

SOUTH AFRICA / JUDGMENT

Saohatse v Vista University (J1496/98)

[1999] ZALC 88 (3 June 1999)

[1999] ZALC 88**COURT**

Labour Court

BEFORE

G J Marcus

CASE / FILE NUMBER

J1496/98

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Source record**IN THE LABOUR COURT OF SOUTH
AFRICA****HELD AT JOHANNESBURG****CASE NUMBER: J1496/98****In**

the matter between:

DR M.C. SAOHATSE Applicant

and

VISTA UNIVERSITY Respondents

JUDGMENT**MARCUS AJ:**

The applicant is a teacher by profession. She has lectured for many years at Vista University. She has impressive academic credentials. She obtained her B.A. at Vista University, her B.A. Honours degree at the University of Pretoria, an M.A. at Rand Afrikaans University and lastly, a PhD at Unisa.

In September 1997, having obtained her doctorate, she unsuccessfully applied for promotion to the position of senior lecturer at Vista University. She was aggrieved at the University's refusal to promote her. She alleged that lesser qualified colleagues had received promotions but she had been overlooked. She sought reasons for the decision not to promote her. The Deputy Vice Chancellor (Academic) wrote to her on 12 March 1998 in the following terms:

"I have gone back to look at your original application forms and for the record you should know that the recommendation from your department and faculty was in favour of your promotion. However, the promotions Committee set down criteria at the start of the meeting to ensure that everyone had the same understanding of the principles to be applied. On the basis of those criteria the Committee could not support the recommendation for your promotion. I can assure you that based on the information on the forms and checking back through the audio tapes, there was nothing of a personal nature that surfaced to possibly prejudice your

application. I should perhaps just explain to you that obtaining a PhD is no longer the sole criteria for promotion beyond lecturer

level at Vista. Hence, you will be aware that last year and this year people with no PhD's had been promoted to senior lecturer.

That was done on the basis of their research output. This is the practice at many other Institutions. The simple argument is that a good PhD should result in at least five good journal papers and if you apply your mind to it, you should be able to spend time repackaging your PhD to produce publications. This is how academics make a name for themselves and for their institutions because not many people get to read your PhD thesis and in many respects one is expected to have a PhD to truly claim one's position in academia. If you need time off or other assistance to go and write these papers so that you can re-apply this year, let me know and we will do everything we can to assist you. I sincerely hope this clears the issue in your mind."

Dissatisfied with this response, the applicant invoked the dispute resolution mechanism created by the Labour Relations Act 66 of

1995. The matter was ultimately settled. The terms of the settlement agreement were as follows:

"It is recorded by the parties that:

1. The applicant, Mokgadi Caroline Saohatse, who is currently a Lecturer A at Vista University be promoted to a position of a senior lecturer;
2. The said promotion will be with retrospective effect from the 1st of October 1997;
3. The respondent will pay attorneys costs on a scale between party and party;
4. This agreement is in full and final settlement of the claim by the applicant; and
5. The parties agreed that the settlement agreement will be made an order of court." On 30 July 1998 the agreement of settlement was made an order of court. The applicant now complains that she has not been afforded the increases in salary in accordance with the respondent's policy.

She contends that the respondent's policy requires that her salary be increased by three notches. The applicant does not in express terms contend that the claimed increase of three notches was dictated by the terms of the settlement agreement. Instead, she relies on the respondent's policy in this regard. The policy upon which reliance is placed is annexed to the papers and forms part of the University's conditions of service for officers and employees. The relevant paragraph is 3.2 and it provides: "3.2 PROMOTION OF AN OFFICER

(a) Promotion occurs annually where applicable on 1 October.

(b) NOTCH ADJUSTMENT WITH PROMOTION

Dissatisfied with this response, the applicant invoked the dispute resolution mechanism created by the Labour Relations Act 66 of

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"It is recorded by the parties that:

1. The applicant, Mokgadi Caroline Saohatse, who is currently a Lecturer A at Vista University be promoted to a position of a senior

lecturer;

2. The said promotion will be with retrospective effect from the 1st of October 1997;

3. The respondent will pay attorneys costs on a scale between party and party;

4. This agreement is in full and final settlement of the claim by the applicant; and

5. The parties agreed that the settlement agreement will be made an order of court."

On 30 July 1998 the agreement of settlement was made an order of court.

The applicant now complains that she has not been afforded the increases in salary in accordance with the respondent's policy.

She contends that the respondent's policy requires that her salary be increased by three notches. The applicant does not in express terms contend that the claimed increase of three notches was dictated by the terms of the settlement agreement. Instead, she relies on the respondent's policy in this regard. The policy upon which reliance is placed is annexed to the papers and forms part of the University's conditions of service for officers and employees. The relevant paragraph is 3.2 and it provides:

"3.2 PROMOTION OF AN OFFICER

(a) Promotion occurs annually where applicable on 1 October.

(b) NOTCH ADJUSTMENT WITH PROMOTION

Two salary notches are normally allocated with a further salary notch if the officer's incremental date is 1 October. In highly

exceptional cases council can allocate a further additional salary notch.

- (c) The incremental date of an officer remains unchanged." In this matter there has been no replying affidavit. Mr Mokoena, who appeared on behalf of the applicant, accepted that the well-known rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 620(A) applies. It is appropriate that I repeat what was said in that case at 634H 635C:

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"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits

which had been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.In such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof and include this fact among those which it determines whether the applicant is entitled to the final relief which he seeks.... Moreover, there may be exceptions to this general rule, as, for example where the allegations or denials of the respondent are so far - fetched or clearly untenable that the court is justified in rejecting them merely on the papers...." It is appropriate that I set out the actual relief claimed in the notice of motion. I do so, bearing in mind that what the applicant seeks in these proceedings is in essence compliance with an order of court. I have already set out the terms of the settlement agreement which were made an order of court. In the notice of motion the applicant claims the following relief: "1. Interdicting the respondent to comply with the court order granted on 30 July 1998 the material terms of which are as

follows:

- (i) The applicant, Mokgadi Caroline Saohatse, be promoted to the position of senior lecturer with retrospective effect from 1 October 1997; (ii) Compelling the respondent to accord the applicant two salary notches and other ancillary privileges concomittant with the

promotion of the person from the position of Lecturer A to senior lecturer with effect from 1 October 1997;

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits

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"1. Interdicting the respondent to comply with the court order granted on 30 July 1998 the material terms of which are as

follows:

(i) The applicant, Mokgadi Caroline Saohatse, be promoted to the position of senior lecturer with retrospective effect from

1 October 1997;

(ii) Compelling the respondent to accord the applicant two salary notches and other ancillary privileges concomittant with the

promotion of the person from the position of Lecturer A to senior lecturer with effect from 1 October 1997;

(iii) Directing the respondent to adhere to its practice and policies as stipulated in the respondent's policy booklet being the

Vista University Conditions of Service for Officers and Employees read with the respondent's salary scale as revised from 1 July 1996 regarding the promotion of the applicant; (iv) Compelling the respondent to accord the applicant one salary notch as the applicant's annual increment with effect from 1

January 1996;

(v) Directing the respondent to accord the applicant one salary notch in recognition of the highly exceptional circumstances involved in the promotion of the applicant; (vi) Compelling the respondent to adjust the applicant's salary notch from R103 446,00 per annum to R120 186,00 per annum; (vii) Awarding the applicant costs of suit; (viii) Granting the applicant further and/or alternative relief." The relief sought essentially falls in two parts. The first part of the relief is an order compelling the respondent to comply with that part of the settlement agreement which requires the applicant to be promoted to a senior lecturer with retrospective effect. The second part of the relief, which is embraced in subparagraphs (ii)

- (vi), all turn on the applicant's demand for a further increase in the salary notches to which she claims entitlement. In her founding affidavit the applicant states the following concerning the claimed salary notches:

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Vista University Conditions of Service for Officers and Employees read with the respondent's salary scale as revised from 1 July 1996 regarding the promotion of the applicant;

(iv) Compelling the respondent to accord the applicant one salary notch as the applicant's annual increment with effect from 1

January 1996;

(v) Directing the respondent to accord the applicant one salary notch in recognition of the highly exceptional circumstances involved in the promotion of the applicant;

(vi) Compelling the respondent to adjust the applicant's salary notch from R103 446,00 per annum to R120 186,00 per annum;

(vii) Awarding the applicant costs of suit;

(viii) Granting the applicant further and/or alternative relief."

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- (vi), all turn on the applicant's demand for a further increase in the salary notches to which she claims entitlement.

In her founding affidavit the applicant states the following concerning the claimed salary notches:

"13. In terms of the respondent's conditions of service for employees booklet at page 99, clause 3.2, where an employee is

promoted, two salary notches are normally allocated. A further salary notch is allocated if the officer's incremental date is the 1st of October and in exceptional cases Council can allocate a further additional salary notch. In accordance with the respondent's policies, I patiently waited for the respondent to allocate to me a minimum of three salary notches in accordance with the respondent's policies." The applicant then refers to the policy which I have already set out. The respondent's answer to this is instructive. In the answering affidavit, the respondent states the following: "6.13 I have already explained that the incremental date of the applicant is 1 January of each year and it is correct that 'normally' a salary increase of two notches are granted upon promotion. That increase is of course granted in the first place if the applicable salary scale allows it but in the final analysis granted on merit, and not as a matter of course. The approach is that a person deserving a promotion would normally also be deserving a salary increase but provision is also made for exceptional circumstances where a person can be promoted in rank but not granted a salary increase.

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promoted, two salary notches are normally allocated. A further salary notch is allocated if the officer's incremental date is the 1st of October and in exceptional cases Council can allocate a further additional salary notch. In accordance with the respondent's policies, I patiently waited for the respondent to allocate to me a minimum of three salary notches in accordance with the respondent's policies."

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6.14 The applicant was at most entitled to an increase of two salary notches upon her promotion and not to 'a minimum of three'. The settlement agreement and court order was to the effect that the applicant is to be promoted with effect from 1 October 1997. In order to implement that agreement and order the respondent had to deal with the matter as it existed hypothetically on 1 October 1997. Viewed from this perspective the applicant was then granted two salary notches increase in salary immediately, that

is from 1 October 1997, and a letter to this effect was written on 5 August 1998. The consequences of such a promotion then had to be considered, one consequence being that on 1 January 1998 (that is the first incremental date after the promotion of the applicant) she would receive a further salary notch increase if she were not at that stage already remunerated at the maximum of the applicable scale. This was not the case and therefore the position of the applicant was recalculated with effect from 1 January 1998 so as to affect a further salary increase of one notch.... 6.15 The applicant did not qualify at any stage for a further salary increase of 'a further additional salary notch'. In view of the foregoing I fail to understand how the applicant could have waited for a "minimum of three salary notches".

(emphasis added) The focus of the applicant's complaint and indeed that part of the case which was pressed upon me by Mr Mokoena turned on the alleged failure by the respondent to allocate to the applicant the claimed three-notch salary increase. In this regard the legal basis for the claim is dubious. The applicant alleges that the respondent has failed to adhere to the "spirit" of the settlement agreement and the court order.

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In addition Mr Mokoena argued that the denial of the third salary notch increase amounted to a violation of the applicant's existing and vested rights. In my view this argument is misconceived. Mr Oosthuizen, who appeared for the respondent, emphasised that the applicant's demand in the notice of motion compelling the respondent to adjust her salary notch from R103 446,00 per annum to R120 186,00 per annum would take the applicant out of the existing salary scale for persons at her level at the University. This much is made explicit in the answering affidavit to which, as I have indicated, there is no reply. The respondent states that were this court to give the applicant a further salary increase over and above the salary increases which she has already been given, it would take her out of the salary scale to which she is entitled and would move her into the salary scale for an Associate Professor. The answering affidavit points out that the maximum scale for a Senior Lecturer is R116 001,00. The next salary increase would take the applicant beyond that level. It seems to me that in the circumstances there is no real scope for the argument that there has not been compliance with the terms of the settlement agreement. Mr Mokoena, however, advances a further argument. He suggests in his heads of argument that: "The respondent has failed and/or refused and/or neglected to recognise that highly exceptional circumstances exist regarding

the promotion of the applicant. Although the respondent does not define the exceptional circumstances the applicant feels that her promotion is highly exceptional because she had to go through great lengths to obtain same i.e. approaching the court and incurring legal costs."

In addition Mr Mokoena argued that the denial of the third salary notch increase amounted to a violation of the applicant's existing and vested rights. In my view this argument is misconceived. Mr Oosthuizen, who appeared for the respondent, emphasised that the applicant's demand in the notice of motion compelling the respondent to adjust her salary notch from R103 446,00 per annum to R120 186,00 per annum would take the applicant out of the existing salary scale for persons at her level at the University. This much is made explicit in the answering affidavit to which, as I have indicated, there is no reply. The respondent states that were this court to give the applicant a further salary increase over and above the salary increases which she has already been given, it would take her out of the salary scale to which she is entitled and would move her into the salary scale for an Associate Professor. The answering affidavit points out that the maximum scale for a Senior Lecturer is R116 001,00. The next salary increase would take the applicant beyond that level. It seems to me that in the circumstances there is no real scope for the argument that there has not been compliance with the terms of the settlement agreement.

Mr Mokoena, however, advances a further argument. He suggests in his heads of argument that:

"The respondent has failed and/or refused and/or neglected to recognise that highly exceptional circumstances exist regarding

the promotion of the applicant. Although the respondent does not define the exceptional circumstances the applicant feels that her promotion is highly exceptional because she had to go through great lengths to obtain same i.e. approaching the court and incurring legal costs."

The factual foundation for this argument appears in paragraph 17 of the founding affidavit which states the following: "It is clear from the aforesaid documents that I should be allocated a minimum of three salary notches as a result of my

promotion from Lecturer A to Senior Lecturer. Putting it simply, my salary should move from R103 446,00 per annum to at least R116 001,00 per annum. In fact, it is my submission that I am entitled to a movement of four salary notches in accordance with clause 3.3(b) of annexure N as highly exceptional circumstances apply in my case as the respondent clearly discriminated against myself and I had to go to great length to obtain the aforementioned

promotion." In answer, the respondent states the following in paragraph 6.20 of the answering affidavit, and I again emphasize that to this there is no reply: "The applicant's attempts to bring her case within the ambit of paragraph 3.2(b) of the policy document ... which provides for a further additional salary notch that can be approved in 'highly exceptional cases' is nothing more than an opportunistic attempt to turn the respondent's arm. Such an increase is intended as a reward for excellence. If she wanted to claim compensation for alleged discrimination (an allegation that is denied by respondent) she should have done so in the proper manner and without reaching a full and final settlement on a dispute regarding her promotion." In my view, this (together with that part of the answering affidavit referred to in paragraph 8 above) constitutes a complete answer to the argument advanced by Mr Mokoena

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For the sake of completeness I should mention that in the papers the applicant sought to place great store by a letter written by the respondent's attorneys on 11 August 1998 which stated that the "effective date for all the promotions that were approved towards the end of last year" will be 1 January 1998. This, the applicant contended, demonstrates that the respondent was acting in contempt of the court order. The letter does not bear the meaning contended for. The applicant's reliance upon this letter is also somewhat disingenuous. She states in her affidavit that on 17 August, that is, after receipt of the attorney's letter referred to above, she received a letter from the respondent advising her that she had been promoted to the position of Senior Lecturer with effect from 1 October 1997. In argument before me Mr Mokoena sought to argue that the promotion had to be considered

together with the salary notches which were claimed. I did not understand him to dispute, however, that the actual promotion to the status of Senior Lecturer was not given effect to with the retrospective effect as required by the agreement of settlement.

His principal contention turned on the claim for the third salary notch increase. In my view, even if one takes the founding affidavit on its own, the applicant has not made out a proper case for the relief

claimed. I have indicated already that it seems that what has caused the applicant so much pain is her contention that the

University has not acted in accordance with the spirit of the settlement agreement. A comparison between the relief claimed in the notice of motion and the settlement agreement itself reveals that what is being sought, goes beyond the express terms of the settlement agreement.

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Mr Oosthuizen, however, goes further. His principal contention is that the terms of the settlement agreement have in fact been complied with. He bases his argument on the strength of the uncontested averments contained in the answering affidavit the affect of which was that the retrospective implementation of the promotion was done in the following manner:

1. On 30 September 1997 the applicant held the position of Lecturer A with an applicable salary scale of R71 226,00 x 3591 - 74817 x 4074 - 99261 and on which scale the applicant was remunerated at a salary notch of R95 187,00 per year and her promotion to senior Lecturer was ordered to be with retrospective effect from 1 October 1997.
2. As a point of departure, the position of the applicant on 30 September 1997 was taken and her promotion was then implemented.
3. The retrospective promotion of the applicant to the position of Senior Lecturer, normally accompanied by two salary notch increases as per the general and normal policy of the respondent, would on 1 October 1997 have brought her within the range of a new salary scale on which she qualified and was granted retrospectively the usual two salary notch increase. This resulted in an annual salary of R103 446,00 calculated by adding the following:
 - (a) Her old salary of R95 187,00 per year;
 - (b) One salary notch in the amount of R4 074,00 giving a subtotal of R99 261,00 per year; and
 - (c) A second salary notch in the amount of R4 185,00 giving a total of R103 446,00 per year.

Mr Oosthuizen, however, goes further. His principal contention is that the terms of the settlement agreement have in fact been complied with. He bases his argument on the strength of the uncontested averments contained in the answering affidavit the affect of which was that the retrospective implementation of the promotion was done in the following manner:

1. On 30 September 1997 the applicant held the position of Lecturer A with an applicable salary scale of R71 226,00 x 3591 - 74817 x 4074 - 99261 and on which scale the applicant was remunerated at a salary notch of R95 187,00 per year and her promotion to senior Lecturer was ordered to be with retrospective effect from 1 October 1997.
2. As a point of departure, the position of the applicant on 30 September 1997 was taken and her promotion was then implemented.
3. The retrospective promotion of the applicant to the position of Senior Lecturer, normally accompanied by two salary notch increases as per the general and normal policy of the respondent, would on 1 October 1997 have brought her within the range of a new salary scale on which she qualified and was granted retrospectively the usual two salary notch increase. This resulted in an annual salary of R103 446,00 calculated by adding the following:
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 - (b) One salary notch in the amount of R4 074,00 giving a subtotal of R99 261,00 per year; and
 - (c) A second salary notch in the amount of R4 185,00 giving a total of R103 446,00 per year.
4. The retrospective promotion necessitated a reconsideration of the adjustments that were made to the applicant's salary in May
1998. Because the applicant's doctoral thesis was the basis for her retrospective promotion, there was no justification for a further salary increase. The said salary adjustment therefore fell away.
5. However, the retrospective promotion also necessitated a reconsideration of applicant's position as far as her incremental

salary increase was concerned. Her promotion made another salary scale applicable on which scale she was not receiving the top notch or maximum salary provided for. Consequently, she should have received a salary notch increase on her incremental date. Due to her promotion with effect from 1 October 1997 she was receiving an annual salary of R103 446,00 and with an increment of one notch in the amount of R4 185,00 she became entitled to a salary of R107 431,00 per year from effect from 1 January 1998 which was granted to her.

6. A general salary increase was also negotiated with the respondent's work force in or about September 1998. The effect thereof was that each employee was granted a 6 percent salary increase on the sum of his or her basic salary and allowance. The applicant was also given the benefit of this general salary increase on her adjusted salary of R107 533,00 and allowance of R12 600,00 per year.
7. The process of reconsideration of other events affected by the retrospective promotion, resulted in some benefits falling away but also in the applicant receiving some other benefits. As I have indicated these facts all appear in the answering affidavit and are not subject to refutation.
4. The retrospective promotion necessitated a reconsideration of the adjustments that were made to the applicant's salary in May
1998. Because the applicant's doctoral thesis was the basis for her retrospective promotion, there was no justification for a further salary increase. The said salary adjustment therefore fell away.
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6. A general salary increase was also negotiated with the respondent's work force in or about September 1998. The effect thereof was that each employee was granted a 6 percent salary increase on the sum of his or her basic salary and allowance. The applicant was also given the benefit of this general salary increase on her adjusted salary of R107 533,00 and allowance of R12 600,00 per year.
7. The process of reconsideration of other events affected by the retrospective promotion, resulted in some benefits falling away but also in the applicant receiving some other benefits.

As I have indicated these facts all appear in the answering affidavit and are not subject to refutation.

In my view, therefore, the very foundation of the applicant's case must fail. There is no substance to the argument that she is being deprived of her existing or vested rights. This is demonstrated by the evidence to which I have referred which shows that exceptional circumstances justifying a salary increase are a reward for excellence and nothing else. Mr Oosthuizen also argues that the material terms of the court order as set out in the notice of motion are not a true reflection

of that order. I have set out the terms of the settlement agreement and the relief claimed in the notice of motion. I am of the view that there is merit in this submission. The applicant is impermissibly seeking to go beyond that which was agreed between the parties. She has not sought rectification of the agreement. Mr Oosthuizen contends further that the relief sought by the applicant is misconceived. His argument is that there is no provision for an interdict as part and parcel of the procedure to enforce a court order and it is thus not legally permissible to issue such an interdict. The usual procedure for the enforcement of a court order such as the present is contempt of court proceeding and not an interdict. In my view there is merit in this submission, (see Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*

(1997) at pages 815-828.) but it is not necessary for me to decide this issue. In all the circumstances the application falls to be dismissed. Mr Oosthuizen, somewhat faintly, suggested that this was a case which justified an award of costs on the attorney and client scale. The basis for his submission was that grave and serious imputations were made against the University's good name and reputation. I am loathe to find that this alone would justify a punitive order or costs. In the circumstances I am of the view that costs on a party and party scale should be awarded. The application is accordingly dismissed with costs on a party and party scale.

In my view, therefore, the very foundation of the applicant's case must fail. There is no substance to the argument that she is being deprived of her existing or vested rights. This is demonstrated by the evidence to which I have referred which shows that exceptional circumstances justifying a salary increase are a reward for excellence and nothing else.

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In all the circumstances the application falls to be dismissed. Mr Oosthuizen, somewhat faintly, suggested that this was a case which justified an award of costs on the attorney and client scale. The basis for his submission was that grave and serious imputations were made against the University's good name and reputation. I am loathe to find that this alone would justify a punitive order or costs. In the circumstances I am of the view that costs on a party and party scale should be awarded. The application is accordingly dismissed with costs on a party and party scale.

G J MARCUS ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA DATE OF HEARING: 3 JUNE 1999 DATE OF JUDGMENT: 3 JUNE 1999 For the applicant: Mr Mokoena of MOKOENA ATTORNEYS For the Respondent: Adv. M M Oosthuizen instructed by Maponya Inc

G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 3 JUNE 1999

DATE OF JUDGMENT: 3 JUNE 1999

For the applicant: Mr Mokoena of MOKOENA ATTORNEYS For the Respondent: Adv. M M Oosthuizen instructed by Maponya Inc

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Prepared on 12 October 2026 · Esheria