

SOUTH AFRICA / JUDGMENT

Cold Chain (Pty) Ltd v Mooi NO and Others (J1053/13) [2016] ZALCJHB 222 (30 June 2016) [2016] ZALCJHB 222

COURT

Labour Court Johannesburg

BEFORE

Howes

CASE / FILE NUMBER

J1053/13

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1053/13

In the matter between:

THE COLD CHAIN (PTY) LTD Applicant and COMMISSIONER FAIZEL MOOI N.O First Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent
TIMOTHY MAEKO Third Respondent ASHLEY SEOPA Fourth Respondent

Heard: 14 January 2016

Delivered: 30 June 2016

Summary: Review application brought 19 months out of time. No compelling explanation for inordinate delay. Condonation application dismissed and arbitration award made an Order of Court. Established principles applied.

HOWES, AJ

Introduction:

- [1] This is an application to review and set aside the arbitration award (“the award”) issued by the First Respondent, an arbitrator of the Second Respondent under case number GAJB 23040-12 dated 11 December 2012, in terms of which the First Respondent found that the dismissal of the Third and Fourth Respondents were substantively unfair and ordered the

Applicant to reinstate the Third and Fourth Respondents with no loss of salary from the date of their dismissal (25 July 2012). The Third and Fourth Respondents were required to report for duty on 19 December 2012. The Applicant was ordered to pay to the Third and Fourth Respondents four months and three weeks loss of salary. The Third Respondent was to receive the sum of R29 095.61 and the Fourth Respondent was to receive the sum of R24 369.92.[1]

[2] The Applicant's application for review is accompanied by an application for condonation in respect of the late filing of the

review application.

[3] The Third and Fourth Respondents filed a notice of intention to oppose the Applicant's applications, however, they did not file an answering affidavit and they did not make an appearance at the Labour Court on 14 January 2016.

Background facts:

[4] The Applicant's business is that of merchandising, warehousing and the distribution of ambient and perishable food products.

[5] The Third Respondent commenced employment with the Applicant in 2001 as a driver. The Fourth Respondent commenced employment with the Applicant in 2008 as a van assistant.

[6] The Third and Fourth Respondents were both charged with gross misconduct in relation to events that took place on 5 June 2012. The Applicant alleged that the Third and Fourth Respondent colluded and attempted to misappropriate stock that was meant for Shoprite Gankuwa by not offloading according to receiving procedures. The stock referred to in the charge sheet related to cheese, butter and haddock fillets.

[7] In addition, the Third Respondent was also charged with gross misconduct in that he carried an unauthorised van assistant in the delivery vehicle on 5 June 2012.

[8] Following a disciplinary enquiry, the Third and Fourth Respondents were dismissed by the Applicant on 25 July 2012. The Third and Fourth Respondents referred a dispute to the Second Respondent on the basis of the alleged substantive unfairness of the dismissal.

[9] The First Respondent acting under the auspices of the Second Respondent found the dismissal of the Third and Fourth Respondents to be substantively unfair as the Applicant, inter alia, failed to prove its case on a balance of probabilities and, accordingly, ordered the Applicant to reinstate the Third and Fourth

Respondent with no loss of salary from the date of dismissal. In terms of the arbitration award, the Third and Fourth Respondents were to report for duty on 19 December 2012.

[10] On 19 December 2012, the Applicant advised the Third and Fourth Respondents that they should not report for duty as it intended

challenging the arbitration award on review. The application for review was served on 25 August 2014 and filed with this Honourable

Court on 29 August 2014. This is some 19 months outside of the statutory time period. As such, I am required to first assess the

application for condonation, which I deal with below.

Application for Condonation – General principles applicable:

- [11] In terms of s145 (1)(a) of the Labour Relations Act 66 of 1995 ('the Act'), an applicant who seeks to review an arbitration award is afforded a six week period (calculated from the date of service of the arbitration award on the applicant) within which to serve and file a review application with the Labour Court.
- [12] Where, an applicant to a review application fails to comply with the time period set out in s145(1)(a) of the Act, the Labour Court is empowered to condone the late filing of a review application in terms of s145 (1A) of the Act, provided that the applicant has shown good cause.
- [13] It is trite law that an applicant to a review application, who has failed to comply with the rules of the Honourable Court bears the onus in proving that good cause has been established in order for condonation to be granted. Condonation is not a matter of right but rather it remains an indulgence granted by the court only in circumstances where good cause has been sufficiently demonstrated.
- [14] When considering an application for condonation, the court has a discretion, which must be exercised judicially, upon consideration of the facts and it must be considered with reference to fairness of both parties.[2]
- [15] The Act seeks as a primary objective, to bring about the expeditious resolution of disputes so as to, inter alia, bring finality to all litigants.[3] As such, when the discretion of the court is being exercised to determine whether good cause has been demonstrated by an applicant or not, it must consider that the effective and expeditious resolution of labour disputes is one of the primary objectives of the Act.
- [16] The Constitutional Court in the matter of *van Wyk v Unitas Hospital and Others*[4] thereof held that:

'... A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay, a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.'

[17] The courts have adopted a 'strict scrutiny' approach when assessing condonation applications that accompany review applications. In *Queenstown Fuel Distributors CC v J Labuschagne N.O and Others*, [5] Conradie, JA held that:

'[24] ... In principle, therefore, it is possible to condone non-compliance with the time limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.

[25] By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the labour court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.'

[18] In *Makuse v Commission for Conciliation, Mediation and Arbitration and Others*, [6] Myburgh, AJ applied the 'strict scrutiny' approach adopted by Conradie, JA in the *Queenstown Fuel Distributors* case. Myburgh, AJ held that:

'... condonation for delays in labour law litigation is not simply there for the taking. But this is particularly so when it comes to delays in the launching of s145 review applications, especially in the context of individual dismissals. Here the courts have made it clear that applications for condonation will be subject to 'strict scrutiny' and that the principles of condonation should be applied on a 'much stricter' basis...'

[19] The test that the Applicant is required to satisfy in order to show good cause, is set out in the case of *Melane v Santam Insurance Co Ltd*. [7] In this case, Holmes, JA explained the relevant principles applicable to an application for condonation:

'...the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

[20] In *Colett v Commissioner for Conciliation, Mediation and Arbitration and Others*,^[8] Musi, AJA on behalf of the Labour Appeal Court held that:

‘[37] In deciding not to grant condonation for the delay, the court a quo found the explanation for the delay unsatisfactory and unacceptable. It did not deem it necessary to consider the prospects of success in view of the bad explanation. Mr Nyondo took issue with the court a quo’s approach and insisted that the failure to consider the merits amounted to a misdirection.

[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success.

[39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.’

[21] The Labour Appeal Court in *Colett* referred to the case of *NUM v Council for Mineral Technology*,^[9] where the court held that in addition to the approach adopted in *Melane v Santam Insurance Co Ltd*, when assessing whether good cause has been shown, there is a further principle that is to be applied in condonation applications, namely; that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial; and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

The Condonation Application – Degree of lateness

[22] The Applicant records that it received the arbitration award dated 11 December 2012 from the office of the Second Respondent on 19 December 2012.

[23] In accordance with the prescribed time period set out in s145 (1)(a) of the Act, the Applicant was required to serve and file its review application on or before 29 January 2013.

[24] The Applicant served the review application on the First to Fourth Respondents on 25 August 2014 and then filed the review application

with the Labour Court on 29 August 2014.

[25] Although the Applicant contends that the application is one year and six months outside of the prescribed time period, according to my calculation, this review application is approximately one year and seven months outside of the prescribed time period set out in s145(1)(a) of the Act.

[26] Whether the delay is one year and six months or one year and seven months outside of the prescribed time period, the delay is clearly

excessive. Given the inordinate delay, the Applicant's excuse for non-compliance with the mandatory statutory time periods would have to be compelling in order to survive scrutiny.

[27] The Applicant contends, however, that 'Such [delay] is not so inordinate when one considers the mix up between Richard and Bronwen. Furthermore, the prospects of success in this review application are overwhelmingly in favour of the Applicant in the circumstances'.^[10]

The Condonation Application – The explanation for the delay:

[28] The Applicant together with the Applicant's attorney of record, Bronwen De Fin ("De Fin") an attorney practising with Gishen-Gilchrist Inc ("the Firm"), are united in their explanation for the delay. Quite simply, they submit that the reason for the inordinate delay is as a direct result of the dilatory conduct of De Fin and the Firm, and not as a result of the Applicant's wrongdoing.

[29] The deponent to the Applicant's founding affidavit, Gladwill Lepadima ("Lepadima"), records that upon receipt of the arbitration award from the Second Respondent, he addressed letters to the Third and Fourth Respondents on 19 December 2012 recording, inter alia, that the 'company intends bringing an application to review and set aside the arbitration award...'^[11] and as such the Third and Fourth Respondents were not required to tender their services on 19 December 2012, as directed by the First Respondent in terms of the the arbitration award.

[30] Lepadima then contacted De Fin 'with a view to consulting with her in respect of the matter and bringing a review application'.^[12] On an unspecified date, Lepadima and De Fin consulted on the matter and Lepadima then delivered documents to De Fin on a date once again not specified. Thereafter, De Fin advised Lepadima that the Firm would proceed with the review application; however, no date is provided as to when this transpired.

[31] Lepadima records that in 'late' January 2013, De Fin attended to a draft review application and requested the assistance of her partner, Richard Lightfoot ("Lightfoot") as he had more experience in labour matters. De Fin requested Lightfoot to finalise the draft review application.

[32] In the absence of clarity on the timeline by the Applicant, 29 January 2013 (the review application due date) falls within the interpretation of 'late' January 2013. As such, it appears that the review application may have already been due or

possibly late when De Fin drafted the review application or thereafter, when De Fin requested Lightfoot to assist her.

[33] Lightfoot then 'proceeded over a week or so to duly peruse, check, complete and amend the same'.^[13] De Fin then became involved in a High Court matter and it is De Fin's version that she requested Lightfoot to complete the review application and then to serve the same. Lightfoot, however, disputes that he was requested to complete and serve the application. It was his understanding that he was only required to check and peruse De Fin's document. He was not required to take over the matter. There are no documents or detailed particulars to

support either De Fin or Lightfoot's version of events.

- [34] The entire explanation provided by the Applicant up until this point, reflects a rather vague timeline and there are significant periods of time not accounted for or not properly accounted for. The explanation is devoid of required detail.
- [35] A few months then elapse with no explanation.
- [36] On or about 22 May 2013, Lepadima received an application brought by the Third and Fourth Respondents in terms of s 158(1)(c) of the Act. He then sent an email to De Fin attaching the application. De Fin records that she placed the email and the application in her 'post' pile, where she would usually have dealt with it a day or two later, however, she states that the email and the application 'disappeared'. As such, De Fin did not deal with the application in terms of s 158(1)(c). Lepadima records that at the time of deposing to his founding affidavit, he did not have a copy of the email or the s 158(1)(c) application due to the passage of time, however, there is no explanation from De Fin as to why she could not produce the email or the copy of the application that she received from Lepadima. There is further no explanation from Lepadima as to why he did not follow up with De Fin on the status of the s 158(1)(c) application after he sent her the email or if in fact, there were specific follow ups on this matter, when did they occur and what was said.
- [37] A period of approximately one year and two months then elapses with no compelling explanation provided.
- [38] On or about 16 July 2014, Lepadima received a copy of a directive issued by the Labour Court directing the Third and Fourth Respondents to file their statement of claim. Lepadima records that it was upon receipt of the directive that he became concerned. He believed that the review application had been filed and that everything was in order. A day or two following receipt of the directive, he spoke with De Fin and 'it became apparent that Bronwen [De Fin] knew very little about the review application and what I [Lepadima] was talking about save for the fact that she had attempted to draft an application for review.' [14] De Fin advised him that she would look into the matter. It transpired that there had been no account number or file reference allocation

and no billing had taken place on the file.

- [39] Lepadima records that he was 'in contact with her [de Fin] on a regular basis in respect of report-backs on numerous proceedings. At all material times, I was advised by Bronwen that the matters were in hand in respect of my follow-ups.' [15] Furthermore, Lepadima records that he had never received any feedback from De Fin, where she advised him as to any problem on this matter. He states '[i]n fact, on numerous occasions when I spoke to Bronwen and requested information from her in respect of the matter she advised me that the matter was in hand and being dealt with.' [16]

[40] Despite the failures of De Fin, Lepadima cannot escape the fact that he is the Applicant's Human Resources Executive and such position no doubt requires that he act with utmost due diligence. It is apparent from the founding affidavit that this was not the first occasion that Lepadima had ever dealt with a review application or had come across the concept of a review application. If one has reference to, inter alia, the letters drafted by Lepadima on 19 December 2012, he advised the Third and Fourth Respondent that the Applicant 'intends bringing an application to review and set aside the arbitration award...'[17] These letters were drafted even before he spoke with De Fin.

[41] Lepadima then contacted De Fin 'with a view to consulting with her in respect of the matter and bringing a review application.'[18] This sentence once again supports that Lepadima was aware as to the review application procedure alternatively, at a minimum, Lepadima was aware as to the nature of the review application. Furthermore, following the consultation with De Fin, it is highly unlikely that the review process and/or the timeline was not discussed. Lepadima should have been reasonably aware that he would have been required to sign an affidavit and/or provide instructions to De Fin on her draft review application. There is, however, no explanation from Lepadima as to why he did not make specific enquiries on when he would be required to attend to commission his affidavit/s or when he would receive a copy of the draft review application and so forth.

[42] While I accept that De Fin handled many matters for the Applicant and that she provided report-backs on various matters to Lepadima, it is unlikely that Lepadima actually received any proper report-back on this particular matter prior to 16 July 2014 nor did he ever ask any specific or detailed questions on this particular review application. Had De Fin, in fact, provided specific report-backs on this review, she would not have advised Lepadima that she knew very little about the matter and that she did not know what Lepadima was talking about, when he enquired about the review 'a day or two' after 16 July 2014.

[43] If, however, I am incorrect and De Fin, in fact, provided report-backs on this matter 'in the belief that Richard was taking care of the matter and that the matter would be sorted out by him in due course' then Lepadima's lack of diligence as the Human Resources Executive is again highlighted. It is clear from the content of the founding affidavit that De Fin's report-backs were extremely nebulous and devoid of detail pertaining to the review and in fact the s158(1)(c) application. The fact that Lepadima was ever satisfied with the nature and the content of the report-backs described within the founding affidavit does not reflect the conduct of a conscientious Human Resources Executive. One could have reasonably expected Lepadima to have asked De Fin for a copy of the review application or to enquire as to when he was required to depose to any of his affidavits or whether the matter had been opposed by the Third or Fourth Respondents or what in fact was the status of the s158(1)(c) application. It is highly likely that any one or more of these questions would have resulted in De Fin investigating the matter in order to provide a suitable response. Lepadima's failure to diligently follow up on this review has, in my view, contributed to the length of the delay

although I do accept that the Firm, in particular, De Fin was the main reason for the momentous delay.

[44] Following the conversation with Lepadima, the Applicant submits that De Fin investigated the matter ‘over the period from 16 July 2014 to 8 August 2014’[19] Lepadima, however, records that he only spoke with De Fin a day or two after 16 July 2014. Despite the apparent conflict with the dates, the real concern is that the affidavit is absent of an explanation as to why it took three weeks to investigate a matter. There is no detail as to what either De Fin or Lepadima did during this period.

[45] De Fin and Lepadima then consulted with Counsel on 8 August 2014. Lepadima records that Counsel advised him that the review application

was required to be brought with ‘due haste’,[20] however, the review application was only served on the Respondents on 25 August 2014 and filed with the Labour Court on 29 August 2014, some three weeks after consulting with counsel.

[46] The explanation provided for this delay, is that:

‘The application has been brought with all due haste and practicality thereafter considering the logistical issues pertaining to my availability as Human Resources Executive for the Applicant and my duties to attend to conciliations and arbitrations on a weekly basis for the Applicant, and that applicable to counsel and Bronwen in respect of their work schedules.’[21]

On Lepadima’s own admission, his conduct was contributory to this delay.

[47] A period in excess of six weeks elapsed between Lepadima discovering that there was in fact an issue on 16 July 2014 and the date upon which the Applicant finally filed its review application with the Labour Court on 29 August 2014. This delay, in itself, is in excess of the time period afforded to the Applicant in terms of s 145 (1)(a) of the Act.

[48] Traditionally, the courts have demonstrated their reluctance to penalise a litigant on account of the conduct of his/her/its elected representative, however, there is a limit beyond which a litigant cannot escape the results of his/her/it’s representatives lack of diligence or the insufficiency of the explanation tendered for the delays in complying with the rules of court. [22]

[49] While I appreciate that De Fin, Lightfoot and the Firm take sole responsibility for the inordinate delay, I have substantial difficulty in accepting that there was no contributory negligence by Lepadima for reasons which I have already dealt with above.

[50] Even if I were to accept that Lepadima had not been contributory to the profuse delay, on the facts before this court, there is an inordinate delay, which is absent of a full and proper explanation (let alone a compelling explanation) for the entire period of the delay. While I have accepted that the main reason for the delay is as a result of the gross negligence of the Applicant’s legal representatives, there is a further period in excess of six weeks, from 16 July 2014 to 29 August 2014, where Lepadima, De Fin and Counsel all confirm that they

played a role in the delay and again, no proper explanation is provided for the entire period of this delay.

[51] In *van Wyk v Unitas Hospital and Others*,^[23] the Constitutional Court held at paragraph 22 thereof that '[a]n applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay'.

[52] In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*,^[24] Conradie, AJ held that:

'[13] In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position to properly assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[53] In *Makuse v Commission on Conciliation, Mediation and Arbitration and Others*,^[25] referred to above, Myburgh AJ held that:

'[15] It is in this overall context that the application for condonation herein stands to be determined. As a point of departure, the delay of some eight months is egregious. Instead of taking six weeks to bring the review, the applicant took more than nine months to do so, which equates to more than six times longer than the statutory standard (Judged in terms of the current six-month standard in s145(5), the applicant took three months longer just to launch her review than applicants have to apply for a hearing date.)

[16] The question then is whether the applicant (in the words of the LAC in *Queenstown Fuel Distributors*) has tendered a 'compelling' excuse for non-compliance....'

[54] The facts in this matter reflect a delay of approximately nineteen months (one year and seven months) which delay is more than double the period referred to in *Makuse*.

[55] The Applicant was required to provide this court with a compelling excuse for the inordinate delay. It failed to do so. It further failed to provide an explanation that covers the full length of the delay and in many occasions, it simply listed dates and events as opposed to providing a suitable explanation. In particular, the total lack of urgency demonstrated by the Applicant after discovering the problem on 16 July 2014, is material. The Applicant upon discovery of the problem was required to urgently take steps to remedy its gross and flagrant failure to comply with the rules of this court. It failed to do so and it further failed to provide a sound and compelling explanation for the further lengthy delay.

[56] Lepadima must have been aware of the statutory time periods for bringing review proceedings. Even if this somehow fell through the cracks of his and the Firm's administration, the service of the section 158(1)(c) application should have caused the alarm bells to ring. Despite this, there is no evidence of any attempt to act with haste to rectify the substantial delays in this matter. The deponents to the affidavit appear to be deliberately vague as to what was done, by whom and when. Given the massive delay, this is unacceptable. On the facts before me, both the Applicant and its attorneys were negligent in their handling of this matter.

[57] The law is clear – without a compelling explanation for failure to comply with statutory time periods, the matter fails, and the prospects of success are immaterial. On this basis, I dismiss the condonation application. Accordingly, the review application also fails and the section 158(1)(c) application succeeds.

Order:

[58] In the circumstances, the following order is made:

- (i) The application for condonation is dismissed;
- (ii) The review application is accordingly dismissed;
- (iii) The arbitration award under case number GAJB 23040-12 dated 11 December 2012, is made an Order of Court;
- (iv) There is no order as to costs.

Howes, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Attorney L.C Leysath

Instructed by:

Gishen-Gilchrist Inc

For the Third and Fourth Respondent: No appearance

- [1] Arbitration Award at page 51, paras 68 to 71 of the review bundle.
- [2] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 532 (A) at 532C-D.
- [3] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*

[2009] 3 SA 493 (SCA); [2009] 30 ILJ 829 (SCA) at para 34; Makuse v Commission for Conciliation, Mediation and Arbitration and Others

[2016] 37 ILJ 163 (LC) at paras 4 and 5

[4]

[2007] ZACC 24; 2008 (2) SA 472 (CC) at para 31.

[5]

(2000) 21 ILJ 166,

[6]

(2016) 37 ILJ 163 (LC) at para 5.

[7] 1962 (4) SA 532 (A) at 532C-D.

[8]

(2014) 35 ILJ 1948 (LAC) at paras 37-39,

[9]

[1999] 3 BLLR 209 (LAC) at para 10.

[10] Founding Affidavit at 39, para 68.

[11] Review Application Bundle at 52 and 53.

[12] Founding Affidavit at 33, para 53.

[13] Founding Affidavit at 34, para 57.

[14] Founding Affidavit at 36, para 62.

[15] Founding Affidavit at 35, para 59.

[16] Founding Affidavit at 37, para 63.

[17] Review Application Bundle at 52 and 53.

[18] Founding Affidavit at 33, para 53.

[19] Review Application Bundle at 41, para 81.

[20] Review Application Bundle at 42, para 81.

[21] Review Application Bundle at 42, para 82.

[22] Independent Municipal and Allied Trade Union on behalf of Zungu V SA Local Government Bargaining Council and Others

(2010) 31 ILJ 1413 (LC) at para 22; NUM v Council for Mineral Technology (supra) at 211, Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 140H-141D.

[23] Above n 4 at para 22.

[24] Above n 22 at para 13.

[25] Above n 6 at paras 15 and 16.

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