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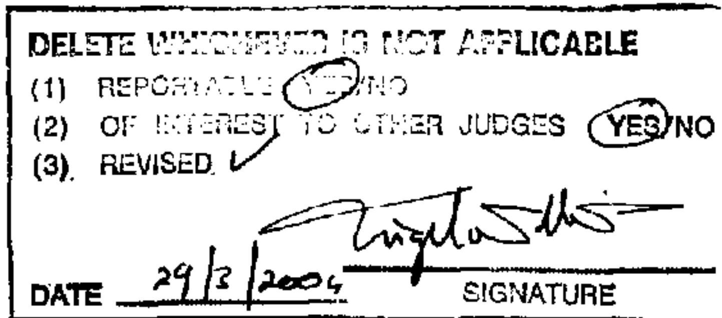
IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 17363/03

2004-03-19 5



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In the matter between

SASOL OIL (PTY) LTD First Applicant

BRIGHT SUN DEVELOPMENTS CC Second Applicant

and 15

METCALFE, MARY N.O. Respondent
(in her capacity as the Member of
the Executive Committee, Gauteng
Provincial Government, Department
of Agriculture, Conservation, 20
Environment and Land Affairs)

J U D G M E N T

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WILLIS, J:

[1] The applicants have approached the court seeking the following relief:

"1. A declarator that clause 1 of paragraph 2 of the General Departmental Guidelines of the EIA Administrative 30 Guideline issued by the Department of Agriculture,

Conservation, Environment and Land Affairs of the Gauteng Provincial Government ("the Department"), published during March 2002, is *ultra vires* the Environment Conservation Act, 73 of 1989, and is invalid and unenforceable. 5

2. The respondent is called upon to show cause why -

   2.1 her decision dated 28 April 2003, in which she upheld the Department's decision to deny EIA authorisation to the second applicant in respect of the construction of a filling station on Erf 4025, 10 Randpark Ridge Ext 78 ("the property"); and

   2.2 the Department's decision, taken during September 2002, to refuse the application for EIA authorisation submitted on behalf of the second applicant; 15

   should not reviewed and set aside.

3. Costs of suit.

4. Further and/or alternative relief."

[2] The applicants have come to court by way of motion proceedings. The first applicant is Sasol Oil (Pty) Ltd which 20 carries on business as an oil company and which, *inter alia*, markets on a wholesale and retail level liquid fuels and lubricants. The second applicant is Bright Sun Developments CC. The respondent is Mary Metcalfe, against whom this application has been brought in her capacity as the member of 25 the Executive Committee of the Gauteng Provincial

Government, Department of Agriculture, Conservation, Environment and Land Affairs.

[3] During 2000 the applicants had identified the property as suitable for the construction of a filling station and a convenience store, from which there would, *inter alia*, sell petrol 5 and diesel supplied by the first applicant, in the petroleum market. The second applicant sought the Department's authorisation in terms of section 22 of the Environment Conservation Act, 73 of 1989 ("the ECA") for the construction of a filling station and convenience store. The application was 10 submitted by an independent environmental consultant appointed by the second applicant in terms of the relevant EIA Regulations.

[4] During September 2002 the Department refused the application for authorisation submitted on behalf of the second applicant. 15 Thereafter, on 2 October 2002, the first applicant lodged an appeal with the respondent against the Department's decision to refuse to grant the authorisation sought by the second applicant. The respondent refused the appeal and informed the first applicant that she had "concluded that the decision to deny 20 authorisation was properly issued". She accordingly informed the first applicant of her decision to "uphold the decision by this Department to deny authorised authorisation for the proposed filling station". This document was dated 28 April 2003 and was received by the first applicant's attorneys by telefax on 5 25 May 2003. It is this decision which the applicants in the

present application seek to review and set aside.

[5] Critically relevant to the decision was the application of the guidelines referred to in the prayers of the application. The validity of these guidelines has been disputed by the first applicant. The first applicant submits that this is an issue upon 5 which resolution is necessary in order to provide certainty regarding future applications for authorisation in relation to the construction and upgrade of filling stations and associated tank installations made to the Department. These guidelines were first issued during March 2001 and then September 2001 and 10 they were replaced by current guidelines which are dated March 2002.

[6] The respondent has taken a point *in limine*. She has alleged that the decision of the Head of the Department was taken on 2 September 2002 and that the respondent's decision was 15 taken on 28 April 2003. Although it is accepted that the applicants' attorneys may have received the advice of the respondent's decision on 3 May 2003, it is submitted that the review application falls outside of the 30 day period stipulated in section 36(2) of the ECA which in conjunction with 36(1) 20 reads as follows:

"(1) Notwithstanding the provisions of section 35 any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days of having become aware of such decision, request that 25 body, in writing, to furnish reasons for the decisions

within 30 days after receiving a request.

(2) Within 30 days after having been furnished reasons in terms of subsection (1) or after the expiration of the period in which reasons had to be submitted by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction to review the decision." 5

[7] Section 7(1) of the Promotion of Administrative Justice Act No. 3 of 2000 (widely referred among lawyers, albeit somewhat esoterically as "PAJA"):- 10

"Any proceedings for judicial review in terms of section 6(1) must be executed without unreasonable delay and not later than 180 days after the date -

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) having concluded; or 15

(b) where no such remedies exist, on which the person concerned of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons." 20

It is trite that in the interpretation of ordinary statutes, to the extent that there is an inconsistency between earlier and subsequent legislation, the provisions of subsequent legislation will ordinarily prevail. 25

Mr Freund, however, has submitted that the maxim *generalia specialibus non derogant* applies: in other words, PAJA is general legislation and cannot derogate from the provisions contained in the ECA which relates specifically to environmental matters. In my view, PAJA cannot be regarded as ordinary 5
legislation. The preamble to PAJA refers to the fact that sections 33(1) and (2) of the Constitution provide that everyone has the right to administrative action that is "lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be 10
given reasons". The preamble also refers to section 33(3) of the Constitution which requires national legislation to be enacted to give effect to those rights and to provide for review of administrative action by a court, or where appropriate, an independent and impartial tribunal and imposes a duty on the 15
State to give effect to those rights and to promote an efficient administration. PAJA then proceeds to enact provisions designed to give effect to those rights in respect of administrative action. The purpose of PAJA is plainly to give effects to the rights, constitutionally enshrined in the Bill of 20
Rights of the Constitution, to just administrative action. It is constitutional legislation. It is triumphal legislation. It is widely recognised that the Bill of Rights was incorporated in our Constitution with the unanimous approval of all political parties represented in Parliament because we, the citizenry, believed 25
that there were potent lessons to be learnt not only from our

apartheid past but also from the experience of other countries around the world, especially in the past century. We were resolved, almost unanimously, that never again must such injustices as had been experienced under apartheid and in other parts of the world prevail in our own country. Over the past 5
100 years most of the terrible suffering which human kind has actually experienced, whether it arose from war, genocide, religious persecution, racial classification, racial segregation, forced removals, arrest under the pass laws, detention without trial, confiscation of property, denial of access to health, or the 10
application of fatally flawed economic policies derives from the exercise of administrative power. The limitation of administrative power, according to law reflecting internationally respected human rights, lies at the heart of a modern constitutional democracy. PAJA is not general legislation in the 15
sense that it is some generally useful tool. It is rather "universal" legislation: it confers rights upon all who lives in South Africa in so far as their dealings with organs of State are concerned. To the extent that earlier legislation is inconsistent with PAJA, PAJA must prevail. Section 7(1) of PAJA very 20
sensibly provides that reasonableness is the primary yardstick in determining whether a review application has been timeously brought. Reasonableness always depends on the facts of each particular case. Lesser time periods than the maximum of 180 days allowed in terms of section 7(1) of PAJA which may be 25
provided in earlier legislation, may be indicators of

reasonableness within certain contexts but they can never be determinative of the issue. In this particular case the first applicant became aware of the respondent's decision on 5 May 2003. The application for review was issued on 31 July 2003, less than three months after the respondent's decision. This particular matter is complex. There is much that is at stake. The legal principles with which the parties have had to grapple are, in many respects, new and rapidly evolving. The applicants clearly needed to consider their position carefully. I do not think it can be said that the applicants came to court after unreasonable delay. Furthermore, the provisions of the ECA are obviously dated. They are of an era, or in the broad sense of the term, a regime in which reasons for administrative action seemed less important than they do in our new constitutional order. It seems to me that it would be quite inappropriate to hold the applicants to the provisions of section 36 of the ECA.

[8] Section 21 of the ECA provide as follows:

> "(1) The Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.
>
> (2) Activities which are identified in terms of subsection (1) may include any activity in any of the following categories, but are not limited thereto:
>
> (a) Land use and transformation;

(b) water use and disposal;

(c) resource removal, including natural living resources;

(d) resource renewal;

(e) agricultural processes; 5

(f) industrial processes;

(g) transportation;

(h) energy generation and distribution;

(i) waste and sewage disposal;

(j) chemical treatment; 10

(k) recreation.

(3) The Minister identifies an activity in terms of subsection (1) after consultation with:

(a) the Minister of each department of State responsible for the execution, approval or 15 control of such activity;

(b) the Minister of State Expenditure; and

(c) the competent authority of the province concerned."

Section 22(3) of the ECA provides: 20

"The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorisation <u>for the proposed activity</u> or an alternative proposed activity on such conditions, if 25 any, as he or it may deem necessary." (my emphasis)

[9] On 5 September 1997 the Minister, at the time Mr Pallo Jordan, exercised his powers in terms of section 1 and issued a notice which was published in the *Gazette*. In that notice the Minister identified the activities in Schedule 1 in general as activities "which may have a substantial detrimental effect on the 5 environment". Schedule 1, in the first paragraph thereof refers to "The construction, erection or upgrading" of various facilities and installations. They include facilities for the commercial generation of electricity, nuclear reactors, roads, railways, airfields and associated structures, marinas, harbours, above 10 ground cableways, structures associated with communication networks, including masts, towers and reflector dishes, racing tracks for motor-powered vehicles, canals, channels, dams, levees and weirs, reservoirs, private and private resorts, sewage disposal plants and building and structures for industrial, 15 commercial and military manufacturing and storage of explosives or ammunition or for testing disposal of such explosives or ammunition. Significantly, nowhere in Schedule 1 is there any reference to filling stations. Counsel for both sides were agreed that the only provision in Schedule 1 which 20 would be of any relevance to the present matter is item 1(c) which refers to -

"with regard to any substance which is dangerous or hazardous and is controlled by national legislation:

(i) infrastructure, excluding road and rail, for the 25 transportation of any such substance; and

(ii) manufacturing, storage, handling, treatment or processing facilities for any such substance."

It is common cause that the products in which the applicants are proposing to deal, namely petroleum products, are indeed hazardous products as referred to in this item. It is furthermore common cause that the respondent is a person duly designated by the Minister who may exercise these powers relating to the construction and erection or upgrading of the facilities or installations referred to in Schedule 1, paragraph 1 of the Minister's notice. In May 2002 the Minister amended this notice but it is common cause between the parties that for the purposes of this particular application, nothing depends on the amendment. In item 1(c) of Schedule 1 of the amended notice there is reference to exactly the same wording.

Mr Freund submitted that petrol or filling stations fell within the ambit of "infrastructure, excluding road and rail, for the transportation of any such substance". If I may say so, he argued that point faintly. Mr Unterhalter vigorously disagreed with him. I am in agreement with Mr Unterhalter. It would require the most strained use of language to conclude that petrol filling stations could be described as "infrastructure excluding road and rail, for the transportation of any such substance".

[10] Counsel for both parties agreed that the respondent did indeed have the power to authorise or not to authorise matters relating to the storage and handling of petroleum products. In terms of section 22(2) of the ECA:

"The authorisation referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be complied and submitted by such persons and in such manner as may be prescribed." 5

It is common cause that, as I have already indicated, the Department issued guidelines relating to authorisation for filling stations. The one issued in March 2002 is headed "Guideline for the Construction and Upgrade of Filling Stations and 10 Associated Tank Installations". In the introduction the following is said:

"The purpose of this guideline is to provide an overview of the department's approach to the management of applications in respect of the construction and upgrading 15 of filling stations with a view to ensuring that the department's responsibility in respect of the protection of the environment are carried out in an efficient and considered manner. The guideline is therefore intended to facilitate a reduction of the department's 20 evaluation/review period, whilst simultaneously ensuring that such developments take place in a sustainable manner but ensuring that the impacts of such developments have been addressed." Then there are, in paragraph 2, a number of general guidelines. These 25 provide, *inter alia*, that new filling stations will generally not be approved where they are within 100 metres of

residential properties, schools or hospitals; where they are within 3 kilometres of an existing filling station in urban, built-up or residential areas; or within 25 kilometres driving distance from an existing filling station in other instances (i.e. rural areas, and along highways 5 and national roads), or within a sensitive area, *et cetera.* The guidelines refer to a host of other activities that may be relevant. These relate to, for example, "the ability of the natural and social environment to assimilate cumulative stresses placed on them, the likelihood of 10 "negative synergistic effects" and the economic and social consequences generally of filling stations being erected.

[11] In March 2002 the Department also issued a paper which is headed "Background to the EIA Administrative Guideline for the 15 Construction and Upgrade of Filling Stations and Associated Tank Installations". In paragraph 2 thereof the following is said: "In terms of the Environment Conservation Act, 1989 (Act 73 of 1989), the Minister of Environmental Affairs and Tourism may identify a list of activities which may have a substantial 20 detrimental impact on the environment. On 5 September 1997, the EIA Regulations were promulgated in terms of Sections 21, 22 and 26 of the Environment Conservation Act. One of the activities listed in Schedule 1 of GN R.1182 is (item 1(c)), which refers to '(t)he construction or upgrading of ... 25 transportation routes and structures, and manufacturing, storage, handling or processing facilities for any substance

which is considered as dangerous or hazardous and is controlled by national legislation'. Filling stations and associated tank installations fall within the ambit of this activity." In this document various principles are set out. Among these are the principle that: 5

> "Development must be socially, environmentally and economically sustainable"

and

> "the social, economic and environmental impacts of activities, including disadvantages and benefits, must be 10 considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment."

The document also refers to what are called "social impacts" and says:- 15

> "Filling stations can have significant social impacts on the environment, which may detrimentally affect the social well-being of citizens. These include:
>
> * noise impacts;
> * reduction in land value and real estate properties in 20 proximity of filling stations;
> * visual impact and 'sense of place';
> * impact on the safety and security of the area and specifically adjacent properties;
> * potential impacts on health as a result of VOC 25 emissions;
> * impacts associated with fire; and

* impact on the feasibility of filling stations in close proximity, i.e. the financial security of existing filling station owners, job-security of his/her employees and the necessity for rehabilitating the land." 5

[12] There is much that is good, indeed commendable in these guidelines. To my mind, there is nothing inherently offensive in them. It may well be so that in regard to certain aspects thereof opinions amongst reasonable men and women may differ. That is no business of the courts. What is clear, 10 however, from these guidelines is that the respondent believed that she had the power to authorise or refuse to authorise the erection or construction of filling stations *per se.* That the respondent believed that she had the power and authority to regulate the erection and construction of filling stations *per se,* 15 also appears from the correspondence between the parties, the reasons given for the refusal of the authorisation and the respondent's reasons for dismissing the appeal. I did not understand Mr Freund to have submitted otherwise. On the contrary, I understood him to submit that the respondent 20 necessarily and impliedly had these powers. I do not agree with him. After all, any schoolchild learning basic mathematics, will know that if B is a subset of A, the functions in B can be manipulated without impacting on A. Diagrammatically, for example, one can colour in subset B without having to go over 25 the border into the major part of A. I can see no reason why

the respondent should not be able to regulate and control the storage and handling of petroleum products within filling stations without having to regulate all other aspects relating to the erection and construction of filling stations. I believe it may fairly be observed that considerations relating to the storage and handling of petroleum products in question hardly feature at all anywhere in the documentation which was exchanged between the parties.

[13] These guidelines are clearly, on the papers, guidelines as they ordinarily understood. This much, it seems to me, is obvious from having a look at them. It is repeatedly stated in the documentation that they are to serve as guidelines and are not to be rigidly applied. Moreover, the respondent herself has said on repeated occasions in her answering affidavit that these guidelines were applied as guidelines in the sense that we ordinarily understand them to be. As these are motion proceedings, it would be quite wrong for me to peer behind the *ipse dixit* of the respondent. There are no special circumstances which would justify the inference that she is not telling the truth in this regard. I would further note that there is nothing inherently wrong in the issue of departmental guidelines. On the contrary, they can be of enormous assistance, not only as was said in the document headed "Background to the EIA administrative guideline for the construction and upgrade of filling stations and associated tank installations", can they facilitate the expedition of applications

but they can also assist in ensuring consistency and predictability in the application of policy. Clearly these guidelines do not constitute subordinate legislation in the sense that regulations, for example, are so considered. Mr Freund has, in my view correctly, taken the point that the guidelines do not constitute "administrative action" as defined in section 1 of PAJA. The guidelines do not constitute "a decision taken ... which adversely affects the rights of any person and which has a direct, external legal effect". He referred me to Cora Hoexter's work, *The New Constitutional and Administrative Law*, vol 2 at 107-108 where the following was said:

> "In the German context a *legal effect* means that a decision entails a determination (or indeed a deprivation) of someone's rights. A *direct* legal effect (or an immediate effect) would seem to refer to finality - the idea that only final decisions ought to be subjected to judicial scrutiny: *If, for example, a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review* ".

And further:

> "The allusion to finality in the word 'direct' does, however, add something. It seems in the first place to re-enforce the common law idea that administrative decision-making must be '<u>ripe</u>' before it can be reviewed;

that there is no point in wasting the court's time with decisions that are not yet final and whose shape may yet change.

Mr Freund also referred me to J R De Ville *Judicial Review of Administration Act in South Africa* pages 54 to 58 and where, in particular, the following was said at page 58:

"In Germany, should a high ranking official give instructions to a low ranking official as to how a certain power is to be exercised, the instruction itself would not be subject to review. Only once the official concerned has exercised the power, can a decision be taken on review. The position is the same where a circular indicates how discretionary powers should be exercised. The circular cannot be challenged for its validity as it is an internal administrative act. An exercise of power in accordance with the circular may, however, be challenged on review."

In *Ferreira v Levin N.O.* 1996 (1) SA 984 (CC) Kriegler J said as follows at para 199:

"The essential flaw in the applicant's case is one of time or, as the Americans, and, occasionally, the Canadians call it, 'ripeness'. That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations of problems that

are already ripe or crystallised and not with prospective or hypothetical ones."

[14] Therefore I do not consider that the applicants can succeed in their first prayer to have the guidelines declared to be *ultra vires*. I wish, however, to emphasise that the guidelines, while not *ultra vires*, are for the most part totally irrelevant and inappropriate, not because they purport to take into account irrelevant environmental considerations but they are based upon a clearly wrong premise, that the respondent has the power to regulate the construction and erection of filling stations *per se*. Respondent applied her mind to considerations that at present properly belong to the local municipality or some other such authority.

[15] Mr Freund sought to defend the respondent's actions in taking into account a welter of other considerations by referring to the principles contained in section 2 of the National Environmental Management No. 107 of 1998 ("NEMA") which provides that the principles therein contained are to serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment." The principles are numerous and it would serve no purpose to list them all. I would merely refer to subsection (3) which provides that:

> "Development must be socially, environmentally and economically sustainable".

These principles, in my view, reflect a broad international consensus as to the need to protect the environment but at the same time ensure human development.

Mr Freund also relied on the Development Facilitation Act No. 67 of 1995 ("The DFA"). Section 2 thereof refers to the general principles set out in section 3 and says that in subsection (d) they are to service as guidelines by reference to which any competent authority shall exercise any discretion or take any decision in terms of this Act or any other law dealing with land development.

Once again, these principles very broadly stated, reaffirm the principles set out in NEMA.

It seems to me that these principles cannot confer on an organ of state powers which it does not have. These principles serve to restrain power rather than to extend it. They cannot confer the power or authority upon persons who do not have it. They do, however, circumscribe a person who has either power or authority. Furthermore, the provisions of section 33(3) of the ECA, as already referred to, give a person in the position of the respondent the power to "grant authorisation for the proposed activity" (my emphasis). The proposed activity here clearly relates to the storage and handling of petroleum products and cannot go wider than that. It is the storage and handling of petroleum products within the filling station to which the respondent had to apply her mind. Any other considerations, however laudable they may be, are, as a matter of law,

irrelevant. Respondent clearly believes that she had the power to regulate the erection and construction of filling stations generally and *per se*. She did not. In my view, the decisions taken by the respondent and her department were taken "for a reason not authorised by the empowering provision" in terms of the provisions of section 6(2)(e)(i) of PAJA and also stands to be set aside "because irrelevant considerations were taken into account" as provided for in section 6(2)(e)(iii) of PAJA. 5

[16] Mr Unterhalter submitted furthermore that the decision failed the "rationality" test provided for in section 6(2)(f)(ii) of PAJA. By reason of the conclusions which I have already reached, it is unnecessary for me to consider this aspect. It is also unnecessary for me to consider, as Mr Unterhalter invited me to do, whether the decision was, at common law, *ultra vires* and therefore, perhaps, constitutionally offensive. It seems to me, therefore, that the applicants are entitled to the relief which they have sought in terms of prayer 2 of their notice of motion. 10 15

[17] I have given consideration to the question of whether instead of issuing the declarator as sought in terms of prayer 1, I could issue a declarator that the guidelines were, for the most part, irrelevant. In my view, to grant such an order would be to grant alternative relief rather than lesser relief that had been sought by the applicant. Such alternative relief was not sought by the applicants in their notice of motion and it was only in reply that Mr Unterhalter faintly submitted that he should be allowed to amend his notice of motion. In my view, this is far 20 25

too late in the day. Clearly it would be very prejudicial to the respondent to allow such an amendment.

[18] The respondent has come to court prepared to defend the challenge to the guidelines, on the grounds that they are unconstitutional. She has succeeded in that they are not *ultra* 5 *vires*. As she has succeeded in this regard, she is entitled to an order accordingly. Therefore, for the reasons given, the respondent has succeeded in regard to prayer 1 of the notice of motion but failed in regard to prayer 2. Accordingly, it seems to me appropriate that the parties to this application should 10 each pay their own costs.

[19] The following order is made:

1. The application for a declarator in terms of prayer 1 of the notice of motion that the guidelines of the Department are *ultra vires* is dismissed. 15

2.1 The decision dated 28 April 2003 in which the respondent upheld the Department's decision to deny authorisation to the second application in respect of the construction of a filling station at Erf 4025, Rand Park Ridge Extension 78; and 20

2.2 The Department's decision taken during September 2002 to refuse the application for authorisation submitted on behalf of the second applicant

are reviewed and hereby set aside.

3. The parties are to pay their own costs in this application. 25

ON BEHALF OF APPLICANTS:	ADV D N UNTERHALTER SC
	ADV A E BHAM
Instructed by:	Winstanley Smith & Cullinan Inc
	5
ON BEHALF OF RESPONDENT:	ADV A J FREUND
	ADV M SIKHAKHANE
Instructed by:	State Attorney
DATE OF HEARING:	18 MARCH 2004 10
DATE OF JUDGMENT:	19 MARCH 2004