



REPORTABLE

CASE NO: SA 53/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ROCKVIEW INVESTMENT NUMBER SEVENTY ONE CC

Appellant

and

NOTTINGHAM INCORPORATED

Respondent

Coram: DAMASEB DCJ, SMUTS JA and FRANK AJA

Heard: 10 July 2020

Delivered: 11 August 2020

Summary: The High Court simultaneously ordered the winding-up of Rockview Investment Number Seventy One CC (the appellant) and a related entity VXK Investments Thirty (Pty) Ltd (VXK) – entities registered in Namibia - in accordance with a liquidation application instituted by Nottingham Incorporated (Nottingham). Nottingham was a corporation incorporated in the state of Georgia in the United States of America (USA). VXK and Nottingham entered into a sale of shares agreement. The appellant stood suretyship and was joint principal debtor for certain of VXK's obligations under this sale agreement. Subsequent to the sale agreement, Nottingham was placed under receivership by a court in Georgia, USA. The court appointed receiver (in the name of Nottingham) instituted the

arbitration proceedings against VXK (in South Africa), arising from the sale of shares agreement and made the resultant award an order of court in South Africa and later in Namibia. The receiver thereafter successfully instituted liquidation proceedings against the appellant and VXK.

The appellant is appealing the High Court's winding-up order. In the court *a quo*, appellant raised a number of preliminary and technical points and a defence on the merits.

On appeal however, the issues narrowed to whether the respondent had standing (*locus standi in judicio*) to bring the application and whether the defence raised on the merits meets the threshold of establishing that the respondent's claim is *bona fide* disputed and on reasonable grounds.

Appellant argued that the founding affidavit and court order did not establish standing for the receiver to bring the winding-up proceedings on behalf of Nottingham. It further argued that for the receiver to bring these proceedings, recognition was a prerequisite – reference was made to the case of *Miller & others NNO v Prosperity Africa Holdings (Pty) Ltd* 2019 (4) NR 905 (SC). In the absence of recognition, appellant argued that it was not competent for the receiver to institute proceedings on behalf of the respondent. On the issue of the defence raised, appellant argued that its suretyship was only in respect of the obligation to deliver granite to the value of US\$2 500 000 (as a portion of the purchase price) and the respondent failed to place orders or to receive granite from VXK as per clause 4.3 of the sale of shares agreement (the defence of frustration). Appellant submitted that Nottingham was in breach of its obligation to VXK and frustrated VXK's ability to deliver granite under clause 4.3.

Respondent argue that the court order appointing the receiver provided authority for the bringing of the application. It argued that the decision in *Miller* is distinguishable on the facts (in *Miller*, the company's capacity and that of its directors was curtailed by the liquidation – only the liquidators could act on behalf of the company). Respondent submitted that the appointment of a receiver did not alter Nottingham's juristic status. It was thus Nottingham and not the receiver who

instituted the arbitration proceedings and that the award was owing to Nottingham and not to the receiver. It further argued that it was Nottingham who approached the court to liquidate the appellant and not the receiver who would have brought the application in his own name *nomine officio*. The respondent further argued that the defence of frustration had been rejected by the arbitrator in the proceedings against VXX (the appellant was however not party to those proceedings).

Held that, the receiver was appointed to manage the affairs of Nottingham, and acting in that capacity, the receiver launched these proceedings. As stated in *Miller*, once a company is liquidated, its capacity to act is curtailed and its directors and management can no longer represent it, with the consequence that the liquidators (or receivers) are required to do so subject to the powers conferred upon them (by court order and applicable legislation).

Held that, the receiver brought the winding-up application on behalf of Nottingham. Whether or not the application was brought in the name of Nottingham or in the name of the receiver *nomine officio*, this court would have regard to substance and require that the receiver first obtain recognition by the High Court in order to do so. This was not done. In the absence of recognition, the receiver does not have standing to bring these proceedings.

Held that, the institution of winding-up proceedings against the appellant on behalf of Nottingham is also not authorised by the court order. The receiver relies upon the court order for the authority to bring the proceedings and in the absence of it being supplemented by an appropriate power, these proceedings cannot be said to be authorised by the court order.

Held, on the issue of *locus standi*, this court finds that, the respondent has not established *locus standi in judicio* to bring the winding-up application and that the application should have been dismissed for this reason.

It is held that, the fundamental principle developed from the common law that a person is not permitted 'to improve his condition by his own wrongdoing'.

Held that, this defence was raised by VXX in the arbitration proceedings and dismissed by the arbitrator.

Held that, the appellant was not party to those arbitration proceedings and the arbitrator's findings between Nottingham and VXX are not binding upon the appellant and are irrelevant for a consideration of the defence raised in respect of the appellant's indebtedness to the respondent's claim.

That, there are thus prospects that the appellant would in any event meet the low threshold of establishing a *bona fide* dispute of indebtedness on reasonable grounds.

The appeal succeeds with costs.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and FRANK AJA concurring):

[1] In this appeal, the appellant challenges the order of the High Court winding it up. A number of preliminary and technical points and a defence on the merits were raised in the High Court. The issues have narrowed on appeal as to whether the respondent had standing (*locus standi in judicio*) to bring the application and whether the defence raised on the merits meets the threshold of establishing that the respondent's claim is *bona fide* disputed and on reasonable grounds.

Factual background

[2] The High Court simultaneously ordered the winding-up of the appellant and a related entity, VXX Investments Thirty (Pty) Ltd (VXX) on 28 August 2018. Those applications were preceded by arbitration proceedings in South Africa in which the

respondent obtained an award against VXK in the sums of US\$437 500 and US\$2 434 135 plus interest (the award). The award was made an order of court in South Africa and subsequently in the High Court of Namibia.

[3] The respondent's claim in the arbitration proceedings arose from the sale of shares and claims by the respondent to VXK for a total purchase price of US\$4 500 000. The respondent, Nottingham Incorporated (Nottingham), was then a corporation incorporated in the state of Georgia in the United States of America. Subsequent to the sale, it would appear to have been placed under receivership by a court in Georgia. The court appointed receiver instituted the arbitration proceedings in the name of the respondent against VXK and later liquidation proceedings against the appellant and VXK (both entities registered in Namibia).

[4] The appellant stood suretyship for certain of VXK's obligations under the sale agreement. The terms of the suretyship are referred to in more detail below.

[5] Under the sale agreement, it was agreed that the purchase price of US\$4 500 000 was payable by way of the sum of US\$2 million in cash and the balance of US\$2 500 000 would be paid in kind by way of the delivery of granite stone by VXK to the respondent. VXK paid the first two instalments in the total sum of US\$1 562 500 and also procured the delivery of granite worth US\$65 865 to the respondent. VXK failed to pay the cash balance of US\$437 500 and did not deliver granite for the balance of US\$2 434 135.

[6] The sale agreement provided for the determination of disputes by way of arbitration which then took place in South Africa and resulted in the award against

VXK. That award was made an order of court in South Africa and subsequently in the High Court on 31 July 2015.

[7] The respondent subsequently applied in the High Court for the winding-up of both VXK and the appellant. In the case of the appellant, the application was preceded by a statutory demand in the sum of US\$2 500 000 to settle the full amount of VXK judgment debt.

[8] Prior to the sale agreement, the appellant had bound itself as surety and joint principal debtor for the due fulfilment of certain obligations of VXK under the sale agreement but the suretyship was limited to US\$2 500 000. In response to the statutory demand, the appellant made a written settlement offer to the respondent, accompanied by draft annual financial statements for the period ending June 2014 and management accounts for the subsequent period ending June 2015. The respondent rejected the settlement offer. The respondent contended that the appellant was commercially insolvent in view of its obligation as surety for VXK's judgment debt alternatively deemed to be unable to pay its debts.

[9] Both liquidation applications were opposed. They were heard together because of the interrelationship of VXK and the appellant.

[10] The High Court placed both VXK and the appellant under final liquidation. They both noted appeals. Shortly before the hearing, VXK's appeal was abandoned.

[11] In opposition to the winding-up application, the appellant raised a wide range of technical and preliminary points. Only one of those remains relevant. It concerns the respondent's *locus standi*. The appellant also raised a defence on the merits of the respondent's claim against it.

[12] There are two separate components to the appellant's defence of a lack of *locus standi*. The first is that Nottingham was placed under receivership by a Superior Court in Georgia, United States of America. The receiver was appointed in terms of a court order attached to the founding affidavit. According to that court order, the receivership proceedings were at the instance of a banking institution against a group of companies and Nottingham was one of the defendants and borrowers in those proceedings. The receivership was in respect of administering, preserving or recovering collateral as defined in the court order.

[13] It was contended on behalf of the appellant that the definitions in the court order of personal property collateral, real property collateral and collateral do not include assets and claims of Nottingham. Nor were the steps contemplated by the order sufficiently widely described to include a winding-up application of Nottingham. The appellant accordingly contended that the receiver lacked standing to bring the winding-up application under the court order.

[14] In the second place, the point was also taken that there was no allegation that the receiver, as a foreign receiver, had been recognised in this jurisdiction and that this is necessary in order to institute winding-up proceedings against the appellant, an entity domiciled in Namibia. Counsel for the appellant in written

argument relied on a judgment of this court, namely *Miller & others NNO v Prosperity Africa Holdings (Pty) Ltd*¹ in support of this contention.

[15] On the merits, the appellant referred to the terms of the deed of suretyship and argued that its obligation was specifically restricted to only one cause of action, namely VXK's failure to deliver granite to pay that component (US\$2 500 000) of the purchase price under clause 4.3 of the sale agreement. The appellant asserted a defence of delivery – *ad factum praestandum* against that claim, even though this defence had been dismissed by the arbitrator in the claim against VXK. A defence of prescription was also raised. It was further argued that it was open to the appellant to raise any defence which was open to the VXK as principal debtor and that the appellant's liability under the suretyship was to indemnify Nottingham for VXK's failure to deliver granite to the value required as part of the purchase price. The appellant maintained that owing to Nottingham's deteriorating financial position, which preceded its receivership, it failed to place orders or receive granite despite the availability of granite and VXK's willingness to supply it. The appellant concluded that Nottingham was thus in breach of its obligations to order and receive granite which frustrated VXK's ability to deliver granite and perform under the sale agreement.

[16] The respondent's response to this defence of frustration was to point out that this defence had been rejected by the arbitrator in the proceedings against VXK. The appellant was not however party to those proceedings. It was pointed out that the arbitrator's finding would be irrelevant in separate proceedings between different parties.

¹ *Miller & others NNO v Prosperity Africa Holdings (Pty) Ltd* 2019 (4) NR 905 (SC) (*Miller*).

[17] Appellant's counsel contended that this defence met the low threshold which respondent is required to meet in disputing indebtedness in winding-up proceedings - by discharging the onus of proving on a balance of probabilities that the dispute (of indebtedness) is *bona fide* and on reasonable grounds.²

[18] Respondent's counsel disputed the appellant's interpretation of the suretyship and argued that, as co-principal debtor, the appellant was liable for the judgment debt under the suretyship. Counsel also pointed out that reliance was placed upon the court order reflecting VXK's indebtedness and that the appellant as surety was liable for that.

The respondent's *locus standi*

[19] The liquidation application was brought by a firm appointed as receiver in terms of a court order of the Superior Court of Douglas County, State of Georgia on 22 July 2011. A partner of that firm deposed to the founding affidavit and stated that the attached order had appointed his firm as receiver for several companies listed in it, including Nottingham. Nottingham had been cited as a defendant in the proceedings culminating in the appointment of the receiver and had not opposed those proceedings or the appointment of the receiver.

[20] The receiver had pursued Nottingham's claim under the share sale agreement against VXK. This resulted in the arbitration proceedings in the second half of 2014 and culminated in the award made in January 2015.

² P M Meskin, Q Vorster, P A Delport, B Galgut & J A Kunst *Henochsberg on the Companies Act 71 of 2008* at 347. *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* 2015 (2) SA 550 (GJ) para 60; *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd & another intervening)* 1978 (1) SA 70 (D) at 72.

[21] The applicant in the liquidation proceedings against the appellant is described by the receiver in the following way:

- ‘3. The applicant is Nottingham Incorporated, a company registered as such in accordance with the laws of the State of Georgia, United States of America, having its principle place of business at 1590 Jason Industrial Parkway, Winston, Douglas County, Georgia, United States of America.
4. The Superior Court of Douglas County, State of Georgia, U.S.A appointed Finley, Colmer & Co as the Receiver of several companies incorporated in the U.S.A, including the applicant in this application, as appears from annexure MS 1 hereto. The order has been extended on several occasions, as *inter alia* appears from annexure MS 2 hereto.’

[22] The firm appointed as receiver thus sought to bring the application on behalf of Nottingham.

[23] There is no affidavit by an expert on the law of the State of Georgia testifying as to the powers of receivers in these circumstances and the effect of such an order upon Nottingham.

[24] The appellant's challenge to Nottingham's *locus standi* is two pronged. It was firstly contended that the founding affidavit and court order did not establish standing for the receiver to bring the winding-up proceedings on behalf of Nottingham. In the second place, it was argued that for the receiver to bring the proceedings, recognition was a prerequisite, citing this court's judgment in *Miller*. In the absence of recognition, it was argued that it was not competent for the receiver to do so.

[25] The respondent's response was that the court order appointing the receiver, read in context, provided authority for the bringing of the application. It was further contended that Nottingham took an order in the High Court against VXX which is enforceable.

[26] A few days after the hearing of oral argument, this court requested the parties to file written supplementary argument on the effect of this court's judgment in *Miller* upon these proceedings as oral argument was not delivered on that issue.

[27] This court in *Miller* conducted an extensive survey of applicable authority and concluded that foreign appointed liquidators of foreign corporations are required to seek and obtain recognition of the High Court to deal in Namibia with the assets of the corporation in liquidation.³ As was held in *Miller*:

'A foreign liquidator whose appointment has not been recognised simply lacks the power to act in that capacity in Namibia.'⁴

[28] In response to this invitation for further argument, the appellant referred to its two pronged challenge or the issue of standing.

[29] The respondent on the other hand contended that *Miller* was distinguishable on the facts. It was argued that in *Miller*, the company's capacity to act was curtailed and the directors could not act – and only the liquidators for practical purposes could do so, whose powers were limited. It was contended that

³ *Id* para 3-5.

⁴ *Id* para 5.

the present case is different. In its supplementary written argument, it is stated on behalf of the respondent that the juristic status of Nottingham, registered in Georgia in the USA, had not been altered by the appointment of the receivers and that 'the receiver was appointed for G & L Marble and the collateral, not for the respondent.' It is further stated that Nottingham and not the receiver instituted the arbitration proceedings and that the award was owing to Nottingham and not to the receiver. It was argued that it was accordingly Nottingham which had approached the court to liquidate the appellant and not the receiver who would have brought the application in his own name *nomine officio*.

[30] Despite the contention by the respondent that Nottingham's juristic status has not been altered by the appointment of the receiver, this is not supported by the evidence of the deponent (a partner in the firm appointed as receiver). Nor is there any evidence of the law in the State of Georgia in the United States of America on the effect of the attached order of receivership upon the legal capacity to litigate on the part of Nottingham. This court is accordingly confined to the evidence in the founding affidavit of the partner in the receiver firm in this regard and the terms of the attached court order.

[31] Despite the respondent's belated contention that the receiver was appointed for G & L Marble Inc and not for Nottingham, the receiver's founding affidavit is to the contrary. The deponent unequivocally states that his firm was appointed as receiver 'for several companies, including the applicant (Nottingham)'. The order itself groups G & L Marble Inc and nine other companies including Nottingham together as the 'borrowers' which were cited as defendants. The order proceeds to appoint the firm as receiver of G & L Marble Inc 'and the

collateral'. Collateral is defined in the order as the listed items of specified companies cited as defendants and borrowers as 'personal property collateral'. It also refers to secured interest in real property specified in respect of certain of the same borrowers. These interests are in turn referred to as 'real property collateral' which together with the defined 'personal property collateral' are collectively referred to as 'the collateral'. That is how collateral is defined and is to be understood for the purpose of the order. The firm's appointment is as receiver of G & L Marble Inc 'and of the collateral.'

[32] The order further provides that the borrowers (which by definition includes Nottingham) and their employees and principals are 'restrained and enjoined from the transaction of any business of the borrower or the collateral except with the prior approval of the receiver'. The receivership order vests authority in the receiver to the collateral which supersedes directors and shareholders of the borrowers with respect to the collateral. The order further provides that the receiver was to take immediate possession of the collateral 'and act as an officer of this court according to Georgia law'.

[33] The respondent's position is in essence that Nottingham and not the receiver is the applicant for liquidation. As a foreign company, it has sought recourse in this jurisdiction.

[34] The founding affidavit does not however bear out this contention. Whilst Nottingham is described and identified as the applicant – as a company registered in Georgia, USA - the partner in the receiver firm thereupon states that his firm is appointed as receiver for Nottingham in terms of the order and that he acts on its

behalf in bringing the application. The fact that the proceedings are brought in the name of Nottingham and not by the receiver firm *nomine officio* would not affect the actual position as to who is in fact bringing the application. A court would after all have regard to the substance and not the form in which the application is brought.

[35] Furthermore, the application was not launched by the ordinary structure of the company – by its directors or its management – but by the court appointed receiver in the capacity as receiver (as is stated under oath by the partner in the receiver firm).

[36] The court order further expressly contemplates that Nottingham is precluded from transacting business save through or with the approval of the receiver.

[37] The respondent did not place any evidence as to the position under the law of Georgia of a receiver and the powers and capacities vested in that office. The belated assertion in supplementary written argument concerning the legal status of Nottingham upon appointment of a receiver cannot avail the respondent. It has not been properly established and cannot be accepted and is in any event contrary to the evidence placed before the court.

[38] It would thus appear that the receiver appointed to manage the affairs of Nottingham, acting in that capacity, launched these proceedings. As has been spelt out in *Miller*, once a company is liquidated, its capacity to act is curtailed and its directors and management can no longer represent it, with the consequence

that the liquidators (or receivers) are required to do so subject to the powers conferred upon them (by court order and applicable legislation). This is also reflected in the court order attached to the founding affidavit – in terms of which Nottingham’s capacity to act is severely curtailed. As was held in *Miller*, a liquidator (or receiver) would not be able to litigate in Namibia without recognition by the High Court.⁵

[39] The underlying common law principle was neatly summarised in *Zinn NO v Westminster Bank Ltd*⁶ (as followed by this court in *Miller*):

‘. . . (w)hen a foreign representative, whatever name he may be given elsewhere, claims property in this country, by virtue of his foreign authorisation, he requires recognition by a court of law or person of competent jurisdiction in South Africa.’⁷

[40] In this application, the receiver has brought the winding-up application on behalf of Nottingham. Whether or not the application was brought in the name of Nottingham or in the name of the receiver *nomine officio*, this court would have regard to substance and require that the receiver first obtain recognition by the High Court in order to do so. This was not done. In the absence of recognition, the receiver does not have standing to bring these proceedings.

[41] If the application was launched by Nottingham itself, represented by the receiver firm, as is asserted on behalf of the respondent, the order and allegations in the founding affidavit furthermore did not establish standing.

⁵ *Id* para 15.

⁶ *Zinn NO v Westminster Bank Ltd* 1936 AD 89 at 99.

⁷ *Id* at 99. See also *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste Intervening* 1990 (1) SA 954 (A) at 959I-960A.

[42] The terms of the court order define collateral. Claims of Nottingham are not included in that definition. The order also does not empower the receiver to bring winding-up proceedings against Nottingham's debtors. The reliance by the respondent upon the receiver's authorisation to 'engage legal counsel to bring on behalf of borrowers such lawsuits as might have been necessary to recover the collateral' does not assist the respondent if the claim is not included in the definition of collateral contained in the court order.

[43] It would follow in my view that the bringing of winding-up proceedings against the appellant on behalf of Nottingham is not authorised by the court order. The receiver relies upon the court order for the authority to bring the proceedings and in the absence of it being supplemented by an appropriate power, these proceedings cannot be said to be authorised by the court order.

[44] It follows that the respondent has not established *locus standi in judicio* to bring the winding-up application and that it should have been dismissed for this reason.

[45] Even though it would not be necessary to further consider the defence on the merits raised by the appellant, it is apposite to briefly refer to this aspect in the event of the receiver applying for recognition. I consider this necessary because under the new ethos underpinning our civil justice process, courts must strive to deal with what are the real disputes between the parties so as to bring litigation to an early end and thus limit costs. Merely resolving the *locus* issue would therefore not achieve that result considering the importance that the appellant attached to the defence on the merits, both *a quo* and on appeal.

[46] The defence on the merits is directed at the appellant's indebtedness to Nottingham. It is asserted that any indebtedness under the suretyship is restricted to the obligation in clause 4.3 and that as a surety the appellant is entitled to raise any defence to that claim of indebtedness open to the principal debtor.

[47] In terms of the deed of suretyship, the appellant bound itself as 'surety and co-principal debtor . . . for the due and proper fulfilment of all the obligations of, and for the punctual payment for all sums which are or may become due by (VXK) in terms of, or in connection with or arising out of the provisions of clause 4.3 of the . . . agreement . . . It is recorded that this surety is limited to the obligations of VXK towards Nottingham Inc by virtue of clause 4.3 of the agreement only.'

[48] Clause 4.3 of the sale agreement concerns the obligation to effect payment of the portion of the purchase price of US\$2 500 000 payable by delivering granite to Nottingham in the following terms:

'4.3. The balance purchase price of US\$2 500 000-00 (Two million Five Hundred Thousand US Dollars) shall be payable by the Purchaser by virtue of the Purchaser procuring delivery of granite material to the Seller or its nominee, customary to the granite material that is currently shipped to the Seller or its nominee in 24 (Twenty Four) monthly shipments, at a value of at least US\$ 104 167 (One Hundred and Four Thousand One Hundred and Sixty Seven US Dollars) per shipment, invoiced at the list price, from time to time, of Roach, with the first shipment due during May 2011 and monthly thereafter during each consecutive month. These arrangements shall constitute a valid and binding standing order by the Seller.'

[49] The appellant claims that Nottingham failed to place orders or receive granite from VXK despite the availability of more than a year's stored surplus and

sufficient granite available to mine the balance during the second year of performance. Those factual assertions are not placed in issue. It is thus contended that Nottingham was in breach of its obligations to VXK and frustrated VXK's ability to deliver granite under clause 4.3.

[50] There are reasonable prospects that a court will interpret the surety as being restricted to the obligation to perform under clause 4.3 to deliver the granite to the value of N\$2 500 000 given the express reference to clause 4.3 which embodies this obligation and limiting the suretyship to only that obligation.

[51] It is a fundamental principle developed from the common law that a person is not permitted 'to improve his condition by his own wrongdoing'.⁸

[52] This principle manifests itself in the principle of fictional fulfilment in contract as is crisply summarised by Schutz JA in *Wimbledon*:

'If a party is under a duty not to prevent the fulfilment of a condition, he is treated as if it had been fulfilled, if he fails in that duty.'⁹

[53] Whilst the early decisions on fictional fulfilment confined the application of the principle to the fulfilment of a condition in a contract, there is a growing tendency for it to be expanded to a term of a contract as well.¹⁰ It is not necessary for the purpose of this judgment to delineate the ambit of the principle. What is

⁸ Ulpian, as translated by Watson as quoted in *Wimbledon Lodge (Pty) Ltd v Gore NO & others* 2003 (5) SA 315 (SCA) para 10.

⁹ *Id* para 11.

¹⁰ R H Christie *The Law of Contract in South Africa* 7 ed (2016); *Du Plessis NO & another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) at 626.

however clear for present purposes, is that there is a reasonable basis to contend for its application in the case of VXX's liability to deliver granite to Nottingham.

[54] This defence was raised by VXX in the arbitration proceedings and dismissed by the arbitrator whose award was attached to the respondent's papers. But the appellant was not party to those arbitration proceedings and the arbitrator's findings between Nottingham and VXX are not binding upon the appellant and are irrelevant for a consideration of the defence raised in respect of the appellant's indebtedness to the respondent's claim.

[55] It is well settled that where indebtedness is challenged in winding-up proceedings, the respondent company bears no onus to establish that the company is not indebted to the applicant but only that such indebtedness is *bona fide* disputed on reasonable grounds.¹¹ There are thus prospects that the appellant would meet this low threshold of establishing a *bona fide* dispute of indebtedness on reasonable grounds.

[56] The appellant also raised a defence of prescription which is not considered for present purposes.

[57] The following order is made:

1. The appeal succeeds with costs, including the costs of one instructing and two instructed legal practitioners.

¹¹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348.

2. The order of the High Court is altered to read:

‘The application is dismissed with costs, including the costs of one instructing and two instructed legal practitioners.’

SMUTS JA

DAMASEB DCJ

FRANK AJA

APPEARANCES

APPELLANT:

J Marais, SC (with him D Obbes)

Instructed by Fisher, Quarmby &
Pfeifer, Windhoek

RESPONDENTS:

T P Krüger, SC (with him C D Alton)

Instructed by Erasmus & Associates,
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