REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON THE APPLICATION TO EXECUTE THE JUDGMENT AND ORDER PENDING APPEAL

Case No: HC-MD-CIV-ACT-OTH-2021/02269

In the matter between:

NAMIBIA NATIONAL OLYMPIC COMMITTEE & COMMONWEALTH GAMES ASSOCIATION	**1ST APPLICANT**
ABNER AXEL XOAGUB	**2ND APPPLICANT**
JOAN SMIT	**3RD APPLICANT**

and

NAMIBIAN GYMNASTICS	**1ST RESONDENT**
THE NAMIBIA SPORTS COMMISSION	**2ND RESPONDENT**
THE MINISTER OF SPORTS, YOUTH AND NATIONAL SERVICES	**3RD RESPONDENT**

Neutral Citation: *Namibia National Olympic Committee and Others v Namibian Gymnastics and Others* (HC-MD-CIV-ACT-OTH-2021/02269) [2023] NAHCMD 102 (9 March 2023)

CORAM: SIBEYA J
Heard: **6 February 2023**
Delivered: **9 March 2023**

Flynote: Application to execute the judgment and order of court pending appeal in terms of rule 121 (2) – The applicants stated that no authority was provided to oppose the application – They further stated that the noting of the appeal against the whole of the judgment and order of this court of 28 July 2022 will severely prejudice them and the Namibian gymnasts while the first respondent will suffer no prejudice if the order sought is granted – first respondent opposed the application and stated that the applicants will suffer no prejudice if the judgment and order is not executed –The court found that the applicants proved that they will suffer prejudice if the judgment and order appealed against is not executed pending appeal – The court further found that no prejudice will be suffered by the first respondent if the order sought is granted – Application succeeds.

Summary: On 28 July 2022, the court delivered judgment in a matter wherein the first respondent was the plaintiff. It upheld a special plea that the first respondent lacked *locus standi in judicio*. The applicants filed this application where they seek an order that the judgment and order of the court of 28 July 2022 should not be suspended pending the outcome of the appeal launched by the first respondent at the Supreme Court. The first respondent opposed the application.

Held – That the applicants bear the onus to satisfy the court that good grounds exist for the court to exercise its discretion in favour of granting an order to execute the judgment and order pending the outcome of the appeal.

Held that – The first respondent failed to prove that it authorised Ms. Olivier to oppose this application and as a result this application is strictly unopposed.

*Held further th*at – The noting of the appeal and the consequent suspension of the execution of the judgment and the order will cause irreparable harm to the applicants while the granting of the order sought will not prejudice the first respondent.

Held that – If a party decides to abide by the ruling of the court without participating in the proceedings, after being served with the application including the prayers sought,

surrenders his or her interests to the court, cannot cry foul if the orders ultimately granted have adverse effects on him or her.

Held that – The applicants satisfied the court to, in the exercise of its discretion, order execution of the judgment and order in this matter pending appeal. The application succeeds.

ORDER

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[1] This court's order dated 28 July 2022 shall not be suspended pending the outcome of the appeal noted by the first respondent in the above matter to the Supreme Court on 23 August 2022 under case number SA 68/2022.

[2] The first respondent shall pay the costs of the applicants, including costs of one instructing and two instructed legal practitioners and such costs are capped by rule 32 (11).

[3] The matter is removed from the roll and regarded as finalised.

RULING ON THE APPLICATION TO EXECUTE A JUDGMENT AND ORDERS PENDING APPEAL TO THE SUPREME COURT

SIBEYA J:

Introduction

[1] The court is rather seized with an exceptional application where the applicants

seek an order that the execution of the judgment of this court delivered on 28 July 2022 should not be suspended by the appeal to the Supreme Court noted against such judgment. It is the applications that are out of the ordinary that entice the interpretation and application of the law, and in my view, render adjudication worthwhile.

[2] The application is opposed only by the first respondent.

The parties

[3] The first applicant is Namibia National Olympic Committee & Commonwealth Games Association, a voluntary association with its address situated at 31 Tacoma Street, Suiderhof, Windhoek.

[4] The second applicant is Ms Joan Smit, the Secretary General of the first applicant, with her address situated in Windhoek.

[5] The third applicant is Mr Abner Xoagub, an adult male and president of the first applicant with his address situated in Windhoek.

[6] The first respondent is Namibian Gymnastics, a voluntary association with legal personality and whose business address is situated at 12 Tanzanite Street, Swakopmund. The first respondent shall be referred to as Nam Gym.

[7] The second respondent is the Namibia Sports Commission, a statutory body with legal personality provided for in section 2 of the Namibia Sports Act 12 of 2003 (“the Sports Act”) with its address situated at Erf 2 c/o General Murtala Muhammed Avenue and Kahn Street, Eros, Windhoek.

[8] The third respondent is the Minister of Sports, Youth and National Services, cited in her official capacity, with her address of service at the Office of the Government Attorney, 2nd Floor, Independence Avenue, Windhoek.

[9] Mr Heathcote SC represents the applicants while Mr Olivier represents the first respondent and Mr Ketjijere represents the second and third respondents.

[10] The second and third respondents stated that they will abide by the order of the court.

Background

[11] This application emanates from an action where the first respondent averred that it is a national sports body in terms of the Namibia Sports Act 12 of 2003 ("the Sports Act") and that it is registered with the second respondent. Its aim is said to be to promote, organise and control gymnastics in Namibia. The first respondent claims that the first applicant and second respondent purported to place it under sequential administration until the Extra Ordinary General Assembly is held. This decision was successfully appealed against to the Appeal Committee but the first applicant still refused to allow the first respondent to conduct its affairs as per its Constitution. The first respondent then instituted review proceedings where it alleged that the decisions of the first applicant and the second respondent were illegal with no basis in law.

[12] The applicants together with the fourth and fifth respondents defended the action and raised a special plea of *locus standi in judicio*. It was the applicants and the second and third respondents' case that the entity that was suspended was not the first respondent but the Namibia Gymnastics Federation (NGF). The first respondent stated contrariwise that a properly constituted Special General Assembly held on 28 November 2020 amended the first respondent's Constitution to provide for a name change to the name of the first respondent and, therefore, the first respondent duly existed as a result of the name change of the NGF.

[13] On 28 July 2022, after hearing evidence on the special plea raised, this court delivered judgment in favour of the applicants against the first respondent and ordered that:

'1. The defendants' special plea that the plaintiff lacks the necessary *locus standi in judicio* to institute these proceedings is upheld.

2. The plaintiff's claim is dismissed.

3. The plaintiff shall pay the costs of the first defendant limited to one Counsel and the costs of the second, third and fourth defendants' consequent upon the employment of one instructing and two instructed Counsel.

4. The matter is removed from the roll and regarded as finalised.'

[14] Subsequent to the delivery of the judgment, Nam Gym, on 23 August 2022, noted an appeal against the whole judgment and order of court.

[15] The applicants filed this application where they seek an order that the judgment and order of 28 July 2022 should not be suspended pending the outcome of the appeal noted by the first respondent to the Supreme Court.

[16] Rule 121 of the rules of this court regulates the effect of judgments and orders appealed against to the Supreme Court. The rule provides in no uncertain terms in subrule 2 that such judgment and order is suspended pending the outcome of the appeal. For the sake of brevity and completeness, I quote rule 121, which reads as follows:

'121. (1) Notice of an appeal to the Supreme Court against a judgment or order of the court must be filed in accordance with the Rules of the Supreme Court.

(2) Where an appeal to the Supreme Court has been noted the operation and execution of the order in question is suspended pending the decision of such appeal, unless the court which gave the order on the application of a party directs otherwise.

(3) If the order referred to in subrule (2) is carried into execution by order of the court the party requesting the execution must, before such execution, enter into such security *de restituendo* as

the parties may agree or in the absence of an agreement, the registrar may decide, for the restitution of any amount obtained on the execution, which amount includes capital and interest, if so ordered, and taxed costs and the registrar's decision is final.'

[17] It is apparent from rule 121 that the noting of an appeal against the judgment and order of this court suspends the practical effect of such judgment and order and returns the *status quo* to the position before delivery of the said judgment and order. This rule further confirms the long established common law position that an appeal suspends the operation of a judgment or order.

[18] It is the latter part of rule 121 (2) that forms the subject of this matter. It is this, whether or not the applicants have made out a case for the relief sought, namely that the court should direct that the noting of an appeal shall not suspend the execution of the judgment and order delivered by this court on 28 July 2022 pending the decision of the appeal. The applicants further pray for costs consequent upon the employment of one instructing and two instructed legal practitioners and not subjected to rule 32 (11).

Applicants' case and arguments

[19] The applicants called on the court to exercise its discretion to grant the application.

[20] It is the applicants' case that the first respondent is not a recognised national sports body for gymnastics as provided for in s 26 of the Sports Act. It is only the NGF that is recognised as the national sports body for gymnastics in Namibia. The second applicant, who is the President of the first applicant, deposed to the founding affidavit in this application on behalf of the applicants. He stated that the first respondent has no prospects of being registered by the Namibian Sports Authorities. The Sports Authorities will, however, have to consider the registration of the first respondent if it is successful in the appeal at the Supreme Court.

[21] In the judgment of 28 July 2022, this court found that the amendments to the

Constitution of the NGF were invalid and constituted a nullity. Resultantly, the first respondent lacked *locus standi in judicio.* The only witness for the first respondent was also found to be an unreliable witness who lacked credibility.

[22] The appeal noted by the first respondent, argued Mr Heathcote, is a delaying and self-interest tactic by those who control the first respondent with no regard to the interests of the young Namibian Gymnasts. Mr Heathcote minced no words when he said that the appeal is frivolous.

[23] It was further argued that even if the first respondent succeeds on appeal against the judgment of this court, the result may be that the first respondent will represent Namibian gymnasts on the world stage. This entails that the first respondent will suffer no prejudice if the application is granted pending the determination of such appeal.

[24] Mr Heathcote argued further that if this application is not upheld, then the deadlock which is prevailing at the moment where no national gymnastic body represents the gymnasts will unfortunately continue pending the determination of the appeal which may take years. This status quo prohibits international gymnastics organisations like the Federation Internationale de Gymnastique (“the FIG”) from making decisions regarding Namibian gymnasts. This situation causes irreparable harm to the NGF and the Namibian gymnasts.

[25] The second respondent deposed in the founding affidavit that Namibia stands to lose out on hosting international gymnastic events if the application is not granted. This will prejudice the Namibian gymnasts.

[26] The applicants contend that it is highly questionable if the first respondent exists as the Special General Assembly of 28 November 2020 did not create the first respondent. The first respondent is a juristic person which can only act through an authorised official and it is the applicants’ case that the first respondent has a duty to prove that Ms Sonya Olivier, who deposed to the opposing affidavit on behalf of the first respondent in this matter, is duly authorised to oppose the application. The applicants

relied on a decision of this court of *National Union of Namibian Workers v Naholo*.[1]

[27] The applicants contend further that the authority by Ms Olivier to represent the first respondent was challenged by the applicants. Ms Olivier only stated that she is duly authorised to depose to the opposing affidavit without alleging that she is authorised to oppose the application. No resolution to authorise the opposition of the application and to authorise Ms Olivier to so oppose was filed of record.

[28] There is a dispute between the parties regarding the use of the bank account and the funds of the NGF which is in the exclusive control of Ms Olivier. The applicants aver that if the order sought is granted then the NGF will take back the control of its bank account.

[29] Mr Heathcote wrapped his argument by emphasising that the noting of the appeal has halted the participation of Namibian gymnasts in international games. The applicants, therefore, have a direct and substantial interest in advancing gymnastics in Namibia and internationally.

The first respondent's case and arguments

[30] The first respondent's case is that, *in casu*, the party who stands to be prejudiced by the noting of the appeal, at least on the applicants' papers, is NGF and not the applicants. The first respondent further states that the applicants indirectly seek a declarator to legitimize the existence of NGF, which relief is incompetent in this forum.

[31] Mr Olivier argued that irrespective of the constitutional validity or otherwise of the NGF's name change to the first respondent, the fact is that the president did not lose her position.

[32] The first respondent states that the second respondent did not respond to the application by the applicants yet the effects of the order sought directly impact on the

[1] *National Union of Namibian Workers v Naholo* 2006 (2) NR 659 (HC).

second respondent. Mr Olivier argued the order sought cannot be granted as a result. The first respondent threw back the blame for the unfortunate position of the Namibian gymnastics in the international world as having being caused by the applicants' illegal actions of interfering in the affairs of the federation.

[33] The first respondent went at length to allege and argue that what it termed a splinter group called the NGF was unlawfully established.

[34] Mr Olivier argued that the applicants will not suffer any prejudice as a result of the appeal noted against the judgment of this court. He argued that possible prejudice of gymnasts does not equate to prejudice of the applicants.

[35] Mr Olivier concluded by inviting the court to dismiss the application with costs. He stated further that in the event that the application is granted, no adverse costs order should be made against the first respondent because it is a voluntary association or at the very least costs, if any, should be capped as per rule 32 (11).

The law

[36] As stated, it is part of common law that the noting of an appeal suspends the execution of the judgment and order appealed against. Rule 121 of the rules of this court cited above further stipulates as much.

[37] Corbett JA, while discussing the effect of noting an appeal and the application for leave to execute the judgment and order pending appeal, in *South Cape Corp. v Engineering Management Services,*[2] remarked as follows at page 544H – 545G:

'… it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the

[2] *South Cape Corp. v Engineering Management Services* 1977 (3) SA 534 (A) at 545.

party in whose favour the judgment was given must make special application. (See generally *Olifants Tin "B" Syndicate v De Jager*, 1912 AD 377 at p. 481; *Reid and Another v Godart and Another,* 1938 AD 511 at p. 513; *Gentiruco A.G. v Firestone SA (Pty.) Ltd.,* 1972 (1) SA 589 (AD) at p. 667; *Standard Bank of SA Ltd. v Stama (Pty.) Ltd.,* 1975 (1) SA 730 (AD) at p. 746.) The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's* case, *supra* at p. 513). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet,* 49.7.3; *Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another, supra* at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton*, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.
(See in this connection *Ruby's* case, *supra* at pp. 127-8; also *Rood v Wallach*, 1904 T.S. 257 at p. 259; *Weber v Spira*, 1912 G T.P.D. 331 at pp. 334-4; *Rand Daily Mails Ltd. v Johnston,* 1928 W.L.D. 85; *Frankel v Pirie*, 1936 E.D.L. 106 at pp. 114-6; *Leask v French and Others,* 1949 (4) SA 887 (C) at pp. 892-4; *Ismail v Keshavjee*, 1957 (1) SA 684 (T) at pp. 688-9; *Du Plessis v Van der Merwe*, 1960 (2) SA 319 (O).)'[3]

[38] The above authority is plain that before court orders the execution of a judgment

[3] See also: *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia and Another* 2014 (1) NR 22 (HC) ta para 13, which judgment cited the *South Cape Corp* decision with approval.

and order pending appeal, it must have regard to the possibility of irreparable harm and to the balance of convenience of the parties.[4]

[39] The applicant for the relief bears the onus of satisfying the court that good grounds exist for the court to exercise its general and wide discretion to grant the relief to execute the judgment and order pending appeal. If the court is in doubt then the leave sought should be refused.

Analysis

[40] I commence the analysis with the prospects of success of the appeal. It is common cause that the appellant in the pending appeal before the Supreme Court is the first respondent. The first respondent is not NGF but it states that there was a name change from NGF to its name. This court found that the meeting of 28 November 2020 did not establish the first respondent. I am of the view that no quorum was constituted to breathe life in the first respondent. It is on this basis that the court found that the first respondent lacks *locus standi* to institute review proceedings in the matter.

[41] Mr Olivier's argument that irrespective of the constitutional validity or otherwise of the NGF's name change to the first respondent, the fact is that the president did not lose her position is, in my view, the foundation of the main matter. If the first respondent accepts that the name change of the meeting of 28 November 2020 was invalid, as found before by this court, then the first respondent did not come into existence. This is an issue that is pertinent to this matter and cannot be simply brushed aside as it appears to be suggested by Mr Olivier.

[42] Having traversed the factual terrain in the main matter appealed against, and considering the factual findings made therein together with the credibility findings made in respect of Ms Olivier, I hold the view that the first respondent does not enjoy the reasonable prospects of success of appeal on appeal.

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[4] *Minister of Health v Treatment Action Campaign* (No 1) 2002 (5) SA 703 (CC) at para 10.

[43] The applicants further challenged the authority of Ms Olivier to oppose this application on behalf of the first respondent. No resolution by the first respondent was attached to the papers of the first respondent nor sought to be introduced by the first respondent which could prove that it authorised Ms Olivier to oppose this application on its behalf. What comes to mind is a position that probably the first respondent did not file a resolution for authority to oppose this application because the meeting that led to its creation was found to be null and void by this court. If this is the case, the judgment of this court appealed against is, in my view, no bar to the first respondent passing a resolution to oppose the application if it so elects. This is in keeping with the principle that the noting of an appeal suspends the execution of the judgment and the order appealed against.

[44] As it is, Ms Olivier, except for stating that she was duly authorised to depose to the answering affidavit, she is mute on whether or not she is authorised to oppose this application. The authority by Ms Olivier to oppose the application was challenged, but no such authority or resolution was produced.

[45] Patel J in *Eleventh v Minister of Home Affairs and Another*[5] had occasion to discuss the approach to be followed when the authority to act for another person is challenged and said the following:

> 'It is trite law and practice that where one person … is authorized by another, then the person so authorizing is required to confirm that authority when challenged.'

[46] The failure by the first respondent to confirm that it authorised Ms Olivier to oppose this application on its behalf, when the authority was challenged, in my view, means that Ms Olivier opposed the application without being authorised to do so. The first respondent made no effort to produce a resolution to confirm authority suggesting that no such resolution exists. It follows that the first respondent failed to prove that Ms Olivier was duly authorised to oppose the application and the application may therefore

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[5] *Eleventh v Minister of Home Affairs and Another* 2004 (11) BCLR 1223 (T) at 1227C.

be strictly speaking regarded as unopposed.[6] In the event that I am wrong I proceed to address other issue that may require consideration in this matter.

[47] The applicants, in my view, demonstrated the prejudice caused by the suspension of the execution of the judgment and order of this court. This includes, *inter alia*, the prejudice that the Namibian gymnasts suffer at the international stage, the non-recognition of Namibian gymnastics at the world stage; and the hindrance to the FIG to make decisions regarding Namibian gymnastics for the benefit of the Namibian gymnastics. The list is endless. The applicants, as regulators and bodies and persons involved in regulating and administering sport in the country have a direct and substantial interest in the development of Namibian gymnasts and the gymnastics code.

[48] I have difficulties to appreciate the argument advanced by Mr Olivier that the possible prejudice of gymnasts does not equate to prejudice of the applicants. This argument, in my view, loses sight of the role that the applicants play in the Namibian gymnastics field and their objectives. Their direct and substantial interest in Namibian gymnastics demonstrates that the hindrance to the development of gymnastics in the country prejudices them. Surely, Mr Olivier did not expect that gymnasts would individually depose to affidavits to demonstrate their prejudice and seek the relief sought in this application. In my view, it is sufficient for the regulatory bodies and administrative officers to state, as *in casu*, their prejudice.

[49] I find that the noting of the appeal causes irreparable harm to the Namibian gymnasts and the applicants in this matter as discussed above.

[50] During oral arguments the court posed a question to Mr Olivier as what prejudice is likely to be suffered by the first respondent if the order sought by the applicant is granted. Mr Olivier was at loss of words and left the question unanswered, save for submitting that the applicants have not proven the prejudice that they stand to suffer if the application is not granted. I cannot envisage the prejudice that the first respondent will suffer let alone irreparable harm, if the leave to execute the judgment and the order

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[6] *National Union of Namibian Workers v Naholo (supra).*

is granted and stated above. Mr Olivier did not assist the court of the possible existence of the contrary position.

[51] Mr Olivier raised another argument that the relief sought by the applicants has an effect on the second respondent who did not file papers in response to the application before court. He went further to state that he doubts if the relief sought can be granted without being alerted to the position of the second respondent regarding the application. The concise answer to the argument raised by Mr Olivier is that the second respondent was served with the entire application before court and it opted not to oppose but to abide by the decision of the court.

[52] When a party decides to abide by a ruling of the court without making submissions after being served with an application, it is assumed to do so in full appreciation of the application and the relief sought therein. If such party decides to abide by the ruling of the court while the orders sought may have adverse effects on it, it is taken to have surrendered itself to the orders that the court may make in the matter. If a party sleeps on his or her rights and elects not to participate in a matter where the order may affect such party, he or she cannot, in my view cry foul afterwards as he or she abandoned his or her opportunity to participate in the proceedings and make necessary submissions for consideration by the court in making the decision. In any event, I fail to appreciate the concern of the first respondent on whether or not the order will affect the second respondent. I hold that the argument lacks merit.

Conclusion

[53] As the matter stand and in the exercise of my discretion, I find that the applicants have established that they will suffer prejudice if the leave to execute the judgment and order of this court of 28 July 2022 is not granted. On the other hand, I hold the view that the first respondent stands to suffer no prejudice if the application is granted. As a consequence of this finding, I find that the determination of the balance of hardship or convenience as set out in *South Cape Corp* does not arise as there is no potential harm to both parties if the application is granted.

[54] I further hold the view, for the reasons mentioned hereinabove, that the first respondent does not enjoy reasonable prospects of success on appeal.

[55] In view of the findings and conclusions made above, I hold the view that the applicants have proven that this is a matter where leave to execute the judgment and order pending appeal should, in the exercise of judicial discretion, be granted.

Costs

[56] It is settled law that costs follow the result. The applicants will be awarded costs. This is an interlocutory application and ordinarily should be subject to rule 32 (11). In the main matter the court did not cap the costs, but in the exercise of my discretion and in keeping with the fact that the current proceedings are interlocutory in nature, I am of the view that costs to be awarded should be subject to rule 32 (11).

Order

[57] In the result, I make the following order:

[4] This court's order dated 28 July 2022 shall not be suspended pending the outcome of the appeal noted by the first respondent in the above matter to the Supreme Court on 23 August 2022 under case number SA 68/2022.

[5] The first respondent shall pay the costs of the applicants, including costs of one instructing and two instructed legal practitioners and such costs are capped by rule 32 (11).

[6] The matter is removed from the roll and regarded as finalised.

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O S SIBEYA

JUDGE

APPEARANCES:

APPLICANTS:	R. HEATHCOTE SC (with G. Dicks) Instructed by Koep & Partners Windhoek
1ST RESPONDENT:	J OLIVIER Du Pisani Legal Practitioners, Windhoek
2ND & 3RD RESPONDENTS:	R Ketjijere Office of the Government Attorneys, Windhoek