

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. HC-MD-CIV-MOT-GEN-2018/00227

In the matter between:

MINISTER OF FINANCE

1ST APPLICANT

**NAMIBIA NATIONAL REINSURANCE
CORPORATION LIMITED**

2ND APPLICANT

and

**HOLLARD INSURANCE COMPANY OF NAMIBIA
LIMITED**

1ST RESPONDENT

HOLLARD LIFE NAMIBIA LIMITED

2ND RESPONDENT

SANLAM NAMIBIA LIMITED

3RD RESPONDENT

SANTAM NAMIBIA LIMITED

4TH RESPONDENT

TRUSTCO INSURANCE LIMITED

5TH RESPONDENT

TRUSTCO LIFE LIMITED

6TH RESPONDENT

OUTSURANCE INSURANCE COMPANY OF NAMIBIA LTD	7TH RESPONDENT
OLD MUTUAL LIFE ASSURANCE COMPANY NAMIBIA LTD	8TH RESPONDENT
JACOBS CELLIERS LAMPRECHT	9TH RESPONDENT
ANDRE VERMEULEN	10TH RESPONDENT
TERTIUS JOHN RICHARD STEARS	11TH RESPONDENT
FRANCO GEOFFREY FERIS	12TH RESPONDENT
QUINTON VAN ROOYEN	13TH RESPONDENT
ANNETTE BRANDT	14TH RESPONDENT
NANGULA KAULUMA	15TH RESPONDENT
KOSMAS HEINRICH EGUMBO	16TH RESPONDENT

Neutral Citation: *Minister of Finance v Hollard Insurance Company of Namibia Limited* (HC-MD-CIV-MOT-GEN-2018/00227) [2018] NAHCMD 294 (20 September 2018)

CORAM: MASUKU J
Heard: 27 and 28 August 2018
Delivered: 20 September 2018

Flynote: Administrative law – Administrative act – Dissatisfied with certain provisions of the Act regulations and notices – Consequence of administrative body bringing an application for non-compliance with an administrative act pending review proceedings challenging the constitutionality of the said

administrative act – Party bringing the judicial review entitled to treat the administrative action as void and await further developments – This approach not be equated with contumacious disregard for the law.

Administrative law – Collateral challenge – Requirements - Right party in these proceedings – Right remedy is being sought – Whether these are the right proceedings – Circumstances under which collateral challenge may be raised – Peculiar circumstances in which the collateral challenge raised in this case considered.

Civil Procedure - Notice of motion to strike out – certain paragraphs of the respondents' answering affidavit on the bases that same were scandalous, vexatious or irrelevant – Interlocutory application – The parties followed the peremptory provisions of rule 32 (9) and (10).

Summary: The Applicants brought an urgent application to compel the respondents to comply with certain notices and regulations in terms of Namibia National Reinsurance Act No. 22 of 1998 (the 'Act'). The First Applicant caused certain notices and regulations to be issued and gazetted namely; Government Notices 333, 334, 335, 336, 337 and 338, promulgated on 29 December 2017 in terms of the Act in Government Gazette 6496, and published in terms of the Act and published in Government Gazette No. 6496. These notices dealt with the compulsory cession of insurance contracts and reinsurance business and related matters. A constitutional challenge to the issuance of these notices was mounted by the respondents, who brought an application for review before this court, in which they seek to have the said notices and regulations should be set aside.

The First Applicant sought a declarator that the said notices and regulations were valid and enforceable and compelling the Respondents to comply with the 29 December 2017 notices and regulations or face imprisonment for contempt of court. The Respondents contended that they would not comply with the notices and regulations pending a final determination of the pending judicial review proceedings and raised a collateral challenge in that regard.

The Applicants argued that the current proceedings are not the right ones in which to bring such a challenge whilst respondents contended the opposite.

Held - that even though it may appear at first blush that these are not the right proceedings in which to raise a collateral challenge, the peculiar circumstances of this case, particularly the type of proceedings which have given rise to the collateral challenge, namely, an urgent application, together with the fact that other proceedings are pending before this court, points inexorably in the way of staying the effect of the First Applicant's actions, pending the full and comprehensive treatment of all the issues raised in the pending proceedings.

Further held - that pending the outcome of the review and the action proceedings, the decision of the First Applicant must be stayed to allow the matters, which have already been launched, to be ventilated and decided by this court.

Held - that in the circumstances, it would appear that parties in the respondents' position are entitled at law, as held in the *Black Range* case, to treat the administrative action as void and await developments.

Held further – that certain language employed by the respondents in their answering affidavit fell within the realms of the scandalous, vexatious and irrelevant and should therefore be struck out.

The court granted an order staying the application and enforcement of the Minister's notices and regulations pending the determination of the pending proceedings with costs. Concomitantly, the court ordered the respondents jointly and severally for the costs in respect of the motion to strike out.

ORDER

1. The application and implementation of the impugned provisions of the Namibia National Reinsurance Act No. 22 of 1998 (the 'Act') and Government Notices 333, 334, 335, 336, 337 and 338, promulgated by on 29 December 2017 in terms of the Act in Government Gazette 6496 and the Regulations promulgated on 29 December 2017 in terms of the Act, and published in terms of the Act and published in Government Gazette No. 6496 be and are hereby stayed, pending the determination of the following cases presently pending before this Court, namely, HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127.
2. The Applicants are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.
3. The offensive matter contained in the following paragraphs of the answering affidavit be and are hereby struck out as constituting scandalous and/or vexatious matter, namely, paragraphs [71.2]; [74.2]; [254]; [288]; [339]; [340] and [345].
4. The respondents are jointly and severally ordered to pay the costs of the motion to strike out on the normal scale.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Ms. Karen J. Mathis, in her capacity as the President of the American Bar Association, poignantly remarked as follows:

'For lawyers throughout the world, the Rule of Law is our compass, our gravity. It ensures predictability, stability, and fairness. Without it, we cannot function. Individuals cannot flourish. Business cannot flourish. Society cannot grow. Anywhere it is under attack, lawyers everywhere are threatened.'¹

[2] The rule of law, as a constitutional concept, is at the centre of this judgment. No wonder the litigants in this case are up in arms, ably supported in their respective causes by their respective sets of legal practitioners. It is alleged that that sacred principle has been violated and is under attack. This should present no wonder for the reason that the concept of the rule of law is one of the foundational pillars that underpin the grand edifice that is Namibian State. In this regard, Art. 1 (1) of the Constitution of Namibia provides the following:

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

[3] As often happens, however, in litigation, both sets of protagonists stand on the mountain top and point an accusing finger at the other, claiming that the other has, because of conduct that shall be excavated in this judgment, fallen foul of the foundational principle of the rule of law.

[4] It would be obvious, that both of them standing on opposite sides of the lectern as they do, cannot be both right that their conduct is steeped in the ethos of the rule of law. Who amongst these litigants stand on the proper side of the rule of law, is the question that confronts the court and which will lead to a determination of the principal question posed.

The parties

¹ Francis Neate, The Rule of Law: Perspectives from Around the Globe, Lexis Nexis, 2009, at p22.

[5] The 1st applicant is the Minister for Finance of the Republic of Namibia, a member of the Executive organ of State. The 2nd applicant is the Namibia National Reinsurance Corporation Limited, (NamibRe), a State-owned corporation established in terms of the provisions of the Namibia National Reinsurance Corporation Act.²

[6] The 1st to the 8th respondents are various insurance companies duly incorporated in terms the company laws of the Republic of Namibia. They all have their seat in the City of Windhoek and are represented by Messrs. Francois Erasmus and Partners, a Windhoek based law firm.

[7] The 9th to the 16th respondents, are private individuals who hold the positions of Chief Executive Officer in respect of the insurance companies referred to in the immediately preceding paragraph. The Chief Executive Officers have been cited, it would seem, in their personal capacities in respect of some of the relief that the applicants seek and which shall be adverted to below.

Relief

[8] Presently serving before court is an urgent application brought in terms of the provisions of rule 73 (3) and in terms of which the applicants referred to above seek the following relief against the respondents:

‘1. Condoning the applicants’ non-compliance with the rules relating to time periods, forms and service, and directing that the matter be heard as one of urgency in terms of Rule 73(3);

2. Declaring that pending the final determination of the proceedings brought by the first to the eight respondents (“the respondents” under case numbers HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127 (“the pending proceedings”), the following are of full force and effect:

² Act No. 22 of 1998.

2.1 The Namibia National Reinsurance Act, 22 of 1998 (“the Act”);

2.2 Government Notices 333, 334, 335, 336, 337 and 338 promulgated on 29 December 2017 in terms of the Act, and published in Government Gazette No. 6496 (“the Notices”);

2.3 The Regulations promulgated on 29 December 2017 in terms of the Act, and published in Government Gazette 332 in Government Gazette No. 6496 (“the Regulations”)

3. Ordering that pending the outcome of the pending proceedings, the respondents are obliged to comply with the provisions of the Act, the Notices and the Regulations with immediate effect;

4. Authorising herewith the applicants, failing compliance with prayer 3 above by any respondent, to apply to this Court forthwith on the same papers, duly amplified if required, for an order of committal for contempt in respect of any such breach of this Court’s order, of such respondent’s or respondent’s chief executive officer, being the ninth to sixteenth respondents;

5. Ordering the respondents to pay the applicants’ costs, jointly and severally, the one paying the others to be absolved, on a scale as between attorney and client, such costs to include the costs of two instructed counsel and one instructing counsel.’

Commendation

[9] It is appropriate to mention at this juncture, that the respondents were served with the application and the matter served before me whilst on urgent duty on 31 July 2018. I then took charge of the matter and case managed it. In this regard, I put the various parties to terms regarding the filing of all the relevant sets of papers, which would conduce to the ripening of the matter for hearing. This included the filing of the respective sets of the parties’ heads of argument.

[10] I must express the court’s appreciation to all counsel involved, firstly for substantially complying with what were stringent time limits imposed and demanded by the matter, within which to file the relevant sets of papers in this

matter, which cannot be described as a straightforward run of the mill case. Additionally, I wish to commend both sets of legal teams for the high degree of industry, diligence and assiduousness displayed. The court has drawn tremendous assistance from your toil and sleepless nights, burning the midnight oil, as you sought to perform your respective duties to the court.

Background

[11] This matter has a long and chequered history. Shorn of all the frills, the relevant history acuminates to this: In 1998, Parliament promulgated the Namibia Reinsurance Act, (the 'Act'), which served *inter alia* to establish a framework for the regulation of reinsurance in this country. Also established in terms of the Act was the 2nd applicant, NamibRe, whose main objects were to include the promotion and development and participation of the people of Namibia in the insurance and reinsurance industry; the provision of reinsurance cover of international standards; the development of local retention capacity in insurance and reinsurance business and to minimise the placement of insurance and reinsurance outside Namibia, thereby preventing capital outflows.

[12] In order to realise these main objects, the Act made provision for compulsory cession of insurance contracts, compulsory cession of reinsurance business and for a right of first refusal to NamibRe for insurance over and above that which is ceded to it in terms of the Act.

[13] Dissatisfied with certain provisions of the Act, the private insurance industry launched a constitutional attack on the constitutional validity of the Act. This was around 1999. A full bench of this court, however, dismissed the challenge on grounds that need not be revisited in this judgment.³

[14] In 2017, the 1st to 8th respondents, together with other insurance companies, including Momentum, King Price, Corporate Guarantee and Bonben Assurance Namibia Limited t/a Bonlife, instituted action proceedings

³ *Namibia Insurance Association v Government of the Republic of Namibia and Others* 2001 NR 1 (HC).

before this court under case no. HC-MD-CIV-ACT-OTH-2017/04493. In this action, the said parties challenged the constitutionality of the Act on grounds that need not be traversed in this judgment. That case remains pending before this court and as I understand, the applicants, as defendants in the matter, have filed an exception to the particulars of claim lodged.

[15] It is not disputed that the Minister is empowered by the Act to make regulations and to issue notices with a view to giving effect to the objects of the Act. In exercise of that power, the Minister, in November and December 2016, caused certain notices to be issued and gazetted, namely notices numbers 266, 267 and 291. These notices dealt with the compulsory cession of insurance contracts and reinsurance business and related matters. A challenge to the issuance of these notices was mounted by the respondents, who brought an application for review before this court, in which they seek to have the said notices set aside.⁴

[16] The Minister, in view of the challenge, decided to withdraw the said notices and opted to engage in a public consultation process on the issue.⁵ In this regard, interested parties were required to make representations in writing. It appears that there was a lot of misunderstanding between the Minister and the respondents, culminating in the exchange of correspondence that was at times feisty, each party giving and taking in the acrimony traded *inter partes*.

[17] It would appear that part of the complaint by the respondents was that the time fixed by the Minister for the making of the representations was short and not quite accommodating of the needs of the respondents. An issue also arose regarding NamibRe not tendering costs for the proceedings that were withdrawn as a result of the Minister's decision to consult widely on the way forward.

⁴ *Hollard Insurance Company of Nomibia Ltd and Others v Minister of Finance and Another* HC-MD-CIV-MOT-REV-2018/00127.

⁵ P29 of the record and reference to the Minister's Statement marked "FA 1".

[18] As if that was not enough, there was another bone of contention between the parties, namely, the respondents required information from the Minister which he relied on in issuing the notices, from which demand the Minister smelt a yellow rat, so to speak and declined to issue the information, alleging that the information was sought to be used by the respondents for litigation purposes. It is accordingly fair to say that there is a lot of mistrust between the parties, as to their words, actions and assumed motives. Nothing, it seems, said or done by the other is taken at face value. This has made reaching common ground on any issue very difficult, even in respect of issues that may be considered as mundane.

[19] It would appear that the respondents did not eventually participate in the public consultation. According to them, they filed affidavits in which their position regarding the proposed notices were recorded. A dispute about whether these affidavits were uploaded on the Ministry of Finance website loomed large. I do not have to resolve that issue though. I may mention *en passant* though, that the affidavit referred to by the applicants in terms of which the applicants rely for their position that the affidavits were indeed uploaded, does not support the applicants. I will say no more on that issue as it is not very germane to the enquiry under consideration.

[20] I should also mention, that a lot of time was expended by the parties arguing their respective positions and in respect of which they understandably adopted discordant positions. It would do each side's ego a great deal of good and afford a needed massage for the court to decide on the various issues in contention by saying who was right and wrong on the various highly contentious issues argued. I am however acutely aware that the resolution of only very few of those issues would result in cutting the proverbial Gordian Knot in need of attention. I should, for that reason not be side-tracked or seduced to expend time on issues that although captivating and interesting, and probably convincingly argued, will not conduce to the resolution of what are the real issues in need of determination in this matter.

[21] It would appear that the Minister, armed with the representations at his disposal, following a public hearing on 20 October 2017, including the

affidavits filed by the respondents, issued Government Gazette number 332, dated 15 December 2017, which was issued on 29 December 2017. This Gazette contained notices and regulations in terms of s.47 of the Act and also served to repeal the regulations published *vide* Government Notice No. 155 dated 5 August 1999.

[22] The respondents took issue with the Minister's latest decision and instructed their legal practitioners to record their collective view of the Minister's decision to gazette the new regulations and notices. In this regard, the respondents' legal practitioners, Messrs. Francois Erasmus, wrote a letter to the Minister's legal practitioners, the Government Attorney, dated 27 June 2018.

[23] Paragraph 4 of the said letter bears quoting, as it appears, it set the cat amongst the pigeons, as it were and accordingly set the present proceedings in motion. The said paragraph reads as follows:

'Given the above circumstances and the unresolved pending litigation, we place on record that the majority of our clients have no other option, but to, not comply with the impugned Notices. Accordingly, NamibRe does not have to take out any reinsurance in respect of any of the our clients, other than Momentum Short term insurance Limited, Bonben Assurance Namibia Pty Ltd (t/a Bonlife), King Price Insurance Company Limited and Nedbank Life Assurance Company Limited. These four companies will have to comply with the impugned Notices against their will, without prejudice to any of their rights, under protest and on condition that, if they are successful in impugning the Notices, the Regulation or the targeted provisions of the Act, they shall institute a claim for the loss of profit against NamibRe and/or the Government of Namibia. The main reasons for their – under protest – compliance would have been explained to the Minister in detail, had a meeting as requested and promised been scheduled. The four companies interpret any vague provision to their benefit.'

The last paragraph, has a conciliatory note to it, namely, 'Our clients regret that matters have come to this.'

[24] The Minister and NamibRe did not rest on their laurels after what they considered a letter of open defiance of the law. They struck while the iron was still hot and then brought the present application, seeking, as indicated in para [8], the relief set out therein.

Preliminary issues

Urgency

[25] Although the issue of whether or not the matter fell within the rubric of the provisions of rule 73 loomed large, the parties appeared *ad idem* at the end that the issue of urgency no longer constituted a live matter for determination. This was so because to some extent, any injury or prejudice that may have been suffered, particularly by the respondents, was ameliorated by the court setting out a time table for the filing of papers thus conducing to the eventual hearing of the matter, levelling the playing field in the circumstances.

Notice of motion to strike out

[26] The Minister, as he was entitled to, filed an application for the striking out of certain paragraphs of the respondent's answering affidavit on the bases that same were scandalous, vexatious or irrelevant. As this application is clearly interlocutory, the parties followed the peremptory provisions of rule 32 (9) and (10), which did not, however, bear any fruit and as such, the respondents stuck to their guns, conceding not even an inch of territory. It is thus necessary to deal with this application, albeit in as short and decisive a manner as possible. I proceed to do so below.

[27] There are a number of words and phrases that the respondents used particularly in relation to the Minister, which are alleged to be scandalous and have therefor left him wounded, thus seeking the balm that a striking out application can provide. I will not mention that various epithets that ground the application but will sample through the contents of the notice in order to highlight these, if any.

[28] At para 339, the respondents alleged that the Government was seeking to enrich herself in the following language:

‘ . . . through them Government is enriching itself to the prejudice of consumers of insurance products who prudently invest to protect themselves against debilitating risks (and thus seeks to escape the social-welfare net for which Government is responsible). If reinsurance funds are cheaply borrowed to Government, insured individuals risk being exposed to risks which reinsurance cannot compensate because ‘government can have access’ i.e. help itself to the funds.’

[29] At para 345, the respondents say in their answering affidavit:

‘This court should not with respect permit Government, in the interim to bankroll itself by “accessing” citizens insurance investments. Particularly not in circumstances where the status *quo* is that, as the latest Namfisa statistics demonstrates, that insurance companies capital primarily sits on balance sheet of Namibian companies and therefore invested across the Namibian economy in various asset classes as dictated by the impugned measures in the interim. Doing so will actually increase any legitimate “access” to the funds within the Namibian economy. Instead it would open the door to misappropriation by Government. The public interest strongly militates against interim relief in favour of the Government in such circumstances.’

[30] What is the approach of the courts towards such applications? In this regard, I will not deal with the procedural issues regarding whether the relevant procedure was followed or not as there is no such complaint in this regard. The learned author Erasmus,⁶ says the following regarding the operative principles in such applications:

‘Two requirements must be satisfied before an application to strike out can succeed: first, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; second, the court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced. The procedure for striking out was not intended to be utilised to make technical objections which merely

⁶ Erasmus, Superior Court Practice, Juta & Co., 2010 at p. B1-58.

increase costs. . . Scandalous or irrelevant matter may be defamatory of the other party and the retention of such matter will therefore be prejudicial to such party.'

[31] The question that the court must now consider, having regard to the above authority, together with the bases of the complaint raised by the Minister, is whether the application is in the instance case sustainable. Is the matter complained of one that falls within the prohibited sphere?

[32] In *Vaatz v Law Society of Namibia*,⁷ this court stated as follows regarding scandalous and vexatious matter:

'Even if the matter complained of is scandalous or vexatious or irrelevant, this Court may not strike out such matter unless the respondent would be prejudiced in its case if such matter be allowed to remain. All those words, "scandalous", "vexatious" and prejudice are words used almost every day in courts of law. The context in which they are used can lead to variation of meaning, but basically, they have the meaning allotted to them by the Shorter Oxford English Dictionary. In rule 6 (15) the meaning of these can be briefly be stated as follows:

Scandalous matter – allegations which may or may not be relevant, but which are so worded to be abusive or defamatory:

Vexatious matter – allegations which may or may not be relevant but are worded as to convey an intention to harass or annoy.'

[33] At p 334, this court proceeded to say the following in the *Vaatz* matter:

'If a party is required to deal with scandalous or vexatious matter, the main issue could be side tracked but if such matter is left unanswered, the innocent party may well be defamed, the retention of such matter would therefore be prejudicial to the innocent party.'

[34] I am of the considered view that having regard to the above quoted paragraphs of the answering affidavit, these appear to me to fall within the realms of the scandalous and vexatious. To impute theft to the Government in

⁷ 1990 NR 332 (HC) at 334.

these circumstances for improper use of the monies so stolen, is certainly abusive and defamatory of the members of Government. I am aware that politicians are normally to be regarded as having the proverbial 'thick skin' to withstand attacks but to do so willy-nilly in court papers is certainly unacceptable, particularly when there does not appear to be any evidential basis supplied for the nefarious claim or allegation.

[35] There are also allegations made that suggest that the Minister lacks integrity as he misled the court⁸ and that he was acting in terms of 'Cabinet's coercion'⁹ and not in terms of his own free will, judgment and dictates of his office. It was further alleged that he 'sought to settle the industry's litigation . . . in exchange for his own exemption from giving *viva voce* evidence . . .',¹⁰ suggesting that he acts improperly in order to serve his own interests to the detriment of the principle and the public interest.

[36] I consider that these are also abusive allegations and attacks *ad hominem* on the Minister in particular, and they should be struck out in the circumstances. They appear to be a personal attacks on the Minister in the absence of evidence supplied for the impropriety imputed to him and to the Government in general. This being an application, the affidavits also constitute the evidence and that is where the relevant evidence should have been included. A party may not embellish its case in this regard with evidence from the bar or in its heads of argument. A party may canvass their case fiercely, valiantly but they must also do fairly, without taking their eyes off the ball and playing the man or woman, as the case may be.

[37] In this regard, it is important to have regard to the admonition issued by the Supreme Court in *New Africa Dimensions CC and Others v Prosecutor General*,¹¹ where the court stated the following regarding language not expected to be employed in court papers:

⁸ Para 254 of the answering affidavit, p.491 of the record.

⁹ Para 74.2 of the answering affidavit, p.401 of the record.

¹⁰ Para 288 of the answering affidavit, p.502 of the record.

¹¹ Case No. SA22/2016 (SC), delivered on 8 March 2018, at para [57].

'I fully agree that the various epithets gratuitously used in the appellants' principal answering affidavit to cast aspersions on the PD and to ridicule her application such as "malicious prosecution", dishonourable conduct", "fraud", "nonsense", or even "foolishness", are not supported by any evidence. They appear to be raised *ad hominem*, so as to discredit the PG or officials seized with the conduct of the application personally for exercising their public functions. Conducting the defence of a client in such a highly antagonistic and personal fashion is patently contrary to the high standards of practice to which all counsel must be committed.'

[38] I accordingly order that the following paragraphs of the respondents' answering affidavit be and are hereby struck out with costs; paragraphs [71.2]; [74.2]; [254]; [288]; [339] and [345].

The Minister's position

[39] I now revert to deal with the position adopted by the Minister in view of the issues that arise as captured in the background given above. The Minister's position, which appears to be shared by NamibRe is that the issue now exhumed, and those are the words used by Mr. Gauntlett, for the applicants, was settled by a full Bench of this court in 1999. In this regard, the applicants were at pains to point out, the judgment was not appealed and remains binding. Furthermore, they further charged, the respondents have not made any allegation that the said judgment was clearly wrong such that it should be departed from.

[40] The Minister did not take kindly to the 'defiance' shown by the respondents. He appears to have been moved by what one may term 'righteous indignation' at the respondents' avowed 'defiance' of the law. In this regard, he expressed himself as follows in his affidavit:¹²

'In stark contrast the respondents adopt a position of defiance regarding their obligations to act in terms of the operative reinsurance scheme during the period before the final determination of the challenge and review. Although they undertake to file compulsory borderaus – being a detailed statement accounting for compulsory cessions under the measures (and provided for in the Regulations) – they indicate

¹² P 48 of the record, para 90.2 of the Minister's Founding Affidavit.

that they will “*not comply*” with the regime of compulsory cessions; that “*NamibRe does not have to take out any reinsurance*” in respect of the respondents; and that “*no money will be paid over*” by them. Put differently, they flatly refuse to implement the substance of measures without any lawful justification. And they do so, not consistently, but by themselves selecting some measures with which they will comply, and others they choose to defy. They simply pick and choose.’

[41] At para [95] and [96], the Minister proceeds to say the following, in his line of assault:

‘[95] The respondents’ conduct has brought about a very serious situation. For the first time, clearly deliberately on the last day of the notice period, the respondents have chosen to disclose that they will not comply with extant, operative legislative provisions (an Act, its Regulations and an implementing Notices) as well as my (unreviewed) decision. They do so inconsistently, choosing what to comply with and what no to. They have broken ranks with other major insurers which are not flouting the law pending the determination of the challenge and the review. They have co-ordinated however with each other, sending a single joint letter. The financial planning of both Government and NamibRe is severely disrupted by this defiance. So, too, I shall show, other macro-economic consequences now arise.

[96] It has accordingly become necessary to approach this Court for relief in order to affirm the principle of the rule of law and uphold Article 1(1) of the Namibian Constitution, and to ensure that the measures – being the product of an exhaustive public process – are implemented by all those subject to them to achieve the objects of the Act.’

[42] At para [101], the Minister continues and states that, ‘If the respondents are permitted to continue in their stance, there is every reason to apprehend that those who are currently complying will cease to do so. Also, more widely, that other corporate entities or individuals stand to follow the respondents’ example, and to decide with what parts of Government tax or other regulatory schemes they have “no other option” but to choose to defy. Government in general and public finance (for which I hold executive responsibility in Cabinet) in particular cannot afford to allow such a stance to be allowed to continue.’

[43] It may be accurate, from the portions of the Minister's affidavit, quoted above, to say that he was not in the least pleased by the reaction of the respondents, particularly their refusal to comply with what he considered to be effective and applicable law of this Republic. In this wise, he decided to call the errant respondents to book by bringing this application, possibly for the court to read the riot act to them and point them to the virtuous behaviour expected of them, namely, to comply with the law until it is properly set aside by a competent court.

The respondents' reaction

[44] The respondents, it would be fair to say, stuck to their guns – they did not become lily-livered. They took the position, upon advice, that there was nothing wrong with them not complying with what they considered impugned provisions of the Act, the notices and the regulations issued by the Minister.

[45] The respondents' collective response is captured in the answering affidavit of Mr. Jacobus Celliers Lamprecht, to which the CEO respondents filed confirmatory affidavits. I will not seek to capture all the allegations made therein directed at gainsaying what the Minister and NamibRe have stated in the founding affidavit. I will seek to essentially capture the cream of the respondents' contentions, particularly regarding their 'defiant' stance as perceived by the applicants. In this regard, I will seek to tease out the legal premise of their stance as gleaned from their affidavits, eschewing, in the process some of the highly technical contentions that do very little to deal with the legal validity of the respondents' stand not to comply with the Act, notices and regulations issued by the Minister.

[46] Regarding the Minister's contention relating to the respondents alleged 'exhumation' of the bones of the settled NamibRe judgment of this court, the respondents pour scorn on this allegation and state that theirs is a new challenge altogether, initiated by way of a combined summons and is far from a resurrection of the earlier proceedings. The respondents further allege that tellingly, the applicants have not, in these papers, raised the applicability of the doctrine of *res judicata*. In further substantiation of their stand, the

respondents contend that the parties to the present action are substantially not the same as those in the earlier proceedings. They contend further that the issues for determination in the current pending proceedings, substantially differ from those pronounced on by the Full Bench of this court.¹³

[47] The respondents further vehemently denied that they were in 'defiance' at all. In particular, they denied having impermissibly defied any valid legal provision and further denied that their conduct violates the rule of law as alleged by the applicants. It is the respondents' case that they are the ones holding the applicants, who choose resort to 'rule by law', to the rule of law.¹⁴

[48] In particular, the respondents contend that they have launched constitutional applications regarding the validity of the Minister's actions complained of and that these proceedings carry good prospects of success. In that regard, continue the respondents, the Minister is required to respect this court's constitutional competence to decide on the constitutionality of those provisions and not seek to have same enforced before the constitutional challenge is fully and finally settled.

[49] In view of the competing issues for determination, as raised by the parties, it would seem to me that there is one critical issue, which if decided, is likely to cut the Gordian Knot in this matter and this is regardless of which way the court rules. This, in my view is the question of the collateral challenge raised by the respondents as a reaction to the relief sought by the Minister. Dealing with and deciding that issue, would have the desired effect of deciding who among the protagonists, for the purposes of this case, is on the right side of the rule of law. This is said in view of the finger-pointing exercise that I referred to earlier.

The collateral challenge

[50] It is apparent, from reading the respondents' papers that as a defence to the Minister's relief sought, particularly the order relating to contempt of

¹³ Page 124, para 211 of the Respondents' answering affidavit.

¹⁴ P 137 of the Respondents' answering affidavit at para [265].

court and possible imprisonment, the respondents attack the validity of the Minister's action from which the contempt spoken of arises and this is raised as a collateral challenge.

[51] The court, during argument, was referred to a number of cases by both parties and some of them common to both that deal with the concept of a collateral challenge. These include *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Others NNO*;¹⁵ *Boddington v British Transport Police*;¹⁶ *Rally For Democracy v The Registrar of the High Court*;¹⁷ *Merafong v Ashante Gold*¹⁸ to mention, but a few.

[52] In dealing with the issue of the collateral challenge, I do not need to reinvent the wheel as it were. In the *Black Range* case, the Chief Justice referred with approval to *Rally for Democracy and Progress (supra)*, where the Supreme Court distilled the principles applicable to a collateral challenge as follows:¹⁹

(a) A collateral challenge may only be used if the right remedy is sought by the right person in the right proceedings.

(b) Generally speaking and in an instance where an individual is required by an administrative authority to do or to refrain from doing a particular thing, if he or she doubts the lawfulness of administrative act in question, the individual may choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved, and the individual will be able to raise the voidness of administrative act in question as a defence.

(c) It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he or she is threatened by a public authority with coercive action, precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.

¹⁵ 2014 (2) NR 3210 (SC).

¹⁶ [1998] 2 All ER 203 (HL)

¹⁷ [2013] 3 NR 664 (SC).

¹⁸ 2017 (2) SA 211 (CC).

¹⁹ *Ibid* at p. 329 D-H at para [19].

(d) Collateral challenges may not be allowed where evidence is needed to substantiate the claim, or where the decision-maker is not a party to the proceedings, or where the claimant has not suffered any direct prejudice as a result of the alleged invalidity,

(e) A collateral challenge bears on a procedural decision.

[53] At para [20], the learned Chief Justice continued to reason as follows regarding the collateral challenge:

‘As a general principle, a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. The general thread that runs through the case law is that a collateral challenge may be allowed where an element of coercion exists: a typical example is where the subject is threatened with coercive action by a public authority into doing something or refraining from doing something and the subject challenges the administrative act in question “precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.” It must be the right remedy sought by the right person in the right proceedings.’

[54] At para [21], the Supreme Court proceeded to deal with the meaning to be attached to the phrase ‘coercive action’ and reasoned as follows:

‘The term “coercion” includes both direct and indirect coercion. A form of compulsion must exist to prevent a person from exercising their free will to do or refrain from doing something. This court in *Namibia Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) in para 25 accepted the definition in *The Collins Dictionary Complete and Unabridged* 8 ed where the word “coercion” was used along with terms such as “compulsion by use of force or threat” and “constraint”. The *Concise Oxford Dictionary* 10 ed defines “coerce” as to “persuade (an unwilling person) to do something by using force or threats”. This can be distinguished from persuasion or consideration, in the sense that a person is no longer persuaded when he is influenced by another by threat of taking away something he or she possesses or preventing him or her from obtaining an advantage he or she would otherwise have obtained.’

[55] The next question to consider, having drawn the perimeters of the application of a collateral challenge, is whether the respondents, who have raised the collateral challenge, meet the requirements so carefully set out in the above judgment. In particular, the questions that have to be answered, as captured in the *Rally for Democracy* judgment are (a) is the remedy sought by the respondents the proper one?; (b) are the respondents the 'right' persons?; and (c) are these the right proceedings in which to raise a collateral challenge. It may be well to also consider whether there is any coercive action threatened by the Minister in this case.

[56] Mr. Gauntlett, in his eloquent address, argued with a lot of force and conviction, that the respondents do not meet the above criteria. He submitted that although the respondents may be the proper persons to raise the collateral challenge, the proper remedy that was available to the respondents in the circumstances, was not to raise the collateral challenge but rather, to apply to this court to stay the application of the Minister's notices and regulations under the Act. Had the respondents taken that pre-emptive step, he further argued, the court might well be dealing with another matter and not a collateral challenge.

[57] In this regard, it was further submitted on behalf of the applicants that these proceedings were not the right ones in which to raise the reactive challenge. This submission was made in the light of the fact, as mentioned in the background, that the respondents launched a constitutional challenge to certain provisions of the Act; the notices and regulations passed by the Minister in terms of the Act. Those, according to the applicants, are the right proceedings in which a collateral challenge ought to have been raised.

[58] Mr. Gauntlett also argued that the respondents approached the matter from the wrong end of principle. In this regard, he submitted that the Act, the regulations and the notices are extant and thus are of 'full force and effect', the consequence of which is that the respondents are obliged to comply with them as a matter of law. In this regard, so the argument further ran, it is in very narrow and circumscribed situations that a party in the respondents' shoes may disregard the administrative decision or legislative prescript. In the

regard, in any event, he further submitted, the onus rests on the respondents to establish that they are entitled to raise a collateral or reactive challenge. This, he submitted, the respondents had dismally failed to do.

[59] The respondents' submissions were a different kettle of fish altogether. Mr. Heathcote, who delivered the first blows at the applicants' argument, submitted that the respondents were eminently correct in raising the collateral challenge and that there was no better case for them to raise it than in the present proceedings. He claimed that the respondents were the correct party, a submission that the applicants have not gainsaid and I will take it as a given.

[60] Furthermore, he claimed that these are the right proceedings in which to raise the challenge. In this regard, he drew the court's attention to the fact that the respondents did not only start questioning the Minister's decision, as it were, on the eve of the Minister's notices and regulations coming into effect. He argued that they had before the end of 2017 already filed the review application and the constitutional challenge.

[61] Mr. Heathcote further submitted that properly considered, the respondents were on the correct track for the reason that the Minister's order sought, particularly that the respondents should comply, failing which the respondents, particularly the C.E.O.s, also cited, should pay a personal sacrifice with their liberty, in the circumstances, amount to coercive action within the meaning of the *Black Range* judgment.

[62] He further submitted very forcefully too, that there was nothing of an aberration in the respondents' action because it is in the very nature of a proper approach to a collateral challenge for the party on the receiving end of the administrative order, action or decision, 'to treat it as void and await the developments', as captured in *Black Range*. In this regard, it would seem from the respondents' argument, the Minister played right into their hands and that the events that unfolded had all the hallmarks of a reactive challenge, thus rendering this current matter an open and shut case where a collateral challenge is condign.

Determination

[63] I should start the exercise, by stating that in deciding the question of whether this is a proper case in which to raise the collateral challenge, it would be useful to answer the questions as framed in the *Black Range* case quoted above. In the first place, as I have noted above, there is no question that the respondents are the right party in these proceedings. In this regard, there can be no qualms or compunctions regarding the fact that the respondents stand to be affected by the order sought by the Minister. In fact, the 8th to 18th respondents are, if the Minister's application is granted, and they do not comply, to pay a personal price by forfeiting their liberty, even if for a season. They are, for that reason, the right party. They have also shown on affidavit that they stand to suffer great prejudice if the Minister's decisions are allowed to stand.

[64] The next question is whether the right remedy is being sought. It would seem to me that it would be preferable, in the peculiar circumstances of this case, to deal with the last questions together, as they seem to coalesce to some extent with the last question, namely, whether these are the right proceedings.

[65] In essence, it would seem to me, the respondents seek, in terms of their defence, an order where a decision on the current proceedings, namely that the Minister's order is extant and of full force and effect, is decided against the Minister by reasoning that same are unlawful and unconstitutional. This, as suggested above coalesces with the question whether these are the right proceedings in which to raise the collateral challenge.

[66] I am of the considered view that the question whether these are the right proceedings, must be considered from the viewpoint that this application comes in the wake of the two other proceedings mentioned earlier and which have been raised by the respondents themselves. As intimated earlier, the applicants contend that the right proceedings, in which a determination ought to be made on the collateral challenge, is in the pending matters and not the current proceedings. Are they correct?

[67] I am of the considered view that the applicants do not stand on firm ground in this regard. I say so for the reason that they are aware of both the constitutional and the review matters. This is plainly so because they are parties thereto and they were served with the papers and it would seem that the matters are progressing as we speak. In light of that fact, the question then becomes whether it was proper for the Minister to issue the notices and the regulations in the face of the impending two challenges? More importantly, the issue is whether the current proceedings, accompanied as they were, with the sword of Damocles, namely coercive action that precariously hangs over the respondents' heads, namely the contempt of court, is appropriate in the entire circumstances of the case?

[68] I am of the considered view that the applicants are not correct in saying these are not the correct proceedings in which to raise a collateral challenge. In my view, the respondents are the correct parties as stated earlier. There is a coercive force that the Minister seeks to have unleashed on them. They have, in the circumstances, particularly in the light of the pending proceedings, treated the Minister's actions as invalid and thereupon raised the collateral challenge in this matter. To that extent, I am of the view that this matter falls neatly within the meaning of correct proceedings as envisaged in *Black Range*. The fact that they have instituted other proceedings, including review proceedings cannot be correctly held against them.²⁰

[69] Although I have found that the current proceedings are the right ones, it would be my considered view, informed by my brief reading of the pleadings that the issues raised in the pending proceedings are very comprehensive and the issues raised are very wide and complex. It would, in the circumstances, and for no other reason than convenience, be fitting that all the important matters of law, and fact, where applicable, and which accordingly may require the adduction of oral evidence in the action proceedings, would be best dealt with in the pending proceedings.

²⁰ *Airports Company South Africa Ltd v Airport Bookshop (Pty_ Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ), see the headnote.

[70] As is clear, these proceedings were brought on urgency. Urgent applications, by their very nature, have inherent limitations that may render certain types of matters ill-suited for proper resolution. In the instant case, I am of the view that because proceedings have already been initiated by the respondents against the applicant, it makes economic and judicial sense to not deal with the issues in the present setting but refer the ultimate decision to the more appropriate forum already created by the respondents in the pending matters referred to earlier.

[71] It is in my view important to recognise that this is not the usual case where a collateral challenge is being raised as a defence for the first time in these proceedings. As has become clear, the respondents took it upon themselves, even before the Minister issued and gazetted the notices and regulations, to challenge certain provisions of the Act, the regulations and the notices both by way of review and on a constitutional basis as stated earlier.

[72] It would appear to me, in these peculiar circumstances, that in view of the respondents taking pre-emptive measures, and considering the staggering legal issues that arise from the affidavits filed by the respondents, considered *in tandem* with the allegations made in the pending matters that it would not be convenient to decide the collateral challenge in this particular matter. Should the collateral challenge be dismissed merely on the basis that a more suitable forum has been made available?

[73] I am of the view that such an approach would be unfair and would serve to rob the respondents of the protection that the pre-emptive challenge offers them even in the context of the present matter. As stated, although there is nothing that can stop this court from dealing with the matters of the collateral challenge, there are, however, other weighty considerations that should not be allowed to sink into oblivion.

[74] I should, in this connection, also point out that the argument about the correct proceedings should be considered contextually. It would be a travesty of justice for a litigant in the position of the applicants to launch proceedings of this nature on urgency, knowing that they may not be appropriate for the

raising and determination of a collateral challenge and have them benefit therefrom thus depriving the opposite party of a perfectly legal challenge on no other basis than that the applicant in advance deliberately chose a forum that would not conduce to the proper determination of a collateral challenge. In saying this, I am not in any way intimating that this was the tactical approach of the applicants in this case.

[75] As stated, other proceedings are pending before this court in which the collateral issues raised in the collateral challenge are pertinently raised. Were this court, as presently constituted, to proceed to deal with the issues that arise, a danger may well be courted in that different decisions may be reached by this court on similar issues between the same parties, which would be unwise in the circumstances. This would not redound to clarity and certainty on the issues central to this dispute.

[76] I entertain no doubts that the Minister's weapon, namely the contempt suggested in the papers, manifests itself as a coercive action. This is because he seeks the compliance by the respondents now – failing which they should be liable for contempt of court. In his argument, Mr. Gauntlett attempted to downplay the seriousness and the immediacy of the Minister's intended action in case there is non-compliance.

[77] He submitted that there is no immediate danger of the respondents, particularly the 9th to the 16 respondents losing their freedom because the decision to send them to jail, if taken, will be the result of a criminal prosecution, where relevant provisions of the Act will have been alleged to have been violated and the Prosecutor-General, having exercised her constitutional powers in regard to whether or not to prosecute.

[78] It is well to speak in those considerate terms at this stage. A reading of the orders sought by the applicants, particularly prayer 3 does not seem to support Mr. Gauntlett's argument. The writing is on the wall as to what the applicants seek in case of non-compliance and this cannot be changed by oral argument, which downplays the consequences of non-compliance. I am of the considered view that the applicants must be held to what they have

asked for in black and white as there is nothing suggesting that they are jettisoning and abandoning their previous prayers.

[79] On the other hand, it seems to me also important to mention that the fact of the alleged unconstitutionality of the Minister's actions and their alleged reviewability, was made known even before the Minister contemplated these proceedings, it would seem to me. In these peculiar circumstances, I am of the considered view that it would be wise and prudent not to deal with the collateral challenge, which as I said, is otherwise properly raised, but await a better placed forum where all the issues raised can be properly and fully canvassed and ventilated and at the same time, avoid this court speaking in multiple tongues on the same issues.

[80] In the circumstances, it seems proper and fair to say even though it may appear at first blush that these are not the right proceedings in which to raise a collateral challenge, the peculiar circumstances of this case, particularly the type of proceedings which have given rise to the collateral challenge, namely an urgent application, together with the fact that other proceedings are pending before this court, points inexorably in the way of staying the effect of the Minister's actions, pending the full and comprehensive treatment of all the issues raised in the pending proceedings, in a setting where time and the needed resources can be availed to make a full and proper determination of the issues.

[81] One issue that deserves mention is that the situation, which the Minister seeks to correct in his view, and this is contested territory, has been continuing for some time. There is, in the circumstances less harm in holding the implementation in abeyance *pro ha vice*. It would, in my considered view, be preferable that the effect of the Minister's decisions be stayed and allow the matters, which have already been launched, to be ventilated and decided by this court than to have the decision implemented under a serious cloud of controversy and possible illegality, which was raised even before the notices and regulations were promulgated.

[82] I am acutely aware that there are other issues that have been raised by the parties that would have been expected to be determined. In view of the approach that I have found appropriate in this case, and without seeking to express views on matters that may be better ventilated in the pending proceedings, I would prefer to keep the matters to the present.

[83] I should, however, mention that from the reading of the respondents' papers, considered together with the pleadings in the pending proceedings, on the one hand, and the contentions of the applicants on the other, a *prima facie* case, I would venture to suggest, has been made by the respondents. Of particular note, is the case presented particularly on behalf of the two Trustco respondents, namely that they do not transmit any money outside the country at all. As such, they contend, the Minister's decisions act to their serious disadvantage, to the extent of pushing their business to the realms of the moribund.

[84] I am of the considered view that this is an issue that was not addressed by the applicants fully in reply and the court would, at this stage, have to proceed on the premise that the said respondents are correct, an issue that can be fully ventilated in the pending proceedings.

[85] Having said this, I am of the opinion that some alarm may have been caused to the independent observers about what may be perceived as open defiance of the law by the respondents and in a sense an air of condescendence of the Minister in particular. In my understanding, it would appear that parties in the respondents' position are entitled at law, as held in the *Black Range* case, to treat the administrative action as void and await developments. This approach, as can be seen, is known to and endorsed, in appropriate circumstances, by the law and may not be equated with contumacious disregard for the law by anarchists and legal delinquents.

[86] In the light of the position that I have adopted, and the order that I intend to issue, it is of utmost importance that the parties move with deliberate haste to deal with and finalise the pending matters so that the needed clarity on the validity and constitutionality of the Minister's measures, is decided as

soon as is reasonably possible. Whatever the true picture is, and which can be seen with all the evidence being in, it is necessary for these matters to be dealt with on their real merits as soon as possible, eschewing in the process, unnecessary point-taking and counter-productive interlocutory applications.

[87] The sooner these issues are resolved, the clearer the shores will be on the permissible and impermissible. This will assist all the parties, including the Minister, to know when they eventually set the ball rolling, that the new approach carries this court's imprimatur. There can be no better feeling and atmosphere to operate in than when one knows that the steps they take have the court's stamp of approval.

[88] In this regard, this court, I need not appeal to the learned Judges allocated to deal with these matters as I am confident that the leadership of this court will appreciate the need to manage these cases and to ripen them for hearing and trial as soon as possible in the interest of the people of this country, the Government and the industry. Everyone watches with baited breath as these matters develop.

Costs

[89] It is trite learning that the costs follow the event. In this case, it is clear that the respondents appear to have had a measure of success in staving off the effects of the orders sought in the Applicants' application. If circumstances had been marginally been different, I would have considered ordering each party to pay its own costs but the law in this matter and the proper exercise of the discretion in matters of costs dictates that the successful party should have its day. I would, in the circumstances, order the applicants pay the respondents' costs on the normal scale.

Order

[90] Having regard to all the issues that have arise, in this matter, I am of the considered view that the following order is condign:

1. The application and implementation of the impugned provisions of the Namibia National Reinsurance Act No. 22 of 1998 (the 'Act') and Government Notices 333, 334, 335, 336, 337 and 338, promulgated by on 29 December 2017 in terms of the Act in Government Gazette 6496 and the Regulations promulgated on 29 December 2017 in terms of the Act, and published in terms of the Act and published in Government Gazette No. 6496 be and are hereby stayed, pending the determination of the following cases presently pending before this Court, namely, HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127.
2. The Applicants are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.
3. The offensive matter contained in the following paragraphs of the answering affidavit be and are hereby struck out as constituting scandalous and/or vexatious matter, namely, paragraphs [71.2]; [74.2]; [254]; [288]; [339]; [340] and [345].
4. The respondents are jointly and severally ordered to pay the costs of the motion to strike out on the normal scale.
5. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

APPEARANCE:

APPLICANTS

J Gauntlett (with him S Namandje; Kelly;
Hengari and E Nekwaya)

Instructed by the Government Attorney
and Sisa Namanje & Co. Inc., Windhoek

RESPONDENTS

R Heathcote (with him R Töttemeyer; M
Chaskalson and R Maasdorp)
instructed by Francois Erasmus & Partners,
Windhoek