THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 264/2019

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

UNITED MANGANESE OF KALAHARI (PTY) LTD **RESPONDENT**

Neutral citation: *C:SARS v United Manganese of Kalahari (Pty) Ltd* (264/2019) [2020] ZASCA 16 (25 March 2020)

Coram: CACHALIA, WALLIS, MBHA, DAMBUZA and SCHIPPERS JJA

Heard: 13 March 2020

Delivered: 25 March 2020

Summary: Mineral and Petroleum Resources Royalty Act 28 of 2008 – royalty calculation based on gross sales determined in terms of s 6(2)*(b)*, read with s 6(3)*(b)* of the Royalty Act – gross sales to be determined without regard to any expenditure incurred in respect of transport, insurance and handling of mineral – meaning of 'without regard to any expenditure'.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Meyer J, sitting as court of first instance):

1 Paragraph 1 of the order of the High Court is altered to read as follows:

'1 The applicant is entitled to calculate its gross sales (in terms of subsections 6(2) and 6(3) of the Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act)) in respect of manganese transferred by it in the 2010 and 2011 years of assessment, by deducting:

1.1 any expenditure incurred by it in respect of transport, insurance and handling of the manganese after the manganese had been brought to the condition specified in Schedule 2 of the Royalty Act; as well as

1.2 any expenditure incurred by it in respect of transport, insurance and handling to effect the disposal of the manganese;

irrespective of whether, in the price charged by it to purchasers of manganese, any amount was separately specified for expenditure incurred by it in respect of transport, insurance and handling under either of paragraphs 1.1 or 1.2.'

2 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Cachalia, Mbha, Dambuza and Schippers JJA concurring)

[1] In exchange for the right to extract portion of South Africa's mineral wealth from our soil and dispose of it for their own profit, mining companies pay royalties to the National Revenue Fund in terms of s 2 of the Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act). The royalty payable is determined in accordance with the formula in s 4(2) of the Royalty Act. One of the elements in calculating the formula is the mining company's gross sales. These are to be determined in accordance with s 6 of the Royalty Act. This appeal concerns the proper method of determining a mining company's gross sales in accordance with that section as it stood in 2010 and 2011.

[2] The respondent, United Manganese of Kalahari (Pty) Ltd (UMK), is the fourth largest manganese miner in South Africa. It conducts its mining operations in the Northern Cape and sells manganese as an unrefined mineral resource both locally and overseas. In respect of local sales purchasers take delivery of the manganese at the mine and no issues arise in relation to such sales. Its sales to foreign purchasers are made on either an FOB[1] or CIF[2] basis. These sales give rise to the present dispute between UMK and the appellant, the Commissioner, South African Revenue Service (SARS).

[1] Free on board.
[2] Cost, insurance, freight.

[3] UMK rendered royalty returns to SARS in respect of the 2010 and 2011 tax years. In 2012 SARS commenced an audit of those returns during the course of which it appeared that UMK and SARS had different approaches to the determination of the amount of UMK's gross sales for the purpose of calculating the royalties due by UMK. In September 2016 UMK approached the Gauteng Division of the High Court, Pretoria, seeking declaratory relief in regard to the proper method of determining the amount of its gross sales. Meyer J granted a declaratory order and refused leave to appeal. Such leave was granted on application to this court.

[4] In its opposing affidavit, in argument before the high court, and in its heads of argument in this court, SARS argued that UMK's application was premature as the audit process had not yet been finalised. It contended that UMK should have awaited the outcome of that process and then pursued its internal remedies under the Tax Administration Act 28 of 2011, by way of objection and appeal against any assessment with which it did not agree. Alternatively, it contended that it was inappropriate for UMK to seek relief by way of a declaratory order. However, after the parties' attention was drawn to a recent judgment of this court[3] dealing with a similar argument, we were informed that SARS no longer persisted with these points and would confine its arguments to the legal issue raised by UMK concerning the proper interpretation of the relevant provisions of the Royalty Act.

THE DISPUTE

[3] *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd* [2019] ZASCA 163; [2019] JOL 46353 (SCA) paras 7-10.

[5] When UMK rendered its 2010 and 2011 returns, s 6 read in relevant part as follows:

'(2) Gross sales in respect of an unrefined mineral resource transferred─

(*a*) as mentioned in paragraph (*a*) of the definition of 'transfer' in section 1 in the condition specified in Schedule 2 for that mineral resource is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource …

…

(3)*(b)* For purposes of subsection (2), gross sales is determined without regard to any expenditure incurred in respect of transport, insurance and handling of an unrefined mineral resource after that mineral resource was brought to the condition specified in Schedule 2 for that mineral resource or any expenditure incurred in respect of transport, insurance and handling to effect the disposal of that mineral resource.'

[6] Some aspects of this were not in dispute. Thus, both parties correctly accepted that the expression 'received or accrued' in s 6(2)*(a)* bore the same meaning as the corresponding expression in the definition of 'gross income' in s 1 of the Income Tax Act 58 of 1962.[4] Accordingly gross sales included every amount actually received by UMK, or to which UMK became entitled, in each of the years with which we are concerned. UMK and SARS also agreed at what point the manganese ore was brought to the condition specified in Schedule 2 of the Royalty Act.[5]

[7] The focus then turned to the expression 'without regard to any expenditure incurred in respect of transport, insurance and handling' after the manganese ore was brought to the specified condition. The dispute related to the proper meaning and effect of that provision in determining UMK's gross sales for royalty purposes. By the end of the hearing in this

[4] *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 at 207-210; *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A).

[5] Schedule 2 dealt with the grade of the ore and its required and permitted chemical components.

court, the difference between the parties in that regard was narrow. SARS contended that where the price charged by UMK to its customers specified separate amounts for transport, insurance and handling (TIH costs) of the ore in arriving at the global price to be paid, the amounts so specified should be deducted in determining the amount of gross sales on which royalties would be paid. UMK said that it was irrelevant whether the TIH costs were specified as separate line items in the determination of the price. What mattered was not the price charged to customers, but whether such costs had in fact been incurred by UMK in either of the circumstances described in s 6(3)*(b)*. If they had been incurred, then a deduction fell to be made for such costs in calculating its gross sales for royalty purposes.

DISCUSSION

[8] It is unnecessary to rehearse the established approach to the interpretation of statutes set out in *Endumeni*[6] and approved by the Constitutional Court in *Big Five Duty Free*.[7] It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute.[8] The inevitable point of departure is the language used in the provision under consideration.

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[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 4 SA 593 (SCA) para 18.
[7] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29.
[8] *Commissioner for the South African Revenue Services v Bosch and Another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 9.

[9] No difficulty arose in determining the amounts received or accrued by UMK from sales of manganese in the condition specified in Schedule 2 to the Royalty Act.[9] This was its income from disposing of the minerals it extracted. The problem lay with the requirement to 'have regard to any expenditure incurred in respect of transport, insurance and handling' of the mineral. An immediate difficulty arose because TIH costs are expense items, not part of the receipts or accruals constituting gross sales. Receipts and accruals and expenditure on TIH costs fell on opposite sides of the ledger. Despite this, s 6(3)*(b)* directed the taxpayer to determine its gross sales *without* regard to these three items of expenditure. This was not optional. It was part of the section's prescription of the manner in which gross sales were to be determined for royalty purposes. It could not be disregarded. How then was the taxpayer to have regard to TIH costs in determining its gross sales?

[10] The answer, as SARS accepted, was that, when disregarding the specified expenditure, the taxpayer was obliged to make a deduction from the receipts and accruals constituting its gross sales. Mr du Plessis, who deposed to the answering affidavit on SARS' behalf,[10] said:

'The words 'without regard to' must correctly be understood to mean that a taxpayer must disregard any costs actually spent after the point at which the mineral reaches the condition specified. In other words, if the taxpayer spent any money on transport, insurance or handling *after* the point of condition specified, it is required to disregard, or not take into account, such costs in calculating gross sales.'

[11] UMK's domestic sales were on FOR[11] terms. Purchasers collected the manganese from the mine and paid for it to be transferred from there,

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[9] Schedule 2 deals with unrefined minerals and specifies in relation to manganese that this is ore with a manganese content between 37% and 48% and a silicon and aluminium content of less than 11%.
[10] Vol 4, p 523, para 15.
[11] Free on rail.

whether by rail or road. No TIH costs were incurred in relation to such sales. The position was different in regard to international sales. UMK incurred expenditure in relation to transport, insurance and handling of the manganese because these sales were on either FOB or CIF terms. In respect of FOB sales, UMK incurred the costs of arranging for the transport of the manganese ore by road or rail to the ports of Durban or Port Elizabeth and for it to be loaded onto ships in accordance with the instructions of the purchasers. In the case of CIF sales, it was obliged to secure appropriate vessels for the carriage of the cargo to its destination, either by booking space on a bulk carrier or by way of the charter market; to pay the freight or charter hire; to insure the cargo whilst in transit; and discharge it at its destination. UMK sought to disregard these TIH costs in determining its gross sales for royalty purposes, by deducting them from the amounts it received or that accrued to it in the years in question.

[12] SARS accepted that UMK incurred expenditure in respect of TIH costs. Purely linguistically therefore, it was difficult to understand on what basis it contended that UMK was not entitled to deduct the TIH costs it had actually incurred from its receipts and accruals. SARS said that the expression 'without regard to' meant that they should be 'disregarded' by deducting them from the receipts and accruals. That being so, it seemed to follow naturally from the words of s 6(3)*(b)* that the TIH costs fell to be deducted from UMK's receipts and accruals.

[13] SARS' stance was described by Mr du Plessis in the passage from his affidavit immediately following that quoted in para [10]. It read:

'If, of course the taxpayer did not actually include such costs in the computation of gross sales, there is no need for a deduction of these expenses. In other words, if the sales price received by the Applicant from its customers was simply a market price

and was not based upon the costs, which were incurred in respect of transport, insurance and handling, then such costs may not be deducted by the Applicant from its gross sales.'

Later in his affidavit, Mr du Plessis said:

'I point out that the relevant question is not whether the Applicant actually incurred the costs, but rather whether the Applicant in fact incorporated those costs into the gross sale price or not. … [T]he amount spent is irrelevant unless considered in relation to the condition specified and whether the amount was incorporated into the gross sale price as contemplated by the Royalty Act. Any expenditure for transport, handling and insurance after the condition specified point must be disregarded for purposes of calculating gross sales in terms of section 6(3) of the Royalty Act. To the extent that the sales price, and thus gross revenue, has not been determined by having regard to such costs, there is nothing to disregard.'

[14] It is impossible to find any basis for this qualification in the language of s 6(3)*(b)*. The section said that 'any expenditure' incurred in respect of TIH costs should be disregarded. It said nothing about the manner in which UMK should determine the prices to be paid by its customers, much less did it require that those prices should specify separately amounts to be charged for transport, insurance and handling of the mineral. All it said was that expenditure incurred in respect of TIH costs should be disregarded. That wording may have been clumsy and inapt to perform the intended function, because it required expenditure to be disregarded when dealing with receipts and accruals, but once it was accepted, as SARS did, that this involved deducting the expenditure in question from the receipts and accruals, any difficulty arising from the wording evaporated.

[15] SARS' approach was not a sensible construction of the section. In essence it was this. If UMK charged its customer in a CIF sale $6.00 per ton, and specified in the contract that $1 of the price reflected the cost of

transport from the mine to the port; freight or charter hire for the voyage; insurance; and loading and discharge costs, then UMK's gross sales for royalty purposes on that contract would be made at $5 per ton. If it simply charged $6 per ton and incurred expenditure of $1 per ton on those self-same costs, its gross sales on the contract would be $6 per ton, not because it had not incurred the expenditure, but because it had not specified it separately in its sales contract. No conceivable reason existed for making that distinction.

[16] A consideration of the context of the Royalty Act and its provisions in regard to payment of royalties points decisively away from the construction advanced by SARS. A brief word about context in regard to statutory interpretation may not be out of place in the light of a recent suggestion in a minority judgment that:

'Context is fact-specific and can be applied in the interpretation of contracts and like documents, but not of statutes'.[12]

The judgment said that *Endumeni* had suggested,[13] in reliance on a passage from *KPMG v Securefin*,[14] that there is 'no distinction in the interpretation of contracts, statutes and other documents'. That misconstrues what was said in *Endumeni*. It summarised the general approach to the interpretation of documents. The footnote reference to *Securefin* was to the proposition that the rules of admissibility of evidence in the interpretation of documents do not change depending on the nature of the document, whether statute, contract or patent. That was cited because, if common evidential rules apply to the interpretation of all documents, it logically follows that the basic approach to interpretation

[12] In the minority judgment in *Commissioner of the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Ltd* [2018] ZASCA 66; 80 SATC 33 para 31.
[13] *Endumeni* para 18, fn 14.
[14] *KPMG Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.

will not vary depending on whether they are contracts, statutes or other documents. The latter proposition was not novel. In formulating his 'golden rule' of interpretation in *Gray v Pearson*,[15] a case about the construction of a will, Lord Wensleydale said the rule applied in 'construing wills, and indeed statutes and all written instruments'. Context is fundamental in approaching the interpretation of all written instruments, but there are differences in context with different documents including the nature of the document itself. Legislation is different in character from contracts, and a contract formulated carefully by lawyers after lengthy negotiations will differ from one scribbled by laypeople on a page torn from a notebook.

[17] The difference in the genesis of statutes and contracts provides a different context for their interpretation. Statutes undoubtedly have a context that may be highly relevant to their interpretation. In the first instance there is the injunction in s 39(2) of the Constitution that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment.[16] Third, where legislation flows from a commission of enquiry,[17] or the establishment of a specialised drafting committee,[18] reference to their reports is permissible and may provide helpful context. Fourth, the legislative history may provide useful background in resolving interpretational uncertainty.[19] Finally, the general factual background to the statute, such as the nature of its concerns, the social

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[15] *Gray and Others v Pearson and Others* (1857) HL Cas 61.
[16] *Hoban v ABSA Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) para 20.
[17] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 562D-563B.
[18] As occurred with the Labour Relations Act 66 of 1995. See Explanatory Memorandum by the Ministerial Task Team 1995 *ILJ* 278 and *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC) para 94, fns 100- 102.
[19] *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A) at 526I-527B.

purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation. It follows that context is as important in construing statutes as it is in construing contracts or other documents and the contrary suggestion is incorrect.[20] In this regard, since drafting this, I have had the advantage of seeing in advance a copy of Swain JA's judgment in *Telkom SA SOC Limited v The Commissioner for the South African Revenue Service* [2020] ZASCA 19, which is to be delivered today, and agree with his analysis of *Daikin* in paras 10 to 17 thereof.

[18] The background to the Royalty Act is that South Africa is a country with vast mineral wealth, which is exploited primarily by private enterprise in a heavily regulated environment. The mining industry has always formed a major part of the South African economy. Royalties are payable in return for the right to exploit these mineral resources. As emerges from the two schedules to the Royalty Act, while some commodities are refined in this country, others are exported after only limited beneficiation. Most of this is shipped in bulk.[21] The sample contracts put up by UMK, which were not suggested to be unrepresentative of contracts for the sale of bulk minerals, reflect trading denominated in an international currency, the US Dollar.[22] These

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[20] See M Wallis 'Interpretation Before and After *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)' (2019) PER/PELJ (22) 1 at 17-20.

[21] See the description of iron ore exports at Saldanha in *Transnet Ltd v The Owner of the Alina II* [2011] ZASCA 129; 2011 (6) SA 206 (SCA) para 2. As to bulk carriage of grain shipments see *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others* [2019] ZASCA 67; [209] 3 All SA 321 (SCA).There are specialised terminals for the loading of bulk cargoes including a variety of minerals at Durban, Saldanha and Richards Bay.

[22] The South African Mineral Industry Report 2017/2018 published by the Department of Mineral Affairs Table 12, p26 reflects most mineral prices, including that for manganese, as being denominated in dollars, the principal international trading currency. See https://www.dmr.gov.za/LinkClick.aspx?fileticket=PClz-cRGkyg%3d&portalid=0.

contracts were concluded on FOB or CIF terms and there is no reason not to accept that this would be common practice. The choice of one or the other allocates responsibility for transporting the mineral from country of origin to the country of the purchaser. Prices are fixed in dollars per ton FOB or CIF. Under such contracts the purchaser will not be interested in the TIH costs to be incurred by the seller, but will want to fix a global price to be paid for the minerals up to the point of delivery.

[19] This very basic information must have been known to those responsible for this legislation, in particular the Department of Finance, SARS and the Department of Minerals and Energy Affairs. The annual South African Mineral Industry reports issued by the Department of Mineral Affairs demonstrate that the Department is thoroughly familiar with all mining activities and the basis upon which trade in minerals occurs. It is proper then to approach the interpretation of s 6 on the basis that those responsible for drafting the legislation did so in the light of their knowledge of common, if not invariable, trading patterns. It can be accepted that they were aware that many contracts for the sale of minerals would be concluded at fixed prices on FOB or CIF terms, without the cost of transport, insurance and handling being separately specified. There is nothing to indicate why then, in providing that expenditure on TIH costs should be disregarded in determining the amount of gross sales, they would have in mind only those contracts – potentially very few in number – in which the price was divided into an amount for the mineral in question and separate amounts for transport, insurance and handling. No sensible reason existed, and none has been advanced in the affidavits or argument, for distinguishing between the two situations.

[20] The purpose of the Royalty Act is to secure the payment of royalties on the value of minerals extracted. Even if there are situations in which mineral extraction and transfer to a third party, which is the event attracting the royalty, occurs without incurring TIH costs, in very many if not the vast majority of cases, such costs are incurred in order to dispose of the minerals. The evident purpose of s 6(3)*(b)* was that the extractor would not be burdened by paying royalties on amounts expended on TIH costs and recovered as part of the price paid for the minerals. On SARS' case that is what happens when these costs are specified as separate components of the price of the mineral. It has provided no explanation for interpreting the section as meaning that where the same minerals are sold at the same global price, without a separate specification of TIH costs as components of the price, those costs should not be deducted.

[21] Lastly, SARS' contentions disregard the statutory history. In its original form the section said that gross sales should be determined 'without regard to any amount received or accrued for the transport, insurance and handling' of the mineral. That made little sense because those were not revenue items and hence, they would not be received or accrued in the same way as revenue items. They were expenses that would be incurred. The section was amended to the wording before us with effect from March 2010. Since then it has been further amended in 2019 by the deletion of the words 'without regard to expenditure incurred' and their replacement by 'after deducting any expenditure actually incurred'. In argument SARS conceded that the effect of this was that all TIH costs incurred would be deductible in determining the amount of gross sales, irrespective of whether they had been separately specified as components of the price.

[22] It is illuminating to consider the explanatory memorandum that accompanied the Bill embodying this amendment dated 16 July 2018. It read:

'The proposed amendment in subsection (3)*(b)* seeks to clarify the original policy intent. When the Mineral and Petroleum Resource Royalty Act was introduced in 2008, the policy intention was clear regarding the definition of the tax base. The tax base was generally defined both in the legislation and the explanatory memorandum as gross sales excluding the costs of transportation, insurance and handling of the final product or mineral between the seller and the buyer as this would unintentionally increase gross sales leading to a higher royalty tax payable. In 2009, additional clarification was made in s 6(3) of the Mineral and Petroleum Resource Royalty Act dealing with gross sales. The 2009 changes resulted in the policy intent regarding the definition of gross sales not to be clearly expressed in the text of the legislative provision even though the policy intent was clear in the explanatory memorandum.

In order to give certainty regarding policy intent, it is proposed that the meaning of gross sales be clarified in the legislation to take into account the policy rationale which is explained when the Mineral and Petroleum Resource Royalty Act was introduced by reverting back to the original wording prior to the 2009 amendment.'

[23] The Bill was not finalised in 2018 and when it returned to Parliament it embodied the amendments described in para [20]. The explanatory memorandum dated 17 January 2019, said:

'These amendments seek to provide clarity to both taxpayers and SARS regarding the meaning of the tax base for purposes of calculating the royalty (the tax base is gross sales after deducting expenditure actually incurred in respect of transport, insurance and handling of the disposed unrefined mineral resource or the disposed refined mineral resource).'

[24] Where Parliament has clearly shown by later amending legislation what was meant by the earlier legislation under amendment and the amending legislation is passed explicitly for the purpose of clarifying that meaning, it is permissible as an aid in interpretation to

have regard to the meaning ascribed by the later legislation to its predecessor.[23] That is not to say that the court is not exercising its proper function of interpreting the legislation. Counsel for SARS correctly said that if the prior version of s 6(3)*(b)* could not bear the meaning ascribed to it in the explanatory memoranda quoted above then it was not open to this court to remedy the legislature's earlier deficiencies. However, given that, without referring to the memoranda, I have arrived at the conclusion that the section must bear that meaning, the subsequent amendment lends force to that conclusion.

[25] For those reasons the appeal must fail. However, there was a difficulty with the wording of the declaratory order granted by the high court and it is necessary to alter it to reflect correctly the court's finding. In the result the following order is granted:

'1 Paragraph 1 of the order of the High Court is altered to read as follows:

'1 The applicant is entitled to calculate its gross sales (in terms of subsections 6(2) and 6(3) of the Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act)) in respect of manganese transferred by it in the 2010 and 2011 years of assessment, by deducting:

1.1 any expenditure incurred by it in respect of transport, insurance and handling of the manganese after the manganese had been brought to the condition specified in Schedule 2 of the Royalty Act; as well as

1.2 any expenditure incurred by it in respect of transport, insurance and handling to effect the disposal of the manganese;

irrespective of whether, in the price charged by it to purchasers of manganese, any amount was separately specified for expenditure incurred

[23] *Patel v Minister of the Interior and Another* 1955 (2) SA 485 (A) at 493 A-D, approved and followed in *National Education Health and Allied Workers' Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC) para 66.

by it in respect of transport, insurance and handling under either of paragraphs 1.1 or 1.2.'

2 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	C D Loxton SC (with him N Rajab-Budlender)
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