

SOUTH AFRICA / JUDGMENT

Sasol Oil Limited v B-BEE Commission and Others (21415/2020) [2022] ZAGPPHC 431 (14 June 2022)

[2022] ZAGPPHC 431

COURT

North Gauteng High Court, Pretoria

BEFORE

Selby Baqwa

CASE / FILE NUMBER

21415/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 21415/2020

REPORTABLE:

YES/ NO

OF

INTEREST TO OTHER JUDGES: YES / NO

REVISED:

YES / NO

14/06/22

In

the matter between:

SASOL

OIL

LIMITED

APPLICANT

AND

THE

B-BEE COMMISSION

FIRST RESPONDENT

TSHWARISANO

LFB INVESTMENT (PTY) LIMITED

SECOND RESPONDENT

AWEVEST

INVESTMENT LIMITED

THIRD RESPONDENT

AFRICAN
WOMEN ENTERPRISE INVESTMENTS
FOURTH
RESPONDENT
(PTY)
LIMITED
GOLDEN
FALLS 467 (PTY) LIMITED
FIFTH RESPONDENT
ASTRA
GROUP HOLDINGS (PTY) LIMITED
SIXTH RESPONDENT
FIREFLY
CAPITAL (PTY) LIMITED
SEVENTH RESPONDENT
JAN
WILLEM DAVID BICKER CAARTEN
EIGHTH RESPONDENT
PETER
CHARLES NASH
NINTH RESPONDENT
EMPOWERDEX
(PTY) LIMITED
TENTH RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on June 2022.

BAQWA J:

INTRODUCTION

[1] This is an application for the review and setting aside of a decision ("The Decision") of the first respondent ("The Commission") based on alleged erroneous and unlawful adverse findings made by the Commission regarding non-compliance by the applicant ("Sasol Oil") in term of the provisions of the Broad-Based Black Economics Empowerment Act 53 of 2003 ("The Act").

[2] The Sasol Oil bases its application on the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or alternatively on the principle of legality in light of the provisions of the Act and the B-BBEE Regulations promulgated in term of section 14(1) of the Act ("The Regulations").

THE

ISSUES

[3] The issues to be determined are mainly the following:

3.1 Whether the point raised in limine by the Commission to the effect that Sasol Oil has sought to review the wrong decision ought to be upheld;

3.2 Whether the decision constitutes procedurally unfair and unlawful administrative action in terms of PAJA.

3.3 Whether the decision is invalid and unlawful having regard to the principle of legality and the regulations.

3.4 Whether the Commission should be interdicted from making unlawful demands of Sasol Oil and threatening to invoke its powers against Sasol Oil if the latter does not comply with such demands.

THE

FACTS

[4] Sasol Oil is one of the subsidiaries of Sasol Ltd which is a listed public company. In 2006 Sasol Oil Ltd sold 25% of the shares of Sasol Oil to the second respondent ("Tshwarisano") in a black

economic empowerment transaction. Tshwarisano is a black controlled company whose shareholders are mostly black people or companies

controlled by black people.

[5] Awevest Investment Ltd ("Awevest") is the third respondent which is the investment company of two groups of African Women represented by Queen Elizabeth Sangion ("Sangion"). Awevest is the sole shareholder in Golden Falls Trading 567 Pty Ltd ("Golden Falls") which is one of the shareholders of Tshwarisano. Golden falls is a special purpose vehicle which was created exclusively to hold 5.58% of the shares in Tshwarisano.

[6] Golden falls did not have and could initially not raise the purchase price of the shares of R19.3 M and a group of funders agreed to finance the acquisition of the shares by subscribing for redeemable preference shares in Golden Falls. The funders subscribed, for the preference shares at a price of R19.5 M in terms of a Preference Share Subscription Agreement on 3 May 2007 ("Pref Share Agreement").

COMPLAINT BY MS SANGION

[7] In December of 2015 Ms Sangion complained to Sasol Limited that the Prefshare Agreement unfairly favoured the funders and thereby undermined the BEE purpose of the transaction. Sasol Limited took up the matter with Tshwarisano, Golden Falls, Ms Sangion and the funders through a facilitated negotiation. The negotiation resulted in a settlement between

the third to ninth respondent on 5 September 2016. The Settlement Agreement was between Astra Group Holdings (Pty) Limited, Firefly Capital (Pty)Ltd, Jan Willem David Bicker Caarten, Peter Charles Nash, Golden Falls Trading 567 (Pty) Limited, Awevest Investments Limited and African Women Enterprise Investments (Pty) Limited. (“Settlement Agreement”)

- [8] In October 2017 Sasol Oil received a notice from the Commission that it was investigating a complaint by Ms Sangion laid in terms of the Act. The complaint was that Sasol Oil was somehow, responsible for the unfair terms of the Pref Share Agreement. The Commission interpreted the complaint as an accusation that Sasol Oil had knowingly engaged in “fronting” in that it claimed a BBE rating on the basis that Golden Falls shares in Tshwarisano were held by a black company while in truth the white funders were the true beneficiaries of the shares.

SASOL OIL’S RESPONSE

- [9] Sasol Oil made comprehensive submissions denying awareness of the Pref Share Agreement until Ms Sangion approached it for assistance in December 2015. It made reference to the Settlement Agreement which seemed to have resolved the Sangion complaint and that it had no reason to doubt that Golden Falls was not only a black controlled company but also that it was a beneficial owner of its shares in Tshwarisano.
- [10] Sasol Oil submitted further, that its BEE rating did not in any way depend on the question whether Golden Falls was the true beneficial owner of its shares in Tshwarisano. Sasol Oil’s BEE status was based on the fact that Tshwarisano, a black controlled company, held 25% of its shares and that under BEE rules Tshwarisano qualified as a 100% black-controlled company as long as it had 51% or more black shareholders.

THE FINAL FINDINGS

- [11] After Sasol Oil’s submissions the Commission issued its findings on 7 October 2019 which according to Sasol Oil did not seem to address or engage with the submissions submitted by it.
- [12] The Commission conveyed its findings to Sasol Oil by means of a letter to which it annexed a summarised version of a report dated 1 October 2019. The letter was purportedly in terms of its powers in terms of section 135 of the BEE Act and regulations 15 to 17 of the BEE Regulations.
- [13] The Act and the regulations set the parameters within which the Commission is expected to operate as follows:

13.1 In terms of section 13B(3)(b) of the Act, the Commission “must be impartial and perform its functions without fear, favour or prejudice”

13.2 In terms of section 13B(3)(c) ii, the Commission must exercise its powers “in accordance with the values and principles mentioned in section 195 of the Constitution”

13.3 In terms of regulation 15(13), the Commission must afford a respondent an opportunity to respond to adverse findings.

13.4 The Commission must, in terms of regulation 15(17), conduct its investigations in a manner that conforms “to all the rules relating to fair administration of justice processes applicable to investigations”

[14] Whilst the Commission’s decision to issue its final findings constitutes an administrative act and falls to be dealt with in terms of PAJA, it may equally be reviewed under some of the provisions of the Act and regulations mentioned above.

THE COMMISSION’S POINT IN LIMINE

[15] In its application for review Sasol Oil seeks to review the Commission’s final findings letter of 7 October 2019 including its final findings in paragraphs 6 and 7, its ultimatum in paragraphs 8 and 17 and its threats in paragraph 9.

[16] According to the Commission its final findings letter was the means through which it informed Sasol Oil of the findings it had made in the “final Investigation report” dated 1 October 2019 and which it contends Sasol Oil ought to have reviewed and not the letter.

[17] Sasol Oil on the other hand contends that whilst it is true that the Commission notified it of its decisions through the final findings letter, nothing was said about the final report at the time and that its review application is directed at the decisions and that its notice of motion specifies the decisions which it seeks to review.

[18] Sasol Oil therefore contends that whilst reference may be made to the final findings letter, it is the decisions referred to therein that are correctly targeted for review.

GROUND'S OF REVIEW

[19] The first ground of review is that Sasol Oil did not know of the Prefshare Agreement. This ground arises from the Commission’s final findings letter which is premised on the supposition that Sasol knew of the Pref Share Agreement from the very onset. This assumption appears to be based on the understanding that a Mr Peter Wingrove “Wingrove” who was allegedly involved in the negotiation of the Pref Share Agreement, was an “advisor to Sasol Oil”.

[20] The Commission appears to have persisted in its final findings to state that Mr Wingrove was “characterised” as an advisor to Sasol Oil despite the fact that Sasol Oil had pointed out in its response to the Commission’s findings that Wingrove was at the time an advisor to Tshwarisano and not Sasol Oil.

[21] In its founding affidavit Sasol Oil repeats that it had not known of the Pref Share Agreement until Ms Sangion sought its assistance in December 2015. Sasol Oil did not submit any credible or admissible evidence in support of the contention that Wingrove was Sasol Oil's advisor.

[22] In paragraph 67 of Sasol Oil's replying affidavit Wingrove's involvement is dealt with succinctly as follows:

"67.7.2 an email dated 20 July 2011 from Deshnee Naiker ("Ms Naiker")

to Ms Sangion, as annexure "RA2". In this email Ms Naiker referred to Mr Wingrove as a representative of Tshwarisano. Ms Naiker is Sasol Oil's legal advisor and was involved in the Tshwarisano transaction, and

67.7.3 an email dated 4 February 2015 from Wingrove to Ms Naiker, as

annexure "RA3", in which he records that he stopped being employed by Tshwarisano at the end of December 2014, and

67.7.4 Ms Naiker's confirmatory affidavit as annexure "RA4".

"She confirms that, in 2007, Mr Wingrove was not an advisor to Sasol Oil and he was instead acting on behalf of Tshwarisano".

[23] Evidently, the Commission's decision regarding the relationship between Wingrove and Sasol Oil was based on incorrect facts which renders it reviewable. At the same time it is rendered irrational in that it is not based on admissible evidence.

[24] The second ground of review is that Sasol Oil had been brought under the impression that Ms Sangion's complaint had been resolved. As alluded to above, at the instance of Ms Sangion Sasol Oil had caused Golden Falls, Awevest, African Women Enterprise Investments (Pty) Ltd together with the funders to engage in negotiations with Professor Katz as facilitator.

[25] The rule 53 record presented by the Commission includes copies of the Settlement Agreement which was the result of the said negotiations and it was concluded on 5 September 2016 and it had been signed by Ms Sangion on behalf of Golden Falls and Awevest.

[26] A Golden Falls board resolution attached to the Settlement Agreement signed by two directors including Ms Sangion stated:

"That it considers it in the interests of the company's business and to the commercial benefit and advantage of the company to enter into and implement the settlement agreement".

[27] On the basis of the said Settlement Agreement Sasol Oil had presumed that the matter had been resolved satisfactorily in the interests of all parties only to learn in October 2017 when it was notified by the Commission of Sangion's complaint that the matter had remained unresolved.

[28] Despite being informed and being aware of Sasol Oil's prior attempt to have the matter resolved it still found it within itself to strangely criticise Sasol Oil in the following manner in its paragraph 6.3.

"That Sasol Oil (Pty) Ltd failed to take material steps to combat possible fronting that was being perpetrated through the preference share subscription agreement when they became aware of it, which clearly defeated the objectives and the purpose of the B-BBEE Act despite the complaint having brought the issue to the attention of Sasol Oil (Pty) Ltd, and instead continued to benefit through the fictitious B-BBEE ownership scheme that directly benefited the funders, a fact they were fully aware of".

[29] In paragraph 6.5 the Commission held that Sasol Oil referred the Sangion complaint "to be arbitrated by Dr Michael Katz....in a manner that effectively perpetuated the enforcement of the Preference Share subscription agreement that reduced black people to fronts or conduit in a transaction that ought to benefit them"

[30] At paragraph 6.6 the Commission held that Sasol oil,

"Failed to follow through to ensure that the matter, which clearly impacted on its B-BBEE status was satisfactorily resolved"

[31] The Commission was duly informed of the steps that had been taken by Sasol Oil when Ms Sangion brought the matter to their attention. The matter had reached what appeared to be a satisfactory conclusion. This was confirmed on the form not only of the Settlement Agreement but also through the annexure thereto which was a Board resolution signed inter alia by Sangion confirming acceptance of the Settlement Agreement. Until the renewed complaint to the Commission Sasol was entitled to remain under the impression that the matter remained resolved. This begs the question what 'follow through' Sasol Oil would have been expected to make. In these circumstances, the irrational nature of the Commission's findings is rather

astounding.

[32] It would indeed seem that the final findings are reviewable under section 6 of PAJA in that:

32.1 They were made because irrelevant considerations were taken into account or relevant considerations were not considered, within the meaning of section 6(2)(e)(iii);

32.2 They were made arbitrarily or capriciously with the meaning of section 6(2)(e)(vi);

32.3 They were irrational within the meaning of section 6(2)(f)(ii) and

32.4 They were unreasonable within the meaning of section 6(2)(h).

[33] The third ground of review is that the transaction complained about had no effect on Sasol's BEE rating which negates the Commission's finding that the Preference Share Agreement "defeated the objectives and the purpose of the B-BBEE Act".

[34] In paragraph 6.2 the Commission's final findings were that Sasol Oil "continued with its tick box approach to claim points for black ownership that they knew did not exist in practice and could not be verified, which on paper appeared to be valid and marketed as such on the website of Sasol Oil".

[35] In 6.5 the Commission held that Sasol Oil had,

"failed to disclose this material defect in the ownership scheme to the verification professional, thereby resulting in the recognition of points that are based on fictitious black women ownership when control and management rested with the white people who are said to be funders".

[36] The Commission goes on to find in paragraph 6.9 that the black ownership which Sasol Oil claimed through Tshwarisano, Golden Falls

and Awevest "is not only flawed but makes a mockery of what broad-based black economic empowerment stands for"

[37] In its conclusion in paragraph 6.10 it states that the black ownership claimed through Tshwarisano, Golden Falls and Awevest "falls short of meeting the requirements for exercisable voting rights, economic interest and net value".

[38] The reasoning of the Commission in coming to the conclusions referred to above is demonstrably flawed. The manner in which the BEE ratings of measured entities must be measured is contained in the Codes of Good Practice on Broad Based Economic Empowerment of 2013. One of the Codes is Code 100 which prescribes the rules for scoring black ownership of a measured entity and it includes the following provisions.

38.1 Clause 3.1.1 provides that an entity scores points for participation by black people in its rights of ownership. Black people may hold their rights of ownership in a measured entity directly or through another entity such as a company. That was how Ms Sangion and her partners held their interest in Sasol through Awevest, Golden Falls and Tshwarisano.

38.2 Clause 3.3 deals with a "flow-through-principle" which means that when black people hold their interests through one or more companies, the pro rata share of their participation must be calculated at each level of the chain.

38.3 Clause 3.4 contains a "modified flow-through principle" which states:

"when in the chain of ownership, Black people have a flow-through level of participation of at least 51%, and then only once in the entire ownership structure of the Measured Entity, such black participation may be treated as if it were 100% Black"

[39] The uncontested evidence is that black shareholders in Tshwarisano always exceeded 51% even if one were to exclude shares held by Golden Falls. Tshwarisano would therefore be classified as 100% black because its black shareholders exceeded 51% and its BEE rating would not be affected through the flow-through principle.

[40] The same point can be demonstrated differently by looking at the BEE ratings before and after the omission of the shares held by Golden Falls:

40.1 Empowerdex issued a certificate on 15 January 2018 based on the assumption that shares in Tshwarisano were held by black people. Sasol Oil was rated as a Level Three contributor with an ownership score of 24.81 and an overall score of 93.21.

40.2 Sasol Oil then instructed Empowerdex to disregard Golden Falls shares in Tshwarisano and issue a certificate dated 7 November 2018. The result was that there was no difference shown on Sasol Oil's rating which still rated as a Level Three Contributor with an ownership score of 24.36 and an overall score of 92.76 within a Level Three Contributor range of 90-95.

[41] This demonstrates that the Commission had misdirected itself in its conclusion that Sasol Oil had misrepresented its own BEE status.

[42] The Commission's argument that Empowerdex had calculated Sasol Oil's BEE score without interviewing a sample of its black shareholders does not hold water because the figures the Codes of Good Practice on Broad-Based Economic Empowerment of 2013 set objective measurement criteria which could not be obfuscated by any subjective views. The measurement in which Golden Falls is excluded speaks for itself.

FRONTING

[43] Section 1(c) of the Act defines fronting as the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person.

[44] Based on that definition the Commission contends that Sasol Oil turned a blind eye towards the existence of the Pref Share Agreement and that it was complacent to the fronting practice perpetuated by the agreement. The fallacy of this assumption has been discussed above with reference to the absence of a relationship between Sasol Oil and the purported advisor, Mr Peter Wingrove. Notably however the Commission does not suggest that Sasol Oil or Tshwarisano were parties to the Pref Share Agreement which was an effort by Awevest/ Golden Falls to raise funds to enable them to participate as part of Tshwarisano. To ascribe a fronting intent to Sasol Oil through an agreement to which it was not party to and which was concluded by independent parties is irrational.

AUDI ALTERAM PARTEM

- [45] Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, this is provided for in section 3(1) of PAJA. In its answering affidavit the Commission states that Sasol Oil was informed of the investigation into the allegations of breach and afforded an opportunity to respond in a letter dated 4 October 2017.
- [46] Whilst it cannot be disputed that the Commission appeared to be affording Sasol Oil an opportunity to make submissions, a closer examination of its letter dated 18 October 2018 does not support the Commission's statement in this regard.
- [47] In paragraph 2 of the said letter the Commission states unequivocally that it "has finalised its investigation" and goes on to say in paragraph 4 "having investigated the matter" the Commission "makes the following findings"
- [48] In paragraph 6 and continuing in the same vein the Commission says:
- "Given the above-mentioned findings, the Commission may pursue certain remedial steps". The latter statement seems to confirm the finality of the findings already made.*
- [49] If there is any doubt about the purpose of the letter and the interpretation of its contents, the conclusion in paragraph 7 dispels such doubt when the Commission clarifies that the purpose of the letter was "to notify you of the findings in respect of this complaint" after which it invites Sasol oil to respond. In light of the excerpts quoted above the ambiguity of the invitation is at best puzzling.
- [50] Despite the ambiguity Sasol Oil did respond. An examination of the contents of the Final Findings letter with the Commission's Findings however demonstrates that Sasol oil's responses went down like water off a duck's back in that they appear to have received no consideration at all. The Commission's findings in paragraph 6.1 to 6.10 and its threats in paragraphs 9.1 to 9.4 are word perfect copies of the corresponding paragraphs of the Commission's earlier Findings letter on 18 October 2018.
- [51] The manner in which the invitation was made and a close examination of the correspondence between Sasol Oil and the Commission lead to the conclusion that the Commission would appear to have been merely paying lip service in its invitation to Sasol Oil and that it was not acting in full compliance with section 6(2)(c) of PAJA and in terms of regulation 15(17) of the BEE regulations. This renders the process followed unfair.

ABUSE OF POWER BY THE COMMISSION

- [52] Regulation 15(17) of the Act provides:

"Any investigation conducted by the Commission shall be in accordance with its procedures that are in accordance with the Act, and conform to all the rules relating to fair administration of justice processes applicable to investigations".

- [53] Sasol Oil claims that the Commission acted outside its powers as contemplated in the Act and failed to observe the obligations imposed on it by regulation 15(17) more particularly with regard to the series of “recommendations” in its Final Findings letter which were beyond the Commission’s powers in that they were out of proportion to Ms Sangion’s unhappiness regarding the Prefshare Agreement which she concluded with the funders.
- [54] The recommendations were that Sasol Oil’s directors and senior executives undergo BEE training and that Sasol Oil undertake to abide by the BEE Act on the advice of the Commission and further that it publicly apologise for its role in the violation of the BEE Act. The most egregious of these recommendations was the recommendation that it contribute 10% of its annual turnover to a bursary fund. Counsel for the Commission was hard pressed when requested by the court to point to the source of the powers that the Commission appeared to have accorded itself.
- [55] I find that the Commission’s recommendations are reviewable in that the Commission was not authorised to make the recommendations within the meaning of section 6(2)(a)(i) and that the Commission threatened to exercise its statutory powers for an ulterior purpose of compelling Sasol Oil to adopt and implement its unlawful recommendations within the meaning of section 6(2)(e)(ii) of PAJA.

FINDINGS TIME-BARRED

- [56] Regulation 15(4)(g) provides:

“The Commission must within one (1) year of receipt of the complaint – (g) make a finding, with or without recommendations”.

Sasol Oil contends that the Commission’s findings are time-barred by the above regulation on the basis that the report was rendered outside the prescribed time limit.

- [57] The complaint by Ms Sangion was lodged with the Commission on 6 December 2016 and the final findings were issued on 7 October 2019.
- [58] The Commission submits that it notified the complainant of the need for more time and was permitted to do so in terms of regulation 15(15) of the BEE Regulations which reads as follows:
- “if the Commission is of the view that more time is warranted to conclude its process in respect of an investigation as contemplated in sub-regulation (8), the Commission must inform the complainant of the need to extend the time, the circumstances warranting a longer period, and the exact period required as an extension”.*
- [59] Sasol Oil contends that the investigation by the Commission was not initiated by it in terms of Regulation 15(8) as provided for in Regulation 15(15) and as such it is not subject to an extension in terms of that regulation.

- [60] Sasol Oil contends further that the last email on which the Commission relies was dated 12 July 2018 and that it sought a two months extension to September 2018 and that the email did not provide “the circumstances warranting a longer period” as required by regulation 15(15).
- [61] It is common cause that the Commission only made its final findings in October 2019 and as such fall foul of the provisions of 15(4)(g).
- [62] In the circumstances, I find that the Commission’s findings are reviewable in terms of section 6(2) of PAJA in that a mandatory and material condition prescribed by the empowering provision was not complied with within the meaning of section 6(2)(b) and that the findings themselves contravened regulation 15(4) of the BEE Regulations within the meaning of section 6(2)(f)(i).

CONCLUSION

- [63] Having discussed the grounds of review and the Commission’s responses thereto and taking into account the decisions specified in the notice of motion I find that it is the Commission’s decisions contained in the report dated 1 October 2019 that are sought to be reviewed and set aside.
- [64] In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[1] what constitutes and administrative action was succinctly summarised by Nugent JA as follows:
- “Administrative action means any decision of an administrative nature made...under an empowering provision [and] taken... by an organ of atate, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely effects the rights of any person and which has a direct external legal effect”.*
- [65] With the above understanding of an administrative action, and upon a proper reading of the Final Findings letter of 7 October 2019 and a consideration of the contents of the report dated 1 October 2019, I come to the conclusion that they are two sides of the same coin and cannot be viewed apart from each other.
- [66] On the facts before me, nothing impeded the Commission from providing Sasol Oil with the report after it was issued on 1 October 2019. Instead it communicated same through its letter of 7 October 2019.
- [67] To cry foul and raise it as a point in limine when it chose to communicate its own decisions in a convoluted manner cannot be justified.
- [68] In light of the above, I make the following order:

ORDER

[69] Having heard counsel for the parties, the following order is made:

69.1.1 The Commission's Sasol Oil dated 7 October 2019, including its 'finding' in paragraph 6 and 7, its ultimatum in paragraph 8 and 17, and its threats in paragraph 9, is reviewed, declared invalid and set aside.

69.2 The Commission is interdicted from

i. Making unlawful demands of Sasol Oil, and

ii. Threatening to invoke its powers against Sasol Oil if it does not comply with the Commission's unlawful demands

69.3 The Commission is ordered to pay Sasol Oil's costs including the costs of three counsel

SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 22 February 2022

Date of judgment: May 2022

Appearance

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[1]

[2005] 3 ALL SA 33 (SCA) at para 21

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