IC6/95

REPORTABLE: YES/~~NO~~ CASE NO. 23/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF TRANSPORT AND OTHERS **APPELLANTS**

and

THE SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION AND ANOTHER **RESPONDENTS**

CORAM: CORBETT CJ, HEFER, F H GROSSKOPF, HARMS, JJA et VAN COLLER, AJA

HEARD: 29 AUGUST 1995

DELIVERED: 21 SEPTEMBER 1995

J U D G M E N T

HARMS JA/...

HARMS JA:

This appeal relates to two issues, namely the validity of certain regulations promulgated in terms of the Aviation Act 74 of 1962 (the "Act") and also the validity of some commercial, senior commercial and airline transport pilot licences issued during the period November (or December) 1988 and 2 February 1990 to a number of pilots in the employ of the South African Air Force ("SAAF").

The South African Airways Pilots' Association represented by its president (Mr Fichardt) and Mr Taljaard, a pilot and member of the Association (in his personal capacity) applied for a declaratory order relating to the above-mentioned issues to the Transvaal Provincial Division. Relief was sought against, first, the Minister of Transport, second, the Commissioner for Civil Aviation, and last, some 39 pilots who were, during the relevant period, employed by the SAAF in that capacity and to whom the pilot licences mentioned had been issued. The court below (Van Dijkhorst J) granted an order

declaring some regulations and the civil pilot licences issued to 35 of the then respondents invalid, interdicting these persons from utilising the licences for civil purposes and ordering the unsuccessful respondents to pay the costs. He refused leave to appeal but leave was granted pursuant to a petition.

The objects of the Act were to consolidate the laws that had given effect to the Convention on International Civil Aviation and the International Air Services Transit Agreement (both drawn up in Chicago on 7 December 1944) and, also, to make provision for the control, regulation and encouragement of flying within the country. The Act has been amended from time to time and in the light of the fact that the issues in this matter concern the period end 1988 to 2 February 1990, this judgment will deal with the Act as it stood prior to its amendment by the Air Services Licensing Act 115 of 1990. The latter Act came into operation on 1 July 1991.

S 22(1) of the Act empowers the Minister to make regulations relating to a number of matters there stated. The Air

Navigation Regulations, 1976[1], have been promulgated pursuant to its provisions. These regulations, too, have been the subject of amendment and I shall indicate, where necessary, whether an amendment has been made which affects this litigation.

In terms of the regulations no civil aircraft may be flown in the Republic unless the flight crew members are the holders of, *i a*, valid prescribed licences. In order to be valid, all the requirements applicable to such licences have to be complied with. Licences are issued by the Commissioner. A flight crew member can be licensed in one of a number of categories, from student to airline transport pilot. Before a licence in a particular category may be issued, the applicant (in general terms) has to comply with a number of criteria, satisfy the Commissioner in a written examination of his knowledge of set subjects and also pass a flight test.

The Convention deals with international civil aviation. It is applicable only to civil aircraft and not to state aircraft

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[1]GN R141 of 30 January 1976.

(art 3). Licences properly issued are recognised internationally. Aircraft used in military, customs and police services are deemed to be state aircraft. [2] State aircraft may not fly over the territory of another state or land therein without authorization by special agreement. S 2(3) of the Act, in accordance with the Convention, states that the provisions of the Act, the Convention or the Transit Agreement do not apply to aircraft or airports belonging to the SAAF (or for the time being being in use exclusively by it). Nor do they apply to any person employed on or in connection with such aircraft or airports, irrespective of whether so employed in a military or civil capacity. There is a proviso to the effect that the Minister, after consultation with the Minister of Defence, may apply any of these provisions (with or without modification) to any such aircraft, airport or person. This proviso has, as far as I am aware, not been utilised and can, for purposes of this judgment, be ignored.

The pilots who are appellants, are all holders of pilot

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[2]Shawcross and Beaumont *On Air Law* (3rd ed) vol 1 p 203 n 11 submit that this definition is exhaustive.

licences, either commercial, senior commercial or airline transport, issued by the Commissioner. The circumstances under which these licences have been issued were extraordinary. During the so-called sanctions period the SAAF had a need to conduct covert operations by way of civilian aircraft. In order to disguise ownership of the aeroplanes used, they were registered in the name of the Department of Transport as a "flag of convenience". Pilots in the employ of the SAAF were issued, prior to 1988, with fake civil licences enabling them to fly across international borders for state purposes. The dangers of this procedure became obvious during 1987 and it was discontinued. The last of these fake licences lapsed during May 1988. The need for these pilots to fly across borders did not cease.

A plan was devised by Mr van Zyl, the Director, Aviation Safety in the Chief Directorate: Civil Aviation to solve the problem. It involved an agreement between the Commissioner and the SAAF concluded during October to November 1988. Its terms were, in essence, these:

(a) The SAAF would nominate pilots in its employ who were qualified aircrew for applications for civil licences needed for official duty.

(b) They would not be required to write the "ordinary" examination papers set for other candidates but would, instead, write and pass a newly devised "transport rating course" examination. The Directorate would have to approve the content of this course and the examination papers. The Directorate would also appoint an external examiner to monitor the examination.

(c) They would be exempted from examinations where exemptions were possible.

(d) They would have to pass the prescribed flight test, the testing to be done by an inspector from the Directorate or by an SAAF instructor who had been approved by the Directorate for such testing.

These pilots all passed the transport rating course examination and also the flight test and were, consequently,

issued with civilian licences in terms of the agreement. The licences were renewed from time to time. Their continued validity was not dependent upon the holder's continued employment with the SAAF and did not lapse upon the termination thereof. In summary, the respondents alleged that these licences had not been issued in due compliance with the regulations, that the transport rating course examination was inferior to the ordinary examination and that these "special" licences compromised the international status of all licences issued by the Commissioner. They also attacked the validity of certain of the regulations. The appellants, on the other hand, denied that the licences had not been properly issued. They also said that the transport rating course examination was on par with the ordinary examination. These are matters with which I shall deal in due course. They alleged in the final instance that the dispute is a labour dispute and that the true concern of the respondents is not the validity of these licences but rather competition from more licensed pilots. Let me state immediately that the motive

of the respondents is of no consequence because the validity of the licences is an objective question.

I now turn to deal with the first issue, namely the validity of certain of the Air Navigation Regulations. In their notice of motion, the respondents attacked the validity of reg 1.4(1), reg 3.3(3) and any other regulation which relates to military aircraft, airfields or personnel. No further reference was made either in the papers or during argument to the unidentified regulations. The attack on reg 3.3(3), to which reference will be made in due course, was abandoned in the court below and in this Court that attitude was persisted in.

Van Dijkhorst J came to the conclusion that reg 1.4(1) was in part invalid and made a declaratory order accordingly. This regulation reads as follows:

> "These regulations or any part thereof shall not apply to -
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> (a) military personnel in the execution of their duties;
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> (b) military aircraft, <u>except where such aircraft are in flight through controlled airspaces or in use on civil aerodromes;</u>

> (c) any aircraft or person to which or to whom the Minister, on the recommendation of the Commissioner of Civil Aviation[3], directs that these regulations or, as the case may be, such part thereof, shall not apply."
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> [Underlining added.]

The attack on the validity of sub-par (a) and (b) was based on art 3 of the Convention and s 2(3) of the Act, both referred to earlier. The court *a quo* held that sub-par (a) and the part of sub-par (b) not underlined were not void, but merely tautologous. They simply restated what was in the Act. The respondents have attempted to reopen the issue, but, in the absence of a cross-appeal, it is not before this Court.

As far as the underlined part of sub-par (b) is concerned, it was held that it "betrek militêre personeel by burgerlike regulasies" and even if the purpose were laudatory, it was in conflict with s 2(3) and was thus beyond the powers of

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[3]The regulation in its original form read, instead of "the Commissioner for Civil Aviation", the "Commission" meaning the National Transport Commission as then defined in s 1 of the Act. The amendment was effected by means of a so-called Correction Notice R2512 GG 5 December 1980.

the Minister to regulate. The court was not referred to, nor did it consider, the fact that the Convention requires that regulations be made for state aircraft to have due regard for the safety of navigation of civil aircraft (art 3(d)) and that the Act requires of the Minister to make regulations to give effect to the provisions of the Convention (s 22(1)(a)).

It was also argued by the respondents, and held by the court below, that sub-par (c) is *ultra vires,* in this instance because it was not authorised by the enabling provisions of s 22(1)(k) of the Act. This provides that the Minister may make regulations relating to the exemption from any of the provisions of the Act (including the regulations)[4], the Convention or the Transit Agreement, of any aircraft or any persons "where it appears unnecessary that such provisions should apply". In this context the learned Judge held that s 22(1)(k) has two requirements, namely,

"(a) (d)ie regulasie moet vrystelling gee aan persone.

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[4]See the definition of "this Act" in s 1. It includes any regulations.

Daaronder sou ook val 'n klas van persone, maar die persoon of persone moet in die regulasie genoem word" and

"(b) (d)it moet onnodig blyk om die betrokke bepaling waarvan vrystelling verleen word toe te pas."

Whether s 22(1)(k) requires that exemptions must be circumscribed by way of regulation, or whether it envisages that the mechanism for granting exemptions may be created by way of regulation was also not argued before the court *a quo*.

The appellants contended that the validity or otherwise of these regulations is, for the purposes of this case, an academic issue. As far as sub-par (c) is concerned, it was not the case of either party that the Minister had given any direction exempting any person from any regulation. And as far as the other sub-paragraphs are concerned, their validity was of no consequence to the respondents. The invalidity of these regulations arose under the following circumstances: the underlying premise in the founding affidavit and the notice of motion was that the invalidity of the licences was dependent

upon the striking down of these regulations. As the case developed, it became apparent to the respondents that their premise was wrong and they proceeded to attack the licences on the grounds set out later in this judgment. The attack on the regulations became a side issue and in this Court counsel for the respondents abandoned (if I understood him correctly) that part of the order declaring these regulations invalid. That is not the end of the matter because, in the light of the fact that their invalidity is a matter of law, the correctness of the grant of the declaratory order has still to be decided.

A division of the Supreme Court has the discretion, at the instance of an interested person, to grant a declaratory order relating to a right or obligation, notwithstanding that the applicant cannot claim consequential relief (s 19 (1)(a)(iii) of the Supreme Court Act 59 of 1959). The exercise by a court of first instance of its discretion can only be reconsidered by a court of appeal on one or other of the few well known grounds (*South African Mutual Life Assurance Society v Anglo-*

Transvaal Collieries Ltd 1977 (3) SA 642 (A) at 658 E-H). In this case the court below did not consider the question whether it should exercise a discretion. It approached the matter on a strictly legal basis: are the regulations valid or not? It did not consider whether the respondents had an interest in the invalidity of these regulations. They had none (*cf Milani and Another v South African Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 902 F - 903 G). Furthermore, it was not considered whether the question was hypothetical, abstract and academic. It was (*cf South African Mutual Life Assurance Society* case at 658 G-H). It follows that the discretion was not properly exercised, that the declaratory order cannot stand and that it is unnecessary to consider the arguments relating to the invalidity of the regulations any further.

I turn then to the main issue, viz the validity of the civil pilot licences issued to the members of the SAAF who are appellants in this appeal. Art 32(a) of the Convention requires that the pilot of an aircraft engaged in international navigation

must be in possession of a certificate of competency and a licence issued or rendered valid by the state in which the aircraft is registered. Art 37 empowers the International Civil Aviation Organization to adopt international standards and recommended procedures dealing with, *i a*, the licensing of operating personnel of aircraft. It has done so by means of the so-called Annex 1 to the Convention in very general terms. For instance, the applicant for a commercial pilot licence must "demonstrate a level of knowledge appropriate to the privileges granted to the holder of a commercial pilot licence" in a number of subjects. It does not state how this must be demonstrated, e g by way of written, oral or any examination; it does not state who must do the assessment; and it does not lay down any objective standard of knowledge. The Act (s 22 (1)(g)) authorises the Minister to make regulations relating to the manner and conditions of the issue and renewal of certificates or licences required under the Act, the Convention or the Transit Agreement, including the examination and tests to be undergone.

The Air Navigation Regulations deal according to the tenor of Annex 1 then with these matters in the following manner.

In respect of each category of licence specific requirements are laid down. It is not necessary to set out the full particulars and I shall confine myself to the salient aspect of the three types of licences in contention.

[1] **Commercial aeroplane pilot licences (reg 3.3):** In summary, the applicant must

(a) be the holder of a valid general flight radiotelephony operator's licence;

(b) be not less than 18 years of age;

(c) satisfy the Commissioner for Civil Aviation, in a written examination, as to his knowledge of (i) what may, for purposes of this case, be called Air Law, (ii) navigation, (iii) elementary meteorology and (iv) a number of technical subjects;

(d) have completed prescribed hours of flight time; and

(e) have passed set flight tests with an official examiner.

In terms of reg 3.3(3) an applicant who has qualified as a pilot in the SAAF may be exempted by the Commissioner from any or all of the above examinations and tests, excluding the examination referred to in (c)(i), namely Air Law.[5]

[2] **Senior commercial aeroplane pilot licences (reg 3.4)**[6]: The general scheme of the requirements is similar to that set out in [1] above. For present purposes it suffices to state that the applicant for such licence must also (a) satisfy the Commissioner for Civil Aviation, in a written examination, of his knowledge of a number of set subjects including Air Law (with a syllabus similar to that referred to in [1]), (b) undergo a practical flight test with an official examiner and (c) pass another practical flight test within a prescribed period. As far as exemptions are concerned, the regulation in its initial form provided that a person who has qualified as a pilot in the SAAF, could, first, be exempted from the written examination save the

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[5]This provision has been amended during 1994. The amendment does not affect the power referred to.

[6]This regulation has since been repealed.

one in respect of Air Law, and, second, most of the practical flight tests. These exemptions were removed as from 30 May 1985 (GG 9760) and reintroduced in an amended form as from 12 May 1989 (GN R917). The Commissioner may exempt, since that date, an applicant for a licence "from any or all of the prescribed written examinations".

[3] **Airline aeroplane transport pilot licence (reg 3.5)**: The holder of a licence referred to in [2] can obtain this licence without any further examination. All that is required is accredited flight time. The holder of a licence referred to in [1], on the other hand, must pass the written examination and undergo the practical flight test prescribed for [2]. No provision is made for exemptions.

In conclusion on the content of the regulations, reg 1.6 charges the Commissioner, subject to the provisions of the Act, with carrying out the regulations; and he is entitled to exercise his powers and perform his duties in person or by someone designated by him. It is also his duty to issue licences

and before doing so, he has to satisfy himself that the applicant meets the requirements for any such licence (reg 1.11(1)). Lastly, he may designate a person to conduct the licence tests prescribed in the regulations and the person designated is then called an "official examiner" (reg 1.3).

Against this setting the case the appellants were called upon to meet, must be established. The application before the court below was not one for review but one for a declaratory order. Apart from the general statement that the licences had been issued without compliance with the Act and regulations, the specific allegations were simply that the transport rating course differed materially from the courses prescribed in an Aeronautical Information Circular ("AIC") issued by the Director General: Department of Transport on 15 September 1990; and that the pilots had obtained their licences without completing the prescribed written examinations and that the papers had been set and marked by the SAAF.

As far as the standard of the SAAF's training and

examination is concerned, it, at the request of the Commissioner, submitted to him a comprehensive comparison between its syllabus and that prescribed by the regulations. Mr van Zyl alleges that he and other members of his department carefully studied the report and concluded that, generally speaking, it was "at least equivalent to that set out in the regulations". There were, however, in their opinion certain areas where further training and examination were necessary in order to satisfy the requirements laid down in the regulations in respect of a theoretical knowledge of flying. These areas were addressed in the transport rating course. They were, in essence, matters relating to Air Law. The course led, as mentioned, to a written examination. The paper had to be approved by the Commissioner and the examination had to be monitored by an external examiner appointed by the Commissioner. Mr van Zyl stated further that he had satisfied himself and the Commissioner that the standard of training and examination was satisfactory in every respect. The Air Law as contained in the transport rating course was presented

at the higher level of senior commercial pilot licence only.

The AIC relied on by the respondents is hardly of any consequence because it postdates the issue of the last licence in terms of the agreement and does not deal with Air Law at all. In any event, the factual dispute relating to the merit of the respective examinations cannot be resolved on the papers, and is irrelevant. The regulation requires implicitly that the Commissioner must be satisfied about the standard of the written examination. It does not prescribe an objective standard. It merely prescribes the syllabus. The correct question that has to be answered is whether the pilots concerned have, in a written examination, satisfied the Commissioner of their knowledge of Air Law as contained in the prescribed syllabus.

Van Dijkhorst J came to the conclusion that the regulations envisaged one examination only and that the Commissioner was not entitled to base his satisfaction as to the knowledge of a candidate for a licence on more than one examination. I am not certain what was meant with "one

examination". The regulations do not prescribe any specific examination. They merely require that the Commissioner be satisfied, as the result of a written examination, that the candidate has the requisite knowledge. If the learned Judge intended to state that one examination at a given time was all that was permitted, I can understand his conclusion. But it is not the case that two inherently different examinations were written at the same time. The regulations contemplate, in my view, many examinations with different questions and different examiners. Different standards are to be expected from examination to examination and from examiner to examiner. That is inherent in any examination system.

It will be recalled that, in respect of the other written examinations for a commercial licence, exemptions could have been granted. It has also been pointed out that, as far as senior commercial licences are concerned, since 12 May 1989 exemptions could have been granted for all or any of the prescribed written examinations. As far as the grant of

exemptions is concerned, it was, as mentioned, the initial case of the respondents that reg 3.3(3) was void; and that, as a consequence, any exemptions granted in terms of this regulation were of no effect. The respondents have accepted in the court *a quo* and in this Court that the regulation is not invalid. The grant of exemptions to any of the SAAF pilots concerned has not been attacked on any other ground (e g that the Commissioner had not exercised his discretion properly).

In spite of this, Van Dijkhorst J, in relation to the change effected in relation to senior commercial licences on 12 May 1989, held that, since it postdated the agreement, it is of no consequence because the exemptions were given, not in terms of the new regulation but in terms of the agreement. I fail to understand this finding. Exemptions were given. Statutory authority existed. The fact that there was also an agreement in this regard does not detract from the legality of the exemptions. It could have been otherwise had the allegation been (which it was not) that the exemptions were given without the proper

exercise by the Commissioner of his discretion. Van Dijkhorst J was, furthermore, not convinced that the amendment of 12 May 1989 permitted exemption from the written examinations referred to above but rather to "the required technical examinations" mentioned in reg 3(4)(1)(f). I respectfully disagree. The proviso is clear. It permits of an exemption "from any or all of the prescribed written examinations." The only written examinations prescribed were those referred to. In fact, they are the only examinations. The "required technical examinations" of sub-par (f) are, clearly the same examinations. The Commissioner was thus entitled, since 12 May 1989, to grant, in respect of senior commercial licences, exemption from all written examinations.

The court below utilised a further and alternative basis to come to the conclusion that the licences were invalid. It was that the examination and assessment of these pilots had been placed exclusively in the hands of the SAAF. The Commissioner was vested with the authority to judge whether an applicant for a licence had complied with the terms of the

regulation. This discretion had been delegated to the SAAF. A discretion could, at the relevant time, be delegated only with the written consent of the National Transport Commission. This consent had not been obtained. The delegation was thus void, as were the licences.

In terms of s 4(1) of the Act, the National Transport Commission was, subject to the control and direction of the Minister, responsible for the carrying out of the provisions of the Act (including the regulations), the Convention and the Transit Agreement (s 4(1)). Anyone appointed under the Act or concerned with the carrying out of its provisions, was obliged to perform his functions and exercise any discretion vested in him, subject to the Commission's directions and approval (s 4(2)). Only with the written consent of the Commission could a person in whom any discretion was vested, delegate the power to exercise the discretion on his behalf to another specified person (s 4(3)).[7]

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[7]S 4 was amended by the Air Services Licensing Act 115 of 1990. The duties and functions of the Commission now vest in the Minister. The amendment became effective on 1 July 1991.

In contrast, s 22(1)(a)bis (which was introduced in 1965) entitled the Minister to make regulations relating to "the designation of persons to carry out the provisions of this Act, and the powers and duties of persons so designated."[8]

Two questions have to be decided, namely, did the Commissioner delegate his discretion and, if so, did he need and have the consent of the Commission.

The practical flight tests prescribed for commercial and senior commercial licence applicants, have to be with an official examiner. An "official examiner" was defined as "a person designated by the Commissioner to conduct the certificate, licence or rating tests prescribed in these regulations for flight crew members" (reg 1.10). The agreement with the SAAF required that the testing for these tests had to be conducted by an inspector from the Directorate or by an SAAF instructor who had been approved by the Directorate for such testing. The designation of a person by the Commissioner is not the exercise

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[8]It was amended by the Aviation Amendment Act 16 of 1992 as from 1 October 1992.

of a discretion nor is it a delegation of a function vested in the Commissioner. It is the performance of an administrative function vested by the Minister by regulation in the Commissioner and the Minister's authority to have done so was derived from s 22(1)(a)bis.

The applicant for these licences was obliged, as has repeatedly been stressed, to "satisfy the Commissioner ..., in a written examination, as to his knowledge of" the prescribed subjects. These pilots wrote the transport rating course examination. It covered the prescribed area to the satisfaction of the Commissioner. The regulations do not prescribe who has to set, mark and monitor the examination. The Commissioner was entitled to designate persons to exercise his powers and perform his duties. It was not alleged that he had not done so. His designation of members of the SAAF did not amount to a delegation. He still had to satisfy himself that, as a result of a written examination, the candidates had the required knowledge. The regulations do not require the use of official examiners for

written examinations. The system created by the agreement required of him to approve the examination papers and to designate external examiners from his department. It was not alleged that these licences had been issued otherwise than in accordance with the terms of the agreement.

On the assumption that what the Commissioner did had to be done with the permission of the Commission, it is necessary to consider whether this was an issue on the papers before the court. It was only in reply that the point of the improper delegation of a discretion was raised for the first time. It was to the effect that Mr van Zyl (not the Commissioner), whilst holding a discretion, had delegated it to persons not attached to the office of the Commissioner. Mr Fichardt said in this regard that "ek wil dit onomwonde stel dat die deponent [Mr van Zyl] totaal in gebreke gebly het om sy primêre funksie van die daarstelling en handhawing van standaarde te vervul deur hierdie funksies aan 'n militêre owerheid te delegeer." At no stage was the lack of the Commission's consent mooted. The appellants were

thus not called upon to deal with the issue and the court *a quo* not entitled to base its decision on this ground. In any event, as I have attempted to point out, there is no substance in the allegation that "die daarstelling en handhawing van standaarde" had been delegated to the SAAF.

The final argument raised by counsel for the respondents was that the appellants have not shown that the Commissioner had complied with reg 1.15(1) in setting the dates for the transport rating examination. This regulation enjoins the Commissioner to publish, in an AIC, the dates on which examinations are to be written and the latest date by which application for entrance to each such examination are to reach the office of the Director-General of Transport. This argument was not based on anything said in the papers. The appellants were never called upon to deal with it. It is not even apparent that it had been raised in the court below. In any event, I do not accept that a licence issued pursuant to an examination whose dates had not been published in terms of this provision is

invalid. A licence is valid, according to the definition of "valid" in reg 1.3, if all the requirements applicable to such licence, as prescribed by the regulations, have been complied with. By no stretch of the imagination can it be said that the publication of the date for an examination is a requirement for a licence. It follows that this argument also stands to be rejected.

In sum, I am of the view that the licences in contention have been issued properly. In the result the appeal is upheld with costs, the order of the court below set aside and replaced with an order dismissing the application with costs (including the costs of two counsel).

L T C HARMS
JUDGE OF APPEAL

CORBETTT,CJ)
HEFER, JA) AGREE
F H GROSSKOPF, JA)
VAN COLLER, AJA)