REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: A 228/2012

WESTCOAST FISHING PROPERTIES CC **APPLICANT**

And

GENDEV FISH PROCESSORS LTD **FIRST RESPONDENT**
R HEATHCOTE SC **SECOND RESPONDENT**

Neutral citation: *Westcoast Fishing Properties CC v Gendev Fish Processors Ltd* (A 228/2012) [2014] NAHCMD 242 (13 August 2014)

Coram: GEIER J
Heard: **25 September 2013**
Delivered: **13 August 2014**

Flynote : Arbitration – application for the setting aside of award on the ground that one of the persons acting for applicant during the arbitration not being a duly admitted legal practitioner – Section 33(1)(a) to (c) of the Arbitration Act 42 of 1965 setting out basis on which the court can interfere with an arbitration award –

Arbitration – Power of court to set aside arbitration award –Section 33 of Arbitration Act 1965 distinguishes between *‘misconduct’* and *‘irregularities’* committed by the arbitration tribunal in the conduct of arbitration proceedings - ie the section 33(1)(a) and (b) irregularities – on the one hand – and – on the other - those irregularities which have been committed by others, which result in the award being *‘improperly obtained’*, ie. the section 33(1)(c) irregularities - an award can obviously also be *‘improperly obtained’* because of an irregularity which occurred in the proceedings which was not one committed by the tribunal.

The meaning of the words *'any gross irregularity in the conduct of arbitration proceedings'* in s 33(1)(b) was considered in *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) at 42G - 43D –

Court adopting and applying approach formulated in respect section 33(1)(b) to section 33(1)(c) in the determination of the question whether arbitration award in this instance had been *‘improperly obtained’* -

Court thus accepting that not every irregularity in the proceedings will constitute a ground for review under s 33(1) (c) of the Act.

In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case *fully and fairly determined*. The court must also be satisfied that the irregularity caused *substantial injustice*. Only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that one would expect the court to take action would interference with a private arbitration be warranted. The ability to set aside an award due to a gross irregularity is really designed as a long stop, only available in extreme cases where justice calls out for it to be corrected

Legal practitioner – practising and holding him- or herself out to be a duly admitted by legal practitioner - Section 21 of Legal Practitioners Act 15 of 1995 creating offence where someone purports to practice or in any manner holding him-or herself out or pretending to be a legal practitioner where not such practitioner - Purpose of provision is to protect public against charlatans - Such provision in peremptory terms – Statute - Interpretation of - Regard must only be had to manner in which provisions couched - Not only whether provision peremptory or directory - Regard must also be had to intention of Legislature - Section 21 of Legal Practitioners Act clearly intended to protect public - on a reading of the section it was noted that all the scenario's listed in Section 21(1), that is all those, listed in Sections 21(1)(a) to (d), were all visited with the same sanction, ie. the penalties provided in Section 21(3)(a) – accordingly no distinction, as far as the prescribed sanction is concerned, is made between a contravention of Section 21(a) or (b) for instance - also the greater part of Maritz J's reasoning, and the policy considerations enumerated by him in *Rosteve Fishing in regard to Section 21(1)(c)*, would also apply to the other prohibitions listed in Section 21(1)(a), (b) and (d) - this would most certainly be so if perpetrated in legal proceedings which line of reasoning, if taken through to its logical conclusion, would then militate towards a finding that any of the contraventions listed in Sections 21(1)(a) to (d) should all lead to the same result, namely an *ipse jure* voidness of legal proceedings *ab initio*.

Quaere – whether in view of the differences between legal- and arbitration proceedings - the contraventions of Section 21(1) the Legal Practitioner's Act 1995 as perpetrated by one Vorster – should lead to the setting aside of the arbitration award granted against the applicant -

Court holding – that if one would firstly take into account that the irregularity in question occurred in the less formal setting of underlying private arbitration proceedings, where not every irregularity necessarily would be regarded as fatal and if one then, secondly, would examine the nature of the irregularity in question – its impact on the method and conduct of the arbitration - and ultimately its effect on the result of the arbitration it could not be said that the award in question had been

‘improperly obtained’ – and should thus be set aside as Vorster’s lesser involvement, in a private arbitration did not prevent the applicant from having its case *fully and fairly* determined and Vorster’s contraventions of Section 21 of the Legal Practitioner’s Act did not cause such *substantial injustice* to the applicant during the less formal setting of a private arbitration that it had to be said that the arbitration award was ultimately improperly obtained and should thus not be allowed to stand.

Summary: The facts appear from the judgment.

ORDER

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1. The application is dismissed with costs, such costs to include the costs of two instructed- and one instructing counsel.

2. The counter application is also granted with costs on the same scale.

JUDGMENT

GEIER J:

[1] The fundamental issue which underlies the dispute between the parties in this matter is whether an arbitration award, made in favour of the first respondent by the second respondent, is liable to be set aside, as the instructing person, one Dr Andre Vorster, who acted on behalf of the applicant during the arbitration, held himself out to be an attorney when in fact he was neither an admitted attorney in South Africa nor an admitted legal practitioner in Namibia.

[2] The applicant contends that, as a consequence, the arbitration proceedings and the resultant award are void and liable to be set aside.

[3] The applicant, so it is submitted on its behalf by counsel, in written heads of argument, seeks this relief against the following background:

'Applying the test in motion proceedings to determine the salient material facts, it is submitted that the factual background against which the issues in this matter must be considered are the following:

a) During November 2008 to June 2011 Applicant and First Respondent concluded a sale agreement (with addendums),*(sic)*, and a lease agreement which comprised a transaction ("the transaction") in relation to a property, Erf 4986 (a portion of Portion 4984) Walvis Bay ("the property");

b) The transaction became the subject of a dispute between Applicant and First Respondent.

c) Second Respondent arbitrated this dispute.

d) The award was in favour of First Respondent.

e) Subsequent to the arbitration agreement being concluded and Applicant and First Respondent exchanging pleadings.

f) During July 2011 Applicant had instructed Vorster[1] and ABVP[2] to represent it in dealings in relation to the transaction.

g) Vorster and ABVP also acted on behalf of the Applicant when the arbitration agreement was concluded, regarding the filing of pleadings in the arbitration and during the arbitration. ABVP's offices were situated in Meyerspark, Pretoria, Republic of South Africa.

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[1]The said *Dr Andre Vorster*, hereinafter referred to as *'Vorster'* (it also appears from articles drawn from the internet, annexed as 'JB 2 and 3' to the founding papers, that *Vorster* also claims to have two doctorates, which appear to be fake)

[2]*Alberts Bekker Vorster Pillay & Associates* of 212 Kritzinger Street, Meyerspark, Pretoria, hereinafter referred to as 'ABVP'

h) Vorster and ABVP instructed counsel of the Pretoria Bar, Advs. T P Kruger, E Botha and E Clavier to assist and represent Applicant during the arbitration process.

i) At the arbitration, Advs. T P Kruger and E Clavier, on instruction of ABVP represented Applicant.

j) The arbitration took place in Walvis Bay, Namibia.

k) Vorster also attended the arbitration hearing.

l) Vorster never was an attorney in terms of relevant South African legislation and ABVP never was a firm of attorneys.

m) Certain correspondence exchanged between ABVP on behalf of Applicant and Webber Wentzel Attorneys on behalf of the Respondent, as well as some of the pleadings filed during the arbitration process, apart from referring to ABVP Attorneys also refer to Mathe Attorneys[3].

n) The correspondence referring to Mathe Attorneys is on the letterhead of ABVP, which letterhead does not indicate anywhere that Mathe Attorneys was acting in association with ABVP and/or that Mathe Attorneys and/or Mr Mathe himself had any sort of relationship with ABVP Attorneys. A handwritten inscription "Mathe Attorneys" appear on the last page of the arbitration agreement.

o) First Respondent nowhere in its own pleadings in the arbitration process refers to Mathe Attorneys and consistently refers to ABVP as the Applicant's attorneys. It is also clear from the correspondence that the First Respondent never directed any correspondence to Mathe Attorneys and/or exchanged any correspondence with Mathe Attorneys.

p) Applicant never instructed Mathe Attorneys, was not aware of its existence and never had any dealings with it. Neither was Mathe Attorneys aware of Applicant, at least

[3] *Mr Themba Mathe*, a duly admitted attorney, practising under the name and style of *Mathe Attorneys*, with offices at 181 Vom Hagen Street, Pretoria-West, Pretoria

not until Mr Mathe became aware of Applicant's existence during on or about November 2012 when he was contacted by Applicant's current attorney of record, Mr Basson. Mr Basson informed Mr Mathe that ABVP and Vorster indicated in correspondence and pleadings that he acted on behalf of Applicant. Mr Mathe also never acted for the Applicant.

q) Vorster and ABVP unlawfully in a fraudulent manner represented that Mathe Attorneys acted for clients, which includes Applicant, in legal matters.

r) Mathe has not signed any documents filed in the matter.

s) Vorster inter alia has signed the arbitration agreement as well as Applicant's statement of defence, which was filed during the arbitration proceedings.

t) Subsequent to Second Respondent making his award, Applicant on or about 27 June 2012 filed a notice of appeal in terms of clause 12.4 of the arbitration agreement. This notice refers to both Mathe Attorneys and ABVP indicating both to be the attorneys for Applicant. This notice again was signed by Vorster.

u) On or about August 2012 Applicant, who appointed ABVP as its attorneys (and Vorster specifically to act as its attorney) became aware that the said firm was not a firm of attorneys and that Vorster intentionally and unlawfully represented himself to be an attorney.

v) Subsequently Bares & Basson informed First Respondent's attorneys of record, Webber Wentzel, that Vorster and ABVP fraudulently represented themselves to be attorneys and a firm of attorneys respectively, that Applicant regarded the whole arbitration process and everything going with it as void and that an application would be brought to set it aside.

w) First Respondent was also informed that Applicant was of the view that the appeal of Second Respondent's award should be suspended until finalisation of the current application.

x) On 12 September 2012, Webber Wentzel on behalf of First Respondent wrote to Bares & Basson informing it that if the current application was not filed by 21 September 2012 that it would have been assumed that Applicant was no longer serious about contesting the arbitration award and that an urgent application would have been filed to enforce the award.

y) Applicant's application in this matter by agreement was served on First Respondent's attorneys of record on the 21st of September 2012.'

[4] On behalf of the first respondent counsel on the other hand contended in their written heads of argument that the material facts were as follows:

1. 'In any proceedings other than those in a court of law, we submit that, in order for proceedings to be set aside, it is necessary to establish prejudice. Whether prejudice is present depends on the facts of each case.

2.

The issues

a) It is unclear whether the applicant intends persisting with its pleaded case. Accordingly, in these heads, we will address both the applicant's pleaded case and the new case set out in its heads of argument, and will demonstrate that, on either version, the applicant is bound to the arbitration agreement, and is liable to comply with the award.

3.

b) In broad summary, in these heads we accordingly contend that:

4.

1. the applicant has failed to set out a factual basis for Vorster's alleged misrepresentation;

4.1

4.2 1.2 in any event, the applicant represented to the first respondent that Vorster was entitled to act for it, and is bound by that representation;

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4.4 1.3 even if the applicant was the victim of a fraud, it (as opposed to the first respondent) must bear the consequences thereof;

4.5

4.6 1.4 Vorster's alleged contravention of the Attorneys Act, and indeed the Practitioners Act does not *ipso facto* result in the invalidity of the arbitration proceedings;

4.7

4.8 1.5 on the facts of this case, the Practitioners Act does not apply; and

4.9

4.10 1.6 the consequence of the applicant launching this application is that it has lost its right to prosecute an appeal in terms of the arbitration agreement.

5.

The relevant facts

c) The applicant admits that it was represented by Namibian attorneys until approximately July 2011, but has not responded to the first respondent's challenge to provide any evidence that it has terminated its relationship with those attorneys.

6.

d) Despite having Namibian attorneys, the applicant contends that it selected ABPV to act for it "*specifically*" as its attorney. The applicant does not explain why it needed a South African attorney specifically.

e) There is no question that the applicant represented to the first respondent that it authorised Vorster to act for it. In this regard, the applicant unequivocally admits that it "*does not dispute that it represented that ABPV was authorised to act in its behalf in the dispute between applicant and first respondent*…"

f) Immediately after the applicant appointed Vorster, an exchange of correspondence commenced between him and the first respondent's Cape Town attorneys, Webber Wentzel. That correspondence led to an arbitration agreement, pleadings, and, ultimately, to the arbitration award that forms the subject matter of this application. We submit that the correspondence and pleadings constitute clear representations that Vorster was acting for the applicant, and that he was acting in concert with a firm called Mathe Attorneys ("Mathe"). In this regard:

7.

7.1 i) on 25 July 2011, Vorster advised Webber Wentzel that he and Mathe act on behalf of the applicant;

7.2 ii) on 3 October 2011, Vorster advised Webber Wentzel that he and Mathe had referred proposals to their client;

7.3

7.4 iii) both the draft and final deeds of arbitration were signed by Vorster (for ABPV) and Mathe;

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7.6 iv) On 18 October 2011, Vorster advised Webber Wentzel that the applicant had perused its statement of defence;

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7.8 v) the applicant's statement of defence was signed by "*ABVP / Mathe Attorneys*"

7.9

8. g) As a result of the above, the first respondent believed that Vorster and ABPV were legal advisors who were authorised to act for the applicant, together with Mathe, who were attorneys acting with Vorster. In light of the circumstances set out above, we submit that this belief was reasonable.

9.

10. h) The applicant contends that it only discovered that Vorster was not an attorney after the award was delivered. We submit that this is not plausible, and can only be believed if it can be accepted that the directors of the applicant who instructed Vorster did not read any of the correspondence or pleadings referred to above.

11.

12. i) In this regard, in response to the first respondent's challenge, the applicant blithely states that "*correspondence and pleadings were not always exposed to detailed consideration*."

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14. j) It is also clear that the applicant knew Vorster represented to the first respondent that he acted in conjunction with Mathe attorneys, and that the applicant represented or knowingly allowed ABPV to represent that ABPV acted in conjunction with Mathe attorneys.

15.

16. k) Applying the rule in *Plascon-Evans,*[4] we submit that this application falls to be determined on the basis that the applicant did have such knowledge, alternatively that the first respondent's contention that the applicant must have been aware of the role of Mathe is not far-fetched nor does it warrant rejection.

17.

l) The respondent reasonably relied on these representations in concluding the arbitration agreement.'

[5] In addition it was noted that:

18. 'In its founding and replying papers, the applicant relied on Vorster's fraudulent misrepresentation – that he was an attorney - as constituting grounds to set aside the award.

19.

20. In its heads of argument, the applicant has introduced a new ground. It now contends that Vorster's conduct in acting or holding himself out as an attorney, when he was not admitted as such, constitutes a criminal offence in terms of section 83(1) of the Attorneys Act 57 of 1997 ("the Attorneys Act"). The applicant submits that the effect of Vorster's contravention of the Attorneys Act is to invalidate the arbitration proceedings, including the award.

21.

The applicant's reference to the Attorneys Act is a reference to a South African statutory provision, and accordingly the first respondent submits that a contravention thereof is irrelevant to these proceedings. The first respondent contends that any purported irregularity must be determined by reference not to South African legislation, but to the legislation applicable in Namibia, and in particular to the Legal Practitioners Act 15 of 1995 ("the Practitioners Act") and the consequences of a contravention of section 21 thereof.'

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[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), Namibia, Broadcasting Corporation v Kruger and others 2009 (1) NR 196 (SC) at 225.

[6] In further support of its case it was submitted on behalf of the applicant that regard would have to be had to the nature of Vorster's and ABVP's appointment. These submissions were introduced by way of two questions:

'Firstly, did Applicant appoint ABVP and Vorster to be its attorneys and did they thereafter act as attorneys on behalf of the Applicant?:

Secondly, considering that Vorster is not an admitted attorney and ABVP not a firm of attorneys as is envisaged in the Attorneys Act, 53 of 1997 ("the Attorneys Act") applicable in the Republic of South Africa, whether the Applicant reasonably should have realised that ABVP and Vorster were not attorneys or alternatively not a firm of attorneys. In this regard it seems that First Respondent's contention is that ABVP acted in association and/or in conjunction with Mathe Attorneys, that Applicant having had access to correspondence sent on its behalf by ABVP, and pleadings referring to Mathe Attorneys, it should have been aware of this association. Consequently, the contention seems to be, Applicant should have realised that Vorster was not an attorney and ABVP not a firm of attorneys.

Regarding the first question … :

a) Fernandez who was intimately involved in the dealings regarding the transaction and the subsequent arbitration clearly states that ABVP was appointed as Applicant's attorneys and Vorster specifically to be Applicant's attorney and to provide legal advice.

b) Vorster also signed the arbitration agreement and directly below his signature it is indicated that he is the attorney for the Applicant (who was the Respondent in the arbitration).

c) Vorster signed the statement of defence and directly below his signature there is reference to him being Applicant's attorney.

d) The same applies to other pleadings.

e) The First Respondent always regarded ABVP to be Applicant's attorneys. First Respondent itself has referred to ABVP in pleadings filed by it as Applicant's attorneys.

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f) Applicant's counsel was instructed by Vorster.

g) Vorster was present during the preparations for the arbitration and also attended the arbitration.

h) Furthermore it is clear from the arbitration agreement and pleadings that Applicant was represented by an attorney, and if it was not Mathe, then it only could have been Vorster and AVBP, albeit unlawfully and in a fraudulent matter. There can be no doubt that Mathe Attorneys never acted for Applicant.

First Respondent's contention that Applicant appointed Vorster and AVBP as legal advisors and Mathe as attorney, for the same reasons should be rejected. It is not supported by the facts. Applicant was not aware of Mathe and Mathe not aware of Applicant. He never had any mandate from Applicant. In fact, he had no knowledge of this case. It is simply preposterous and illogical to even contemplate under the circumstances that AVBP and Vorster were the legal advisors and Matha the attorney.

Consequently it is submitted that the only logical conclusion is that Vorster and AVBP were appointed as attorney and firm of attorneys respectively to represent the Applicant and that they throughout acted, albeit illegally and fraudulently, as such.

Because Mathe never acted in association and/or in conjunction with ABVP and Vorster it means that there is consequently no substance in First Respondent's contention that Applicant's counsel, and therefore Applicant itself, should have been aware of the situation and that Applicant therefore must have been aware that is employed a legal advisor. The basis for First Respondent's proposition that Applicant reasonably should have been aware that Vorster and ABVP were not attorneys, alternatively a firm of attorneys is of course based on First Respondent's contention that ABVP were acting in association and/or conjunction with Mathe Attorneys. In the absence of such a relationship, which clearly did not exist, there is simply no substance in this allegation.

Furthermore Vorster and ABVP were not even regarded by the First Respondent as merely legal advisors.'

[7] In this basis the following further submissions where mustered on behalf of applicant:

‘THE CONSEQUENCES OF VORSTER ACTING AS AN ATTORNEY AND ABVP AS A FIRM OF ATTORNEYS:

In the Act an “attorney” Is defined as a person duly admitted to practice as an attorney in any part of the Republic of South Africa.

In terms of Section 15 of the Act any person to be admitted as an attorney must be:

a) A fit and proper person to be so admitted;
b) Must have certain tertiary qualifications namely a LLB;
c) Must have done articles under a contract of service; and
d) Must have passed certain practical exams.

In terms of Section 23 of the Act, read with the relevant definitions of .practitioners, only admitted attorneys are entitled to establish a juristic person, a firm, incorporated in terms of the relevant Corporate Laws, through which to conduct a practice.

Vorster and ABVP have not complied with any of these requirements and acted in breach of the provisions of the Act. Vorster is not an attorney and ABVP not a firm of attorneys.

It is a criminal offence In terms of Section 83(1) of the Act for a person to act as an attorney or for the person to hold himself out to be an attorney. Vorster and ABVP have also consequently committed criminal offences in acting as Applicant’s attorneys, or in holding themselves out to be Applicant’s attorneys.

It is contended that all the steps and processes that Vorster and ABVP were involved in, in relation to the dispute which was before the Second Respondent have been tainted by the unlawful and criminal conduct of Vorster and ABVP. They were appointed as Applicant’s attorneys whom they clearly could not be.

The appointment of counsel on behalf of Applicant to act in the arbitration was also unlawful because of Vorster not being an attorney. Counsel can only be appointed by an attorney in a matter of the nature, which was before the Second Respondent.[5]

The circumstances of this present matter is not dissimilar to that of *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A) where each of the appellants had been tried and convicted in the Transvaal Provincial Division of various offences and had been represented at their respective hearings by one De Jager. De Jager had obtained the LLB degree but had never been admitted to practise as an advocate in terms of s 3(1) or s 5(1) of the Admission of Advocates Act 74 of 1964. He took the identity of someone who had been admitted and thereby became a member of the Society of Advocates of the Orange Free State after serving his training period as a pupil and after having passed the practical examination. By the some deception he also became a member of the Pretoria Bar. When the full facts became known the appellants applied for a special entry alleging that the proceedings in their respective trials had been vitiated by this irregularity. The Court examined the procedure for admission to practise and was of the opinion that it was more than a mere formality: though an applicant might be duly qualified and satisfy the other requirements for admission, his character and integrity were of cardinal importance. The proper administration of justice required that he be a person of unquestionable honesty and Integrity. The Court held that, from the language of the Act and its provisions and considered in conjunction with the privileges, duties and responsibilities of an advocate, authority to practise in terms of the Act was essential to the proper administration of justice. The lack of such authority was so fundamental and irregular as to nullify the entire trial proceedings.

In *Compania Romana De Pescuit (SA) v Rosteve Fishing* 2002 NR 297 (HC) a certain Mr Dickenson purported to act as a legal practitioner and also signed a notice of application as a legal practitioner. It appeared that he was not a legal practitioner in terms of the Legal Practioners Act, 15 of 1995. The Court after *inter alia* referring to section 21(1) of this Act which prohibits that a person practice, or holds him out, or pretends to be a legal proctioner unless enrolled as such, said the following:

"The legislative purpose behind the section is clear: it seeks to protect the public against charlatans masquerading as legal practitioners who seek to prey on the misery and money of its members; it serves the public interest by creating an identifiable and regulated

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[5] *Society of Advocates of Natal v De Freitas (Natal Law Soc Intervening)* 1997 (4) SA 1134 (N) at 1171B – 1172 G

pool of fit, proper and qualified professionals to render services of a legal nature and it is aimed at protecting, maintaining and enhancing the integrity and effectiveness of the legal profession, the judicial process and the administration of justice in general.[6]

Applicant has stated that it is not aware of any prejudice that It suffered because of the unlawful and criminal conduct of Vorster and ABVP. It is however Applicant's contention that it is irrelevant whether or not Applicant has suffered any prejudice and that the Irregularity which exist *(sic)* because of Vorster and ABVP's conduct is so serious and of such a nature that prejudice to Applicant play *(sic)* no role in deciding this matter. It is contended that it is in the public Interest, where a party has chosen to be represented by an attorney in an arbitration, that full recognition is given to the right and choice of that party to be so represented. A party who has elected to be presented by an attorney is entitled thereto and where it later appears that the person who acted as the attorney unlawfully and fraudulently pretended to be on attorney it constitutes an irregularity justifying declaring the total process a nullity.[7] Prejudice play no roll in matters of this nature as the overriding considerations are interest of justice, proper administration of justice and the interests of the public.[8]

Consequently it is submitted that the arbitration agreement, the subsequent arbitration as well as the award of the Second Respondent is invalid and that it should be declared null and void.'

[8] The counter argument ran as follows:

[6] At 302B-D –On 302 B-D; Also see Ex Parte application of *THE PROSECUTOR-GENERAL – RE : IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF SECTION 51 OF THE PREVENTION OF CRIME ACT* 29 OF 2004 (Case no: POCA 11/2011} where It was held that a person attached to the staff of the Prosecutor-General had no locus standi to appear in a matter for the application of a prevention order as the proceedings are clvii in nature and the person was not admitted as a legal practitioner. The principal *(sic)* that those who are not attorneys should not be permitted to give themselves out as attorneys and do the work of an attorney, which includes briefing council *(sic)*, has been confirmed In *Marx v Stalcor & Others; Glaubiz v Preston Anderson CC* (2001) 22 lLJ 2669 (LC); Also see Shali v Prosecutor General [2012] NAHC paragraphs [45] to [51] where it was held that a notice of motion not signed by a legal practitioner is invalid.

[7] *S v Le Roux* 1988 (2) SA 868 (A) on 871F – 875.

[8] *Compania Romana De Pesquit (SA)* supra on 302 H-I where the approach in *S v Le Roux* supra that prejudice need not be considered has been approved. See also *Nduli v SA Commercial Catering & Allied Workers Union* (2001) 22 ILJ 198 (LC) par. [16] were the South African Labour Court found that arbitration proceedings in terms of the Labour Relations Act of South Africa (66 of 1995) was tainted by a candidate attorney without appearance right appearing in the matter. The Court raised the matter *meru moto* and concluded that it was an irregularity where prejudice played no role. Under the circumstances the court refused to make the award an order.

‘The proper approach to irregularities in legal proceedings

22.

23. The applicant’s assumption that the inevitable consequence of Vorster’s contravention of the Attorneys Act or the Practitioners Act is the invalidity of the award is misplaced. The legal position is not as straightforward as the applicant would have it.

24. At the outset, we point out that, in South Africa, the consequence of a person who is not an attorney briefing counsel is that the Bar rules are breached. No criminal offence is committed in respect of that act. Accordingly, the applicant’s contention that “*The appointment of counsel by Vorster happened in a manner not permitted by South African law*” is misleading, and *De Freitas*[9] is not authority for that proposition. *De Freitas* clearly states that where an advocate acts without a brief from an attorney, he commits unprofessional conduct, not illegal conduct.[10] It says nothing about the effect of that unprofessional conduct on proceedings that the guilty party was involved in. We point out that in *De Freitas*, there was no suggestion that any of the proceedings that the advocate in question acted in were void *ab initio* as a result of his contravention of the Bar rules.

25.

26.

27. Accordingly, if any criminal offence has been committed in this matter, it could only have been in Vorster’s acting as or holding himself out to be an attorney, but not in the briefing of counsel.

28. In any event, we submit that even if Vorster contravened the Attorneys Act or the Practitioners Act, the effect thereof is not to render the arbitration proceedings void, rather, an act that contravenes legislation will only be a nullity if that is the intention of the legislature.

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[9] *Society of Advocates of Natal v De Freitas (Natal Law Soc Intervening)* 1997 (4) SA 1134 (N)
[10] _De Freitas_ *supra* at 1174A-C

29. The South African Appellate Division considered this issue in *Standard Bank v Estate Rhyn*[11] and found as follows:

> 30. *"The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.13.16) puts it – 'but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it. … The reason for all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law."*[12] (our emphasis)

31. The court applied a variation of this principle in *S v Mkhise; S v Mosia; S v Jones; S v Le Roux.*[13] In that case, the court considered the effects of a contravention of section 9 of the Admission of Advocates Act,[14] which is similar to the provision in the Attorneys Act that the applicant relies on.[15]

32. The court did not find that the contravention *ipso facto* resulted in the invalidity of the proceedings. Rather, it held that:

> 33. "*It is a well-established principle that an irregularity in the conduct of a criminal trial may be of such an order as to amount per se to a failure of justice, which vitiates the trial. (I shall, for convenience, refer to an irregularity having such*

[11] *Standard Bank v Estate Rhyn* 1925 AD 266
[12] *Estate Rhyn supra* at 274-275, confirmed by the Namibian Supreme Court *(sic)* in *Rosteve Fishing supra* at 301I-J
[13] 1988 (2) SA 868 (AD)
[14] 74 of 1964
[15] **i**.e. that it is an offence for a person to act or hold himself out as an attorney – section 83(1) of the Attorneys Act – or an advocate – section 9(3) of the Admission of Advocates Act (74 of 1964).

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> *an effect as a 'fatal irregularity'.) On the other hand, less serious and less fundamental irregularities do not have that effect".*[16]

34. The Namibian Supreme Court confirmed that this is the proper approach in *S v Shikunga and Another*[17] The court held that, in the context of a criminal trial, prejudice must be established in order to vitiate the trial:

> *35. "There can be no doubt … that a non-constitutional irregularity committed during a trial does not per se constitute sufficient justification to set aside a conviction on appeal. The nature of the irregularity and its effect on the result of the trial has to be examined."*[18]

36. The court found that this principle applied to both constitutional and non-constitutional breaches.[19]

37. In *Mkhise*, a person who had not been admitted as an advocate had conducted a criminal trial. The court found that it was in the public interest that the defence in a criminal trial be undertaken by a person authorised to practice as an advocate in terms of the Admissions of Advocates Act, and the lack of authorisation constituted a fatal irregularity.[20]

38. In *Shikunga*, the trial judge admitted evidence on the basis of an unconstitutional provision of the Criminal Procedure Act. The court found that, although the admission of this evidence constituted a constitutional irregularity, it did not constitute a fatal irregularity that would render the conviction of the accused unfair, and refused to set the conviction aside.[21]

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[16] *Mkhise supra* at 871G
[17] 2000 (1) SA 616 (NmSC)
[18] at 629-D
[19] *Shikunga supra at 629F*
[20] *Mkhise supra at 875G*
[21] *At 630E-F*

39. We emphasise that in both _Mkhise_ and *Shikunga*, the accused were charged with the serious charge of murder, and although *Mkhise* was eventually reprieved in terms of section 326(1) of the Criminal Procedure Act, he was initially sentenced to death.[22]

40. In this case, a person who had not been admitted as an attorney was interposed between the applicant and its counsel, who were admitted as advocates, and furthermore, who were members of the Pretoria Bar (and who would, on that basis, qualify to be admitted as legal practitioners in terms of the Practitioners Act). It is common cause that the applicant's counsel were involved in proceedings from a preliminary stage.

41. It is not insignificant that the counsel who represented the applicant in the arbitration continues to represent the applicant in this application.

42. In the premises, we submit that no fatal irregularity, of the kind that vitiated the trial in _Mkhise,_ is present in this matter.

43. In these circumstances, we submit that a court would not interpret section 83(1) of the Attorneys Act or section 21(1) of the Practitioners Act to require that a civil arbitration should be set aside on the basis that one of the attorneys involved therein contravened that section by acting as or holding himself out as an attorney when he was not. The result – that an innocent third party should have its arbitration award set aside – is precisely the sort of impropriety contemplated by *Voet* and set out in *Estate Rhyn*.[23]

44. The legislature, in enacting section 21 of the Practitioners Act, could never have intended this to be the case. This much is apparent by simply postulating that the applicant had won the arbitration. If the applicant's argument is correct, the arbitration proceedings would still be invalid, and the first respondent would be entitled to have the award set aside. The applicant would have it that an unsuccessful litigant could challenge litigation on the basis of his opponent's conduct even in the absence of prejudice.'

[22] _Mkhise_ *supra at 869B-C*
[23] Cf paragraph 43 *supra*

45. [9] During oral argument Mr Kruger, who appeared with Mr van der Westhuizen on behalf of applicant, once again emphasised that attorney Mathe never played a role, although Mathe at some stage practised from Vorster's office.

46. [10] In his view it was of no significance that the arbitration was conducted in Namibia, as Vorster, in any event, was also at no stage a legal practitioner in terms of the Namibian Legal Practitioner's Act 1995.

47. [11] The arbitration proceedings in question were quasi-judicial in nature and once it was accepted that the services, which Vorster had rendered, were of a legal nature, that was the end of the matter as this rendered the proceedings null and void. A fundamental irregularity had thus occurred, which went to the root of the matter, as a result of which the arbitration award had to be set aside.

48. [12] Mr Fitzgerald SC, who appeared with Mr Traverso on behalf of first respondent, on the other hand, went so far as to submit that the applicant knew all along that Vorster was not an attorney, but acquiesced in this knowledge as Mathe was there. In any event there had to be some association. He then meticulously analysed the relevant averments with reference to the approach to disputed facts in motion proceedings and with reference to which the applicant had failed to discharge its onus. In this regard the applicant had also failed to prove that there was a misrepresentation by Vorster on which they could reasonably rely.

49. [13] He submitted further that the nature of the proceedings should be taken into account and which were in the form of a private arbitration and should not be equated with, for instance, arbitrations in labour disputes, which arbitration tribunals had been established by statute and which would be regarded as being quasi- judicial.

50. [14] Mr Fitzgerald posed the rhetorical question what the relevance of the contraventions of a foreign statute were in Namibia, where the emphasis should rather be on the local legislation and were the Legal Practitioner's Act should find

application as far as the arbitration was concerned, which, after all, had been conducted in Walvis Bay. Only the relied upon misrepresentation, on the other hand, had taken place in Pretoria, where the arbitration agreement, all pleadings and also the Notice of Appeal had been signed.

[15] He emphasised that the Supreme Court, in *Shikunga*, had adopted the common law test, which draws a distinction between irregularities of a fundamental and non-fundamental nature, in regard to constitutional and non-constitutional errors in criminal proceedings. Also the applicant's reliance on *Rosteve Fsihing* was misplaced as that case was fact specific and in any event only applies to proceedings in a court of law. In all other proceedings it was necessary to establish prejudice. The present matter was a private arbitration in which the applicant thus had to establish prejudice suffered as a result of Vorster's misrepresentations, which it had failed to do, as counsel had been briefed at all material stages, who were all duly admitted advocates. The application was thus liable to be dismissed.

THE IMPACT OF THE CONTRAVENTIONS OF SECTION 21(1) LEGAL PRACTITIONER'S ACT 1995 ON LEGAL PROCEEDINGS

[16] Without wanting to do an injustice to all the other arguments mustered by counsel on behalf of the parties, I believe that the key to the solution of the dispute between the parties is found in the first instance in the provisions of the Legal Practitioner's Act No 15 of 1995.

[17] While it is undoubtedly correct that the arbitration agreement and all pleadings emanating therefrom, as well as all instructions and work relating thereto, were all done in South Africa, it is also not in dispute that the resultant arbitration proceedings, which the applicant now seeks to assail, were conducted in Namibia.

[18] It does not take much to fathom that at least, as far as the arbitration proceedings and the resultant award is concerned the Namibian statute applies.

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[19] This view is in any event also reinforced by the 'choice of law' provision, clause 7 the arbitration agreement, as concluded between the parties, which expressly states that Namibian law shall apply to the arbitration.

[20] Section 21 of the Namibian statute then criminalises certain acts committed in contravention of the statute. It does so in the following manner:

> '21 Certain offences by unqualified persons
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> (1) A person who is not enrolled as a legal practitioner shall not-
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> (a) practise, or in any manner hold himself or herself out as or pretend to be a legal practitioner;
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> (b) make use of the title of legal practitioner, advocate or attorney or any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner or is recognised by law as such;
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> (c) issue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of law in the name or on behalf of any other person, except in so far as it is authorised by any other law; or
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> (d) perform any act which in terms of this Act or any regulation made under section 81(2)(d), he or she is prohibited from performing.
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> (2) A candidate legal practitioner shall not accept, hold or receive moneys for or on account of another person in the course of his or her training or attachment to a legal practitioner, or in the course of the conduct of the practice of the legal practitioner to whom he or she is attached.
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> (3) A person who contravenes any of the provisions of subsection (1) or (2) shall be guilty of an offence and liable on conviction-

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(a) in the case of a contravention of subsection (1), to a fine not exceeding N$100 000,00 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment; or

(b) in the case of a contravention of subsection (2), to a fine not exceeding N$50 000,00 or to imprisonment for a period not exceeding 30 months or to both such fine and such imprisonment.'

[21] It was correctly pointed out on behalf of first respondent, with reference to the South African Supreme Court decision delivered in *Standard Bank v Estate Rhyn*[24] that the effect of these prohibitions and whether or not they will attract invalidity and nullity is to be gathered from the intention of the legislature.

[22] Maritz J, as he then was, was alive to this principle, which he recognised when he stated:

'Section 21 is formulated in peremptory terms and a contravention of its prohibitive provisions constitutes an offence carrying with it a severe punishment. Whereas an act in contravention of a statutory provision so formulated is, as a general rule, regarded as a nullity. The general rule notwithstanding, a Court cannot decide the legal status of such an act simply by reference to the 'peremptory' or 'directory' labels that may be attached to the legislative formulation of the enactment. It is compelled in every instance to seek the intention of the Legislature in the 'language' scope and purpose of the enactment as a whole' (per Trollip JA in *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A. Compare also *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274.)'[25]

[23] I do of course have the benefit of the learned judges interpretation of section 21(1), which he motivated as follows:

'The language used in the section is of an imperative nature. As Van den Heever JA remarked in *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683D-E with reference to the use of the word 'shall' in an enactment:

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[24] At 274-275

[25] At 301 para I - J

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'If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity.'

Limited semantic support for that inference may also be found in the negative or prohibitory form in which the provision has been couched (see *Sutter v Scheepers* 1932 AD 165 at 173).

The legislative purpose behind the section is clear: it seeks to protect the public against charlatans masquerading as legal practitioners who seek to prey on the misery and money of its members; it serves the public interest by creating an identifiable and regulated pool of fit, proper and qualified professionals to render services of a legal nature and it is aimed at protecting, maintaining and enhancing the integrity and effectiveness of the legal profession, the judicial process and the administration of justice in general.

It is not difficult to envisage a plethora of highly prejudicial, irregular and disagreeable consequences that may follow if a person unlawfully holds him- or herself out as a legal practitioner. Some of those consequences are apparent from reported cases. So, for example, one De Jager by theft and subterfuge gained admission to the Society of Advocates of the Orange Free State and Transvaal under the assumed identity of one Pienaar, who was an admitted advocate in Namibia. Although he had studied law and had the requisite academic qualifications to apply for admission as an advocate, he was never admitted to practise. During 1983 and 1984 he appeared pro deo in no less than 21 criminal cases. Four of the cases in which the accused were convicted of murder and certain other crimes went on appeal and were collectively dealt with in the judgment of Kumleben AJA (as he then was) in *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A). In its judgment the Appellate Division of the Supreme Court of South Africa dealt with some of the reasons why the accused persons should only have been represented by a duly admitted legal representative. Referring to the interests of the public, the profession and the Courts and concluding that the authority to practise is essential to the proper administration of justice, the Court held that representation by a person not admitted to practise in those instances constituted a fatal irregularity in the proceedings. It arrived at that conclusion without considering whether the accused had suffered any actual prejudice during the trial and notwithstanding the regrettable but unavoidable hardship of a trial de novo.

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One shudders to think of the disrepute that would have befallen the administration of justice had the death sentence imposed on one of those appellants (Mkhise) been executed. Fortunately, he had received an executive reprieve. Although these cases may be extreme examples of the interests at stake, the financial prejudice that may be brought about when a member of the public acts on the advice of a bogus 'legal practitioner' may be just as devastating. In *Oliver en 'n Ander v Prokureur-Generaal, Kaapse Provinsiale Afdeling, en Andere* 1995 (1) SA 455 (C) at 464H-465A Fagan AJP mentioned another consideration when he set aside the convictions and sentences of an accused who had been represented by a candidate attorney in a Court where the latter had no right of audience:

"Ek meen dat die vertroue van die publiek in die regstelsel wel skade kan ly waar die Hof nie optree in 'n geval waar 'n onbevoegde persoon vir hom voorgedoen het as iemand wat 'n ander kan regsverteenwoordig nie. Geregtigheid moet nie net geskied nie, dit moet gesien word om te geskied."

"I think that public confidence in the legal profession can suffer harm where a Court does not act in a case where someone who is not competent to represent someone, pretends that he is competent to do so. Justice must not only be done; justice must also be seen to be done."
(Editor's translation.)

In similar circumstances, the convictions and sentences of accused persons were also quashed in S v La Kay 1998 (1) SACR 91 (C), S v Gwantshu and Another 1995 (2) SACR 384 (E) and S v Khan 1993 (2) SACR 118 (N).

Given the compelling policy considerations behind s 21(1) of the Legal Practitioners Act, 1995 and the formulation, scope and object of the section, I am of the view that the Legislature intends that if a person, other than a legal practitioner, issues out any process or commences or carries on any proceeding in a court of law in the name or on behalf of another person, such process or proceedings will be void ab initio. The view I have taken corresponds with the rules of practice in this Court. Any 'looseness' in the enforcement of the well-established practice and of the Rules of Court in that regard is likely to bring the administration of justice into disrepute, erode the Court's authority over its officers and detrimentally affect the standard of litigation.'[26]

[26] At 301 J – 303 F

[24] The judgment in *Rosteve Fishing* has since been cited with approval and has recently also been applied in two further decisions of this court.[27]

[25] Also I cannot fault the learned judges reasoning which led to the finding that the Namibian legislature intended that if a person, other than a duly admitted legal practitioner, issues out any process or commences or carries on any proceeding in a court of law in the name or on behalf of another person, such process or proceedings will be *ipse jure* void *ab initio*.[28]

[26] Mr Fitzgerald has however submitted that Maritz J's decision in *Rosteve Fishing* is case specific, but is it?

[27] It is clear that he must be correct if a contravention of Section 21(1)(c) has occurred in legal proceedings.

[28] It appears further on a reading of the section that all the scenario's listed in Section 21(1), that is all those, listed in Sections 21(1)(a) to (d), are all visited with the same sanction, ie. the penalties provided in Section 21(3)(a).

[29] It will be noted that no distinction, as far as the prescribed sanction is concerned, is made between a contravention of Section 21(a) or (b) for instance.

[30] It would also seem that the greater part of Maritz J's reasoning, and the policy considerations enumerated by him in *Rosteve Fishing in regard to Section 21(1)(c)*, would surely also apply to the other prohibitions listed in Section 21(1)(a), (b) and (d).

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[27] See the judgment of Damaseb JP in *Maletzky v Zaaluka; Maletzkey v Hope Village* (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013) at para's [56] – [61] – see also Smuts J in the Labour Court in *Kamwi v The Government of the Republic of Namibia (A 31/2013) [2013] NAHCMD 380 (20 December 2013)* at pages 11 to 14

[28] Compare also : *Ex Parte Prosecutor-General In Re: Application For A Preservation Order In Terms of S 51 of The Prevention of Organised Crime Act 29 of 2004* 2012 (1) NR 146 (HC) and *Shalli v Prosecutor-General POCA* (9/2011)[2012] NAHC 112 (2May 2012) reported on the SAFLII web-site at : http://www.saflii.org/na/cases/NAHC/2012/112.html at [45] to [51]

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[31] This would most certainly be so if perpetrated in legal proceedings, which line of reasoning, if taken through to its logical conclusion, would then militate towards a finding that also any of the other contravention of Sections 21(1)(a) to (d) should all lead to the same result, namely an *ipse jure* voidness of legal proceedings *ab initio*. Such conclusion would then clearly favour the applicant's case.

[32] What is then to be gleaned from this?

[33] Mr Fitzgerald has also contended that these considerations do not apply to private arbitrations.

[34] I believe that Mr Fitzgerald must at least be correct that the impact of the contravention complained of must be determined in this context in order to determine whether or not this distinction should lead to a different result.

[35] It is common cause that Vorster was never an admitted attorney or legal practitioner and that ABVP was never a firm of legal practitioners as contemplated in section 7 of the Legal Practitioner's Act. This means that Vorster has at least contravened Sections 21(1)(a) and (b) of the Legal Practitioner's Act 1995, while he attended the arbitration proceedings in Walvis Bay, during which he also purported to act- and held himself out - to be a duly admitted legal practitioner.

[36] The question which thus arises is whether these contraventions of section 21 of the Legal Practitioner's Act 1995 would attract the same consequences during private arbitration proceedings than they would, if they had been perpetrated during legal proceedings?

THE NATURE OF PRIVATE ARBITRATIONS

[37] Instructive and therefore relevant to this enquiry must be a comparative analysis of the nature of arbitration proceedings with litigation. In this regard counsel for first respondent referred the court to the useful comparison set out in *'The Law of*

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Arbitration – South African & International Arbitration' by Peter Ramsden 2009, which the learned author summarises as follows:

'2.4.2 Comparison of arbitration with litigation

One of the Roman Dutch law writers most influential on the South African common law , Johannes Voet[29], has set out a number of reasons why parties chose arbitration over judicial proceedings (litigation in the courts). According to Voet, arbitrators are commonly approached with a view to avoiding a formal trial by those who are 'frightened of the too heavy expenses of lawsuits, the din of legal proceedings. Their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of law.' The reasons are probably the same today.

According to Voet arbitration resembles judicial proceedings in so far as: the dispute is resolved (an end is put to cases) …

Voet also listed a number of differences between arbitration and judicial proceedings. A number of these differences are no longer as clear-cut as in Voet's time and it appears that arbitration has become more similar to judicial proceedings over time. While there is still no appeal from arbitration, at least not to the courts, arbitrators can now compel witnesses to give evidence.' Today, when an arbitrator has been corrupted by one of the parties the award can be set aside (made null and void) and it is no longer necessary to pursue the action of fraud against the person corrupting to recover the award.

Other commonly recognised differences between arbitration and judicial proceedings are:

(a) Arbitration is dependent on the existence of a prior arbitration agreement, while a claimant can institute judicial proceedings against the other party without the other party's cooperation;

(b) Arbitration is a private process and only those involved in the arbitration process have access to the hearing, while litigation is a public process and the

[29] Voet 4. 8.1, The *Selective Voet* being the *Commentary on the Pandects* [Paris Edition of 1829] by Johannes Voet [1647 – 1713] and the Supplement to that work by Johannes van der Linden [I756 – 1835] translated by Percival Gane, Butterworth & Co (Africa) Ltd, 1955.

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general public, including the media, have free access. Companies and other litigants often prefer the confidentiality of arbitration and the protection that confidentiality provides for reputation and trade secrets;

(c) In arbitration, the parties themselves select the arbitrator through agreement either directly or indirectly. The parties can also agree on the qualifications or expertise of the arbitrator. In judicial proceedings, the parties have no say in which judge is allocated to hear the case;

(d) In arbitration, the parties choose the venue of arbitration, normally by nominating a neutral city in the arbitration agreement. Judicial proceedings take place in a court that has jurisdiction which may give one of the parties a forum advantage;

(e) The arbitral award is generally final and binding and not subject to appeal. In judicial proceedings judgments are appealable;

(f) Judicial proceedings are a formal legal process, where procedural errors can prove fatal to either party's case. With a number of caveats, this is less so in arbitration;

(g) Arbitration is said to be less expensive than judicial proceedings, although in court litigation the parties do not pay for the use of the court or the cost of the judge while in arbitration the parties pay the arbitrator's fees, for the venue, and for the recording and transcription of the proceedings;

(h) An important advantage of arbitration for the claimant is that there is minimum delay. The process can be very efficient. Courts are often booked years in advance and judicial proceedings are subject to other purposeful delays brought about by litigation tactics. This expedited process may of course prove to be a disadvantage for the defendant.' [30]

[30] *'The Law of Arbitration'* op cit at p 6 -7

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[38] A judicial analysis of the nature of private arbitrations occurred also in *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*[31] which Smalberger ADP formulated as follows

'[24] Arbitration does not fall within the purview of 'administrative action'. It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed. See *Mustill and Boyd Commercial Arbitration* 2nd ed (1989) at 41.

[25] The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in s 3(1) of the Act. As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in *Patcor Quarries CC v Issroff and Others* 1998 (4) SA 1069 (SE) at 1082G. Decisions made in the exercise of judicial functions do not amount to administrative action (cf *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) at 576C (para [24]), and compare also the exclusionary provision to be found in (b)(ee) of the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act). It follows, in my view, that a consensual arbitration is not a species of administrative action and s 33(1) of the Constitution has no application to a matter such as the present.'[32]

[39] Also O'Regan ADCJ considered the nature of private arbitrations in *Lufuno Mphaphuli & Assoc (Pty) Ltd v Andrews.*[33]

[31] 2002 (4) SA 661 (SCA)
[32] At p 673-674
[33] 2009 (4) SA 529 (CC) (2009 (6) BCLR 527; [2009] ZACC 6) at p585 to 586

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‘Private arbitration

[195] In approaching these questions, it is important to start with an understanding of the nature of private arbitration. Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another*[34] as follows:

'The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.'

[196] Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. With the growth of global commerce, international commercial arbitration has increased significantly in recent decades. This growth has been fostered, in part, by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[35] which provides for the enforcement of arbitration awards in contracting States and which has had a profound effect on arbitration law in many jurisdictions.[36] It has also been served by the adoption of the Model Law on International Commercial Arbitration (the UNCITRAL Model Law) by the United Nations Commission on International Trade Law in 1985, which was amended in 2006 and which has been adopted in many jurisdictions.[37]

[197] Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator, including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an

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[34] 2002 (4) SA 661 (SCA) ([2002] ZASCA 14)

[35] The New York Convention was entered into in June 1958 in New York. It now has 144 signatories see http://www.uncitral.org/uncitral/en/uncitral_ texts/arbitration/NYConvention_status.html (accessed on 16 March 2009). South Africa has ratified the Convention and brought it into force by enacting the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (although the Act has been criticised by the South African Law Reform Commission - see South African Law Reform Commission Project 94 'Arbitration: An International Arbitration Act for South Africa' Report: July 1998 at paras 3.13 - 3.15). The Convention has been described as the 'most effective instance of international legislation in the entire history of commercial law' (Mustill 'Arbitration: History and Background' (1989) 6(2) Journal of International Arbitration 43 at 49 quoted in the South African Law Reform Commission Report: July 1998, op cit, in para 3.3)

[36] See Sutton, Gill & Gearing Russell on Arbitration 23 ed (Sweet & Maxwell, London, 2007) at 21

[37] For a discussion in the South African context see Christie 'Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations' (1994) 111 South African Law Journal 360; and Turley 'The Proposed Rationalisation of South African Arbitration Law' (1999) 2 Tydskrif vir die Suid-Afrikaanse Reg 235.

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accelerated form to an appellate arbitral body).[38] In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.

[198] The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, ie a non-State process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.'

[40] Further marked differences also emerge from paragraphs [199] to [218] of the learned judges comparative analysis as contained in *Lufuno Mphaphuli & Assoc (Pty) Ltd v Andrews.*[39]

[41] From the aforementioned analysis and given the aforementioned 'twin hallmarks' of private arbitration - ie. that it is based on consent and that it is private, ie a non-State process - it also emerges that, generally speaking, the voluntary resort to arbitration results in a less formal process of adjudication in which formal and procedural defects play a lesser role than in formal legal proceedings were such irregularities can prove fatal. It can thus be said that private arbitration proceedings do indeed differ markedly from proceedings before a court of law in these important respects. Nevertheless, and despite the choice, not to proceed before a court or statutory tribunal, private arbitration proceedings will still be regulated by the law. The question remains to what extent?

THE LAW OF ARBITRATION AND THE POWERS OF THE COURT TO INTERFERE IN PRIVATE ARBITRATION AWARDS

[38] For a fuller discussion, see Redfern & Hunter Law and Practice of International Commercial Arbitration 4 ed (Sweet & Maxwell, London, 2004) at 22 - 35.

[39] 2009 (4) SA 529 (CC) (2009 (6) BCLR 527; [2009] ZACC 6) at [195] to [218]

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[42] The sources to the South African law of arbitration are identified by Advocate Ramsden as follows:

'The South African common law is based on Roman Dutch law. Johannes Voet (1673 -1745) is arguably the most authoritative and accessible Dutch jurist on the common law. Gane's translation of Voet's Commentarius ad Pandectas'[40] has become the standard work on Roman Dutch law in South Afiica.[41] Voet's elucidation of the Roman Dutch law of arbitration has also been referred to in many judgments. …

The application of the common law on arbitration has however been restricted in South Africa because three provinces of the Union of South Africa adopted, with some variation, the English Arbitration Act, 1889, with the result that English case law on arbitration was authoritative in domestic South African courts.[42]

These ordinances were repealed on 14 April 1965 by the Arbitration Act, 1965.[43] …[44]

[43] Section 41 then made the Arbitration Act 1965, and any amendment thereto, applicable to South- West Africa as of 14 April 1965. The Arbitration Act 1965 has not been repealed since Namibia attained its independence and thus continues to govern private arbitrations[45] in Namibia.[46]

[44] It should incidentally also be noted at this juncture that the 'deed of submission' concluded between the parties in this instance expressly grants the arbitrator all such powers in the conduct of the arbitration as are conferred by 'the Act', defined to be the Arbitration Act 1965 (Act 42 of 1965).

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[40]'' Gane, P The Selective Voet being the *Commentary on the Pandects by Johannes Voet* [1647 - 1713] (Paris Edition of 1829)) and the Supplement to that work by Johannes van der Linden [1756 - 1835] (Butterworths 1957) 1698-1704.

[41] Thomas, Ph J, van der Merwe, C G & Stoop, B C *Historical Foundations of South African Private Law* 2ed (Butterworths 2000) 70.

[42] Adopted by statute in the Cape Province by Act 29 of 1898 (C), in the Transvaal by Ordinance 24 of 1904 (T), and in Natal by Act 24 of 1898 (N). South Africa is now a Republic with one unified Arbitration Act 42 of l965.

[43] Section 42(1) of Act 42 of 1965

[44]*'The Law of Arbitration'* op cit at p 13 - 14

[45] See : section 1 Definitions - In this Act, unless the context otherwise indicates - "arbitration proceedings" means proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement;

[46] See also Article 140(1) of the Namibian Constitution

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[45] Section 33 of that act then sets out the grounds on the basis of which the courts can interfere with an arbitration award:

'33 Setting aside of award

(1) Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[46] It does not take much to fathom that only Section 33(1)(c) can be of application in the current instance.

[47] I was not referred to any case law in which the courts have previously had the opportunity to consider and interpret the provisions of this sub-section, nor was I able to find any.

[48] It is however the commentary by Peter Ramsden on Section 33(1)(b) which I find most instructive:

'The ground of review envisaged by the use of the phrase *gross irregularity* in the conduct of the arbitration proceedings in s 33(1)(b) of the Arbitration Act relates to the conduct of the proceedings and not the result thereof Furthermore, every irregularity in the proceedings will not constitute a ground for review under s 33(1) (b) of the Act. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it

resulted in the aggrieved party not having his case *fully and fairly determined*.[47] … *(my emphasis)*

The court must be satisfied that the irregularity caused a *substantial injustice*. *(my emphasis)* Only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The ability to set aside an award due to a gross irregularity is really designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected.[48] *(my underlining)*

[49] In my view the section distinguishes between *'misconduct'* and *'irregularities'*, which have been committed by the arbitration tribunal in the conduct of arbitration proceedings - ie the section 33(1)(a) and (b) irregularities – on the one hand – and – on the other - those irregularities which have been committed by others, which result in the award being *'improperly obtained'*, ie. the section 33(1)(c) irregularities. An award can obviously also be improperly obtained because of an irregularity which occurred in the proceedings which was not one committed by the tribunal.

[50] The meaning of the words *'any gross irregularity in the conduct of arbitration proceedings'* in s 33(1)(b) was considered by Brand AJ (as he then was)(King J concurring) in *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) at 42G - 43D were the learned judge stated:

'We have not been referred to any decision by our Courts where the phrase 'gross irregularity in the proceedings' within the context of s 33(1)(b) of the Act formed the subject of consideration. Generally speaking, this phrase is however not foreign to our law and it has in fact been discussed in a number of reported cases.

From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof. This

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[47] *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C); *Patcor Quarries CC v Issroff and Others* 1998 (4)SA 1069 (SE).
[48] *Egmatra AG v Marco Trading Corporation* [1999] 1 Lloyds Rep 862 (QBD); *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751 (CA).

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appears clearly from the following dictum of Mason J in *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'
(See also, for example, *R v Zackey* 1945 AD 505 at 509.)

Secondly it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined. (See, for example, *Ellis v Morgan* (supra); *Coetser v Henning and Ente NO* 1926 TPD 401 at 404; *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551; and cf also *S v Moodie* 1961 (4) SA 752 (A).'[49]

[51] This approach would also seem not be out of kilter with the test adopted in *Shikunga*.[50]

[52] Returning to the present matter and given the parameters set by Section 33(1)(c) it will thus, as a next step, have to be determined whether Vorster's contraventions of section 21 the Legal Practitioner's Act 1995[51] constitute an irregularity which impacts in such a manner on the award made by the second respondent that it can be said that *'the award has been improperly obtained'*.

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[49] Cited with approval by De Villiers J in *Mia v DJL Properties (Waltloo) (Pty) Ltd and Another* 2000 (4) SA 220 (T) at p 230 at G - H
[50] At 629 C – J
[51] And also ABVP's contravention of section of Section 7 of the Legal Practitioner's Act 1995 : Juristic person may conduct a practice (1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if-
(a) such company is incorporated and registered as a private company under the Companies Act, 1973 (Act 61 of 1973), with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office;
(b) only natural persons who are legal practitioners and who are in possession of current fidelity fund certificates are members or shareholders of the company or persons having an interest in the shares of the company; etc

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[53] In answering this question I will adopt and follow the approach utilized by the South African courts in the *Easigas* case. In this regard I pose the following further questions:

a) did Vorster's or ABVP's involvement, in the arbitration, prevent the applicant from having its case *fully and fairly* determined;

b) were Vorster's contraventions of Section 21 of the Legal Practitioner's Act of such a serious nature that they resulted in the applicant not having its case *fully and fairly* determined;

c) was Vorster's involvement in the arbitration and his contraventions of Section 21 of the Legal Practitioner's Act of such a serious nature that they caused *substantial injustice* to the applicant;

d) was, that which happened at the arbitration, so far removed from what could reasonably be expected of the arbitral process that one would expect the court to take action;

e) was Vorster's or ABVP's involvement in the arbitration and Vorster's contraventions of Section 21 of the Legal Practitioner's Act of such a extreme nature that justice calls out for it to be corrected?

[54] In my view all of the above questions should be answered in the negative if one firstly takes into account that the irregularity in question occurred in the less formal setting of the underlying private arbitration proceedings, where not every irregularity necessarily is to regarded as fatal and if one then, secondly, examines the nature of the irregularity – its impact on the method and conduct of the arbitration - and ultimately its effect on the result of the arbitration.

[55] Here it becomes of relevance that instructed counsel were centrally – and at all material times – involved in the preparation and conduct of the applicant's case. Advocates TP Kruger and Etienne Botha for instance signed the applicant's

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statement of defence and counterclaim and conditional counterclaim. There is no suggestion that, as a result of a non-admitted person being interposed between the client and instructed counsel during the arbitration process, the arbitration agreement, for instance, did not properly reflect the intention of the applicant to arbitrate the underlying dispute or that the applicant's statements of defence, more importantly, did not correctly reflect the applicant's case, for example.

[56] It is uncontroverted that applicant's instructed counsel were all duly admitted advocates. These instructed counsel were in charge of the applicant's case - virtually since its inception. The applicant has thus had the benefit of admitted counsel's advice and has also had the benefit of their professional services all along. Applicant's duly admitted instructed counsel also remained involved in every step of the arbitration thereafter. During the arbitration Advocates TP Kruger and Clavier from the Pretoria bar acted for the applicant. To this day instructed counsel continue to represent the applicant, and where also in this application, Advocates TP Kruger SC and GL van der Westhuizen act for the applicant.

[57] It is also important to take into account that no evidence was led at the arbitration and that the matter was decided on common cause facts and legal issues only. I have already mentioned that there is no suggestion that the applicant's pleadings did not correctly reflect that applicant's case.

[58] In all the circumstances it must therefore be concluded that it was of very little or of no significance in the arbitration that Vorster was not an admitted attorney and that ABVP was not a firm of attorneys in this constellation.

51. [59] In any event the following further factors do also not strengthen the applicant's case:

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a) The applicant's failure to respond to the first respondent's challenge to provide any evidence that it had terminated its relationship with those Namibian attorneys ie. *Fisher Quarmby & Pfeiffer*, which had represented it

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until approximately July 2011. The failure to furnish an explanation on this score, which could easily have been forthcoming, also renders it more than likely that the applicant had at least retained its correspondent legal practitioners in Namibia all this time;

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b) The express references contained in correspondence and pleadings which pertinently indicated that Vorster had acted in concert with Mathe Attorneys, and that ABVP was associated with Mathe Attorneys, (duly admitted legal practitioner's in South Africa). In this regard it had been pointed out :

53.1 i) that Vorster had advised Webber Wentzel, on 25 July 2011, that he and Mathe were acting on behalf of the applicant;

53.2 ii) that Vorster had advised Webber Wentzel, on 3 October 2011, that he and Mathe had referred proposals to their client;

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53.4 iii) that both the draft and final deeds of arbitration were signed by Vorster (for ABPV) and Mathe;

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53.6 iv) that Vorster had advised Webber Wentzel, on 18 October 2011, that the applicant had perused its statement of defence;

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53.8 v) that the applicant's statement of defence was signed by "*ABVP / Mathe Attorneys*"

53.9 Here it is apposite to note further that the first respondent had alleged in the answering papers that the applicant's contention that it believed Vorster to be an admitted attorney could only be accepted if one were to believe that the applicant's directors *Ms Fernandes and Mr Roelofse* had failed to read any of the correspondence or pleadings and in response, to which the applicant had blithely stated that "*this could have been missed as often*

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correspondence was forwarded by Vorster, which only confirmed what was discussed and, as a consequence, "*correspondence and pleadings were not always exposed to detailed consideration*." It is thus not without doubt that applicant did have absolutely no inkling that ABVP required the association with Mathe Attorneys.

[60] Be that as it may - ultimately I cannot see how Vorster's lesser involvement, in a private arbitration, could thus have prevented the applicant from having its case *fully and fairly* determined or how Vorster's contraventions of Section 21 of the Legal Practitioner's Act caused such *substantial injustice* to the applicant during the less formal setting of a private arbitration, so much so that it has to be said that the arbitration award was ultimately improperly obtained and should thus not be allowed to stand.

[61] This finding would obviously have been different if applicant would have been represented by Vorster only. All in all the irregularities were however of such little practical significance that they had no impact on the outcome of the arbitration given admitted counsel's material involvement at all stages.

THE APPEAL ISSUE

[62] Applicant has also appealed against Second Respondent's award in terms of clause 12 of the arbitration agreement.

[63] It is now contended that if Applicant's application succeeds it would have been a complete waste of time to have pursued the appeal simultaneously with the application. It would also have been a waste of money and illogical. Also if the current application succeeds there would be no need or basis upon which the appeal could be pursued further. If the arbitration agreement would be declared null and void there would consequently also be no basis upon which the appeal could be pursued further.

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[64] As the said appeal is currently still pending - and in the event that applicant's application fails – the applicant still wishes to finalize the appeal.

[65] It was also submitted by Mr Kruger that the arbitration agreement clearly contemplates that the appeal process should be finalized prior to a party being entitled to exercise its rights to make the award an order of Court. It was submitted that in the interim the position had been similar to the situation in the civil courts where an application for leave to appeal and/or an appeal would have suspended the execution pending the outcome of the appeal and were the applicant would now, once again become entitled to pursue the appeal.

[66] In any event, so it was submitted further, the first respondent had agreed that all further processes be stayed and suspended pending the outcome of applicant's application. It has done so in its letter of 12 September 2012.

[67] Mr Fitzgerald on the other hand took the position that the applicant had lost its contractual right to appeal as clause 12.4 of the arbitration agreement provides that any appeal be lodged within 10 days of any final award by the arbitrator and that it was further apparent from the timetable set out in clause 8 of the arbitration agreement that the parties contemplated the arbitration proceedings, including any appeal thereof, to be conducted within a reasonable period of time.

[68] The applicant had noted its appeal on 27 June 2012. It then elected to proceed with this application rather than continue to prosecute its appeal. Accordingly, the applicant had failed to prosecute its appeal within a reasonable time, and in the premises has lost its contractual right to appeal the arbitration award.

[69] To the extent that the applicant seemed to suggest that "the first respondent had agreed that further proceedings be stayed and suspended pending the outcome of the Applicant's application", it was submitted that the letter relied upon, as properly construed, proved that no such agreement existed.

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[70] Indeed, it was clear from the letter that all the first respondent did was to advise the applicant that it would bring an urgent application to have the award enforced unless the applicant launched its intended application before 21 September 2012. No extension of time within which the appeal was to be prosecuted was ever discussed or agreed.

[71] In so far as it had been alleged in the replying affidavit that the applicant had specifically reserved its right to appeal in the said letter, it was submitted that no such reservation was contained therein.

[72] If regard is then had to the arbitration agreement it appears that it does indeed contain the following relevant provisions from which the intention of the parties can be fathomed regarding their intentions to finalise the arbitration process with promptitude:

a) Clause 6 - the arbitration times – the arbitration shall run from 22 to 24 February 2012;
b) Clause 8 – here it was recorded that the claimant had delivered its statement of claim on 29 September 2011 – the respondent was to deliver its statement of defence by close of business on 13 October 2011 – any replication was to be served by close of business on 27 October 2011 – discovery – on or before 19 January 2012 – requests for trial particulars by 24 November 2011 and replies thereto by 19 January 2012
c) Clause 10 – the arbitrator’s award – as soon as practicable –
d) Clause 12 – appeal – any appeal was to be lodged within 10 days of any final award – the appeal tribunal was to deliver its appeal award as soon as possible after the conclusion of the appeal – such award would then be final
e) Clause 13 – the parties here agreed not to avail themselves of the provisions of section 20 of the Arbitration Act 1965.

[73] While it would certainly have made practical sense to suspend the appeal process pending the outcome of this application, which the applicant attempted to achieve by writing the letter of 6 September 2012, it cannot be said that this purpose was achieved if regard is had to the response formulated in the letter of reply dated 12 September 2012. It should be remembered in this regard that the parties had opted for private arbitration, in the context of which they were always free to agree to a change to the rules of engagement, but any change in and to that framework pre-supposed an agreement, which was not achieved in this instance given the manner in which the legal practitioners' of first respondent reacted to the applicant's request made in this regard: I quote:

'We refer to your letter of 6 September 2012 to which we have been instructed to reply as follows:

1. In paragraph 7 of your letter under reply you record that your application to have the award set aside ("your application") will be served at our office within 7 – 10 days of date thereof (ie. by 16 September 2012) and ask that we hold off on the bringing of our application to have the award enforced, as this will delay matters further. Bearing in mind that:

1.1 The arbitration award was granted on 8 June.2012;

1.2 your client noted its intention to appeal that award on 27 June 2012, but has now indicated that the Appeal process must be suspended until the finalization of your application; and that

1.3 your firm was instructed at least a month ago.

Should we not receive your application by 21 September 2012we shall assume that your client is no longer serious about contesting the arbitration award and shall make; urgent application to the High Court to have the award enforced.'

[74] As it must from the terms of the arbitration agreement be concluded that the parties intended the arbitration process to be completed with promptitude – at the very least that they intended it to be concluded within a reasonable time, as was contended on behalf of first respondent, and as the correspondence before the court

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did not reflect an agreement to suspend the process, pending the outcome of this application, I cannot uphold the submission made on behalf of applicant in this regard.

[75] In the result the following orders are made:

1. The application is dismissed with costs, such costs to include the costs of two instructed- and one instructing counsel.

2. The counter application is also granted with costs on the same scale.

H GEIER

Judge

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APPEARANCES

APPLICANT:	T.P Krüger SC (with him G.L van der Westhuizen) Instructed by Fisher, Quarmby & Pfeifer, Windhoek
1st RESPONDENT:	M.J Fitzgerald SC (with him N Traverso) Instructed by Engling, Stritter & Partners, Windhoek