NOT REPORTABLE

CASE NO.: (A) 196/2010

1. **IN THE HIGH COURT OF NAMIBIA**

In the matter between:

DE WET ESTERHUIZEN

APPLICANT

and

THE CHIEF REGISTRAR OF THE

HIGH COURT AND SUPREME COURT OF NAMIBIA

(In her capacity as Sheriff of the Two Courts) 1ST

RESPONDENT

MANFRED HENNES

(In his capacity as Acting Deputy Sheriff for the

High Court and Supreme Court of Namibia) 2ND

RESPONDENT

THE MINISTER OF JUSTICE 3RD

RESPONDENT

CORAM: SMUTS, J

Heard on: 22 November 2011

Delivered on: 9 December 2011

JUDGMENT

Smuts, J

2.

3. The applicant was appointed Acting Deputy Sheriff by the Minister of Justice for a specific term of 15 May 2009 to 31 January 2010. This appointment followed the sudden retirement, due to health reasons, of the former Deputy Sheriff, the applicant's mother, on 15 May 2009.

4. During this period, it had been contemplated that the post of Deputy Sheriff would be advertised and would then have been filled by the time this term ended. This was not to be. After the expiration of the fixed term, the applicant was subsequently appointed by the Chief Registrar of the High Court, the first respondent, on a temporary basis as Acting Deputy Sheriff under s 30(6) of the High Court Act, 16 of 1990 ("the Act") for successive one month terms, commencing on 1 February 2010 until 18 June 2010 when the Registrar terminated that

appointment with immediate effect.

5. That gave rise to a review application brought in June 2010 in which urgent interim relief was sought pending the finalisation of the review. The urgent interim relief sought was to interdict the Registrar from persisting with her decision set out in her letter of 18 June 2010 to terminate that appointment and also directing that the applicant be reinstated forthwith to the position with immediate effect and keep appointing him for successive one month periods pending the finalisation of the review. That application was initially set down on 25 June 2010 but was adjourned until 5 July 2010. Before the initial date of hearing, an answering affidavit was filed which was amplified prior to the hearing on 5 July 2010. In addition to seeking the review of the decision to terminate the applicant in his position as Acting Deputy Sheriff, the applicant also sought an order directing that the first respondent keep appointing him to that position until the permanent appointment of the Deputy Sheriff were to be made.

6. The applicant's acting appointment, which was terminated on 18 June 2010, was to expire on 30 June 2010. The applicant however alleged that the Registrar had promised that he would be appointed as Acting Deputy Sheriff until the permanent position of Deputy Sheriff had been filled. He contended that,

on the basis of this alleged promise and the prior appointments, he enjoyed a legitimate expectation to further temporary acting appointments until the position had been filled permanently. He contended that he was entitled to be heard prior to the termination of his appointment and that this had not occurred. He also alleged that the Registrar had acted in conflict with the provisions of Article 18 of the Constitution. He further alleged that the Registrar should have first suspended him and complied with the procedures stipulated in s 31 of the High Court Act, contending that this provision applied also to Acting Deputy Sheriffs temporarily appointed, by virtue of the definitions section in the Act. He contended that the procedure contemplated by s 31 must precede any termination of services which could only be done by the Minister. He accordingly claimed that the Registrar had acted unfairly and unreasonably and *ultra vires* the provisions of the High Court Act. He did not pursue the original relief sought concerning his position as Acting Deputy Sheriff of the Supreme Court.

7. The Registrar denied having made any promise to the applicant that she would continue to appoint him until the vacancy had been filled by a permanent appointment. The Registrar expanded upon this denial and attached a letter which she addressed to the Permanent Secretary of the Ministry of Justice to support her denial and undermine the applicant's version of

such a promise.

8. The Registrar also referred to the grounds of termination set out in her letter of 18 June 2010. Although she denied that the acting appointment for one month periods under s 30(6) of the Act constituted administrative action and gave rise to the right to be heard, she contended that there had in any event been compliance with this principle as the Deputy Registrar had addressed an earlier letter to the applicant affording him an opportunity to respond to the allegations made against him and which formed the basis for the reasons ultimately to terminate his services. It was pointed out that the applicant was thus given the opportunity to provide a written response to the complaints within a period of ten days and had not done so.

9. The application for interim relief was heard by Geier, AJ on 5 July 2010. His judgment was delivered on 21 July 2010. It has since been reported. [1]

10. The application for interim relief was opposed on several bases. As I have already pointed out, the alleged promise of future appointments was emphatically denied by the Registrar. So too was it denied that the temporary appointments constituted

[1] Esterhuizen v Chief Registrar of the High Court and Supreme Court and others 2011(1) NR 125 (HC).

administrative action. It was contended that the applicant's appointment was on the basis of an appointment of an independent contractor on a monthly basis for the duration of the specific term and that the Registrar's power to cancel the appointment arose from the principles of contract under common law. It was thus denied that the cancellation of the contract amounted to administrative action for the purpose of Article 18 of the Constitution. It was in any event contended that there had been compliance with the principle of *audi alteram partem* in the circumstances concerning the complaints which formed the basis for the termination of the appointment, with reference to the Deputy Registrar's letter calling for the applicant's response to the complaints in question within a ten day period which the applicant had not met.

11. It was also denied that s 31 applied. This section follows the appointment of both Deputy Sheriffs and Acting Deputy Sheriffs dealt with in s 30. Section 31 provides:

> **"(1) A deputy-sheriff who is alleged to have been negligent or dilatory in the service or execution of process or wilfully to have demanded payment of more than the prescribed fees or expenses or to have made a false return or in any other manner to have misconducted himself or herself in connection with his or her duties, may pending investigation, be suspended from office and profit by the sheriff**

who may appoint any person to act in his or her place during the period of suspension.

(2) The sheriff shall forthwith report to the Permanent Secretary for Justice for the information of the Minister any action which he or she has taken under this section, and the Minister may after investigation set aside the suspension or may confirm it and may if he or she deems fit dismiss from his or her office the deputy-sheriff who has been so suspended."

12. It was common cause that the applicant's appointment was made under s 30(6). For the sake of completeness and so that provision can be understood within its context, this section is quoted in full and provides:

13.

14. **"(1)(a) The Minister may, subject to the laws governing the public service, appoint for the High Court a registrar and such deputy-registrars, assistant registrars, sheriffs, deputy-sheriffs and other officers as may be required for the administration of justice or the execution of the powers and authority of the said court: Provided that if, in the opinion of the Minister the duties of such deputy-sheriff can be performed satisfactorily or with a reduction in governmental cost by a person who is not an officer in the public service, the Minister may appoint any person as such deputy-sheriff at such remuneration and on such conditions as the Minister may determine.**

15.

16. **(b) Whenever by reason of absence or incapacity a registrar, deputy-registrar, assistant**

registrar, sheriff, deputy-sheriff or other officer is unable to carry out the functions of his or her office, or his or her office becomes vacant, the Minister may authorise any other competent officer of the public service to act in the place of the absent or incapacitated officer during such absence or incapacity or to act in the vacant office until the vacancy is filled: Provided that, when any such vacancy has remained unfilled for a continuous period of six months that fact shall be reported to the Public Service Commission.

17.

18. **(2) Any officer in the public service appointed under subsection (1) may simultaneously hold more than one of the offices mentioned in that subsection.**

19. **(3) Any deputy-sheriff who is not an officer in the public service may with the approval of the Minister appoint one or more assistants for whom he or she shall be responsible and any such assistant may subject to the directions of the deputy-sheriff exercise any of the powers and perform any of the functions or duties of such deputy-sheriff.**

20.

21. **(4) Any person appointed as an assistant to a deputy-sheriff who is an officer in the public service may, subject to the directions of such deputy-sheriff exercise any of the powers and perform any of the functions or duties of such deputy-sheriff.**

22.

23. **(5) A deputy-sheriff who is not an officer of the public service shall as soon as possible after his or her appointment furnish security to the satisfaction of the sheriff for the due and faithful performance of his or her duties and functions, and if he or she fails or neglects to furnish such security within a period determined by the sheriff, his or her appointment shall lapse at the expiration of the said period.**

24.

25. **(6) Whenever in any matter objection is made to the service or execution of process by the sheriff or a deputy-sheriff by reason of the interest of such sheriff or deputy-sheriff in such matter or the relationship of such sheriff or deputy-sheriff to a party to such matter or of any good cause of challenge, or whenever on account of illness or absence or any other good and sufficient reason, it is necessary to appoint any person to perform temporarily any of the duties of the deputy-sheriff, the registrar may appoint any acting deputy-sheriff.**

26.

27. **(7) The Minister may delegate to an officer in the Ministry of Justice any of the powers vested in him or her by this section."**

28. The applicant had contended in the application for interim relief that s 31 applied. He claimed that the Registrar only had the power to suspend and not terminate or dismiss a Deputy Sheriff. It was contended that the latter power only vested in

the Minister of Justice by virtue of the provisions of s 31(2) and that the procedures envisaged by that section should have been followed. It was contended as a consequence that the Registrar had acted outside the provisions of s 31 and that the termination of the applicant's services was *ultra vires* as a consequence.

29. The applicant also contended that the decision to terminate the applicant's services constituted administrative action and that Article 18 applied. The applicant alleged that he was entitled to be heard prior to the decision to terminate his services and that this fundamental right had been breached and that the decision should also be set aside for this reason.

30. In his judgment, Geier, AJ, rejected the applicant's approach and found that s 31 did not apply. The Court first dealt with certain arguments raised on behalf of the applicant in paragraphs 40 to 42 of its judgment in the following way:

> **"[40] As attractive as Mr Namandje's arguments were at first glance, they do indeed not take into account that, the 'across- the- board application' of the provisions of section 31, to all categories of deputy-sheriff's, would indeed lead to an absurdity if also applied to acting 'stop-gap' appointments, as was correctly pointed out by Mr Frank.**

[41] These arguments and such interpretation would, in my view, also fail to take into account, that the services of an acting deputy-sheriff, such as the applicant can, so-to-speak, be ‘outsourced’, by way of a contractual arrangement. In such scenario it would not make sense to place the services of an independent contractor ‘on suspension’. The relationship that was created was a contractual one. An aggrieved party, faced with a material breach of contract, does not normally suspend a contract, pending an investigation, once faced with such material breach. The normal contractual remedies would apply, namely those of cancellation and/or of specific performance, for instance.

[42] Mr Namandje’s line of reasoning also fails to take into account that deputysheriffs may also, subject to the laws governing the public service, be appointed from the ranks of the public service in terms of sections 30(1)(a) and (b). Here the legislature has expressly decreed that such appointments are subject to the laws governing the public service, recognising that such appointments are made in the context of an existing employment relationship and such laws, which relationship just cannot be terminated willy-nilly.”

Geier, AJ then concluded in paragraphs 54 and 55 as follows:

[54] That same intention was not expressed by the legislature in the case of section 30(6) appointments, which involves the contractual exercise of the act of cancellation of the services of an independent contractor. If one takes into account further, that, given the sort of person upon

whom the power to appoint and suspend is conferred, (here the sheriff as opposed to the Minster), and given the person or class of persons for whose benefit such power is to be exercised, (here the sheriff contractually appointing an independent contractor in terms of section 30(6) as opposed to a permanent ministerial appointment), it would appear that the legislature cannot be said to have intended, that the power to suspend here was, in the case of section 30(6) appointments, coupled with the duty to exercise same.

[55] Accordingly I uphold the submission that section 31 has no application in the present matter."

31. The Court further examined the question as to whether the termination of the applicant's services constituted administrative action. After referring to several of the leading reported cases in this difficult terrain, Geier, AJ concluded in paragraphs 67 and 68 as follows:

"[67] Having already held that section 31 has no application in the present matter, the source of the applicant's power, to terminate, lies in contract. When she purported to cancel the contract, she was not performing a public duty or implementing legislation. She was purporting to exercise a contractual right founded on the *concensus* of the parties in respect of the particular contract of appointment.

[68] For the above reasons, and upon the application of the suggested guidelines and principles, I conclude that the first respondent was not exercising a public power, when

> **she cancelled the agreement. Accordingly the first respondent's actions are not administrative in nature and accordingly are not liable to review in terms of Article 18 of the Constitution."**

32. The Court further dealt with the question as to whether the decision of the first respondent would be reviewable on other bases as well such as on the grounds of a duty to act fairly (as was found to exist in *Logbro Properties CC v Bedderson NO* [2]) and concluded in paragraph 75 as follows:

> **"[75] The power to dismiss — being a corollary of the power to appoint — does not in this instance constitute administrative action for the reasons set out above. It would also not be appropriate to constrain the contractual power of cancellation, a unilateral act14, in the case of material breach, to the requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. This does not, however, mean that there are no constraints on the exercise of this power. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the law. Even if procedural justice were a requirement for the exercise of the power to dismiss, it seems to me that, on the facts, the applicant has had sufficient opportunity to respond to the allegations of misconduct set out in the letter annexed as "DWE7", and in the circumstances of the applicant's failure to respond to such allegations, such allegations were, at least on a prima facie basis established, entitling cancellation. I can accordingly**

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[2] 2003(2) SA 460 (SCA)

> **find no cause to hold that the exercise of that power was not in accordance with the law."**

33. The Court accordingly concluded that the applicant had not established a *prima facie* right to the review and related relief sought in the main (review) application and expressed the view that the applicant's remedies would lie in contract. After reading this conclusion and denying the applicant the interim relief sought on the basis of the reasoning quoted above, the Court further stated:

> **"I do however want to make it clear that this judgment does not decide any of these issues finally. Those are issues, which can be decided finally, when there is again a proper ventilation thereof in the continuation of the review proceedings, if so advised."**

34. The applicant, despite the Court's judgment on the legal questions of the applicability of s 31 and whether the termination of the appointment amounted to administrative action and whether there had been the right to be heard in the circumstances, continued with the review application. After the record of the decision making had been provided, further affidavits were exchanged, although the pertinent issues had already been raised at the time when the application for interim relief was heard and determined. The review application was

then proceeded to set down for hearing on 22 November 2011.

35. It was argued on behalf of the Registrar, as was foreshadowed in her further affidavit, that the matter had become *res judicata*. The Registrar, represented by Mr TJ Frank SC, together with Dr S Akweenda, submitted that the requirements for *res judicata* had been met and that the application should be dismissed with costs on this basis alone without the need to deal with the further issues. It is well established that the elements of the defence of *res judicata* are as follows:

36.

37. (a) The judgment and order must be a final and definitive judgment and order on the merits of a matter;

(b) It must be a judgment and litigation between the same parties; and

(c) The cause of action in both cases must be the same, with the same relief being claimed in both cases. [3]

38. The requisites for the defence of *res judicata* were neatly summarised in *Bafokeng Tribe v Impala Platinum Ltd and*

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[3] Le Roux v Le Roux 1967(1) SA 446 (A); African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977(2) SA 38 (A); Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2006(6) SA 68 (C).

others [4] in the following way:

> "**From the aforegoing analysis I find that the essentials of the exceptio res judicata are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (ex eadem petendi causa), (3) with respect to the same subject-matter, or thing (de eadem re). Requirements (2) and (3) are not immutable requirements of res judicata. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.**
>
> **However, where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed.**
>
> **A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions.**

39. **This principle must be carefully delineated**

[4] 1999(3) SA 517 (B) at 566

and demarcated in order to prevent hardship and actual injustice to parties.”

40. Whether or not this defence can succeed would depend upon the effect of the judgment of Geier, AJ. As to the manner in which a judgment of a Court is to be construed, I take into account the approach accepted over the years concerning the interpretation of a Court’s judgment or order, as was succinctly summarized by Nicholas, AJA (as he then was) in *Administrator, Cape and another v Ntshwaqela and others* [5] where he stated:

“**In Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) Trollip JA made some general observations about the rules for interpreting a Court's judgment or order. He said (at 304D - H) that the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in**

[5] 1990(1) SA 705

meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it.

The position is essentially no different from that where a patent specification is interpreted. That consists of three main parts: the title, the body of the specification and the claims. And the interpreter must be mindful of the objects of a specification and its several parts. The purpose of the claims is to delimit the monopoly claimed. If the meaning of a claim is clear and unambiguous, it is decisive and cannot be restricted by anything else stated in the body or title of the specification. On the other hand, if it is ambiguous, the body or title of the specification must be invoked to ascertain whether at least a reasonably certain meaning can be given to the claim. See Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 615B - D. Similarly, the order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended

by anything else stated in the judgment."

41. Mr Frank strenuously submitted that all the requisites for the defence of *res judicata* had been met. The second requirement does not give rise to any dispute as the parties are the same in both the application for interim interdict and the review relief in the main application. He contended however, with reliance on the *Bafokeng*-decision, that this Court had already come to a decision on the merits of the questions in issue and that those issues cannot be resuscitated in subsequent proceedings. He contended that the exact same legal questions arose to be dealt with in the review as had already been dealt with and disposed of in the application for interim interdict by Geier, AJ.

42. Mr Frank correctly submitted that the refusal of the interim interdict was a final judgment and that the applicant should have appealed against it if he was not satisfied with the conclusions reached and the order made by Geier, AJ. In contrast with this, the granting of an interim interdict, clearly not a final judgment between the parties, would not give rise to *res judicata* by reason of the different onus and test to be applied in respect of final relief. He referred to the *African Wanderers*-case where the following was stated:

> **"Indeed, it very often happens that, when a Court is asked to grant a temporary interdict, and the right which is sought to protect is not clear, the**

> **Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is refused, against the prejudice to the respondent if it is granted”**.

43. Mr Frank referred to the refusal of a temporary interdict in *Knox D’arcy Ltd and others v Jamieson and others* [6] where the Court followed an earlier decision [7] where the following was stated:

> **“ ‘It also seems to me that the Judge of first instance, having once refused to grant the provisional interdict pending action, is not competent to grant the application subsequently on the same facts and vary his order once pronounced after having heard both parties. His duty or office is, so far as concerns the request for an interdict, once for all exercised and determined, and the applicant, who feels himself aggrieved by reason of the refusal of the temporary interdict, has no other means of redress than by way of appeal'.”**

44. This also reflects the law in Namibia. It is clear to me that the refusal of an interim interdict would be final in respect of the refusal to grant that form of interim relief. Mr Frank contended that the refusal of interim relief, on the basis of the reasoning set out by Geier, JA, is final and dispositive in respect of the review application as well and not merely on the question of the

[6] 1996(4) SA 348 (A)

[7] Donoghue and others v Executor of Van der Merwe (1897) 4 OR 1

refusal of the interim relief. This would in my view appear to be correct. The interim relief was refused on the basis that the decision to terminate did not constitute administrative action and was thus not subject to a review.

45. Mr Namandje, for the applicant, however contended that there could be no question of *res judicata* given the fact that Geier, JA only dealt with the matter on the basis of refusing to grant interim relief. He furthermore contended that this was clear from the approach of Geier, AJ where he expressly stated that the issues can only be determined finally when there would be **"again a proper ventilation thereof in the continuation of the review proceedings, if so advised."** Mr Namandje submitted that, in the light of this pronouncement, it would be unjust for the doctrine of *res judicata* to apply.

46. Both counsel also directed full submissions on the issues decided by Geier, AJ, namely as to the applicability of s 31, whether or not the decision to terminate amounted to administrative action and the applicability of Article 18 of the Constitution, and furthermore as to whether there was compliance with the principles of natural justice in the form of *audi alteram partem*. Mr Frank however contended that the mere say-so and reservation by Geier, AJ could not have the effect of changing the legal position as the Court would be

functus officio on those issues and that it would not be open to revisit those issues in arguing the review.

47. The question arises as to whether the reservation by Geier, AJ would alter the position as to the appealability of the judgment <u>and</u> its effect. In my view it would not. The meaning of the order given by Geier, AJ is clear and unambiguous. The decisive nature of the refusal to grant the interim interdict cannot in my view be restricted or extended by what is stated elsewhere in the judgment, applying the principles set out by Nicholas, AJA in the *Ntshwaqela*-case cited above. It is not clear on what basis Geier, AJ expressed his reservation – as it would not in my view apply once he had reached the conclusions set out in his judgment. If the reservation were to caste some doubt as to the nature of the test adopted by Geier, AJ in reaching his conclusions, then this would have been all the more reason for the applicant to have appealed against his judgment. The reservation may conceivably have been expressed because Geier, AJ may have considered that further factual matter could emerge in the course of the review. But that would have not arisen in respect of the legal questions as to whether the decision making in question constituted administrative action and the applicability of s 31. His conclusion on the former issue meant that the review could not succeed and was final as far as that question was concerned.

The further factual matter which later emerged in the review was in any event not in essence relied upon in respect of the claim for a legitimate expectation or the right to be heard.

48. It follows in my view that the reservation by Geier, AJ was inapposite in view of the finality and decisiveness of the refusal of interim relief on the bases set out in his judgment. His stated qualification to his judgment that it would not be final on the issues set out is in my view thus inapposite and incorrect as the refusal of the interim relief on the bases contained in his judgment had a final effect upon the applicant.

49.

50. Mr Frank accordingly submitted that the decision on issues set out above and raised in the review application were rendered the matter *res judicata.* As the judgment of Geier, AJ in respect of those issues had not been appealed against, that judgment would be binding upon the applicant however much the applicant disagreed with the approach in that judgment. I am inclined to agree with this submission. The determination that the decision sought to be reviewed does not constitute administrative action and is therefore not reviewable as well as the issue as to whether s 31 applies or not, have been finally determined by Geier, AJ, despite his reservation in his judgment. That judgment should have been appealed against if the applicant felt aggrieved by it.

51. It would follow in my view that the requisites for the *exceptio res judicata* have been met and that the application should be dismissed with costs for this reason alone. Although the parties canvassed the issues determined by Geier, AJ in some considerable detail before me in both written and oral argument, Mr Frank submitted that as a matter of public policy it would be inappropriate for me to further address those issues given the fact that the object of the *exceptio res judicata* is to prevent the recapitulation of the same issues in dispute, giving rise to conflicting and contradictory decisions which would have their own deleterious effect, as is stressed in the Bafokeng

judgment. I am also inclined to agree with that view. I thus decline and deliberately leave open the question as to whether the termination of the applicant's appointment by the Registrar constitutes administrative action or whether the duty to act fairly as contemplated in the *Logbro*-decision would apply to that decision making. I also decline to deal with question as to whether s 31 would apply in the circumstances, even though this section would appear to embody a mere empowering provision to suspend a Deputy Sheriff and would not appear to be a prerequisite for termination of the services of a Deputy Sheriff. After all, it would not appear to me that the Registrar or the Minister would be required to suspend a Deputy Sheriff pending an investigation before any decision to terminate, if such a decision were to be made. I also decline to address the question as to whether the requisites for a legitimate expectation and the ambit of that were met as well as the nature and the ambit of that expectation and also whether it could apply in the manner contended for by Mr Namandje (beyond 30 June 2010 and for subsequent appointments) in view of the absence of an application to refer the dispute of fact upon the question of the alleged promise to that effect by the Registrar.

52. As to the question of costs, in view of the issues raised in this application, the engagement of two instructed counsel would in

my view be warranted.

53. I accordingly make the following order:

54. The application is dismissed with costs. These costs are to include the costs of two instructed and one instructing counsel.

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SMUTS, J

ON BEHALF OF APPLICANT:

Assisted by:	**Mr S Namandje**
Instructed by	**Sisa Namandje & Co**

ON BEHALF OF THE 1ST RESPONDENT:

Instructed by:	**Mr TJ Frank SC anad with him, Dr S Akweenda**
Instructed by:	**The Government Attorney**