have been treated differently from that of the two respondents. The respondents said that it was further apparent that the applicant still did not comprehend its own policy which required appointments after 1 January 1999 to be placed on the minimum salary scale in circumstances when the two respondents were in the same boat as Ms Gouws and Ms Moodley, having been appointed post 1 January 1999.

28. In respect of requiring similar treatment for the two respondents and Ms Gouws and Ms Moodley, the respondents said that it was a trite principle that employees on the same level doing the same jobs have the right to be treated equally. All the more so in the circumstances where the applicant is an organ of state and is obliged to act rationally.

29. The third respondent was said to have noted that the findings concurred with that of one of the applicants Human Resources Team Leaders who comprehended the fact that the decisions in respect of the two

respondents was irrational. It was said that Mr Wybenga was authorised by his manager and that in any event, his conclusions were clearly correct as the differences between the two respondents and Ms Gouws and Ms Moodley were glaringly obvious and unfair.

Analysis

30. This application is premised on section 145 of the Act. The relevant provision reads:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.-
> ….
> ….
> (2) A defect referred to in subsection (1) means:-
> (a) that the commissioner-
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award has been improperly obtained."

31. In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC), Navsa AJ said the following in relation to the standard of review:

> "To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better apporach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star:* Is the decision reached

> by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

32. The enquiry before me is therefore whether or not the third respondent has commmitted any defect as comtemplated in section 145 (2) of the Act and further, whether the decision she reached in this matter is one that a reasonable decision maker could not reach.

33. The date 1 January 1999 is critical in the resolution of issues in this matter. It was used by the applicant as a point of reference in the application of its placement policy. Those terms of the policy that are relevant in this matter are clear and easy to apply. They were duly arrived at in consultation between the applicant as an employer and representatives of the employees. A differential pay policy consequent upon the application of the Hay Grading Process is, in the circumstances, reasonable. The applicant was therefore entitled to use the differential pay policy when placing all of its employees, to the extent that it was applicable, with due regard to a number of other factors such as consistency, fairness, impartiality, tranparency and without bias – see in this regard *Coop & Others v SABC & Others* [2005] 2 BLLR 179 (W). The applicant may, after all, be described in general terms, as an organ of State which is therefore constitutionally bound to promote high standards of ethics and good human resources management.

34. On 1 January 1999 Ms Gouws, Ms Moodley and the two respondents were all employed by the applicant as typists. Up until the end of 1999 therefore none of them had moved from their positions of being typists to take positions of Personal Assistants and Secretary which happened thereafter. All four therefore occupied the same or similar status within the applicant's workplace, with the exception that some had longer work

experience than others. All four subsequently moved from the typist positions which had become redundant to take new positions.

35. In terms of the Hay Grading Process therefore all four employees ought to have been given the minimum salary of the band as opposed to midpoint salary of that band. The first reason proferred by the applicant to explain the differentiation among them was clearly an untruth. Ms Moodley and Ms Gouws were appointed to other positions after 1 January 1999 and the applicant knew about it or subsequently came to know of it. According to the newsflash of 8 March 2002, 1206 jobs were downgraded. The applicant chose not to downgrade the payband of Ms Gouws and Ms Moodley. By denying that Ms Gouws and Ms Moodley did move after 1 January 1999, the applicant denied itself an opportunity to explain the resultant disparity between the payband of the two respondents and that of Ms Gouws and Ms Moodley. The consequence is that the applicant acted inconsistently and with unfair results to some of its employees who even had much longer experience than one of the benefactors of the inconsistency.

36. The second explanation for differentiation equally applied to Ms Gouws and Ms Moodley and therefore provides no comfort to the inconsistent application of the grading policy. The third explanation amounts to no explanation at all. The applicant, at least with subsequent developments to the initial grading, came to be possessed of the true facts in respect of Ms Gouws and Ms Moodley and could have redressed the situation but it chose not to. The reason to refuse to pay the two employees the higher remuneration after the applicant had chosen not to downgrade the pay band of Ms Moodley and Ms Gouws, was in the circumstances unreasonable. By choosing to keep the *status quo ante* in respect of Ms Gouws and Ms Moodley the applicant had to ameliorate the resultant disparity to the two respondents by placing them in the mid-point of their

salary band. Had it done so, it would have shown an impartial and transparent approach in the resolution of the dispute.

37. The applicant was called upon to engage in ad hoc adjustments as this was clearly a case of exceptional situation as opposed to exceptional performance of an employee. The question of skills or knowledge of the two respondents was irrelevant in the circumstances. How the case of the two respondents could be motivated by branch or centre managers of the applicant, was an issue best left to the applicant. One of its managers, a Mr Wybenga had already made a very important contribution in this regard.

38. The result which I have consequently arrived at is very similar to the decision reached by the third respondent in this matter. For that reasons, it can not reasonably be said that the third respondent committed any of the defects as are comtemplated in section 145 of the Act. Nor can it be said that the decision reached by the third respondent is a decision which a reasonable decision maker could not reach.

39. I am guided by the law and fairness applicable in this matter to conclude that the costs will follow the results.

40. Accordingly, the following is an appropriate order, in the circumstances:

1. The application to review and set aside the:
    - jurisdictional ruling dated 24 March 2007 issued by the second respondent in this matter and
    - arbitration award dated 21 June 2007 issued by the third respondent, in this matter

is dismissed.

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

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Cele J

Date: 27 March 2009

Appearances:

For the Applicant: Adv Kabelo Lengane instructed by Masermule Attorneys

For the Respondent: B. Macgregor – Macgregor Erasmus Attorneys