IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No: D293/21

In the matter between:-

RC BLOM	**FIRST APPLICANT**
BJ DAVIDS	**SECOND APPLICANT**
RI NTHULANE	**`THIRD APPLICANT**
SC KHATHI	**FOURTH APPLICANT**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**FIRST RESPONDENT**
N GREEN-THOMPSON N.O	**SECOND RESPONDENT**
THE PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)	**THIRD RESPONDENT**

Heard on: 6 May 2022
Delivered on: 21 June 2022

JUDGMENT

MHLANGA AJ

Introduction

[1] The Applicants are approaching this Honourable Court for an indulgence. They seek to reinstate their review application which is deemed to have been withdrawn by virtue of the Applicants failing to file the record within sixty (60) days of being notified by the Registrar that the record has been received.

[2] The Third Respondent, who is the beneficiary of the Arbitration Award that is a subject of the withdrawn review application, is opposing the reinstatement Application on various grounds which are fully set out hereunder.

Chronology

[3] On the 4th of June 2021 the CCMA filed the record of the arbitration proceedings and advised the Applicant that the record has been so filed with the Registrar of the Labour Court.

[4] In terms of clause 11.2.2 of the Practice Manual, the transcribed record was required to be filed on or about 30th August 2021.

[5] On the 24th of August 2021 the Applicant filed the transcribed record. The transcribed record filed by the Applicants on 24th August 2021 had two portions of the record missing:

[5.1] The record of the proceedings of the 1st of April 2021; and

[5.2] The testimony and cross-examination of five of the Applicants' witnesses.

[6] On the 7th of September 2021 the Third Respondent's attorneys advised the Applicants' attorneys that the transcript of the 1st of April 2021 containing oral arguments was missing from the record.

[7] On the 8th of September 2021 the Applicants filed their Supplementary Affidavit.

[8] On the 21st of September 2021 the Third Respondent filed its Answering Affidavit. Simultaneously with its Answering Affidavit, Third Respondent dispatched a letter advising the Applicants' attorneys that the record was missing further portions and therefore the review application was deemed to be withdrawn for non-compliance with clause 11.2.2 of the Practice Manual.

[9] On the 27th of September 2021 the Applicants' attorneys dispatched an email to Sneller Recordings checking if the record transcribed comprised the entire recordings as per the compact disc provided. On the same date the Applicants' attorneys dispatched a letter to the First Respondent requesting the missing portions of the record.

[10] On the 29th of September 2021 the Applicants served and filed their Replying Affidavit.

[11] From 7th October 2021 to 22nd October 2021 there were various email exchanges between Applicants' attorneys and Second Respondent the purpose of which was to locate the missing portions of the record. Third Respondent was informed of these developments accordingly.

[12] On the 26th of October 2021 Second Respondent had located the missing portions of the record which was dropped off at Sneller Recordings for quotation and transcription.

[13] On 28th October 2021 a quotation for the full transcription costs was received from Sneller Recordings.

[14] Partial payment of the quotation was made to Sneller Recordings on the 29th of October 2021.

[15] Full payment of the quotation was made to Sneller on the 8th of November 2021.

[16] On the 19th of November 2021 Sneller Recordings provided the full transcription of the record.

[17] On the 22nd of November 2021 the outstanding portions of the record were served and filed.

[18] On the 1st of December 2021 this Application was lodged.

[19] For purposes of this Judgment, although there is an overlap, I deal with the periods (3) three groups:-

[19.1] 4th June 2021 to 30th August 2021 ("first period").

[19.2] 1st September 2021 to 27th September 2021 ("second period").

[19.3] 27th September 2021 to 22nd November 2021 ("third period").

Non-compliance with Rule 7A(6) read with clause 11.2.2 of the Practice Manual

[20] The period of delay in respect of which condonation is sought run from the 31st of August 2021 to 22nd November 2021.

[21] The period from 4th June 2021 to 30th August 2021 is inconsequential for purposes of this application. However it is important to underscore the fact that the first incomplete portion of the record was served and filed on the 24th of August 2021 which was within the prescribed (60) sixty days from the date when the record was made available by the Registrar.

[22] Between the period 24th August to 30th August 2021 was a mere (6) six days within which it would have been impossible to transcribe the missing record even if it had been discovered that the record was incomplete. As will appear below, it took the transcribers at least (3) three weeks to transcribe the missing portions of the record hence I am of the view that (6) six days would have, in any event, caused the Applicants to fall foul of the provisions of Rule 7A(6) read with clause 11.2.2 of the Practice Manual. Be that as it may, not much turns on the (6) six day period as the non-compliance only occurs from the 31st of August 2021.

[23] The second period comes on the heels of filing the incomplete record on the 24th of August 2021, and thereafter a full steam exchange of pleadings by way of filing the necessary affidavits for the review Application. To this, on the 8th of September 2021 a Supplementary Affidavit was filed followed by the Answering Affidavit on the 21st of September 2021 and thereafter the Replying Affidavit on the 29th of September 2021.

[24] It will seem that, save for the Third Respondent's letter of 07 September 2021, between the period 25th August 2021 to 29th September 2021 the parties engaged, full steam, on the prosecution of the review Application. On the 7th of September 2021 Third Respondent's attorneys sent a letter to the Applicant alerting them of the missing record of 1 April 2021. In my view, it is this letter which is the root cause of much discontent by the Third Respondent.

[25] Third Respondent contends that it alerted the Applicants that the record of the 1st of April 2021 was missing in the letter of 7th September 2021 to which the Applicants failed to respond. Indeed paragraph (3) three of the letter does explicitly bring to the attention of the Applicants that the record was incomplete particularly in that the recording of the 1st of April 2021 when the closing arguments were made by both parties had not been transcribed.

[26] According to the Third Respondent, it was incumbent upon the Applicants' representatives, acting with the necessary skill, care and diligence, to go through the transcribed record of proceedings to verify if the record was complete. This, they ought to have done when the transcript was delivered to them on or about the 24th of August 2021 but if this was not done then, they ought to have, at the very least, done so when they received their letter of 7th September 2021.

[27] It will appear that the Applicants took a sober decision not to worry about the missing portions of the record as pointed out by the Third Respondent's letter of 7th September 2021 as, in their view, the proceedings of the 1st of April 2021 did not constitute the record necessary for purposes of the review.

[28] According to the Applicants, Rule 7A(6) of the Labour Court Rules provides that the Applicant in a review Application must furnish the Registrar and each of the other parties with a copy of the record or portions of the record, as the case may be. The Applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.

[29] The Applicants contend that closing arguments by parties' Counsels in amplification of the written arguments is not evidence and therefore does not fall within the threshold of what is contemplated by Rule 7A(6). The Applicants formed this view after consultation with their Counsel on record and thus elected to ignore the letter of 7th September 2021 in so far as it deals with the issue of the incomplete record of the 1st of April 2021.

[30] It is therefore apparent that whereas it is common cause that the other portions of the record, *i.e;* the testimony and cross-examination of the Applicants' five witnesses is the portion of the record necessary for purposes of the review, there is a clear dispute amongst the parties whether the record on the 1st of April 2021 constitutes the necessary portion of the record for purposes of the review.

[31] It is common cause that the record of 1 April 2021 consists of oral submissions which were made by parties' Counsels subsequent to filing written closing submissions. In other words this record is no more than an oral amplification of written submissions. Importantly, the record is not evidence from which the Second Respondent could draw from in reaching her findings. Therefore, *ex facie*, the record of the 1st of April 2021 does not appear to be such portion of the record necessary for purposes of the review as contemplated in Rule 7A(6).

[32] Notwithstanding the above, Courts have held that the full record of arbitration proceedings must be filed. In *South African Police Services v Coericius and Others (C263/19) [2021] ZALCCT 64 (30 August 2021)* it was held that:

> "[12] The Applicant is essentially arguing that it does not fall foul of clause 11.2.3 on the basis that it filed a part of the record within 60 days of launching the review. This simply cannot be correct. Clause 11.2.3 of

the Practice Manual provides that an Applicant is to request an extension of time to obtain the full record from a Respondent, or approach the Judge President with an application for extension, if consent is not forthcoming, if it fails to file the record within the prescribed 60 day period. **The notion that an Applicant can file a record in '*dribs and drabs*' and that the *dies* of 60 days only starts running when it is of the opinion that the record is adequate, militates against the principle that a review is by its very nature urgent**. This principle of urgency is set out in Clause 11.2.7 of the Practice Manual and has been repeated in numerous judgments of this Court. **Any interpretation of the Practice Manual that accords the word 'r*ecord*' in clause 11.2.3, the meaning 'a part of the record' as submitted by the Applicant is absurd on a plain reading of the clause, and in addition would be contrary to its purpose."** [my emphasis]

[33] Referring to *Coericius* with approval, in *Department of COGTA: Gauteng Provincial Government v GPSSBC and Others (JR1983/19) [2021] ZALCJHB 412* (15 October 2021) this Court held as follows:

"[19] …Advocate Pheto, counsel for the Applicant, continued with this line of argument in Court and stated that it is the prerogative of the Applicant to determine the relevant and necessary portions of the record to be filed. **In this regard he was plainly wrong**. Record for the purposes of review means a full record of the proceedings. It is only in instances where a full record cannot be found that the parties may agree whether the portion available is sufficient for the determination of the issue in dispute by the reviewing Court. It was therefore incumbent upon the State Attorney upon being advised that the record is incomplete to ask for an extension and if same was refused to approach the Judge President. The State Attorney failed to do either of the two and stubbornly maintained that it had complied. It appears it was oblivious of the provisions of the Practice Manual in particular clause 11.2.2 and 11.2.3." [underlining in my emphasis]

[34] With reference to both the *Coericius* and *Department of COGTA: Gauteng Provincial Government* decisions, it is without a doubt that irrespective of whether the 1st April 2021 record is material or not and irrespective of whether that record constitutes a portion of the record necessary for purposes of the review, the Applicant was still required to file the full record which by its definition must include the record of the 1st of April 2021. It was not open to the Applicant to simply consult their Counsel and decide that the record is not deserving to be filed as part of the record for the review.

[35] Having said that, it is not difficult to understand why the Applicants thought they had an election on what portions of the record must be filed. There is a clear disjuncture between the provisions of Rule 7A(6) as interpreted in various judgments of this Court with clause 11.2.6 of the Practice Manual. Whereas I have indicated above that the legal requirement as espoused by various judgments of this Court requires that the full record be transcribed and filed, clause 11.2.6 of the Practice Manual emphasises the need to only file those portions of the record that are necessary for the purposes of the review. In fact clause 11.2.6 of the Practice Manual sounds a warning to Applicants in review proceedings that unless they carefully considered the record and decide, based on sound reasons, which portions of the record is necessary for the review they run a risk of being mulcted with costs for filing unnecessary portions of the record. This clause, correctly construed, explicitly directs the Applicant to file only those parts of the record that are necessary for purposes of the review. Put differently, this clause forbids the Applicant from filing unnecessary portions of the record otherwise he run a risk of being punished with costs. The determination of which portions of the record to file is a unilateral act by the Applicant. Therefore the *Coericius* and *Department of COGTA: Gauteng Provincial Government* decisions could very well be wrong when one has regard to clause 11.2.6.

[36] Accordingly, and with regards to the second period, it was reasonable for the Applicants to labour under an impression, based on the plain reading of Rule 7A(6) read with Clause 11.2.6 of the Practice Manual, that it was not obliged to file unnecessary portions of the record such as that of 1 April 2021. This, coupled with the fact that during the second period parties went full steam on filing their respective

affidavits and must have been fully engaged in that process, I find the Applicants' explanation for its inaction, in terms of attempting to locate the missing portions of the record and responding to the alert from Third Respondent's attorneys on 7th September 2021, excusable.

[37] In dealing with the third period between 27th September 2021 and 22nd November 2021, I am guided by the leading authority on reinstatement Application, the seminal judgment of Lagrange J in *Overberg District Municipality v Independent Municipal and Allied Trade Union obo Spangenberg and Others (2021) 42 ILJ (LC)* delivered on 8th June 2020. This judgment has been quoted with approval by various Judges of the Labour Court on subsequent reinstatement Applications. A collection of such cases include the following:

> Department of Education: *Limpompo v Education Labour Relations Council and Others (JR343/16) [2020] ZALCJHB 179 (31 August 2020) at paras [11] to [12]; Segakweng v Commission for Conciliation, Mediation and Arbitration and Others (JR 848/15) [2020] ZALCJHB 243 (14 September 2020)* at para *[6]; Vesela Risk Services (Pty) Ltd v CCMA and Others (JR648/18) [2021] ZALCJHB 37 (28 January 2021)* at paras *[9]* to *[10]; Mashego v Commission for Conciliation, Mediation and Arbitration and Others (JR 602/15) [2021] ZALCJHB 195 (27 July 2021)* at para *[34]; Department of Agriculture and Rural Development v Khumalo and Others (D566/17) [2021] ZALCD 55 (29 July 2021) at paras [31], [37] to [41]* and *[87] and Gema v National Commissioner of South African Police Service and Others (D1972/18) [2021] ZALCD 65 (5 October 2021)* at para *[52].*

[38] There are at least two important principles to be extracted from the *Overberg District Municipality* judgment: *(1)* in a reinstatement Application the non-compliance must be purged first before reinstatement can be granted, and *(2)* one of the important considerations is the subsequent conduct of the Applicant to cure or purge non-compliance.

[39] In *casu,* this application was lodged after the Applicant had purged the non-compliance and therefore the first principle expounded by Lagrange J in *Overberg District Municipality* is satisfied and deserves no further mention.

[40] With regards to the second principle from *Overberg District Municipality*, Lagrange J held as follows:

> "[36] The next issue to consider for the purpose of this application is how the Court is to deal with subsequent steps taken by an Applicant to pursue the review Application, after a review Application is deemed defunct.
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> …..
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> [38] In my view, it would be odd that a party whose non-compliance had caused its application to become inactive, could then fold its arms until its Application for reinstatement was decided. While it might not be strictly obliged to take further steps, its *bona fides* in seeking to finalise the review would surely be questionable if it did nothing further to ready the matter for speedy resolution in the event its reinstatement Application succeeds. To accept the passivity of such a party once their application is deemed inactive, would also seem to promote further delay rather than curtail it, contrary to the principle that reviews should be dealt with expeditiously. An Applicant party that has been dilatory and is seeking an indulgence to revive the review application therefore ought to satisfy the Court that in the interim it has done what it can to remedy its failure which led to the application being deemed inactive in the first place and done whatever else it could reasonably do so that the matter would be ready for hearing if reinstated. Accordingly, steps taken during the time the application is inactive should, in my view, have a material bearing on the success of attempts to revive it, and if the steps taken would also have led to the review Application being deemed withdrawn, they would have to be condoned if it is to be permitted to proceed". [underlining is my emphasis]

[41] It was only on the 27th of September 2021 that it dawned on the Applicants that they had filed an incomplete record of proceedings. There can be no genuine debate about the adequacy of the efforts taken by the Applicants' representatives from the time when it was alerted of the missing testimony and cross-examination of the Applicants' witnesses on 27 September 2021 to the 22nd of November 2021 when the record was eventually filed. The Applicants acted with the necessary speed in all the steps that were taken during this period. The chronology set out above clearly depicts the haste with which the Applicants acted in this period.

[42] In fact, had it not been for the desire to have the record transcribed and filed with the necessary speed, perhaps the period of delay in question would have been between 31st August and 26th October 2021. I say this because on 26th October 2021 the compact discs with the missing portions were discovered and instead of filing them to the Labour Court they were rather taken directly from the CCMA to the transcribers. Ordinarily, the official record is the one that the CCMA dispatches to the Registrar of the Labour Court whereafter the latter notifies the parties about the availability of the record for collection. Instead, what happened in this case was that the process was short-circuited to exclude the detour of the record to the Registrar as it travelled on a straight line to the transcribers. This, in my view, is consistent with the party seeking to purge the non-compliance without incurring further delays. It is my view that had the CCMA followed the normal route of dispatching the record, the Registrar of the Labour Court would have had to issue a fresh Rule 7A(5) Notice causing the (60) sixty day period to run from 26th October 2021 in respect of the new portion of the record.

[43] Without overlabouring the point, it follows that the steps taken by the Applicants between the period 27th September 2021 to 22nd November 2021 when the complete and full record was filed were reasonable.

[44] Accordingly, the Applicants' conduct also complies fully with the second principle enunciated by Lagrange J in *Overberg District Municipality*.

Failure to bring an extension application

[45] By the time the Applicants became aware or were alerted to the inadequacy of the record on 07 September 2021, it was already in breach of Clause 11.2.2 as the (60) sixty day period had lapsed on the 30th of August 2021.

[46] The Third Respondent has argued strongly that the non-discovery of the missing portions of the record by the Applicant is a product of negligence. Had the Applicant been diligent in its pursuit of the review it ought to have discovered that the record had missing portions on the 24th of August 2021 when the record was received, if not then, surely on the 7th of September 2021 when they were alerted, so the argument goes.

[47] What seems clear to me is that the parties retained the same representation from the arbitration at the CCMA to the review Application in this Court. What similarly appears very clear to me is that parties were able to prepare their affidavits using both the unofficial records in their possession and muscle memory of the evidence led at arbitration. It is for this reason, in my view, that the Applicant did not discover that the record was missing certain portions when their Supplementary Affidavit was being prepared.

[48] On the 7th of September 2021, when it was alerted of the missing portions of the recorded, the horses had bolted. The (60) sixty day had already lapsed and therefore the Applicant could not invoke clause 11.2.3 of the Practice Manual.

[49] I am reminded that in this period parties were able to file all their affidavits in the review application the effects of which I deal with in detail below.

Status of the review application

[50] The Court was cautioned by Counsel for the Third Respondent not to refer to the pleadings having closed in the review Application on grounds that there is no review Application. I am nevertheless constrained to find that, subject to the parties retaining their natural rights to supplement their papers with leave of the Court, pleadings have indeed closed on the review Application. I have so much taken time

to consider the affidavits filed by the parties in this regard and made the following observations:

> [50.1] The Applicants' Supplementary Affidavit extends to 26 pages and appear to have comprehensively dealt with the issues.
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> [50.2] The Third Respondent's Answering Affidavit extends to 113 pages and appear to have dealt with issues comprehensively.
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> [50.3] The Applicants' Replying Affidavit extends to 29 pages and again deals with issues extensively.

[51] Inasmuch as these affidavits were prepared under a limited record, the effects of such limited record on the preparation of these affidavits is not apparent when one has regards to the extent to which issues are canvassed in those affidavits.

[52] The status of the review application, even defunct as it is, is an important factor to consider in a reinstatement Application. It serves as a useful indicator of whether granting a reinstatement will plunge the matter into further delays or not.

[53] In this case pleadings have closed in the defunct review Application which in essence means that the review will proceed without any further delays in the event that the reinstatement application is granted. I say this being acutely aware that the review is deemed withdrawn and that parties may still exercise their rights to supplement their papers.

Prospects of Success

[54] The Third Respondent argued strongly that the reinstatement Application should fail on further grounds that the Applicants have failed to demonstrate any prospects of success in the review Application. This being a condonation Application, absent prospects of success, condonation should not be granted.

[55] In amplification of its submission, Third Respondent argued that the Second Respondent had made several findings pertaining to the contradictory nature of the evidence tendered by the Applicants. However, Applicants have failed to mention a word about that contradictory nature of their evidence.

[56] The Applicants in rebuttal of this submission argued that not all contradictory evidence requires specific mention. It is those contradictions that are material that should inform the decision of the Second Respondent.

[57] The threshold for prospects of success in a review Application is low in a reinstatement Application. In fact this Court has boldly stated that there is no requirement to demonstrate excellent prospects of success to gain reinstatement. Moshoana J in *MEC: Department of Health Eastern Cape Province v PHSDSBC and Others (PR187/16) [2020] ZALCPE 4 (7 February 2020)* held that:

> *"[15] In my view, it is not a requirement that an applicant must demonstrate excellent prospects of success to gain reinstatement. Such is not required since all that an applicant would obtain is a regain of the automatic right of review. Such a review application may still be dismissed and or upheld by a Court of review. With that possibility, it is an unnecessary burden to require an applicant to demonstrate excellent prospects of success at this stage. I agree that reinstating a hopeless review application would be nothing but clogging the roll and effectively troubling a judge with a non-meritorious reviews. Unfortunately, there is no mechanism to gate-keep in reviews. Unlike in appeals, a mechanism to gate-keep is provided through the need to apply for leave to appeal.*
>
> *[16] Refusing to reinstate a review application simply because it lacks excellent prospects of success is at odds with section 34 of the* Constitution."

[58] The Applicant referred this Court to its review papers to demonstrate that it has strong *prima facie* prospects of success.

[59] I agree with Counsel for the Applicants that a merely regurgitation of the grounds of review contained in the review papers would invite a similar reaction from the Respondent who will also simply regurgitate its opposition grounds to the review Application. That exercise will serve little purpose in the reinstatement Application as the full argument and extent of the parties prospects of success will be dealt with by the reviewing Court.

[60] I am satisfied that the prospects of success demonstrated by the Applicant does meet the threshold for prospects of success on reinstatement Applications. The Court hearing the review will be better positioned to hear full argument on each party's prospects of success or lack thereof. All that is required for the Applicant to meet the threshold is to demonstrate *prima facie* strong prospects of success on review. The Applicant has done that.

Prejudice

[61] Third Respondent argued that it is prejudiced by the reinstatement Application mainly because the Applicants have been found guilty of bribery and corruption by an independent senior and well respect Counsel. His findings were also upheld by Senior Commissioner of the CCMA.

[62] Once again the veracity of the findings of the independent chairperson and those of the CCMA Senior Commissioner are a subject of dispute in the defunct review application. The Court hearing review will consider the full extent of those findings. Otherwise the prejudice occasioned by the delay in the filing of the complete record by the Applicants appear to be very limited, if any. The parties were able to file their affidavits without the complete record. As matters stand, the review application could be allocated a date of hearing in due course. If anything, in my view, it is the relentless opposition of this reinstatement Application that has plunged the review Application into further delays and, by extension, prejudiced both parties.

Costs

[63] The Applicants have invited the Court to consider holding the Third Respondent responsible for the costs of this application mainly due to what they term an 'unreasonable opposition' to the application. It was submitted by the Applicant that the Third Respondent's conduct deserves censure by this Court not only because it was unreasonable but also because it was obstructive to the finalisation of the review.

[64] In response to the submissions on costs, Counsel for the Third Respondent referred the Court to two recent judgments of the Constitutional Court which, in his view, completely oust this Court powers to make any cost orders. I was referred to *Union of Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited (CCT228/20) [2021] ZACC 41 (12 November 2021) and SAHRC obo South African Board of Directors v Masuku and Another (CCT14/19) [2022] ZACC 05 (16 February 2022).*

[65] I have taken time to consider the two judgments and could not find anything that ousts this Court's discretion to determine the issue of costs in appropriate circumstances. In fact these two judgments do not flow from the Labour Court and are irrelevant for consideration of this Court's discretion to make cost orders. The latest authority on the Labour Court's powers to make cost orders remains *Long v South African Breweries (Pty) Limited and Others (CCT61/18) [2019] ZACC 07 (19 February 2019).*

[66] In any event, I found it odd that the Constitutional Court would order that the Labour Court does not have powers to issue cost orders when *section 162 of the LRA* has not been repealed.

[67] For the very reason that I found Applicants' conduct to ignore the alert by the Third Respondent on the missing record on the 7th of September 2021 and their conduct to consult their Counsel and decide that it was unnecessary to file the full record in the face of various authorities of this Court calling for the full record to be filed, that then makes the opposition of this application by the Third Respondent necessary and reasonable. Third Respondent's opposition may have been vehement but certainly it was not obstructive.

[68] In the conspectus of all the circumstances, I make the following order:

[68.1] The late filing of the record in this matter outside the (60) sixty day period provided for in Clause 11.2.2 of the Practice Manual of the Labour Court is condoned.

[68.2 The review application herein is reinstated.

[68.3] The registrar is directed to enrol the review application on an opposed application.

[68.4] No order as to costs.

MHLANGA AJ
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Mr P. Schumann Instructed by J Philip Attorneys
For the Third Respondent:	Mr F. Boda SC Instructed by Norton Rose Fulbright South Africa Inc