

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: CA 119/2016

In the matter between:

**NAMIBIAN MARINE PHOSPHATE (PROPRIETARY) LIMITED**

**APPELLANT**

And

**MINISTER OF ENVIRONMENT AND TOURISM**

**1<sup>ST</sup> RESPONDENT**

**MICHAEL GAWESEB**

**2<sup>ND</sup> RESPONDENT**

**THE ENVIRONMENTAL COMMISSIONER**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Namibia Marine Phosphate (Proprietary) Limited v Minister of Environment and Tourism* (CA 119/2016) [2018] NAHCMD 122 (11 May 2018)

**Coram:** UEITELE J

**Heard on:** 10 August 2017

**Delivered on:** 11 May 2018

**Flynote:** *Statutory Appeal* - Section 51(1) of the Environmental Management Act, 7 of 2007 - on points of law only - Meaning - Whether grounds of appeal are based on points of law.

*Constitutional law* — Fundamental rights — Administrative justice — Failure to invite one of the parties to a dispute to the appeal hearing— fundamentally unfair hearing — Violation of arts 12 and 18 of Constitution.

**Summary:** The appellant was granted an environmental clearance certificate for marine phosphate mining by the Environmental Commissioner. The second respondent, a certain Mr Michael Gaweseb, appealed against the Commissioner's decision, to the Minister. The Minister set aside the granting of the certificate, primarily on the ground that the Commissioner did not adequately consult the public and interested persons.

During the appeal hearing before the Minister, both parties had made written representations. The second respondent completed the appeal Form 3 which was also handed to the appellant and the appellant subsequently, delivered a responding statement thereto. On the day of the hearing, the Minister gave the second respondent an opportunity to make oral submissions, but, the appellant was not informed of the appeal hearing and was thus not present at the appeal hearing. During those submissions, the second respondent introduced a new issue – inadequate consultations, but this issue was not recorded as a ground of appeal on the appeal Form 3 and therefore the appellant had no knowledge of it.

Aggrieved by the Minister's decision to set aside the environmental clearance certificate which was issued to it by the Commissioner, the appellant appealed, in terms of s 51 of the Act, to this Court against the Minister's decision. The appellant's attack on the Minister's decision was that there was no proper appeal for the Minister to consider, the second respondent had no *locus standi* to appeal to the Minister and the Minister violated the appellant's right to a fair hearing and fair administrative action. The Minister and the second respondent opposed the appeal on a variety of grounds. The main ground on which they opposed the appeal is that the appellant's appeal was allegedly not based on points of law only, but on factual matters.

*Held* that the second respondent's appeal before the Minister was compliant with the Regulations made under the Environmental Management Act, 2007.

*Held further* that in a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law to determine their rights. The court thus found that, in the context of the Act, Mr Gaweseb has a legal grievance and is as such, an aggrieved person entitled to approach courts to determine his rights.

*Held further* that it is now well established in our law that an administrative act or decision, even if improperly taken, remains effectual until properly set aside and cannot just be ignored. Since the Minister extended the time within which to launch the appeal and the decision to extend the period within which to lodge a s 50 appeal is not the subject of a review application, that decision remains and the appeal was thus lodged within the extended period.

*Held furthermore* that the question whether or not the s 51 appeal hearing before the Minister violated the appellant's rights conferred on him by Articles 12 and 18, is a question of law.

*Held furthermore* that if the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.

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## JUDGMENT

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- a) The appeal succeeds.
  
- b) The Minister's decision of 02 November 2016 (in terms of which he set aside the environmental clearance certificate issued to the Namibian Marine Phosphate (Pty) Ltd, on 05 September 2015), is hereby set aside.

- c) The Minister may (if so inclined) in accordance with the law (either personally or as contemplated in s 50(3) of the Environmental Management Act, 2017) conduct an appeal hearing *de novo*.
- d) The Minister and Mr Gaweseb, must jointly and severally the one paying the other to be absolved pay the costs of the appellants, such costs to include the costs for one instructing and two instructed counsel.
- e) The matter is hereby removed from the roll and regarded as finalised.

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## JUDGMENT

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UEITELE J:

### Introduction

[1] The appellant in this matter, Namibian Marine Phosphate (Pty) Ltd, is a company which intends to develop a marine phosphate project off the coast of Namibia. (I will, in this judgment, refer to this company as the appellant). The appellant appealed, in terms of s 51 of the Environmental Management Act, 2007,<sup>1</sup> against the decision of the Minister of Environment and Tourism<sup>2</sup> to set aside a decision of the Environmental Commissioner to award an environmental clearance certificate to the appellant.

[2] The appeal by the appellant was opposed by the Minister and by Michael Gaweseb, the second respondent, who refers to himself as a Namibian, community activist and a trustee of the Economic Social Justice Trust.<sup>3</sup> The Environmental Commissioner,<sup>4</sup> the third respondent in these proceedings, did not participate in this appeal.

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<sup>1</sup> Environmental Management Act, 2007 (Act No. 7 of 2007) I will in this judgment refer to this Act as the Act.

<sup>2</sup> The Minister of Environment and Tourism is the first respondent in this matter and I will, in this judgment, for ease of reference refer to him as the Minister.

<sup>3</sup> I will, in this judgment for ease of reference, refer to the second respondent as Mr Gaweseb.

<sup>4</sup> I will, in this judgment for ease of reference, refer to the third respondent as the Commissioner.

## Background

[3] The brief background to this appeal is this: On 26 July 2011 the Ministry of Mines and Energy granted a Mining License (ML) 170 to the appellant for the latter to mine phosphorite minerals from the seabed off the coast of Namibia some 120 Km west of Walvis Bay. Despite the fact that the granting of the Mining License (ML) 170 preceded the coming into operation the Environmental Management Act, 2007,<sup>5</sup> the Act is applicable to this matter.

[4] Section 27 of the Act requires of the Minister to, after following a consultative process, list, by notice in the *Gazette*, activities which may not be undertaken by any person without that person having obtained an environmental clearance certificate. The Minister listed the activities requiring an environmental clearance certificate<sup>6</sup> and one such activity is the removal of resources. Since the activities which the appellant intend to develop comprises of the removal of resources which is a listed activity, it, in terms of s 32 of the Act, applied for an environmental clearance certificate to the Commissioner.

[5] On 11 April 2012 the appellant submitted its environmental impact assessment and environmental management plan to the Ministry of Environment and Tourism for review. After the department of Environment in the Ministry reviewed the environmental impact assessment and environmental management plan, the Commissioner required of the appellant to conduct further consultations and to subject the environmental assessment and environmental management plan to review as contemplated in s 45 of the Act.

[6] The appellant undertook the verification programme during the year 2013 and 2014 and submitted its verification report to the Commissioner on the 04<sup>th</sup> and 12<sup>th</sup> of December 2014. On 05 September 2016, the Commissioner granted the appellant an

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<sup>5</sup> The Environmental Management Act, 2007 was assented to by the President on 21 December 2007 but only came into operation on 6 February 2012 by Government Notice No. 28 of 2012 published in Government Gazette No. 4878 of 06 February 2012.

<sup>6</sup> The activities were listed by publication under Government Notice No. 29 in Government Gazette No. 4878 of 6 February 2012.

environmental clearance certificate. This decision by the Commissioner to grant the appellant an environmental clearance certificate, aroused mixed feelings and debates amongst the Namibian public.

[7] On 24 October 2016, the Minister addressed a letter to the Minister of Mines and Energy in which letter he advised the Minister of Mines that he has, in terms of s 50 of the Act, and Regulation 25(7) extended, the period within which appeals can be submitted against the issuance of the environmental clearance certificate issued on 05 September 2016 to the appellant, on the following grounds: a) The unprecedented public outcry against the issuance of the said clearance certificate, b) The alleged secrecy under which the clearance certificate was issued, and the public interest to ensure that all parties have adequate opportunity to submit an appeal.

[8] On 28 October 2016, Mr Gaweseb, alleging that he is aggrieved by the decision of the Commissioner to issue an environmental clearance certificate to the appellant, lodged an appeal against the issuing of the environmental clearance certificate, to the Minister. Mr Gaweseb, by electronic mail, sent a copy of the 'appeal application document' to the appellant. The appellant indicated that it will oppose the appeal and on 30 October 2016 transmitted its responding statement to the Minister.

[9] On 31 October 2016, the Minister acknowledged receipt of the appellant's responding statement and informed the appellant that he will deal with the appeal 'as soon as practically possible'. On the same day, (i.e. on 31 October 2016) the Minister conducted an appeal hearing. Present at the appeal hearing were, the Minister, Dr Lindeque (the Permanent Secretary in the Ministry of Environment and Tourism), Mr Michael Gaweseb and Ms Saima Angula, (the secretary of the appeal panel). I pause here to observe that it appears that immediately after the appeal hearing, the Secretary to the appeal panel addressed a letter to the appellant in which she informed the appellant that *'the appeal hearing took place and did not yield new information. Therefore the Minister intends to pronounce himself on the appeal without further input required'*.

[10] After hearing representations from Mr Gaweseb, the Minister adjourned the appeal hearing and he on 02 November 2016 announced his decision. In terms of his decision the Minister, (a) set aside the Commissioner's decision to grant an environmental clearance certificate to the appellant, (b) ordered the Commissioner to notify the Ministry of Fisheries and Marine Resources, the fishing industry and all other interested parties to finalize their inputs in the report within three months, and (c) to complete the whole consultative process within three months. The appellant, aggrieved by the decision of the Minister appealed, in terms of s 50(4) of the Act, to this court. I find it appropriate to, in dealing with this appeal, first set out the statutory framework in terms of which the appeal must be considered.

#### The statutory framework

[11] Section 32(1) of the Act provides that a person who is required to obtain an environmental clearance certificate must, in the prescribed form and manner and on payment of the prescribed fee, apply to the relevant competent authority for an environmental clearance certificate in respect of the listed activity to be undertaken. In ss (2) it provides that the competent authority must in the prescribed manner forward the application referred to in ss (1) to the Commissioner, if the proponent complies, in respect of the proposed activity, with any requirements prescribed by law in respect of that activity.

[12] Section 36 of the Act empowers the Commissioner to review an application submitted to him or her in terms of the Act and to take any action he or she considers appropriate for the review of the application, including, (a) consulting any person, institution, or authority on any matter concerning the application, the assessment or any submission received in relation to the application; (b) carrying out, or appointing a person or a committee of persons to carry out, an investigation, including a process of public consultation, in relation to any matter concerning the application, the assessment or any submission; or (c) holding a public hearing.

[13] Section 37 of the Act empowers the Commissioner to, after he or she has reviewed the application, grant the application, and on payment of the prescribed fee,

issue an environmental clearance certificate to the proponent; or refuse the application and provide the proponent with reasons for the refusal.

[14] Section 50 of the Act provides for appeals against a decision of the Commissioner. It provides that, a person, aggrieved by a decision of the Commissioner in the exercise of any power in terms of the Act, may appeal to the Minister against that decision. The appeal must be noted and must be dealt with in the prescribed form and manner. The Minister may consider and determine the appeal or may appoint an appeal panel consisting of persons who have knowledge of, and are experienced, in environmental matters to advise him on the appeal. Section 50(4) of the Act provides that the Minister must consider the appeal and may confirm, set aside or vary the order or the decision or make any other appropriate order including an order that the prescribed fee paid by the appellant, or any part thereof, be refunded.

[15] Section 51 of the Act provides that a person aggrieved by a decision of the Minister made in terms of s 50(4) or a decision under s 21 may appeal, on points of law only, against that decision to the High Court within the prescribed time and in the prescribed manner. The appeal must be proceeded with as if it were an appeal from a Magistrate's Court to a High Court.

[16] The Minister acting under s 56 of the Act, made the Environmental Impact Assessment Regulations.<sup>7</sup> Regulation 25 of these regulations deals with appeals in terms of s 50 of the Act. The regulation amongst other matters provides that:

(a) An appeal in terms of s 50 of the Act must be made within 14 days from the date of receipt of notification of a decision contemplated in s 50 of the Act and that the appeal must be made on a form which corresponds substantially with Form 3 of Annexure 1 to the regulations, which Form is obtainable from the Ministry, accompanied

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<sup>7</sup> Published by Government Notice No 30 in *Government Gazette* No. 4878 of 6 February 2012. I will, in this judgment, refer to these regulations as 'the Regulations'.



by the prescribed fee. The appeal must be submitted to the secretary of the appeal panel, designated in terms of regulation 25(3).

(b) If the appellant is an applicant, the appellant must serve on each person registered as an interested and affected party in relation to the applicant's application a copy of the appeal application referred to in regulation 25(2) and a notice indicating where and for what period the appeal submission is available for inspection by the person. If the appellant is a person other than an applicant, the appellant must serve on the applicant a copy of the appeal application referred to in regulation 25(2); and a notice indicating where and for what period the appeal submission is available for inspection by the applicant.

(c) The Minister may, in writing, on good cause extend the period within which an appeal must be submitted.

(d) A person that receives a notice in terms of regulation 25(5), or an applicant who receives a notice in terms of regulation 25(6), may submit to the Minister, a responding statement within 30 days from the date the appeal submission was made available for inspection.

(e) A person or applicant who submits a responding statement in terms of regulation 25(8) must serve a copy of the statement on the appellant.

(f) The Minister may, in writing, on good cause extend the period within which responding statements or an appellant's answering statement in terms of regulation 25(6) must be submitted.

(g) An appellant and each respondent is entitled to be notified of the appointment of an appeal panel in terms of s 50(3) of the Act, if the Minister appoints an appeal panel for purposes of the appeal.

(h) The Minister may request the appellant or a respondent to submit such additional information in connection with the appeal as the Minister may require.

[17] Having set out the statutory framework under which appeals may be dealt with, I now proceed to look at the grounds on which the appellant based his appeal to the court and the grounds on which the Minister and Mr Gaweseb oppose the appeal.

The grounds of appeal and the grounds of opposing the appeal.

[18] The appellant avers that the Minister's decision was irregular, improper and *ultra vires* the Act, in that the appeal was lodged out of time, the prescribed fee was not paid and Mr Gaweseb failed to inform the appellant where and for what period the appeal submission will lie open for inspection. It also avers that Mr Gaweseb who was the appellant in respect of the appeal that served before the Minister did not have *locus standi* to launch the appeal to the Minister.

[19] The appellant furthermore contends that in so far as the Minister exercised appeal powers under s 50 of the Act, he violated the appellant's rights in terms of Articles 12 and 18 of the Namibian Constitution, in that the Minister did not notify the appellant of the appeal in a manner compliant with the Regulations,<sup>8</sup> and that the Minister did not notify the appellant of the appeal hearing or afford the appellant an opportunity to make representations at the appeal hearing.

[20] The appellant furthermore contends that in so far as the Minister allowed Mr Gaweseb to adduce evidence at the hearing of the appeal and considered the evidence so presented, the Minister acted *ultra vires* the Act. The appellant furthermore based its appeal on the ground that the Minister violated Articles 12 and 18 of the Constitution when he:

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<sup>8</sup> That is the Environmental Impact Assessment Regulations made under s 56 of the Act.

(a) allowed Mr Gaweseb to present evidence at the hearing of the appeal without affording the appellant an opportunity to contradict Mr Gaweseb's evidence or affording the appellant the opportunity to cross examine Mr Gaweseb; and

(b) allowed Mr Gaweseb to introduce records of the hearing reports, statements, correspondence and other documents', without informing the appellant or making the hearing reports, statements, correspondence and other documents available to the appellant.

[21] Another ground on which the appellant basis its appeal is the contention that when the Minister, in his decision, ordered the Commissioner 'to invent any form of notifying the public', he had no powers to make such an order, and thus acted *ultra vires* the Act.

[22] Both the Minister and Mr Gaweseb opposed the appeal on the basis that the appellant's appeal does not comply with s 51 of the Act because the appeal is on factual findings rather than on points of law. The Minister furthermore contends that the grounds of appeal relied upon by the appellant raise matters which must appropriately be dealt with through other remedial judicial processes such as review.

#### Mr Michael Gaweseb's *Locus standi*

[23] I find it appropriate to mention that in its responding statement submitted to the Minister in terms of regulation 25(6), the appellant did not take issues with Mr Gaweseb appealing to the Minister against the Commissioner's issuance of the environmental clearance certificate. In this Court, the appellant challenged the *locus standi* of Mr Gaweseb to institute the appeal before the Minister. It would be thus convenient to deal with the question of Mr Gaweseb's *locus standi* first.

[24] Mr Tötemeyer, who appeared for the appellant argued that the Minister erred in finding that Mr Gaweseb had the necessary standing to lodge and prosecute the appeal in terms of s 50(4). He said:

'Quite on what basis the first respondent (i.e. the Minister) was satisfied that the second respondent had the necessary *locus standi* to initiate the s 50 appeal in the first place, is unclear, It is respectfully submitted that the second respondent (i.e. Mr Gaweseb), simply put, did not have the necessary *locus standi* to initiate and prosecute the s 50 appeal.'

[25] Ms Katjipuka, who appeared on behalf of Mr Gaweseb, asserts that Mr Gaweseb has the necessary standing to launch the s 50 appeal. She argued that Mr Gaweseb's standing to launch the s 50 appeal must be decided in the light of the following factors:

(a) First, argued Ms Katjipuka, the matter concerns the protection of the environment. The sovereign ownership of natural resources lies with the State and therefore the Namibian people.

(b) Secondly, she continued, the Act and its regulations which constitute the law based on Article 95 of the Constitution, do not limit the right to appeal to any person.

(c) Thirdly, in terms of the Act the Commissioner may, when he or she reviews the application for an environmental clearance certificate engage in a process of public consultation and hold public hearings and notice for such public hearings is given, not only to persons who made submissions in respect of the application, but also to the public in general.

[26] Ms Katjipuka thus submitted that against the above background, the words '*any person aggrieved by a decision of the Environmental Commissioner in the exercise of any power in terms of the Act may appeal to the Minister*' must be read in their proper context and are broad enough to include Mr Gaweseb.

[27] The ordinary common-law principle is that a litigant must have a direct and substantial legal interest in the outcome of the proceedings.<sup>9</sup> A financial interest will not

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<sup>9</sup> See, for example, *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC) *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) (2011 (1) BLLR 15) at para 30; *Clear Channel Independent Advertising (Pty) Ltd v TransNamib Holdings Ltd* 2006 (1) NR 121 (HC) at 138G – I.

suffice. There are exceptions to this rule to prevent the injustice that might arise where people who have been wrongfully deprived of their liberty are unable to approach a court for relief.<sup>10</sup> The exceptions, do not cover the present facts and cannot assist Mr Gaweseb.

[28] In the matter of *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*<sup>11</sup> it was argued that the phrase 'aggrieved person' must be given a wide meaning to ensure administrative fairness. In support of this argument reference was made to in the minority judgment in the South African case of *Francis George Hill Family Trust v South African Reserve Bank and Others*.<sup>12</sup> Rejecting the minority approach in the *Francis George Hill Family Trust* matter Strydom CJ said:

'In this case [i.e. the *Francis George Hill Family Trust v South African Reserve Bank and Others* case] the Court was called upon to interpret the words 'any person who feels himself aggrieved' in reg 22D of the Exchange Control Regulations, 1961. After a review of South African as well as English cases Hoexter JA who wrote the majority judgment concluded as follows at 102C - D:

"Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general conclusion that the words "person aggrieved" signify someone whose legal rights have been infringed - a person harbouring a legal grievance. The current of judicial interpretation would appear to run in the same direction in the decisions of English Courts - see the remarks of Donovan J in *Ealing Corporation v Jones* (supra at 392)."

I respectfully agree with this conclusion which in my opinion is also the correct way to interpret the words 'aggrieved persons' in art 18. I agree with Mr Gauntlett that art 18 provides a

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<sup>10</sup> See *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at 311 – 312 which concerned the locus standi of a person to apply for an interdict de libero *homine exhibendo*. The court held: ' (i)f a person who has neither kith nor kin in this world is illegally deprived of his liberty, and a person who comes to hear of this were to apply for an interdict de libero *homine exhibendo*, he could hardly fail to be considered the prisoner's friend' (At 311A.).

<sup>11</sup> *Supra*.

<sup>12</sup> *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A).

substantive right for aggrieved persons to claim redress and was not intended to widen the ambit to also include persons who would otherwise not have had standing to bring proceedings.’

[29] In the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*,<sup>13</sup> Justice O’Regan opined that in a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights. I am inclined to follow the reasoning of Justice O’Regan and agree with Ms Katjipuka that, in the context of the Act (the context being that in respect of an application for environmental clearance certificate the Commissioner is required to consult the public and hold public meetings, how else than who a member of the public who is aggrieved by the Commissioner’s decision obtain redress if they are excluded by the strict rules of standing), Mr Gaweseb has a legal grievance and is, in the context of s 50, an aggrieved person and is entitled to approach courts to determine his rights. I conclude, therefore, that Mr Gaweseb did have standing to launch the s 50 appeal.

[30] The next aspect that, in my view, I have to deal with is the question as to whether or not there was an appeal proper before the Minister.

Was there a proper appeal for the Minister to consider?

[31] One of the basis on which the appellant appeals against the decision of the Minister is its contention that, when the Minister considered Mr Gaweseb’s appeal, there was no appeal proper pending before him. This the appellant contends was so because the appeal was not made within 14 days from the date of receipt of notification of a decision contemplated in s 50 of the Act and that the appeal was allegedly not accompanied by the fee prescribed in Annexure 2.

[32] The Minister and Mr Gaweseb do not dispute that the appeal against the Commissioner’s decision to grant a clearance certificate was made outside the 14 days

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<sup>13</sup> *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

contemplated in the Regulations. I have, in the background part of this judgment, indicated that, on 24 October 2016, the Minister addressed a letter to the Minister of Mines and Energy in which letter he advised the Minister of Mines that he has, in terms of s 50 of the Act, and Regulation 25(7) extended, the period within which appeals can be submitted against the issuance of the environmental clearance certificate issued on 5 September 2016 to the appellant.

[33] There is no doubt in mind that the decision to extend the period within which an aggrieved person may lodge an appeal against the decision of the Commissioner to issue an environmental clearance certificate is an administrative decision. It is now well established in our law that an administrative act or decision, even if improperly taken, remains effectual until properly set aside and cannot just be ignored.<sup>14</sup> Since the decision to extend the period within which to lodge a s 50 appeal is not the subject of a review application, that decision remains and the appeal was thus lodge within the extended period.

[34] Regulation 29 provides that the payment of all fees or other moneys payable under the Act must be effected by affixing a revenue stamp to the document concerned. In this matter Mr Gaweseb affixed a revenue stamp of N\$ 1000 to the Form 3 appeal form. The argument that the appeal was not accompanied by the prescribed fees, is without substance. Another argument in support of the contention that there was no proper appeal before the Minister is the argument that Mr Gaweseb allegedly did not, as required under regulation 25(2), inform the appellant as to where and for what period the appeal submission is available for inspection by the appellant.

[35] It may be so that Mr Gaweseb did not inform the appellant as to where and for what period the appeal submission is available for inspection by the appellant. But what is not in dispute is the fact that, Mr Gaweseb did transmit the appeal submission to the appellant. In my view, the purpose of regulation 25(2) is to ensure that a party to a matter which is the subject of a s 50 appeal to the Minister must have knowledge of the appeal. The Supreme Court, in the matter of *Torbitt v The International University of*

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<sup>14</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

*Management*,<sup>15</sup> was of the view that where there is substantial compliance with a peremptory provision and such substantial compliance achieves the object of the legislation, exact compliance with the statutory provision will not be required. I am thus satisfied that, although, Mr Gaweseb did not comply exactly with regulation 25(2), he substantially complied with the regulation. I thus conclude that there was a proper appeal before the Minister.

Is the appellant's appeal on a point of law only?

[36] The Minister and Mr Gaweseb oppose the appeal on the ground that the appeal is based on factual considerations and not on points of law as set out in s 51 (2) of the Act. Mr Maleka who appeared on behalf of the Minister furthermore argued that the grounds of appeal relied upon by the appellant raise matters which must appropriately be dealt with through other remedial judicial processes such as a review. Section 51(2) (b) provides that an appeal against a decision, made under s 50 of the Act must be proceeded with as if it were an appeal from a Magistrate's Court to a High Court. I therefore find it appropriate to briefly look at the distinction between an appeal and review.

[37] When a party appeals against a Magistrate's court judgment to the High court, what the party seeks is that a judge or judges of the High Court must overturn or set aside the judgment of the Magistrate's court. It follows that when a party, in terms of s 51 of the Act appeals against the decision of the Minister, that party must ask the High Court to overturn or set aside the decision of the Minister. The appeal is about the merits of the judgment and the High Court will replace an incorrect order, ruling or judgment with its own judgment. The test, when a court hears an appeal, is, whether the record contains material showing that the decision - notwithstanding any errors of reasoning - was correct. This is because in an appeal the only determination is whether the decision is right or wrong.<sup>16</sup>

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<sup>15</sup> Unreported judgment of the Supreme Court of Namibia, *Torbitt v The International University of Management*, Case No.: SA 16/2014, delivered on 28 March 2017.

<sup>16</sup> Per Cameron JA in the matter of *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at pp 589-590.



[38] When a decision of a magistrate or other administrative official is taken on review, the question is not whether the decision is capable of being justified, but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion. In other words, in the case of a review, the court is concerned about the procedure followed. The unlawfulness of the procedure may be due to misconduct, gross irregularity, bias and procedural irregularities. An offensive rudeness to a party or witness would be misconduct. Making a decision capriciously, or that is uninformed or impossible to carry out, are examples of procedural irregularity. A frequently cited example of what judicial review is about is the dictum of Lord Brightman in the English case of *Chief Constable of North Wales Police v Evans*<sup>17</sup> where he said:

‘Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.’

[39] What is clear from the distinction between an appeal and a review is that in an appeal, the question is invariably whether the decision was based on correct legal principles whilst review concerns itself with the decision making process. Does this then mean that if a party approaches a Court by way of a review rather than by way of appeal or the other way round the court cannot adjudicate the dispute? All that I would say at this moment is that it would, to my mind, be a travesty of justice if a litigant who establishes that he or she has been legally wronged, has to be sent away from a court of justice empty handed just because he or she has entered the court through the ‘wrong door.’ I say so because Article 18 of the Constitution enjoins administrative bodies and administrative officials to act fairly and reasonably and to comply with the requirements imposed upon them by common law and any relevant legislation. The article proceeds and confers on persons aggrieved by the exercise of administrative acts and decisions the right to seek redress before a competent Court or Tribunal.

<sup>17</sup> *Chief Constable of North Wales Police v Evans* [1982] 3 ALLER 141(HL) at 154 or [1982] 1 WLR 1164.

[40] Article 1(1) of the Constitution provides that:

'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.'

I echo the words of Justice O'Regan that the constitutional principles of the rule of law and justice for all require, at the very least, a dispute resolution system that eschews arbitrary, irrational or perverse decision-making, so that all those who find themselves in Namibia have confidence in the administration of justice.<sup>18</sup>

[41] In view of these remarks, I find the reasoning of Justice O'Regan fitting when she argued that when an appellate Court is determining an appeal where the legislature has limited the right to appeal to a question of law only, the test to determine whether the appeal is on points of law only is exacting. The test is whether the decision that the decision maker has reached is one that no reasonable decision-maker could have reached. I am therefore of the view that when the Court asks itself that question it can never blind itself to the process followed by the decision maker.

[42] The crux of the appellant's complaint is that the Minister acted unfairly (thus violating Articles 12 and 18 of the Constitution) when he arrived at his decision to set aside the Commissioner's decision to grant the appellant an environmental clearance certificate. The question that I must thus answer is, whether the appellant's complaint that the Minister acted unfairly, is a question of fact or law. Counsels for both the appellant and the respondents were agreed on the applicable legal principles.

[43] In the matter of *Shaama v Roux*<sup>19</sup> Van Niekerk J said:

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<sup>18</sup> *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC).

<sup>19</sup> *Shaama v Roux* 2015 (1) NR 24 (LC).

[28] ...I have no doubt that when this Court is faced with the enquiry of whether arbitration proceedings measure up to the standard of a fair trial, a right expressly protected by the Constitution, the standard employed is a legal one. ...

[29] In the present matter the appeal ground is based on the assumption that the facts are clear from the record. In other words, the fact that the alleged procedural defects set out in paragraphs (i) – (iii) of the amended notice of motion occurred must be common cause or appear clearly from the record. Whether these procedural defects, singly or jointly, have the effect that the trial was not just and fair, is a question of law.

[44] In the matter of *Janse van Rensburg v Wilderness Air Namibia*<sup>20</sup> O'Regan said:

'... First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr Janse van Rensburg enter Runway without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record and may not be the subject of an appeal to the Labour Court.

If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperilled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review ...

Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree

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<sup>20</sup> *Supra* footnote 20.

but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)(a) and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement.

In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.'

[45] In the light of the authorities that I have quoted in the preceding paragraphs, I have come to the conclusion that the question whether or not the s 51 appeal hearing before the Minister violated the appellant's rights conferred on him by Articles 12 and 18, is a question of law.

#### Was the appeal hearing before the Minister fair and just?

[46] Mr Töttemeyer argued, on behalf the appellant, that the failure by the Minister to; notify the appellant of the appeal in a manner compliant with the Regulations, notify the appellant of the place and time when the appeal hearing will take place and the failure to afford the appellant an opportunity to make representations at the appeal hearing is a violation of the appellant's rights guaranteed under Articles 12 and 18. Mr Töttemeyer further argued that when the Minister allowed Mr Gaweseb to adduce evidence at the hearing of the appeal and considered the evidence so presented, the Minister acted *ultra vires* the Act.

[47] Mr Maleka argued, on behalf of the Minister, that the Minister is an administrative official as referred to in Article 18 of the Constitution and must act fairly and reasonably.

Relying on *Trustco t/a Legal Shield Namibia & Another v Deeds Registries Regulations Board & Others*,<sup>21</sup> Mr Maleka submitted that it is not for the Court to impose the course that the Court would have chosen, the Court must enquire whether the one chosen by the Minister was reasonable, even amongst many. He concluded by submitting that when the procedure adopted by the Minister is considered, there can be no basis in fact or in law for the contention that there was a violation of the appellant's rights in terms of Articles 12 and 18 of the Constitution and its applicable common law rights. For this submission he relied on the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>22</sup> where the Constitutional Court of South Africa said:

[219] The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. *Du Preez's* case is no authority for such a proposition, nor is it authority for the proposition that, whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case. For instance, in *Du Preez's* case, the calling of the evidence was likely to cause severe prejudice to the persons implicated thereby. It was precisely for that reason that the commission was required to give notice to them. Yet, it could hardly have been suggested that the commission would not have been entitled to take the decision to call the witnesses without first hearing such persons.'

[48] Mr Maleka furthermore argued that nothing in the Act or the regulations prevented the Minister from holding an appeal hearing. The *audi alterem partem* rule, embodied in Article 18, was a flexible principle and depended on the context or circumstances of each case, in that it may be ousted or greatly reduced in its application by statute. For this argument he relied on the case of *Nelumbu and Others v Hikumwah and Others*<sup>23</sup> where Damaseb DCJ said:

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<sup>21</sup> *Trusto t/a Legal Shield Namibia & Another v Deeds Registries Regulations Board & Others* 2011 (2) NR 726 (SC).

<sup>22</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

<sup>23</sup> *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC) at para [52].

'The importance of specificity in relying on breach of audi under art 18 of the Constitution is accentuated by the fact that audi is not a one size fits all but a flexible principle. As has correctly been stated by Hoexter in *Administrative Law in South Africa* (2012) 2 ed at 362:

“(P)rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness. ... An approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.”

[49] Ms Katjipuka argued, on behalf of Mr Gaweseb, that the fact that the Act and regulations authorise the introduction of new information on appeal to the Minister who is the political head of the Ministry, is a clear indication that public interest considerations and the principles enumerated in the Act turn to suggest that the appeal before the Minister was an appeal in the wide sense. She continued and submitted that ‘the permissibility of new and further information is apparent from the prescribed appeal form, which requires an appellant to provide “a description of each document or thing the appellant intends to produce at the hearing”. Having been notified of the further information Mr Gaweseb intended to rely on, the appellant did not object to its production, but sought to address the merits of the said further information in its response dated 30 October 2016, argued Ms Katjipuka. She thus concluded that the appellant’s argument that the Minister received new information has no substance.

[50] I have no qualms with the legal principles enunciated in the cases<sup>24</sup> to which Mr Maleka referred me. I furthermore accept the statements that, the requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. What procedural fairness requires depends on the circumstances of each particular case and that the *audi* is not a one size fits all but a flexible principle, are as a general rule

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<sup>24</sup> *Trustco t/a Legal Shield Namibia & Another v deeds Registries Regulations Board & Others* 2011 (2) NR 726 (SC), *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC). *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC) at para [52].

accurate statements of our law. But it is so that there are certain requirements that a hearing must comply with for it to be considered a fair hearing. Those requirements were recognised more than a century ago in the English case of *Board of Education v Rice*<sup>25</sup> where Lord Loreburn LC said:

'In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind.... In such cases the Board... will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for doing that is duty lying upon everyone who decides anything. But I do not think they are bound to treat such question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.' (Underlined for emphasis).

[51] In this matter the parties are in agreement that the Minister is an administrative official bringing him within the ambit of Article 18 of the Constitution. The appellant's grievance in this matter is the fact that Mr Gaweseb was informed and invited to the appeal hearing and he personally appeared and in addition to the written appeal submission, made oral submission to the Minister, whilst it (the appellant) was not accorded the same privilege.

[52] Both Article 18 and the common law imposes a duty upon the Minister to act fairly, I accept that the duty to act fairly does not require of the Minister to observe the strict procedures of courts of law, however he has a duty to observe the principles of fair-play, regardless of the procedures that he employs.<sup>26</sup> While it cannot be said that the Minister did not act in good faith in this matter, can it be said that the Minister listened fairly to the appellant and to Mr Gaweseb (when one party, Mr Gaweseb, was given an opportunity to make written and oral submissions while the other party, the appellant, was only given the opportunity to make written presentations)? Can it further be said that the Minister gave a fair opportunity to the appellant to correct or contradict

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<sup>25</sup> *Board of Education v Rice* [1911] AC 179.

<sup>26</sup> C Hoexter & R Lyster. *The New Constitutional & Administrative Law*. 2002. Juta Law. p. 196.

any relevant statement prejudicial to its view, when the appellant was not present to hear what Gaweseb, had, in addition to what he wrote, to say?

[53] In my view, even if the *audi alteram partem* rule is flexible and not a 'one size fits all' rule, the Minister failed in his duty to listen fairly to both the appellant and Mr Gaweseb, he furthermore failed to give the appellant a fair opportunity to correct or contradict statements that are prejudicial to its views. The failure to listen fairly to both the appellant and Mr Gaweseb is fatal to the procedural fairness of the hearing. In the matter of *Swaziland Federation of Trade Unions v President of the Industrial Court of Swaziland and Another*<sup>27</sup>

The Swaziland Court of Appeal held that 'A clear violation of natural justice will, *in every instance*, vitiate an order and no room for judicial discretion as to whether to set it aside can, in such instances, exist.' Baxter<sup>28</sup> puts the position clearly, he says:

'The principles of natural justice are considered to be so important that they are enforced by the Courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration their enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignored.

[54] The policy of the English Courts (which policy I intend to follow) was crisply stated in the case of *General Medical Council v Spackman*,<sup>29</sup> by Lord Wright in 1943 as follows:-

'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision'.<sup>30</sup>

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<sup>27</sup> *Swaziland Federation of Trade Unions v President of the Industrial Court of Swaziland and Another* (11/97) [1998] SZSC 8 (01 January 1998) at p 17.

<sup>28</sup> Lawrence Baxter: *Administrative Law*. Juta 1984.at 540.

<sup>29</sup> *General Medical Council v Spackman* [1943] AC 627, 644-5.

<sup>30</sup> Also see the cases of *Roads Contractor Company v Nambahu* 2011 (2) NR 707 (LC) at 724A-G, and in *Strauss v Namibia Institute of Mining & Technology & Others* NLLP 2014 (8) 390 LCN (para [51]).



The decision of the Minister to set aside the environmental clearance certificate granted by the Commissioner is accordingly no decision and must be set aside.

[55] Having come to the conclusion that the Minister's decision is no decision at all and must be set aside, I find it unnecessary to deal with the remaining grounds on which the appellant based its appeal.

[56] Finally regarding the question of costs. The appellant has succeeded in its appeal. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general rule.

[57] For the reasons that I have set out in this judgment I make the following order:

- a) The appeal succeeds.
- b) The Minister's decision of 2 November 2016 (in terms of which he set aside the environmental clearance certificate issued to the Namibian Marine Phosphate (Pty) Ltd, on 5 September 2015), is hereby set aside.
- c) The Minister may (if so inclined) in accordance with the law (either personally or as contemplated in section 50(3) of the Environmental Management Act, 2017 conduct an appeal hearing *de novo*.
- d) The Minister and Mr Gaweseb, must jointly and severally the one paying the other to be absolved pay the costs of the appellants, such costs to include the costs for one instructing and two instructed counsel.
- e) The matter is hereby removed from the roll and regarded as finalised.

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SFI Ueitele

Judge

## APPEARANCES

APPELLANT: R Töttemeyer (assisted by D Obbes)  
instructed by EnsAfrica I Namibia (incorporated as  
LorentzAngula), Windhoek

FIRST RESPONDENT: V Maleka  
instructed by the Government Attorney

SECOND RESPONDENT: U Katjipuka  
of Nixon Marcus Public Office