

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WESTCOAST FISHING PROPERTIES

Appellant

and

GENDEV FISH PROCESSORS LIMITED

First Respondent

R HEATHCOTE SC

Second Respondent

Coram: DAMASEB DCJ, HOFF AJA and O'REGAN AJA

Heard: 03 November 2015

Delivered: 04 November 2016

APPEAL JUDGMENT

HOFF AJA (DAMASEB DCJ and O'REGAN AJA concurring):

Introduction

[1] The appellant (as applicant) approached the High Court on notice of motion for the following relief:

1. That the arbitration agreement annexed to the founding affidavit be declared null and void.
2. That the arbitration proceedings conducted before the second respondent be declared null and void.
3. That the arbitration award handed down by second respondent on 8 June 2012 be declared null and void and unenforceable; and
4. Costs against any of the respondents in the event of them opposing the application.

[2] The first respondent in a counter application prayed for the following relief:

(a) That the arbitration award made by second respondent on 8 June 2012 be made an order of court.

(b) That the applicant be ordered to pay the costs of this application.

[3] In its founding affidavit the appellant sought no relief against the second respondent except in the event of his opposition to the application.

[4] The High Court dismissed the application with costs. The costs included the costs of one instructing and two instructed counsel. The counter application was granted with costs on the same basis.

Background

[5] During March 2006 the appellant and the first respondent entered into a lease agreement in terms of which the appellant leased a property (Erf 4986) in Walvis Bay from the first respondent.

[6] On 13 November 2008 the appellant and the first respondent concluded a written sale agreement in terms of which the appellant purchased the property from the first respondent. This agreement was subject to certain suspensive conditions.

[7] During June 2011 a dispute arose between the appellant and the first respondent in respect of the suspensive conditions. Up to this stage the appellant was represented by legal advisors from Namibia.

[8] During July 2011 the appellant appointed Alberts Becker Vorster Pillay and Associates Incorporated (ABVP) based in Pretoria, Republic of South Africa as its attorneys to deal with and advise it further on the matter. One Dr Andre Vorster, a director of ABVP, was appointed specifically to act as appellant's attorney and to provide legal advice.

[9] In terms of clause 17 of the sale agreement it was agreed between the parties in the event of there being a dispute to submit such dispute to arbitration. In terms of an arbitration agreement (signed on behalf of the appellant by Vorster) disputes that had arisen between the parties stood to be resolved by way of arbitration and were referred to arbitration.

[10] Vorster and ABVP instructed counsel of the Pretoria Bar, *inter alia* Advs, T P Kruger and E Clavier to assist and represent appellant during the arbitration process.

[11] During the arbitration hearing aforementioned instructed counsel represented the appellant. The arbitration hearing took place in Walvis Bay, Namibia. Vorster also attended the arbitration hearing.

[12] On 8 June 2012 the second respondent as arbitrator handed down an award in favour of the first respondent.

[13] On 27 June 2012 the appellant filed a notice of appeal¹ to an arbitration appeal tribunal. This notice refers to 'Mathe Attorneys / ABVP' as attorneys for the appellant.

[14] On 16 August 2012 the appellant's attorneys of record (Bares & Basson Attorneys) informed first respondent's attorneys (Webber Wentzel) that it came to their attention that Vorster had misrepresented himself as an attorney of the High

¹ In terms of clause 12.4 of the arbitration agreement.

Court of South Africa when in fact he is not admitted to the profession and holds no tertiary qualification of any kind.

[15] In a letter dated 6 September 2012 first respondent's attorneys were informed that appellant was finalising an application to have the arbitration started *de novo* since appellant's rights had been severely prejudiced by the fact that the appellant had been represented by a person who had fraudulently acted as an admitted attorney.

[16] The first respondent was also informed that the appellant was of the view that the appeal of second respondent's award should be suspended until such time that appellant's case has been finalised in Court.

[17] On 12 September 2012 Webber Wentzel on behalf of first respondent wrote to Bares & Basson Attorneys informing it that if the intended application was not filed by 21 September 2012 it would be assumed that appellant was no longer serious about contesting the arbitration award and that an urgent application would be filed to enforce the award.

[18] Appellant's application was served on first respondent's attorneys on 21 September 2012.

The High Court Judgment

[19] It was contended on behalf of the applicant/appellant that all the steps and processes that Vorster and ABVP took in relation to the dispute before the second respondent were tainted by the unlawful conduct of Vorster and ABVP and that the arbitration proceedings should be set aside on that basis alone. Applicant/appellant contended that it was irrelevant whether or not the applicant had suffered any prejudice.

[20] It was contended that the irregularity was so serious and of such a nature that prejudice played no role in deciding the application, since the overriding considerations are the public interest, the proper administration of justice, and the interests of justice.

[21] The Court *a quo* reasoned that the key to the resolution of the dispute between the parties was to be found in the first instance in the provisions of the Legal Practitioners Act 15 of 1995.

[22] The Court considered the impact of contraventions of s 21(1) of the Legal Practitioners Act on legal proceedings and with reference to case law² concluded that any contravention of s 21(1)(a) to (d) should lead to the same result, namely an *ipse jure* voidness of legal proceedings *ab initio*.

² *Compania Romana De Pescuit (SA) v Rosteve Fishing* 2002 NR 297 (HC).

[23] The Court *a quo* then considered the nature of arbitration proceedings with reference to a judicial analysis by Smalberger ADP in *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*³ where it was stated that arbitration arises through the exercise of private rather than public powers and that arbitration has distinctive attributes.

[24] It was also emphasised that the hallmark of arbitration is that it is an adjudication and the function of the arbitrator is not administrative in nature but judicial in nature.

[25] The Court *a quo* remarked that private arbitration proceedings differ markedly from court proceedings or statutory tribunal proceedings and then considered the powers of a Court to interfere in private arbitration awards. The court *a quo* referred to s 33(1) of the Arbitration Act 42 of 1965 which provides that a court of law may set aside an arbitration award in the following circumstances:

- '(a) on the ground of misconduct by the arbitrator;
- (b) on the ground of gross irregularity in the conduct of the proceedings; and
- (c) where an award has been improperly obtained.'

³ 2002 (4) SA 661 (SCA) at 673 paras [24] and [25].

[26] The Court *a quo* referred with approval to the matter of *Bester v Easigas (Pty) Ltd & Another*⁴ where it was held⁵ that in order to justify a review, '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'.

[27] The Court *a quo* then considered the provisions of s 33(1)(c) and concluded that the involvement of Vorster or ABVP in the arbitration did not result in the applicant not having its case fully and fairly determined nor that Vorster's contraventions of s 21 of the Legal Practitioners Act caused substantial injustice to the applicant.

[28] It was emphasised by the Court *a quo* that instructed counsel, all duly admitted advocates, were in charge of the applicant's case virtually since its inception, and that applicant had the benefit of admitted counsels' advice and professional services.

[29] The Court *a quo* pointed out that no evidence was led at the arbitration and that the matter was decided on common cause facts and legal issues. It 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.

The Counter-application

⁴ 1993 (1) SA 30 (CPD) at 43B.

⁵ With reference to a consideration of the provisions of s 33(1)(b).

[30] It was contended on behalf of the applicant that if the application succeeds it would have been a waste of time to have pursued the appeal simultaneously with the application; that the appeal is still pending, and in the event of the application failing, applicant still intends to pursue and finalise the appeal.

[31] The Court *a quo* preferred the submissions advanced by Mr Fitzgerald on behalf of the first respondent that the applicant had lost its contractual right to appeal as clause 12.4 of the arbitration agreement provides that any appeal must 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.

Issues on appeal

[32] Mr Kruger who appeared on behalf of the appellant submitted that the appellant's application in the High Court was not based on the Arbitration Act (which provides limited grounds for setting aside an arbitration award), but premised on the unlawful conduct of Vorster, which had the inevitable consequence that the entire process was flawed and therefore should be set aside; that the appointment of counsel on behalf of the appellant to act in the arbitration was unlawful because Vorster was not an attorney; that it is irrelevant whether or not the appellant has suffered any prejudice because the irregularity is of such a serious nature that prejudice to the appellant plays no role in deciding this matter; that Vorster's unlawful

and fraudulent conduct constituted an irregularity justifying declaring the whole process a nullity; that any attempt to legalise the unlawful conduct of Vorster and ABVP by relying on counsel's involvement in the arbitration will mean one unlawful act is cured by another unlawful act; a finding that the arbitration agreement, pleadings, arbitration and award should stand because counsel was involved, will mean that an unlawful act, would be deemed to be lawful, which would be against the public interest and the proper administration of justice; that the arbitration agreement, the arbitration itself as well as the award is void *ab initio*, and that the only prejudice the first respondent would suffer is that the matter must commence *de novo*.

[33] For the contention that the unlawful and fraudulent conduct of Vorster constitutes an irregularity justifying declaring the whole process a nullity, counsel relied on the case of *S v Mkhise*, *S v Mosia*, *S v Jones*, *S v Le Roux*⁶ where Kumleben AJA said the following:

'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 effect as a fatal irregularity:). On the other hand, less serious and less fundamental irregularities do not necessarily have that effect. As Holmes JA said in *S v Naidoo* 1962 (4) SA 348 (A) at 354D-F, in reference to such irregularities:

"Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of appeal sets aside the conviction without reference to the merits. There

⁶ 1988 (2) SA 868 (A) at 871F-872.

remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried in terms of s 370(c) of the Criminal Code. That was the position in *Moodie's* case, in which the irregularities of the deputy sheriff remaining closeted with the jury throughout their two-hour deliberation was regarded as so gross as to vitiate the whole trial. On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of appeal is able to separate the bad from the good, and to consider the merits of the case, including, any findings as to the credibility of witnesses.”⁷

[34] It was submitted by Mr Kruger that a private arbitration proceeding is fundamentally a judicial proceeding, despite the fact that it is voluntary in nature and less formal than court process, and that once it is determined that the process is judicial in nature, it should have brought an end to the enquiry.

[35] It was indeed held in *Total Support Management* that the function of an arbitrator is not administrative but judicial in nature. It is however necessary in my view in the first instance to consider the nature of private arbitration a little more closely.

The nature of private arbitration

[36] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another*⁷ the Constitutional Court of South Africa (majority judgment) refers with approval to the *Total Support Management* case where private arbitration was referred to as ‘an adjudication’. The Constitutional Court proceeded to compare private arbitration with

⁷ 2009 (4) SA 529 (CC) at 585B.

court proceedings in order to highlight the nature of private arbitration and stated the following:⁸

[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 accelerated form to an appellate arbitral body). 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 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 1995'⁹

[37] The Constitutional Court in considering whether s 34¹⁰ of the South African Constitution is applicable to private arbitration firstly pointed out 'that the primary purpose of s 34¹¹ is to ensure that the State provides courts or where appropriate, other tribunals to determine disputes that arise between citizens'.

⁸ At 585 par [197] to 586 par [198] per O'Regan ADCJ

⁹ The Namibian Legislation establishing and regulating Arbitration Tribunals under the auspices of the Labour Commissioner is contained in Chapter 8, Part C of the Labour Act 11 of 2007.

¹⁰ Section 34 provides that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

¹¹ The equivalent in the Namibian Constitution is contained in Article 12(1)(a) which provides that: 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law; provided that'

[38] The Constitutional Court found as follows:¹²

‘On a straightforward reading, the section¹³ provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public hearing by a court or another independent or impartial tribunal. Quite clearly, when parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have the dispute determined by a court. They are seeking to have it determined by an arbitrator of their own choice’
and continues at par 212:

‘Underlying this right,¹⁴ as this court has held, is the rule of law and the positive obligation upon the State to provide courts and, where appropriate, other fora for the resolution of disputes. Private arbitrators are, of course, not provided by the State but are private agents employed by parties for the resolution of disputes.’

[39] The Constitutional Court found that despite the fact that s 34 does not have ‘direct application to private arbitration’, the ‘arbitration proceedings will still be regulated by law and, . . . by the Constitution.’¹⁵

[40] It held¹⁶ that at ‘Roman Dutch law it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice’.

[41] At [236] the following appears:

¹² At par [201].

¹³ Section 34 (footnote provided).

¹⁴ As embodied in s 34 (footnote provided).

¹⁵ Footnote omitted.

¹⁶ With reference to Voet *Commentary* on the Pandects 4.8.26 (*inter alia*). Other footnotes omitted.

[236] The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts The international conventions¹⁷ make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1),¹⁸ the goals of private arbitration may well be defeated.'

[42] In my view, it should be apparent from the afore-mentioned analysis that there is a fundamental distinction between proceedings in a court of law and proceedings in private arbitrations. Private arbitration proceedings cannot therefore as explained, be equated with court proceedings or judicial proceedings.

[43] I do not agree with the submission by Mr Kruger that the considerations advanced in the matter of *Compania Romana De Pescuit (SA) v Rosteve Fishing*¹⁹ should be extended to arbitration proceedings in the interests of justice because of

¹⁷ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in June 1958 (the 'New York' Convention) and The UNCITRAL Model Law on International Commercial Arbitration (adopted on 21 June 1985) (footnote added).

¹⁸ Of the Arbitration Act 42 of 1965. As the Court *a quo* correctly pointed out this Act governs private arbitrations also in Namibia.

¹⁹ 2002 NR 297.

the marked differences between court proceedings and private arbitrations described above (*supra*).

[44] In *Rosteve Fishing* the High Court considered the conduct of an individual who acted in contravention of the provisions of s 21(1)(c) of the Legal Practitioners Act 15 of 1995 which provides that a person who is not enrolled as a legal practitioner shall not:

‘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 insofar as it is authorised by any other law.’

[45] The High Court²⁰ found that the ‘legislative purpose behind the section . . . 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 service of a legal nature and it is aimed at protecting, maintaining and enhancing the integrity and effectiveness of legal profession, the judicial process and the administration of justice in general’.²¹ (Emphasis provided).

[46] It was found²² that where a person acts in violation of the provisions of s 21 any such process or proceedings will be void *ab initio*. The ratio of the High Court related to proceedings *in courts of law*.

²⁰ Per Maritz J.

²¹ At 302B-C.

²² At 303E-F.

[47] It was not contended, on behalf of the appellant, that it is a legal requirement that an admitted attorney must sign an arbitration agreement. Appellant's objection is entirely procedural in nature.

[48] Given the nature of private arbitration as referred to hereinbefore, and in particular the fact that private arbitration is a consensual, private process, compelling and legally justifiable reasons need to be advanced in order to have the considerations mentioned in *Rosteve Fishing* extended, in the interests of justice, to private arbitrations even in circumstances such as the present instance where the appellant has not shown any prejudice as a result of the conduct of Vorster.

[49] The proceedings in *S v Mkhise*, *S v Mosia*, *S v Jones*, *S v Le Roux* were court proceedings and for that reason the considerations mentioned in that case are not applicable to private arbitration proceedings.

[50] What the interest of justice require, in my view, as stated in *Lufuno Mphaphuli & Associates* is that private arbitration proceedings must be fair.

[51] The Court *a quo* correctly emphasised that at all material times duly admitted and instructed counsel were involved in the preparation and conduct of the appellant's case, that they signed appellant's statement of defence, counterclaim and conditional counterclaim, that there was no suggestion that because of Vorster's prior involvement, the arbitration agreement, for instance, did not properly reflect the

intention of the appellant to arbitrate the underlying dispute, or that appellant's statement of defence did not correctly reflect the appellant's case in the arbitration proceedings.

[52] The fact that Vorster was part of a 'team', as submitted by Mr Kruger, is of no significance and certainly did not affect the fairness or otherwise of the arbitration proceedings at all. Neither did his involvement cause any 'substantial injustice' as correctly found by the Court *a quo*.

[53] It was submitted by Mr Kruger that the first respondent will suffer no prejudice if the court were to set aside the arbitration proceedings and order proceedings to start *de novo*. I disagree. The prejudice lies therein that an already costly arbitration, and the award given in favour of the first respondent, will become useless and considerable expense and time would again have to be invested in new arbitration proceedings.

[54] If it is accepted for the sake of argument that the intention of the Legislature is that ss 21(1)(a) and 21(1)(b)²³ are also applicable to private arbitration proceedings in view of the absence of the words 'court of law' as they appear in s 21(1)(c) then the answer, to the question whether a contravention of any one of these subsections

²³ Section 21(1)(a) prohibits a person who is not enrolled as a legal practitioner to 'practise, or in any manner hold himself out as or pretend to be a legal practitioner', whilst s 21(1)(b) prohibits such a person to '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'. Section 21(3) provides that a person who contravenes *inter alia* ss (1) shall be guilty of an offence and stipulates the penalty.

would result in private arbitration proceedings being *void ab initio*, is to be found in what was stated in *Standard Bank v Estate van Rhyn*²⁴. Solomon JA considered the effect of the non-compliance with s 116(1) of the Administration of Estates Act 24 of 1913 where a penalty was prescribed for the non-compliance of the subsection and stated as follows:

'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 (1.3.16) 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" he proceeds: "The reason of all this I take to be that in these and the like cases greater inconvenience and impropriety would result from the rescission of what was done, than would follow the act itself contrary to the law." '

These remarks of Voet are applicable in my view to the present matter.

[55] The status of acts done contrary to statutory provisions depends at least in part (in addition to the object and scope of legislation), whether or not a litigant has suffered any prejudice.

²⁴ 1925 AD 266 at 274.

[56] In *Johannesburg City Council v Arumugan & Others*²⁵ Steyn J said the following:

‘Turning then to the intention of the Legislature in the instant matter and the question of whether or not any prejudice or injustice might result from a failure to hold the relevant meetings exactly 21 days after publication of the requisite notices in the Gazette and newspapers, I must immediately point out that it was not suggested in the papers before me, nor was it submitted in argument, that any prejudice had in fact been suffered by anybody in the instant case’

[57] The Court *a quo* in my view did not misdirect itself in any manner when it refused to dismiss the application (with costs).

The counter application

[58] In respect of the counter-application it was submitted by Mr Kruger that the appeal is still pending and that it was envisaged in the arbitration agreement that the appeal process must be finalised prior to a party being entitled to exercise its right to make the award an order of court. The arbitration agreement is silent on this aspect.

[59] However, it is common cause after the notice of appeal to an arbitration appeal tribunal in terms of the arbitration agreement had been filed, members of the arbitration appeal tribunal had been identified and agreed upon, and the parties had also proposed a period during which the appeal was to be heard.²⁶

²⁵ 1961 (3) SA 748 WLD at 755A-B. See also *Pio v Franklin, NO & Another* 1949 (3) SA 442 CPD at 454; *Jefferies v Komgha Divisional Council* 1958 (1) SA 233 (AD) at 238H-239A.

²⁶ See p 262 of the record of the appeal before this Court, the letter dated 17 August 2012.

[60] The agreement, to have the whole arbitration award as handed down by the arbitrator, determined by an appeal tribunal, was reached in spite of the fact that the notice of appeal was filed outside the 10 day period²⁷ as stipulated in clause 12.4 of the arbitration agreement.

[61] In the letter dated 6 September 2012 addressed to Webber Wentzel, appellant was of the view that the appeal process should be suspended until the application to the High Court had been finalised. The letter properly construed is no more but a proposal. It was submitted and correctly so, by Mr Fitzgerald that the parties did not specifically agree to suspend the appeal process.

[62] The Court *a quo* found that from the arbitration agreement itself, it must be concluded that the parties intended the arbitration process to be completed with promptitude or within a reasonable period of time. This may indeed be so. Generally one of the aims of private arbitration is to facilitate a speedy and cost effective procedure and resolution of disputes.

²⁷ The parties agreed subject to the terms of the arbitration agreement, that the Uniform Rules of the High Court would apply *mutatis mutandis* to the arbitration. The High Court Rules, applicable at that stage, provided that 'only court days shall be included in the computation of any time expressed in days prescribed by these rules'

[63] It was submitted by Mr Fitzgerald that the appellant has lost its contractual right to appeal the arbitration award in view of its failure to prosecute its appeal within a reasonable time.

[64] The parties have also agreed (and impliedly so), as indicated hereinbefore, that the arbitration should be fair. Fairness in this context includes the right to appeal to an appeal tribunal as agreed between the parties and where a party to private arbitration is deprived of exercising such right, the fairness of the process is compromised. As was advised in *Lufuno*, courts should be respectful of the intentions of parties in relation to procedure. The decision by the appellant to approach the High Court in an attempt to have the whole arbitration process be declared null and void, of necessity negatively impacted upon the goal of a speedy resolution of the dispute. In my view it would undermine fairness of procedure in these circumstances to deny the appellant the right to appeal as agreed between the parties.

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

1. The order of the High Court dismissing the application with costs, is confirmed.
2. The order of the High Court granting the counter-application, is set aside with costs.

3. The costs to include the costs of one instructing and two instructed counsel.

HOFF AJA

DAMASEB DCJ

O'REGAN AJA

APPEARANCES

APPELLANT: T. P. Kruger (with him G. L. van der Westhuizen)
Instructed by Fisher, Quarmby & Pfeifer,
Windhoek

FIRST RESPONDENT: M. J. Fitzgerald, SC (with him N. Traverso and B.
de Jager)
Instructed by Engling, Stritter & Partners,
Windhoek

