REPORTABLE

CASE NO: A 24/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETRONEFT INTERNATIONAL	**FIRST APPLICANT**
GLENCORE ENERGY UK LIMITED	**SECOND APPLICANT**
and	
THE MINISTER OF MINES AND ENERGY	**FIRST RESPONDENT**
THE PERMANENT SECRETARY OF MINES AND ENERGY	**SECOND RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**THIRD RESPONDENT**
NATIONAL PETROLEUM CORPORATION OF NAMIBIA (PROPRIETARY) LIMITED	**FOURTH RESPONDENT**
NAMCOR PETROLEUM TRADING & DISTRIBUTION (PTY) LTD CORPORATION OF NAMIBIA (PTY) LTD	**FIFTH RESPONDENT**
NAMCOR INTERNATIONAL TRADING LIMITED	**SIXTH RESPONDENT**
NAMCOR INTERNATIONAL LIMITED	**SEVENTH RESPONDENT**

CORAM: SMUTS, J

Heard on: 14 March 2011
Delivered on: 28 April 2011

JUDGMENT

Smuts, J [1] At issue in this application is the legality of the decision by the Cabinet of the third respondent, the Government of the Republic of Namibia, to revoke the fourth respondent's mandate (National Petroleum Corporation of Namibia (Pty) Ltd ("Namcor")) to import 50% of Namibia's annual required petroleum products. The applicants have approached this Court in this application to review that decision. In addition, the applicants apply for interim relief on an urgent basis pending the outcome of the review to restore the prior position.

[2] Given the corporate structures of the different parties and their relevance to the overall contractual scheme which I sketch below, I rather refer to the parties by their names. I refer to the first applicant as "Petroneft" and to the second applicant as "Glencore". They are oil international traders.

[3] The background facts which have led to the present dispute – and indeed most of the facts relevant to the issues raised in the application – are in essence not in issue. I first refer to them and their statutory context.

[4] During 2004, Namcor (the fourth respondent) was granted the mandate by the Government of Namibia to procure through importation 50% of the Namibia's annual required petroleum products. This was granted under Regulation 30(10) of the Petroleum Products Regulations, 2000 ("the Regulations") issued under the Petroleum Products and Energy Act, 13 of 1990 ("the Act"). In terms of the Act and Regulations, the Minister regulates the importation and distribution of petroleum products in Namibia. Namcor is a parastatal (and a body corporate)

also tasked with advising the Minister on matters concerning the importation and distribution of petroleum products in Namibia. In pursuit of the statutory objective of securing the reliable supply of petroleum products to Namibia, the Minister of Mines and Energy (first respondent) granted the mandate to Namcor in 2004. When doing so, the Minister amended the wholesale licenses of local oil companies by imposing a condition upon their licenses, requiring them to procure 50% by volume of each of the petroleum products, delivered by them annually under their licenses, from the fifth respondent, Namcor Petroleum Trading & Distribution (Pty) Ltd Corporation of Namibia (Pty) Ltd ("NPTD"). It is a wholly owned subsidiary of Namcor and was utilized to give effect to its mandate to import the 50% petroleum product needs of Namibia.

[5] To enable it to give effect to the mandate, it is common cause that Namcor approached Glencore, given the latter's capitalization, expertise and experience in the importation of oil and petroleum products internationally. As a result of this approach, three inter related contracts were then entered into. There is firstly a joint venture agreement between Petroneft (Glencore's subsidiary) and Namcor dated November 2008. Secondly, a supply agreement was concluded between Namcor and the joint venture company (established pursuant to the joint venture), Namcor International Trading Ltd, the sixth respondent. This contract was entered into on 13 March 2009. The third contract is a tripartite deed of novation between Petroneft, Namcor and another of Namcor's subsidiaries, Namcor International Ltd, the seventh respondent, incorporated in Mauritius. It is referred to as "assignee", by reason the terms of this agreement.

[6] The joint venture agreement between Petroneft and Namcor established the joint venture company to source and sell petroleum products and crude oil pursuant to Namcor's mandate. Namcor and Petroneft are equal shareholders in the joint venture company and are each entitled to appoint two directors to its board.

[7] Pursuant to the joint venture agreement, NPTD (delegated by Namcor to give effect to the mandate) and the joint venture company entered into a supply agreement to give effect to the joint venture. This it does by providing for the supply of petroleum products exclusively by the joint venture company to Namcor. It is common cause that it was the corporate vehicle through which Glencore and Petroneft were to give effect to the undertaking to Namcor to comply with the mandate. Furthermore, Glencore is reflected as a guarantor in terms of clause 4.2 of the supply agreement for the joint venture company's performance in its obligations towards Namcor.

[8] Clause 9.2 of the supply agreement, referred to extensively by both parties, provides for the termination of the supply agreement 90 days after notification by the Government in the event of the Government revoking the supply mandate. It was this decision – on the part of the Government to revoke the mandate – which is sought to be reviewed in these proceedings.

[9] The third agreement of relevance for present purposes is the deed of novation. It is concluded between Namcor, Petroneft and the assignee. Under this agreement, Namcor transferred its whole interest in the joint venture company to the assignee and in terms of clause 2 guaranteed the assignee's performance under the joint venture agreement with Petroneft.

[10] This contractual scheme was described by the applicants (and not disputed by the Governmental respondents opposing the application) as essentially comprising a joint venture between Petroneft and the assignee in terms of which Petroneft would be entitled to enforce Namcor's obligation in terms of clauses 6.6 and 6.7 of the joint venture agreement against the assignee and against Namcor as guarantor of the assignee. These terms relate to the obligation on the part of Namcor's assignee to use its best efforts to ensure the satisfactory performance of the joint venture company's business in giving effect to the mandate. It is also not disputed that the petroleum products which were

supplied in satisfaction of the contractual scheme were procured by Glencore which in turn entered into supply contracts with the joint venture company.

[11] It was contended on behalf of the applicants that, as a consequence of the contractual matrix, they each have a direct and substantial legal interest in the continuation of and compliance with the supply agreement and in Namcor's continued mandate granted by the Government. This aspect is further discussed when dealing with the challenge by the opposing respondents of the applicants' standing in these proceedings.

[12] It was also not disputed between the parties that Glencore was not only approached and involved in the establishment of the contractual scheme with the consequential interdependent contractual relationships, but also provided capital to fund the joint venture company and absorbed the risks inherent in international petroleum procurement, given the lack of experience and capitalization on the part of Namcor to do so.

[13] It is also common cause between the parties that Namcor's ability to perform its mandate was adversely affected by the determination of the on sale price of petroleum commonly referred to as the basic fuel price or BFP formula. This formula was utilized within the Southern African Customs Union (SACU) as an import parity price construct at a time when South Africa served as the exclusive supplier of petroleum to other SACU members. The applicants point out that it was no longer apposite, given the fact that the mandate contemplated the importation of petroleum products from other sources on an intercontinental basis, thus including factors not contemplated within the context of a import parity price construct within SACU, such as freight charges, decreases in product density during transport and currency fluctuations.

[14] The impact of these charges resulted in Namcor operating at a loss. As a consequence, the Minister was approached by Namcor and Glencore to

determine the price with reference to these market conditions and not the artificiality of the BFP construct. Despite these approaches, the Minister declined to revise the pricing methodology. Instead, the Cabinet in October 2010 proceeded to revoke Namcor's mandate and the Minister instructed the termination of the supply contract. This decision making was preceded by a briefing document marked confidential and dated 23 September 2010. It was attached to the applicants' founding papers. The Governmental respondents challenge any reliance upon this document on the basis of what they term the doctrine of "dirty hands". I deal with this aspect below. The document in essence recommended in its conclusion that because it was giving rise to debt on the part of the Government, the arrangement with the applicants be terminated (by revoking Namcor's mandate).

[15] In a letter dated 21 October 2010 the Permanent Secretary of the Ministry (second respondent) stated that the Cabinet "approved the revocation of Namcor's current mandate of importation of 50% of petroleum products" and directed "Namcor to clear all its current obligations and commitments with the supplier before 1 February 2011". This letter was addressed to Namcor. It is the decision set out in this letter which forms the subject matter of this application. It is sought to be reviewed and set aside by the applicants.

[16] On 28 October 2010 Namcor informed Glencore of the Ministry's letter of 21 October 2010, notifying Namcor of the revocation of the mandate. After receipt of this letter, Glencore's London solicitors addressed a letter to the Minister on 17 November 2010, seeking an undertaking that the supply agreement be reinstated, failing which action would be taken within 7 days. The Government Attorney responded to this letter on 13 December 2010, pointing out that the Government of Namibia was not party to the agreement in question and had no contractual obligation to accede to Glencore's call to reinstate the agreement and indicated that any proceedings would be defended.

[17] This application was then launched on 23 February 2011. The main relief is to review and set aside the revocation of Namcor's mandate and the decision to direct Namcor to terminate its contractual obligations under the supply agreement. The applicants also seek declaratory orders that Namcor remains authorized to procure 50% of the fuel import requirement for Namibia and that the supply agreement is of full force and effect and binding on NPTD. The application is two pronged. Interim relief is sought pending the determination of these matters. The interim relief is directed at restoring the status *quo ante* in seeking to interdict and restrain the respondents from implementing the Government's decision to approve the revocation of the mandate and the decision by the first respondent to require Namcor to terminate its contractual obligations to the joint venture company.

[18] The application for the main (review and declaratory) relief is based upon nine grounds raised in the founding affidavit. These are:

- The lack of legal authority for the revocation and the directive, contending that these are *ultra vires* the Constitution and the relevant legislation;

- The failure to provide an administratively fair procedure before revoking the mandate and directing the termination of the contract;

- Contending that the decisions were unfair given the failure on the part of the authority is to disclose the gist of adverse information upon which the decisions are sought to be based;

- The failure to provide reasons for the decisions;

- The unreasonableness of the decisions, being based upon what is termed one-sided and misleading information;

- The decisions were arbitrary and irrational;

- The decisions were taken for an improper purpose by seeking to extricate Namcor or the State from binding contractual obligations by the exercise of public power on the part of the Government;

- *Mala fide*s or ulterior motives by seeking to oust Glencore in order to introduce alternative suppliers;

- A reasonable apprehension of bias in contending that the relevant authorities did not act independently, impartially and objectively when making the impugned decisions.

[19] When the matter was called, only the Minister, Permanent Secretary and the Government (first, second and third respondents respectively) opposed the application. Namcor's Chairperson stated on its behalf that it was not aggrieved by the decision and that sufficient and fair consultation had taken place before the decision was taken and that the termination of the supply agreement between the fifth and sixth respondents "simply occurred *ex contractu*".

[20] In their opposition, the first to third respondents, through an affidavit by the Minister, raised a number of preliminary points which I shall first deal with. These relate to the questions of urgency, service on respondents located outside Namibia, non-joinder of oil companies, a claim that the applicants approached the Court with "dirty" hands, the *locus standi* of the applicants and delay in bringing the review application.

[21] In the answering affidavits filed on behalf of the first, second and third respondents, it is expressly stated that their answer is directed against both interim and final relief. The affidavit was deposed to by the Minister himself. No further time was sought by the respondents to file further papers. Mr Gauntlett

SC who appeared for the applicants together with Mr F Pelser contended that no purpose would be served by a two-phase hearing in the circumstances. When I raised this with Mr Namandje, who appeared for the first to third respondents, he did not agree with this submission. He instead asserted that the applicants would at best be entitled to interim relief and not to final relief at this stage. But upon my enquiry, he was unable to point to any further aspect which the respondents would want to cover to address the legality of the revocation on the basis of authority, notice and the opportunity to be heard. These facts were essentially common cause between the parties. Mr Gauntlett also stated that the applicants would not rely upon the point of *mala fide*s relating to the decision to revoke the mandate.

[22] As the Minister's answering affidavit does make it clear that he answers to both the application for interim and final relief and, given the conclusion I reach on the basis of facts which are not in issue, it would not serve any purpose to proceed with a two-phase hearing. I turn now to the preliminary points raised by the respondents.

Urgency

[23] Mr Namandje pointed out that Glencore through its London solicitors already on 17 November 2010 threatened legal proceedings within 7 days should the supply agreement not be reinstated. He pointed out that no response was given within 7 days and that the applicants should then have commenced preparation of their application. This submission however overlooks the fact that a response was provided to Glencore's solicitors by the Government Attorney on 13 December 2010. It would in my view be prudent for the applicants to await such a response, given the magnitude of the matter. Mr Namandje further contends that the applicants' delay in launching the application only on 23 February 2011 was excessive in the circumstances and that the applicants have not made out a sufficient case for urgency as is required by Rule 6(12). He

referred to a decision of the Full Bench of this Court in Mweb Namibia (Pty) Ltd v Telecom Namibia and Others[1] and to Bergmann v Commercial Bank of Namibia and Another[2] and submitted that any urgency was self created.

[24] Mr Gauntlett however referred to paragraphs 78 and 79 of the applicants' founding affidavit which set out the steps taken by the applicants after being apprised of the impugned decisions. The applicants first point out that this constituted a "sudden development" which required them to establish what had occurred and to conduct thorough investigations in Windhoek. Glencore is based in London whilst Petroneft is incorporated in the British Virgin Islands. The applicants state that it became apparent by mid December that the revocation and directive would not be withdrawn. Although not expressly stated, this would have been with reference to the letter by the Government Attorney of 13 December 2010. The applicants confirm that they engaged London solicitors and thereafter identified and instructed Namibian legal practitioners. They point out that the offices of the Namibian legal practitioners were closed for some three weeks over the Christmas period but that counsel were instructed in late December 2010 for advice during the Christmas vacation. It would appear that the advice was received in the last week of January 2011 and instructions for the preparation of court papers occurred in the first week of February 2011. Draft papers were then prepared and considered by counsel, attorneys and solicitors. Factual enquiries needed to be resolved and the papers thereafter finalized in the second week of February 2011 and deposed to on 23 February 2011. The application launched immediately thereafter. The applicants point out that the process of preparing the application was difficult and that it entailed assembling the contractual documentation, researching statutory and other material, establishing the historical background and taking advice from legal practitioners and thereafter consultations and finalizing papers between London, Namibia and elsewhere.

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[1] Case number A 91/2007, unreported 31. 07. 2007

[2] 2001 NR 48 (HC).

[25] It is clear to me that the statutory and contractual context and commercial setting of the application would need to be thoroughly considered prior to launching the application. This is quite apart from the magnitude of the matter and its importance to the various parties. This process would clearly entail thorough and detailed preparation, preceded by research and consultation. These aspects are undoubtedly highly relevant to the exercise of my discretion whether or not to condone the non-compliance with the Rules of Court and hear the matter as one of urgency.

[26] In exercising this discretion, it is firstly important to note that there are varying degrees of urgency as was stated in Luna Meubel Vervaardigers (Edms) Bpk v Makin and another 1977(4) SA 135 (W)[3] which has been cited with approval by this Court and its constitutional predecessor. This is also recognized in the Bergmann matter, where it is stressed that Rule 6(12) allows a deviation from the prescribed procedures in urgent applications and that, as far as practicable, parties and practitioners should give effect to the objective of procedural fairness when determining the procedure to be followed in such instances to afford a respondent with reasonable time to oppose the application.

[27] Mr Namandje argued however that commercial issues would not give rise to urgency. But this is not the case. This Court has frequently recognized that form of urgency in following Twentieth Century Fox Film Corporation and another

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[3]Approved in Sheehama v Inspector General Namibian Police 2006 (1) NR 106 (HC).
Clear Channel Independent Advertising Namibia (Pty) Ltd v Transnamib Holdings Ltd 2006 (1) NR 121 (HC).
Old Mutual Life Assurance Co Namibia Ltd v Old Mutual Namibia Staff Pension Fund 2006 (1) NR 211 (HC).
Mulopo v Minister of Home Affairs 2004 NR 164 (HC).
Bergmann v Commercial Bank Namibia Ltd 2001 NR 48 (HC).
Swanepoel v Minister of Home Affairs 200 NR 93 (HC) at 95 A-C.
Eimbeck v Inspector General of the Namibian Police 1995 (NR) 13 (HC) at 20 C – D.
Mweb Namibia (Pty) Ltd v Telecom and Others Supra

See also IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another 1981(4) SA 108 (C) at 110 C.

v Anthony Black Films (Pty) Ltd[4] that the protection of a commercial interest can also justify urgent relief under Rule 6(12).

> **"The urgency of commercial interest, as in casu, may justify the application of rule 6(12) no less than other interest and, for purposes of deciding upon urgency, I must assume that the applicant's case is a good one and that it has a right to the relief which it seeks."**

The above quoted portion in the Twentieth Century Fox – matter is stated after counsel submitted, as Mr Namandje did in these proceedings, that there was no urgency in the absence of some threat to life or liberty and that only commercial urgency was raised in that matter Goldstone, J (as he then was) swept that approach aside in the previous passage and added in that matter that:

> **"However, due allowance must clearly be made in the case of a foreign company, or foreign companies, and more especially in a case such as the present, where the applicants have international interests which must receive attention from its executives".**

[28] In commercial matters there would thus be degrees of urgency and it would be incumbent upon applicants to demonstrate with reference to the facts of a specific matter that they are unable to receive redress in the normal course and that the facts justify the urgency with which the application has been brought. They must not however have created their own urgency and would need to have afforded the respondents a sufficient opportunity to deal with the matter raised. It would be a question of fact to be determined in each case.

[29] Whilst it is clear in this matter that the respondents were afforded a short period of time to provide answering papers, they have not sought any

[4] 1982 (3) SA 582 (W) at 586 G Approved in Bandle Investments (Pty) Ltd v Registrar of Deeds and Others 2001 (2) SA 203 (SE) at 213 E-F

postponement and have in fact answered to both the interim and final relief sought. The Minister does however point out that the respondents are "massively prejudiced" by the short time periods. He points out that certain officials were not available at the time. The Minister furthermore does not in his affidavit point out what further factual matter, relevant to the determination of the issues would need to be placed before Court. Nor was Mr Namandje able to do so in argument, particularly with regard to the legality of the revocation of the mandate on the issues I have already referred to. The parties were both able to file heads of argument and presented detailed and thorough argument.

[30] Mr Namandje also pointed out in argument that the respondents had not been able to file the record in terms of Rule 53. This would ordinarily be a right for the applicants to pursue which they have indicated they would decline to exercise. Furthermore the applicants are not required to follow Rule 53 if they seek to review decision making and can do so under the common law.[5]

[31] Mr Gauntlett on the other hand, pointed out that there would be an irretrievable loss to the applicants if the status *quo ante* were not restored and further contended that the applicants were not culpable with regard to the time taken in bringing the application. In this regard he also referred to paragraph 81 of the founding affidavit in which it was contended (and not squarely disputed) that it would be extremely difficult for the applicants to compute the loss of revenue and damages they would sustain and that there was not a clear remedy for the recovery of damages of this nature so suffered in Namibian law. He also referred to the logistical difficulties faced by the applicants' as foreign litigants in the preparation of the application and submitted that it was prudent for them to await the response on behalf of the Minister to the letter of 17 November 2010.

[32] There is in my view much merit in these submissions. The importance of awaiting that response, and then seeking advice, researching and the like are

[5] Jockey Club of South Africa v Forbes 1993(1) SA 649 A at 662 F-H.

clearly factors together with logistical difficulties caused by distance and being in different jurisdictions should be taken into account in the exercise of my discretion when considering whether to grant condonation under Rule 6 (12). These factors were referred to in this context in an unreported decision of this Court in The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and Others[6] where it was held that in assessing urgency a Court could have regard to the factors enumerated in Radebe v Government of the Republic of South Africa and others[7] when considering whether there had been unreasonable delay in bringing a review. The following was stated in the Ongopolo matter with reference to the factors listed in Radebe:

> *"I agree that the factors listed, such as a reasonable time to be taken to take all reasonable steps preceding an application including considering and taking advice, attempts to negotiate, obtaining copies of relevant documents and obtaining and preparing affidavits, should also be taken into account, if these are fully and satisfactorily explained, in considering whether an application should be heard as one of urgency. In addition, I agree that in considering the time taken to prepare the necessary papers, allowances should be made for differences in skill and ability between practitioners practising as attorneys and advocates, and that a party cannot be expected to act over hastily, particularly in complex matters. In addition, in this matter, both sets of parties are based in Tsumeb, some distance from this court".*[8]

[33] Taking the factors raised by the applicants (in their founding affidavit and especially in paragraphs 78 and 79) into account, I cannot fault the applicants for taking some time "to marshal their forces", as was found in Corium (Pty) Ltd and

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[6] Delivered on 30 November 2006
[7] 1995 (3) SA 787 (N) at 799 B-F
[8] At P of the unreported judgment.

Others v Myburgh Park Langebaan (Pty) Ltd and Others.[9] I accordingly do not find that their delay was culpable. I also take into account that the respondents have not sought a postponement to place further matter before this Court. Nor, as I have said, has any evidential matter been identified by Mr Namandje which the respondents would still need to address. I also take into account that the respondents themselves have been on notice for some time that the applicants may take legal action to challenge the decision making.

[34] In the exercise of my discretion, I accordingly would grant condonation to the applicants for bringing this application as one of urgency under Rule 6(12).

Service: non-compliance with Rule 5(1) and s 27 of the High Court Act

[35] The second preliminary point taken by the first to third respondents was that there had been no edictal citation as provided for in Rule 5 of the Rules of this Court which preclude service of process outside the jurisdiction of this Court without leave of this Court. The respondents also took the point that the time allowed for entering an appearance to defend is set in peremptory terms at being not less than 21 days in s 24 of the High Court Act[10] and that the application was in direct conflict with this mandatory provision, in providing for shorter periods.

[36] In the course of his oral argument, Mr Namandje also pointed out that there was no reference in paragraph 1 of the first part of the notice of motion (seeking condonation) to Rule 5. He pointed out that there was only reference to Rule 6(12). But the reference in Rule 6(12) is with a view to secure condonation for non-compliance with the Rules of this Court. Rule 5 concerning edictal citation is one such Rule. There is thus an application for condonation for non-compliance with that rule.

[9] 1993 (1) SA 853 (C) at 858.
[10] Act 16 of 1990

[37] He further pointed out that s 24 of the High Court Act is peremptory and that the urgent relief against foreign respondents would be precluded by virtue of the operation of that section. It provides:

> **"The time allowed for entering an appearance to a civil summons served outside Namibia shall not be less than 21 days."**

[38] According to Mr Namandje, this section would preclude even interim relief – not final in nature or effect – from ever being granted against a foreign respondent if the time limit in s 24 were not adhered to.

[39] On the other hand, Mr Gauntlett submitted that the founding and replying affidavits made out a proper case for non-complying with these formalities. He further referred to the approach of the Supreme Court in Mahe Construction (Pty) Ltd v Seasonaire[11] which he contended lent support for the applicants' application for condonation with the Rule's service requirements for foreign entities. He contended that its underlying rationale demonstrated that in commercial circumstances like this matter where foreign entities operate in Namibia the transactions and interactions with them leading to litigation are routed on Namibian soil, edictal citation and associated procedural rules are not mandatory.

[40] The Supreme Court held in Mahe Construction that a foreign entity with substantial operations in Namibia was sufficiently subject to the jurisdiction of Namibian Courts and that leave to sue by edictal citation was not required. In reaching this conclusion, the Court cited Ochs v Kolmanskop Diamond Mines Ltd[12] with approval where it was held that:

> **"great inconveniences would arise and commercial dealings might, in consequence, become restricted [if] … companies whose head**

[11] 2002 NR 398 (SC)
[12] 1921 SWA 8

> **offices are in Berlin, but whose business is carried out in this country … could not be sued in respect of transactions that arose wholly in this jurisdiction, until their property had been attached *ad fundandam jurisdictionem* and leave be granted to sue by edictal citation."**

[41] Although the Supreme Court did not deal with the provisions of s 24 in Mahe Construction, the underlying approach of the Court would indicate that this Court would have a discretion in granting non-compliance with Rule 5, particularly where the foreign entities in question are the joint venture company in which Namcor and Petroneft each have a 50% share and the assignee registered in Mauritius is a wholly owned subsidiary of Namcor. The contracts in question were concluded in Namibia and fundamentally relate to the supply of petroleum products to Namibia through the joint venture corporate vehicle.

[42] It would in my view also be inconceivable for this Court never to be able to hear and determine urgent relief without the need for edictal citation and for adherence to the time period contained in s 24. I would certainly consider that this Court has the inherent jurisdiction to grant non-compliance with Rule 5 and in the exercise of my discretion I would do so.

[43] As far as s 24 is concerned, it would also be inconceivable for this Court never to be able to grant urgent relief against a foreign entity without requiring to compliance with the time limit in question. It would seem to me that the urgent jurisdiction of this Court empowers it to dispense with forms and service in terms of the Rules and that this would also include the time period provided for in s 24. This accords with the approach of the courts in South Africa which have held that the urgent jurisdiction of superior courts empowers those courts to dispense with formal service in terms of the rules which would include s 27 of the then South African Supreme Court Act[13].

[13] Davey v Douglas and Another 1999(1) SA 1043 (N) at 1060; Scott v Hough 2007 (3) SA 425 (0)

[44] Due regard should also be had for the purpose of edictal citation and s 24. A South African Court stressed this in the context of a similar point being taken, but in circumstances where an appearance to defend was entered.

> **"It seems to me, however, that once a defendant has entered appearance to defend as it has done in the present matter, non-compliance of the rules as to service and section 27 becomes irrelevant. The purpose of service in terms of the rules is to bring the edictal citation to the attention of the defendant and the purpose of section 27 is to ensure that such defendant has sufficient time to defend if it so wishes. Both of these objectives have been achieved and the particular statutory provision and the rule had been exhausted".**

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2. [45] It would also seem to me that it is not a question of dispensing with the relevant section but rather ruling that in sufficiently urgent circumstances, the relevant section would not apply.

3.

4. [46] It would also seem to me that the period provided for in s 24 applies once a Court has granted edictal citation. If a Court dispenses with a need for edictal citation, then the application of this section and the time period would not seem to arise.

5. [47] In this instance, the seventh respondent has made an affidavit indicating that the time for giving a notice to oppose and to file an answering affidavit had passed by the time the papers were served. This respondent does not however state that it wishes to oppose that relief. In the absence of stating that, there would not be prejudice to that respondent as a consequence. This issue has also not been raised by it, but by the governmental respondents. Furthermore, its parent company, Namcor, has further stated that it does not oppose the application.

[48] It follows that the points taken by the first to third respondents concerning service and s 24 do not avail them.

Non-joinder

[49] The Governmental respondents also take the point of non-joinder of local oil companies. They do so with reference to the new oil importation arrangements which were made in January 2011 and which came into force in February 2011. In terms of these arrangements, the licenses of the local oil companies have been varied to supply 100% of their market share of Namibia's oil products.

[50] Mr Namandje contended that the local oil companies would have a direct and substantial interest in this application as a consequence and needed to be joined.

[51] Mr Gauntlett on the other hand countered that these companies do not have a direct and substantial interest in the question as to whether the revocation of the mandate and termination of the supply agreement was lawful. I agree with that submission. During argument I enquired from Mr Namandje whether the oil companies would have standing to review the decision to revoke the mandate to Namcor and the directive relating to the termination of the supply agreement. He did not have an answer to this, and rightly so. In my view, they would not have the requisite standing. Their interest is too remote.

[52] It would follow that it was not necessary to join them to these proceedings.

Doctrine of "dirty hands"

[53] I have already referred to the use of this expression by the respondents. The preliminary point raised by the respondents is that the applicants' application substantially relied upon documentation illicitly obtained by them, as is asserted in paragraphs 28 and 29 of the Minister's answering affidavit. In argument, Mr Namandje expanded upon this by stating that the applicants had avoided disclosing how they had obtained the briefing note. In the replying affidavit, the applicants however squarely deny that they had obtained or procured the document illegally. As I understood Mr Namandje, the reliance upon this document and the application of this doctrine would preclude the applicants from their obtaining relief.

[54] In response, Mr Gauntlett pointed out that a doctrine of "dirty hands" did not exist in Namibian law and that Namibian law only knows of a defence of unclean hands. He is correct in this submission. The Supreme Court in Minister of Mines and Energy v Black Range Mining (Pty) Ltd[14] accepted that this doctrine applies "in circumstances where there was some or other dishonesty on the part of the person who claimed protection for his rights",[15] after a thorough survey of authorities on the point. The Supreme Court concluded that:

> **"a Court does not deny a person access thereto in respect of the enforcement of his rights, or the protection thereof, if not contaminated by some or other act of dishonesty or other impediment … To do otherwise will run counter to the principle that the Court will not close its doors to a litigant except in exceptional circumstances such as was, *inter alia*, mentioned by the learned Judge. To do so in unjustifiable circumstances will also run counter to Art. 12 of our Constitution where that right is guaranteed."**

[14]

[15] Unreported, 15/7/2010

[55] In the answering affidavits,[16] the respondents made no allegation of dishonesty, fraud or *mala fide*s on the part of the applicants in relying upon the document. When I raised this with Mr Namandje, he was unable to refer to any act of dishonesty on the part of the applicants. Instead, he countered that the document was inadmissible hearsay evidence. But I pointed out to him that it was after all a document of the third respondent and would thus not be inadmissible hearsay.

[56] Given the fact that there was no suggestion or evidence of impropriety on the part of the applicants, there can be no question of the application of the doctrine of unclean hands to this application.

Locus standi

[57] Mr Namandje contended that the interest of the applicants is merely a financial and commercial interest in the continuation of the mandate and that the applicants themselves were not the contracting parties and thus would have no standing to seek the relief in this application. He pointed out that the applicants acknowledge that they were not themselves parties to the supply agreement but claimed an interest by virtue of their holding in the joint venture company. He contended that a mere financial and commercial interest has been held to be insufficient by a Full Bench of this Court in Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others[17] and the cases relied upon in that judgment, being United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another[18] and Wistyn Enterprises (Pty) Ltd v Levi Strauss and Co and Another[19]

[16] Unreported, 15/7/2010
[17] 2000 NR 1(HC)
[18] 1972 (4) SA 409 (C)
[19] 1986 (4) SA 796 (T)

[58] In his argument, Mr Gauntlett stressed that the starting point is that the Supreme Court has found that a corporate entity could have standing to invoke a Chapter 3 right, as was held in Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia.[20] In doing so, the Court recognized that:

> **"behind the 'corporate veil' of juristic persons are their members; behind the legal fiction of a separate legal entity are, ultimately real people. They are financial beneficiaries of the corporate structures which they have created"**

[59] Mr Gauntlett referred to the fact that the joint venture company, the contracting party in the supply agreement, is 50% owned by Namcor, an entity wholly owned by the decision-maker and that Namcor does not consider itself aggrieved by the decision-making. The other 50% shareholding is held by Petroneft. The joint venture company would thus be paralysed in the circumstances and would not itself be able to institute the review application and these proceedings by virtue of its shareholding. Mr Gauntlett also referred to a decision of a Full Bench of this Court in Oshuunda CC v Blaauw[21] which confirmed that where a close corporation could not institute proceedings because a majority decision to do so by its members could not be obtained, then an individual member may do so. Although in a different context, this underlying approach, firmly rooted in common sense, should in my view find application in this matter.

[60] Mr Gauntlett further submitted that the decision in United Watch is distinguishable as the applicants do not seek to exercise contractual rights in these proceedings or rights which arise from a lease or by virtue of a contract, but by reason of the exercise of a public law power. It is correct that the decision sought to be reviewed was after all not one made by the State as a contracting

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[20] 2009 (2) NR 596 (SC)
[21] 2001 NR 203 (HC)

party but was rather made by exercising a public law power (under statute) to revoke Namcor's mandate. Mr Gauntlett also pointed out that the first applicant was furthermore throughout the development partner in respect of the contractual scheme under which effect was given to the public law mandate provided to Namcor. This was also how the Government and Namcor regarded the position as is borne out by the correspondence between the parties and the internal documentation of both the Governmental and Namcor. In this regard Mr Gauntlett referred to the factual averments contained in the founding affidavit which were not put in issue by the respondents and correctly submitted that the commercial reality was that the applicants had been engaged to fulfil the Government's commitment to ensure a sustainable supply of petroleum products to Namibia.

[61] Mr Gauntlett submitted that it would be artificial to disaggregate the identities of the parties and then contend that only Namcor or the joint venture company would have standing to challenge the revocation of the mandate. He referred to the decision of this Court in Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others[22] and contended that standing – a procedural and not substantive issue – should be viewed more widely in the context of constitutional challenges. I agree with this fundamental approach, succinctly summarised in two passages in that well reasoned judgment.

> **"[12] Under common law, the question of standing (in the sense of an actionable interest) has always been regarded as an incidence of procedural law. The assessment of the concept as an aspect of procedural (rather than substantive) law allows the court a greater measure of flexibility in determining whether, given the facts of the particular matter, the substance of the right or interest involved, and the relief being sought, locus standi has been established. Moreover, although the**

[22] 2009(2) NR 670 (HC)

nature of the interest to be shown for standing is captured in the clipped phrase 'direct and substantial', the scope and ambit thereof are not capable of exact delineation by rules of general application which are cast in stone. Whether a litigant's interest in the subject matter of the litigation justifies engagement of the court's judicial powers must be assessed with regard to the peculiar facts and circumstances of each case. What will generally not suffice is apparent from the illuminating judgment of Botha JA on the issue of locus standi in Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) at 533J - 534C: an interest which is abstract, academic, hypothetical or simply too remote. Considerations such as that the interest is 'current', 'actual' and 'adequate' are vital in assessing whether a litigant has standing in the circumstances of a case.

[13] These common-law principles and the measure of flexibility they allow the court is an important reference but not the true criteria for deciding standing when litigants claim that their fundamental rights and freedoms protected under the Constitution have been infringed, derogated from, or diminished. Whilst it is accepted for purposes of this judgment on the basis of the Dalrymple case that our law does not recognise standing on the basis of a citizen's action to vindicate the public interest, the court has relaxed the common-law criteria to establish standing in appropriate circumstances."

[62] The Court in Uffindel further followed the approach of the South African Constitutional Court in Ferreira v Levin N.O. and Others; Vryenhoek and Others

v Powell N.O. and Others[23] in dealing with standing constitutional matters under the South African Constitution.

> **"Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. . . ."**

[63] In that same matter O'Reagan, J also stresses why a broader approach should be adopted.[24]

> **"This expanded approach to standing is quite appropriate for constitutional litigation. Existing common-law rules of standing have often developed in the context of private litigation."**

[64] In applying this approach, the Court in Uffindel stated the following:

> **"Even if the phrase 'aggrieved persons' is not to be applied on the basis of a subjective assessment - and I expressly refrain from finding that on a purposive approach it may not be so understood - but falls to be assessed by the more stringent standard of reasonableness, I am satisfied that a reasonable person in the applicant's position would have had cause to be aggrieved and to claim that his or her fundamental rights have been infringed or**

[23] 1996 (1) SA 984 (CC)
[24] At para 229 on 1103 E-H

threatened by the assumedly unlawful decision of the second respondent. For these reasons the applicant had adequate cause to be aggrieved and to claim enforcement or protection of his fundamental rights as contemplated in art 25(2) of the Constitution. It is on this premise that the court proceeded to consider the merits of the application and make the order it did."

[65] Mr Namandje on the other hand submitted that only Namcor would have standing by reason of the fact that the mandate is to it. But this narrow approach does not take into account the full contractual setting which arose from and was dependent upon the mandate. I agree with Mr Gauntlett that this approach is untenable as it would effectively amount to the Government being afforded the opportunity to contract out of the Constitution by incorporating a parastatal which it controls and then exercising statutory powers through it. It would also seem to me that the position in the McNamara matter is distinguishable. That decision should be understood within its factual context. It was in a tender context where an unsuccessful tenderer had brought a review and then withdrew it. The Court held that subcontractors of that unsuccessful tenderer would not have standing to review the allocation of the tender.

[66] Plainly the joint venture company would have standing to challenge the revocation decision in the contractual scheme. If it cannot act by virtue of the equal shareholding between Namcor and Petroneft (where Namcor is controlled by its sole shareholder, the decision maker) and thus cannot act by reason of this paralysis, the question arises as to which party would have standing. Applying the approach in Oshuunda CC, it should follow that Petroneft, as 50% shareholder in the joint venture company would have standing. This would also accord with a broad and purposive approach to standing in constitutional matters eloquently set out in Uffindel with which I respectfully agree. I accordingly find that the applicants have sufficient standing to bring this application.

Delay in bringing the review application

[67] Mr Namandje contended on behalf of the first to third respondents that the applicants have unduly and unreasonably delayed in bringing their review application and that it should be dismissed for this reason. He submitted that the delay was inordinate, taking into account that the decision had already been made in late October 2010 with the application only being served in late February 2011 – a period of some 4 months. Mr Namandje referred to a recent decision of this Court in Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others[25] where the Court held that a period of beyond three months to bring a review would be unreasonable in the context of that matter (where the review was brought 10 months after the impugned decision). He also referred to Radebe matter[26], which was followed by a Full Bench of this Court in Medical Products (Pty) Ltd v The Tender Board of Namibia [27]. What was stressed in the latter matter is that the time within which to bring a review application would depend upon the merits of each individual case.

[68] In this matter, it was clearly reasonable for the applicants to address a letter to the respondents and to await their response before launching their review application. That response was only forthcoming on 13 December 2010. The annual year end break, specifically referred to by the applicants, thereafter followed. In taking into account the various factors referred to in the Radebe matter, to which I have already referred in addressing the question of urgency, it is clear to me that there has not been an unreasonable delay in bringing this review for the reasons I have given. This preliminary point accordingly also fails.

[69] I now turn to the merits of the application.

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[25] 2009 (1) NR 277 (HC) at 278

[26] *supra*

[27] 1997 NR 129 (HC)

Revocation of mandate

[70] I have already referred to the grounds upon which the revocation of the mandate and instruction to terminate the supply agreement are challenged.

[71] As I have also indicated, much of the factual matter material to certain of the grounds to which I refer has not been placed in issue. Mr Namandje essentially argued that there was no need to provide the joint venture company or the applicants of any notice prior to the decisions being taken to revoke the mandate and instructing that the supply agreement be terminated. He argued that the notice to Namcor was sufficient and that the *audi alteram partem* rule is flexible and that on this basis as well, the notice given to Namcor would suffice.

[72] It is common cause that no prior notice of the revocation was given to either the joint venture company or to the applicants.

[73] Mr Namandje also argued that the review grounds raised by the applicants would not arise by virtue of the fact that the joint venture company and NPTD were parties to the supply agreement. They had in that agreement expressly agreed (in clause 9.2) that in the event of revocation of the mandate, the agreement would terminate in 90 days. He submitted that the termination of the agreement thus arose in terms of the contract itself following upon the revocation of the mandate.

[74] These arguments concern the application of Article 18 of the Constitution. It provides for administrative justice and does so in these terms:

> **"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."

6. [75] This constitutional provision was recently explained by the Supreme Court in Permanent Secretary of the Ministry of Finance v Ward[28]:

"[27] The duty of administrative bodies and administrative officials to act fairly and reasonably when exercising these functions is, in terms of the provisions of art 18, now constitutionally guaranteed.

[28] It was further laid down by this court that the words which enjoin officials and administrative bodies to 'act fairly and reasonably' are not restricted to procedure only but also apply to the substance of the decision. (See Minister of Health and Social Services supra para [25] at 772.)"

7. [76] As to the requirement of reasonableness, the Supreme Court has stated in Mostert v Minister of Justice[29]:

8.

9. **"The word 'reasonable', according to The Concise Oxford English Dictionary 9th ed means:**

10. **'(H)aving sound judgment; moderate; ready to listen to reason; not absurd; in accordance with reason.'**

11. **Collectively one could say, in my opinion, that the decision of the person or body vested with the power, must be rationally justified.**

[28] 2009 (1) NR 314 (SC)
[29] 2003 NR 11 (SC) at 28

(See Mafongosi and Others v United Democratic Movement and Others 2002 (5) SA 567 (TkH) at 575A - E.)"

[77] Mr Gauntlett on the other hand contended that the applicants had a vested interest in the continuation of the mandate and supply agreement and thus had the right to be afforded an opportunity to be heard in respect of the decision to revoke the mandate to Namcor upon which the supply agreement depended and was inextricably linked. He further contended that the common cause facts also showed that the Government had considered itself at large to interfere in the contractual relations of others (being the parties to the supply and other agreements). This would not only be unlawful in common law, but would also be unlawful for it to apply its public law power to revoke the mandate for the purpose of escaping what it considered to be an unprofitable obligation. He contended that this had been done in an arbitrary and a procedurally unfair manner and that it was accordingly unlawful.

[78] I understood Mr Namandje to contend that the decision to revoke would not be justiciable in that it did not constitute administrative action, being of a policy nature. This Court in Open Learning Group Namibia Finance CC v Permanent Secretary, Ministry of Finance[30] held that the revocation of the contract in question by Government gave rise to a remedy in public law,uncluding under Article 18 of the Constitution, in addition to one based on contract. In that matter, the specific contractual power amounted to the exercise of what was essentially a statutory power which had been set out in that contract. The Court held that the Government was bound by Article 18 in exercising that power and was obliged to afford an affected party the opportunity to make representations before revoking that contract and to give reasons for the revocation. In the Ward matter, the Supreme Court however held that the termination of the specific contract which arose in that matter constituted a purely contractual commercial

[30]2006 (1) NR 275 (HC). See also President of the RSA v SA Rugby Football Union 2000 (1) SA 1 (CC) at par 141. Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) Gcaba v Minister of Safety and Security and Others 2010 (1) SA 238 (CC)

act by reason of the fact that the Government had in those circumstances merely exercised a contractual remedy open to it under that contract.

[79] In this matter, the Government did not exercise any contractual power at all in revoking the mandate, as occurred in the Ward matter. The fact that the revocation gave rise to a consequence for the supply contract does not negate the public law nature of the power exercised by the Government in the revocation. The nature of the power exercised by the Cabinet was not formulating policy but rather determinative of rights and was thus administrative action. The source of the power was also statutory, and would arise from the Act and its regulations under which the mandate would be granted. The public law power, which arose from the statutory power to grant such a mandate, would in my view be decisive of this issue. This is quite apart from Mr Gauntlett's submission that the termination by virtue of a revocation reflected in clause 9.2 of the supply agreement would presuppose a lawful revocation. He made this submission with reference to Kauluma en Andere v Minister van Verdediging en andere. [31] I agree with that submission. The revocation of the mandate contemplated in clause 9.2 would contemplate one lawfully done.

[80] The applicants are clearly affected by the exercise of the public law power to revoke Namcor's mandate. At the very least, they would in my view have enjoyed a legitimate expectation that their interest in the continuation of the supply agreement would not be adversely affected without being notified in advance and then being afforded the opportunity to make representations. At the very minimum, the joint venture company would have such an expectation and right. It received no prior notice and was not afforded the opportunity to be heard in relation to the decision.

[31] 1987(2) SA 833 (A). See also S v Maphelle 1963(2) SA 651 (A) and Abbott v Commissioner for Inland Revenue 1963(4) SA 552 (C) at 556 E.

[81] It would follow that the Government or Ministry would be required to afford interested parties such as the applicants (or joint venture company) the opportunity to make representations. The failure to have done so, which is common cause in these proceedings, would render the decision to revoke the mandate invalid for this reason alone. This is quite apart from the right to reasons for the decision to revoke the mandate, is inherent in a fair and reasonable procedure, to which the applicants were also entitled – and did not receive.

[82] There is a further basis upon which the decision to instruct the termination of the supply agreement is to be set aside. This Court in S v Carracelas (1)[32] held[33]:

> **"The fact that the Cabinet is the executive authority in the country does not take the matter any further. The Cabinet must still act within the law and cannot under the guise of the executive authority, for example, make legislative decrees. The fact that the executive may have certain prerogatives in the field of foreign policy, as pointed out by Mr Small, cannot assist them in the matter under consideration. The issuing of notices, etc, is also not relevant to the present proceedings if considered in vacuo. These notices, etc, must in any event be issued pursuant to the law and cannot, in the absence of a law permitting them, be of any force or effect. The Cabinet as Executive Authority must administer laws in terms of the law and not contrary thereto."**

[83] The respondents have not provided any statutory authority for the decision of the Cabinet or Minister to instruct the termination of the supply agreement. Given the purpose of the revocation of the mandate to achieve that end, it would also follow that the decision to revoke the mandate would need to be authorized

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[32] 1992 NR 322 (HC)
[33] At 327A-C

and be subject to the constitutional rights of affected parties to administrative justice and that the decision to revoke be taken in accordance with the requisite statutory provisions. The respondents have in this context raised no legal authority for the revocation of the mandate and the instruction to terminate the agreement. The lack of authority for the decisions would also vitiate them.

[84] There would also in my view be considerable support on the facts for the challenge by the applicants upon the decision making on the grounds that it was not reasonable or on the basis of irrationality or arbitrariness. The main answer of the Governmental respondents to these challenges was the *ipse dixit* of their deponents that the decision itself was reasonable and rational. These are however self serving conclusions without any factual matter raised to support them and cannot avail the respondents in the face of the factual matter raised by the applicants calling into question the reasonableness and rationality of the decisions. Given the fact that the decision is vitiated by failing to accord the applicants and the joint venture company the right to be heard and thus acting in conflict with a fair procedure as is required by Article 18, it is not necessary to further deal with this and the other review grounds raised by the applicants.

Conclusion

[85] In the result, I am satisfied that the applicants have established their entitlement to the final relief sought in Part B of the notice of motion. Mr Namandje rightly did not take issue with Mr Gauntlett's submission that an order for costs should include the costs of two instructed counsel. The complexity of the legal issues and the importance of the matter to the applicants would warrant such an order. I accordingly grant the following order:

1. Condoning the applicants' non-compliance with the Rules of this Court and authorise that this application be heard as one of urgency in terms of Rule 6 (12).

2. Reviewing and setting aside the decision by the third respondent, through the Cabinet of the Republic of Namibia on or about 21 October 2010 purporting to approve the revocation of the fourth respondents' mandate to import 50% of petroleum products into Namibia.

3. Reviewing and setting aside the decision by the first respondent, alternatively second respondent, on to about 21 October 2010 requiring the fourth respondent to terminate its contractual obligations to the sixth respondent.

4. Declaring that:
   (a) the fourth respondent remains authorised to procure by import into Namibia 50% by volume of each of the petroleum products required for delivery by local oil companies pursuant to their respective wholesale licences during each calendar year;

   (b) the supply agreement entered into between the fifth respondent and sixth respondent on 13 March 2009 remains valid, of full force and effect and binding.

5. Directing the first, second and third respondents to pay the applicants' costs, including the costs of two instructed and one instructing counsel, jointly and severally, the one paying the other to be absolved.

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SMUTS, J

ON BEHALF OF APPLICANT:

Adv JJ Gauntlett SC
and with him

Mr F Pelser
Instructed by
LorentzAngula Inc

ON BEHALF OF 1ST, 2ND AND 3RD RESPONDENTS:

Mr S Namandje
Instructed by
The Government Attorney