

56/92

Case No 362/90
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

COIN SECURITY GROUP (PTY) LTD

Appellant

and

J SMIT N O

First Respondent

NAMIB AIR (PTY) LTD

Second Respondent

C J SCHUTTE

Third Respondent

CORAM:

BOTHA, MILNE, KUMLEBEN, VAN DEN HEEVER JJA
et VAN COLLER AJA

DATE OF HEARING: 19 March 1992

DATE OF JUDGMENT: 30 March 1992

J U D G M E N T

/MILNE JA.....

MILNE JA:

On 21 March 1990 the Recognition of the Independence of Namibia Act No 34 of 1990 came into operation. I shall refer to this as the Independence Act. Section 2(1) provides that:

"The Republic shall cease to exercise any authority in the Territory referred to in the Treaty of Peace and the South West Africa Mandate Act, 1919 (Act No 49 of 1919)."

It was held by the court a quo (Leveson J) that this deprived the court of jurisdiction to confirm a rule which had been granted before Namibia became independent. The judgment is reported in 1991(2) SA 315 (T). The factual background is as follows.

The appellant company is engaged in the business of carrying money and other valuables throughout the Republic of South Africa and Namibia (I shall refer to Namibia throughout although in South Africa it was

generally called South West Africa before its independence). Amongst the appellant's clients are certain banks. In 1989 the appellant commenced transporting, on an ad hoc basis, cash and valuables for such banks in Namibia by means of its air service. Towards the end of that year it concluded contracts for a regular air service of this nature. It had, in 1987, been granted a non-scheduled air transport service licence entitling it to operate, inter alia, in the Republic of South Africa and Namibia. It is necessary at this stage to deal briefly with the relevant legislation in terms of which this licence was granted. Appellant's licence was granted in terms of section 9 of (what is now called) the International Air Services Act No 51 of 1949 ("the Air Services Act"). Section 1 of that Act defines "air service" as "any service performed by means of an aircraft for reward, and includes an air transport service". "Air transport service" is defined as "a service by aircraft for the carriage of passengers or

goods for reward, and includes such a service on chartered terms." Section 2 provides that subject to certain exceptions no person shall use an aircraft for the provision of any air service except under and in accordance with the terms and conditions of a licence granted to that person or deemed to have been so granted. The body which is given power to grant licences is the National Transport Commission established under section 3 of the Transport (Co-Ordination) Act, 44 of 1948 ("the Commission"). Section 4 sets out the information which is to be supplied to the Commission in support of an application for a licence. Sub-section (1)(h)(ii) requires particulars to be furnished concerning "... the airports to be used." Section 5 provides for the publication of notice of applications and section 6 for the submission of representations in writing in support of or in opposition to such applications. Section 9 deals with the powers of the commission with reference to such applications. Sub-sections (2) and (3) set out the

matters to which the Commission "shall" have regard in considering such applications. Section 9(4) provides that the Commission

"... may grant wholly or in part any application by an air carrier for the amendment or modification of his licence or the conditions thereof, if in its opinion by reason of altered circumstances or for any other good and sufficient reason, including any consideration mentioned in sub-section (2) or (3), it is desirable to do so in the public interest or in order to avoid hardship."

Section 10 is of crucial importance in this matter and I accordingly set out its terms in full.

"Whenever an air service provided by an air carrier within any particular area or over any particular route is, in the opinion of the commission, satisfactory and sufficient to meet at a reasonable charge the need of the public for that class of air service within that area or over that route, the commission shall not grant a licence to any other person for the provision of an air service within substantially the same area or over substantially the same route, in competition with the first-mentioned air service: Provided that this sub-section shall not be deemed to prohibit the commission from granting a licence for the provision of an air transport service over a route which overlaps any segment of a route over which an air transport service is provided by any other air carrier, if the commission is

satisfied that the provision of an air transport service over such first-mentioned route is necessary in order to satisfy adequately the air transportation requirements of the public."

I interject here that it is quite clear that this section, in terms, applies only to an application for the grant of a licence and does not apply to an application for the amendment of a licence or the conditions thereof. Section 11 provides for the matters to be specified in the licence and the conditions to be attached thereto. Sub-section (3)(a) empowers the commission inter alia to attach to a licence a condition that the aircraft to be used "... shall only operate at or from one or more specified aerodromes: ...". Regulations were promulgated in terms of section 22 of the Air Services Act. Regulation 3 provides for the issue of four classes of air service namely,

- "Class I - Scheduled Air Transport Service.
- Class II - Non-scheduled Air Transport Service.
- Class III- Flying Training Air Service.
- Class IV - Aerial Work Air Service."

Regulation 7 stipulates that applications inter alia for the grant and for the modification or amendment of a licence or the conditions thereof are to be made in the form prescribed in annexures to the regulations. The form, "Annex A", provides in paragraph 7 for "Particulars of air service it is desired to provide." This paragraph requires in the case of scheduled and non-scheduled air transport services the following to be completed:

- | | |
|-------|---|
| "(i) | *The area to be served _____ |
| (ii) | The route or routes *and towns to be served _____ |
| (iii) | *The aerodromes to be used/*Base or bases of operation _____ |
| (iv) | Types and classes of traffic to be conveyed and assessment of potential traffic available _____ |
| (v) | Frequency and timetables to which service will be operated _____ |
| (vi) | Proposed tariff of charges or fares _____ |

This is, of course, followed by the magic words much beloved by the compilers of forms "*Delete if not applicable." This paragraph of this form is the only reference that I have been able to find to "base of operations". It is not used in the Act nor in the body of the regulations. The Afrikaans version uses the word

"uitgangspunt". The record is silent as to the meaning of the phrase. The appellant's counsel told us that it meant, in effect, a place where the aircraft used in carrying out the service were "hangared" and from which they normally operated. This phrase would seem to derive its statutory authority from section 11(3)(a) referred to above. It was a condition of the appellant's licence that its "base of operation" was Wonderboom Airport which is apparently an airport near Pretoria.

I return now to a narrative of the relevant facts. When the appellant decided to operate its air service for the banks in Namibia on a regular basis it was thought necessary to obtain permission from the Commission to use Eros Airport in Windhoek as a base of operation. An application was accordingly lodged by the appellant for the amendment of the conditions of its licence so as to add Windhoek as an extra base of operation. This was on 6 December 1989. It had earlier

applied for what it called "ad hoc permission" from the Commission to use Windhoek as a base of operation for a period of 90 days in order to provide a cash-carrying service for banks in Namibia on an ad hoc basis. The respondents submitted before the Commission and the court a quo that there was no provision in the Air Service Act or the regulations therefor. This permission was however "granted". Further such permission was "granted" on 2 February 1990. The appellant alleges that the first such application, although referring to Windhoek Airport, was intended by the appellant (and understood by the Commission) to refer to Eros Airport and indeed the second "grant" refers to Eros Airport. It would seem that Eros Airport is actually in Windhoek whereas Windhoek Airport is, curiously enough, some 48 km outside Windhoek. There is some dispute about this detail as to whether Eros Airport was intended to be referred to but nothing turns on it.

Notice of the application for the amendment was published in the Gazette and two other air carriers, namely the second and third respondents, objected to the application. The record does not contain the objections themselves. On 22 February 1990 a hearing took place before the Commission and the appellant was represented by its attorney and the second and third respondents by their attorney. At that hearing evidence was led and argument was submitted and the respondents' attorney put in written heads of argument on their behalf. These heads of argument rely expressly on the provisions of section 10 of the Air Services Act. The submissions contained in that document are confined to the elaboration of the submission that section 10 precluded the grant of the application. I think it is fair to say that that was the main thrust of the objection by the second and third respondents. (Their attorney described the section as "... ons geliefde artikel 10 ..."). On the following day the application was refused by the

Commission.

Under notice of motion dated 9 March 1990 the appellant brought proceedings seeking certain relief. The chairman of the Commission in his capacity as such, was cited as the first respondent and the second and third respondents were the other respondents. The substantive relief sought by the appellant in its amended notice of motion was the following:

- "2. That a rule nisi do issue calling upon the First Respondent to show cause why:
 - 2.1 The National Transport Commission's decision, taken at Pretoria, refusing to grant an extension to the Applicant's licence No N300 and conveyed to the Applicant's attorneys on 23 February 1990, should not be corrected or set aside in terms of Rule of Court 53(1)(a);
 - 2.2 An amendment of the licence No N300 to include Eros Airport in Windhoek as a base of operation in terms of Condition 2 should not be issued in terms of the Air Services Act, No 51 of 1949, as amended;
 - 2.3 The National Transport Commission should not pay the costs of this application.
 - 2.4 An order declaring that the National Transport Commission's withdrawal of the

90 day ad hoc permission granted to the Applicant on 2 February 1990 as invalid and declaring that the Applicant is entitled to continue to operate in terms of the ad hoc permission granted to it by the National Transport Commission on 2 February 1990.

3. Ordering the relief sought in terms of paragraphs 2(1), 2(2) and 2(4) of the rule nisi to operate as interim orders pending the return day of the rule, being a date to be determined by this honourable court."

Affidavits were filed on behalf of all three respondents and a replying affidavit on behalf of the appellant. The matter came before Eloff DJP on 16 March 1990. At that stage the only affidavit filed on behalf of the Commission was that of an employee of the Department of Transport stating that the first respondent was overseas, and that without his co-operation it was impossible to decide what should be done in relation to the application or to give instructions to legal advisers. The first respondent was nevertheless represented by counsel at the hearing before Eloff DJP

but "... did not actively contest the applicant's (appellant's) further claim."

Eloff DJP ruled that the matter was one of urgency, granted an order in terms of prayers 2 and 3 of the amended notice of motion and ordered that costs be reserved. The return day of the rule was 17 April 1990. This was extended until May 1990 when the matter came before Leveson J. The first respondent had, in the meanwhile, filed a further affidavit in which the Commission abided the decision of the court. I shall return to the contents of this further affidavit at a later stage.

When the matter came before Leveson J the learned Judge *mero motu* raised the question as to whether he had jurisdiction to grant the relief sought. At that stage what was sought was confirmation of the rule. Counsel for the second and third respondents, on

instructions, declined to make submissions on the point.

The learned Judge then reserved judgment and requested

counsel to furnish written argument on the question.

Counsel's written submissions were indeed filed but, as

appears from the note at the foot of p 317 of the report,

these submissions were mislaid in the Registrar's office

and judgment was eventually delivered on 6 July without

the learned Judge having had the benefit of them. He

made the following order:

"(a) The application is dismissed.

(b) The second and third respondents are to pay the applicant's costs incurred up to 21 March 1990, including the costs reserved on 16 March 1990.

(c) The applicant is to pay the costs of the second and third respondents incurred after 21 March 1990."

Leveson J held that the appellant would have been

successful in the proceedings but for the fact that the

court did not have jurisdiction.

In essence, the learned Judge's reasons for

holding that he did not have jurisdiction are the following:

"In the present case the relief sought includes an order setting aside the decision of the Commission as well as an order amending the applicant's licence so as to include Eros Airport as an area of operation. In regard to the latter, if granted, this Court would require the authorities of a sovereign foreign State to submit to its order. But whether the order is negative as in the former instance (i.e. not requiring performance of an Act by the Commission) or an order for the issue of a licence, it seems to me that the authorities of Namibia are entitled to ignore both. As the relief sought is therefore not capable of enforcement, this Court, in my opinion, does not have jurisdiction."

Leave to appeal was granted by the court a quo.

All three of the respondents have stated that they abide the decision of this court, and none of them was represented at the appeal.

It will be apparent from the above recital that Eloff DJP clearly had jurisdiction to grant the order which he did. In the light of the intervening

independence of Namibia it is understandable that on the information at his disposal, Leveson J raised the question as to the effectiveness of the order sought by the appellant. Confirmation of the rule would effect an amendment of conditions of the appellant's licence so as to include Eros Airport in Namibia as a base of operation; hence the learned Judge's remark that he was "... unable to perceive any basis upon which this Court remains entitled to trespass upon the rights of a sovereign country by purporting to regulate the rights of that country's citizens." (at p 317H of the report).

As a result of the failure of the Registrar's office to deliver counsel's written arguments the learned Judge was unfortunately not aware of the provisions of article 140 of the Namibian Constitution. Sub-paragraphs (1), (2) and (3) are in the following terms:

"(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament

or until they are declared unconstitutional by a competent Court.

- (2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.
- (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament."

I venture to suggest that had this information been before the learned Judge in the court *a quo* he would probably have confirmed the rule. We have, in addition, information on oath to the following effect:

- (a) The Air Services Act remained in force in Namibia after independence and is still in force subject to the amendment referred to below.
- (b) By Act No 6 of 1991 of the National Assembly of Namibia, signed by the President in terms of the Namibian Constitution, certain amendments were effected to the Air Services Act (which had by virtue of the provisions of section 140(1) referred to above continued to remain in force in Namibia). This amending Act came into force on 27 May 1991.
- (c) In terms of section 1(a) of Namibian Act No 6 of 1991 the National Transport Commission ceased to be the commission exercising powers in terms of the Air Services Act and in its place was substituted the Transportation Commission of Namibia established by section 2A of the Road Transportation Act, 1977.

(d) The Transportation Commission of Namibia has not yet been constituted.

I must confess it seems to me to be arguable that even without regard to the provisions of article 140 of the Namibian Constitution, an order confirming the rule would have been capable of enforcement. Even on the reasoning of the court a quo, there was no reason why paragraph 2.1 of the order should not have been granted. The Commission had its "residence" within the court's jurisdiction. With regard to paragraph 2.2 it is clear that whether the Commission amended the original licence in its own records, or whether it amended a licence produced to it by the appellant, that would be an act taking place within the court's jurisdiction. It may be argued therefore that the court was not concerned with the effectiveness of the licence which it ordered to be amended but solely whether its order could be carried out. What was required to give effect to the order was

that the Commission amend the licence. That is an act which would have to be carried out within the jurisdiction of the court. What effect the licence would have once it had been amended is, so it may be argued, not a matter with which the court had to concern itself.

Compare *Barclay's National Bank Ltd v Thompson* 1985(3) SA

778 (A) at 796D where Hoexter JA said the following:

"In this connection I agree with the submission advanced by the plaintiff's counsel that the question whether or not the Court's order for payment of money will result in satisfaction of the judgment creditor's claim is not a jurisdictional issue. It is important to bear in mind, I think, that in the law of jurisdiction the principle of effectiveness relates to the mere power of a Court to give an effective judgment rather than to the exertion of that power in any particular instance. The matter is succinctly stated by POLLAK in footnote 2 at 208 of *The South African Law of Jurisdiction*:

'... the principle of effectiveness does not mean that a court has no jurisdiction unless it can in fact make its judgment effective against the particular defendant. It means merely that the judgment of the court should normally be effective against a person in the position of the defendant. That is why the domicile of the defendant, although unaccompanied by physical presence, is a ground for jurisdiction in an action for a judgment sounding in money.'"

It is, however, unnecessary to decide whether this would be a correct manner in which to approach the question. The Transvaal Provincial Division clearly had jurisdiction to grant the rule when the proceedings commenced and, as a general proposition, in our law such jurisdiction continues until the end of the proceedings. See VOET 5.1.64, *Rex v De Jager* 1903 TS 36 at 38 and *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969(2) SA 295 (A) at 301C-D (the majority judgment of Ogilvie-Thompson JA) and at 310C-H (the minority judgment of Potgieter JA with whom Steyn CJ concurred). The court a quo (at p 317G-H) apparently anticipating that provisions like those of article 140 might have been enacted, took the view that the principle that if a court has jurisdiction when proceedings commence its competence continues "cannot apply in the face of a statutory provision such as the present" (at

318 I). I am, with respect, unable to agree. There is, to my mind, no inconsistency between this common law principle and the provisions of section 2(1) of the Independence Act. The legislature of the Republic of South Africa was not in that section considering the question of the continuance of proceedings validly commenced in a court of the Republic before the Act came into operation. It is clear that in De Jager's case *supra* the Transvaal courts had jurisdiction in a criminal matter at the time when the proceedings commenced. At that time Vryheid was part of the Transvaal. After the proceedings had commenced Vryheid was annexed to Natal and no longer formed part of the Transvaal. This was effected by Letters Patent passed under the Great Seal of the United Kingdom. This annexation was an act of state but it was nevertheless held that the court retained jurisdiction. It is conceivable that the common law principle might, in exceptional cases, not apply e.g. for reasons affecting the comity of nations (which seem to

underlie the reasoning of the learned Judge in the court a quo). It is however unnecessary to consider that aspect of the matter further since the following circumstances make it clear that there can be no question of "trespassing" upon the rights of a sovereign country, nor of making an order that the authorities of Namibia would be entitled to ignore. In terms of article 140 of the Namibian Constitution, both the Air Services Act and the Transport (Co-ordination) Act No 44 of 1948 continued to be in operation in Namibia, and everything done under those laws prior to the date of independence by inter alia an official of the Republic of South Africa was deemed to have been done by a corresponding official of the Government of the Republic of Namibia unless such action were to be subsequently repudiated by an act of parliament. There is nothing to indicate that there was any such repudiation. On the contrary, we are aware by virtue of the information placed before us, to which I have already referred, that the Air Services Act

continued to be in operation in unamended form until it was amended by Act No 6 of 1991 of Namibia. It seems to have been the clear intention of Namibia that there should be a smooth and uninterrupted carrying over of the provisions of the Air Services Act and the powers of the National Transport Commission under that Act until provision had been made for corresponding Acts and institutions of its own in terms of Namibian legislation. It follows, in my judgment, not only that the court's order was able to be enforced, but that it and the amended licence issued in pursuance of it would be effective. It follows that the reasons of the court a quo for refusing to confirm the rule were, in the light of the information now before us, unfounded.

The court a quo in dealing with the question of costs considered the merits. The learned Judge held that but for the passing of the Independence Act after the rule was granted the appellant would have been

successful. Briefly summarized, his reasons for this conclusion were:

- (a) The Commission refused the amendment because it held that it was precluded from granting it by reason of the provisions of section 10 of the Air Services Act and
- (b) Section 10 does not apply to an application for the amendment of an existing licence.

I agree. I have already referred to the fact that the written representations on behalf of the second and third respondents relied exclusively upon the provisions of section 10 and to the fact that the main thrust of their representations at the hearing before the Commission related to the provisions of section 10. Before the extended return day the Commission filed the record of the hearing before it and this reflects its decision in the following terms:

"The Commission resolved that it was satisfied that the existing services were satisfactory

and sufficient to meet at a reasonable charge the need of the public for that class of Air Service within that area."

This reproduces faithfully the wording of the relevant portion of section 10. Paragraph 4 of the second affidavit filed on behalf of the Commission reads as follows:

"Na die aanhoor en deeglike oorweging van al die getuienis wat tydens die aansoek aangebied was, het die Kommissie besluit dat die bestaande diens genoegsaam en bevredigend is om teen 'n redelike fooi aan die behoeftes van die publiek aan die betrokke lugdiens in die spesifieke area te voldoen. Gevolgtlik is die aansoek deur die Kommissie geweier. In hierdie verband verwys ek die Agbare Hof na 'n afskrif van 'n skrywe waarin die redes vir die besluit van die Kommissie verskaf is soos versoek, en hierby aangeheg is as aanhangsel 'A'." (My emphasis).

The annexure referred to states that the Commission "... was satisfied that the existing services were satisfactory and sufficient to meet at a reasonable charge the need of the public for that class of air service within that area." Once again, a reproduction of the phraseology of section 10.

Thus far the conclusion is inescapable that the sole reason for the Commission's refusal of the application for the amendment of the conditions of the appellant's licence was that it was precluded by the provisions of section 10 from granting the application. In fact, it was clearly wrong in taking the view that section 10 applied at all. Having taken that view, however, there was obviously no room for the exercise of any discretion. The affidavit filed on behalf of the Commission however goes on in the next paragraph to say:

"By die uitoefening van sy diskresie het die Kommissie besondere klem gelê op die aangeleenthede wat ingevolge die bepalings van artikel 9 van die Wet op Lugdienste, No 51 van 1949, in ag geneem moet word by die oorweging van 'n aansoek."

As already mentioned, once it concluded that section 10 applied there was no question of the Commission exercising any discretion. Without being unduly uncharitable to the Commission (and without in any way

impugning its bona fides) it is conceivable that this paragraph was included because it is customary to include such a paragraph in proceedings dealing with an attack upon a decision of the Commission. Some weight may be given to this surmise by the fact that this paragraph refers to matters which it is said must be taken into account in terms of the provisions of section 9. Sub-sections (2) and (3) of section 9 set out in ten subparagraphs the matters which the Commission "shall" take into consideration in applications for the grant of a licence. In sub-section (4) however, which is the sub-section dealing with amendment of a licence or the conditions thereof, while the Commission may take into account any consideration mentioned in sub-section (2) or (3), it is not obliged to do so. The basis upon which it may grant such an application is its opinion that it is desirable to do so in the public interest or in order to avoid hardship. In any event, as already mentioned, there are quite a number of matters referred to in sub-

sections (2) and (3) and this kind of "shot-gun" allegation without reference to the particular subparagraphs of the sub-sections which the Commission allegedly considered and without any particularisation of the factual basis for so doing is, in my view, not entitled to be given any material weight. I am fortified in this conclusion by the absence of any factual allegations in the affidavits filed on behalf of the second and third respondents which would found a refusal of the application for amendment upon the provisions of section 9 and not section 10. In paragraph 45 of the launching affidavit filed on behalf of the appellant the deponent states the following:

"Grounds for Review

Although the record of the hearing before the Commission is, as I said, not available at the time of drafting this affidavit, I respectfully submit that, judging from the representations made to the Commission by the objectors, and by the general thrust of the hearing, the only basis for the Commission refusing the extension to the Applicant's licence is a finding by the Commission in terms of Section 10 of the Act that the air service provided by the two objectors is, in the Commission's opinion,

satisfactory and sufficient to meet at a reasonable charge the need of the public for that class of air service."

In the affidavit filed on behalf of the second respondent it was said that in the light of the fact that the record of the proceedings before the Commission and the reasons of the Commission were not, at the time of the launching of the application available, it was premature to attempt to deal with the allegations of the appellant. Under the heading "Die beweringe van die Applikant" this affidavit says furthermore:

"30. Soos hierintevore gemeld, is dit prematuur om op hierdie stadium te handel met spesifieke bewerings van die Applikant in soverre dit slaan op die beoogde hersiening. In soverre daar nie met spesifieke beweringe gehandel is nie, moet dit nie gesien word as 'n erkenning van die korrektheid daarvan nie maar, sal vollediglik daarmee gehandel word wanneer die bepalings van Reël 53 nagekom is.

31. In die algemeen gestel, doen ek egter met eerbied aan die hand dat die Applikant nie aan die bepalings van Artikel 9 van die Wet voldoen het nie en derhalwe nie geregtig was op die

toestaan van 'n lisensie aan hom
nie."

The third respondent deals more specifically with the allegations in paragraph 45 of the appellant's launching affidavit. He says in this regard:

"27. Ad paragraaf 45.

27.1 Dit mag korrek wees dat die kommissie onder andere bevind het, vanweë die bepalinge van Artikel 10 van die Wet dat die Applikant nie geregtig is op 'n lisensie nie. Ek doen egter met eerbied aan die hand dat daar ook verskeie ander redes is waarom die Applikant nie geregtig is op die uitreiking van 'n lisensie aan hom deur die Eerste Respondent nie, maar doen met eerbied aan die hand dat die gepaste tydstip om daarmee te handel sal wees nadat die Applikant aan Reël 53 voldoen het en aan myself en die ander Respondente behoorlik ingevolge die bepalinge van Reël 53 geleentheid gebied was om te reageer op die beweringe van die Applikant."

Both these affidavits were filed before the hearing took place before Eloff DJP. The return day was, as already mentioned, extended but no further affidavits were filed on behalf of the second or third respondents. Thus both

the second and third respondents, having stated that they would deal more fully with the appellant's allegations and in particular with the allegation that the basis of the Commission's refusal was section 10, nevertheless after the provisions of Rule 53 had been complied with and after the record had been filed, failed to deal with that allegation. It seems more probable than not that they did not do so because they could not honestly do so and therefore that the sole basis upon which the application was refused was the (mistaken) view of the Commission that section 10 prohibited the grant of the appellant's application.

In the result, the appellant is entitled to have the decision of the Commission set aside. It does not necessarily follow that the court will order the Commission to amend the conditions of the licence in the manner sought by the appellant. In *Belinco (Pty) Ltd v Bellville Municipality & Another* 1970(4) SA 589 (A) at

600E-F, Holmes JA referring to the decision in Local Road Transportation Board and Another v Durban City Council and Another 1965(1) SA 586 (A) at 598D-G said:

"Adapting to the present case what was there said, the position may be stated thus -
The Court has a discretion, to be exercised judicially upon a consideration of the facts of each case; and, although the matter will be sent back if there is no reason for not doing so, in essence it is a matter of fairness to both sides. Fairness to the Municipality demands that ordinarily the administration of the building regulations should be left to it. Fairness to the appellant recognizes that in certain circumstances it would be a denial of justice to remit the matter."

In the Belinco case it was common cause that the plans complied with the Municipality's building regulations and that the only reason for their non-approval was the invocation of a clause in a town-planning scheme which the court held to be ultra vires and that there was accordingly "no let or hindrance to approval." See also Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others 1986(2) 663 (A) at 680F-G where Van Heerden JA said:

"But in the absence of exceptional circumstances such as bias or gross incompetence on the part of the board, or a long delay occasioned by an arbitrary decision, a court will not order the issue of a permit unless the only proper decision of the board on remittal would be to grant the application."

(This was a minority judgment but the decision of the majority in that case does not affect the validity of the passage quoted). In my judgment the circumstances here satisfy both legs of the test laid down by Van Heerden JA. In the first place there are special circumstances. There has been a long delay. The rule was granted in this matter two years ago. What is more, there is the highly significant factor that since the amendment affected by Act No 6 of 1991 of Namibia, the National Transport Commission has ceased to have any jurisdiction in respect of Namibia and the body which is to succeed it namely, the Transportation Commission of Namibia, has not yet been appointed. There is therefore no appropriate body to which to remit the matter. Furthermore, in the light of the matters already referred to, and in

particular where, having based their objections both before the Commission and Eloff DJP squarely on section 10, the respondents failed to set out a sufficient basis upon which the Commission could have refused the application upon any of the grounds set forth in section 9(2) or 9(3) - this, despite the intimation that they intended to supplement their papers after compliance with Rule 53(3) - the only proper decision of the Commission on remittal, had it had power to consider the matter, would have been to grant the application.

There remains the question of costs. The second and third respondents should have lost on the merits in the court a quo. The appellant is accordingly entitled to an order for costs against the second and third respondents in the court below, including the costs reserved by Eloff DJP on 16 March 1990. (The first respondent at no time opposed the proceedings and no costs were sought against the first respondent). I can

see no basis, however, why the second and third respondents should be ordered to pay the costs of the appeal since neither of them raised the point which has necessitated the appeal and in fact they declined to do so. It appears from the judgment granting the application for leave to appeal, however, that they opposed that application and the appellant is accordingly entitled to the costs occasioned by such opposition.

In the result:

- (a) The appeal is upheld.
- (b) The following order is substituted for the order of the court a quo:

Paragraphs 2.1 and 2.2 of the rule are confirmed with costs (including the costs reserved on 16 March 1990) such costs to be paid by the second and third respondents.

- (c) The second and third respondents are ordered to pay the costs occasioned by their opposition to the application for leave to appeal.

A J Milne

A J MILNE
Judge of Appeal

BOTHA JA	]	
KUMLEBEN JA	]	
VAN DEN HEEVER JA	]	CONCUR
VAN COLLER AJA	]	