

Piero Foresti, Laura de Carli and others v. Republic of South Africa

(ICSID Case No. ARB(AF)/07/1)

Concurring Statement of Arbitrator Matthews

Because the Award in this matter requires a two-staged exercise of our discretion, I submit this concurring statement to clarify my exercise of discretion during the second stage of that process. The Tribunal unanimously exercised discretion to require that Claimants make some contribution to the Respondent's costs. That was stage one. Stage two then required a determination of the amount. Although we are unanimous in concluding that 400,000 Euro is an appropriate amount, it is important to explain the manner by which I came to join my colleagues in making that part of the Award unanimous.

As noted in paragraph 129 of the Award, there is a paradox inherent in the Tribunal's exercise of discretion as to the first stage of our analysis. In my view there is an even more difficult paradox in exercising our discretion to determine the amount of our cost award against Claimants. The second paradox follows: Claimants' Operating Companies employ significant numbers of Historically Disadvantaged South Africans in the beneficiation process. The Department of Mineral Resources recognized this in reaching its determination that Claimants' Operating Companies and others in the dimension stone industry should receive a significant beneficiation credit toward the legislative goals of insuring HDSA participation in the mining industries. Claimants submitted financial information supporting their request for discontinuance presumably to indicate that there are some concerns about the financial viability of at least some of the Claimants' Operating Companies.

In exercising my discretion, as one of the three members of this Tribunal, regarding the amount of costs to be reallocated against Claimants, this paradox weighed heavily toward keeping the amount of the cost award against Claimants modest.

[Signed]

Joseph Matthews

Date: 03/08/10