

REPORTABLE

CASE NO.: SA 17/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BARMINAS RICK KUKURI

Appellant

and

SOCIAL SECURITY COMMISSION

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 24 October 2016

Delivered: 29 November 2016

APPEAL JUDGMENT

MAINGA JA (SMUTS JA and HOFF JA concurring):

[1] This is an appeal against a decision by Kauta AJ given in the High Court, whereby he ordered summary judgment in the sum of N\$238 564,25, together with costs, against the appellant (defendant in the court below) at the instance of respondent (plaintiff in the court below). For convenience I shall continue to refer to the parties as plaintiff and defendant. Defendant was originally cited as first defendant, the Ministers of Finance and Labour as second and third defendants respectively. Both Ministers did not enter appearances. No relief was sought

against the Ministers, they were joined in the action in as far as they might have had an interest in the action.

[2] The cause of action is set forth in the summons as follows:

‘5. The plaintiff –

5.1 Is a creature of statute, established in terms of section 3 of the Act;

5.2 Is constituted as provided for in section 4 of the Act, which section – in pertinent part – provides that the plaintiff shall be constituted, and its members, including the chairperson and the deputy chairperson of the plaintiff (comprising part of the plaintiff’s Commission), shall be appointed in accordance with, and for a period as determined under, sections 14 and 15 of the State-owned Enterprises Governance Act, 2006 (“the SOE ACT”);

5.3 Is a State-owned enterprises as envisaged in the SOE Act, its portfolio Minister being the third defendant;

5.4 Is subject to Part IV of the SOE Act, section 13 (2) of the SOE Act providing that any provision contained in the establishing Act (including the Act) or constituent document or memorandum of association and articles of association of a State-owned enterprise (including the plaintiff) which is contrary to a provision of Part IV of the SOE Act must be construed as if it had been amended correspondingly with the provisions of Part IV of the SOE Act.

6. Section 22 (1) of the SOE Act (falling under Part IV of the SOE Act) provides that the remuneration and allowances payable to the members and alternate members of a board of a State-owned enterprise (including the members of the Commission constituted in terms of section 4 of the Act) contemplated in section must be determined by the portfolio Minister (*in casu* the third defendant) with the concurrence of the second defendant

and with due regard to any directives laid down by the State-owned Enterprises Governance Council under section 4 of the SOE Act.

7. At times material hereto –

7.1 The first defendant was the plaintiff's chairperson (and member of Commission), and served in that position until or about November 2013. As such, the first defendant stood in a fiduciary relationship towards the plaintiff;

7.2 The first defendant – *inter alia* in terms of section 18 (2) of the SOE Act and the applicable common law – was subject to the following conditions and had the following duties and responsibilities *vis-à-vis* the plaintiff, including –

7.2.1 To at all times act honestly in the performance of the functions of his office;

7.2.2 To at all times exercise a reasonable degree of care and diligence in the performance of his functions;

7.2.3 After he ceased to be a member of the board of a State-owned enterprise, to not make improper use of information acquired by virtue of his position as such a member to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the State-owned enterprise;

7.2.4 Not to make use of his position as a member to gain, directly or indirectly, an advantage for himself or for any other person or cause detriment to the State-owned enterprise;

7.2.5 To act in good faith towards the plaintiff, and to exercise his powers as chairperson for the benefit of the plaintiff, and to avoid a conflict between his own interests and those of the plaintiff.

8. During or about the following periods, the first defendant received the following sums from the plaintiff, purportedly as members' remuneration or allowances, totaling N\$776 411.74 and computed and arrived at as follows –

8.1	January to February 2012	-	N\$47 457,00
8.2	March 2012 – February 2013	-	N\$437 381,75
8.3	March 2013 – October 2013	-	N\$291 573,00

N\$776 411,74

9. The afore-pleaded total includes the sum of N\$238 564,25 ("the claim amount"), computed and arrived at as follows –

9.1	January to February 2012	-	N\$14 869,50
9.2	March 2012 – February 2013	-	N\$131 619,25
9.3	March 2013 – October 2013	-	N\$92 075,50

N\$238 564,25

10. The claim amount was paid to the first defendant in non-compliance with the provisions of section 22 (1) of the SOE Act in that the second defendant did not concur with any such amount being payable to the first defendant as

member's remuneration or allowances and as envisaged in paragraph 6 above.

11. The claim amount comprises the difference between total paid to the first defendant by the plaintiff (during the period January 2012 to October 2013) and the amount which the first defendant was lawfully entitled to receive (during the same period) as members' remuneration or allowances pursuant to the mandatory provisions of section 22(1) of the SOE Act.

MAIN CLAIM

12. The claim amount was paid by the plaintiff to the first defendant in the *bona fide* and reasonable (but mistaken) belief that the first defendant was lawfully entitled to receive same as part of the first defendant's members' remuneration or allowances.
13. The claim amount was not owing to the first defendant for the reasons as set out in paragraph 10 above.
14. The first defendant nevertheless appropriated the claim amount.
15. In the result, the first defendant was unjustly enriched at the expense of the plaintiff and is liable to repay the claim amount to the plaintiff, which claim amount was neither due nor payable by the plaintiff to the first defendant.'

[3] The action was also pleaded in four alternative claims of unjustified enrichment which alternatives boil down to: the plaintiff in error, paid the claim amount to defendant enriching defendant unjustly (1st alternative), correspondingly unjustly impoverishing plaintiff (2nd alternative), defendant misstated alternatively misrepresented to the plaintiff that he was lawfully entitled to receive the claim which misstatement or misrepresentation was false as a consequence, plaintiff suffered damages in the amount of the claim (third alternative), defendant

breached his fiduciary duties towards the plaintiff when, defendant received and appropriated the claim amount, failed to repay, notwithstanding defendant's attention having been drawn to the non-compliance with s 22(1) of the SOE Act, in the premises plaintiff suffered damages in the amount of the claim amount.

[4] The defendant having filed the notice of intention to defend, the plaintiff, in support of the application filed an affidavit deposed to by the then Chief Executive Officer (CEO) one Kenandei Tjivikua. The CEO swore to the facts verifying the indebtedness of defendant to the plaintiff in the amount of the claim and that defendant had no *bona fide* defence to the action and he delivered the intention to defend solely for the purpose of delay.

[5] The defendant filed an opposing affidavit setting out the basis of his defence which is in this form:

1. The application is misguided and ill advised.
2. The application is brought in wanton disregard of defendant's constitutional rights to dignity, freedom to engage in commerce, right not to be arbitrarily deprived of his removable (sic) property as well as his rights contained in Art 12 of the Namibian Constitution.
3. The decision of the Minister of Labour of 19 January 2012, which increased defendant's allowance from the medium level to the upper

quartile in tier two has not been reviewed and set aside by a competent court of law; it remains valid.

4. In terms of the State Owned Enterprises Governance Act (the SOE Act) the financial budget of the plaintiff is submitted for approval to the Council of State Owned Enterprises (a committee of the cabinet of the Republic of Namibia) (the Council) by the portfolio Minister. Even if the second and third defendant (Ministers of Finance and Labour) had not consulted technically, which is strongly disputed, there have been substantial compliance with s 22 of the SOE Act, by the third defendant and the plaintiff pertaining to defendant's remuneration. During the budget approval detailed explanation and information is provided to the council, which information constitutes sufficient consultation between the Ministers of Finance and Labour pertaining to the expenditure of the plaintiff. Reliance on s 22(1) of the SOE Act by the plaintiff is, in the circumstances of this case, untenable. Thus there was no irregularity pertaining to the remuneration of the defendant. After all plaintiff was at all material times fully aware of the letter or must have been aware of the letter of the Minister of Labour but failed to set the record straight.
5. Section 22 is not peremptory, it does not entitle the plaintiff to visit non-compliance with the demand plaintiff seeks from the defendant. If civil liability was a consequence of non-compliance with s 22(1) the Legislature would have so provided in s 22(1).

6. There is no indication in the plaintiff's particulars of claim as to how the amount pleaded in para 7, 8, 9 was arrived at. The plaintiff's particulars of claim is thus vague and embarrassing and therefore excipiable for non-compliance with Rule 45 of the High Court Rules.
7. The non-joinder of the Council, a party that has a direct and substantial interest in this matter is fatal to the case of the plaintiff.
8. Defendant denies being indebted to the plaintiff in the amount in the particulars of claim or any amount at all and denies that he delivered the notice of intention to defend solely for the purpose of delay.

[6] In his judgment in the court below, Kauta AJ rejected the defence of substantial compliance with s 22(1) of the SOE Act as not being *bona fide*. He found that the authority of the Minister of Labour to increase the remunerations and allowances payable to members of a board of Social Security Commission ("SSC") was subject to the concurrence of the Minister of Finance which was absent in the permission so granted by the Minister of Labour to increase the allowance of the defendant. He further found that, that concurrence by the Minister of Finance as per the provisions of s 22(1) of the SOE Act is the substratum of the plaintiff's case against the defendant. The acting judge on the substantial compliance defence went on to say:

'[10.5] The respondent's principal defense that section 22 of the SOE Act was – in fact – complied with, is based on vague and broad allegations which skirt around various crucial aspects. On this score, the respondent *inter alia* –

- 10.5.1 Does not state as a fact that the claim amount formed part of the “remuneration” which allegedly found its way into the budget of the applicant;
- 10.5.2 Does not allege as a positive fact that the (relevant) budget was “submitted for approval to the Council of State Owned Enterprises”, and – in any event – provides no detail, if so, when, where, how and by whom this was done;
- 10.5.3 Does not allege that the (relevant and claim amount inclusive) budget was approved;
- 10.5.4 Does not state that the second defendant attended and participated in any meeting at which the (relevant) budget was considered and/or approved.’

[7] He also rejected the collateral challenge defence to the effect that the decision of the Minister of Labour which granted the defendant a raise in his allowances is valid until set aside by a competent court of law. He, as a result found that the defendant had no *bona fide* defence which is good in law to the plaintiff’s claim, which was accordingly entitled to summary judgment.

[8] The arguments on behalf of the defendant which were dismissed by the court below were repeated on appeal and they form grounds of appeal in this court. Counsel for the defendant contended that the learned judge erred when he held that the Minister of Labour’s determination, on the remuneration to be granted to the defendant was not an administrative decision, which begs the question whether the alleged illegality underlying the Minister of Labour’s decision nullifies the decision. On the second ground, it is contended that the learned judge was in

error when he held that the non-compliance by the Minister of Labour had been proved by the plaintiff and admitted by the defendant. Finally it is contended that s 22(1) of the SOE Act does not apply to the remuneration of a Commissioner of the SSC, which is a departure from the substantial compliance defence with s 22(1) of the SOE Act relied on in the court below; neither was it set out in the opposing affidavit of the defendant.

[9] The erstwhile Rule 32 of the High Court deals generally with summary judgment. Sub-rule 3 provides that upon the hearing of an application for summary judgment the defendant may –

- (a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given; or
- (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or herself or of any other person who can swear positively to the fact that he or she has a *bona fide* defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

Rule 32(5) provides:

- (5) If the defendant does not find security or satisfy the court as provided in paragraph (b) of sub-rule (3), the court may enter summary judgment for the plaintiff.

[10] In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418(A) at 423F-G, Corbett JA made reference to the extraordinary and drastic nature of the remedy of summary judgment and continued to say that ‘the grant of the remedy is based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law.’ The learned judge continued at 426A-426E to say the following:

‘Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. (See generally, *Herb Dyers (Pty) Ltd v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N); *Arend and Another v Astra Furnishers (Pty) Ltd.*, *supra* at pp. 303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine it by the standards of pleading. (See *Estate Potgieter v Elliott*, 1948 (1) SA 1084 (C) at p 1087; *Herb Dyers* case, *supra* at p 32.)’

See also *Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362(W) at 366E-367B; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227E-F and 228B-H.

[11] In *Sheptone v Shepstone* at 466-467, Miller J had this to say on the word “fully”:

‘While there is a great deal to be said for the view that the word “fully” in the context of Rule 32(3)(b) should not be given its strictly literal meaning and that it is not required of a defendant to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence, it is clear, I think, that there ought to be a sufficient disclosure of material facts to enable the court to decide whether the defendant, if those facts are true, would have a defence to claim. (Cf. *Lombard v van der Westhuizen*, 1953 (4) SA 84 (C) at p 87; *Herb Dyers (Pty) Ltd v Mahomed and Another*, 1965 (1) SA 31 (T) at pp 31-2; *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N) at p 97). Where the defendant fails to make such disclosure and thereby fails to “satisfy” the court that he has a *bona fide* defence, he necessarily runs the risk of having judgment entered against him but the court is not obliged to condemn him summarily without the benefit of a trial of the action. The court has a discretion in such a case whether or not to grant summary judgment. (*Gruhn v M Pupkewitz & Sons (Pty) Ltd.*, 1973 (3) SA 49 (AD) at p 58, and the cases there cited). The approach of the court to the problem of how to exercise its discretion has been discussed in very many cases, reported and unreported. In *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of S.A. Ltd.*, 1959 (3) SA 362 (W) at p 366, Marais, J., emphasized that summary judgment procedure provided “an extraordinary . . . and a very stringent” remedy and expressed the opinion that it was proper always to keep that fact in mind—an observation which has found favour in many judgments of the courts, of which I need mention only two of the most recent. (See *Edwards v Menezes*, 1973 (1) SA 299 (NC) at p 304; *Arend and Another v Astra Furnishers (Pty) Ltd.*, 1974 (1) SA 298 (C) at p 305). The court will not be disposed to grant

summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case. (*Mowschenson's case*, at p 366; *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son*, 1967 (3) SA 728 (D) at p 732). Such an approach appears to me to be justified not only on the broad ground that the remedy is a drastic one, but also on a consideration of the nature of the affidavit which a plaintiff is required by Rule 32 (2) to file before he may properly ask for summary judgment.'

[12] In the present case the trial acting Judge found that the defendant's defence of substantial compliance with s 22(1) of the SOE Act is based on vague and broad allegations which skirt around various crucial aspects. The defendant's affidavit in so far as it purports to set forth the defence on the merits, fall short of what is required by Rule 32(3) to enable the court to assess the defendant's *bona fides*. The defendant's case is that, the budget of the SSC is submitted for approval to the Council after consultations with the plaintiff by the Minister of Labour. The Council is a committee comprising of cabinet Ministers which is chaired by the Prime Minister. Prior to the approval of the budget the Ministers of Labour and Finance consult extensively pertaining to the budget and the operations of the plaintiff. During the approval of the budget, detailed explanations and information in terms of the Act are provided to the Council, including the procedure for the appointment of board members. Defendant particularly refers to ss 19 and 20 of the SOE Act which provides for the approval of the budget of the plaintiff. The budget would also include relevant information and consultation process pertaining to the defendant's remuneration. The submission of the information to the Council would also constitute sufficient consultation between the Minister of Finance as well as the Minister of Labour pertaining to the expenditure of the plaintiff.

[13] This assertion by defendant, is wholly unsatisfactory. It amounts to the procedure or the information pertaining to the budget of the SSC, which budget would include the budget of the board members of the SSC. There is no evidence that the Minister of Labour consulted with the Minister of Finance on the allowance increment of the defendant as per the provisions of s 22(1) of the SOE Act. As the court *a quo* correctly observed the defendant's affidavit or defence is extremely vague. In *Breitenbach v Fiat SA (EDMS) BPK*, Colman J stated: 'All that is required is that the defendant's defence be not set out so baldly, vaguely or laconically that the court, with due regard to all the circumstances, receives the impression that the defendant has, or may have dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.' Where the statements of fact are equivocal or ambiguous or contradictory or fail to canvas matters essential to the defence raised, then the affidavit does not comply with the Rule. See *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304A-B. The plaintiff's claim is premised on the non-compliance with s 22(1) of the SOE Act. The defendant attached to his affidavit a letter he wrote to the Minister of Labour under whom the SSC resorted, seeking a raise in his allowance. The Minister approved the request. It was that approval defendant presented to the SSC for his future remunerations, which was honoured until the error was discovered. The onus was on the defendant to show that the concurrence of the Minister of Finance was obtained for the review of his remuneration from the then medium level to the upper quartile level. This he failed to do.

[14] In this court on the defence of substantial compliance with s 22(1) of the SOE Act, the defendant moved to a different terrain, to the effect that s 22(1) does not apply to the remuneration of the board members of the SSC. This change of the defence, is in my opinion, an indicator that the defendant is clutching at straws, he has no *bona fide* defence. As a general matter the Appeal Court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battle ground, a party should ordinarily not be allowed to move to a different terrain. However, the court has a discretion whether or not to allow a litigant to raise a new point on appeal. This will depend on whether, the point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have conducted its case differently had the point been raised earlier in litigation. See *Di Savino v Government of the Union of SA* 1910 AD 263 at 272-273. Summary judgment is a drastic remedy, a court of law should be slow in disallowing the new point. It appears that it has been generally accepted that a defendant may attack the validity of the application for summary judgment on any aspect. See *Di Savino v Nedbank Namibia (Ltd)*, *supra*, at 518; *Arend and Another v Astra Furnishers (Pty) Ltd*, *supra* at 314A-C. But there are instances where the court will, in the exercise of its discretion, refuse to permit the defendant to raise a new defence, for example, where it appears to the court that the defendant is clutching at straws, as is the case here. We allowed counsel to argue this new defence but the argument is untenable. Section 22(1) of the SOE Act is headed: 'Remuneration of Board Members and Management Staff of State-Owned Enterprises'. Section 22(1) then provides:

'The remuneration and allowances payable to the members and alternate members of a board of a state-owned enterprise must be determined by the portfolio Minister with the concurrence of the Minister of Finance and with due regard to any directives laid down by the Council under section 4.'

[15] Section 4 provides for the functions of the Council. One of the functions of the Council in sub-section 4(1)(d) is to lay down directives in relation to (iii) the remuneration levels of board members, chief executive officers and other senior management staff of state-owned enterprises, and (iv) benefits for employees of state-owned enterprises generally.

[16] Counsel for the defendant argued that it is s 5(2) of the Social Security Act 34 of 1994 ("SS Act") which applies, which provides:

'A member of the Commission who is not employed in the public service on a full-time basis shall be paid out of money's appropriated by law such remuneration and allowances, if any, . . . and in respect of a journey undertaken for purposes of the business of the Commission, such subsistence and travelling allowances, as may be determined by the Minister after consultation with the Commission.'

[17] The first part of s 5(2) provides for the vote from which remuneration and allowances of commissioners may be paid from and nothing else. The second part provides for subsistence and travelling allowances as may be determined by the minister in consultation with the Commission. Even if I were to accept that the words 'as may be determined by the Minister in consultation with the commission' should also be read with the first part of s 5(2), which is denied, there is no evidence that the Minister consulted with the commission when he permitted the

increment of the defendant's remuneration. It was an agreement between the Minister and the defendant as the Chairperson of the Commission. In my opinion s 5(2) of the SS Act co-exists with s 22(1) of the SOE Act as they provide for different purposes. The argument has no merit.

[18] It is argued that the decision of the Minister of Labour to increase the remuneration of the defendant was an administrative action which remained valid until set aside by a competent court of law. This contention fails to appreciate the plaintiff's case against the defendant. As I understand the position, the plaintiff's case as laid out in the particulars of claim is that, the defendant was the chairperson of the plaintiff until about November 2013. As such he stood in a fiduciary relationship towards the plaintiff. In terms of s 18 of the SOE Act he was subject to certain conditions, duties and responsibilities vis-à-vis the plaintiff (para 7 of the particulars of claim). In paras 8 and 9 the plaintiff details the remuneration or allowances that the defendant earned from January 2012 to October 2013, minus the claim amount from the said amount. The claim amount was paid as a result of non-compliance with s 22(1) of the SOE Act in that the Minister of Finance did not concur in the decision of the Minister of Labour to increase the remuneration or allowances of the defendant (para 10). In para 12 – 14 of the particulars of claim the plaintiff alleges that the claim amount was paid by plaintiff to the defendant in the *bona fide* and reasonable (but mistaken) belief that defendant was entitled to the claim amount, in result unjustly enriching the defendant. The alternative claims particularly the third alleges negligence (on the part of the defendant when he failed to take reasonable care to establish the correctness of the decision of the Minister to increase his remuneration or allowances) misstated or misrepresented to the plaintiff that it was in the discretion

of the Minister of Labour to increase defendant's remuneration or allowances. The misstatement or misrepresentation is wrongful by virtue of the office defendant occupied, he owed the plaintiff a legal duty not to make the misstatement or misrepresentation; which misstatement or misrepresentation was false in that the claim amount was paid to the defendant in non-compliance with s 22(1) of the SOE Act. In the fourth alternative it is alleged that when defendant received the claim amount, he acted for his own benefit and to the prejudice of the plaintiff.

[19] The plaintiff's claim is founded on the non-compliance with s 22(1). For a valid increase in pay the concurrence of Minister of Finance is required. In other words the decision of the Minister of Labour to increase the remuneration or allowance of the defendant without the concurrence of the Minister of Finance is not valid. The defendant's reliance on it alone for his increased remuneration is ineffective and without legal foundation and defendant is obliged to pay back the moneys paid under the said circumstances. 'Where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law. See *Di Savino*, supra, para 26. I cannot see how this defence could possibly assist the defendant if I were to exercise my discretion to grant the defendant leave to defend the action. Both the Minister of Labour and Finance were served with the summons in this matter but did not enter appearances. By not doing so, they do not contest the allegations in the particulars of claim.

[20] Viewing the defendant's affidavit as a whole, as against the claim as set forth in the plaintiff's summons, I hold the view that it does not raise a *bona fide* defence and plaintiff was entitled to summary judgment.

[21] In the result I make the following order.

1. The appeal is dismissed.

MAINGA JA

SMUTS JA

HOFF JA

APPEARANCES:

Appellant:

T C Phatela

Instructed by Conradie & Damaseb

Respondent:

R Töttemeyer SC (with him D Obbes)

Instructed by LorentzAngula Inc