**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN**

Reportable

Case no: DA 1/2015

In the matter between:

**HOSPERSA OBO TS TSHAMBI**
**Appellant**

and

**DEPARTMENT OF HEALTH, KWAZULU –NATAL** **Respondent**

**Heard:** **25 February 2016**

**Delivered:** **24 March 2016**

**Summary: Section 24 of the LRA provides for arbitration of disputes about the 'interpretation or application' of collective agreements– interpretation of – section provides for a dispute resolution device ancillary to collective bargaining, not to be used to remedy an unfair labour practice under pretext that a term of a collective agreement has been breached.**

**The phrase 'interpretation or application' is not to be read disjunctively – the 'enforcement' of the terms of a collective agreement is a process which follows on a positive finding about 'application' not a facet of 'application'.**

**A dispute about an employer's failure to pay an employee during period of suspension pending a disciplinary enquiry is, properly characterised, an unfair labour practice about unfair suspension as contemplated in section 186(2) (b) of the LRA.**

**An arbitrator must characterise a dispute objectively, not slavishly defer to the parties' subjective characterisation- failure to do so is an irregularity.**

**The determination of what constitutes a reasonable time within which to refer a dispute when no fixed period is prescribed for that category of dispute, such as a section 24 dispute, is a fact-specific enquiry having regard to the dynamics of labour relations considerations – where for example the dispute may be understood as a money claim, the prescription laws are irrelevant.**

**Labour court reviewing and setting aside award in which arbitrator deferred to an incorrect characterisation of a dispute and ordering the matter to be heard afresh upheld and appeal against order dismissed.**

**Coram: Ndlovu, Musi *et* Sutherland JJJA**

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**JUDGMENT**

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SUTHERLAND JA

[1] This case is about what an arbitrator ought to do when there is a dispute about the nature of a dispute referred to the CCMA or to a bargaining council.

[2] The relevant facts are few. Mr Tshambi, the appellant, was appointed to a post by the respondent. After some time, the respondent learnt that he had falsified his academic credentials. An enquiry was held and he was dismissed on 21 October 2010.

[3] However, prior to his dismissal, he had been suspended on 7 January 2010. Thus he was on suspension for nine and a half months. During this period, he was not paid the salary due in respect of the post.

[4] The appellant did nothing to challenge the respondent about non-payment during this period. He referred a dispute for conciliation to the bargaining council concerning his suspension without pay, 692 days after his dismissal.

[5] When, in turn, the matter was placed before an arbitrator of the bargaining council, the question of the long delay arose. The respondent argued that the referral ought to have been made within 90 days, as prescribed by section 191(1)(b)(ii) of the Labour Relations Act 66 of 1995 (LRA) which regulates time periods for the referral of disputes about unfair dismissals and unfair labour practices. Accordingly, so it was argued, the referral was late, and as no condonation was sought of that non-compliance, the matter should not be heard.[1]

[6] The appellant countered by arguing that the referral of the dispute was not late because what had been referred was a dispute as contemplated by section 24 (2) of the LRA[2] which section does not prescribe any fixed period

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[1] Section 191 provides:

(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-
  (i) a council, if the parties to the dispute fall within the registered scope of that council; or
  (ii) the Commission, if no council has jurisdiction.
(b) A referral in terms of paragraph (a) must be made within-
  (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
  (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee aware of the act or occurrence.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

[2] Section 24 Disputes about collective agreements

(1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-
  (a) the collective agreement does not provide for a procedure as required by subsection (1);
  (b) the procedure provided for in the collective agreement is not operative; or
  (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

(3) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(4) The Commission must attempt to resolve the dispute through conciliation.

(5) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration. 4

(6) If there is a dispute about the interpretation or application of an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, any party to the dispute may refer the dispute in writing to the Commission, and subsections (3) to (5) will apply to that dispute. 5

for a referral to be effected, and thus had only to be referred within a reasonable time. The appellant then argued, ostensibly, that a referral of such a dispute, 692 days after the event, was within a reasonable time.

[7] The appellant in the referral form to the bargaining council stated this:

> 'The issue in dispute is interpretation and or application 24(2) and 24(5). The applicant was placed on precautionary suspension without (pay) remuneration.'(sic)

Further, in answering the question what relief he wanted he stated:

> 'To order the department of health Kwazulu Natal to pay the applicant the equivalent of the salary that he would have received when on precautionary suspension.'(sic)

[8] These formulations call for comment. First, it should be noted that the citation of section 24(2) is a misnomer; that section applies only to referrals to the CCMA. Section 24(1) is applicable to the bargaining council. Nothing important turns on this. Second, the relevance of section 24 to the grievance, i.e., having been suspended without pay, is not comprehensively articulated. The reader is left to infer that what is implied by the text is that the collective agreement has something to say about suspension or about pay and presumably a connection between the two.

[9] On the record presented to the review court and to this Court, the only other source of information about what information made available to the arbitrator is that which is mentioned in the arbitrator's ruling. From this source, the court can glean that the arbitrator was either shown a copy of the collective agreement or perhaps accepted as a common cause fact, on the say-so of the parties, that the collective agreement "requires a precautionary suspension to be on full pay".

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(7) Any person bound by an arbitration award about the interpretation or application of section 25 (3) (c) and (d) or section 26 (3) (d) may appeal against that award to the Labour Court.
(8) If there is a dispute about the interpretation or application of a settlement agreement contemplated in either section 142A or 158 (1) (c), a party may refer the dispute to a council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.

[10] The contentions advanced by the respondent to address the question were, frankly, neither insightful nor helpful. They can be ignored.

[11] A reading of the ruling evidences that the arbitrator did not interrogate whether the appellant's characterisation of his dispute was, objectively, correct. Rather, after correctly disposing of the distracting irrelevancies advanced by the respondent, the arbitrator took the appellant's characterisation at face value.

[12] Upon the uninvestigated premise that the dispute that had been referred to him was indeed one contemplated by section 24, the arbitrator gave a ruling about the question of the alleged delay. His rationale is stated in paragraphs 7 – 8 of the ruling:

> 'The claim having its foundation in the agreement has therefore been characterised as an 'interpretation/application' dispute. That being said, applicants claim is, nevertheless, essentially a claim of a debt. As such applicant's claim is subject to the provisions of the Prescription Act 68 of 1969. The provisions of that Act stipulates that a debt is prescribed by prescription (3) three years after same becomes due. ….this dispute (ie a claim for a debt arising from the agreement) was referred to this council well within the 3 year period as stipulated in the [act] and has therefore not prescribed. When a period is prescribed for the referral of a dispute, as is the case in this dispute, the unreasonable delay rule does not apply'.

[13] It is plain that the arbitrator was muddled. He did not make a decision whether the dispute had been referred within a reasonable time; rather he concluded that a period had been prescribed by the Prescription Act for this particular dispute and that the period had not yet elapsed.

[14] On review, the Labour Court, set the ruling aside. The Labour Court reasoned that the dispute was not a section 24 dispute, but was indeed a dispute about an unfair labour practice concerning an unfair suspension as contemplated by section 186(2)(b) of the LRA.[3] By implication the referral was late and in the absence of a condonation application, the matter ought not to be entertained.

[3] Section 186 (2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-

[15] In my view, the invocation of section 24 by the appellant and the bland acceptance of that characterisation by the arbitrator were plainly wrong. The Labour Court criticised the attempt to invoke section 24 as a contrivance to circumvent the obviously late referral of an unfair labour practice dispute. I agree that such an inference can be properly made.

[16] An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This Court in *Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw),*[4] addressed directly the question of whether the employees characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought, this Court held that the latter should prevail. As a result, in *Wardlaw,* an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The Constitutional Court disposed of this issue in *CUSA v Tao Ying Industries and Others*[5]

> 'A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the

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(a) ….
(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
(c) ….
(d) ….

[4] (2007) 28 ILJ 1042 (LAC).
[5] (2008) 29 ILJ 2461 (CC) at para 66.

> desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

That approach has been reaffirmed by this Court in *NUMSA (Sinuko) v Powertech Transformers (DPM) and Others* (2014) 35 ILJ 954 (LAC) at [16] – [21] per Coppin JA.

[17] What is a "dispute" *per se,* and how one is to recognise it, demands scrutiny. Logically, a *dispute* requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. What is signally absent from the record is any clue that the respondent disputes that the collective agreement provides that an employee on suspension is entitled to full pay. Indeed, on the basis of the allusions in the ruling, that fact seems to be common cause. Similarly, there is no clue that the respondent disputes that the collective agreement binds itself and the appellant. What then, can possibly be the dispute *about the application of the collective agreement*?

[18] The critical facts put before the arbitrator were that an employee was suspended without pay. *Prima facie*, that is unfair. (see: *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) esp at [31]) The characterisation of such a dispute is manifestly an unfair suspension dispute within the purview of section 186(2)(b) of the LRA. The mere fact that an express right to be paid during suspension can be derived from a statute or an individual contract or from a collective agreement is not a critical dimension of the dispute; rather it is simply evidence of the right.

[19] The idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by section 24 is wrong. Section 23, which provides for the enforceability of collective agreements and section 24 need to be read together. Together they create the legal edifice for the legal effect of collective agreements and certain disputes which take place about

them. Sections 23 and 24 are located in chapter III of the LRA. That chapter deals with collective bargaining. Part A of chapter III addresses organisational rights, and Part B addresses collective agreements. Section 23 and 24 are in part B. Parts C and D address bargaining councils. It is plain that section 24 is a procedure to oil the wheels of the collective bargaining process and an efficient resolution of disputes about collective agreements.

[20] Thompson and Benjamin, *South African Labour Law,* AA1-141, remarked at the time of the enactment of section 24 in the initial 1995 statute that:

> 'Collective agreements are legally enforceable instruments. Any dispute over the interpretation or application (which would include enforcement) of a collective agreement is a rights dispute, a resort to power to settle differences is not permitted. In a massive policy shift that attracted surprisingly little debate or protest from employers or unions, the 1996 LRA privatised all dispute resolution associated with the enforcement of collective agreement disputes. By the same token, it transferred the very considerable costs associated with such dispute resolution from the state judicial system to the parties and their members.'

[21] This perspective of section 24 articulates the significance of locating this category of disputes about collective agreements in the arbitral process; i.e., the advantage of a speedy resolution of disputes and an absence of the use of power in the form of a strike or lock-out. By contrast, individual disputes about employer unfairness are provided for in chapter VIII of the LRA, where section 186(2) is to be found.

[22] The bald statement by Thompson and Benjamin that "application" includes enforcement is unmotivated and is, in my view, insupportable, if what is meant is that any breach of a collective agreement triggers a right to invoke the collective agreement as a cause of action to be adjudicated, pursuant to section 24. A better reading of Thompson and Benjamin is that it is implied that once "application" is proven, the referring party can procure more than just a declaratory order, and can obtain, pursuant to such finding, substantive relief.

[23] Revelas J in *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk*[6] commented about "enforcement" thus:

> 'Whether a dispute about the "application" of a collective agreement, referred to in section 24(1) of the Act, would include the enforcement of a collective agreement when it is breached, is a further question which needs to be decided.
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> Enforcement of an agreement only becomes an issue when there is some form of non-compliance with that agreement. When a party wishes to enforce the agreement it would be, at least *inter alia,* because it believes the agreement is applicable to the party who is in breach thereof. Therefore a "dispute about the application of a collective agreement" (section 24(1) of the Act) applies to the situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. Consequently, the CCMA, and not the Labour Court, should entertain disputes arising from the non-compliance with collective agreements.

[24] It seems plain that the notion of enforcement articulated by Revelas J was of a step that *followed upon* the "applicability" of the collective agreement being proven, rather than a facet of the notion of "application".

[25] In my view, the phrase "interpretation or application" are not disjunctive terms, and ought to be read as being related; i.e., disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining.

[26] A not dissimilar matter was dealt with in *PSA (Hohne) v Department of social Development, Free State.*[7] There, the bone of contention was whether an employer had timeously responded to a request to consider special medical leave for an employee. The collective agreement was the source of the entitlement. The arbitrator examined the facts put forward, purportedly to substantiate an allegation of a section 24 dispute. The arbitrator correctly

[6] [2000] 2 BLLR 196 (LC) at paras 8 –9.
[7] (2008) JOL 21640 (PSCBNC).

recognised the true dispute was an unfair labour practice dispute. *Arend and Others v SALGBC*[8] illustrates an attempt to disguise a dispute about the grading of employees preparatory to a migration to a new pay structure as a section 24 dispute which was unmasked as misdirected because the gravamen of the controversy did not turn on the interpretation or application of the collective agreement.

[27] Martin Brassey, in *Employment and Labour Law, Vol III, Commentary on the Labour Relations Act,* A3-46, expresses the opinion that a general rule exists that section 24 "…is inapplicable to disputes for which remedial processes are especially created in the statute". The proposition is based on the decision in *G A Winders (East Cape) CC and Another v Director, CCMA* (2000) 21 ILJ 323 (LAC) in which, this Court dealt with an award purporting to have been made pursuant to section 24 enforcing the provisions of a collective agreement upon an employer who had claimed not to be bound. Upon a proper characterisation of the dispute, it was held that the controversy was a demarcation dispute and should have been dealt with in terms of section 62.[9]

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[8] (2015) 36 ILJ 1200 (LAC) at paras 21 – 22.

[9] 62 Disputes about demarcation between sectors and areas

(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to-

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers.

(2) If two or more councils settle a dispute about a question contemplated in subsection (1) (a) or (b), the councils must inform the Minister of the provisions of their agreement and the Minister may publish a notice in the Government Gazette stating the particulars of the agreement.

(3) In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1) (a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

(3A) In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1) (a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

The point can be made, in my view, that the LRA creates several "special remedial processes" to address different kinds of disputes, assigning some to particular fora, and others to be dealt with in accordance with particular procedures; one of which is a class of unfair labour practices as contemplated in section 186(2).

[28] Certain remarks of John Grogan, in his work, *Collective Bargaining,* (2007) Juta, Cape Town, p114, which were cited in *HOSPERSA (Somers) v MEC for Health Kwazulu-Natal and Others* [SAFLII] ZALCD/2014/41 at [32] were referred to in the argument by counsel for the appellant to supposedly support the argument that the appellant was correct to invoke section 24. The passage from Grogan's work is given here; the italicised text was omitted in the cited passage, thereby distorting what the author had written:

> *''The dividing line between 'interpretation' and 'application' disputes may not always be absolutely clear*. A dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning of a particular

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(b) the determination of the question raised is necessary for the purposes of the proceedings.

(4) When the Commission receives an application in terms of subsection (1) or a referral in terms of subsection (3), it must appoint a commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context.

(5) In any proceedings in terms of this Act before a commissioner, if a question contemplated in subsection (1) (a) or (b) is raised, the commissioner must adjourn the proceedings and consult the director, if the commissioner is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

(6) The director must either order the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 138 apply, read with the changes required by the context.

(7) If the Commission believes that the question is of substantial importance, the Commission must publish a notice in the Government Gazette stating the particulars of the application or referral and stating the period within which written representations may be made and the address to which they must be directed.

(8) If a notice contemplated in subsection (7) has been published, the commissioner may not commence the arbitration until the period stated in the notice has expired.

(9) Before making an award, the commissioner must consider any written representations that are made, and must consult NEDLAC.

(10) The commissioner must send the award, together with brief reasons, to the Labour Court and to the Commission.

(11) If the Commission believes that the nature of the award is substantially important, it may publish notice of the award in the Government Gazette.

(12) The registrar must amend the certificate of registration of a council in so far as is necessary in light of the award.

provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances. It is quite possible that both types of disputes may arise in same case.'

[29] In my view, what Grogan articulates in this passage is the suggestion that there might be two sets of circumstances contemplated under the rubric "application". First, a difference of opinion whether the collective agreement is applicable at all; eg the relevant workers are not covered by its terms. Second, whether, eg, the activity which gives rise to controversy is covered by the collective agreement. It is not apparent that Grogan in this passage intended to address the question of whether "application" embraces "enforcement", as Thompson and Benjamin casually assume. Moreover, a fair reading of Grogan's statement cannot construe it as intended to be a comprehensive account of the permutations of possible meanings of section 24 because the burden of the text is plainly to distinguish the terms "interpretation" and "application" and to alert the reader to the potential for seamlessness between these notions in a real dispute, a sound reason why they ought not to be read disjunctively.

[30] There is accordingly no need nor any justification to understand section 24 in a sense so broad that any alleged breach of a term of a collective agreement means the dispute automatically falls within section 24. In the result, the arbitrator misdirected himself by not determining objectively the true dispute and had he done so he would have found that the true dispute was one contemplated by section 186(2)(b) of the LRA, and, in consequence, startlingly out of time, requiring an application for condonation.

[31] Accordingly, it must follow that the order of the Labour Court, setting the award aside and finding that the dispute is an unfair suspension dispute, should be upheld.

[32] It is not strictly necessary to address the arbitrator's flawed rationale that because a dispute, purportedly contemplated by section 24 dispute, resembles a money claim, and because section 24 does not prescribe a time period for referral, therefore that dispute is subject to a prescribed period for

referral as determined by the prescription Act. Nevertheless, it is appropriate to deal with such flawed thinking in order to inhibit any repetition. Axiomatically, the arbitrator missed the point about determining a reasonable period by thinking the Prescription Act prescribed a period. Perhaps a generous reading of his ruling could be that, by analogy, inspiration could be derived from the laws about prescription of money claims to assess reasonableness. However, what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA not from civil litigation. A true money claim belongs to civil litigation and insofar as such a claim is covered by section 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and Prescription Act would prevail in such a context. The use of analogy must be tempered by an appreciation of the context and functionality of the procedures and remedies provided in the LRA. In true labour disputes, the provisions of section 191(1) of the LRA are a more obvious general yardstick to test what is a reasonable time for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. The appropriate enquiry is into the history of the engagement between the parties about the controversy, and the elapse of time since engagement to resolve the controversy ceased. Self-evidently, the ultimate decision on reasonableness has to be fact-specific. A lapse of 692 days in respect of a failure to pay a salary is a remarkably long time. On this record, nothing said provides a convincing rationale why the delay was unavoidable.

Order

[33] The order of the court is as follows:

33.1. The appeal is dismissed.

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Sutherland JA

Sutherland JA (with whom Ndlovu and Musi JJA concur)

APPEARANCES:

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| FOR THE APPELLANT: | Adv P J Blomkamp, |
| | Instructed by Llewwllyn Cain attorneys |
| FOR THE RESPONDENT: | No appearance |