REPORTABLE

CASE NO.: SA 3/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HEINRICH SCHWEIGER **Appellant**

and

ERIKA KäTHE MüLLER **Respondent**

Coram: SHIVUTE CJ and CHOMBA AJA

Heard on: 11 October 2005

Delivered on: 12 October 2012

APPEAL JUDGMENT

SHIVUTE CJ (CHOMBA AJA CONCURRING):

Introduction

[1] The respondent, a German national with permanent residence in Namibia as plaintiff, instituted action in the High Court in terms of which she claimed repayment of forty thousand Deutschmark (DM40 000) from the then defendant and now appellant, a

Namibian citizen. The respondent alleged that the agreement in terms of which she had paid the amount claimed from the appellant was illegal and unenforceable; that the appellant could not fulfil his obligations in terms thereof, and that she was unaware of the invalidity of the agreement at the time when the parties concluded same. The claim was principally based on the *condictio indebiti* and, in the alternative, on the basis of unjust enrichment.

[2] With regard to the main claim, the appellant denied that the agreement was illegal and unenforceable. He pleaded that the document referred to by the respondent as 'the illegal agreement' was not an agreement at all but a unilateral declaration by the appellant to renew the lease agreement on the same terms and conditions at the expiry of the then existing lease agreement. The appellant's alternative defence was that if the agreement was illegal, then the respondent was not entitled to recover anything that was paid in terms of an illegal agreement. The appellant later amended his plea to abandon the alternative defence.

[3] The appeal in this matter was heard by a Bench consisting of me, my brothers O'Linn AJA and Chomba AJA. Our brother O'Linn became indisposed at the time the draft judgment was circulated for his consideration. To our regret, his health has not improved since then and he remains indisposed and unable to further deal with the appeal. Pursuant to the provisions of s 13(4) of the Supreme Court Act, 15 of 1990 and as discussed by this Court, amongst others, in *Wirtz v Orford and Another* 2005 NR 175

(SC), my brother Chomba and I can validly and properly finalise the matter provided we agree on the judgment.

Background

[4] During 2001 or early 2002 the respondent and the appellant entered into an oral agreement of lease in terms of which the respondent would rent from the appellant a house, certain ancillary rooms and livestock camps on the farm Gamikaub No. 78 in the District of Karibib, for a period of 20 years, the rent being eighty thousand Deutschmark (DM80 000), payable in installments by January 2002.

[5] The parties later had regard to the provisions of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act) and came to the realisation that in the light of certain provisions thereof, the agreement was prohibited and unenforceable.

[6] The parties consequently entered into two agreements on 9 July 2002, written in the German language and the sworn translations of which formed part of the record. The one was titled '*pachtvertrag*' or lease agreement and the other styled *'vereinbarung'* or written agreement. For convenience, the latter will be referred to herein as 'the invalid agreement'. The agreements were entered into personally by the parties and at Farm Gamikaub No. 78 in the District of Karibib, Republic of Namibia (the farm).

[7] The material terms of the lease agreement were, in summary, that the ‘house and ancillary rooms according to enclosure 1, additionally leased camps K1/K2/K3/K17’, on the farm ‘as highlighted in yellow’ on a diagram attached to the lease agreement identified as ‘Enclosure 2’, would be leased to the respondent for a period of 9 years and 11 months with a one off rental fee of DM40 000.

[8] The material terms of the invalid agreement were, briefly, that the appellant, at the expiry 'of the regular period of lease of 9 years and 11 months ... will conclude a new lease agreement with the respondent on the same terms and conditions;' that the appellant would ensure that the invalid agreement would be 'taken over...and be realized by the successors;' that the appellant was obliged to inform his heirs of the existence of the agreement, which in the event of his death was 'to retain its validity'. The invalid agreement had also recorded that: the respondent and the appellant had previously concluded an oral agreement of lease for 20 years in respect of the farm; the respondent had paid a 'lease fee' of DM80 000 in respect of the lease of a period of 20 years, and the appellant was not in a position to refund the respondent half of the 'lease fee'.

[9] As previously mentioned, the respondent realised that whilst the lease agreement was valid and enforceable, the invalid agreement was in contravention of the Act. She accordingly instituted action for the repayment of the DM40 000 she had paid to the appellant in terms of the invalid agreement.

[10] The respondent made an unopposed application in the High Court praying that the issue of whether the invalid agreement was legal, binding and enforceable be decided separately from any other issue in the action. The parties furthermore agreed that should the Court find the invalid agreement to be illegal and unenforceable then neither party would lead evidence. Instead, the appellant would repay the claimed amount to the respondent.

[11] The Court below ruled that the invalid agreement was in contravention of s 58(1) *(b)* of the Act and was thus illegal and void *ab initio*. Consequent to the ruling, counsel for the respondent moved for an order granting judgment for the respondent in the amount claimed in the summons, interest thereon at the rate of 20% per annum a *tempore morae* from 1 February 2002 to date of payment as well as costs of suit. Thereafter counsel for the appellant raised the issues from which date interest should run and at what rate. It was argued for the appellant that interest should run from the date of judgment as the parties had *bona fide* and voluntarily entered into the illegal agreement, that no demand had been made and the appellant was therefore not in *mora*. Counsel for the respondent ‘as a concession’ argued that the interest should instead run from the date on which the invalid agreement had been entered into, namely 9 July 2002.

Findings by the High Court

[12] Having heard brief arguments on the date when interest should run, the learned Judge indicated that since she was going to give reasons for the ruling on the status of the invalid agreement in any event, she would reserve judgment on the issue of interest and give a ruling at the same time with the reasons for the earlier ruling. Subsequently, with regard to the legality and enforceability of the invalid agreement, the High Court found that the purpose of the legislature in enacting the Act was to preclude foreign nationals from enjoying any rights of tenure in respect of agricultural land for a period exceeding ten years. The Court further found that the invalid agreement in effect had purported to grant the respondent who, as mentioned already, is a foreign national the right to occupy the agricultural land in question for a period exceeding ten years and therefore effectively evaded the very prohibition contemplated by the Act. To that extent, so the Court a quo concluded, the agreement was in *fraudem legis*. The High Court found furthermore that because the invalid agreement was illegal, the respondent's claim for DM40 000 had succeeded.

[13] As regards the date from which interest should run, the Court below made a finding that the respondent was entitled to restitution and to be placed in the same position that she was in immediately before the conclusion of the illegal agreement. The appellant was ordered to pay interest on the capital amount of DM40 000 at the rate of 20% per annum from 9 July 2002 (being the date the invalid agreement was entered into by the parties) to date of payment. Appellant was furthermore ordered to pay costs of suit. The judgment of the Court a quo has since been reported at 2005 NR 98 (HC).

Counsel's submissions on appeal

[14] The appeal was argued by Mr Frank, SC on behalf of the appellant and by Mr Corbett on behalf of the respondent. The appeal was initially directed against the finding of the High Court that the invalid agreement was void *ab initio* as it had contravened s 58(1)*(b)* of the Act and the order that the appellant pay interest at the rate of 20% per annum on the amount of DM40 000 calculated from the date the invalid agreement was concluded. Counsel for the appellant, who is not the same counsel who represented the appellant in the Court below, in the end conceded that the High Court was correct in holding that the invalid agreement was in contravention of s 58(1)*(b)* of the Act and therefore illegal. Counsel for the appellant contended, however, that the Court a quo erred in deciding the matter on the basis of restitution. Once the invalid agreement had been found to be illegal, so counsel argued, the question of restitution did not arise at all. Instead, what should have been considered and decided was the issue whether the *par delictum* rule should be relaxed in the circumstances to allow the respondent to recover the DM40 000 and interest. The respondent should have provided evidence to enable the Court a quo to make a decision whether there were circumstances present to relax the *par delictum* rule. Counsel continued to argue that there was no basis for the High Court to relax the *par delictum* rule so as to grant interest, because there was no material placed before that Court in this regard. It was counsel for the appellant's further contention that the High Court had approached the matter as an ordinary contractual claim where rescission had to take place. In any event, so the argument proceeded,

since the *mora* interest was way out of line with the bank interest, there was no basis for the Court a quo to relax the *par delictum* rule and to grant interest to the respondent.

[15] Counsel for the respondent on the other hand, drew the Court's attention to the relevant provisions of the Act and the legal principles flowing from the application of s 58 of the Act which section, counsel maintained, had rendered the invalid agreement illegal. Respondent's counsel furthermore advanced arguments on the principles of the *condictio indebiti* and the scope and ambit of the *par delictum* rule as well as principles of unjust enrichment. Counsel for the respondent argued that irrespective of how the invalid agreement was structured and designated, the intent and import thereof was to confer a right of possession of the agricultural land for a period exceeding ten years. In terms of the lease agreement, he continued to argue, DM40 000 would be payable in respect of each ten year period during which the respondent was in occupation of the land in question. He submitted that the requirements for relaxing the *par delictum* rule as set out and discussed in the decision of this Court in *Ferrari v Ruch* 1994 NR 287 (SC) were not met and ordering that interest should be paid from the date on which the parties entered into the illegal agreement would not amount to enforcing the illegal agreement.

Issues on appeal

[16] As previously mentioned, it was conceded on behalf of the appellant that the invalid agreement was illegal. Hence, the issue regarding the validity of the said

agreement need not be traversed in any greater detail. It is, nevertheless, necessary to refer to some of the provisions of the Act to ascertain whether the Court a quo was correct in its finding that the invalid agreement was illegal and whether the concession made by counsel for the appellant, that the Court below was correct in its holding, was properly made. The legislative purpose of the Act can be gleaned inter alia from the long title as well as other provisions of the Act. The long title of the Act reads as follows:

> 'To provide for the acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices; to vest in the State a preferent right to purchase agricultural land for the purposes of the Act; to regulate the acquisition of land by foreign nationals …'.

[17] Section 58(1) of the Act provides that:

> 'Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the date of commencement of this Part, without the prior written consent of the Minister, be competent –
>
> (a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or
>
> (b) to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national –

(i) for a period exceeding 10 years; or

(ii) for an indefinite period or for a fixed period of less than 10 years, but which is renewable from time to time, and without it being a condition of such agreement that the right of occupation or possession of the land concerned shall not exceed period of 10 years in total.'

[18] Section 59 of the Act reads as follows:

> 'No person shall acquire and hold, as a nominee owner, on behalf or in the interest of any foreign national any agricultural land if the Minister's written consent therefor has not been obtained as required by section 58.'

[19] In the event that agricultural land is unlawfully acquired or held, s 60 provides for remedies to the Minister in that regard. Section 61 deals with restrictions upon registration of agricultural land and states that:

> '(1) Notwithstanding anything to the contrary in any law contained, the Registrar shall not register any transfer of agricultural land or any lease or sublease in respect of such land or any cession of such a lease or sublease, unless there is submitted to the Registrar-
>
> (a) a statement made under oath or affirmation by or, in the case of a company or close corporation, on behalf of the transferee, lessee, sublessee or cessionary, as the case may be, declaring-
>
> (i) his or her nationality or, in the case of a company or close corporation, the nationality of each member thereof and whether or not the company or close corporation is a foreign national; and

(ii) whether or not the land to be transferred or mentioned in the lease, sublease or cession, as the case may be, will be held by him or her or it on behalf or in the interest of any other person and, where applicable, giving particulars of the name and nationality of that person or, in the case of a company or close corporation, the name and nationality of each member thereof; and

(b) if in the statement referred to in paragraph (a), the transferee, lessee, sublessee or cessionary, as the case may be, declares that he or she is not a Namibian citizen or, in the case of a company or close corporation, that it is a foreign national, or that the land in question will be held by him or her or it on behalf or in the interest of another person who is not a Namibian citizen or, in the case of a company or close corporation, which is a foreign national-

(i) the written approval of the Minister referred to in section 58; or

(ii) proof by affidavit in the form and manner determined by the Registrar that he or she or it qualifies for exemption from the provisions of section 58 by virtue of the provisions of section 58(3) or 62,

and the Registrar may request the transferee, lessee, sublessee or cessionary concerned to submit to the Registrar such further proof as he or she may require that the transferee, lessee, sublessee or cessionary may lawfully acquire or hold such land in terms of this Part.'

[20] It is evident from the above provisions of the Act that the legislative purpose thereof is to provide for the acquisition of agricultural land by the state for the objective of land reform. Once such land has been acquired, the primary beneficiaries thereof are those Namibian citizens who do not own or have the use of any or adequate agricultural land and foremost those Namibian citizens who have been disadvantaged by past

discriminatory laws or practices. In a nutshell, therefore, the purpose of the Act is, amongst other things, to address the pressing issue of land reform, a perennial problem associated with this country's history. It is apparent from the relevant provisions of the Act that the purpose is also to regulate the acquisition of land by foreign nationals. I agree with counsel for the respondent's submission, which submission also found favour with the High Court that the clear and unambiguous intention of the legislature in enacting the Act and s 58(1)*(b)*(ii) in particular was to preclude foreign nationals from enjoying any rights of tenure in respect of agricultural land in commercial areas for a period exceeding ten years without prior consent of the Minister. In so far as the invalid agreement therefore purported to grant the respondent the right of occupation and possession of commercial agricultural land for a period exceeding ten years apparently without first complying with the prerequisites set out in the Act, such agreement falls foul of the provisions of s 58*(b)*(ii) of the Act, is illegal and void *ab initio*. The Court below was entirely justified in coming to that conclusion. I am also persuaded that the concession made by counsel for the appellant to that effect has properly been made.

[21] The agreement being prohibited by law and the parties thereto therefore being in *pari delicto*, as a general principle, the parties cannot get relief from the operation of the contract. However, it is trite that exceptions may be made depending on considerations of public policy and the need to do justice between individuals.[1] What remains to be considered, therefore, is whether the *par delictum* rule should be relaxed to order

[1] *Jajbhay v Cassim* 1939; *Rall v Bester* 1951 (3) SA 541 at 545.

repayment of the lease amount and the payment of interest thereon. As already mentioned, the Court a quo ordered the repayment of DM40 000 and that interest should be paid at a rate of 20% per *annum* from 9 July 2002 (being the date on which the agreement was entered into) to date of payment.

[22] The learned Judge's reasoning was that the plaintiff should be placed in the position she was in immediately before the conclusion of the illegal agreement. It is clear from the above reasoning that the Court a quo approached the matter as an ordinary contractual claim where restitution had to take place. I agree with counsel for the appellant that as the agreement in terms of which the DM40 000 was paid to the appellant was illegal, the question of restitution did not arise. What remained to be considered and decided was the question whether the *par delictum* rule should be relaxed in the circumstances to allow the plaintiff to recover the DM40 000 and interest.

[23] In *Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaalvereniging* 1968 (1) SA 283 (TPD) at 285D-F Moll AJ made the following pertinent observations in relation to the types of claims for interest:

> *'Now it is clear, from the decision of Union Government v Jackson and Others, 1956 (2) SA 398 (A.D.) at p.411, that a distinction must be drawn between a claim for interest which forms an integral part of a plaintiff's claim for damages and in respect whereof the necessary foundation by way of evidence must be laid and a claim for interest which "is a consequential or accessory or ancillary obligation automatically attached to some principal obligation by operation of law".'*

[24] Counsel for the respondent conceded that the respondent should have led evidence as to when interest should run, but contended that to ensure equity, the benefit the appellant received from the money should be repaid in the form of interest from the date of payment of the money to the respondent. In the alternative, counsel submitted that since it was not apparent from the record that there had been demand prior to the issuing of summons, interest should start to run at least from the date of the summons. Counsel for the appellant, on the other hand, argued with reference to a passage on page 510 of Christie's *The Law of Contract in South Africa*, 5th ed. that if interest should run, it should run from the date of judgment and not before.

[25] This Court in *Ferrari v Ruch* considered the question whether or not a plaintiff is entitled to interest on the capital amount paid to the defendant in terms of a prohibited agreement and it has become necessary to refer to the relevant passages of the judgment in that matter at some length to reiterate the point that whereas such agreements cannot be enforced by virtue of the well-known maxim *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise) which is absolute and admits no exception, the maxim *in pari delicto potior est conditio defendentis* (in equal fault the condition of the defending party is better) in some cases may be relaxed to allow a plaintiff to recover money paid or property delivered to a defendant pursuant to an illegal agreement so as to prevent manifest injustices. At page 296G–297G

Mahomed CJ rendering the judgment on behalf of the Court, succinctly and crisply put the position thus:

> ‘The object of the *maxim in pari delicto potior est conditio defendentis* is clearly to discourage illegal or immoral conduct, by refusing the help of the courts to delinquents who part with money or chattels in furtherance of prohibited agreements, but, if it was never capable of relaxation, it might perpetuate immorality and cause gross injustice in some cases (for example, where a seller of a prohibited article refuses to deliver the prohibited article but still retains the purchase price which has been paid to him).
>
> Since Jajbhay's case therefore the Courts in Southern Africa have often relaxed the strict operation of *the maxim in pari delicto potior est conditio defendentis* in order to do “simple justice between man and man” (*Petersen v Jajbhay* 1940 TPD 182; *Mancherjee v Bala* 1946 WLD 503; *Padayachey v Lebese* 1942 TPD 11; *Osman v Reis* 1976 (3) SA 710 (C) at 712G-713A).
>
> It is difficult and even undesirable to lay down fixed rules to define the circumstances which would permit the relaxation of the *par delictum* rule, but there are clearly some considerations which are relevant to such an enquiry.
>
> (1) It is clearly relevant to enquire whether one party would unjustly be enriched at the expense of another if the rule *in pari delicto potior conditio defendentis* is not relaxed in a particular case. (*Jajbhay's* case *supra* at 545.) This appears to be the dominant underlying motivation for the relaxation of the rule in the cases of *Petersen v Jajbhay, Mancherjee v Bala, Padayachey v Lebese and Osman v Reis* (*supra*) and in such cases as *Mia v Mohideen, Bawa v Mohideen* 1942 (2) PH A 28 (W) and *Albertyn v Kumalo and Others* 1946 WLD 529.
>
> (2) On the other hand the relaxation of the rule can legitimately be resisted if it has the indirect effect of enforcing the illegal agreement. (*Venter v*

Vosloo 1948 (1) SA 631 (E), *Rall v Bester* 1951 (3) SA 541 (T) and *Essop v Abdullah* 1986 (4) SA 11 (C) and *Essop v Abdullah* 1988 (1) SA 424 (A).)

(3) The fact that the plaintiff who seeks the relaxation of the rule was aware of the fact that the agreement entered into with the defendant was prohibited by law, is not by itself a bar against his claim for recovery of moneys or property which he has transferred to his adversary, pursuant to such an agreement. (*Jajbhay v Cassim* (supra at 549), *Petersen v Jajbhay and Osman v Reis* (supra).) The logical corollary of that proposition must be that the relative degrees of turpitude attaching to the conduct of the parties in entering and implementing the unlawful agreement, is a relevant consideration in determining whether the rule should be relaxed in a particular case (*Jajbhay v Cassim* (supra at 544)).'

[26] At 300B-301A the learned Chief Justice continued to observe as follows:

'The Court in *Jajbhay v Cassim* (supra) was critical of some of the English cases dealing with the relief of restitution in illegal contracts and I think that it is unnecessary in dealing with this question to examine the historical evaluation of the English learning on this problem or to enquire into the theoretical foundations which support the exceptions to the *par delictum* rule in English law or to define the limits of those exceptions. Whatever be the approach of English law to the problem, I am satisfied that the Courts in this country have followed and should continue to follow the approach articulated in *Jajbhay v Cassim* (supra) and that the *par delictum* rule should be relaxed in appropriate cases to prevent manifest injustice. Thus approached, the plaintiff should in my view be allowed to recover the capital transfers he made to the defendant in terms of the relevant agreement of loan between the parties.

It does not follow from this conclusion, however, that the plaintiff should also be entitled to recover from the defendant the interest on that loan in accordance with

> the terms of the unenforceable agreement. It may well be that the defendant will unfairly have enjoyed the free and unfair use of the capital sums of the loan if he is not compelled to pay the interest thereon, but any order requiring the defendant to repay both the original loan as well as the interest which was agreed upon between the parties to the unenforceable contract would indirectly constitute an order enforcing all the material terms of the unenforceable contract. This is not permissible. For similar reasons the Court in *Rall v Bester* (supra) refused a claim for compensation made by the landlord of premises which had been beneficially occupied by the defendant under an unlawful lease.
>
> No reliance needs to be placed on the terms of the unlawful contract itself, if interest on the capital amounts of the loan constituted "fruits" of the original delivery of capital, and therefore constituted a part of what the defendant has to restore in making restitution, but such interest cannot properly be equated with “fruits”.
>
> Moreover there is no evidence that the defendant ever enjoyed or still enjoys such "fruits" or what the extent of this benefit was. These facts were simply not properly ventilated in evidence. The plaintiff cannot in these circumstances, recover any interest on the loans, without being compelled to rely on the terms of the unlawful contract with the defendant. This is precisely what he is not allowed to rely on, in terms of the authorities.
>
> In the result, the plaintiff is entitled to the repayment of the capital amounts of the loan but not the interest thereon.’ (Reference to some of the authorities omitted.)

[27] It would appear from the above passages that interest and the capital must be dealt with separately following which it should be determined whether or not the respondent was unjustly enriched in respect of each separately. When making such

enquiry one should not have regard to the unenforceability or illegality of the agreement in question. To do so would in effect result in the illegal agreement being enforced as if it were legal, which is not permissible in our law as also confirmed by Mohamed CJ in *Ferrari v Ruch* at 300E-G.

[28] In applying the above principles to the present matter, it is my view that whereas the *par delictum* rule should be relaxed to allow the plaintiff to recover the DM40 000, the rule should not be relaxed to award interest to the plaintiff from the date on which the invalid agreement was entered into by the parties. This would have the effect of enforcing the illegal agreement.

[29] However, the value of money does decrease with inflation and the capital amount no longer has the same value as it did when the invalid agreement was entered into by the parties. That notwithstanding, in the view I take of the matter, it would give effect to the principle of justice between individual and individual if both parties are to be put in the position they were in immediately prior to the conclusion of the illegal agreement and nothing more. Therefore, only the amount by which the appellant was actually enriched should be repaid. He only received the capital amount and there is no evidence that he had invested it or that he had earned interest on the capital amount in another manner. In the light of the paucity of material placed before the Court a quo as to when interest, if at all, should run and if so at what rate, there was no basis for that Court to award interest to the plaintiff from the date the agreement was entered into.

[30] The Court below in my respectful view overextended the principle of ‘putting the plaintiff in the position he was in prior to the conclusion of the illegal agreement’. Regard must be had to the fact that the appellant and the respondent were both unaware of the illegality of the agreement. Granting interest to the respondent on the capital amount and at the *mora* interest rate has a punitive effect, which is made harsher by the fact that there was no evidence that the respondent had been enriched by the interest which would be payable if an order to that effect is granted, thus making such an order unjustified. In my view, interest should run from the date of this judgment.

Costs

[31] Counsel for the appellant argued that if the appellant is successful on appeal, the normal rule that costs follow the event should apply. Counsel for the respondent, on the other hand, contended that should interest be ordered to be paid from the date of the summons, each party should pay their own costs. The appellant has been successful on appeal and I see no valid reason why he should not be entitled to costs. In the result, costs will follow the event.

Order

[32] In the result, the following order is made:

1. The appeal is allowed with costs and the respondent is ordered to pay such costs, which include the costs of one instructed and one instructing counsel.

2. The order of the Court below is set aside and substituted for the following order:

   ‘Judgment is entered against the defendant for payment of the sum of DM40 000 or the equivalent thereof in Namibia Dollars at the time of payment.’

3. The appellant is ordered to pay interest on the sum of DM40 000 or the equivalent thereof in Namibia dollars from the date of this judgment to the date of payment at the rate prescribed by law.

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SHIVUTE CJ

I agree

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CHOMBA AJA

APPEARANCES

For the appellant	Mr TJ Frank SC
	Instructed by Andreas Vaatz and Partners
For the respondent	Mr AW Corbett
	Instructed by Basil Bloch Attorneys