REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 337/2013

In the matter between:

INDEPENDENCE CATERING (PTY) LTD	**1ST APPLICANT**
NUTRIFOOD (PTY) LTD	**2ND APPLICANT**
HARITAGE CATERERS (PTY) LTD	**3RD APPLICANT**
WELWITSCHIA RURAL CATERERS (PTY) LTD	**4TH APPLICANT**
TSEPO CATERING (PTY) LTD	**5TH APPLICANT**
TULIPAMWE CATERING SERVICES CC	**6TH APPLICANT**

and

THE MINISTER OF DEFENCE	**1ST RESPONDENT**
THE MINISTER OF FINANCE	**2ND RESPONDENT**
THE CHAIRMAN OF THE TENDER BOARD	**3RD RESPONDENT**
AUGUST 26 HOLDING COMPANY (PTY)	**4TH RESPONDENT**
AUGUST TWENTY SIX LOGISTICS	**5TH RESPONDENT**

Neutral citation: *Independence Catering (Pty) Ltd v The Minister of Defence* (A 337/2013) [2013] NAHCMD 347 (19 November 2013)

Coram: CHEDA J

Heard: 7 October 2013

Delivered: 19 November 2013

Flynote: A party who has an interest in a matter due for adjudication is entitled to know the outcome of such adjudication – Where he acquires knowledge that his

interest in the said adjudication is threatened and has failed to obtain information regarding the truth or otherwise of the goings-on in the matter is entitled to approach the court on an urgent basis for redress. – a party who has a substantial interest with a matter is entitled to be joined in the proceedings – Where a matter is awaiting finalization, it will be premature for the court to make a decision that will affect its outcome, as this will pre-empt the adjudicators' decision (in *casu* the Tender Board) – A cabinet Minister is by virtue of his position empowered to make policy decisions in furtherance of the national interest as long as such decisions do not offend other people constitutional rights – Legitimate expectation arises when such expectation has been induced by the decision maker, it must have been clear, competent and lawful.

Summary: Applicants were contracted to supply food rations to Ministry of Defence up to 30 September 2013. After their mandate of the contract, first respondent extended their mandate to 30 September 2013 without going through the tender process. After the expiry of the extension, they were informed by someone that first respondent had already contracted the fourth respondent to supply food rations to the first respondent through the fifth respondent. This they challenged on an urgent application. Their argument was that they had a legitimate expectation to be awarded tenders by third respondent. They sought an interdict to prevent first respondent from proceeding with the said contract with the fourth and fifth respondent. In addition that third respondent must determine the tenders.

ORDER

The application is dismissed with costs and such costs include two legal practitioners.

JUDGMENT

CHEDA J [1] On the 29th of September 2013, applicants filed an urgent application whose notice of motion is couched in the following terms:

> '*1. Condoning the non-compliance by the applicants with the Rules of this Honourable Court relating to service and time periods and enrolling the application for hearing as one of urgency as envisaged in Rule 6(12) of the Rules of Court.*
>
> *2. Issuing a rule nisi returnable on a date to be arranged with the Registrar of this Honourable Court calling upon any of the Respondents to show cause why the following orders should not be granted:*
>
> *2.1 Reviewing and setting aside the decision of the First Respondent to conclude an agreement with the Third and/or Fourth Respondent for the supply of Rations to the Ministry of Defence*
>
> *2.2 Insofar as it may have decided to withdraw the tender, reviewing and setting aside the decision of the Third Respondent not to consider or make an award in respect of Tender No A5-1/2012 for the supply and delivery of Rations to the Ministry of Defence.*
>
> *2.3 ordering the Third Respondent to consider and make an award in respect of Tender No A5-1/2012 for the supply and delivery of rations from 1 November 2012 to 31 October 2017.*
>
> *2.4 Declaring the agreement concluded between the First and Fourth Respondents during July 2013 for the supply of Rations and Logistics to the Ministry of Defence to be null and void, alternatively of no force and effect, alternatively*

2.5 Suspending the executive and implementation of the agreement concluded between the First and Fourth Respondents during July 2013 for the supply of Rations and Logistics to the Ministry of Defence, pending the final determination of this application;

2.6 Declaring the "professional Services level Agreement" concluded between the Fourth and Fifth Respondents during July 2013 to be null and void, alternatively of no force and effect; alternatively

2.7 Suspending the execution and implementation of the "Professional Service level Agreement" concluded between the Fourth and Fifth Respondents during July 2013, pending the final determination of this application.

2.8 Interdicting the First, Fourth and Fifth Respondents from implementing or executing the agreements referred to in paragraphs 2.4 to 2.7 above pending the final determination of this application.

2.9 Directing that the costs of this application be paid by the First and Third Respondents, and should any other Respondent oppose the relief sought, by those Respondents, jointly and severally with the First and Third Respondents, such costs to include the costs of one instructing and two instructed counsel.

3. Ordering the relief sought in paragraphs 2.5, 2.7 and 2.8 operate as an interim interdict with immediate effect, or with effect from a date to be determined by this Honourable Court, regard being had to the balance of convenience or

any other consideration that this Honourable Court deems relevant in the circumstances.

4. *An Order authorizing the Applicant within 10 days after the Registrar has made the record of the tender process available to it, to add to or amend the terms of the notice of motion and supplement its founding affidavit.*

[2] The brief background of this matter is that applicants are among companies that have been supplying food and services to the Ministry of Defence which falls under first defendent. During the month of July 2012 the Ministry of Defence advertised a tender under reference A5-1/2012 [hereinafter referred to as "the Tender"] for the supply and delivery of various foods from 1 November 2012 to 31 October 2017. Tenderers were supposed to submit tenders to the Tender Board (third respondent) by the 14 August 2012. These were indeed duly submitted. The above background was furnished to the court by one Aaron Mushimba [Hereinafter referred to as "Mr Mushimba"] who is the representative of the first applicant.

[3] It was his assertion that the existing suppliers of goods and services to the first respondent was extended from 1 July 2013 to the 30th of September 2013 by first respondent. He further stated that to his knowledge, as of the 21st June 2013, the Tender Board had not yet made a decision regarding the tenderers. Subsequent to this, he had learnt that an agreement between first respondent and fourth respondent had been entered into for the supply of food rations. A further agreement was then entered into between fourth and fifth respondent in order to enable the effective facilitation of the supply of rations to first respondent. It was his further argument that:

a) The said agreements are in conflict with various regulative provisions which are currently in operation and are in breach of an agreement between applicants and the Tender Board (third respondent) or the Ministry of Defence (first respondent); and
b) The decisions arrived thereat are reviewable for failing to comply with legislative directives in administrative law.

[4] It is for that reason that an interdict is sought to:

i) Restrain third, fourth and fifth respondents from executing an agreement they allegedly entered into;
ii) Directing the third respondent to consider the tender's submitted in response to the advertisements flighted by third respondent;
iii) Ordering the removal and setting aside of the decision of first respondent to conclude the agreements with fourth and fifth respondents in relation to the supply of food to first respondent;
iv) Ordering that in the event that the third respondent has decided to tender and sanction the aforementioned contract, the said decision should be reviewed and set aside; and that
v) Maintain the *status quo* pending consideration of the tender by the third respondent or finalization of this application.

[5] The first applicant's representative, Mr Mushimba who is a shareholder and Director of first applicant, in his affidavit extensively laid the background and facts of this matter as he understood them. This background is largely common cause and the court is indeed grateful for this information.

[6] Relief is sought from all the five respondents, except the second respondent who is cited by virtue of his potential interest in the proceedings. It is Mr Mushimba's evidence that a number of suppliers supply food and services to the Ministry of Defence, which falls under first respondent. It is not in dispute that in July 2012 the first respondent advertised for a tender under reference A5-1/2012 [hereinafter referred to as "the tender"] for the supply and delivery of rations from 1 November 2012 to 31 October 2017. Tenderers were, therefore, invited to submit tenders to the tender board by 14 August 2012 and applicants did so. As of the 21 June 2013 the Tender Board had not made a decision regarding the tenders. The existing suppliers' tenders were, therefore, extended from 1 July 2013 to 30 September 2013. During the course of the month of September, he obtained information to the effect that first respondent had concluded a contract for the supply of goods and services with

fourth and fifth respondents. As a result of this information, applicant mounted this application bearing in mind that their existing contract with first respondent was coming to an end on the 30th of September 2013.

[7] Mr Marais assisted by Ms Schimming-chase for the applicants in his submissions as captured in his heads of arguments vigorously argued this application in the manner hereinunder dealt with:

The requirements for urgency as provided for in Rule 6 (12) (b) namely that in order to qualify for indulgence applicant must explicitly set out the circumstances that renders the matter urgent and set out reasons why it cannot be afforded substantial redress at a hearing in due course.

[8] According to him, the urgency of the matter is mainly grounded on the fact that following newspaper rumours that first respondent had contracted with fourth and fifth respondents. Despite his efforts to elicit a comment from third respondent, he could not obtain any meaningful response from the third respondent and there was totally no response from first respondent. This was during the month of July 2013. On the 10th September 2013, his legal practitioners wrote to third respondent who responded to the effect that the enquiry was due for consideration on 13 September 2013. On the 16th September 2013 one of applicant's members, one Johan Andre Penderis [hereinafter referred to as "Penderis"] received information that there may have been agreements entered into between first respondent on one hand and fourth and fifth respondents on the other. This development indeed added to applicants' concern:

[9] Penderis' informant was, however, unwilling to depose to an affidavit. It is for that reason that this application was mounted as urgent. It is essential in my view to deal with the issue of urgency first as this determination will either halt or allow these proceedings to proceed.

[10] Mr Namandje for the first respondent argued that the court should make a finding that there was no urgency on this matter. It is his argument that while the

court has discretional powers to hear a matter on an urgent basis, there are certain requirements which applicant must fulfill, namely:

> That applicant must explicitly set out that he/she would suffer irreparable harm and he/she would not obtain a substantial redress in due course if the application is not heard on an urgent basis, see *Salt and another v Smith*[1] and *Bergman v Commercial Bank Namibia & another*[2]. They further argued that it was not proper for first applicant to speak for and on behalf of other respondents when they did not file their own founding affidavits.

[11] He went further and argued that applicant's counter-claim that applicants would suffer irreparable harm as third respondent would have awarded the tender to any other person other than themselves should be ignored as there is no guarantee that the tender would be awarded to them.

[12] The issue of urgency in my opinion cannot be plucked from the air, but, must be considered in relation to each particular case. Applicants had been supplying food rations to first respondent and they had their contracts extended to 30 September 2013 pending the outcome of the decision of third respondent. Whether or not they would have been considered favourably is neither here nor there. The important issue is that they expected some kind of response. While waiting for the said response, information started filtering through to the effect that first respondent was already considering a contract which involves both fourth and fifth respondents. At that juncture they started panicking.

[13] In my opinion the panic was reasonable. In the circumstances they therefore had reasons to take reasonable and legal steps to secure their perceived rights in this tender issue. Therefore, it cannot be said that the urgency that prevailed in this scenario was self-created. The time for reckoning was nigh and it would have been folly, therefore, for them to have waited another day without seeking to prevent the imminent threat.

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[1] Salt and another v Smith 1990 NR 87 (HC)
[2] Bergman v Commercial Bank Namibia & another 2001 NR 48 at P49 H-J

[14] I therefore find that this matter had all the necessary ingredients for urgency as envisaged by the rules of this court.

[15] Applicants further argued that indeed rule 16 (5) provides that the court may on an application, order to be struck out any matter which is scandalous, or irrelevant, it may however not grant the application if it is prejudicial to the other party's case, see *Vaartz v Law Society of Namibia*[3]. The underlining point is that in as much as the court has discretion to strike out, it will not do so to the prejudice of the other party. This in fact is the correct legal position of our law.

[16] Applicants are of the strong view that first and third respondent have a duty to account to them. Their reasons are grounded on their belief that there exists a tacit agreement between themselves and the Ministry of Defence in that:

1) First respondent decided to a flight tender to which they responded to;
2) The said tenders are due for considerations by third respondent;
3) Applicants incurred costs in preparing and submitting the said tenders;
4) All applicants complied with the tender requirements; and, that
5) The tenders are due to be considered by third respondent, thereafter, would be awarded resulting in contracts been entered into with first and fourth respondents.

For the above reason they sought an interim relief as they argue that they have established a *prima facie* case against respondents. In supporting this agreement they referred the court to the matter of *Nakanyala v Inspector General of Namibia & others*[4] where the court stated:

> *"The degree of proof required has been formulated as follows: The right can be prima facie established even if it is open to some doubt mere acceptance of the applicant's allegations is sufficient but the weighing up of probabilities of conflicting versions is not required. The proper approach is to consider the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute,*

[3] Vaartz v law Society of Namibia 1990 NR 332 at 334H.
[4] Nakanyala v Inspector General of Namibia & others 2012 (1) NR 200 at 213 par. 46.

and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The fact set out in contradiction by the respondent should then be considered and if they show serious doubt on the applicant's case, the latter cannot succeed."

[17] It is clear therefore in light of the authorities that the court is constrained to weigh the facts presented by both parties, in order to determine which party is supported by the current legal position.

[18] Mr Namandje urged that applicants should have cited the Chief of the Defence Force as he is the implementor of all contracts of the first respondent.
Mr Marais for applicant further argued that the attack by respondents of the non-joinder of the Chief of the Defence Force was without merit as they have already cited the Minister of Defence who is both a political head and a government representative. It is their view that citation of the Ministry of Defence is therefore sufficient in the circumstances.

[19] Mr Marais also argued that the functions of members of cabinet are regulated and governed by article 40 of the Namibian constitution, which reads inter alia:

"*The members of the cabinet shall have the following functions:*

'(a) to direct, co-ordinate and supervise the activities of Ministries and Government departments including para-statal enterprises, and to review and advise the president and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regard being had to the public interest.;

(b) ….

(c) ….

(d) ….

(e) *….*

(f) *to take such steps as are authorized by law to establish such economic organisations, institutions and para-statal enterprises on behalf of the State as are directed or authorized by law;'*
(Own emphasis)

[20] It was further applicant's argument that the Ministry of Defence and the Chief of the Defence Forces were not given a *carte blanche* as it were, to conclude agreements outside the provisions of the law as they have done in this instance. In as much as a statutory body, a local authority or regional council is exempted from granting authority under the State owned Enterprises (Government) Act, 2006, fifth respondent does not qualify. Applicants however, agree that fourth respondent may qualify in terms of section 17(b) (i) of the Tender Board Act, Act 1996 (the Act).

[21] They further contended that the third respondent is yet to consider the tenders and to make a decision, in fact in paragraph 61 of his founding affidavit Mr Mushimba stated:

'*Since the Tender Board therefore still intends to consider the tender and to make a decision, in view of the fact that it had not given notice of withdrawal and because the tenderers are still awaiting the decision of the Tender Board, we submit that, by their conduct, the tenderers (on one side) and the Tender Board (on the other) have, in effect, extended the acceptance period*.'

[22] Mr Namandje has argued that applicants should have joined the Chief of the Defence Forces and stated that the Ministry of Defence is in a separate position and/or administrative function as set out by the Minister of Defence himself, Honourable Mr Nahas Angula, in his answering affidavit in which he stated that his powers are derived from Article 40 of the constitution (supra).

[23] The question which falls for determination in the main is whether or not there has been a non-joinder of the Chief of Defence. Rule 10 (1) of the Rules of the Court provides:

> *'10. (1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he or she brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing the same question of law of fact which, if separate action were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.'*

[24] It is now our settled legal position that a direct and substantial interest is an interest in the right which is the subject matter by the litigant and not merely a pecuniary interest, see *Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*[5]. These courts have adopted a paradigm shift towards the strict application of this principle to an extent that where the need for joinder arises they will ensure that interested parties are afforded an opportunity to be heard (see Maletzky's recent judgment), *August Maletzky v The Minister of Justice and 2 others*, Case No A 9/2013 delivered on 8 November 2013.

[25] This in fact is not strange as for all intents and purposes is in line with the strict requirements of the rules of natural justice *audi alteram partem* rule, see *Ex Parte Body corporate of Caroline Court*[6] *and Pretorious v Slabbert*[7]. The substantial interest factor attracts a lot of judicial importance to an extent that the courts have arrogated themselves a right to raise it *mero motu* where justice so demands, see *Amalgamated Engineering Union v Ministry of Labour*[8] where the court stated:

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[5]Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993 (2) SA 737 (NM)
[6]Ex Parte Body corporate of Caroline Court 2001 (4) SA 1230.
[7]Pretorious v slabbert 2000 (4) SA 935 (SCA) at 939 C-F
[8]Amalgamated Engineering Union v Ministry of Labour 1949 (3) SA 637 (A) at 659-660

> '*Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.*
>
> *Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as res judicata.*

First respondent has further stated that he is entitled to contact with any party in terms of section 14 (1) of the Defence Act which provides:

> '*General Powers of the Minister*
>
> *14 (1) The Minister may do or cause to be done all things which are necessary for the efficient defence and protection of Namibia or any part thereof*'

[26] It is his understanding that he has a right to exercise his executive powers to make decisions relating to defence, *Inter alia* to direct, coordinate and supervise the entities of the Ministry of Defence. He further argues that he also has the power to direct, coordinate and supervise the activities of state owned enterprises pertaining to defence and for that reason that his dealings with fourth and fifth respondents are justified. These powers involve the establishment of economic organisations.

[27] This authority is challenged by the applicants. However, it is worth noting that on the 21st June 2013 first respondent extended the applicants contracts to continue

supplying food rations to first respondent regardless of imminent expiry of the said contracts on the 30th June 2013. This new development was welcomed by applicants as it was beneficial to them. The question is whether this action by first respondent cannot be challenged on the same basis of lack of authority. Applicants have conveniently chosen not to refer to this action with regards to a trace of illegality. The reason for this is to my mind is obvious as it is sweet music to their ears and was a huge benefit for they benefitted without going through tender. In my opinion, first and second respondents must have used their discretional powers in terms of the law (supra). If this was so, why does it only become an issue now? It is beyond question that first respondent has a ministry to run and it is only reasonable to make some policy decisions while on his feet, all in the interest of the nation as stipulated in section 14 (1) of the Defence Act (supra).

[28] I find no legal reason to query his decisions to engage and/or contract any economic organization in the absence of a decision by third respondent. Surely, if he did so previously for economic and security reasons why should it become an issue now when the previous beneficiaries are set to be left out. It is his right to consider who he finds suitable to supply food for his soldiers. While the regulations indeed place checks and balances on the executive, however, extreme care should be taken in allowing unfettered and at times unjustified interferences actuated by personal as opposed to national interests to an extent of rendering the executive incapable of effectively governing in a fair manner and above all in the interest of all citizens. In this sentiment, I take a leaf from remarks by O'Regan J in the matter of *Premier, Mpulanga and Another v Executive Committee, Association of state-aided schools, Eastern Transvaal*[9] where O'Regan, J stated;

> *'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the*

[9] Mpulanga and another v Executive Committee, Associatio of state-aided schools, Eastern Transvaal 1999 (2) SA 91 (CC) at 109 par. 41.

> *importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decision without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness.'*

This country is equally a young democracy and this approach is in all fours with South Africa as observed by the learned Judge in the above matter.

[29] In arriving at this conclusion I bear in mind that third respondent has not adjudicated on tenders. The fact that a determination is yet to be concluded makes this application a far cry for the envisaged order, and hence premature.

[30] It has been argued on behalf of applicants that the fact that they were invited to tender in the supply and services entitle them to a remedy on the basis of legitimate expectation, see *Lisse v The Minister of Health and Social Services*[10]

[31] Married to this argument is the question of legitimate expectation caused by applicants. Mr Marais based his argument on the fact that applicants responded to an invitation to tender and as such they expected to be awarded the tender, which would have meant the continuation of the *status quo*. I do have a difficulty in being persuaded to go along with this argument. The fact that the tenders are yet to be determined does not guarantee applicants success in the tender process unless applicants are aware that they will be rubber stamped to their favour.

[32] A wide debate has been held concerning the principle of legitimate expectation, perhaps it is important to refer to the famous English case of*, Council of Church Services C v Minister of the Civil Service*[11] where it was stated that legitimate expectation arises either from an expressed promise on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. It is, therefore, not an isolated principle, but, is inseparable from the need for a fair hearing. The question which it encompasses is whether or not a party

[10]Lisse v The Minister of Health and Social Services 2004 NR 107.
[11]Council of Church Services C v Minister of the Civil Service [1984] 3 Aller 935 (HL).

expecting a certain decision to be made by a certain body is assured of a fair hearing or adjudication, see *President of the Republic of South Africa and others v South African Rugby Union and another*[12]. In *National Director of Public Prospections v Phillips*[13], the learned judge laid down the requirements for a legitimate expectation as follows:

> *'(i) representation underlying expectation to be clear unambiguous and devoid of relevant qualification;*
> *(ii) expectation to be reasonable;*
> *(iii) representation to have been induced by decision-maker;*
> *(iv) representation to be one which is competent and lawful for decision-maker to make, without which reliance cannot be legitimate.*

[33] Any extension of operation of legitimate expectation which relies upon conduct of unauthorized State official or one going beyond his or her statutory power to bring about effect of nolle prosequi is both unnecessary and undesirable.

In *casu* third respondent is yet to adjudicate on the tenders, therefore no decision has been made. First respondent has for whatever reason unilaterally decided to extend their contracts up to the 30 September 2013, this was without the award of tenders. For obvious reasons, non of the applicants is attacking this decision as it is to their benefit. Surely if in all fairness first respondent was given a free hand to extend their contracts, what is the issue if he uses the same powers to invoke them in contracting other suppliers pending the determination of tenders by third respondent. In the result find that:

1) There was urgency in this matter as applicants were entitled to know what the position was with regards to tenders;
2) There is a need to join the Chief of the Defence Forces as he is an interested party in these proceedings;
3) Third respondent has a right to contract with any party to supply food rations to his Ministry in furtherance of the smooth running of his Ministry pending the adjudication of tenders by the third respondent.

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[12]President of the Republic of South Africa and others v South African Rugby Union and another 1999 (4) SA 147 (CC)
[13]National Director of Public Prospections v Phillips 2002 (4) SA 60 W

Order

The application is dismissed with costs and such costs include two legal practitioners.

M Cheda

Judge

APPEARANCES

APPLICANTS	:	Mr Marais with him Ms Schimming-Chase Instructed by MB De Klerk & Associates Windhoek
FIRST RESPONDENT:		Mr S Namandje Of Sisa Namandje & Co. Windhoek
SECOND AND THIRD RESPONDENT:		Mr Coleman with him Mr Murorua Of Government Attorneys Windhoek