REPORTABLE

OPEN LEARNING GROUP NAMIBIA FINANCE CC v PERMANENT SECRETARY OF THE MINISTRY OF FINANCE & 3 OTHERS

CASE NO.: (P) A 90/2005

DAMASEB, JP

2006.01.10

ADMINISTRATIVE LAW:

Requirements for valid administrative action: non-compliance with procedures prescribed by law renders action *ultra vires* and therefore unlawful; to be valid administrative action must be clear, not 'vague and uncertain'.

Article 18 of the Constitution considered against the backdrop of claim that public authority's decision terminating a contract not 'administrative action' and, therefore, not subject to review because such conduct 'purely commercial'.

Nature of an 'administrative act' discussed.

CASE NO.: (P) A 90/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

OPEN LEARNING GROUP NAMIBIA FINANCE CC	**APPLICANT**
and	
THE PERMANENT SECRETARY OF THE RESPONDENT MINISTRY OF FINANCE	**1ST**
THE MINISTER OF FINANCE	**2ND RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**3RD RESPONDENT**
THE REGISTRAR OF MICRO LENDING AND CREDIT AGREEMENTS RESPONDENT	**4TH**

CORAM: **DAMASEB, JP**

Heard on: 2005.06.10

Delivered on: 2006.01.10

JUDGMENT

[1] DAMASEB, JP: The initial relief sought in this application was an urgent interim order pending the hearing of a review application, coupled with a

review application in terms of Rule 53 of the Rules of Court. Although the matter commenced as one of urgency, a *modus vivendi* was reached (costs being reserved) between the applicant and the respondents, and only the review application was set down and argued before me. Consequently, I here deal only with the review application. The review application involves the vexed question: in what circumstances will the contractual arrangements entered into by a public authority be immune from administrative law review? Mr. Smuts SC appears for the applicant, while Mr. Louw SC, assisted by Mr. Boesak, appears for the respondents.

The affidavits

[2] The main affidavit in support of the review application is deposed to by Theresa de Meillon who is employed as the financial manager of the applicant. She was so employed at the time the events giving rise to this application took place. There are supporting affidavits accompanying hers. The answering affidavits in opposition to the interim relief are deposed to by Magdalene Heydenrych (on behalf of the first to third respondents), and Rachelle Metzler (on behalf of the fourth respondent). Heydenrych is the deputy director: Accounting and Financial Control (Department State Accounts) in the Ministry of Finance, while Metzler is the manager of Micro Lending and Credit Agreements of the Namibia Financial Institutions Supervisory Authority (NAMFISA), a creature of statute1[1]. She is a subordinate of, and reports to, the fourth respondent.

[3] Both Heydenrych and Metzler have personal knowledge of the events to which they depose giving rise to the present application. Their affidavits are also supported by confirmatory affidavits to the extent they rely on hearsay. The affidavits of Heydenrych and Metzler are also relied on in opposition to the review application in so far as they traverse allegations in support of that review application.

[1]1 Namibia Financial Institutions Supervisory Authority Act, 3 of 2001 ('NAMFISA Act')

[4] The above set of initial affidavits is followed by an affidavit deposed to by the first respondent in opposition to the review application on behalf of all the respondents. For that purpose the first respondent's affidavit incorporates, by reference, the allegations of Heydenrych and Metzler in the initial set of affidavits referred to in the preceding paragraph. The first respondent's affidavit is also supported by confirmatory affidavits in so far as he relies on hearsay. There is then a further affidavit deposed to by Quinton van Rooyen whose purpose is to introduce an additional review ground founded on alleged impermissible bias on the part of the fourth respondent, against the applicant. This affidavit is then followed by an answering one deposed to by the fourth respondent, Frans van Rensburg.

[5] All critical averments by and on behalf of the parties on which I rely for the conclusions to which I come, must be taken as either being within the personal knowledge of the deponents, and if not, as properly confirmed by confirmatory or supporting affidavits.

[6] A regrettable feature of this case is that both parties have opened themselves to the accusation of exaggeration and elaborate *ex post facto rationalisation* in the effort to explain away facts which, in certain respects, are patently and objectively not in their favour. In significant respects cold facts are, I regret to say, smothered with tendentious interpretation whose only object is to fit the mould. The record runs into some 680 pages and is repetitive and prolix, a fact evidenced by the length of this judgment. In view of the significant overlap in the affidavits and in an attempt to avoid prolixity in this judgment, I have chosen to deal with each party's case as a compendium, weaving together, as much as possible, the allegations by the deponents of each side - instead of summarising every affidavit in chronological order - save where circumstances just do not allow that.

The varied aspects of the case

[7] The interim relief is no longer a live issue. Only the issue of costs remains in respect of it. The main live issue – which is the subject of this judgment - is the review application aimed at setting aside alleged decisions of the first and fourth respondents on the review grounds identified in the affidavit of de Meillon. There is a further review ground introduced by Quinton van Rooyen alleging impermissible bias. The case has another aspect to it: an application by the applicant to compel the production of parts of the record which, it is alleged, had not been disclosed, but later abandoned in favour of an application simply to discover specific documents allegedly having a bearing on the issue of bias. In the view that I take of this matter overall, I do not deal with the aspects of the case relating to the alleged impermissible bias, or the allegedly incomplete record or missing documents.

The Background

[8] On 17 February 2005, Theresa de Meillon of the applicant wrote a letter to the fourth respondent in the following terms:

> "I refer to our telephonic conversation this morning .We hereby request written proof of our registration with NAMFISA as a micro-lender. Attached please find a copy of our registration with the Ministry of Finance- Financial institutions."

In reply to this letter, the applicant received one dated 21 February 2005 from the fourth respondent in the following terms:

> **"NAMFISA LICENSE**
>
> 1. Your letter of 17 February 2005 refers. I also refer to your letter dated 23 September 2002 wherein you informed us that Open Learning Group Namibia Finance CC is not a Microlender. Furthermore, in your business you "...allow registered students to pay off their study fees...in the same way as an article bought on Hire Purchase."

2. We subsequently confirmed in our letter dated 24 September 2002, that, in view of the modus operandi of Open Learning Group Namibia Finance CC (OLGN), it was not regarded as a Micro lender by NAMFISA.
3. We, at the time, informed you that NAMFISA regarded the operations of OLGN as credit extension which would be subject to the maximum finance charges applicable to credit grantors in terms of the then Exemption Notice No. 135 of 06 August 2002, published in Government Gazette No. 2782 of 06 August 2002.
4. Also, since OLGN is regarded as a credit grantor in terms of Section 1 of the Usury Act, 1968 (Act No. 73 of 1968), they have not been charged any levies as payable by Micro lenders, as they have been deregistered as a Micro lender with effect from 24 September 2002 based on your advice.
5. It therefore follows that we cannot issue you with proof of registration with NAMFISA as a Microlender.
6. We therefore, advise that OLGN is not regarded as a Microlender in terms of Section 15(A) of the Usury act, 1968, bust as a credit grantor.

…

Yours faithfully

FRANS VAN RENSBURG

REGISTRAR: MICROLENDING AND CREDIT AGREEMENTS."

(Underlining is mine)

[9] Then on 9 March 2005, the applicant received a letter from the 1st respondent[2][2], stating as follows:

"The payroll deduction facility granted to Open Learning Group of Namibia (OLGN Finance CC) is hereby revoked as it is not in compliance with our statutory requirements in this regard. Access to the payroll will be terminated with effect of the date of this letter – payment for the month of March 2005 will however still be made as the payroll has already been processed. APS, service provider for the PDMS has been informed accordingly." (my emphasis)

[2]2 It is common cause that this action was taken by the first respondent after receiving a letter from the fourth respondent on 22 February 2005, wherein fourth respondent informed the first respondent that the applicant had stated it was not a micro lender- a fact accepted by the fourth respondent; specifically drawing first respondent's attention to the deduction code.

[10] It is these two letters that have precipitated the present review application.

The following relief is sought in it:

1. Reviewing and correcting or setting aside the decision(s) taken by the first respondent in or about 9th March 2005 to revoke the applicant's payroll deduction facility, as is set out in annexure "D" to the applicant's founding affidavit.
2. Declaring the aforesaid decision unconstitutional, and/or null and void.
3. Reviewing and correcting or setting aside the decision taken by the fourth respondent conveyed to the applicant on or about 21st February 2005 to deregister the applicant as a mircolender with retrospective effect to 24th September 2002, set out in the fourth respondent's letter dated 21st February 2005, annexed as "P" to the applicant's founding affidavit.
4. Declaring the aforesaid decision unconstitutional, and/or null and void.
5. Declaring that the applicant remains a duly registered mircolender.
6. Ordering that the respondents pay the applicant's costs jointly and severally, the one paying, the other to be absolved.
7. Granting such further and/or alternatively relief as this Honourable Court deems fit.

[11] The review grounds are stated as follows in respect of both letters:

> "In respect of both the first respondent's revoking decision ad the fourth respondent's decision to "deregister" the applicant as a micro lender, the grounds for review are as follows:
>
> 51.1 the respective decision-makers acted *ultra vires* their statutory powers and their decision-making was accordingly a nullity.
>
> 51.2 the decision-makers failed to:
>
> (a) apply the *audi alteram partem* rule;
>
> (b) inform the applicant of facts which it considered detrimental to its application;
>
> (c) recognize and apply the applicant;' legitimate expectation to procedural fairness;

51.3 the decision-makers failed to understand and appreciate the nature of their respective statutory powers, discretion and functions vested in them;

51.4 the decision-makers:

(a) failed to take relevant considerations into account;

(b) took irrelevant considerations into account;

(c) failed to give proper weight to considerations;

(d) failed to apply substantive fairness;

51.5 the decision-makers failed to apply their minds properly to the respective matters;

51.6 the decision-makers failed to apply the principle of equality provided for in the Constitution;

51.7 the decision-makers failed to furnish reasons for their respective decisions;

51.8 the respective decisions were materially influenced by an error of law;

51.9 the decisions are not rationally connected to the purpose of the empowering statutory provision (if any);

51.10 the decisions were taken for reasons not authorized by the empowering provision or for an improper purpose;

51.11 the action taken by the respective decision-makers consists in law of a failure to take a decision;

51.12 the decision-makers ignored:

(a) Article 18 of the Constitution;

(b) regulation 5 of the regulations referred to above."

[12] The applicant was established in 1999 to provide loans (referred to as micro -loans in the founding papers) to students who pursue distance teaching courses with Open Learning Group (PTY) Ltd established in 1995.The applicant and OLG (PTY) Ltd are, together, known as the Open Learning Group Namibia (OLGN). The students are mostly in fulltime employment and the dispute relates to those students employed by the third respondent and therefore on its payroll. To be able to directly recover the instalments in repayment of the loans given by the applicant, the applicant applied for and was granted a deduction code on the third respondent's payroll so that deductions are made from the salaries of these government employees by their employer and then paid over directly to the applicant.

[13] Without the deduction code facility, applicant would have had to obtain debit orders from those of its debtors who have bank accounts, or rely on direct payments to it from those debtors who do not have any bank accounts. For that reason, the applicant describes the deduction code as an 'extremely important asset' of a business such as the one it carries out. The applicant further alleges that the importance of the deduction code it enjoys from the third respondent is highlighted by the fact that there is at the moment a moratorium placed on such facilities by the third respondent. This, it alleges, makes a business with a deduction code one of 'considerable value'. It was because of this, it further alleges, that Trustco3[3] bought out one Christiaan Zaayman's member's interests in the applicant.

[14] It is not in dispute that the applicant was 'approved as a registered micro lender' by the first respondent on 10 July 2000. In a letter bearing the same date, the applicant was advised by the first respondent to 'comply' (sic) with s 15A of the Usury Act, 73 of 1968 which provides as follows:

> "The Minister may from time to time by notice in the gazette exempt the categories of money lending transactions, credit transactions or leasing transactions which he may deem fit, from any of or all the provisions of this Act on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption."

[15] On the same date, the applicant was also issued with a 'certificate of registration' by the first respondent in his then capacity as Registrar of Financial Institutions in the following terms:

> "I hereby certify that OLGN FINANCE CLOSE CORPORATION has been approved in terms of section 3 of the Conditions determined under the Usury Act No. 73 of 1968 as amended by section 15A of the Usury act No. 73 of 1968, as a person entitled to

[3]3 It is common cause that by agreement dated 16 February 2005 Trustco Group International (Pty) Ltd (Trustco) bought Zaayman's interests in the applicant, Zaaiman warranting that he (sic) is " the holder of a salary deduction code entitling it(sic) to claim deductions in respect of monies due from the salaries of Government employees.."

carry out such a business of micro loan transactions and who is registered with the Permanent Secretary."

(My underlining)

[16] It is common cause that the fourth respondent had since become the statutory successor to the first respondent as Registrar (of Financial Institutions) by virtue of an amendment to s 1 of the Usury Act, 73 of 1968 ('the Usury Act') in the Schedule to the NAMFISA Act in the following terms:

'' 'registrar' means the person appointed in terms of section 5 of the Namibia Financial Institutions Supervisory Authority Act , 2001, as the chief executive officer of the Namibia Financial Institutions Authority or a person appointed by the Minister , subject to the provisions of the Public Service Act , 1995...''

[17] On 6 August 2002 , the second respondent published Notice No.136 in Government Gazette 2786, in terms of s 15A of the Usury Act (hereafter 'the exemption notice') which, in Part 1 (Cancellation of registration as a microlender), inter alia, provides as follows:

"5. (1) Subject to the provisions of this clause, the Registrar may, by notice in writing to a microlender, and from a date specified in the notice, cancel the microlender's registration under clause 4 if the microlender-

(a) fails to comply with any condition imposed by the Registrar in terms of that clause;

(b) ceases to conduct the business for which the microlender is registered;

(c) is found guilty of an offence under section 14 of the Act;

(2) If the Registrar proposes to cancel the registration of a microlender, the Registrar must give the microlender written notice of his or her intention to cancel the registration.

(3) A notice in terms of sub clause (2) must -

(a) specify the reason for the proposed cancellation; and

(b) invite the microlender to submit to the Registrar in writing, within 30 days of the date of the notice, any representations which the microlender may wish to make in relation to the proposed cancellation." (my emphasis)

[18] De Meillon alleges that some time after 6 August 2002, and subsequent to the publishing of the exemption notice, a meeting was called by Heydenrych, representing the second respondent, with all the micro lenders. At this meeting, De Meillon alleges, Heidenrych advised them that all those using deduction codes on the third respondent's payroll had to enter into a formal business agreement with the third respondent. The microlenders were also informed by Heidenrych that they had to apply to the fourth respondent for a deduction code as, without such application, they would not be able to use deduction codes anymore. The applications were to be screened by the fourth respondent. De Meillon alleges that she duly applied for a deduction code by completing the documentation provided for the purpose and delivered the same to the third respondent, and continued to be allowed by the second respondent to use the deduction code while the 'screening' process was underway.

[19] According to the applicant, the screening process was only completed in August 2003, whereupon the applicant was invited to sign the written business agreement. This agreement was concluded on 22 August 2003. Clause 2 of the Agreement provides, in part, as follows:

> "The lender shall apply in writing for a deduction code and submit to the Ministry the following requirements as attachments:
>
> 2.1.1 Registration certificate as a Micro-lender issued by NAMFISA in terms of section 15A of the Usury Act;
>
> 2.1.2 Certificate issued by NAMFISA that the Micro-lender is in good standing with NAMFISA;
>
> …
>
> 2.2 The Lender further guarantees that all information submitted in 2.1 above are substantially true and correct and should it in any event no longer be substantially true and correct , the lender shall inform and advise the Ministry and NAMFISA thereof within 30 days of such event taking place.
>
> …

2.4 Should the lender be granted a deduction code in terms of this Agreement as approved lender, Government shall be deemed to have entered into this agreement with the Lender and the lender shall be bound by the terms thereof.

2.6 The Minister warrants that all the terms and conditions of this Agreement comply with Treasury instructions and its requirements thereof (sic)."

[21] Clause 2.3 of the agreement states:

"The Lender [applicant] is required to sign and submit this agreement without alteration or modification other than for the purposes of providing details of the Lender and its address as contemplated in this Agreement.''

The agreement (in clause 4) then mentions the creation of a register for deduction codes and then in clause 4.4 states:

"The register allows the Ministry and NAMFISA to regulate loan deductions from the payroll …''

Clause 8 states:

''The Lender shall develop and invest in a social upliftment program in Namibia and provide details thereof in an annual report to the Ministry."

Then it states in clause 9:

"The Lender shall submit itself to the supervision and control of the Ministry and NAMFISA, which shall monitor substantial compliance by the Lender with this agreement". Clause 13 states that the agreement shall remain in force for 4 years, either party having the right to terminate it by giving 6 months' written notice.

Clause 10 of the Agreement deals with breach of contract and provides for circumstances in which the Ministry of Finance may terminate it in the event of breach of its terms by the applicant. It has no such specific provision in favour of the applicant, perhaps understandably.

[22] Clause 12 is the dispute resolution clause which provides as follows:

"12. DISPUTE RESOLUTION

12.1 Any issue arising from the interpretation and implementation of this Agreement shall be resolved through negotiations between the Parties.

12.2 In the event of the Parties failing to reach an agreement, the matter shall be referred for arbitration to a mutually agreed upon arbitrator for final decision in terms of the Arbitration Act 42 of 1965."

[23] De Meillon annexes to her founding affidavit a letter dated 7 January 2002[4], from NAMFISA to the applicant, from which the following is apparent:

a) Since its registration as microlender, the applicant failed to pay levies due and payable and prescribed by law;
b) An extension was granted for defaulters but applicant still did not pay
c) Interest would be charged on all late payments.

[24] It is common ground that in a letter to NAMFISA of 24 February 2003, de Meillon had stated that the applicant was not a micro lender. The applicant acknowledges that again on 23 September 2003, de Meillon wrote a letter to NAMFISA in the following terms:

''**STATUS OF OLGN**

This letter serves to inform you that Open Learning Group is not a Micro-Lender. The code[5] that we were allocated by the Ministry of finance was however, issued as if we were a Micro-lender because they do not have a code for our type of business. In our business we allow registered students to pay off their study fees over a period of twelve (12) months in the same way as an article bought on Hire Purchase." (My emphasis)

[25] De Meillon alleges that she did not receive a reply to this letter and if applicant received such a letter she would, because of her position, have been aware of it. De Meillon now alleges in the founding affidavit that:

"I have now been advised and accept however that the contention advanced in this letter is entirely legally unsound as my argument failed to conceptualise the different functions of the two entities within the Group. The essential nature of the applicant, being the financing entity of the group, is in fact to provide loan financing of a micro

[4] 4 It is common cause that the reference to 2002 is wrong and should be 2003.
[5] 5 This refers to the deduction code on the third respondent's payroll.

> lending nature to students acquiring materials and for their study fees. It is OLGN (Pty) Ltd that makes the study material available to the students'.

[26] She then, on behalf of the applicant, tenders all the outstanding levies due and payable, and adds that her intention at the time in insisting that the applicant was not a micro-lender 'was to avoid payment of levies if at all possible'. She says she 'was aware that registration as a micro lender was vital for the deduction code and certainly would not have contemplated cancellation of registration of applicant as a micro lender.'' De Meillon avers that at the time, NAMFISA never accepted her contentions that the applicant was not a micro lender, and says that the fact that NAMFISA wrote the letter dated 7 January 2003 demanding payment of levies, was proof of the fact they still regarded applicant as a micro lender notwithstanding its assertion that it was not. The applicant's case is that the following additional facts show that NAMFISA regarded applicant as a micro lender:

(a) Applicant was invited by NAMFISA to a meeting held with the microlending industry on 12 December 2002. This, she alleges, could not be the case if applicant was deregistered as a micro lender.

(b) Applicant was invited to and received minutes of a meeting convened by NAMFISA on 8 August 2003 with the microlending industry;

(c) Applicant was invited to another meeting between NAMFISA and micro lenders held on 12 March 2004.

(d) On 4 February 2004 the fourth respondent sought certain information from applicant qua micro lender.

(e) At some point after the applicant said it was not a microlender, Metzler conducted an investigation and came to the conclusion that the applicant is still a registered microlender, a conclusion she duly recorded on official documentation.

(f) In the 2004 Annual report of NAMFISA the applicant is recorded as a microlender, not as a credit grantor as now alleged by the fourth respondent.

[27] Besides being regarded by NAMFISA as a micro lender at all material times, de Meillon says, the applicant continued to also regard itself as a micro lender. One such circumstance it gives as proof is the fact that the principal member of the applicant (Zaayman) sold his entire members' interest in the applicant to Trustco, warranting that the applicant was entitled to a deduction code from the third respondent in terms of the formal business agreement entered into with the third respondent. She alleges that TRUSTCO would not have bought the members' interest had the applicant not possess a deduction code. (The difficulty for the applicant here is that it is Zaayman who warranted and not the applicant. There is no legal identity between the two.)

[28] De Meillon then alleges that she advised NAMFISA's Metzler of the acquisition of the applicant by TRUSTCO and requested to be furnished with proof of registration as microlender. It was then that the applicant received the letter from the fourth respondent asserting that applicant was already deregistered – which letter is the subject of the present review application. She says that considering that her father (Zaayman) had warranted to TRUSTCO that the applicant enjoyed the benefit of a valid deduction code (an assertion which is not factually correct) , she got worried for her father's sake and decided, without reference to the new owner of the applicant, to apply for a licence. This is what she said in the letter of 1 March 2005 addressed to NAMFISA:

> 'Your letter, dated 21 February 2005... has reference. Open Learning Group Namibia is for the first time since registration as a micro lender at the Ministry of finance in the position to perform as one. From the 1st of March 2005 our operations can change from the 'hire purchase basis, reference from our letter to NAMFISA dated 23rd of September 2002, to a full micro lending institute. We want to register at NAMFISA as a micro lender as from today and be charged levies payable by Micro lenders. We will appreciate it if NAMFISA will take our application in consideration and provide us with all necessary documents and licenses.

Etc, etc.' (emphasis provided)

[29] De Meillon also annexes to her papers a letter dated 3 March 2005 and written by Quinton van Rooyen, the principal of TRUSTCO (the new owner of the applicant), to the first respondent in which he said the following:

> "Trustco Group International acquired the total issued membership of OLGN Finance CC and the total issued shareholding of its sister company Open Learning Group (Namibia) (Pty) Limited on 16 February 2005. The operations of the two entities were taken over on 28 February 2005.
> We have received guarantees from the seller, Mr. Christiaan Zaayman that the close corporation is the beneficial holder of a micro financing payroll deduction facility from the Ministry of finance. On 25 February 2005 we were put in possession of a letter from NAMFISA indicating that the close corporation has requested that Namfisa deregister them as a micro lender and consequently their registration certificate has thus been withdrawn on their request. It seems that the Ministry of Finance was uninformed of this fact. The close corporation currently does not engage in classical consumer micro financing but limits itself to the granting of study loans to individuals. As new owners we want to continue with this trend. We request an urgent meeting with the Ministry of Finance to bring the close corporation in line with your requirements.
> Etc, etc."

This letter was copied to Heidenrych of NAMFISA.

[30] De Meillon alleges that she had not seen the letter of NAMFISA's Boni Paulino, dated 24 September 2002, until around the 3rd of March 2003. That letter reads as follows:

> "We take cognisance of your advices and agree that the Open Learning Group is no Micro –lender per se. However, as a group assisting students to pay off their study fees over a period of twelve months, at an agreed interest rate, OLGN is subject to the provisions of the Usury Act 1968 … and the Regulations issued by NAMFISA.
> It therefore follows, that the credit extension operations of OLGN should not exceed the maximum annual finance charges rates …'

[31] The applicant's case is that Paulino was incorrect in accepting de Meillon's contention that the applicant was not a micro-lender and that, in any event, the letter does not mention that the applicant is to be 'deregistered.' The applicant says that at no stage did it cease to carry on the business for which it was registered and that de Meillon's erroneous contentions in the past indicating the contrary did also not result in the applicant ceasing to carry on the business of micro-lender. How she could then in writing say to NAMFISA that the applicant is not a microlender and that the code they got was because none existed for their type of business, is not explained.

[32] It is the applicant's case further that at no stage did it receive a notice from the fourth respondent to cancel its registration as required by paragraph 5 (2) of the exemption notice. Relying on the exemption notice, the applicant alleges that the fourth respondent did not comply with paragraphs 5 (1) and (2) of the exemption notice and, therefore, could not cancel applicant's registration. The action of fourth respondent to 'deregister' applicant is therefore *ultra vires*, de Meillon states.

[33] De Meillon also denies the allegation by the fourth respondent in his letter of 10 March 2005 that the applicant, through misrepresentation, obtained the deduction code from the first respondent while it had already been deregistered on 24 September 2002. De Meilon then states:

> "The applicant was at no stage given any hearing of any nature prior to and in respect of the revoking decision .Considerations detrimental to the applicant were not disclosed to the applicant prior to the making of the revoking decision."

The applicant's case is that it was entitled to be heard by the respondents before a decision adverse to it was taken ; that it is not clear on what statutory basis the third respondent purported to take the revoking decision;

or what facts the first or other respondents took into consideration in taking decisions adverse to its interests.

The first to third respondents' case

[34] In opposition to the review application , Heydenrych , who is responsible for the administration of the third respondent's payroll deduction facilities involving about 80 000 public servants, says the Ministry of Finance is responsible for granting stop order deduction facilities to financial service providers such as insurance companies and banks. In return, the Ministry received a commission. That commission payable by holders of deduction codes is no longer payable to the Ministry but to an independent third party (APS6[6]), specially contracted by the Ministry to administer its deduction codes through a computer- based system. Heydenrych says that there is a high demand for deduction codes, caused primarily by the mushrooming of money lenders. This, she says, resulted in the third respondent requiring 'all institutions afforded deduction facilities to enter into business agreements aimed at formalizing the granting, administration and termination of such facilities'. The applicant entered into one such agreement and, in terms of it, one could only be afforded a deduction facility if that person 'is registered and remains registered as a microlender with NAMFISA'.

[35] The first to third respondents' case is that the applicant, in terms of the business agreement, represented and guaranteed that it was registered as a microlender and in good standing with NAMFISA. Heydenrych says that she learnt in correspondence7[7] from NAMFISA to the first respondent that the applicant had previously advised NAMFISA that it is not a micro lender but a credit grantor and that NAMFISA accepted that contention. She avers she was shocked by that because those facts were never disclosed to the first to

[6]6 Anvil Payment Services (Pty) Ltd.
[7]7 This is the letter dated 22 February 2005 by the fourth respondent to the first explaining that based on such assertions by the applicant, NAMFISA acceded to the deregistration of applicant as a micro lender and then draws first respondent's attention to the deduction code facility.

third respondents by the applicant. She avers that at the time the applicant entered into the business agreement those facts had already existed and had the third respondent known of them (I assume through disclosure by the applicant) 'it would not have entered into the business arrangement for the deduction facility with the applicant.' Heydenrych states that the fact that the applicant, in the business agreement, guaranteed that it was duly registered and in good standing with NAMFISA, was therefore a misrepresentation intended to induce the third respondent to enter into the agreement aforesaid. She says that it was because of this misrepresentation that the third respondent terminated the business agreement with applicant in the letter of 9 March 2005.

[36] What is next testified to by Heydenrych (paragraphs 5.3 – 5.6) is at the heart of this matter. In essence what she says is that the third respondent's letter of 9 March 2005 revoking the deduction code amounts to the exercise of a common law right to rescind the agreement entered into between the parties based on the misrepresentation of the applicant; the contract entered into between the parties being a 'purely commercial' arrangement beyond the scope of administrative law review as the third respondent was not acting from a position of authority when it entered into the agreement, and did not purport to cancel the contract in the exercise of a public duty, or the implementation of legislation. For this reason, she says, the relief sought by the applicant, based as it is on article 18 of the Namibian constitution, is wholly inappropriate and should instead have been founded on an action procedure for breach of contract. Article 18 of the Constitution provides as follows:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon 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."

[37] On behalf of the first, second and third respondents it is stated that allowing access to the third respondent's payroll by means of a deduction code, is entirely discretionary and not something it is by law compelled to do; and that it is done in pursuit of a commercial activity by the third respondent – and that rights and obligations of the parties are governed by the terms of the business agreement. How a deduction code which could be terminated for valid commercial reasons could be central to applicant's business, the respondents say, is particularly 'unfathomable' and only shows that it is a business fraught with risk. The respondents also say that the deduction code is not the only means by which applicant could recover its loans from the debtors.

[38] The respondents deny that the alleged meeting with microlenders to which the applicant was allegedly invited took place at all, or that the matters applicant says were discussed there, were indeed discussed.

[39] The respondents also attach a letter dated 15 July 2002 to microlenders amending the initial conditions of the approval given for the use of the payroll deduction facility to the applicant. The applicant received one. This letter is instructive in that it unilaterally changes the conditions under which the deduction code is given and carries the heading **"REVIEW OF EXISTING DEDUCTION FACILITY: MICRO LENDER and continues:**

1. The Ministry has concluded <u>its investigation into the existing deductions facilities on our payroll on both registered and unregistered micro lenders as well as new applicants and established that:</u>

    1.1 The current payroll system, as administered by the Ministry of Finance was implemented in 1976. The payroll is currently running at maximum capacity and faces severe constraints with regard to the number of employees and total number of deductions that it can be process efficiently. (Total of 360 000 transactions are being processed monthly for 80 000 officials.)

1.2 Lack of proper appraisal of lenders resulted in over commitment of staff to debt and ultimately in zero salaries.

1.3 The above calls for urgent measures to be taken in order to protect the payroll systems' integrity and capabilities.

2. The conditions attached to your deduction code has therefore been amended as follows:

2.1 Payment of commission/administration costs of N$13.00 per person, per transaction, per month;

2.2 Submission of quarterly and annual reports;

2.3 Limitation of number of transactions to 1 200 per month.

3. The abovementioned facility may continue for a period of one year.

4. Notice has also been given to all new applications that the ministry will not be able to approve more/new deduction code facilities and you are therefore requested to adhere to the set conditions as Treasury will enforce strict control over the existing deduction code holders.

U. MAAMBERUA
PERMANENT SECRETARY: FINANCE".

(emphasis supplied)

[40] First to third respondents aver that all existing deductions code holders (including the applicant) were automatically granted access to the third respondent's computer –based deduction code facility on condition that they conclude written agreements with the fourth respondent and that they were not required to submit a new application with the Ministry of Finance for the grant of deduction codes.(There is no explanation what would have happened if existing deduction code holders refused to sign the agreement , although from the averments in the passage quoted below it is clear that the codes would not have been extended in that event.) The respondents also deny that there was any screening process conducted before the introduction of the formal business agreement. Heydenrych then says:

> "12.10 I must emphasize that at no stage prior to, during, or after the implementation of the PDMS was there an interruption in deduction facilities availed to the applicant. Applicant and others who had pre-existing deduction facilities were in a privileged position, and were not in a danger of losing such facilities due to the changes brought about by the PDMS, subject thereto that they had to conclude a business agreement with the third respondent." (My underlining)

[41] The respondents deny that the applicant at all times continued to regard itself as a registered microlender. As regards the reference to "statutory requirements" in the revoking letter of 9 March 2005, the respondents say that the reference to "statutory" is erroneous and should have been a reference to "contractual" requirements as no such statute exists and that the State Finance Act[8] does not have any provision with direct bearing on this type of contract. (I pause here to mention that I understand this averment to mean that the business agreement is not executed on the authority of any law.)

[42] As regards the failure to afford an opportunity to the applicant to be heard before the alleged deregistration, the respondents say, in effect, that it was not necessary as fourth respondent only did that which applicant had asked for.

[43] The respondents say that the applicant obtained the deduction code on the basis that it was a microlender, and guaranteed (in the business agreement) it was a microlender registered as such with NAMFISA; but considering the applicant repeatedly informed the fourth respondent it was not, the respondents say that the third respondent entered into the agreement with applicant (for a deduction code) due to a misrepresentation and fourth respondent was entitled to terminate it for that reason. Since the

[8] 8 Act No 31 of 1991.

agreement was terminated in the exercise of a right deriving from contract, the respondents say, the applicant could not be afforded a right to be heard.
[44] The respondents say that the applicant failed to make use of the dispute resolution mechanism provided for in the agreement entered into between the parties - which document they say should govern the relationship between the parties and the operation of the deduction code.

The fourth respondent's case

[45] An affidavit on behalf of the fourth respondent is deposed to by Rachel Metzler. She was closely associated with the present matter from inception. She says that the applicant is a "financial intuition" as contemplated in s 3 of the NAMFISA Act read with the Usury Act. The applicant therefore falls for regulation by NAMFISA.

[46] Metzler explains the interaction between the NAMFISA Act and the Usury Act and submits that:

a) the Minister had duly exempted certain money transactions from some of the provisions of the Usury Act in terms of the exemption notice ;
b) the exemption notice defines a micro loan transaction and exempts it from the provisions of the Usury Act on condition the person advancing the loan is registered as a micro lender with the Registrar and at all times complies with the exemption notice; and that should a micro lender no longer comply with the exemption notice, its money lending business would no longer be exempted from the provisions of the Usury Act. (The respondents' case being that by declaring it was not a microlender, the applicant voluntarily brought itself under the *regime* of the Usury Act and ceased being a microlender.)
c) the benefit of conducting a micro loans business under the exemption notice is that a higher finance charge rate applies;

d) registration as a micro lender is not compulsory or compellable under law and is voluntary and a micro lender not complying with the exemption notice is subject instead to the provisions of the Usury Act.

[47] Apart from these legal consequences, Metzler says, registration as a micro lender is also advantageous from a business perspective as one could enter into a business agreement with the Ministry of Finance for a deduction facility.
She says that the registration as a micro lender is a pre-condition for access to a deduction facility, in terms of the agreement entered into between the third respondent and the applicant on 22 August 2003. She also says that the Registrar, in the performance of his powers and responsibilities under the Usury Act, acts as an administrative official and that his decisions are therefore subject to review.

[48] Metzler says that the applicant's assertions that it was not a microlender meant that the applicant was never a micro lender and did not operate as such. She then makes the following assertion:

> "8.3 The applicant thereby informed Namfisa that it never was a micro lender and that it did not operate as such, notwithstanding that the applicant was registered as a micro lender already in 2000."

[49] Metzler then says that the procedure provided for in paragraph 5 of the exemption notice for cancelling the registration of a registered microlender, does not apply to an entity which requests the Registrar to cancel its registration as microlender on the basis that it is not a microlender since inception; and that the fact that on 27 July 2000 applicant obtained a deduction code from the Ministry of Finance, was unknown to NAMFISA.

[50] Metzler also asserts that because of the teething problems attendant upon NAMFISA taking over in 2001 the responsibility of supervising financial institutions, 'the database did not flag microlenders not registered anymore, with the result that communication has been directed to them where it concerned the entire micro lending industry.' She offers this as the reason why the applicant remained on the database of registered microlenders after cancellation of such registration by NAMFISA at applicant's request in September 2002. Metzler also explains this as the reason why applicant received p*ro forma* letters intended for microlenders. This, she says, also explains the invitations to the applicant to attend the meetings called with the microlending industry. Metzler denies NAMFISA treated the applicant as a microlender after it stated that it was not one.

[51] Metzler says that after the applicant's second letter saying that it was not a microlender; the fourth respondent never required the applicant to pay statutory levies. It was for this reason that the fourth respondent never issued summons for arrear levies as he was entitled and empowered to do under the NAMFISA Act[9][9]. She also denies the applicant continued to consider itself as a microlender after saying it was not.

[52] The first respondent (Calle Schleitwein) as the incumbent Permanent Secretary of the Ministry Finance deposes to an answering affidavit in opposition to the review application. He seeks to deal with the merits of the review application and describes his affidavit as the 'formal' answer on behalf of all the respondents and incorporates, by reference, the contents of the affidavits deposed to by Heidenrych and Metzler in opposition to the urgent interim relief.

[9]9 Section 25 provides for different kind of levies and the power is given in s 25(4) for NAMFISA to recover unpaid levies through judicial process.

[53] Schlettwein says it is “irregular” for the respondents to continue to avail a deduction code to the applicant in view of the applicant having forfeited the status of microlender. He in ,essence, repeats the argument that the decision to revoke the deduction code is not an ‘administrative act’ and that the prior decision deregistering the applicant only gave effect to the wishes of the applicant and that the fourth respondent therefore did not take an administrative decision.

[54] Schlettwein confirms what is deposed to by Heidenrych and Metzler on the merits of the review application. He says that initially the Treasury Instructions applied by the Ministry of Finance did not allow for any deduction facility to be granted to micro lenders, but that this position changed and that a new dispensation was introduced, through the amendment of Treasury instructions, whereby formal contracts could be entered into between the Ministry and different financial service providers for the granting of deduction code facilities. This appears to be in conflict with the respondent’s version as summarised in paragraph 41 above.

[55] Schlettwein says that Treasury Instructions are not legislative instruments but a mere recordal of the internal workings of Treasury. He says that the Treasury Instructions do not create rights and obligations between the Government and an outside party. In so far as they relate to the payment of salaries by the Government, he says, Treasury Instructions form part of the employment relationship between the Government, as employer, and its employees, and do not operate for the benefit of third parties such as the applicant.

[56] Schlettwein says that NAMFISA’s database shows applicant as a credit agreement company and not a microlender, although the internal administrative system of NAMFISA failed to have the applicant removed from the database as a microlender after deregistration.

[57] To buttress the case that the applicant was not only deregistered as a microlender but was also not treated as one, Schlettwein adds that NAMFISA did not require applicant to submit prescribed returns as a microlender; did not require the applicant to pay prescribed levies and did not subject applicant to routine inspections to vet its contracts with customers; all, he says, proving that applicant was never regarded as a microlender by the fourth respondent after it said so itself.
[58] Schlettwein also makes the point that the fact de Meillon on 1st March 2005 (after being told that the applicant had been deregistered) wrote to apply for the status of microlender is proof positive that she accepted the applicant was not a microlender. He also says that the letter of 3rd March 2005 by Quinton van Rooyen to the Ministry also confirms he accepted that the applicant was not a microlender. He says that he revoked the deduction code enjoyed by the applicant because of the applicant's misrepresentation which vitiated the consensus between the Ministry and the applicant. The agreement was void because of the misrepresentation and the deduction code fell away.

[59] Schlettwein says that the applicant is not a microlender for another reason- and that is because it engages in *credit transactions* and not in *money lending transactions* as defined in Item 1 of the exemption notice. As a credit grantor, applicant could not be registered by NAMFISA as it would not benefit from the exemption notice and was instead subject to the Usury Act *regime.* He continues that the business of applicant is in the nature of a *credit transaction* as defined in s 1 of the Usury Act, as no cash is paid to the client by the applicant or to any one: applicant only collects debts of the company and does not extend loans. Schlettwein also adds that the applicant did not levy interest at a microlenders' rate. He also says that the reference by NAMFISA to applicant as microlender in its 2004 annual report was done in error.

[60] Schlettwein denies that applicant ever submitted documents to NAMFISA for screening or that the Ministry ever requested a screening process and specifically denies a screening process took place before the applicant was made to sign the business agreement.

[61] De Meillon deposed to a further affidavit to deal with the answering affidavit of Schlettwein, and in it she says that the Treasury Instructions are a form of subordinate legislation. She says that the business agreement is derived from statute, being the State Finance Act; ss 23 and 24 of which are specifically referred to in the business agreement in Clause 1.1.4. De Meillon persists that the Treasury Instructions create rights and obligations between the third respondent and third parties such as applicant.

[62] De Meillon says that it is clear from the affidavit of Schlettwein that Heidenrych, by her own admission, investigated the issue of whether or not applicant was a microlender following a meeting of 19 April 2002, and concluded that applicant was still a micro lender. She adds that the admitted amendment of Treasury Instructions- to facilitate deduction codes - points to them being of a legislative character.

[63] Van Rensburg, in so far as it is relevant to the review application, denies that he took any administrative decision concerning the applicant which is reviewable, and relies on the same grounds advanced by the other deponents on behalf of the respondents.

[64] De Meillon deposes to a Replying Affidavit dealing with Schlettwein’s affidavit. In it she takes the view that the first respondent cannot now, in the answering affidavit, change the basis for the decision-making by saying that the decision to revoke the deduction code was founded in contract, when , previously, it was said to be founded on statutory authority and says that shift in stance justifies the grant of the relief sought.

[65] De Meillon avers that the allegation in the founding papers that in saying that the applicant was not a microlender she failed to conceptualise the different functions of the entities within OLGN Group, is not denied by the respondents and that the fourth respondent himself, as recently as March 2005, confused the different entities in OLGN, as exemplified by his reference to the applicant as Open Learning Group Namibia CC (something which does not exist) and the applicant as a 'company' when it is in fact a close corporation. She goes on to say that the fourth respondent misled the third respondent by letter of 21st February 2005 which resulted in the revoking letter of 9 March 2005.

[66] Applicant submits that Article 18 of the Constitution applies to the decision-making regarding the deduction code; that the applicant had no choice in the wording of the agreement of 22 August 2003; that the cancellation of the agreement cannot affect vested rights, and that even if the agreement were cancelled, applicant would be able to continue to use the deduction code in respect of the agreement pre-dating the business agreement. Applicant also maintains that the terms of the agreement of 22 August 2003 were prescribed by the third respondent unilaterally, implying an unequal if coercive relationship.

[67] De Meillon also says that any representation made to second and third respondents in relation to the applicant being in good standing with NAMFISA, was made by the fourth respondent after completing the screening process, as fourth respondent submitted the document to second and third respondents and assured the second respondent that applicant complied with the requirements in order to enter into the business agreement. Applicant therefore denies that it made any representation to the third respondent which could be said to have resulted in being false and therefore

necessitating, on the part of the first respondent, the revocation of the deduction code.

[68] De Meillon also says that the admission by the respondents that the reference to ‘statutory’ in the letter of 09 March 2005 is erroneous, should result in it being reviewed as there is in that letter no reference to cancellation of an agreement or to any misrepresentation on applicant’s part.

[69] As for the allegation that the applicant should have relied on the dispute resolution clause in the business agreement after the deduction code was revoked, applicant says that nothing prevents the Court from reviewing the decision revoking the deduction code pending the arbitration proceedings provided for under the agreement.

[70] De Meillon persists that applicant never submitted a certificate of good standing with NAMFISA to the first respondent, and that the allegation that the applicant did so is based on hearsay and liable to be struck.

[71] Applicant maintains that the fourth respondent failed to show who in fact (and when) took the decision to deregister the applicant and that that is fatal to the case of the respondents that the applicant was ever deregistered.

[72] None of the parties applied for the hearing of oral evidence to resolve any disputes on the facts. Therefore, where genuine disputes of fact exist they have to be resolved on the basis of the facts set out by the applicant which are not (or cannot be) disputed. The facts set out by the respondents must be accepted, unless they are so far-fetched that they can be rejected on the papers.

The deregistration (or cancellation of registration as microlender)

[73] This aspect of the case can be easily disposed off. The respondents take the attitude that the applicant ceased being a microlender - it would appear when Paulino (of the fourth respondent) in his letter of 24 September 2002, in response to the assertion by de Meillon that the applicant was not a microlender, agreed that ‘’ *Open learning Group is no Micro-lender per se. However, as a group assisting students to pay off their study fees …at an agreed interest rate, OLGN is subject to the provisions of the Usury Act 1968… and the Regulations issued by NAMFISA. It therefore follows, that the credit extension operations of OLGN should not exceed the maximum annual finance charges rates…*’’.

[74] The respondents say that the fourth respondent, in so doing, only gave effect to the wishes of the applicant and took no decision that could be reviewed. In the written heads of argument Mr Louw, for the respondents, pursues this line of reasoning in the following way:

“There was no administrative act taken…a fact was merely recorded. The recordal of a fact is not the making of a decision…’’ (Vide paragraph 71 of the heads of argument.) Earlier on (vide paragraph 37 of the same heads of argument) Mr Louw argues: “In so far as NAMFISA is concerned, the essential case of the respondents is that NAMFISA did not take an administrative step **when it deregistered** the applicant. All it did was to comply with a special request of the applicant’’. To say that no administrative step was taken, while at the same time conceding that fourth respondent ‘deregistered’ the applicant is a contradiction in terms. Besides, fourth respondent’s letter of 24 September 2005 states in relevant part:

> “Also , since OLGN is regarded as a credit grantor in terms of section 1 of the Usury act …they have not been charged any levies as payable by micro lenders, <u>as they have been deregistered as a micro lender with effect from 24 September 2002,</u> based on your advice”. (Emphasis supplied)

[75] This is repeated in fourth respondent's letter of 10 March 2005 to applicant where it is said, *inter alia*,

"7. Also, in support of your application to the Ministry of finance, you used the defunct licence …dated 10 July 2000. That approval was revoked on 24 September 2002 when OLGN was deregistered as a Microlender." (emphasis supplied)

How, in the light of all this, Mr. Louw can persist that the fourth respondent did not 'deregister' the applicant, is beyond me. I am satisfied that the applicant made out a case that a decision was taken by the fourth respondent 'deregistering' it as a microlender.

[76] The applicant had been properly registered as a microlender on 10 July 2000. Could that status be forfeited in the manner suggested by the respondents? I think not. Mr Smuts for the applicant submits, and I agree, that the statutory scheme provides for a very specific procedure according to which a registered microlender may lose that status: vide paragraph 5 of the exemption notice. It is common ground that the fourth respondent never followed that procedure. The fourth respondent takes the view (as do the other respondents) that it was not necessary. They are wrong. The applicant remains a duly registered microlender. It can only lose that status on the grounds and in terms of the procedure laid down in paragraph 5 of the exemption notice. Paragraph 5 is couched in peremptory terms and I see nothing in the exemption notice, or the NAMFISA Act, that it must not have that effect. Besides, it is not the respondents' case that there has been substantial compliance with it. On the contrary, they admit a total failure to follow the cancellation procedure. A decision or action will generally be *ultra vires* if there has been a failure to observe a mandatory procedural requirement. In *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113, officials demolished dwellings of squatters without giving the requisite notice and their action was held to be unlawful. By parity of reasoning, a 'deregistration' or (to use the phraseology of the exemption notice)

cancelling the registration of a microlender without complying with the provisions of paragraph 5 of the exemption notice, is *ultra vires*.

[77] It is common ground that the applicant did not meet its obligations as microlender, and successfully evaded the financial consequences of being a microlender while seeking to retain the benefits of it, by saying that it was something other than what, in law, it was. I have to accept that the fourth respondent and NAMFISA advised the applicant that they accepted that the applicant was not a microlender. The question, however, is did that have the result that the respondents contend for, i.e. that in law the applicant ceased to be a microlender? For the reasons set out above, the answer must be in the negative.

[78] I am satisfied that the applicant had made itself guilty of conduct which could, subject to the fourth respondent complying with the clear terms of paragraph 5 of the exemption notice, have resulted in the applicant being stripped of its status as a microlender, for, by de Meillon's own admission, applicant was acting in *fraudem legis* in avoiding paying levies it was obliged to pay as a microlender. (Conduct is in *fraudem legis* when it is 'designedly disguised so as to escape the provisions of the law'*: Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 548.)* However, the fact that the applicant professed that it is not in fact a microlender does not alter the position that it remained one in the eyes of the law.

[79] Until its registration as microlender ceased in the way prescribed by law, the applicant was a microlender and the fourth respondent could still have exacted due compliance (by the applicant) with all the obligations flowing from that status. If the reasoning of the respondents is carried through to its logical conclusion , i.e. that the mere assertion that the applicant is not a microlender made them lose that status without the need for cancellation of registration, they could- by a mere say so- avoid the obligations the law

imposes on them. A Court of law accepting such reasoning is dangerous as it may set a precedent to be invoked by others wishing to avoid onerous obligations imposed by law as a consequence of assuming a certain status, through registration, by merely saying they are not what they were originally registered as.

[80] The fourth respondent is therefore not entitled to act as if the applicant is not a microlender; and to the extent he or his subordinates took decisions to denude applicant of that status, they acted *ultra vires* their powers. The only way they can and could achieve that result is by following the procedure provided for in paragraph 5 of the exemption notice for which there is, *prima facie*, a very strong case and a proper basis in law. I cannot agree with Mr Louw for the respondents that the fourth respondent only gave effect to the wishes of the applicant and for that reason the decision should not be reviewed or set aside. That would render paragraph 5 of the exemption notice a dead letter and of no consequence. The relief directed at the review and setting aside of the fourth respondent's conduct exemplified in its letter of 24 September 2003, 21 February 2005 and 10 March 2005 must therefore succeed. This finding and conclusion make it unnecessary for me to resolve the monumental differences that have arisen on whether the fourth respondent at all events treated applicant as a microlender in spite of it saying it was not one.

The revocation of the deduction code

[81] The next issue I must resolve is the decision of the first respondent to revoke the deduction code granted to the applicant. Central to the respondent's case in opposition to the challenge to the revocation of the deduction code, is the argument that the revocation was merely an exercise of a common law right to terminate a contract on account of a misrepresentation by the applicant.

[82] My conclusion that the applicant throughout remained a microlender must affect the respondents' stance that the revoking letter of 9 March 2005 was necessitated by the misrepresentation of the applicant. The applicant remained a duly registered micro lender and there could have been no misrepresentation of that fact.

[83] I apprehend though that that is not the end of the matter, as the second limb to the respondents' argument appears to be that even if there was no proper basis, under the agreement, to terminate the deduction code, the proper way for the applicant to proceed was by way of action for breach of contract; for, the argument goes, the relationship under which the deduction code exists is one of a purely commercial nature and not in the exercise of a public duty or implementation of legislation. Before I deal with this argument, I first need to dispose off one matter on which there is a dispute.

The reference to 'statutory requirements' in letter of 9 March 2005 (the revoking letter)

[84] In the case at bar, the first respondent maintains that he terminated the business agreement concluded with the applicant because of a misrepresentation. As must by now be obvious, the revoking letter points to non-compliance with statutory requirements as the reason for the withdrawal of the deduction code. The first respondent now maintains that is wrong as he had in mind (or should have referred to) applicant's non-compliance with 'contractual' requirements. He maintains that he is a layman and made a mistake. I find this difficult to accept. This version is far-fetched and stands to be rejected on the papers for the following reasons: the respondents' case is that the business agreement was a major shift in redefining the relationship between the third respondent and microlenders in how their relationship concerning deduction codes was to be dealt with thenceforth. If I understand the respondents' case properly, the deduction code now exists only under and by virtue of the business agreement. Legislation has nothing to do with

it. Could the first respondent, in circumstances where the agreement assumed such a central place, have made a mistake about whether he purported to act in reliance thereon or in the exercise of a public power? I think not.

[85] I accept the first respondent is a layman in the sense he is not a lawyer, but he is no ordinary layman: he is the administrative head of perhaps the most technical and complex department of state - the ministry of finance - administering a myriad of very technical and complex legislation and international instruments in, especially, matters fiscal. Did he really not know the difference between when to refer to a contract and when to refer to a statute? Again I think not.

[86] Besides, the first respondent had at his disposal and for the asking, legal advice from the office of the government attorney on the proper thing to do in the situation. Assuming he would always act as the *diligens paterfamilias* would do in such a situation, I must assume that if he needed legal counsel before acting in the way he did because he thought the matter involved a legal difficulty, he would have done so. Since he did not seek such legal advice at the time he took the revoking decision, it means he considered his position and concluded he did not require such advice. In those circumstances, I cannot accept that the first respondent was in error or inadvertently referred to ‘statutory requirements’ because he is a layman.

[87] I am accordingly compelled to reject the first respondent’s version that in revoking the deduction code he relied on private law remedies. Having, as he did, relied on statute or a public power for his action, and to the extent that he did not identify the relevant statutory provision and the respects in which the deduction code was not in compliance therewith and who was to blame for that, he was acting unreasonably. (The revoking letter states that the deduction code is not in compliance with statutory requirements: there is

no mention in it of any breach on the part of the applicant of any statute or condition under which it was granted.) What exactly the fourth respondent was doing is therefore unclear if one accepts, as I do, that there was no misstatement by the applicant in respect of its status as a microlender.

[88] Administrative action must be clear in order to be valid, and the action of the fourth respondent fails the test of clarity as it is ‘vague’ and ‘uncertain’ (See: Lawrence Baxter *Administrative Law (1984)* p 531, and the authorities there collected.)

[89] In revoking the deduction code the first respondent was also acting in clear breach of the most basic tenet of the law that a person must be given an opportunity to be heard (*audi alteram partem*) and to be informed of considerations adverse to them before any decision affecting them is taken. The principle is so trite as not to require any authority.

[90] It is common cause that the applicant was not afforded the opportunity to be heard before the deduction code was revoked. Mr Louw for the respondents conceded in argument that once I find that the decision revoking the deduction code amounts to administrative action that would be the end of the matter as there was no compliance with the *audi rule.* I agree. On that ground alone this Court can set the decision aside without considering the other review grounds relied upon by the applicant. Therefore, unless the first respondent satisfies me that there are other reasons why the decision should not be set aside in spite of this, it must give way.

[91] Mr Louw’s fallback position is that the revoking decision is not an ‘administrative act’ as it arose in consequence of a ‘purely commercial’ arrangement between the third respondent and the applicant. He argues that the Treasury Instructions make provision for an employee of the third respondent to request an accounting officer, through a stop order facility, to

deduct monthly amounts from such employee's salary and pay to a specified beneficiary, such as a creditor. That the third respondent as employer does so at the direction of the employee and not a third party such as the applicant. That the third respondent retains the right to determine in what circumstances it will deduct amounts from the salary of the employee for payment to third parties such as applicant; and that the employee has no right to claim that deductions be made and paid over to third parties. That there is no statutory provision (the proper submission should be that there is no statutory compulsion) for the third respondent to pay the remuneration of employees to third parties. That there is no law enjoining the state to bind itself to third parties to pay over the salaries of employees to such third parties; and that everything is triggered by a contractual agreement between the fourth respondent and the employee in terms of which the employee mandates the third respondent to pay specified amounts to third parties such as the applicant, but that this does not mean a contract comes into existence between the third respondent and the third party.

[92] Mr. Louw then submits as follows:

> "The business agreement would merely facilitate the flow of funds from the state as employer to the beneficiary of the employee. I is a mere systems agreement and does not create any rights on the part of the microlender to claim that any specific amount be paid over by the employer to the micro lender. The employee must always first authorise the deduction.''

He submits further that:

> "The benefit which accrues to the micro lender through the agreement is that it obtains payment of the debt owing to it by the employee from the employer. The quid pro quo the State receives is that the whole of the deduction system relating to micro lenders is taken up by Avril and the micro lenders pay Avril for the service.
>
> The payroll deduction facility is not a function of government , is not a feature of government , is not something that government procures for itself , does not concern a governmental function but is merely a side benefit , triggered by the employee

> requesting the employer to pay over a part of the monies the employer owes to a third party.''

Elsewhere Mr Louw argues:

> "The relationships between the Ministry and APS on the one hand and between the Ministry and the micro lenders on the other, are purely contractual in nature. No micro lender has any right to demand and to be granted deduction codes by the Ministry''.

[93] I do not understand Mr. Louw to be submitting that the granting of deduction codes by the third respondent is not sanctioned by law. I think Mr Louw's point rather is that third parties such as the applicant have no right to demand a deduction code in virtue of a right given by statute. For present purposes I will accept that proposition to be legally sound. The granting of deduction codes therefore seems to me to be some kind of 'benefit' or 'concession' (and I use the terms advisedly in the sense of denoting a precarious advantage) granted to financial service providers by the third respondent at the behest of its employees. That said, subject to the rider that it is not contrary to any existing law, or is not *contra boni mores*, the absence of a statutory provision requiring the grant of a benefit by a public authority does not make such grant any less an exercise of a public power[10] which is subject to judicial review.

[94] It cannot be correct that just because a benefit or concession granted by a public authority is not prescribed by statute, a public authority can act capriciously and whimsically in respect of it. Where a public authority so acts as to create or bestow a benefit or concession- in circumstances where it is

[110] It is not inconsistent with the Constitution to recognize that the State (the same cannot be said of other creatures of statute) because it possesses legal personality has, through its government departments, inherent power to conclude contracts: *Minister of Home Affairs American Ninja v Partnership Santam Versekeringsmaatskappy Bpk* 1964(1) SA 546. *Diedericks v Minister of Lands* 1964(1) SA 49 (N). I do not share Pretorius' misgiving (Daniel Malan Pretorius '' The defense of the realm: Contract and natural justice' (2002) 119 SALJ 374 at p 384) that this inherent power may not have survived the Constitution. To hold that it did not survive the Constitution will paralyze the state machinery and result in administrative atrophy of unimaginable proportions.

under no statutory duty to do so - those enjoying such benefit acquire a legitimate expectation to be heard before any action adverse to the enjoyment of that benefit is taken. Put simply, the public authority granting the benefit must respect the dictates of the constitution; it must act fairly and reasonably. The reason is simple: relying on such benefit the grantee may organise his or her affairs in reliance on such benefit or concession – affairs which may be negatively affected by a summary withdrawal of the benefit or concession. That, *in casu*, the applicant, relying on the benefit of the deduction code, organised its affairs to its financial advantage - and that a potential disruption would ensue in the wake of its withdrawal - is amply demonstrated on the papers. As is clear from the agreement, the applicant is also required to invest resources in a 'social upliftment programme'. It therefore assumed a financial risk in entering into the agreement. The applicant therefore had a legitimate expectation to be heard, assuming the withdrawal of the code constitutes administrative action.

[95] I still need, therefore, to consider whether the revoking decision is an 'administrative act'. In *casu* that inquiry necessarily involves considering whether our law recognises, in the sphere of the actions of government, the 'purely commercial decision' versus 'administrative decision' dichotomy. I am not aware of any post 1990 Namibian decision, and none has been cited to me, which deals with this issue. The constitution does not deal with the issue in those specific terms either. I have already quoted article 18 of the constitution which requires that administrative officials shall act fairly and reasonably. I need to mention at the outset that the constitution does not mention the nature of the action in relation to which the administrative officials must act fairly and reasonably. What it requires is that when administrative officials act as such, i.e. as administrative officials, they must act fairly and reasonably.

[96] No doubt, the common law informs, but does not limit, the exact scope of article 18. That much is now settled: See The *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107(SC) at 170, and *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) at 226 -29. In context, Mr Louw's submission amounts to this: in concluding the business agreement granting the deduction code and later revoking it, the first respondent was not acting as an *administrative official* and must be deemed to have been acting as a private person. It postulates that where the State enters into contract, not acting from a position of authority, unequal bargaining position, or in furtherance of, compliance with or implementations of legislation, it is not taking 'administrative action' , if in relation to that contract , it chooses to act in a procedurally unfair manner vis a vis the other contracting party. In other words, the State enjoys absolute freedom to contract and act as would private contractants and not be subject to a public duty to proceed fairly and reasonably.

[97] I propose, first, to survey comparative jurisprudence from selected jurisdictions with written constitutions containing a bill of rights such as our own.

Australia

[98] In Australia, in addition to federal legislation, i.e. *Administrative Decisions (Judicial Review Act)* Act 1977 (Cmwlth), the various states of Australia have specific legislation providing for 'judicial review' by the courts of administrative decisions of public bodies and officials. In a long line of cases, the courts in Australia have held that the actions of government agencies governed by contract, entered into with persons who then have cause to complain about those actions, must be impugned in pursuit of private law remedies – not by means of judicial review.

[99] In *Australian National University v Burns (1982) 43 ALR 25* the Court was called upon to decide whether a decision of a statutory body to dismiss an employee was a decision made 'under an enactment' such as was contemplated by the *Administrative Justice Review Act*, when there was a contract between the University and the employee and the University relied thereon in dismissing the employee. Bowen CJ and Lockhart J held (at 31-32):

> "In one sense every decision of the Council may be said to be made 'under' the University Act namely, in the sense of in pursuance of or under its authority. Section 23 is, in effect, the charter of the Council. It confers the widest powers upon the Council including the power of appointing professors and other University staff.
> ...
> Although s 23 confers no power in express terms to remove or suspend professors and others, such power arises from the more general powers conferred by the section on the Council after the express reference to the powers of appointment. In our opinion the control and management of the affairs of the appellant must include the suspension or removal of its deans, professors and others.
> Notwithstanding that s 23 was the source of the Council's power to appoint and dismiss the respondent in 1966, it does not follow that the decision to dismiss him was made under the University Act. It was not a decision to dismiss the respondent *simpliciter*. It was a decision to dismiss him on a particular ground namely, that he had become permanently incapacitated from performing the duties of his office. This was one of the grounds expressly provided for in condition 2(b) (ii) of the conditions of appointment which formed part of the respondent's contract of engagement. The University act prescribes no essential procedural requirements to be observed before a professor is dismissed and lays down no incidents of a professor's employment.
> In our opinion the rights and duties of the parties to the contract of engagement were derived under the contract and not under the University Act. Section 23 empowered the Council to enter into the contract on behalf of the appellant. Even if the Council , in considering the position of the appellant under the contract , might be said to be acting under s 23, the effective decision for dismissal taken and notified to the respondent was directly under the contract''.

[100] Therefore, "a grant of authority to make contracts and employ staff does not mean that when a staff member is dismissed for breach of contract the statute under which the

employer is operating has played a relevant part in the legal force or effect of the decision'', per Gleeson CJ in *Griffith University v Tang [2005] HCA* 7, para 18. In the *Griffith University* case, Gleeson CJ further said (in Para 81): '' If the decision derives its capacity to bind from contract or some other private law source, then the decision is not '' made under '' an enactment ''; and, in paragraph 82, the learned Chief Justice said: ''... a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment.''

Canada

[101] In *Douglas College v Douglas / Kwantlen Faculty Association and Others* [1990] 3 S.C.R. 570 , a constitutional question before the Court, was whether the Canadian Charter of Rights and Freedoms (equate it to Namibia's Bill of Rights) applied to the negotiation and administration of a retirement provision in a collective agreement which provided for mandatory retirement at age 65; and whether that provision or its application was ''law '' as that term is used in s 15 (1) of the Charter which prohibits discriminatory laws based on , amongst others, age. Two faculty members who were about to be retired filed a grievance challenging the collective agreement as violating s 15(1) of the Charter.

[102] The majority of the Court (Dickson CJ, et La Forest and Gonthier JJ) held, La Forest J writing on behalf of the majority:

> "... the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion , the simple fact is that the board is not only appointed and removable at the pleasure by the government ; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this

should not include its actions in dealing with persons it employs in performing these functions."(at 584).

His Lordship continued (at 585):

"... I am of the view that the collective agreement is law. It was entered into by a government agency pursuant to powers granted to that agency by statute in furtherance of government policy. The fact that the collective agreement was agreed to by the appellant association does not alter the fact that the agreement was entered into by government pursuant to statutory power and so constituted government action. To permit government to pursue policies violating Charter rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The transparency of the device can be seen if one contemplates a government contract discriminating on the ground of race rather than age. It may be that age can constitute a rational basis for a party to agree to contract out of certain rights and thus be open to the defences of waiver or estoppel or again that it may in certain circumstances constitute a reasonable limitation under s. 1. These are issues, however, which were not before the Board or the courts below and I refrain from commenting upon them further".

[103] Sopinka J's was a lone voice when he said (at 616 -17):

"While I do not dispute that 'law' is not confined merely to legislative activity, I am of the view that an element of coercion must be present even in government 'activity' or 'program' for such to be reasonably characterized as law. This element of imposition or prescription by the state distinguishes law from voluntarily-assumed rights and obligations.

...

The Charter was intended to protect the individual from the coercive power of the state and not against the individual's own voluntary conduct in dealing with state entities'''. (Emphasis provided)

[104] The Canadian approach differs from the Australian one in that the latter seems more readily to find that the pursuit of policy by an agency of government by means of consensual commercial agreement with a third

party, does not insulate the resultant government action from the purview of judicial review.

South Africa

[105] At the outset three decisions of the South African Appellate Division are worthy of special mention*: Mustapha v Receiver of Revenue, Lichtenburg 1958 (3) SA 343 (A), Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A) and Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA).* These cases (and the approaches they represent) are so ably summarised and analysed by Cora Hoexter in his article "*Contracts in administrative Law: Life after Formalism? 2004* SALJ pp 595-618.

[106] In *Mustapha*, the Minister, exercising statutory powers, had granted permission to occupy a piece of land to a litigant –a transaction recorded in an agreement which, amongst others, gave the Minister power to withdraw the permission by giving three months' notice at any time. The Minister withdrew the licence on the racial ground that the occupier was an Indian. On appeal the Appellate Division took the view that because the relationship between the Minister and the occupier was created by contract, the motive for the withdrawal was irrelevant because in giving the notice the minister was exercising a contractual right and not a statutory power. The relationship was seen as that between two private individuals where discriminatory motive is irrelevant.

[107] In a powerful dissent, Schreiner JA said the following in the *Mustapha* matter:

> Although a permit granted under s 18(4) of Act 18 of 1936 has a contractual aspect, the powers under the section must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of

> fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the subsection is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised…"

[108] Hoexter *op cit* (at 599) characterises the reasoning in *Mustapha* as the 'purely contractual approach' depicting

"… relations between the parties [a public authority and private contractant] as a matter of 'pure contract', a matter of consensus governed by private law alone. Here the legislative framework for the relations between the parties is made to seem unimportant, and the public nature of one of the parties is irrelevant. The duties of the parties are all seen to be contained in express or implied terms of the contract. The rules of administrative law are thus sidelined. They are applicable only if, and to the extent that, the parties have seen fit to include them, either expressly or impliedly, in that contract''

After a thorough review of the cases founded on the *Mustapha* reasoning, Hoexter *op cit* comments (at 602): "Purely contractual reasoning has often been used to defeat a claim to procedural fairness''.

[109] In *Administrator, Transvaal v Zenzile* 1991(1) SA 21 (A) errant employees who , in terms of express provisions of their employment contracts allowing the employer the right of termination on 24 hours' notice, were dismissed without procedural fairness, succeeded to have their dismissals set aside at first instance. The employer appealed maintaining the matter was 'purely contractual'. The Appellate Division was not impressed by that argument. Hoexter JA said (at 36 F-I -37 C):

> "…one then has the situation in which the respondents were summarily dismissed for misconduct by the decision of public officials representing the Administration who were empowered to do so by the provisions of the Code. The exercise of a statutory power to dismiss is not deprived of its intrinsic jural character simply because a corresponding right to dismiss exists at common law or that provision for it may be made in a contract. The common law or contractual right gains an added dimension and is invested with special significance by its express enactment in a statute. This consequence cannot be ignored; and it lays the foundation for the classic formulation of *audi* rule.
>
> One is here concerned with two separate and logically discrete inquiries. The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when, as here, the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant.
>
> …
>
> It is trite, furthermore, that the fact than an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing."

(Also see: *Administrator, Natal, & Another v Sibiya & Another* 1992 (4) SA 532 (A) at 538 G-I, and *Bullock NO v Provincial Government, Northwest Province* 2004 (5) SA 262 (SCA).)

[110] Coming against the backdrop of the above cases, *Cape Metropolitan Council v Metro Inspection Services* is a difficult act to follow. In that case, a public authority which had statutory powers to collect levies and arrears of the same (including the power to contract out that power), outsourced the power to collect levies to a third party, a body corporate, after calling for tenders, who performed the function of collecting levies on behalf of the public authority in consideration of payment of commission. The public authority later established, following a tip-off, that the body corporate had been submitting fraudulent claims for commission over a period of time and

summarily cancelled the contract whilst there was an investigation going on. The body corporate challenged the decision on the basis that it was not procedurally fair administrative action. It succeeded at first instance, but on appeal the Supreme Court of Appeal found against them. The Court reasoned in para 18 as follows:

> "The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution."

(For a critique of the Court's reasoning, see Pretorius *op cit* pp 389-90.) It is now accepted that *Cape Metropolitan*

> "...establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power." (per Cameron JA in *Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 at* para. 10).

[111] *Cape Metropolitan* confirms (para 17) that whether or not conduct is *administrative action* depends on the nature of the power being exercised, the source of the power, the subject – matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation.
That approach was sanctioned by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) 1, para 143. In my view it is the approach which applies to article 18 of the Namibian constitution.

[112] The decision of the Supreme Court of Appeal in *Logbro* is significant for the following reasons: first, it overrules the conclusion of the majority of the Court in *Mustapha* and confirms the dissenting judgment of Shcreiner JA *supra*. Second, it makes clear that *Cape Metropolitan* is not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. Third, it confirms that *Cape Metropolitan* is to be confined to its facts (as to which also see *Bullock* at 269.) Fourth, it makes clear that whether or not a public authority's exercise of powers enjoyed under contract renders it subject to the duty to act fairly, will depend on all the circumstances.

[113] In *Logbro*, a contract concluded by a public authority entitled it not to assign any reasons for the acceptance or non-acceptance of a tender , to withdraw the property placed on tender from such tender at any stage and without giving reasons , and not to consider tenders which did not comply with the requirements . The public authority relied on the contract. The Court held (per Cameron JA) at para 7:

> "Even if the conditions constituted a contract..., its provisions did not exhaust the [public authority's] duties toward the tenderers. Principles of administrative justice

> continued to govern that relationship, and [the public authority] in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights –such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation.''

[114] Pretorius *op cit pp 386 -87* highlights the dilemma confronting us in this branch of the law in the following way:

> "Although public bodies should be required, as a general proposition, to comply with the *audi* rule before deciding to terminate a contract, this rule should not be regarded as being immutable or of universal application. In determining when a public body should act in a procedurally fair manner in exercising its right to cancel a contract, the focus should be on the nature and purpose of the contract, rather than on the source of the power to terminate the contract. More specifically, public bodies should be permitted to terminate contracts of a 'purely commercial' nature, as opposed to 'governmental' contracts (or 'administrative agreements', as they are sometimes called), without having to hear the other party. It is necessary to differentiate between these two categories of contract because public bodies often operate in an ordinary commercial capacity. In practice, it may be difficult to distinguish between these too categories of contract, because governmental contracts often have a commercial dimension, and vice versa."

[115] Reading the cases and the literature it becomes very clear that it is important to appreciate the need for the state to be allowed sufficient space (what is sometimes referred to as the 'freedom of play in the joints of the executive') to operate in the business environment and to be governed by the ordinary rules of contract and private law generally; assuming the risks and enjoying the benefits available in private law. Setting aside a decision of a public authority is a matter not to be taken lightly. It more than likely will have serious budgetary consequences. In that sense, the Court's review jurisdiction is an extra-ordinary remedy[11]. Those who contract with the state

[111] See the Indian case of *Tata Cellular v Union of India* [1993] INSC 335 at para 86, quoting Clive Lewis ''Judicial Remedies in Public Law'' 1992, pp 294-95 as follows: "The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards reopening decisions, and lead to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision

must be alive to that reality. On the other hand, the state is *sui generis* in that whatever it does is for a public purpose and that imposes on it the duty to act fairly and in the public interest. For that reason its actions must always seek to give effect to the ethos of the Constitution. That may, in certain circumstances, require the state's actions in the commercial sphere be subjected to public law standards rather than those of the private law. Where does one draw the line then?

[116] In my view the solution does not lie in an approach which holds that as long as government's dealings with others is regulated or brought into being by contract , remedies can only lie in contract or private law for those who have cause to complain about a public authority's malfeasance arising from such relationship, just as it cannot lie in an approach which postulates that all actions of a public authority (including those founded in contract) will always be subject to judicial review , and that a claim that resort to judicial review is inappropriate as recourse should have been had to private law remedies instead, should always fail for that reason.

[117] The drift of authority from the leading South African cases which I have examined establish that each case must be approached on its facts in determining whether or not a particular decision of a public authority terminating a contract amounts to administrative action and therefore judicial review should avail. I follow that approach in interpreting article 18 of the Namibian constitution. I agree with Pretorius *supra* that the focus should be on the "*nature and purpose of the contract, rather than on the source of the power to terminate the contract*." Factors such as whether or not there was an element of coercion or prescription; whether there was equality of bargaining power; whether the agreement was required under statute or was

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invalidated whatever the administrative inconvenience caused. The courts nowadays recognize that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the courts' remedial discretion and may prove decisive. This is particularly the case when the challenge is *procedural* rather than substantive…"(my emphasis)

intended to carry out legislation- will be considerations to be had regard to. They cannot, by any means, be the sole or defining criteria for the intervention of the Court through judicial review. In view of the extra-ordinary character of this remedy, it is, in my view, just as important a consideration- in deciding whether judicial review should avail – whether the applicant for review could adequately and effectively have protected his rights through the pursuit of private law remedies. It should be borne in mind that Rule 53 offers tactical procedural advantages (e.g. disclosure by the respondent decision-maker of the record (discovery effectively) and the right to supplement, including the fact this sort of matters are heard more speedily). The Court should therefore also be concerned about giving an unfair advantage to a litigant by availing judicial review.

[118] The Court should refuse to come to the assistance of the party who comes to it on review if the review procedure amounts to an abuse of the process of Court. In circumstances where the applicant for review has a choice between proceeding on review or under contract, he must set out facts which satisfy the Court judicial review under Rule 53 is justified.

Principles to the facts

[119] The third respondent's actions leading to the agreement resemble what Sopinka J referred to in the *Douglas* case as an *imposition or prescription* by an administrative body characteristic of the exercise of *coercive power*. I therefore agree with Mr. Smuts' submission to that effect. I cannot accept Mr Louw's submission that this was an arms-length transaction in the sense that the applicant had a free choice to enter into it or not. True, the applicant can, through means other than the deduction code facility, secure payment from its debtors in the employ of the third respondent; but left with the option of relying on those rather risky methods as opposed to deduction code facilities which guarantee payment (as is

common cause), the choice to opt out was really illusory. It had to sign the agreement or forfeit the deduction code.

[120] The decision that there should be a *business agreement* in the first place (considering that until then microlenders using deduction codes did not have to enter into one) was that of the third respondent, taken unilaterally. The applicant had no say in it. The terms of the contract could not be negotiated either as the agreement makes clear in the clauses cited in paragraph 21 above. They were to be accepted as is or there would be no deduction code availed. This conduct echoes the words of Cameron JA in *Logbro* (at para. 11):

> "In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, 'acting from a position of superiority or authority by virtue of if its being a public authority' in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract." I apply this reasoning to the facts of the case at bar.

[121] Significantly, the agreement also constitutes the vehicle through which NAMFISA was to 'regulate' the applicant. That much is clear from an analysis of the agreement in paragraph 21 of this judgment. NAMFISA's regulatory powers are therefore incorporated in it. The effect of that has not been properly explained on the papers.

[122] For all of these reasons the agreement is, in my view, merely a memorial of a scheme whereby third respondent extends deduction codes to microlenders who are otherwise not entitled to claim it as of right. It hardly fits the description of a recordal of agreed terms. From the history of how the scheme has operated, I gain the impression that under that scheme

whenever circumstances changed, the third respondent would unilaterally change the terms under which deduction codes are availed. The agreement only formalises that scheme. I do not discern any departure from the scheme through the conclusion of the agreement. The contractual relationship between the parties is therefore 'framed' by the principles of administrative justice and governs first, second and third respondents' exercise of the rights derived from it.

[123] I conclude therefore that the agreement being relied upon by the first, second, and third respondents to avoid review proceedings is in reality an expression of government action. What it does under and through it is therefore subject to judicial review. Government is under no compulsion to grant deduction codes to financial service providers. If it does, however, it must realise that it creates, by that very act, rights and expectations in favour of those who rely on it and arrange their business affairs accordingly. Government cannot act capriciously and whimsically in relation to the relationship it creates with others as a consequence of choosing to grant deduction codes, just because it is extending a benefit for which there is no provision specifically made in law.

Applicant a credit grantor, not a microlender?

[124] I do not intend to deal in great detail with this aspect of the respondents' defence. It is best disposed off without regard to the merits of the allegation as it may in due course be properly ventilated at an appropriate forum. The applicant alleges that it gives loans to students and receives payment back over a period of time, with interest. The loans are used to further studies. It applied to the first or third respondent for registration on the basis that it was a micro lender and was registered as such. The scheme under which that registration took place has, as I have shown a very specific procedure for dealing with entities registered as such but who are no longer microlenders.

[125] The argument that the applicant is not a microlender can only avail the respondents as a sword, not as a shield. The respondents, in my view, can only sustain such argument in one of two ways: by seeking the cancellation of the registration of the applicant in terms of the exemption notice, or by seeking a declarator that the applicant is not a micro lender as it does not carry on such business. There is no application for declaratory relief before me. The transparency of the device becomes apparent when one considers the effect of upholding it. What it will mean, if upheld, is that the Court will hold that the applicant is not a microlender, while the decision registering it as such had not been set aside. Specific relief should have been sought asking the Court to declare, both that the applicant is not a microlender and that the decision in terms of which it was registered, be set aside. I do not think it is open to the respondents, when faced with a review application such as the present, to argue, without seeking specific declaratory relief in those terms, that the applicant is not a microlender. This defence too must therefore fail.

[126] Costs must follow the result. I wish to repeat though that this record is unnecessarily burdensome and the case could, on both sides, have been fought on a much narrower focus. There is also, as I earlier remarked, gratuitous *ex post facto* rationalisation on both sides. The Court’s displeasure must be shown with an appropriate costs order. In the nature of things such order will only affect the successful party.

[127] The conclusion that the deregistration and revoking decisions constitute reviewable administrative action implies that the applicant was entitled to interdict the same on an urgent basis. To the extent that it took steps to protect its rights on an urgent basis, the applicant is entitled to the costs occasioned thereby.

[128] Accordingly, I order as follows:

1. The decision by the first respondent contained in the letter dated 9 March 2005 revoking the deduction code facility enjoyed by the applicant on the payroll of the third respondent , is hereby reviewed and set aside as being unlawful and unconstitutional.

2. The decisions of the fourth respondent contained in letters dated 24 September 2002, 21 February 2005 and 10 March 2005 (or expressed in any other form), purporting to cancel the registration of the applicant as a micro lender, or having the effect of treating the applicant as if it is no longer a micro lender, are declared to be of no force or effect as being *ultra vires* and unlawful.

3. The respondents are condemned in costs, jointly and severally, the one paying, the other to be absolved. The costs allowed to the applicant shall be reduced by 20%.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT:	**Mr D. F. Smuts, SC**
Instructed By:	**van der Merwe-Greeff Inc.**
ON BEHALF OF THE RESPONDENTS:	**Mr P. Louw, SC**
	Assisted by Mr A Boesak
Instructed By:	**Government Attorneys**