

CASE NO. SA 13/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WATERBERG BIG GAME HUNTING LODGE

OTJAEWITA (PTY) LTD

APPELLANT

And

THE MINISTER OF ENVIRONMENT & TOURISM

RESPONDENT

Coram: Shivute, C.J., O'Linn, A.J.A., Chomba, A.J.A.

Heard on: 17/06/2005

Delivered on: 23/11/2005

APPEAL JUDGMENT

O'LINN, A.J.A.: This judgment is divided for the purpose of easy reference into various sections namely:

I: INTRODUCTORY REMARKS

II: THE CONFUSION ABOUT THE PARTIES INVOLVED, THE FAILURE TO COMPLY WITH RULE 53 OF THE RULES OF THE HIGH COURT AND ART 18 OF THE NAMIBIAN CONSTITUTION RELATING TO ADMINISTRATIVE JUSTICE AND THE DOCTRINE OF REASONABLE EXPECTATION.

III: THE LACK OF AUTHORITY TO DECIDE.

IV: CONCLUDING REMARKS

A: INTRODUCTORY REMARKS

This is a judgment on appeal from the High Court to the Supreme Court. The appellant is Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd, a company conducting business as a hunting and safari lodge with its main place of business at Farm Otjahewita 291, District Otjiwarongo, Namibia. It does business under the name “WABI Lodge” or “Wabi (Pty) Ltd”.

The appellant cited the Minister of Environment and Tourism in his official capacity as respondent, pursuant to his duties, powers and functions as set out in the Nature Conservation Ordinance No. 4 of 1975, particularly his duty to consider and decide on the importation of live game from South Africa in accordance with Section 49(1) of the said Ordinance as amended by Section 12 of Act 5 of 1996.

The said parties will hereinafter be referred to respectively as “Waterberg Lodge” and “the Minister”. The Ministry of Environment and Tourism will be referred to as “the Ministry”. The present appeal is against a decision of the High Court of Namibia, per Mainga J, delivered on 2 July 2004, in which the learned judge dismissed an application by Waterberg Lodge for the review and setting aside of a decision by the Cabinet, alternatively the Minister, refusing applications by WABI Lodge for the importation from South Africa into Namibia of Mountain Reedbuck as per application dated 19.9.2002 and 27.9.2002.

Mr Frank SC appeared before us for the appellant and Mr Smuts SC, assisted by Mr Dicks, for the respondent.

II: THE CONFUSION ABOUT THE PARTIES INVOLVED, THE REASONS FOR THE DECISION AND THE FAILURE OF THE RESPONDENT TO COMPLY WITH RULE 53 OF THE RULES OF THE HIGH COURT AND ART 18 OF THE NAMIBIAN CONSTITUTION RELATING TO ADMINISTRATIVE JUSTICE AND THE DOCTRINE OF “REASONABLE EXPECTATION”.

The applications for the importation of the Mountain Reedbuck were made on the form provided by the “Ministry of Environment and Tourism” and referred to as Annexures B2 and A1 to the founding affidavit of Mr Mark Egger, in his capacity as a shareholder and managing director of “Waterberg Lodge”.

It is unclear what precisely is meant by the term the “Ministry”. I will assume for the purpose of this judgment that the meaning of the term is as defined in the Oxford Advanced Dictionary of current English, namely: “Department of State under a Minister”.

It is further unclear on the available evidence, whether the Ministry or Mr Beytell, Director of Parks and Wildlife Management in the Ministry of Environment and Tourism, or Mr Beytell and the Ministry collectively, took the decision to decline the application. What is clear however is that neither the Cabinet nor the Minister took the decision. Furthermore there is no suggestion whatever that the Minister was consulted or was in any way a party to the decision-making process.

The Minister made no statement in the proceedings. However, Mr Barend Johannes Beytell, hereinafter referred to as Beytell, stated in his answering affidavit that he is “duly authorized to oppose this application on behalf of the respondent and to depose to this affidavit on its behalf.” (My emphasis added)

In the aforesaid answering affidavit Beytell cites the respondent in the heading to the affidavit as “Ministry of Environment and Tourism”. (My emphasis). It follows that the allegation by Beytell is thus in effect that he is authorized by the “Ministry” to oppose the application and is authorized by the “Ministry” “to depose to the affidavit on its behalf”.

This adds to the confusion caused by correspondence from the “Ministry” as well as Beytell in reaction to the two applications by Waterberg Lodge under the name of Wabi Lodge and one application by Mr Dries Malan.

The letter dated 4 September 2002 but only signed by Mr S Simenda, acting Permanent Secretary of the Ministry of Environment and Tourism on 30.9.2002, reads as follows:

“Dear Mr Egger,

In response to your application to import Mountain reedbuck the following is our answer. After the bushbuck importation discussions, we in the Ministry reviewed the list of species that are imported and are busy with drafting a Cabinet submission making essentially the following recommendations:

- (a) That certain species which have been imported in large numbers, such as waterbuck and Black wildebeest, may be imported in future as stopping their importation now, serves no real purpose.
- (b) That certain species such as Cape bushbuck and Mountain reedbuck, although they have been imported in small numbers, should no longer be allowed to be imported as they never occurred naturally in Namibia and some pose real biodiversity conservation risks because of potential inbreeding with Namibian subspecies. Similar springbok colour variants will no longer be allowed to be imported.

It was therefore decided to decline your application to import Mountain reedbuck. We trust that you accept our decision as being in the best interest of conservation in Namibia and want to again encourage you and others like minded to explore ways of promoting our rare Namibian species and conserving them effectively in a co-operative manner.

Yours sincerely

S Simenda – Acting Permanent Secretary.”

The letter dated 17th October 2002 by Mr Beytell to Mr Dries Malan reads as follows:

“Your letter dated 3rd October 2002 refers.

You are granted permission to continue transporting game from the RSA until 31 December 2002 as requested.

Your application to import 50 common bushbuck and Nyale has also been approved.

Please report the bushbucks specifically to our staff at the border post or the nearest office of the Ministry during official working hours. The bushbuck and Mountain reedbuck may not leave the farm which receives them without prior approval from the Ministry.

Please report back farms who received these species and members delivered at each.

Please note that a Cabinet submission has been prepared for the Minister to motivate the refusal of further import of these two species into Namibia. No further permits will be issued for import of common bushbuck and mountain reedbuck until we have received a response from Cabinet. Furthermore no extension of permits not fully utilised will be considered.

Yours sincerely

B Beytell
Director
Parks and Wildlife Management”

The last paragraph of the abovestated letter relating to Bushbuck and Mountain Reedbuck corresponds to some extent to the earlier letter by the Acting Permanent Secretary in so far as the intended submission to the Cabinet is concerned.

The latter letter by Beytell however gives the impression that the applications for import of Bushbuck and Mountain Reedbuck will be declined “until we have received a response from Cabinet”. (My emphasis added).

It was clearly implied in this letter that the decision by the Ministry was a preliminary and temporary measure pending the awaited response of the Cabinet to the submission by the “Ministry”.

This letter by Beytell indicates that at the time when Beytell wrote his letter dated the 17th October 2002 he was under the impression that the Cabinet was the decision maker.

Beytell in paragraph 48 of his aforesaid answering affidavit, says that the draft submission, Annexure B7 to his affidavit, was in fact never sent to Cabinet.

Why it was not sent after it was prepared and after Beytell had referred to it in his letter of the 17th October to Malan, was never explained. There was no indication whatever in the papers before the Court *a quo* and in this Court, that there was any “response” from the Cabinet as envisaged in Beytell’s letter to Malan dated 17th October 2002. That makes nonsense of Beytell’s said letter.

As a matter of fact there is no indication whether the Minister or the Cabinet was ever consulted in regard to the Ministry's new policy to refuse the import of Bushbuck and Mountain Reedbuck.

Further confusion of this policy was created, when Beytell, according to Annexure BB6, annexed to his answering affidavit, on 29.8.2002 approved a permit to Dries Malan for the import of 100 Mountain Reedbuck on 31st October 2002.

The main difference between the Simenda letter of refusal purporting to have been written on 4th September and signed only on 30th September and Beytell's allegations in his answering affidavit are the following:

<u>The letter by Simenda</u>	<u>Beytell's allegations</u>
<ol style="list-style-type: none"> 1. The Ministry decided to decline the application. 2. That certain species such as Cape bushbuck and Mountain Reedbuck, although they have been imported in small numbers, should no longer 	<ol style="list-style-type: none"> 1. Beytell decided. 2. It is submitted that the term "inbreeding was mistakenly used and should read <u>crossbreeding</u>. It was intended in that way and would have been understood in that way. This did

<p>be allowed to be imported as they never occurred naturally in Namibia and <u>some</u> pose real biodiversity conservation risks, because of <u>potential inbreeding with Namibian subspecies</u>. (My emphasis added)</p>	<p>not form any part of my reasoning. I also admit that there is no potential for <u>crossbreeding</u> between Mountain Reedbuck and any Namibian subspecies. This likewise did not form part of my reasoning. The potential crossbreeding referred to in Annexure “A” to the applicant’s papers relates only to the Cape bushbuck mentioned therein. Any confusion in this regard is due to the unintended poor grammatical construction of paragraph (b) of the letter with regard to the decision sought to be reviewed.</p>
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It is astonishing that Beytell, who contends that he was the sole decision-maker and not the Cabinet, the Minister or the Ministry, did not write or draft or ensure the correctness of the letter signed by the Acting permanent Secretary Mr Simenda and purportedly drafted by Mr Erb, both of whom were obviously part and parcel of the Ministry of Environment and Tourism, as was Mr Beytell, the alleged sole decision-maker.

As the decision to refuse the import of Bushbuck and Mountain Reedbuck was a decision based on a new policy, which could be expected to be controversial and not acceptable to entrepreneurs in the live game trade and the hunting and tourist industry, one could expect that the decision-maker, whoever that was, would have taken care to explain correctly and carefully, the new policy and the reasons for the decision to Waterberg Lodge, being the first applicant to be refused on the ground of the new policy. He or she would not have left it to someone else, to do and say what he or she deems fit on the purported behalf of the decision-maker.

It is improbable that Simenda, a senior official, would just usurp Beytell's power and function to write and formulate the letter of refusal and would suck the contents from his thumb. The letter was apparently formulated by Erb. Neither Simenda nor Erb submitted affidavits regarding circumstances in which the letter was written. The inference can thus be drawn that Simenda and/or Erb was not given the opportunity by respondent to submit an affidavit, because he could not support Beytell's version.

The principle applicable was set out in various decisions and recently again applied by this Court.¹

The formulation in the Elgin Fireclays case was as follows:

¹*ELGIN Fireclays Ltd v Wehls*, 1947 (4) SA 744 AD at 749-750.
Minister Estates (Pty) Ltd v Killarney Hills Pty Ltd, 1979 (1) SA 621 (AD) at 624 B-H

“It is true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. See Wigmore, (section 285 and 286). But the inference is only a proper one if the evidence is available and if it would elucidate the facts”.

I may add that if the witness is not available, the party whose duty it is to place the evidence of such witness before Court, should place an explanation to that effect before Court.

In the instant case, no such explanation is before Court. This is the second time in the recent past when a respondent who is a Minister of the Namibian Government and/or his or her legal representative has failed to place such evidence before Court and where an adverse inference had to be drawn against the case put forward by such respondent. The previous case was that of *Dresselhaus Transport v the Government of Namibia*.²

Not only do such tactics not avail the government in the litigation before the Court but they militate against the principle and policy of transparency to which the Government of Namibia has committed itself and by which the Government is bound.

Mr Beytell in his answering affidavit sets out a number of reasons for his decision, not contained in Simenda's letter of refusal and according to Beytell, also conveyed

²*Dresselhaus Transport v Government of the Republic of Namibia* SA 20/2003, NmS delivered 11.5.2005 p44.

by him to the representatives of Waterberg Lodge, including Mr Egger, the managing director of Waterberg Lodge, at a meeting subsequent to the taking of the decision to refuse an importation permit, but prior to the institution of proceedings. At this meeting Beytell did not offer a reconsideration of the applications.

When review proceedings was instituted in this case in accordance with Rule 53 of the Rules of the Namibian High Court, the notice was supported by the affidavits of Mark Egger, Mark Kutzner, Dr H.O. Reuter and Dr Herman Scherer in which the case of applicant was set out in detail.

It also cited the Ministry of Environment and Tourism as the respondent. This was probably induced by the fact that applicant at that stage was influenced by the Simenda letter of refusal, wherein it was indicated that the “Ministry” had taken the decision. However in applicant’s founding affidavit, the respondent was clearly cited as the “Minister of Environment and Tourism”.

In the notice, the respondent was also called upon in terms of Rule 53(1)(b),

“to dispatch, within 15 days of receipt of the notice of motion, to the Registrar of this Honourable Court, the record of the proceedings and decisions sought to be corrected or set aside, together with such reasons as they are by law required or desired to give and that such respondents are to notify the applicants that they had done so”.

It is common cause that the respondent did not submit any reasons at all in response to the aforesaid notice in terms of Rule 53(1)(b) supplementing or correcting the reasons contained in Simenda's aforesaid letter of refusal. Only in the answering affidavit Beytell alleged that he and he alone took the decision to refuse the permit and that it was in no sense a "collective decision".

The applicant as a consequence was placed at a disadvantage because it had no opportunity to respond in terms of Rule 53 (4) to these new reasons contained in respondent's answering affidavit, unless applicant applied to Court for leave to submit additional replying affidavits in terms of Rule 6(5)(e) of the general rules applying to applications.

It may also be argued persuasively, that the implication of Rule 53 was that if reasons were given by a decision-maker at the time of notifying the decision to the applicant, the reasons so given by such decision-maker as appears from the record of the decision, should bind respondent in an application for review. The only excuse by Beytell for not supplementing or correcting the reasons given by Simenda is that he, Beytell orally explained his reasons to representatives of Waterberg Lodge subsequent to the taking of the decision and the notification thereof to applicant in Simenda's letter signed on the 30th September 2002.

This is no justification for the failure. It may be that Beytell also relied on his contention in paragraph 47 of his answering affidavit to the effect that an applicant

cannot claim a right to a permit and that part of Section 83(1) of Ordinance 4 of 1975 read with Section 12 of Act 5 of 1996 which provides *inter alia* that the decision-taker shall not be obliged to furnish any reasons for the refusal by it to grant or issue any permit. This section, if relied on, however does not afford any justification for such an attitude in view of Article 18 of the Namibian Constitution and the many decisions of this Court interpreting and applying that article.

It is further clear from the affidavits that even though the refusal was in terms of a new policy based on formerly undisclosed grounds, neither Beytell nor the Minister or any other official applied the audi alterem partem rule, by notifying the applicant, before taking the decision, of the intended new policy and the grounds thereof and giving the applicant an opportunity to make representations in regard thereto before the decision was taken, as required by the aforesaid Article 18 of the

Namibian Constitution and the decisions of the Court in regard thereto.³

³*Chairperson of the Immigration Selection v Frank & Another*, 2001 NR 1075 SC at 109E – 110B; 116F – 121G; 170F – 176I

Government of the Republic of Namibia v Sikunda, 2002 NR 2003 SC at 226G – 229 F. See also High Court decision; 2001 NR 181

Mostert v Minister of Justice, 2003 NR 11 SC at 22J – 29 D.

Cronje v Municipal Council of Mariental, 2004(4) NLLP 129 at 175 – 182

Du Preez & Another v Truth and Reconciliation Committee, 1997(3) SA 204 AD at 23 I – 234I and 233F – 234.

President of RSA v SA Rugby Football Union and Others, 2000(1) SA 1(CC) at 93I – 99D.

Bel Porto School Governing Body & Others v Premier Western Cape & Another, 2002(3) SA 265CC at 291C – 295H, 300C – 316E.

It was also pointed out by Mr Frank in argument that a considerable number of permits for the importation of Mountain Reedbuck had been issued prior to the disputed refusal to Waterberg Lodge, without any objection by the Ministry. That this is so, is quite clear from the affidavits and the documentary evidence placed before Court.

Furthermore, a number of factual allegations regarding the type of fencing of the property of Waterberg Lodge and the adjoining property, the water facilities available and the issues relating to biodiversity were only raised in Beytell's answering affidavit. These allegations, held against Waterberg Lodge, were never put to the representatives of Waterberg Lodge, before the decision was taken, notwithstanding the fact that these allegations and arguments were clearly controversial and not admitted by Waterberg Lodge. Its representatives should have been apprised of such alleged facts and arguments based thereon, before the decision was taken and an opportunity given to controvert such facts before the decision was taken.

Mr. Frank also pointed out correctly that the entity that decided, be it Beytell and or the Ministry, applied a pre-determined policy, which militated against the exercise of a discretion in each case as envisaged by Section 49 (I) of the Ordinance and Article 18 of the Namibian Constitution. If the policy was merely used as a guideline, it would have been in order if applied by the decision-maker, provided that the applicant had knowledge of the policy and had been given the opportunity to respond to it before the application was decided. In the circumstances applicable

to this application, no discretion was in fact exercised as envisaged by section 49 (I) and article 18 of the Constitution.

Mr Frank further contended that in the circumstances pertaining to the application in this case, the applicant had a legitimate or reasonable expectation to be heard before the taking of the decision and to be granted the importation permit.

The ratio of this “doctrine of legitimate expectation” is consistent with the thinking and principles contained in Article 18 of the Namibian Constitution. The said doctrine, as well as Article 18, are based on reason and justice in the exercise of administrative discretion. The doctrine was overtaken by the later incorporation of Article 18 in the Namibian Constitution. Nevertheless the doctrine can serve a useful purpose in supplying some specifics to the broad and general norms set out in Article 18 and be used as a tool for the implementation of Article 18. As such it should be applied by our Courts in conjunction with Article 18.

Although neither Article 18 nor the decisions of the High and Supreme Court of Namibia require the application of the *audi alterem partem* rule in every case of the numerous routine administrative decisions that must be taken by officials from day to day, the rule must be applied to ensure administrative justice where for example facts adverse to an applicant are relied on by the decision-maker not known to the applicant and where the doctrine of “reasonable expectation” applies.

In my view the circumstances of this case are such that the *audi alterem partem* rule should have been applied. In addition there are several other shortcomings in the decision-making process referred to above which justify a setting aside of the decision.

Any doubt regarding the justification of such setting aside on the aforesaid grounds, is removed by the fact that Beytell had no legal authority to take the decision. As a consequence I have declined to deal in more detail with the failure to comply with Article 18, the *audi alterem partem* rule and the doctrine of legitimate expectation and will deal in the following section with this decisive and fatal ground for setting aside the decision.⁴

III: THE LACK OF AUTHORITY TO DECIDE

During argument before us, certain incisive questions were posed by members of the Court relating to the delegation of powers.

As the issue appeared to be decisive and Mr Smuts for the respondent appeared to have become uncertain of the correctness of his original submissions as contained in written heads of argument, the Court allowed respondent's counsel to submit additional argument and gave leave to appellant's counsel to reply thereto.

⁴ See *Bel Porto School Governing Body and Others v Premier Western Cape and Another* 2002(3) SA 265 (CC) at 332-333, paragraphs 209-212. For the relationship between the doctrine of legitimate expectation and Article 18, see also: *The Chairperson of the Immigration Selection Board v Frank*, Footnote 3 *supra*.

There then followed the filing of supplementary heads of argument which were very helpful and narrowed the field of dispute on this decisive issue. There was no further dispute about the legal requirements for a valid delegation as will appear from my further analysis of the legal issues.

Counsel for the respondent accepted that where “a delegation is raised, the onus rests upon the party asserting it, to prove it”. Counsel referred to the decision in *Chairman, Board of Tariffs and Trade v Teltron (Pty) Ltd*, 1997 (2) SA 25, (AD) where it was stated at p 31 F-G:

“The Board is, after all, a creature of statute, and where the statute creating it gives it the right to delegate its duties, there is an onus on the Board to show that that delegation has been properly made. It may well be that the onus has not been discharged by the mere allegation that there had been a delegation. The terms of the delegation have not been disclosed. There is furthermore no proof that the formalities required for a resolution to that effect had been complied with, that the requisite quorum had been present and that the resolution had been properly recorded. None of this has been done”.

Counsel also referred to other decisions and then concluded: “The approach of the Courts has thus been that a delegation is to be restrictively construed and that the person asserting it bears the onus of establishing the delegation as a question of fact”⁵.

⁵*Kasiyamhuru v Minister of Home Affairs & Others*, 1999 (1) SA 643 (W) at 651 D-E.
Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd 1965(4) SA 628(A) at 639.
Shidiack v Union Government, 1912 AD 642 at 648

Mr Smuts further correctly conceded: “The overriding principle is that where the legislature has vested powers and functions in a subordinate authority it intends the power to be exercised by that authority...”⁶

After making the aforesaid concessions, counsel for respondent attempted to save its case by submitting, without any supporting authorities, that “the fact that the Legislature has taken the power from Cabinet and placed it in the hands of the Minister,.... would not in our submission mean that valid administrative action undertaken by the Cabinet and its predecessors would be undone and fall away by virtue of the amendment.....”

I have no problem with this statement if restricted to valid administrative action, such as e.g., applications for permits granted or refused by an authority, properly authorized by law, to decide on such applications. Where the amending law however removes the power to decide from the previous entity to another entity, such as in the instant case, applications for permits subsequent to such transfer of power, will have to be decided by the new entity, unless that new entity validly, i.e. in terms of a law allowing such entity to delegate, has in turn delegated such power to another entity.

I also disagree with counsel for respondent where they submit: “A delegation is after all administrative action which, we submit, would remain in place until

⁶ Baxter, *Administrative Law*, at 434/435
Martin v Overberg Regional Services Counsel 1991(2) SA 651 at 656 G-H

withdrawn by the new repository of power”. This contention applies to subordinate legislation such as regulations, because regulations are laws which, it may be argued, remain operative, until repealed. However, delegations of the power to decide on applications for the import of game must be distinguished from applications already decided by a previous delegatee, who acted at the time in terms of a valid delegation of power.

If prior delegations remain in place until the new entity appointed by law of Parliament revokes that delegation, it would make nonsense of Parliament’s express appointment of the new entity to exercise the power in question. This is even more apparent where as in this case, neither the new 1996 Act nor any other legislation empowered the Minister to delegate his/her power under Section 49(1) of Ordinance 4 of 1975 as amended.

Even if respondent counsel’s above submission was arguable, respondent’s case is fatally flawed because as appears from the following analysis, there is no sufficient proof of a lawful delegation to Beytell.

It is important to keep in mind that the respondent – being the Minister of Environment and Tourism, has not filed any opposing affidavit and there is no defence or explanation by the Minister before the Court *a quo* and before this Court.

Beytell, does not in his answering affidavit allege that he was authorized by the Minister to oppose the application on behalf of the Minister or to file the answering affidavit on behalf of the Minister. (See par. 1 of the affidavit).

Furthermore, Beytell nowhere sets out or purports to set out, the defence or opposition if any, of the Minister but only his own opposition to the application and his reasons for the disputed decision, allegedly taken by himself. In the circumstances the application for review must be regarded as unopposed by the respondent.

There can also be no doubt that, regardless of what the position was before the enactment and promulgation of Act 5 of 1996, the incumbent Minister of Environment and Tourism in terms of Section 12 of that Act, became the undisputed functionary to take decisions for the granting or refusal of any permit for the importation of game from South Africa in terms of Section 49(1) of Ordinance 4 of 75, unless of course, his authority was subsequently lawfully delegated to another official.

Although Beytell alleged that the said authority was lawfully delegated to him by the pre-independence Executive Committee and thereafter by the Cabinet of the pre-independence “Cabinet of the Interim Government” he could not and did not allege a delegation by the Minister in pursuance of Section 49(1) as amended by Section

12 of the aforesaid Act 5 of 1996, enacted by the Parliament of an independent Namibia.

Mr Beytell did allege a delegation in 1992 or as at 1992 by reference to a document marked BB9 containing a list of office bearers, in terms of which the “Head of the Permit Office” is indicated as the office bearer who could exercise the powers given under Section 49(1). Beytell claimed that he filled that position at the time.

The list is not signed by any person and there is no indication on it or in Beytell’s affidavit who had issued the list and in terms of which law it was issued. The vagueness of this and other allegations by Beytell in this application is indeed worrying. Whether or not he was not properly advised by his legal advisers, remains an open question.

Be that as it may. Beytell nowhere alleges or suggest that the Minister of Environment and Tourism delegated or purported to delegate his powers under Section 49 (1) of Ordinance 4 of 1975 to him in any capacity. The only statutory provision for delegations of authority referred to by counsel for respondent, was a general authority to delegate powers of the Executive Committee of the pre-independence period as contained in Sections 2-6 of the Delegation of Powers Ordinance 24 of 1973 as amended by Section 1 of Ordinance 20 of 1975.

It must be noted that Section 6(2) of Ordinance 24 of 1973 as amended contains a typical savings clause by providing –

“Any power, authority or function delegated to any person in terms of the Ordinance repealed by Section (1) shall be deemed to have been delegated to such person in terms of this Ordinance”.

There is no similar savings clause in Section 12 of Act 5 of 1996 and it consequently appears that at least as from the enactment and promulgation of Act 5 of 1996, the Minister of Environment and Tourism is the only authority to exercise the power under Section 49 (1) of Ordinance 4 of 1975 to grant or refuse permits for the importation of live game from South Africa into Namibia.

I have considered Articles 140 and 141 of the Namibian Constitution which may be regarded as serving the purpose of a savings clause dealing with the law in force at the date of Namibian Independence on 21/3/1990. The said Ordinance 24 of 1973 as amended was never expressly repealed or amended by Act of Parliament or declared unconstitutional by a competent Court and consequently remained in force in terms of Article 140(1) of the Namibian Constitution.

For the purpose of argument I will assume that any delegation of power validly ceded in terms thereof will remain valid even after Namibian Independence on 21 March 1990, unless expressly or impliedly revoked by Act of Parliament after Namibian Independence.

Neither respondent nor counsel for respondent relied on the aforesaid provisions of the Namibian Constitution for supporting the argument that any pre-independence delegation relating to Section 49(1) of Ordinance 4 of 1975 was not only in force at the date of independence but continued in force even after the promulgation of Act 5 of 1996.

Although Mr Beytell in his answering affidavit alleged that there was in fact a delegation of the power to his post by the pre-independence Executive Committee, he produced no documentary proof of such delegation.

Nevertheless, even if I assume for the purpose of argument that a proper delegation did in fact take place, and continued in force for some time after Namibian Independence by virtue of Article 140 and 141 (1) of the Namibian Constitution, I am convinced that such delegation could not survive the coming into force of Section 12 of Act 5 of 1996. This legislation unambiguously and expressly vested the power in the Minister of Environment and Tourism. There is no law in terms of which the Minister could delegate his power and no savings clause in terms of which an existing delegation could remain effective. There is also no allegation that the said Minister delegated or even purported to delegate his power.

It follows from the above that any purported exercise of the power by Mr Beytell or even the “Ministry” would be *ultra vires* their powers and null and void.⁷

IV: CONCLUDING REMARKS

I have shown in the previous section that the purported decision of Beytell and/or the Ministry had to be set aside as null and void.

The question then arises what should be the further course of events. There are two possibilities:

1. That the original application by Waterberg Lodge be referred to the Minister for consideration and decision. Or
2. That the Minister is directed to grant the two applications by the applicant.

I have come to the conclusion that in the particular circumstances of this case the second option should be followed.

⁷*Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes en Andere* 1991 (1) SA 372 (SWA) at 380 D-E.
Shidiack v Union Government (Minister of Interior) 1912 at 642.
Wasmith v Jacobs, 1987(3) SA 629 (SWA)
Yannakom v Apollo Club, 1974 (1) SA 614 (AD) at 623 F-H.
Baxter, Administrative Law at 433-439

Since writing my proposed judgment, I have had the benefit of reading the proposed additional judgments of my learned brothers Shivute, CJ AND Chomba, AJA followed by incisive discussions between us.

We all agree that the appeal must succeed and that the Minister must be ordered to pay the costs.

We differ however in regard to the issue whether or not the Minister must be directed to grant the permits in question or whether the application must be referred to the Minister to consider the applications *de novo*. On this issue I was of the opinion that the Minister should be ordered to issue the permits applied for. My learned brothers on the other hand are of the opinion that the applications must be referred "back to the Minister to consider and decide after complying with the principles of natural justice including the *audi alterem partem* rule".

I will attempt to summarize the main points relied on by my learned brothers:

1. The effect of my proposed order is that the Minister is penalised by not being given an opportunity to properly consider the applications and such penalization is not justified.

2. The Minister did not take part in the previous decision making process and had no opportunity to do so as a result of the unilateral action of Mr. Beytell and/or the Ministry.
3. The Minister did not file an opposing affidavit, probably because he did not know of the court action against him.
4. The issues raised in the papers are complicated and in such a case the Court should not usurp or unduly interfere with the powers of the Minister to exercise his/her discretion. Such action will also be in conflict with the devision of powers between the Legislature, Executive and the Judiciary.
5. The delays in the case are not substantial and was in any case not caused by delays on the side of the Minister and/or Ministry.

5.1 The further delays in obtaining a binding final decision will not be unduly prejudicial to the applicant.

6. To order the Minister to grant the application and issue the requested permit, without giving him the opportunity to exercise the discretion given to him under section 49(1) of the Nature Conservation Ordinance 4 of 1975 as amended by section 12(b) of Act 5 of 1996, will in effect deprive the Minister of his authority. Section 49(1) reads in effect:

"No person shall import ... any game or wild animal ... except under a permit granted by the Minister..."

I regret to have to state that I continue to disagree with my learned brothers on the issue of referral to the Minister to consider the applications *de novo* and adhere to my original point of view.

I find it necessary however to supplement and then consolidate my original reasons in the light of the points made by my learned brothers. The supplemented reasons are as follows:

1. This is a unique case which must be distinguished from the vast majority of administrative cases where the Minister or other office bearers who had to exercise an administrative discretion according to law, purported to exercise such function and such discretion, but had not done so properly, e.g. where such functionary had failed to comply with the empowering law and/or had failed to comply with art 18, 25, 40 and 41 of the Namibian Constitution.

In this case the incumbent of the post of Minister had failed to consider and decide applications since the enactment of section 12 of Act 5 of 1996, which unequivocally placed on the Minister, the duty to decide applications for permits.

The question arises: Which of the above two failures, is the most serious failure of duty? In my respectful view, the last type amounts to a total abrogation by disuse of the said power and function to decide and is the most serious of the two abovementioned failures.

2. Neither the Minister nor the Courts should pass or attempt to pass the buck to the Ministry, or any official of the Ministry. This is so because the Namibian Constitution provided for and entrenched the Rule of Law. It abolished the system of parliamentary supremacy and replaced it with the principle of constitutional supremacy.

Although the constitution also incorporated the principle of the division of powers between Legislature, Executive and the Judiciary, it strengthened the role of the Courts compared with that role in the pre-independence dispensation.

When considering the relevance and applicability of decisions of the Courts prior to the implementation of the Namibia Constitution in 1989, the the Namibian Courts must always consider the impact, if any, of the Namibian Constitution on those decisions.

The same principle applies to decisions of South African Courts. Although the Namibian Courts are not bound by such decisions, their persuasive effect plays a part in the decisions of Namibian Courts.

Moreover, South African decisions based on the new South African Constitution which came into effect in 1996, must be considered in the light of the Namibian Constitution and differences if any between these constitutions.

The Courts play a pivotal role in the enforcement of the Chapter on fundamental human rights and freedoms. The freedoms included in article 21(1)(j) "the right to practice any profession, or carry on any occupation, trade or business" subject to "the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an office".

It is not only the abolition of such rights which are prohibited in terms of article 25(1), but the abridgment of such rights. The Executive and the agencies of Government are included in this prohibition.

Sub-article (2) of article 25 provides that the Courts can be approached by aggrieved persons to enforce or protect a right which has been "infringed or threatened". This right is not limited to rights which have been abolished or abridged.

Sub-article (3) of Article 25 provides specifically that the Court "shall have the power to make all such orders as shall be necessary and appropriate to secure the applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights and freedoms have been unlawfully denied or violated...."

Art. 18 provides for Administrative Justice and reads as follows:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on such bodies and officials by common law and any relevant legislation and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal".

It must be clear from the above that the Honourable incumbent Minister had failed completely to decide on applications for permits for almost ten years. The incumbent Minister thus acted not only in breach of Ordinance 4 of 1975 as amended, but also in conflict with art. 18 of the Constitution, by not at all performing the functions and duties imposed by law for the benefit *inter alia*

of persons in the position of WABI Lodge, carrying on the business of keeping a lodge on a farm stocked with game. The failure of the incumbent Minister becomes even more exposed when art. 40 and 41 of the Constitution is considered. These articles provide:

"Art 40 Duties and Functions
 Members of the Cabinet

The members of the Cabinet shall have the following functions:

- (a) to direct, co-ordinate and supervise the activities of Ministries and Government Departments including para-statal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regard being had to the public interest;
- (b) to initiate bills for submission to the National Assembly;
...
- (c) ...
- (d) to carry out such other functions as are assigned to them by law or are incidental to such assignment;
- (e) ...
- (f) ...
- (g)
- (h)
- (i)
- (j)
- (k) to issue notices, instructions and directives to facilitate the implementation and administration of laws administered

by the Executive, subject to the terms of this Constitution or any other law; ..."

"Art. 41: Ministerial Accountability

All Ministers shall be accountable individually for the administration of their own Ministries and collectively for the administration of the work of Cabinet, both to the President and to Parliament."

Section 12 of Act 5 of 1996, placing the function to consider and decide on applications for permits, squarely on the shoulders of the incumbent Minister, had to be initiated in Parliament by the incumbent Minister in terms of par (b) of Art. 40 of the Namibian Constitution. This specific provision, in conjunction with the general provision in par (a) "to direct, coordinate and supervise the activities of the Ministries", and par (k), the obligation "to issue, notices, instruction and directives to facilitate the implementation and administration of laws administrated by the Executive, makes it impossible for the Minister to plead ignorance of the law and to shield behind members of his Ministry for the Minister's failure to exercise his/her functions in accordance with the constitution and the law. But it must be said immediately in favour of the incumbent Minister, that he/she did not attempt to shift the blame.

The incumbent Minister just did not file any answering affidavit. This omission is aggravated by the fact that officials such as Simenda, the Acting

Permanent Secretary and Erb, who were involved in the decision making process and/or the explanation thereof, did not submit any affidavits.

3. It seems to me therefore with the greatest respect to my learned brothers, that the Court should not shift the blame on behalf of the Minister who failed to take the Court into his confidence. Similarly the Court should not make the excuse on behalf of the incumbent Minister, that he/she may not have known about the legal proceedings in which the applicant cited the Minister as the respondent. Although there were initial discrepancies in the formal citation which appear to be due to the negligence of applicant's attorneys, this point was not taken by counsel for the Minister in the appeal, obviously because it was without substance.
4. It is obvious from the above that although Beytell should have known better, he did not intentionally usurp the powers and functions of the Minister. Rather, it was the incumbent Minister, himself/herself who abrogated his/her function and power by disuse.
5. In the circumstance it cannot be said that if my proposed order is issued by the Court, the Court would be usurping the function of the Minister. It is rather the incumbent Minister himself/herself who had the duty to function over many years, but who deprived himself/herself of the opportunity to function. The Court would consequently also not be "penalizing" the

Minister by making an order as proposed by me, but rather rectifying a grave neglect by the said incumbent in this regard in accordance with the provisions of the Namibian Constitution above referred to.

Should the matter be referred to the Minister for his consideration *de novo*, he would probably rely on officials of his Ministry to come to a decision. Beytell, in his answering affidavit, demonstrated a strongly held opinion and adherence to a fixed policy decided upon by the Ministry. He will probably convey that opinion to the Minister when the Minister considers the applications. There is no indication that the Honourable Minister is an expert on the issue. The possibility of bias of the officials and the effect of the predetermined policy on the Minister, is rather strong.

6. The applicant/appellant will be severely prejudiced if the applicant/appellant is now compelled by the order of Court to put its case *de novo* to a Minister who had failed for many years to exercise the power and function allocated to him/her.

It is not only the three years that have elapsed since the making of its application, but the time needed and the expenses entailed to get finality that have to be considered. This time and cost will not necessarily end with the decision of the Minister, because if the applications are again refused, review proceedings may again have to be instituted by the applicant, delaying finality for a further period of years.

After having had to endure the chaotic position of confusion and neglect caused by the actions and omissions of the Minister and his Ministry, the question must be squarely put and answered: Is it fair and reasonable to require the applicant to submit its case *de novo* to the said Minister and Ministry in such circumstances?

On the other hand, the granting of the said applications by the Minister in execution of the order of the Court, in due course, will not prejudice the State's interest and duty to protect the bio-diversity of Namibian wild life but will enable the Minister and the Ministry, in conjunction with and in consultation with the joint stakeholders, to decide on a policy and procedures which will sufficiently protect such bio-diversity as well as the public interest and the interest of the wild game farmers, traders and businessmen and women. They are entitled in terms of the fundamental freedom enshrined in art. 21 (j) of the Namibian Constitution, to practice their trade, business or profession subject to the law of Namibia, in so far as such law imposes reasonable restrictions, on the exercise of such right or freedom.

Section 49(1) of Ord. 4 of 1975 and art. 18 of the Constitution, are part of the aforesaid law of Namibia. Section 49 does impose reasonable restrictions, such as veterinary control for the importation of any game and in issuing the permit, additional conditions may be imposed other than a total ban to

safeguard biodiversity and to prevent the spread of sickness by imported game.

7. This is not a case where the alleged complications of the issue of biodiversity and the division of powers between the Legislature, the Executive and the Courts should be overemphasized.

7.1 After all, several similar applications were apparently approved over many years for several applicants until the applications of applicants were suddenly refused, in execution of a new policy adopted by an unauthorized Ministry under the control of the Minister.

During this period the issue of protecting the biodiversity was never raised and at no stage was it alleged that the imported game had infected the indigenous game with any disease or had any adverse effect on such game in practice.

- 7.2 As to the alleged infringement of the principle and theory of division of powers and the alleged need not to unduly interfere with division of powers, the following points must be kept in mind:

- (i) Art 1(3) of the Constitution, merely provides that "the main organs of the State shall be the Executive, the Legislature and

the Judiciary. The functions and powers of these organs are dealt with separately in other provisions of the constitution, but although distinct they overlap.

- (ii) As to the power of one organ to interfere in the powers and functions of another, it is obvious that Parliament can and will interfere in the functions of the Executive.

As far as the Courts are concerned, the Courts are mandated specifically to interfere not only with the Legislature in regard to the constitutionality of laws, but with the Executive in regard to its actions and/or omissions which are in conflict with art. 18, 25, 40 and 41 and/or in conflict with the provisions of other laws.

It follows from the above that no principle of non-interference can be derived from the Namibian Constitution at least not in regard to "interference" by the Courts in the functions and powers of the Executive, in the case of acts and omissions in conflict with the Constitution and/or other applicable laws.

8. There can be no doubt that the Minister and the Ministry, although not abolishing the freedom of the applicant/appellant to conduct a business of its

choice, it has by its actions and omissions "abridged" such right in terms of art. 25(1) or "infringed" it in terms of art. 25(2) of the constitution. That abridgment or infringement will be exacerbated by the Court, if the Court prolongs the agony by referring the matter to the Minister for consideration *de novo*.

9. The Court has a wide discretion as to whether it should refer the matter back to the functionary who had failed to exercise his/her function properly, for a rehearing, or whether the Court should direct the functionary to issue an order as defined by the Court in order to achieve an expeditious, reasonable and just solution.⁸

However, in the present case, where the incumbent Minister had failed to perform the function allocated to the Minister by law, without any excuse or justification, it will, in my respectful opinion not only amount to a failure to act in accordance with the letter and spirit of articles 12, 18, 21(j) and 25 of the Namibian Constitution, but also a failure of justice, should this Court refer the applications to the said Minister for a hearing and decision in which the applicant is expected to submit to such process at this late stage.

⁸ See the decisions quoted by my brother Shivute, CJ in regard to the discretion to be exercised by the Court. See in addition: Erf 167, *Orchards cc v Greater Johannesburg Metropolitan Council & An* 1999(1) SA 92 (SCA) at 109 C-G and the decision therein referred to. *Airoad Express (Pty) Ltd., v Chairman Local Road Transportation Board, Durban and Others*, 1986(2) SA 663 AD at 680 E-F in regard to bias, gross incompetence and/or where the outcome appears to be foregone. *The Namibian Health Clinics cc v Minister of Health and Social Services*, unreported judgment of the High Court of Namibia dated 10 September 2002.

10. I have taken note of the decision in *Minister of Environmental Affairs and Tourism & Ors v Phamhill Fisheries Pty Ltd*⁹ quoted by my learned brother Shivute CJ in which the Court held:

"Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency..."

This is obviously only one of the considerations.

Furthermore, a lot of material and opinions have already been placed on record relating to the issues involved and in regard to the applicable facts relevant in this particular case.

It is accepted that the biodiversity of the Namibian wildlife must be protected but whether or not, accepting that principle, the sudden adoption of a policy behind the scenes and arbitrarily choosing the applicant as the first victim, is justified in the case before us, is a completely different issue. On this issue the Court is surely in as good a position as the Minister to decide, if not in a better position.

⁹ 2003(6) 407 (SCA) at 432 par 53

Furthermore, there is no evidence or indication at all, that the Minister is an expert or would have other unbiased expertise available to place him in a better position to decide than the Court, on the issues, factual and legal, which have emerged in this case.

After all, the main consideration as stated by my learned brother Shivute CJ, on the authority of the case law, is - "In essence ... a question of fairness to both sides".

My learned brother Shivute, CJ, has also adopted the *dictum* in the decision of *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd* wherein it was stated:

""Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative action in the hands of the Executive, not the Judiciary."

This broad principle is subject to the provisions of the Namibian Constitution discussed *supra*.

Furthermore, the problem in this case is that the Minister had failed completely to perform the "administrative action" placed in the hands of the Executive by the Namibian Constitution and section 49(1) of the Nature Conservation Ordinance, as amended by Act of Parliament.

In such circumstances the Judiciary must not fail to make the appropriate order because of "judicial timidity" or "an unreadiness to perform the judicial function".

I fear that a decision by this Court ordering the applications to be heard de novo by the incumbent Minister, may well be seen by many as "judicial timidity" or "an unreadiness to perform the judicial function".

For these reasons I adhere to the order proposed by me in my draft judgment being:

1. The appeal succeeds.
2. It is declared that the refusal by Mr Beytell and/or the Ministry of Environment and Tourism to grant the appellant's applications of 19th and 27th of September 2002 for the importation of Mountain Reedbuck, is *ultra vires* and null and void.

3. The respondent, the Minister of Environment and Tourism, is directed to issue the permits applied for.

4. The respondent is ordered to pay appellant's costs of the appeal as well as that in the Court *a quo*.

O'LINN, A.J.A.

ON BEHALF OF THE APPELLANT

Instructed by:

MR T J FRANK SC

ENGLING, STRITTER & PARTNERS

ON BEHALF OF THE RESPONDENT

Instructed by:

MR D F SMUTS SC

ASST. BY MR G DICKS

THE GOVERNMENT ATTORNEY

CASE NO.: SA 13/2004

IN THE SUPREME COURT OF NAMIBIA

WATERBERG BIG GAME HUNTING LODGE
OTJAHIEWITA (PTY) LTD

APPELLANT

versus

THE MINISTER OF ENVIRONMENT & TOURISM
RESPONDENT

CORAM: Shivute, CJ, O'Linn, AJA, et Chomba, AJA.

HEARD ON: 17/06/2005

DELIVERED ON: 23/11/2005

APPEAL JUDGMENT

Chomba, A.J.A.: I have had the opportunity of perusing the judgment prepared with great erudition by my brother O'Linn in this appeal and I therefore entertain no scruples with the verdict he has arrived at that the appeal should be allowed. I have also read the judgment of my brother Shivute C.J. and note that while concurring, as I do with the overall verdict of upholding the appeal, the Chief Justice does not agree with the order proposed by our brother O'Linn that the Minister of Environment and Tourism, (the Minister), must now grant a permit to the Respondent, Waterberg Big Game Hunting Lodge Otjahewita PTY Ltd. (Waterberg) pursuant to the rejected applications which gave rise to the proceedings herein. Instead the Chief Justice has counter-proposed that the applications be referred to the Minister for him to consider and make a decision thereon after complying with the principles of natural justice including the *audi alteram partem* rule.

Before I pronounce my opinion on this important matter on which my two brothers have expressed divergent views, I propose first to examine the factual situation as it emerges from the affidavits of those who assert that the decision of refusal should be reviewed and set aside as well as from the affidavits of the opponents of the requested review.

The motion for review or setting aside the decision whereby the application by Waterberg was refused was principally founded on the affidavit of Mr. Mark Egger (Mr. Egger), a shareholder and managing director of Waterberg. In the ensuing paragraphs I shall highlight only those salient aspects of Mr. Egger's affidavit, which are relevant to the proposed controversial order. Mr. Egger deposed in paragraph 8 that during September 2002 Waterberg, in response to an advertisement, lodged an application with the Ministry of Environment and Tourism (the Ministry). The application, which was annexed to Mr. Egger's affidavit and was marked "A1", was headed "Application to import wild animals or plants or their parts, derivatives and products". The items of intended importation were indicated as 50 live mountain reedbuck. In the same month of September 2002 Waterberg submitted a second import application for 40 more live mountain reedbuck. All the 90 animals were intended to be imported from the Republic of South Africa.

By letter marked "H" and dated 4th September 2002 but said to have been signed on 30th September 2002, it would appear that both applications were refused. The negative letter "H" was signed by one, S. Simenda, designated as the Acting Permanent Secretary of the Ministry. It would appear also that upon receipt of "H" the same was handed over to a Mr. Mark Kutzner, a legal practitioner acting for Mr. Egger. Mr. Kutzner took up the matter of the rejected applications with a Mr. Ben Beytell who was described by Mr. Egger as belonging to the Directorate of Scientific Services. This Mr. Ben Beytell, as will be apparent later herein, is in fact Mr. Barend Johannes Beytell, Director: Parks and Wildlife Management in the Ministry. Mr. Beytell is said to have explained to Mr. Kutzner that the applications were rejected because of the proximity of Waterberg's land to the Waterberg Plateau Game Park.

In paragraph 15.1 of his affidavit Mr. Egger averred that the correct functionary who was required to consider and decide on the applications did not do so. He speculated that in terms of the applicable ordinance the application ought to have been considered and determined by the Cabinet or the Ministry/Minister, adding that the decision on the applications was in fact made by Mr. Beytell, officials of the Ministry or the Acting Permanent Secretary of the Ministry. He further opined that in terms of the contents of the letter "H" the decision was the product of collective action. He then concluded that the proper functionary who should have considered the application and made the decision had abrogated his powers.

In response to the depositions of Mr. Egger as summarised above, Mr. Barend Johannes Beytell's affidavit discloses the following. He, Mr. Beytell, was at the material time the Director: Parks and Wildlife Management in the Ministry. He had rendered 25 years of service in the Ministry and declared that he had the requisite professional qualifications and experience relevant to his position of Director. He deposed that in terms of Section 49(1) of the ordinance as amended, the power to grant permits for the importation of wild game was vested in the Minister. The provisions of Section 49(1) notwithstanding, he declared in paragraph 8 of his affidavit, thus:

"As is apparent from what is stated below the power to grant or refuse permits under Section 49(1) has been delegated to me by virtue of the position I occupy. The applicant's application served before me and after duly and carefully considering the application within the context of appropriate and relevant conservation and environmental principles and guidelines, particularly in furtherance of the biological diversity of Namibia, I decided to refuse it."

In paragraph 24 he added that the discretion exercisable under Section 49(1) by the Ministry "was exercised by me in the present matter." The assertion of Mr.

Beytell having been the decision maker in this context permeates through a number of paragraphs in his affidavit such as paragraphs 26, 51.5, 52.1, 54.2, 54.3, 56 and 57, to mention some only. In paragraph 54.2 he asserted, *inter alia*, "I deny that it was a collective decision in any sense."

Emphasizing his claim that the power to make decisions pursuant to Section 49(1) was delegated to him, Mr. Beytell deposed as follows in paragraph 52.1:

"As Director, Parks and Wildlife management, I am Head of the Permit Office, I'm delegated to take decisions of this nature. The delegation to do so dates back to pre-independence times. I am aware of the decision of the then Cabinet of the Interim Government delegating the power to the equivalent of my position....."

Having highlighted the salient aspects of the depositions made by the dramatis personae, so to speak, namely Mr. Egger on one hand and Mr. Beytell on the other, I shall now proceed to consider the question whether the order that this court should make should be either that the Minister should be ordered to grant Waterberg a permit as my brother O'Linn proposes to do or be ordered to consider the application *de novo* as the Chief Justice counter - proposes.

The resume of the averments of Mr. Egger shows that he was quite assertive that the proper functionary did not consider and determine Waterberg's applications. He thereafter speculated that the decision seemed to have been made by Cabinet, officials of the Ministry, Mr. Beytell or that it was a collective decision. However, whatever doubts were raised by Mr. Egger have been put to rest by Mr. Beytell. The latter deposed that the decision was not made by Cabinet nor was it a collective decision but that it was made by himself. On this issue therefore Mr. Beytell's categorical assertion is to be preferred to that of Mr. Egger which was speculative.

Mr. Beytell's further assertions, as is shown hereinbefore, are that he was the one upon whom the import application were served; that the power to grant or refuse import permits for wild game was delegated to whoever held the position that he had at the material time and ergo that the power was exercisable, and was in fact exercised, by him; that the delegation was done before Namibia's independence; and that he was personally aware that the Cabinet of the Interim Government effected the delegation of the power. All these assertions are equally uncontroverted.

Flowing from the foregoing, I propose to consider the assertion by Mr. Egger that the functionary required to exercise the power of granting import permits had abrogated that power. Was that in fact the case? During the period before the Nature Conservation Amendment Act, No.5 of 1996 was enacted, Section 49(1) of the Nature Conservation Ordinance 1975 provided that the function of issuing import permits for Wild Game was exercisable by the Executive Committee. The 1996 Amendment transferred the function from the Executive Committee to the Minister.

The foregoing notwithstanding, according to the deposition of Mr. Beytell, before Independence the Cabinet of the Interim Government delegated the function to an official of the Ministry holding a position equivalent to that which Mr. Beytell held at the material time. That meant that although the law at that time vested the function in the Executive Committee, which was in fact the Cabinet of the day, by virtue of the directive of the Cabinet of the Interim Government, the discharge of the function became that of an official in the Ministry. It is evident that even after the change of the law in 1996 the *de facto* functionary continued to be the ministry official holding the position of Director. That that was so can be inferred from the deposition of Mr. Beytell at the tail end of paragraph 52.1 where he stated-

"My delegated powers have never been contested by this applicant (or anyone else for that matter) who addressed applications to my office....."

This assertion quite clearly suggests that it is not only in the instant case that Mr. Beytell exercised the so-called delegated power.

To the question I have posed earlier, namely whether the Minister abrogated his power and thereby allowed Mr. Beytell to exercise it, I can now confidently hold and find as a fact that there was no abrogation. The truth of the matter is that the Cabinet - although in my view quite wrongly and unlawfully - purported to divest the Minister's precursor, the Executive Committee, of the said power and to transfer it to the holder of the office of Director.

I take judicial notice that the Cabinet, as a collective body of Ministers and headed by the President, is a superior body vis-à-vis the position of Minister. In the event, it is not surprising that Ministers holding the portfolio of Environment and Tourism (or any of its predecessors) have obligingly let a wrong ministry official exercise the power, which statutorily belongs to them. They had no choice but to defer to the directive of the superior body. To this end therefore the Minister's failure to personally consider Waterberg's applications cannot be attributed to dereliction of duty on his part.

Moreover in the instant case there is not a shred of evidence that the applicant's import applications were at any stage placed before the Minister for consideration. Rather, the factual situation is that Mr. Beytell received the applications and, believing that the power to act on the applications belonged to him through delegation, went ahead and made the disputed decision. It is stated that the proceedings in this case must "obviously" have been brought to the Minister's attention by the Government Attorney. The reason given for this supposition is that it was the Minister who was cited as the Respondent in those proceedings. In so far as I have pored over the affidavit evidence in this matter, I find not a tittle of support for that supposition. Furthermore, it is beyond peradventure that the Minister has not personally participated in these proceedings either in the court *a quo* or in this court.

It is common cause that Section 49(1) of the Ordinance vests a discretion in the Minister in so far as consideration of import permits is concerned. He can either allow or refuse such an application. To order the Minister to grant a permit to Waterberg in the present case, would in my view, unjustifiably deprive him of the statutory authority vested in him by Section 49(1). Since to my mind the Minister did not abrogate his power and as he has not personally participated in these proceedings, it would, in my view, be unduly highhanded to deprive him of his discretion.

What is more, there is in this matter a heated conflict emerging from expert evidence proffered by the proponents of the motion to review or set aside as against the evidence of those opposed to the motion. This is particularly so on whether or not the importation of mountain reedbuck can pose a danger to the genetic integrity of Namibia's indigenous wildlife populations. It is consequently my firm view that it is in the wider interest of Namibia that the Minister be presented with information on the pros and cons of this issue in order to enable him to prudently exercise his statute given discretion.

A notion has been canvassed that to let Waterberg's applications be submitted for reconsideration at this stage would be unfair to it. It is so canvassed on the ground that Waterberg has already waited for a very long time for a favourable decision. The insinuation is that executive red tape has occasioned the delay. The record of appeal, to the contrary, shows that swift action was taken by the executive. The facts in this case show that the two applications were lodged in September 2002. The letter "H" conveying the negative decision was dated 4th September, but only signed on 30th September 2002. It was faxed to Waterberg on October 1, 2002. Waterberg was aggrieved by the negative decision and a Notice of Motion was filed on its behalf on 4th December 2002. Service of the motion was effected on 6th December 2002. A notice to oppose dated 30th December 2002 was filed on 7th January 2003. Allowing for the filing of affidavits by the respective parties, the notice for set down was dated 7th August 2003 and it gave the date of hearing as 10th November 2003. There followed an amended Notice of set down which designated a new date of hearing as 28th November

2003. The Motion was heard on the last mentioned date but the judgment was reserved and was only given on 2nd July 2004. Once again Waterberg was aggrieved and consequently a notice of appeal was filed on its behalf on 28th July 2004. The appeal was heard in this court on 17th June 2005. Thus it can be seen that what has distanced the applicant from receiving an expected favourable decision was not any delay on the part of the Ministry. Rather, it was the slow judicial process, which has caused it. For this further reason I believe that to direct the Minister to grant a licence on the basis that Waterberg has had a long time of waiting would be tantamount to misplacement of blame, if any blame at all can be said to be justified.

In the final analysis I hold that the Minister did not abrogate his power and because the Minister has not participated in the proceedings I concur with the Chief Justice that the Minister be directed to hear and determine Waterberg's applications afresh. In doing so the Minister must comply with the *audi alterum* rule and he is also hereby enjoined to act fairly and reasonably according to the dictates of Article 18 of the Namibian Constitution.

CHOMBA, AJA

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WATERBERG BIG GAME HUNTING LODGE

OTJAHEWITA (PTY) LTD

APPELLANT

And

THE MINISTER OF ENVIRONMENT & TOURISM

RESPONDENT

Coram: Shivute, CJ, O'Linn, AJA, Chomba, AJA

Heard on: 17/06/2005

Delivered on: 23/11/2005

APPEAL JUDGMENT

SHIVUTE CJ: I have had the advantage of reading the judgment of my Brother O'Linn, AJA and I respectfully agree that the appeal should be upheld for the reasons set out in his judgment. I furthermore agree that the respondent should be ordered to pay the appellant's costs. I, however, find myself unable to agree with that part of the order proposed by my Brother O'Linn directing the respondent to grant the permit to the appellant and I shall briefly set out the reasons for so disagreeing.

The application for a permit was made and stood to be considered pursuant to the provisions of section 49(1) of the Nature Conservation Ordinance, 4 of 1975 (the Ordinance). The section as amended by section 12(b) of Act 5 of 1996 (the Act) and insofar as it is relevant reads:

"No person shall import ... any game or wild animal ... except under a permit granted by the Minister: ..."

"Minister" is defined in the Ordinance (as amended by section 1 of the Act) to mean the Minister of Environment and Tourism.

It was common ground between the parties that the decision to refuse the applicant a permit to import mountain reedbeek from South Africa was not made by the Minister. As my Brother O'Linn, AJA, correctly found, there was furthermore no allegation that the Minister was consulted or at any rate was part of the decision-making process. On the contrary, Mr. Beytell the Director: Parks and Wildlife Management in the respondent's Ministry pertinently contended that he was the sole decision maker. Apart from Mr. Beytell's *ipsissima verba*, there was no documentary proof of a valid delegation of the powers to consider and decide applications for a permit to the office of which Mr. Beytell is the head or to any other office in the respondent's Ministry for that matter.

As Botha JA stated in *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965(4) SA 628(A) at 639 C-D:

"The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."

It follows then that in the present case the Minister is the proper functionary to exercise the powers conferred on him or her by section 49(1) of the Ordinance. It was partly on that ground that my Brother O'Linn, found that the purported exercise of the discretionary powers vested in the Minister by Mr. Beytell in the absence of a lawful delegation was *ultra vires* and null and void, a finding that I respectfully endorse.

In the light of this finding that in itself disposes of the appeal, I consider that the proper functionary should be afforded an opportunity to consider and decide on the application, taking into account policy guidelines, the law and the merits of the appellant's application. This is particularly imperative in the light of the consideration that the repository of powers has not deposed to an affidavit setting out his own position *vis-à-vis* the stance taken by Mr. Beytell. Although obviously an employee of the Respondent's Ministry, Mr. Beytell seemingly did not, as O'Linn, AJA found, have authority to oppose the application before the High Court on behalf of the Minister and to depose to the answering affidavit on his behalf. In paragraph 1 of his answering affidavit, Mr. Beytell, *inter alia*, states:

"I am duly authorised to oppose this application on behalf of the respondent and to depose to this affidavit on its behalf." (Emphasis added.)

The respondent is cited in Mr. Beytell's affidavit as the Ministry of Environment and Tourism. Although Mr. Mark Egger, who deposed to a replying affidavit on behalf of the appellant, stated that he did not dispute paragraph 1 of Mr. Beytell's answering affidavit, this attitude must be understood in the context of the apparent confusion or uncertainty about which functionary in the respondent's Ministry dealt with the application and the appellant's contention that the decision to refuse it a permit was essentially a collective decision made by the "Ministry" as conveyed by Mr. Simenda in the letter dated 4 September 2002. That position may well explain the initial citation of the respondent in the Notice of Motion as the "Ministry" rather than the Minister of Environment and Tourism. The respondent was, however, properly cited in Mr. Egger's founding affidavit.

I do not share the view apparently taken that the respondent should, in effect, be penalised, *inter alia*, for having allegedly abrogated his power and, in effect, for having allowed Mr. Beytell to act on his behalf contrary to the relevant provisions of the Ordinance. The finding that the respondent had allowed Mr. Beytell to act on the respondent's behalf presupposes that the respondent had been aware at all

relevant times that the powers to consider and decide on the applications for permits were conferred on him alone and that, contrary to the contention advanced by Mr. Beytell, there had not been a lawful delegation of these powers to any official in the respondent's Ministry. In my respectful view, there is no evidence on the papers before us to support such a finding. On the contrary, the evidence presented by Mr. Beytell in this regard was that the power to decide on applications for a permit had allegedly been delegated to the head of the permit office (headed by Mr. Beytell at the time of the application) before Independence and that the head of the permit office had always exercised the power in question. It seems to me that Mr. Beytell acted on a *bona fide* but mistaken assumption that as the head of the permit office, he was empowered to deal with applications under section 49(1) of the Ordinance.

If Mr. Beytell who says that he had worked for the respondent's Ministry, including its constitutional predecessor, for more than 25 years and that he was "fully conversant" with the provisions of the Ordinance can be so utterly mistaken, can the possibility that the respondent may have been unaware that he was the only functionary empowered to determine applications entirely be excluded? I think not. It does not therefore seem to me to be right that a penalty should, in effect, be imposed on the respondent by being directed to grant the permit before he has had the time to consider the application and when he has evidently not been heard by the Court.

In any event, I am of the view that although there has been a lapse of three years since the submission of the application, it would not be fair to both sides, in the circumstances of this case, for the Court to direct the respondent to grant the permit for the following additional reasons:

When setting aside a decision of an administrative authority, a review Court will not, as a general rule, substitute its own decision for that of the functionary, unless exceptional circumstances exist. *SA Jewish Board of Deputies v Sutherland NO and Others* 2004(4) SA 368 at 390B.

Thus, in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C), the Cape Provincial Division of the High Court of South Africa stated at 1259D-E:

"The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative

authority of the State administration is vested in the Legislature, the executive authority in the Executive, and the judicial authority in the courts."

I respectfully associate myself with this dictum.

See also *Ruyobeza and Another v Minister of Home Affairs and Others* 2003(5) SA 51 (C) at 63G – J.

Whether there are exceptional circumstances justifying a Court to substitute its own decision for that of the administrative authority is "in essence ... a question of fairness to both sides". (Emphasis is mine). *Livestock Meat Industries Control Board v Garda* 1961(1) SA 342 (A) at 349G; *Jewish Board of Deputies v Sutherland NO and others (supra)* at 390G; *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999(1) SA 104 (SCA) at 109C – E.

Hlophe J (as he then was) lucidly and succinctly stated the principles pertaining to the substitution of the functionary's decision in *University of Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131D – G as follows and I quote with respectful approval:

“Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary. The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant. Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself. Of course the mere fact that a Court considers itself as qualified to take the decision as the administrator does not *per se* justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant may demand that the Court should take such a view.”

(Reference to authorities omitted.)

In my respectful view the circumstances of this case, viewed objectively, are such that none of the above grounds justifies the substitution by the Court of its own

decision for that of the functionary. A measure of judicial deference is therefore called for in this case, which as contentions advanced by the parties tend to show, involves the typically complex task of balancing competing interests. Judicial deference in the context of this case should be understood to mean:

"... a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

A Cockrell "Can You Paradigm?"- Another Perspective on the Public Law/Private Law Divide' 1993 *Acta Juridica* 227 (Quoted as in *Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA)*)

Besides, as it was stated by the South African Supreme Court of Appeal in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd* 2003(6) SA 407 (SCA) at 432 para [53]:

"Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency."

In his answering affidavit, Mr. Beytell averred that a consideration of the application for the importation of certain species postulated essentially a weighing up process involving, inter alia, an equally weighty consideration of relevant conservation and environmental principles, particularly the constitutionally recognised principle of the maintenance of ecosystems and sensitive ecological processes as well as the biological diversity of Namibia. (See Article 95(1) of the Namibian Constitution under the heading 'Principles of State Policy'.)

Mr. Beytell furthermore referred to the Convention on Biological Diversity, an important international instrument, which emerged from the landmark 1992 United Nations "Earth Summit" in Rio de Janeiro, to which Namibia is a signatory and which also forms part of the law of Namibia by virtue of Article 144 of the Namibian Constitution. He set out in greater detail the approach he had adopted in

the purported consideration of the appellant's application and expressed certain views regarding the approach, which views Mr. Beytell asserted, were supported by environmental scientists that he mentioned by name.

Mr. Beytell's views may be debatable, so I referred to them merely to illustrate the point I am making, namely that it seems to me that the subject-matter of the administrative decision in this case is relatively technical and therefore the consideration of the application for a permit is best left to the functionary with the power and proficiency to deal with the applications of this nature. The Court seems to me to be ill-equipped to make the decision of this nature. The matter in my view should be referred to the respondent for consideration in the light of this judgement and the judgements of my Brothers O'Linn, AJA, and Chomba, AJA. The respondent will have at his or her disposal the knowledge and skills of the experts referred to in Mr. Beytell's affidavit. The appellant too submitted affidavits of experts who engaged Mr. Beytell and his experts in a spirited debate regarding the question whether or not the importation of Mountain Reedbuck would have had deleterious effects on the ecosystems of Namibia and who generally took issue with their views on biological diversity. I venture to think that some of these experts will offer their own perspectives on matters within the field of their expertise that may fall to be decided during the consideration of the application, thereby assisting the respondent to make a fair, reasonable and informed decision.

With greatest respect to my learned Brother who holds the contrary view, I would like to adopt the following dictum from the decision of the South African Supreme Court of Appeal in *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd (supra)* at 431G Para [50] where it was stated:

"Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative action in the hands of the Executive, not the Judiciary."

What is required of the respondent is essentially for the respondent to have regard to a broad band of considerations and the interests not only of the appellant but also of those that may be affected by the policy. In a nutshell, the respondent is enjoined by the Constitution and the law to act fairly and reasonably.

In the result, I concur with paragraphs 1, 2 and 4 of the order proposed by my Brother O'Linn, AJA. In respect of paragraph 3 of his order, I would make the following order instead:

3. The matter is referred to the Respondent, the Minister of Environment and Tourism, to consider and decide after complying with the principles of natural justice including *the audi alteram partem* rule.

SHIVUTE, C.J.