CIV/T/190/99

IN THE HIGH COURT OF LESOTHO

In the matter between :

DANMOR (PTY) LTD	**PLAINTIFF**
vs	
ERMLINO AIRLINES	**1ST DEFENDANT**
CAHAVIA	**2ND DEFENDANT**
VICTORIA AIR AVIATION COMPANY (PTY)LTD	**3RD DEFENDANT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.L. Lehohla on the 1st day of March, 2002

Advocate Bornman representing the plaintiff and briefed by the firm of Attorneys Messrs Webber Newdigate, appeared before this Court on 7th August, 2001. He moved that the matter be proceeded with even though there was no appearance on the part of any of the above defendants.

The Court having satisfied itself that there was sufficient notice of date of hearing given to the defendants and or their Counsel granted the application for the matter to be heard unilaterally but not before it ordered that the defendants'

names be called three times each on the Public Address System. The Court's orderly shortly afterwards reported that there was no response. The matter was accordingly proceeded with and evidence heard on behalf of the plaintiff.

The following day i.e. - 8th August, 2001 and at the end of the plaintiff's case the Court made the following order :-

"Judgment is granted for plaintiff as prayed and in terms of the Draft Order attached to the Plaintiff's heads of arguments.

The Court has found it established that there has been fraud. That fraud resulted in damages to the plaintiff, and the consequent injury and prejudice to plaintiff were foreseeable to the 1st and 3rd defendants.

Judgment for plaintiff is in the amount of American Dollars reflected in the particulars of claim and at the exchange rate obtaining as on 06-08-2001 for purposes of conversion into **Maluti** currency in terms of the Certificate.

The Registrar is directed to sign the Order based on the Draft Order as soon

as that is filed and bears necessary revenue stamps.

M. LEHOHLA

JUDGE

08-08-2001"

Needless to say a further application for correction of four errors appearing in the record and referred to during proceedings was also granted.

The summons sets out that the 1st defendant is a commercial aviation company, whose physical address is Balaba novo-1, Kaluzhskaya Region, Borovkiy Area, Russian Federation, 249000.

The Court further observed that the 2nd defendant is a commercial aviation company, whose physical address is 37 K, 7 Leninggradisky Pr, Moscow, 125167, Russian Federation.

Finally the summons sets out that the 3rd defendant a Company Registration No. 989/345 is a limited liability company duly incorporated and registered in Lesotho in accordance with Company Laws of Lesotho, which carries on business in the air transport industry in Lesotho, with its registered office at C/O Du Preez

Liebetrau, 3rd Floor, Metropolitan Building, Kingsway, Maseru.

In terms of this summons the defendants are to be informed that the plaintiff, a limited liability company duly incorporated and registered in Lesotho in accordance with the Company Laws of Lesotho, carries on business as an air courier in the air transport industry in Southern Africa, with its registered office at C/O Webber Newdigate, 2nd Floor Metropolitan Building, Kingsway, Maseru.

The action instituted against the defendants is set out in the Plaintiff's Particulars of Claim constituting no less than 34 pages to which are attached annexures extending to 74 pages inclusive of the Plaintiff's Particulars of Claim.

I thus have had to repose much reliance on Mr. Borman's well set out heads of arguments.

The action against the defendants is for damages.

The 1st defendant is a **peregrinus** and is being sued on account of the attachment of an aircraft belonging to it. The attachment followed a Court Order earlier obtained from one of the branches of this Court as reflected in Annexure

"A1" to "A4" at pages 38 through 41 of the Pleadings. Needless to repeat the 3rd defendant is registered in Lesotho as earlier shown. However, the plaintiff is presently not proceeding against the 2nd defendant.

It is important also to note that while it remains a fact that the 1st and 3rd defendants defend the action their attorneys namely Messrs Harley and Morris nonetheless filed a notice of withdrawal on 11th July, 2001. Reference to the notice is reflected at page 2 lines 3 to 10 of the typed transcript of proceedings.

Reference to pleadings in Annexures "B1" to "B2" at pages 42 and 43 amply furnishes proof that the plaintiff has **locus standi** in this action on account of the fact that KELJET CLOSE CORPORATION (CC) trading as CENTRAL AIR CARGO ceded its claims for damages against the defendants.

The claims in point are set out in three alternative amounts as follows:-

1. The main claim is for US$ 249 725.00 which at the time of issue of the summons was equal to M2 098 139.50. This appears at paragraph 66 of the Particulars of Claim at page 30 of the pleadings read with page 109 of bundle A showing that according to the

Standard Bank Lesotho as at 6th August 2001 the ruling rate of exchange was as follows:-

"Selling = 8.4018

Buying = 8.0561"

2. As an alternative to the main claim above the plaintiff sues for an amount of US$ 90 245.00 which at the time of issue of the summons was equal to M758 220.44 . The exchange rate was subject to the ruling rate as at 6th August 2001.

3. As a further alternative to the main or alternative claim above the plaintiff sues for an amount of US$ 59 300.00 which at the time of the issue of summons was equal to M498 226.74. The exchange rate here too was subject to the ruling rate certified by the Standard Bank Lesotho as at 6th August, 2001.

It would be fruitful to provide a brief background to this action.

According to this background the Court has come to observe that in around

October 1998 Kaljet Close Corporation (CC) trading as Central Air Cargo otherwise known as "CAC" of Lanseria in the Republic of South Africa entered into a lease agreement in respect of a Russian aircraft described as Antonov aircraft AN-12 Registration number : RA11916. Contract No 24 sets out details of this agreement Article by Article from pages 2 to 7 in Bundle "A".

The Court has observed that the contract was signed by the lessor namely Key-Avia Airline the 2nd Defendant in this proceeding. This signing was effected on 19th October 1998 in Moscow by the 2nd Defendant and by CAC in South Africa the following month. i.e. November 9th 1998. This detail is set out in Bundle "A" at page 7. The Contract was negotiated on behalf of CAC by PW2 one Viorel **Pruna** an appointed agent for CAC. Pages 45 to 46 of the typed record bear out his role as an agent of CAC.

Evidence shows that the aircraft departed from Moscow to Lanseria in the Republic of South Africa. However, at a stop-over at the Sherjah International Airport it transpired that the lessor owed Air Cess at the said Airport an amount of $32 000.00. (USD). PW1 Bruce Robert **Keller's** attention was drawn to an urgent fax. He was the sole member of CAC aboard the aircraft. (This evidence starts at page 13 of the typed record). The fax appears at page 23 of Bundle "A"

and demands of him to render speedily available a transferred deposit of $ 32 000.00 into the Account of Air Cess.

Faced with this sudden predicament CAC had no option but to make an undertaking to pay the outstanding amount which actually amounted to $ 33 528.00 as reflected in the CAC Operations Manager's guarantee to AIR CESS dated 21-01-1999 at page 24 of Bundle "A".

Needless to say not long afterwards the aircraft arrived in South Africa and was put to use by CAC.

It transpired however at the beginning of March 1999 that the true owner of this aircraft was not the 2nd Defendant but in fact the 1st Defendant namely **Ermolino Airlines** also from Moscow Russia. This company transmitted a letter to this effect as well as a contract of cession from the 2nd Defendant to the 1st Defendant. See Annexure D at page 50 of the pleadings styled **Contract of Cession** No. 15 read with pages 44 and 47 of Bundle A. It is interesting to observe that one Vladimir N. Isupov signed the document at page 47 describing himself as the General Director of the 1st Defendant.

Strange to behold, at more or less the same time an urgent fax message from the South African Embassy in Moscow directed to the Department of Home Affairs in Pretoria revealed that the aircraft in question left Russia under false pretenses. A strong plea appears at page 49 of Bundle A that the aircraft and crew be immediately deported/repatriated to Russia on account of the falsity by means of which that aircraft left Moscow for instance that:

(1) this was different aircraft from one which had been inspected for purposes of and before departure.

(2) the crew used other air companies' call signs during their flight.

(3) they were only (sic) had permission to fly to Sharjar and not Lanseria

(4) it was only supposed to be a shorter flight for a short period and

(5) this is in bridge (sic) of the lease agreement with the owners of the aircraft.

But in retrospect it appears that these allegations were without any substance. They amounted to a ruse to get the aircraft to Ermolino to carry out its devious plans.

The Certificate of Insurance at page 17 in Bundle A clearly specifies the destination and routes of the said aircraft. This certificate covers days extending from 16th January 1999 to the 16th April 1999 (both days inclusive) and mentions flight route covering Azerbayan and South Africa.

Although it did not seem to be of significance to PW1 at the time when he first had sight of this document, it nonetheless specifies the 1st Defendant i.e. Ermolino Airlines as a party who to my mind must have had an obvious interest in the said aircraft.

Amidst occurrences surrounding this aircraft which were quite puzzling CAC discovered that this very same aircraft was also subject to an agreement with Airline Transport Africa of Zimbabwe. CAC discovered at the beginning of March 1999 that the agreement with Airline Transport Africa was concluded way back on the 23rd December, 1998. See CAC's letter dated 10th March, 1999 and addressed to Ermolino Airlines, in which letter CAC expressed its added

consternation owing to the discovery of the agreement dated 23rd December, 1998 involving this aircraft. Pages 53 and 54 of Bundle A in this regard speak for themselves.

All of the above led to a further agreement being concluded between CAC, Ermolino Airlines and Transport Africa. The terms of this agreement as set out in an extract appearing at page 75 of Bundle A are as follows:

"4. Cession

CAC, Ermolino and TA hereby agree that CAC will cede its rights, title and interest as incorporated in annexures A and B to TA, effective upon the signing of this agreement and subject to payment as referred to in paragraph 5.7 hereof". See pages 74-76 of Bundle A for fuller information and better perspective).

In brief, following this agreement the aircraft would in future be leased by Transport Africa. Certain payments as evidenced in clause 5.7 had to be made to CAC and to Ermolino also. In terms of a further oral agreement an additional amount over and above $10 000.00 (USD) referred to in the said clause 5.7 was to be paid by the Company Transport Africa to CAC, to wit $ 49 300.00 (USD).

Quite obviously the situation whichever way it was looked at, was far from

satisfactory. Hence because of all the raging disputes and uncertainty surrounding it as shown above, the aircraft in question was grounded by South African Civil Aviation Authority. This grounding was only uplifted when a new agreement was concluded and the South African Authorities were given assurance by CAC that it was satisfied that the grounding could and should be uplifted.

A faxed message at page 80 of Bundle A dated 18 March, 1999, shows that South African Civil Aviation Authority (SACAA) gave its approval for the departure of the aircraft in question thus marking the end of the said aircraft's grounding.

The new agreement had been signed a day prior to the termination of the grounding. See page 76 of Bundle A in that regard.

During the negotiations which culminated in the conclusion of the agreement the 1st Defendant was represented by Vladimir N. Isupov of whom mention was earlier made in this judgment. He in turn was assisted by oneVictor Granov a Director of Victoria Air Aviation Company (Pty) Ltd the 3rd Defendant in this action.

In pursuance of the provision of the latest agreement between the parties referred to above, a flight plan was prepared and filed with the Air Traffic Control at Lanseria Airport indicating that the aircraft would leave Lanseria airport for the destination, Harare. Indeed the flight plan itself provides ample evidence of this. Indeed PW1 who testified that he is an experienced pilot alerted the Court to the fact that FVHA signifies Zimbabwe, Harare, while FAJS signifies Johannesburg and FXMM signifies Lesotho Maseru. Thus at item 16 at page 82 FVHA meaning Zimbabwe Harare sticks out like the proverbial sow thumb opposite what appears to be "Destination Aerodrome" reflected in the Flight Plan pertaining to the aircraft in question.

FRAUD

The Court is struck by a curious act embarked upon by representatives of the 1st and 3rd Defendants who approached the Director of the Department of Aviation Maseru on 15th March, 1999 to apply for a temporary permit for landing and for a ground base of the aircraft in question i.e. RA-11916. A deliberate effort in that regard was made as shown in Bundle A at page 55 as follows:

"VICTORIA Air

Aviation Company (Pty)Ltd

Director of the Department of Civil Aviation

Maseru

15-March 1999

Dear Sir,

RE: APPLICATION FOR TEMPORARY PERMIT

We hereby apply for a Temporary Permit for landing and a ground-based (sic) of AN-12 aircraft which is due to arrive at Moshoeshoe 1 International Airport between 18-03-1999 and 25-03-1999 for a period of not exceeding 14 days.

The above mentioned aircraft is currently based at Lanseria airport of South Africa and needs minor planned repair and service which will be done at Moshoeshe 1 International Airport.

We undertake obligations to pay all relevant duties and charges.

Please be informed about registration particulars

Owner : "Ermolino Airlines, Moscow, Russsia

Registration : RA-11916

Make : AN -12

We wish to thank you in advance for your understanding and cooperation.

Yours faithfully

Signed

V. Granov/Managing Director"

Two things stick out as most curious about this letter which is an indicator of the 1st and 3rd Defendants' representatives' attitude or frame of mind.

First the letter is written before the meeting which purportedly uplifted the grounding was held and concluded. The letter was written on 15-03-1999. The

meeting was only held on 17-03-1999 and following the uplifting of the grounding the aircraft took off on 18-03-1999.

Next in trying to explain why the aircraft which was not scheduled in the flight plan to head for Maseru Lesotho, these defendants say that it suddenly developed an engine problem 15 or 17 minutes after leaving Lanseria Airport.

A series of questions arise form this episode. First did plaintiff know when making negotiations and coming to an agreement that the aircraft should go to Harare that days before it had been concluded it would in terms of the letter at page 55 of Bundle A above be bound for Maseru? If the plaintiff didn't know this at the time i.e. on 15-03-1999 why was it not disclosed to plaintiff by the defendants? Again why was it pretended by the defendants that the aircraft was bound for Harare following the agreement with other parties while the defendants knew full well in advance that the aircraft was going to Maseru Lesotho instead? Why was it pretended that the aircraft was in distress 17 or so minutes after take off from Lanseria Airport? Why in any case should the aircraft in distress be made to fly one hour and five minutes for attention to its distress when it would take roughly the same 17 or so minutes to land back in Lanseria airport for attention to its problems instead of making it go to Lesotho where there would be less

assurance that the equipment and expertise on the ground would meet the needs for this aircraft? Why then not risk flying to Harare which is a slightly further distance away than Maseru if it was found worthwhile risking to make it fly to Maseru instead of Lanseria or anywhere in Gauteng Area where it would at most take 17 minutes? Truly there does seem to me that the flight to Maseru by this Aircraft and its crew more than accounts for the promise of some milk in the coconut for the defendants than meets the eye.

I accordingly endorse the plaintiff's counsel's persuasive invitation to the Court that the request to be allowed to land in Moshoeshoe I International Airport in Lesotho was not without significance in that it was received three days before the agreement referred to earlier was concluded by the parties in terms of which the very same aircraft would depart for Harare for use by the new lessees, namely Transport Africa. There is certainly no mention or reference in that agreement of an interim landing at Moshoeshoe 1 Airport Lesotho **en route** to the destination ostensibly agreed to by all parties on 17-03-1999.

I accept the learned Counsel's submission therefore that the only inference to be drawn from these actions is that the 1st and 3rd Defendants had no intention whatsoever to allow the agreement with Transport Africa to take effect. The

submission has merit therefore that the only reason why that agreement was ever concluded was merely to persuade the Civil Aviation Authorities in the Republic of South Africa to uplift the grounding of the aircraft and to allow it to depart from Lanseria. This submission further commends itself favourably to me in that it portrays the said Defendants' attitude as consistent with and definitely not in conflict with their stance that despite the indication in the flight plan showing that on leaving Russia this aircraft would finally come to South Africa they nonetheless sought to forestall that eventuality by sending a spurious fax in which a baseless suggestion is made that the wrong aircraft had been allowed to leave Moscow by underhand manipulation or some other form of subterfuge.

Even at the cost of appearing to be repetitive I wish to endorse learned Counsel's observation that evidence clearly shows that it would be ludicrous for an aircraft to depart from Lanseria, fly for some 17 minutes and then when sudden unexpected engine or technical problems manifest themselves, the crew should turn back past numerous airports with highly sophisticated maintenance equipment and staff and fly for one hour and five minutes to ultimately land in Moshoeshoe 1 International Airport and carry out repairs on the mysterious technical problems that the aircraft had developed in mid-air. All this taken along with the actual fact that clearly from the letter of 15th March, 1999 the landing at Maseru was

contemplated and arranged before the agreement with Transport Africa and CAC was concluded, it was naive of the 1st and 3rd defendants to imagine that the plaintiff or anybody with a good sense of the disposition by the greedy to do evil to others, could be so easily hoodwinked.

I have no doubt in my mind that the actions set out above bespeak fraud of truly serious nature. The court has had regard to the fact that fraud is a criminal offence. In this case the gravity of the criminal element is compounded by the trans-border nature of defendants' reprehensible actions. It is fitting therefore by order of this court that the two culprits involved be referred to the Director of Public Prosecutions for investigation of their cases and consideration of what appropriate measures to take. The Registrar of this Court is thus directed to draw the attention of the DPP to this directive.

THE LEGAL BASIS

Mr. Bornman referred me to **Standard Chartered Bank of Canada vs Nedperm Bank Ltd.** 1994(4) SA 747 A for the proposition that a misstatement causing economic loss is sufficient ground for liability for damages in delict. The instant case has a distinction of the misstatement amounting to a deliberate fraud.

In the authority cited above the Appellate Division of south Africa (as it was known) found that the bank which rendered itself guilty of a negligent statement causing economic loss is liable. It stands to reason that so much more must such liability flow from a blatant fraud as was perpetrated by the 1st and 3rd defendants in the instant case.

At page 764 **Corbett** CJ in his judgment deals with the factual and legal causation between misstatement in that matter and the loss suffered and as to whether it is justified to link the loss to the misstatement.

He concluded "My conclusion is that the untrue report issued by Nedbank was a factual cause of Stanchart's loss. In other words, it was a *condition sine qua non* of such loss. That, however, does not conclude the enquiry. It is still necessary to determine legal causation, i.e. whether the furnishing of the untrue report was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. The principles applied in such an inquiry have recently been expounded by this Court in the cases of **S. Mokghethi en Andere** 1990 (1) SA 32 at 39 D-41 B; **International Shipping Co (pty)Ltd** vs **Bentley (supra)** at 700 E-701 G; and **Smit vs Abrahams** as yet unreported, dated 10 May 1994----------

As appears from these judgments, the test to be applied is a flexible one in which factors such as reasonable foroseeability, directness, the absence or presence of a **novus actus interveniens**, legal policy, reasonability, fairness and justice all play their part ".

I have considered all these factors which **Corbett** C.J. regards as indispensable in the formulation of the standard for determining degree of liability and have found them all tending to overwhelmingly favour the plaintiff's case in the instant matter.

I am strengthened in my view by the fact that it is not even necessary to find that the precise result of the damages suffered due to the defendants' actions were forseen by them. It is enough, as in criminal law, that the result did not deviate materially from the wrongdoers' contemplation. Be it recalled that consistently with the final episode of the aircraft landing in Maseru instead of Harare the defendants' initial attitude had been that the aircraft, despite the route set out in proper document was that it should not come to South Africa from Moscow. See **Jowell vs Bramwell-Jones and ors** 1998 (1) SA 836(w) at 884 C-J.

The Court allowed the rectification of four errors made by plaintiff and

ordered that

(1) description of the aircraft be as follows "ANTONOV AN-12 Registration No; RA11916"

(2) "KELJET CLOSE CORPORATION CC trading as CENTRAL AIR CARGO" be inserted in the agreement between the words "and" and "hereinafter" in the 3rd line of the paragraph of the first page which commences

"Avia company "Key-Avia"Airline------" and which ends "entered into this contract on the following".

(3) the description "Managing Director" wherever it appears in the agreement and where this description refers to Mr. Bruce Keller is to amended to read "Managing Member".

(4) Annexure "G1" to"G3" to Particulars of Claim (pages 53 to 55 of the pleadings also at page 74 of Bundle A) the words "paragraph 5.6 hereof" are amended to read "paragraph 5.7 hereof ".

THE CLAIMS

It is clear to me that the 1st and 3rd Defendants defrauded CAC into relinquishing its rights with regard to the 1st agreement (Annexure C to the Particulars of Claim)

CAC was then induced to enter into the cession of rights agreement, as shown at p. 78 Bundle A, and also the agreement between CAC, 1st Defendant and Transport Africa.

At the time when all this was happening it becomes now clear that the 1st and 3rd Defendants had no intention whatsoever to honour the said agreements. The mere fact of diverting the flight to Lesotho in the circumstances described clearly indicates their complicity in the fraud that was perpetrated on CAC by the 1st and 3rd Defendants.

The agreements G and H to the Particulars of Claim is therefore voidable at the instance of the plaintiff in that, the claims for damages were ceded to the Plaintiff by CAC.

I accept the submission that the inference is irresistible that all the defendants conspired into manipulating CAC to enter into the original lease and afterwards to put the 1st Defendant in the foreground to manipulate the conclusion of the last agreement Annexure "G". I accept also that in doing so the 1st and 3rd Defendants attracted vicarious liability for the inability of the 2nd Defendant to perform in terms of the original agreement.

This being the case it stands to reason that they are joint wrongdoers who are therefore equally liable jointly and severally for the losses suffered by CAC which in turn was ceded to the Plaintiff.

I accept the calculations made on behalf of the plaintiff and the conclusion that the main claim accordingly translates into an unutilised period of 499 hours and 45 minutes' use the said aircraft representing in terms a gross income of $1 248 625.00 (USD) after having subtracted the running costs as set out in paragraph 65, a nett profit of $ 249 725.00 (USD), which is the actual loss of CAC ceded to the Plaintiff.

The first alternative claim, it was submitted by Mr. Bornman, is based on the facts as set out from paragraph 71 of further Particulars of Claim (page 32 of

the Pleadings) in that the Plaintiff, because of the same cession from CAC, is out of pocket in the amount paid out which exceeds the income generated by the aircraft up till this stage of the fraud referred to above. The reason for this shortfall, is that before CAC had the opportunity from January to March 1999 to make up the initial payments, the fraud on it was committed. Had the Contract run its full course then this situation would not have prevailed so it would seem logic dictates.

The Plaintiff maintains also that the Defendants should further be alternatively held liable jointly and severally on the basis of the fraud they have been shown to have committed, in that, had the aircraft not been fraudulently diverted to Maseru, but instead arrived at its intended destination, Harare, the payment agreed upon in the total of $59 300.00 (USD) would have been paid to CAC by Transport Africa. Because of the fact that the flight was diverted CAC never received the payment agreed upon.

Such payment was in the knowledge and contemplation of the parties; but knowing full well that the payment would not be forthcoming because of their fraudulent conduct the 1st and 3rd Defendants pretended to the Plaintiff at the meeting where the Plaintiff agreed that the grounding be lifted, that the aircraft

would be leaving for Harare whereas 3 days before then these Defendants had communicated to Maseru that this aircraft would soon be headed for Maseru to land there and occupy the base for no less than 14 days. Because of this deliberately unlawful conduct the said Defendants have attracted liability to pay to the Plaintiff the amount calculated at $ 59 300.00 (USD).

COSTS

It is indeed trite that where parties render themselves guilty of fraudulent conduct a special order for costs is called for. In the instant matter the facts overwhelmingly show a careful and deliberately a somewhat obscured manipulation of CAC. This is the conduct the Defendants embarked upon resulting in losses claimed by the Plaintiff.

For this reason the Court feels justifiably at large to demonstrate its displeasure towards the conduct of the 1st and 3rd Defendants by awarding the special order for costs sought on behalf of the Plaintiff.

For this view I derive comfort from **Sentrachem Ltd vs Prinsloo** 1997 (2) SA 1A where the headnote reveals the following:-

"On appeal, the Court reiterated that an award of attorney and own client costs had to be seen as an attempt by the Court to go one step further than an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation. Taxation would in such cases be more liberal but would not sanction excessive or unreasonable costs. It was an extraordinary order which could not be made without good reason. (At 22B-D.) The Court was of the opinion that there was, in view of the appellant's conduct no reason to interfere with the trial Court's award of attorney and own client against the appellant----------".

I have also relied on **Rhino Hotel & Resort (Pty) Ltd vs Forbes & ors** 2000(1) SA 1180 (W) for reaffirmation of sentiments expressed in **Prinsloo** above.

What is clear in the instant matter is that what took place did not occur on the spur of the moment, nor was it an instant temptation to take advantage of a **business situation** but something that was carefully planned and executed without regard to the precepts of fairplay or interests of other parties adversely affected by the Defendants' callous behaviour.

I accept the Plaintiff's Counsel's submission that such behaviour warrants demonstration of the Court's displeasure manifested by an award of punitive costs against the Defendants. The Court is persuaded that it is fully justified in awarding to the Plaintiff an order for costs on the scale of attorney and client and inclusive therein be the actual fees charged by Counsel for the services rendered in this matter.

In finding for the Plaintiff the Court granted an order based on the Draft order handed up with the Heads of argument submitted before Court.

It is so ordered.

M.L. LEHOHLA

JUDGE

1ST MARCH, 2002

For the Plaintiff : Mr. Bornman S.C.

For 1st and 3rd Defendants : No Appearance