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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 2121/2016

In the matter between:

JAMES M GOODMAN Applicant

and

THE NATIONAL HORSERACING AUTHORITY OF SOUTHERN AFRICA First Respondent

JONATHAN WITTS-HEWISON N.O. Second Respondent

JUDGMENT

Vahed J:

[1] The applicant is a licenced racehorse trainer. He is licenced by the first respondent which is a voluntary association incorporated in terms of a constitution and under whose authority, horseracing, *inter alia*, is regulated in South Africa.

[2] On Friday 10 October 2014 night racing was held at the Greyville Racecourse in Durban. The second race at that meeting was run at 18h35. The horse, Aldric, trained by the applicant, ran in and won the second race. At approximately 18h53 urine samples were collected from Aldric and packaged for forwarding to the first respondent's laboratory in Johannesburg.

[3] On 9 December 2014 the applicant acknowledged receipt of a letter addressed to him by the first respondent, dated 4 December 2014, advising him, *inter alia*, that Aldric's urine had tested positive for Caffeine, a prohibited substance.

[4] In accordance with the first respondent's rules the applicant was advised that a reference sample of Aldric's urine, collected at the same time as the sample that was tested, was available for dispatch to a separate laboratory of the applicant's choice (i.e. one of three nominated in the letter).

[5] On 18 December 2014 the applicant advised the first respondent that he did not require the reference sample to be sent to a separate laboratory for confirmation but, (in the relevant email correspondence) required "... the workings from [the laboratory] regarding the workings (sic) in finding the presence of Caffeine in the said specimen...".

[6] On 23 December 2014 the first respondent acknowledged that the applicant did not require the reference sample to be sent for confirmation but required an unequivocal response from the applicant who, on 7 January 2015 advised that he firstly accepted the finding of the presence of Caffeine in the said specimen and also reaffirmed his decision that he did not require the reference specimen to be sent to any other laboratory.

[7] On 21 January 2015 the applicant was advised that the first respondent had, in accordance with its rules, decided to conduct a formal enquiry into the circumstances surrounding the presence of the prohibited substance and advised him further of the possibility, as the enquiry unfolded, that the applicant "... may be charged in terms of The National Horseracing Authority Rules pertaining to

prohibited substances in the horses participating in races". Although then that letter said that the enquiry would commence on 11 February 2015 at the first respondent's premises at the Greyville Racecourse in Durban it, for a number of reasons did not commence until 9 June 2015. The letter advising the applicant of the decision to hold the said enquiry had annexed to it a document titled *Analysis of Equine Urine* which indicated that it had been signed off by Doctor S.S. de Kock who described himself as a laboratory director and Doctor G.M Rosemann who described himself as assistant laboratory director, and which was dated 2 December 2014.

[8] As I have indicated the enquiry began on 9 June 2015. It continued thereafter again on 4 September 2015, and then continued and concluded on 13 November 2015 where, at the conclusion of the evidence and after a brief adjournment to confer, the three members of the panel that constituted the enquiry returned a finding of guilty in respect of charges that had been earlier preferred against the applicant. Sometime later the enquiry board handed down a "judgment" titled *Finding of the Enquiry Board*. That document is undated and it is not clear when it was made available to the parties, and in particular to the applicant. At the conclusion of the "judgment" the enquiry board imposed a fine of R80 000-00 on the applicant and in addition directed him to pay a contribution of R35 000-00 towards the first respondent's costs incurred in connection with the enquiry proceedings and a further amount of R10 500-00 relating to the costs incurred in having a reference sample of Aldric's urine analysed by a laboratory of the Hong Kong Jockey Club. In total the applicant was directed to pay the amounts totalling R125 500-00 to the first respondent. In addition, Aldric was disqualified as being the winner of race number 2 run at Greyville Racecourse on 10 October 2014 and the winning stake relating to that race was declared forfeit.

[9] As the applicant was not legally represented at the enquiry the proceedings were reviewed by the first respondent's Inquiry Review Board which, confirmed the findings of guilt, confirmed the imposition of a fine of R80 000-00 but set aside the remaining penalties imposed upon the applicant.

[10] Remaining aggrieved at what has happened to him the applicant then approached this court on Notice of Motion to review and set aside the proceedings and in particular to have the finding and the penalty reversed. In addition, and apart from the merits of his review, the applicant takes issue with the penalty imposed.

[11] In his founding affidavit the applicant attacks the conviction on three separate grounds. These are:-

a) A reasonable apprehension of bias on the part of the chairman of the enquiry board;
b) Procedural unfairness; and
c) That the decision was not rationally justifiable.

[12] In addition, as indicated, the applicant attacks the sentence imposed upon him, that attack being without prejudice to his overall submission that the conviction ought to be set aside.

[13] I will deal firstly with the law applicable to reviews of this nature. It is not as yet been settled whether the promotion of Administrative Justice Act, 2000 applies to the actions of a domestic tribunal such as what occurred here. That much appears to be common cause between the parties. It also appears to be common cause that the approach of the majority in *National Horseracing Authority v Naidoo* 2010 (3) SA 182 (NPD) is the correct approach to be adopted in this case. There

Wallis J indicated that he preferred to decide *Naidoo* on the broader basis that the respondent was entitled to challenge the decision of the board of enquiry by way of a rationality review under PAJA. He did so without expressly deciding that that was the legal position and said as much in the judgment. According to him, that approach was adopted because it was most favourable to the respondent. Levinson DJP (with whom Kruger J concurred) did not agree with that approach:

> "Prima facie it seems to me that the weight of legal authority in South Africa favours the view that the quartet of Jockey Club cases is still applicable and that the Constitution and PAJA did not have any impact on this. Any change in the law, particularly one that classifies the disciplinary powers of the appellant as being the exercise of public powers and therefore administrative action under the umbrella of PAJA would in my view result in a seismic shift in the state of the law, particularly as it affects the appellant's activities".

[14] In paragraph 11 of his judgment in *Naidoo* Levinson DJP went on to say:-

> "In these circumstances it seems to me taking the cue from counsel's submission in the *Turner* case, supra, that it would not be inappropriate to introduce a further ingredient into the fundamental principles of justice concept and that is the one of rationality. This would particularly be apposite in a complex case where a reviewing court would be in exactly the same position to assess the objective evidence in the case and would be able to conclude that the decision made is rational in relation to the evidence laid before the tribunal. In my opinion this would be a development of the common law which would be wholly in accordance with the values encompassed in the Bill of Rights".

[15] The quartet of jockey-club cases referred to are *Marlin v Durban Turf Club and others* 1942 AD 112, *Jockey Club of South Africa and others v Feldman* 1942

AD 340, *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) and *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

[16] I shall return to one or more of these decisions when dealing with the individual grounds of review but for present purposes proceed to deal with this case on the basis set out by Levinson DJP in *Naidoo*.

[17] I deal firstly with the question of apparent bias. The second respondent is the chairman of the board of enquiry which dealt with this matter. At the commencement of the proceedings the applicant asked the second respondent to recuse himself and he refused that request. However, some context must be given to this aspect.

[18] As I indicated earlier the applicant was not legally represented at the enquiry. However prior to the enquiry commencing he was assisted by attorney Bloomberg, a well-known attorney in horseracing circles and someone whom the affidavits described as being well-known to the first respondent. On 9 June 2015 Bloomberg addressed a letter to the first respondent's chairman setting out reasons why it was undesirable for the second respondent to be the chairman of this particular enquiry. The reasons underpinning that request were that the second respondent has been a director on the board of the second respondent for many years and was a past chairman of the first respondent. In addition where, as in this case, Boards of Inquiry are conducted without legal representation being present, the entire process is reviewed by an Inquiry Review Board, the panel of which is chaired by the second respondent. In his letter to the first respondent's chairman

Bloomberg also pointed out that in previous matters the second respondent had been asked to recuse himself which had consistently been refused.

[19] When the enquiry began the applicant again moved for the second respondent's recusal on the basis of a perception of bias because of his perceived ability to influence not only the Inquiry Board, but also, at some later stage, the Inquiry Review Board.

[20] In refusing to recuse himself the record reveals that the second respondent said the following:-

> "I also considered the position in regard to your concerns arising from the fact that I sit on the enquiry review board, I am satisfied that that is not a basis for and there is no need for me to recuse myself by virtue of the fact that I sit on the enquiry review board. I do not participate in the review board decisions which I may be involved and I don't think there is any basis on which I can properly be expected to recuse myself. So I will not be recusing myself. If a can continue then where we left off Mr Goodman?".

[21] In *Ndlovu v Minister of Home Affairs* 2011 (2) SA 621 (KZD) Wallis J pointed out that the law with regard to applications for recusal is now well settled. In making that statement he was referring to a trilogy of cases in the Constitutional Court: *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC), *South African Commercial Catering and Allied Workers Union and others v Irvin and Johnson Limited* 2000 (3) SA 705 (CC) and *Bernert v Absa Bank Limited* 2011 (3) SA 92 (CC).

[22] In paragraph 21 of *Ndlovu* Wallis J summarised the position as follows:-

> "The correct approach to an application for a recusal is objective, and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. Two factors are of fundamental importance in this regard. The first is the presumption of impartiality, arising from the judge's oath of office, requiring him or her to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law, and judges' ability by virtue of their training and experience, to put on one side any irrelevant matter or predisposition that they may have in regard to a case. The second is the double requirement of reasonableness, in that both the person who apprehends bias and the apprehension itself must be reasonable."

[23] The applicant submits that in the present matter a reasonable, objective and informed person would on the facts reasonably apprehend that the second respondent would not bring an impartial mind to bear on the adjudication of the case. The "correct facts" are that the second respondent, as chairman of the enquiry, was at the time a director of the first respondent (which was the effective prosecuting authority once a charge was preferred) and had in fact been a past chairman of the first respondent. Also, at the time of the commencement of the enquiry the second respondent was chairman of the Review Board which body was constituted by the first respondent to review the decisions of Inquiry Boards as constituted by the first respondent. All this, it is submitted, demonstrates that the second respondent had for many years, and continued to be, intimately associated with the first respondent in both its executive functions and its quasi-judicial disciplinary functions. The apprehension of bias, so the submission went on, based on these facts was not only perceived by the applicant but also Bloomberg in the letter dealt with earlier.

[24] It was submitted further that the second respondent, being so involved in all aspects of the first respondent's functions, would not be perceived to be someone of unquestionable independence and impartiality by reasonable, objective and informed persons knowing the facts and background of the second respondent. It is submitted further that such a person would reasonably apprehend that the second respondent would not bring an impartial mind to bear on the adjudication of the case. It is appropriate at this stage to perhaps restate the obvious: the case is not about whether the second respondent is indeed someone of unquestionable independence and impartiality and whether he is indeed not capable of bringing an impartial mind to bear on the adjudication of the case that was before him. It is all about the perception held by the applicant and whether such perception of bias was reasonable in all the circumstances.

[25] Relying on *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinocehet Ugarte* (2) [1999] 1 ALL ER 577, Mr Shepstone, who appeared for the applicant, submitted that the second respondent fell foul on both bases of the principle as set out in that case:

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suite and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. The second type of case is not strictly speaking in application of the

> principle that a man must not be a judge in his own cause, since the judge will not normally be himself benefitting, but providing a benefit for another or by failing to be impartial."

[26] In advancing the case based on apparent bias the applicant also relied upon an appeal that served before the appeal board of the British Horseracing Authority (referred to in the applicant's Heads of Argument as the *Appeal Board Reasons regarding Jim Best/ 1 June 2016*). The relevant report, being the reasons for the appeal board's decision, were annexed to counsel's Heads of Argument, that document having been sourced via an internet search (http://www.britishhorseracing.com/press_releases/appeal-board-reasons-regarding-jim-best (accessed on 7 November 2016)) I shall refer to this as "the Jim Best appeal".

[27] The Jim Best appeal was decided by the British Horseracing Authority appeal board by accepting as sufficient "... an appearance of bias within the meaning attributed to that phrase in *Porter v Magill* [2001] UKHL 67...".

[28] In amplification of those submissions I was referred, during argument, by Mr Shepstone, to an article that appeared in the Law Society Gazette of 9 February 2012: *Nicholas Dobson – Automatic Disqualification and Apparent Bias* (https://www.lawgazette.co.uk/law/automatic-disqualification-and-apparent-bias-/ (accessed on 7 February 2017)):

> "Two jurisprudential strands were brought together by the Court of Appeal on 19 October 2011 when determining a challenge brought by Darsho Kaur, a student member of the Institute of Legal Executives (ILEX).

Ms Kaur contended that decisions made by both the disciplinary and appeal tribunals of ILEX that she had cheated in examinations were tainted by apparent bias and in breach of natural justice. This was because an ILEX Council member and director had sat on the disciplinary tribunal (DT) and the vice-president of ILEX had been on the appeal tribunal (IAT). As part of the governance of ILEX they had therefore been acting as judges in their own cause (ie that of ILEX). Kaur's application was successful in that the orders of both the DT and the IAT were quashed (see *R (Kaur) v Institute of Legal Executives Appeal Tribunal and another* [2011] EWCA Civ 1168). The substantive judgment was given by Rix LJ with which Sullivan LJ and Black LJ agreed.

The modern law of apparent bias was settled by Lord Hope in *Porter v Magill* [2001] UKHL 67, where Lord Hope indicated that the 'question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. However, before *Porter* the *House of Lords (in R v Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet)* [2000] 1 AC 119) held that Lord Hoffman had been automatically disqualified from sitting on the House of Lords judicial committee when hearing *Pinochet No 1* because he was an unpaid director of a subsidiary of Amnesty International when the latter had intervened as a party in the proceedings. Although Lord Hoffman had no personal interest in the case, both Amnesty International and its subsidiary were parts of a movement working towards the same goals with an interest in the outcome of the proceedings. The House therefore applied the doctrine of 'automatic disqualification' on the basis that no one should be a judge in his own cause.

In a subsequent case (*Davidson v Scottish Ministers* [2004] UKHL 34) Lord Bingham remarked that what '...disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment'. For: 'In maintaining the confidence of the parties and the public in the integrity of the judicial process, it is necessary that judicial tribunals should be independent and impartial, and also that they should appear to be so'. The judge must therefore '...be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so'.

> Lord Hope subsequently remarked in *Meerabux v The Attorney General of Belize* [2005] UKPC 12 that, if the House of Lords had felt able to apply the apparent bias test in the Pinochet case 'it is unlikely that it would have found it necessary to find a solution to the problems... by applying the automatic disqualification rule'. Rix LJ in the present case was consequently 'somewhat sceptical' that apparent bias and 'automatic disqualification' (per *Pinochet*) 'remain to this day separate doctrines'. For he found force in Lord Hope's *Meerabux* indication that if the *Porter v Magill* development had been available to the House of Lords in *Pinochet* they would have turned more naturally to that doctrine. Rix LJ therefore thought that it may be possible in the present case to see the two doctrines '...as two strands of a single overarching requirement: that judges should not sit or should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court), that the tribunal could be biased'."

[29] Mr Beckerling SC, who appeared for the first respondent, contended that the applicant's point relating to apparent bias was misconceived for a number of reasons. Firstly he contended that because the applicant also mistakenly thought that the second respondent had chaired a previous enquiry involving the applicant; that when that factor turned out not to be true that considerably weakened his application for recusal as described earlier in this judgment. In addition Mr Beckerling also contended that the reliance on the Jim Best appeal and on the references to *Porter v Magill* were misplaced because those arguments were not proffered at the enquiry so as to enable the second respondent to deal with them. In addition he also argued that it did not appear that *Porter v Magill* had been referred to in any South African authority and therefore had not been pronounced upon in our Courts.

[30] Mr Beckerling also correctly referred me to clause 18.3.1 of the first respondent's Constitution which, contractually, is binding upon the applicant. That

clause stipulates that the first respondent's National Board has the sole discretion to appoint members of an enquiry board and "... shall be entitled to exercise this power of appointment... by appointing one or more of its number as a member or members of an enquiry board...". He continued by submitting that the second respondent was, therefore, under no obligation to recuse himself as chairperson because of his position on the National Board and that the first respondent's Constitution expressly authorised the second respondent so to sit. In this regard Mr Beckerling reinforced his submission by reference to a short passage in *Turner's* case. I too wish to refer to Turners case but in a more expanded reference including the passage referred to by Mr Beckerling:

> "In *Marlin v Durban Turf Club and Others*, 1942 AD 122, TINDALL, J.A., at pp. 125 - 6 examined what the "principles of natural justice" - an expression borrowed from the English Courts - comprehended, and came to the conclusion that the expression,
>
> > "when applied to the procedure of tribunals such as those just mentioned, seems to me merely a compendious (but somewhat obscure) way of saying that such tribunals must observe certain fundamental principles of fairness which underlie our system of law as well as the English law. Some of these principles were stated, in relation to tribunals created by statute, by INNES, C.J., in *Dabner v South African Railways*, 1920 AD 583, in these terms:
> >
> > > 'Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned: these parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartially discharged'."
>
> At pp. 126 - 7 of the report the learned Judge of Appeal observed, however, that the test of fundamental fairness,
>
> > "must be applied with due regard to the nature of the tribunal or adjudicating body and the agreement, if any, which may exist between the persons affected".
>
> It is clear, I think, that the reference to "the nature of the tribunal", in its context in the passage cited, is a reference to the nature of the tribunal's constitution, i.e. according to whether it was created by statute or by contract. In the case of a

statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. (*Maclean v Workers' Union*, (1929) 1 Ch.D. 602 at p. 623). The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in *Mullin (Pty.) Ltd.* v *Benade Ltd.*, 1952 (1) SA 211 (AD) at pp. 214 - 5, and the authorities there cited. The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified. (*Marlin's* case, *supra* at pp. 125 - 130).

Though the effect of the respondent's rules is that a steward may, contrary to the fundamental principles of justice, function both as witness and as judge, and is not disqualified from adjudicating, though biassed against the person charged by reason of his own observations, as long as he keeps an open mind, ready to be persuaded to a conclusion contrary to that which his own observations led him to believe (*Marlin's* case, *supra* at pp. 124 - 5), it was common cause that no other requirement of the fundamental principles of justice has been expressly excluded by the respondent's rules.

What the fundamental principles of justice are which underlie our system of law, and which are to be read as tacitly included in the respondent's rules, have never been exhaustively defined and are not altogether clear. In *Russell v Duke of Norfolk and Others*, (1949) 1 All E.R. 109, Lord TUCKER said at p. 118 that -

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing

his evidence and of correcting or contradicting any prejudicial statement or allegation made against him (*Marlin's* case, *supra* at p. 126; *Bekker v Western Province Sports Club (Inc.)*, 1972 (3) SA 803 (C) at p. 811). The tribunal is required to listen fairly to both sides and to observe "the principles of fair play" (*Marlin's* case, *supra* at pp. 126 and 128). In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially (*Dabner v SA Railways and Harbours*, 1920 AD 583 at p. 589). They require also that the tribunal's finding of the facts on which its decision is to be based shall be "fair and *bona fide" (Jockey Club of S.A.* v *Transvaal Racing Club, supra* at p. 450). It is, in other words, "under an obligation to act honestly and in good faith (*Maclean v Workers' Union, supra* at p. 623)."

[31] In my view the argument that the second respondent occupied positions that were potentially conflicting is unassailable. He ought to have recused himself. However, in addition, the perception of bias held by the applicant was perfectly reasonable on any analysis. On this ground alone the case falls to be decided for the applicant.

[32] However, and if I am wrong on the point relating to the recusal of the second respondent, I am of the view that the proceedings conducted by the second respondent were manifestly procedurally unfair. A causal reading of the record demonstrates that there was no structure whatsoever to the proceedings. Given that the applicant appeared in person it was, in my view, incumbent upon the second respondent to advise him of the procedure that was going to be followed. He did not do so.

[33] In addition, certain of the laboratory documents requested by the applicant were denied him by the second respondent. That ultimately led, according to the

applicant, to his expert, Professor Tobin, being hamstrung in his testimony. In my view, the test is not ultimately whether evidentially the document which was refused would have resulted in a finding favourable to Mr Goodman; the test is whether on the face of it procedural fairness was evident. In my view it was not.

[34] I also find it significant that when Professor Tobin testified he was denied the opportunity of questioning the specialist chemist (de Kock) employed by the first respondent. A reading of the record reveals that Dr de Kock was called to testify on a number of separate occasions, in a haphazard fashion and apparently in support of the first respondent's case and at the request of the second respondent but the applicant was denied the opportunity of having Dr de Kock present when Professor Tobin testified. It was crucial to the applicant's case to have Dr de Kock present for Professor Tobin to interact with him. And it was on Dr de Kock's evidence the applicant was ultimately convicted.

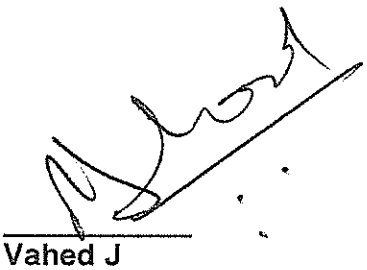
[35] In the result on either basis I find for the applicant and there is no need to embark upon analysis of the third ground of review.

[36] I make the following order:-

1) The findings of the enquiry board appointed by the first respondent and of which the second respondent was chairman, made on 13 November 2015, finding the applicant guilty of the charge preferred in terms of Rule 73.2.4 of the first respondent's rules are reviewed and set aside.
2) The penalty of a fine in the sum of R80 000-00 imposed upon the applicant in the judgment of the enquiry board appointed by the first

respondent and handed down on 20 January 2016 is reviewed and set aside.

3) The first respondent is directed to pay the costs of the application, such costs to include those costs reserved on previous occasions.



Vahed J

Case Information:

Date of Argument:	10 February 2017
Date of Judgment:	31 August 2017
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