CASE NO.CC137/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

1. **JACOBUS BAREND LOFTY-EATON**
2. **RIAAN DE KLERK**
3. **NICOLAAS DREYER**

CORAM: **O'LINN, J.**

Heard on: IQ<H3\ll\2&

Delivered on: 1993/12/01

JUDGMENT

O'LINN, J.: After leading certain evidence in the trial of the above accused, Mr Small on behalf of the State, applied on urgent motion for the appointment in terms of section 171 of the Criminal Procedure Act 51 of 1977, of a Commission to take the evidence of certain state witnesses, who are unwilling to come to Namibia to testify before this Court.

Mr Maritz, on behalf of the accused, opposed the motion.

In addition to the material contained in the affidavits submitted by the respective parties, Mr Small submitted written heads of argument. Both Mr Small and Mr Maritz then

presented oral argument. Thereafter, at the request of the Court, Mr Small submitted further references to amendments of laws since independence. Mr Maritz in turn submitted short written heads of argument with references to authorities.

Both counsel reiterated that this Court had correctly upheld the defence objections to the indictment in its judgment, dated 11th November 1993, unreported.

As a consequence of that judgment most of the charges against the present accused were quashed and the trial continued on 11 charges.

The relevant finding in the aforesaid judgment is that whereas in the Livestock Improvement Act of 1977, the Customs and Excise Act of 1964, the Animal Diseases and Parasites Act of 1956 and the Departure from the Union Regulation Act of 1955, the word "Republic" is defined as including the "territory" and the "territory" is defined in turn as the "territory of South West Africa" or the "territory" is "deemed to be part of the Republic of South Africa" or of the Union of South Africa, and the further fact that these definitions have not been changed by and since Namibian independence. South Africa and Namibia had to be regarded as a geographic and economic unit for the purposes of the said Acts. "Imports" therefore continued to be regarded as imports from countries outside the aforesaid combined area and the word "departure" in the Departure from the Union Regulation Act, meant "departure" from a place or

point inside the aforesaid combined area of "the Union of South Africa" to a place outside it.

The main objection raised by Mr Maritz, to the granting of a Commission is of a constitutional nature.

He contends that this Court has no power whatsoever to issue a Commission to take evidence in a criminal case in the Republic of South Africa after Namibian independence, whether in terms of section 171 of the Criminal Procedure Act 51 of 1977 or whether in terms of the Foreign Courts Evidence Act no. 80 of 1962.

He says there is a lacuna and this can only be put right by enactment of appropriate amendments to the existing laws in both Namibia and South Africa.

According to Mr Maritz, the Foreign Court Evidence Act still defines "Republic" as including "the territory of South West Africa" and thus where section 2 refers to a "Court of law of comptetent jurisdiction outside the Republic" it means a Court of law outside the combined area of South Africa and Namibia.

The Namibian High Court is outside this combined area and therefore the South African Supreme Court cannot give effect to a Commission issued by such Namibian Court.

At the same time, the Namibian Court cannot issue a Commission in terms of section 171 of Act 51 of 1977, to

take evidence in a criminal case in South Africa, because in terms of section 2(2) of the Recognition of Independence of Namibia Act, of 1990, the Criminal Procedure Act of 1977 (as applicable in South Africa) is not applicable in the Republic of Namibia after Namibia gained independence and sovereignty on 21 March 1990.

According to Mr Maritz, although the word "Republic" in Act 51 of 1977 continues to include the territory of South West Africa, that definition "solely refers to which area should geographically for certain purposes of the Act, be regarded as part of the Republic" (My underlining).

In the alternative, Mr Maritz relies on the doctrine of "effectiveness" and the doctrine of "sovereignty and equality of states".

Mr Maritz says that in accordance with these doctrines

> "a state cannot take measures on the territory of another state by the way of enforcement of national laws without the consent of the latter.
>
> Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for the production of documents may not be executed on the territory of another state except under the terms of treaty or other consent given."

Mr Maritz relies for this general proposition on Brownlie: "Principles of Public International Law, " (4th edition) p. 307.

Then Mr Maritz makes the following concession:

> "There may be many reasons why one State, for purposes of the application and operation within the area of its sovereignty, may nevertheless define a geographical area larger than such area of its sovereignty.
>
> 4. Some of these reasons have been referred to in the judgment on the objection dated 11th November 1993.
>
> 5. In terms of a treaty between certain states, one or more of those states may make it an offence to, for example, import goods to the geographical area of states who are parties to the said treaty, without a permit issued by an authority established in such treaty -this however does not mean that the laws of the one state would apply within the other state."

Mr Maritz also contends that

> "there is no evidence of any treaty between Namibia and South Africa in relation to the issuing of a Commission, nor is there any evidence of any consent given - it is submitted, that sovereignty being a matter relating to the foreign affairs of the country, such consent cannot be given by a magistrate."

Furthermore, according to Mr Maritz, the fact that the South African government has amended the definition of "Republic" in a large number of Acts after the date of Namibia' s independence, does not detract, from the aforegoing.

Mr Small has referred the Court to twenty-four (24) South

African Acts where the definition of Republic has been changed during the period 21st March 1990 - 1992, in so far as it included in the term "Republic" the "territory of South West Africa". In seven (7) Acts the reference to "the territory of South West Africa" was deleted from the definition. In twelve (12) Acts the definitions of "Republic" as including "the territory of Namibia", was left unaltered. The latter Acts included Acts relating to the administration of justice, such as:

> Foreign Courts Evidence Act, of 62 (Act 80 of 1962)
> Criminal Procedure Act, 1977 (Act 51 of 1977)
> Magistrates Court Act 32 of 1944
> Supreme Court Act 59 of 1959 insofar as "Republic" includes the territory of S.W.A. for the purposes of sections 28, 29, 33.
> Admission of Advocates Act, 1964 (Act 74 of 1964)
> Justices of the Peace and Commissioners of Oaths Act 1963 (Act 74 of 1964)

It must be noted that section 33 of the Supreme Court Act, which deals with Commissions Rogatoire, Letters of Request and documents for service originating from foreign countries and pertaining to civil matters. includes the territory of South West Africa in the definition. Thus Namibia is regarded as part of this whole of South Africa, and not as a "foreign country" for the purposes of sections 28, 29 and 33 of the Supreme Court Act of 1959.

This situation is similar to that created by the Foreign Courts Evidence Act of 62 and the Criminal Procedure Act of 1977. In both the said Acts' "magistrate" is defined as

"including" an additional magistrate and an assistant magistrate. The Criminal Procedure Act expressly excludes a regional magistrate. In none of the aforesaid Acts is the term "magistrate" however restricted to an additional "magistrate" and an "assistant" magistrate.

In the Foreign Courts Evidence Act, section 2(1) the "magistrate" referred to can be any person having the rank of magistrate in either South Africa or Namibia.

In section 3, the term "any magistrate" will have the same meaning.

In section 7, the term "magistrate" has the same meaning as in sections 2(1) and 3, supra.

The word "court" as it appears in section 171 of the Criminal Procedure Act dealing with evidence on commission, is not defined in the Act.

It is not restricted as Mr Maritz suggests, when looking at it from the point of South Africa, to divisions of the Supreme Court of South Africa in South Africa or magistrate's courts in South Africa, but extend to such courts or courts of law of a similar nature in Namibia, whether or not such courts have undergone some changes in Namibia as to their organization and names and the methods of appointment of their judges and magistrates.

For the purposes of the Foreign Court Evidence Act, the

court or judge of any provincial or local division of the Supreme Court can approve of an application for the examination of witnesses in South Africa, when it appears to such Court or judge that -

> "a court of law of competent jurisdiction outside the Republic, ... is desirous of obtaining the evidence in relation to such proceedings of any witness within the jurisdiction of such division, the court or judge hearing the application may grant an order for the examination of such witness before a person named in such order, who in the case of criminal proceedings, shall be a magistrate."

Both the Foreign Court Evidence Act and the Criminal Procedure Act are operative in Namibia, as well as in South Africa. Before independence, these acts were operative in Namibia by virtue of South African legislation and at and after independence of Namibia, by virtue of section 140(1) of the Namibian Constitution.

Section 171 of the Criminal Procedure Act is intended to have extra-territorial effect. The whole of the Foreign Court Evidence Act, has extra-territorial effect. The Foreign Court Evidence Act, provided for several ways in which the judicial act in foreign countries, are allowed to have effect in South Africa and Namibia respectively. Section 2(1) provides for the examination of witnesses in Namibia and South Africa, when it is shown on application that a foreign court is desirous of obtaining such evidence.

Section 3 - provides for a shorter process, where a magistrate in South Africa or Namibia, shall, upon the request of a judicial officer performing the duties of any magistrate in any territory mentioned in the first schedule, take the examination of any witness within his area of jurisdiction, in connection with any civil proceedings pending in the court of such judicial officer in such territory.

The first schedule territories when the Act first came into operation were:

Basutoland
Federation of Rhodesia and
Nyassaland

The Swaziland Protectorate.

Section 7. even provides that -

> "whenever a subpoena, purporting to be issued by the proper officer of a competent court of law in any territory mentioned in the second schedule for the attendance in any civil or criminal proceedings before that Court of any person, is received from such officer by any magistrate within whose area of jurisdiction such person resides or is, such magistrate shall, if he is satisfied that the subpoena was lawfully issued, endorse it for service on such person, whereupon it may be served as if it were a subpoena issued in the Court of such magistrate in proceedings similar to those in connection with which it was issued."

schedule countries at the time the Act became operative.

The list of first and second schedule countries were amended from time to time in terms of section 10 of the Act by the Minister of Justice.

By 9th March 1984, these lists took due cognisance of the independence and sovereignty of the listed states. At that time the list read as follows: The Kingdom of Lesotho; the Republic of Botswana; the Kingdom of Swaziland; the Republic of Transkei; the Republic of Bophuthatswana; the Republic of Venda; the Republic of Malawi; the Republic of Transkei.

Section 5 provides for the rights and privileges of witnesses who must appear and be examined in terms of section 2 and 3. Section 6 provides for the penalty for not complying with the court process.

Subsection (3) and (4) of section 7 provides the penalty for non-compliance with section 7 and any magistrates court in whose area of jurisdiction the subpoena has been served, has jurisdiction to try such person for contravention of subsection (3).

See also: S v Charalambus; 1970(1) SA 599 (T).

In my view sections 2 and 3 of the Act provides inter alia for a commission, launched or initiated in a foreign country, even though the word "commission" is nowhere

See comment on section 2, 3 and 7 in "Statutes of the Republic of South Africa."

In civil proceedings section 28 of the Namibian High Court Act provides a procedure for obtaining the evidence of a witness in a foreign territory or country by issuing "a letter request" to a competent Court in such country. Section 29 deals with the procedures for giving effect to commissions rogatoire, letters of request and documents for service originating from foreign countries.

The corresponding sections in the Supreme Court Act of South Africa are sections 32 and 33. However section 32 is wider than section 28 of the Namibian High Court Act, because the South African provision applies to cases where the witnesses whose evidence is sought, is outside the area of jurisdiction of the Court of a provincial or local division in South Africa, and not necessarily in a foreign country or territory.

For the purposes of section 33 of the South African Act, the territory of South West Africa is included in the definition of Republic, and the territory of S.W.A. is therefore, by virtue of the South African Act itself, not regarded as a territory or Court outside the Republic. The procedure of section 33 for a commission rogatoire or letter of request is therefor not applicable to South West Africa, the latter being regarded as not outside the Republic of South Africa

for the said purposes.

It must be noted that section 32 of the South African Act, in contrast to section 33, does not refer to "Republic" but provides specifically for evidence to be taken by means of interrogatories outside the jurisdiction of the South African provincial or local division and also specifically and within the jurisdiction of the then Supreme Court of South West Africa.

There are several other areas where South Africa and Namibia allow foreign judgments or arbitral awards and other foreign judgments extra-territorial effect in the home country. This is also the position provided for by the Reciprocal Enforcement of Civil Judgments Act of 1966, which provides for the reciprocal enforcement of certain civil judgments given in the Republic, including the territory of S.W.A., and in any country or territory outside the Republic which the State President has for the purposes of the Act designated by Proclamation in the Gazette.

After Namibian independence, the President of Namibia by virtue of article 140(4) of the Namibian Constitution, took the place of the President of South Africa for the purposes of designating countries provided for in the said Act. The reference to "gazette" in the said Act became the "Government gazette of the Republic of Namibia" for the purposes of this act, by virtue of article 146(2)(e) of the Namibian Constitution.

The legislatures of both countries after Namibian independence contemplate that the aforesaid section 171 and the Foreign Court Evidence Act, continue to have extraterritorial effect.

The aforesaid provisions and Acts, are only a few of many examples where sovereign countries have by legislation, whether as the result of colonial relationships or agreements of some sort between sovereign countries, provided for the extra teritorial effect of the acts of the courts, or officials or representatives of other sovereign countries in the first mentioned sovereign country. Such provisions may be reciprocal between sovereign countries but not necessarily so. There however usually exists a mutual or common interest or friendship as motivation for such provisions.

Mr Maritz remarked that there is to his knowledge no treaty between Namibia and South Africa in relation to the issuing of a Commission. The Foreign Courts Evidence Act and section 171 of the Criminal Procedure Act constitute legislation evidencing consent by South Africa and Namibia to give extra territorial effect to judicial acts of the other, in the course of the administration of justice. It is also evidence of the reciprocal right granted to each other to appoint a commission in terms of section 171 of the Criminal Procedure Act.

One of the glaring weaknesses in the argument of Mr Maritz, is his inability to explain why the South African Parliament

as well as the Namibian constitution and the Namibian Parliament, have to date retained the definition of "Republic" in the Criminal Procedure Act, and in several other Acts, as including the "territory of South West Africa." Mr Maritz has cited the reasons for such retention given in this court in the aforesaid judgment of 11 November 1993 where the Court upheld the objections raised by Mr Maritz to the indictment.

The reasons pertaining to the Livestock Improvement Act of 1977, the Customs and Excise Act of 64, the Animal Diseases and Parasites Act of 1956, and the Departure from Union Regulation Act of 1957 however relates primarily to joint economic interests extending beyond the territorial limits of the respective sovereign countries.

In the case of the Foreign Courts Evidence Act and the Criminal Procedure Act, particularly section 171 of the latter, the reasons for retention of an extended area of operation of the said acts, extending beyond the normal territorial boundaries of the respective sovereign countries, are obviously not primarily the joint economic interests, but rather primarily the joint interest in matters relating to the administration of justice.

The deliberate act by the sovereign parliaments of Namibia and South Africa, read in conjunction with article 140 of the Namibian constitution, not to change the definition of "Republic" as including "the territory of South West Africa" in Acts such as the Criminal Procedure Act and the Foreign

Courts Evidence Act, is clear evidence of an intention to retain the status quo of the pre-independence period, in regard to the operation of article 171 after independence.

It is true that after independence the aforesaid Acts remained in force in Namibia by virtue of article 140 of the Namibian Constitution. They obviously remained in force in South Africa.

The fact that the Foreign Courts Evidence Act continued in force in Namibia and South Africa, and as in the Criminal Procedure Act, retained the definition of Republic as including the "territory of South West Africa", indicates that it was intended in the latter Act, notwithstanding Namibian independence and sovereignty gained on 21/3/1990, not to regard Namibia as a "foreign" country and to regard as "foreign" countries, those outside the combined area of South Africa and Namibia. Furthermore, the provisions in section 3 of the said act, pertaining to simplified but radical steps to conduct the examination of witnesses in the Republic at the request of similar institutions in foreign countries contained in Schedule 1 and 2 to the Act and the simplified and radical steps relating to the service of subpoenas in the Republic, issued in foreign countries named in the said schedules, are not applicable to Namibia, because Namibia is not to be regarded as a "foreign" country for the purpose of those provisions and also because neither the "territory of South West Africa" nor Namibia is included in the aforesaid schedules.

Again the reason is that the respective sovereign legislatures in Namibia and South Africa regarded the

provisions of section **171** of the Criminal Procedure Act as remaining in force in Namibia after independence, with South Africa and Namibia remaining one jurisdictional area for the purpose of section **171** and that as a consequence, the judicial authorities in South Africa, would give effect to a commission issued in accordance with the provisions of section **171.**

The only real obstacle to this approach is the provisions of section **2** of the South African Act, called the Recognition of Independence of Namibia Act of **1990.** That section reads as follows:

> " **(1**) The Republic shall cease to exercise any authority in the territory referred to in the Treaty of Peace and South West Africa Mandate Act, **1919.** (Act **49** of **1919)**
>
> **(2**) Any rule of law of the Republic which was in force in the said territory, immediately prior to the commencement of this Act shall as far as the Republic is concerned, cease to be in force in the territory."

To allow a commission issued in Namibia to take evidence of witnesses in South Africa, does not in any way amount to the exercise of authority by South Africa in Namibia. In itself, it does also not make a South African rule of law operative in Namibia.

Section 171 is operative **in South** Africa. **It** is **also** operative in Namibia.

By virtue of South Africa's choice to retain the Criminal Procedure Act in South Africa and to regard the area of the territory of South Africa and South West Africa as one for the purpose of giving effect to a commission issued by a Namibian Court, South Africa acts within the limits of and in accordance with its own legislation, not because of Namibian legislation made applicable to South Africa.

The South African magistrate, giving effect in his district to the issue of a Commission in Namibia, does not act in terms of Namibian law, but in terms of a South African statute. He also does not act on the orders so to speak of a Namibian Court, but gives effect to such an issue of a commission because of and in terms of South African law, namely articles 171, 172 and 173 of the South African Criminal Procedure Act.

If the Foreign Courts Evidence Act of South Africa can provide as it does, for a South African to be examined by a South African magistrate in South Africa at the request of "a judicial officer performing the functions of a magistrate" in the foreign country contained in the first schedule to the Act, then it is not unusual and not a derogation of South African sovereignty, to allow a magistrate in South Africa to examine a witness in South Africa in response to the issue of a commission by a Namibian Court in terms of section 171 of the Criminal Procedure Act. Similarly, where a South African citizen can be compelled in terms of the said Foreign Courts Evidence Act to go to a foreign country listed in schedule 2 of the

Act to give evidence before a foreign court, in response to a subpoena, issued by "the proper officer of a competent Court of law" in the said foreign country and endorsed by a magistrate in South Africa, then surely it is not unusual and not a derogation of South African sovereignty, to give effect to a commission issued by a Namibian Court for the taking of evidence in South Africa by a magistrate in South Africa.

In my view the term "any court" in section 171, includes, even from the point of view of South Africa, a court known and functioning as such in Namibia before as well as after Namibian independence. I therefore see no reason whatsoever why this Court cannot issue a commission. The alleged ground that it will derogate from South African sovereignty or that it will be ineffective because a South African magistrate will not be bound to give effect to it, does not appear to me to be sound propositions.

In the alternative. and should I be wrong in my above approach regarding the effectiveness in South Africa of the commission issued, the state in the case of the state witnesses and the defence in the case of the defence witness Viljoen, could apply to a provincial or local Division of the Supreme Court of South Africa in terms of section 2 of the Foreign Courts Evidence Act for an order, that the magistrate of Johannesburg or a magistrate in whose area the witnesses reside, should examine the witnesses in accordance with the Commission issued by this Court.

The provisions of section two (2) of the said Act, can only assist Namibia, if it can be successfully argued that Namibia has become a foreign country for the purposes of the said Act. Such argument may proceed on the following lines:

6. In view of the fact that the former territory of S.W.A. has become an independent state under the name of "Namibia", and furthermore the fact that article two (2) of the Recognition of the Independence of Namibia Act No. 34 of 1990, provides that South African authority and rules of law have, as far as South Africa is concerned, ceased to operate in Namibia, the provision that the "Republic" includes "the territory of S.W.A.", has therefore, by necessary implication, resulted in the exclusion from the term "Republic", of the words "includes the territory of South West Africa".

7. The "territory of South West Africa" was not only a geographical concept but the concept of a territory with a special status and identity, including distinguishable political and constitutional characteristics in international law.

> This special indentity and status lapsed with the attainment by this entity of independance and sovereignty. The territory of South West Africa as such has ceased to exist and therefore its inclusion in the term "Republic of South Africa" has become redundant and of no force and effect.

(c) The retention of the words "territory of South West Africa", in the definition of "Republic" is in conflict with section 2 of

the Recognition of the Independance of Namibia Act of 1990, in that in defining the term Republic, to include part of a foreign sovereign country for whatever purpose, whether for the benefit of such other sovereign country or not, is tantamount, from the South African point of view, to purport to keep a South African rule of law operative in Namibia after Namibian independance.

Namibia has therefore on this basis become a foreign country in relation to South Africa, not only in international law, but also for the purposes of the whole of the Foreign Courts Evidence Act 1962.

Although the parties can apply to a division of the Supreme Court of South Africa for the purposes aforesaid, in particular to ensure the effectiveness of the Commission, whether ex abundanti cautela or because it is necessary, this does not detract from the need for this Court to issue a commission and to issue the Commission first, whether or not a subsequent step would be taken by the parties in terms of section 2 of the said Foreign Courts Evidence Act.

The fact of the issue of the Commission by this Court, will be the decisive indication to the appropriate division of the Supreme Court of South Africa, that a court of law of competent jurisdiction outside the Republic, before which any criminal proceedings are pending, is desirous of obtaining the evidence in relation to such proceedings of any witness.

Because of a measure of uncertainty as to the correct interpretation of the law, I have considered the requirements of section 171 of the Criminal Procedure Act, whether or not the witnesses must be regarded as outside the Republic or not.

It is common cause that the State witnesses are unwilling to come to testify in Namibia, whatever the reason.

It is also common cause that the state witnesses at least, can give relevant and important evidence on the merits of the remaining charges.

When the attendance of a witness cannot be obtained without undue delay, expense or inconvenience, it does not mean that the attendance cannot be obtained. However, if it cannot be obtained, it is not necessary to decide whether it cannot be obtained, without undue delay, expense or inconvenience, because that follows from the fact that the attendance cannot be obtained, whether because the witness is outside the Republic, or for other reasons. The attendance of a witness may be obtainable even if a witness is outside the Republic, but not without undue delay, expense or inconvenience.

I find that the attendance of the state witnesses cannot be obtained without undue delay, expense or inconvenience.

I have seriously considered the accused's allegations in regard to the burden, financial and otherwise, caused by a

further lengthy postponement.

It seems to me that this burden has been exaggerated by the accused, perhaps owing to a bona fide misunderstanding of their right. This does not detract from the fact that a considerable burden remains, particularly in the case of accused no. 2.

I sincerely suggest that the authorities should perhaps reconsider their refusal of permits and/or their cancellation of permits or registrations, pending the outcome of this case, in view of many changed circumstances and considerations of reasonableness and justice.

It does not appear to me to be sound to anticipate at this stage the possible refusal of the state witnesses to testify or to claim privilege. Section 204 of the Criminal Procedure Act, should take care of their anticipated claim of privilege.

It appears to me in all the circumstances, that it is necessary in the interests of justice, to attempt to obtain the evidence of the state witnesses and the defence witness.

It is not a matter of importance to distinguish whether the witnesses are inside or outside the Republic for the purposes of deciding whether to issue a commission to a magistrate or competent person. In my view the witnesses, except M.W.H. van der Eecken, must clearly be regarded as being inside the Republic, and not outside, irrespective of

whether or not the word "Republic" includes the words "including the territory of S.W.A.".

A magistrate is clearly the only competent person to be appointed to take the evidence in a criminal case, should section 2 of the Foreign Courts Evidence Act be applicable.

I have also been asked to reserve the question of costs for the stage when this Court will resume the hearing once the Commission had run its course.

I have also decided not to burden the commission with prima facie irrelevant matter, such as the witnesses excuses, if any, for not having been willing to come to Namibia to testify before this Court.

In the result the order that I make in regard to the State's application and the counter-application of the defence is as follows:

8. The matter is regarded as one of urgency. The non-compliance with the rules by the State and Defence in regard to the application and counter-application is condoned.

9. The Court dispenses with the attendance of the state witnesses P.K. Bitzke, K.W. Roberts, G.P. de Bruyn and M.W.H. van der Eecken and the defence witness C.C. Viljoen at the trial of the State versus J.B. Loftie-Eaton, R. de Klerk and K. Dreyer pending before this Court.

A commission is issued to the Chief magistrate of Johannesburg, Mr B. Loots or a magistrate appointed by him in writing in whose area of jurisdiction the said witnesses reside at the relevant time, in order to:

(a) Subpoena the said witnesses to appear before him or her or such other magistrate and to produce specified documents relating and relevant to the issues hereafter set out:

In the case of the state witnesses:

(i) The alleged illegal import of ostriches from South Africa into Namibia.

(ii) Particulars of:

3 flights undertaken from Wintersfield, Hoopstad to 18°05 23SX 2345 48E in Namibia;

The conveyance of ostriches on the three occasions;

The persons who met the witness in Namibia and who were present during the off-loading of the ostriches;

The conversations which took place when the said ostriches were offloaded in Namibia.

In the case of the defence witness C.C. Viljoen:

The negotiations between himself and N.J. Dreyer, the third accused

in the trial:

The origin of the ostriches delivered to third accused.

The extent of his involvement in the delivery of ostriches and the circumstances under which the said deliveries took place.

The receipt of certain monies paid to him by R. de Klerk, the second accused and the purpose for which such payments were made.

10. Take the evidence of the said witnesses in South Africa in accordance with the provisions of section 171 and 172 and 204 of the Criminal Procedure Act and such other provisions of the law which may be applicable.

11. Return the evidence in question to the Registrar of the High Court of Namibia in accordance with section 173 of the Criminal Procedure Act 51 of 1977.

(4) The State and the accused will be entitled during the taking of the evidence on commission to be represented by counsel and/or attorney.

Counsel or attorney shall have the right to examine, cross-examine or re-examine each witness.

(5) Whether the State should be ordered to pay the costs of the accused in accordance with section 171(1)(c) of Act 51 of 1977, stands over until the stage when this trial will resume after the

commission has run its course.