



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

**JUDGMENT**

In the matter between:

Case no: HC-MD-CIV-MOT-REV-2018/00127

**HOLLARD INSURANCE COMPANY OF  
NAMIBIA LIMITED**

**FIRST APPLICANT**

**HOLLARD LIFE NAMIBIA LIMITED**

**SECOND APPLICANT**

**SANLAM NAMIBIA LIMITED**

**THIRD APPLICANT**

**SANTAM NAMIBIA LIMITED**

**FOURTH APPLICANT**

**MOMENTUM SHORT TERM INSURANCE LIMITED**

**FIFTH APPLICANT**

**TRUSTCO LIFE LIMITED**

**SIXTH APPLICANT**

**TRUSTCO INSURANCE LIMITED**

**SEVENTH APPLICANT**

**KING PRICE INSURANCE COMPANY**

**OF NAMIBIA LIMITED**

**EIGHTH APPLICANT**

**OUTSURANCE INSURANCE COMPANY**

**OF NAMIBIA LIMITED**

**NINETH APPLICANT**

**NEDNAMIBIA LIFE ASSURANCE LIMITED**

**TENTH APPLICANT**

**BONBEN ASSURANCE NAMIBIA**

**LIMITED T/A BONLIFE**

**ELEVENTH APPLICANT**

**OLD MUTUAL LIFE ASSURANCE COMPANY**

**(NAMIBIA) LIMITED**

**TWELVTH APPLICANT**

and

**MINISTER OF FINANCE**

**FIRST RESPONDENT**

**NAMIBIA NATIONAL REINSURANCE  
CORPORATION**

**SECOND RESPONDENT**

**Neutral citation:** *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-REV-2018/00127) [2019] NAHCMD 9 (21 January 2020)

**Coram:** GEIER J

**Delivered:** 21 January 2020

**Flynote:** Review – Procedure – Record on review – Extent of record – Applicable rule to be widely interpreted to afford an applicant in a review access to all material relevant to the exercise of the public power in question – court will ordinarily look favourably on a claim by a litigant to gain access to documents and other information required to assert or protect and to advance applicant's rights of access to courts and will thus afford a party a reasonable opportunity in doing so

Review – Procedure – Record on review – Extent of record – Rule 76(6) to be seen as a means to complete a record – requested additional material must be all material in the possession of the decision-maker relevant to the decision – possession does not mean actual possession only and it includes all facets of control available to the decision-maker by virtue of the powers he/she has – Rule 76(6) however stops short and does not seem to include documents/materials in the possession of third parties and the rule does not give the decision-maker the power to extract such documents/materials from third parties. The decision-maker is however obliged and has a duty to make all relevant enquiries and conduct a search for all relevant documents requested and then to either produce them or to record that such search and the relevant enquiries were unsuccessful.

Review – Procedure – Record on review – Extent of record – documents/materials/information which can be requested in terms of Rule 76(6) to be relevant to the impugned decision – relevance is not to be determined only with reference to the pleaded case in the founding affidavit as the review procedure set in

Rule 76 envisages the grounds of review changing later – accordingly what must be disclosed are all those documents/materials *that could have any tendency, in reason, to establish any possible/potential review ground in relation to the decision to be reviewed, ie. all materials relevant to the exercise of the public power in question ...*. The word ‘relevance’ as used in Rule 76(6) is ‘wide(r) in its scope and meaning’ and the concept differs in its scope and in the way it is applied in action- and also motion proceedings in general in that it is also not limited only to the actual material serving before the decision-maker but it so also includes all material available to the decision-maker – whether considered or not – for as long as it is relevant to the decision to be reviewed - and in any event it includes all material that is incorporated by reference.

**Summary:** How the court dealt with each separate request made in terms of Rule 76(6) appears from the judgment.

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### ORDER

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1. Prayers 1.1, 1.2, 1.3, 1.4, 1.5, 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12 of the Notice of Motion, dated 5 March 2019, are hereby granted
2. The request made in paragraph 1.6 of the Notice of Motion, dated 5 March 2019, is refused.
3. The request made in paragraph 1.13 of the Notice of Motion, dated 5 March 2019, is hereby granted in part and is limited to those documents evidencing compliance with Section 12 of the Namibia National Insurance Corporation Act, Act 22 of 1998 relevant to any NamibRe Board meetings convened for the taking of resolutions regarding the implementation or enforcement or giving effect to Sections 39(5) and (8), and 43(2) of the said NamibRe Act;
4. This Order is limited to the production of those documents in the First Respondent’s actual possession or under his control, alternatively to those

documents which are in the possession or under the control of officials within the First Respondent's Ministry and in any event this order is to apply also to all those documents/materials which the Minister's may be able to obtain by virtue of the powers vested in his office;

5. Prayers 2, 3 and 4 of the Notice of Motion, dated 5 March 2019, are also granted.
6. The case is postponed to 19 February 2020 at 08h30 for a Status Hearing.
7. The parties are to file a joint status report indicating their proposals on the way forward.

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## JUDGMENT

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GEIER J:

[1] The legal battle which rages between the parties engages in the first place the legal principles, pertaining to discovery, in review applications, and more specifically additional discovery, which is sought in circumstances where the decision-maker avers that he has discovered all documents, ie, the complete review record, which served before him at the relevant time and where it is thus contended that he has complied with the requirement to provide the complete- and in any event all relevant parts of the sought record, as required by Rule 76(2)(b) of the Rules of Court.

[2] The applicants however are of the belief that there are further documents in the possession of the first respondent, the Minister of Finance, the decision-maker in this instance, which are relevant to the decisions sought to be reviewed. They have thus demanded additional documents/materials in terms of Rule 76(6) and once that request - made under cover of the relevant notice - was not heeded - have launched this interlocutory application to compel the sought additional documentation – which application was opposed on various grounds.

[3] It should also be recorded that in order to expedite the proceedings the parties have also waived their right to oral argument. This judgment is thus made with reference to the papers exchanged between the parties and the written heads of argument filed in this regard.

[4] As a case is never determined *in vacuo* and as context is generally always relevant I believe it apposite to first call to mind against which backdrop this particular dispute will have to be decided.

#### The context

[5] Mr Töttemeyer SC, who drafted applicants' heads of argument with Mr Maasdorp's assistance, sketched the background to these proceedings usefully in such heads as follows:

4. The review seeks to set aside Notices and Regulations published on 29 December 2017 ("the December 2017 Notices") under the Namibia National Reinsurance Corporation Act, 1998 ("the NamibRe Act") by the Minister of Finance ("the Minister"). The Notices were preceded by a consultation process between February 2017 and October 2017, which the applicants assert was fundamentally flawed. The consultation process was in turn preceded by two earlier detailed review applications brought by the applicants in December 2016, against similar Notices published by the same Minister in November 2016. The Minister withdrew those 2016 Notices on 14 February 2017 and on the same day published an invitation to consult on new notices ("the Valentine's Day invitation"). The invitation was accompanied by detailed draft Notices that would inform the consultation.

5. The Minister had withdrawn the 2016 Notices without producing any reasons for the 2016 Notices or any record of his decision making in respect thereof, despite having been called upon to do so. The Minister also did not explain how he arrived at the percentages and other information in the detailed draft Notices. The Minister then, in correspondence exchanged over 4 months, refused to inform the applicants what informed the draft notices or provide copies of the documents he had before him when preparing the draft Notices. The applicants were compelled to launch an application to the High Court for access to the information, which they launched on 30 June 2017. This Information Application remains pending as the Minister continues to refuse to inform the applicants what material he had before him when he prepared the draft Notices, or provide them with copies of documents which the applicants specifically requested from him.

6. The 2016 Notices were, and the 2017 Notices are aimed at implementing the three pillars of the NamibRe Act. The pillars are the compulsory cession by each insurer to NamibRe of a percentage determined by the Minister of the value of each insurance policy; the compulsory cession by each insurer to NamibRe of the value of each reinsurance contract placed by that insurer with any other insurer or reinsurer; and the right of first refusal in respect of all reinsurance contracts in favour of NamibRe. The Minister is further empowered by the NamibRe Act to determine the rate of reinsurance commission payable by NamibRe to insurers.

7. The 2016 Notices set the percentages in respect of the first pillar at 12.5 percent for 2017, increasing to 15 percent from 1 January 2018, then to 17.5 percent from 1 January 2019, and finally to 20 percent from 1 January 2020. The second pillar percentage was fixed at 20 percent.<sup>1</sup> The 2016 Notices also specified the rate of commission, over-rider commission and rate of reinsurance brokerage payable by NamibRe to insurers and reinsurers.

8. The Valentine's Day invitation set the percentages at 18 percent in respect of the first pillar<sup>2</sup> and 20 percent in respect of the second pillar.<sup>3</sup> It also specified the rate of commission payable to insurers and dealt with several practical aspects not addressed in the 2016 Notices.

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<sup>1</sup> GN 266 of 2016, Founding Affidavit in Review Application, Record 61-62, Annexure "JL5".

<sup>2</sup> Founding Affidavit in Review Application, Record 77, Annexure "JL8".

<sup>3</sup> Founding Affidavit in Review Application, Record 76, Annexure "JL8" .

9. In the December 2017 Notices, the first pillar percentage was again fixed at 12.5 percent (with no indication whether, when and by how much the percentage would increase), and 20 percent in respect of the second pillar. The December 2017 Notices also set out the rate of commission and practical measures as proposed in the Valentine's Day invitation.

10. The Minister did make revisions to the portion of the insurance premium to be ceded by long-term insurers, and introduced an over-rider commission for short-term insurers, and addressed some of the participants in the consultation process' practical concerns, but left several other significant concerns unaddressed. The key features of the 2016 Notices - the 12.5% and 20% compulsory cession of insurance and reinsurance contracts - thus remained even after the flawed consultation process, as did the vast majority of the proposals in the Valentine's Day invitation. The undisputed evidence is that the terms of the 2016 Notices were determined by Cabinet directive and were never explicitly up for discussion with the insurance industry.<sup>4</sup>

11. These similarities, amongst others, support the applicants' entitlement to all documents which, on a wide definition of a record, would have formed part of the record of decision making for the 2016 Notices, and their entitlement to all documents which moved the Valentine's Day invitation, as those categories of documents are clearly also relevant to the December 2017 Notices sought to be reviewed in the present review application.'

[6] Counsel for the respondents, Mr Gauntlett SC, QC assisted by Messrs Namandje, Kelly and Nekwaya, on the other hand placed a different emphasis on the events leading up to this interlocutory skirmish. They did so as follows:

1. 'This is the third interlocutory application the applicants have brought to their pending review. The review is itself ancillary to a separately-instituted constitutional challenge by way of trial action. The trial action is being enrolled for the first term of 2019. The review is not even enrolled.

2. This third interlocutory invokes rule 76(6). It seeks to compel the first respondent ('the Minister') to produce documents for purposes of the review proceedings. These in addition to the record of his decision already produced under Rule 76, and separately confirmed by him on oath.

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<sup>4</sup> Founding Affidavit, Discovery Application, Record 17-18, paras 8.2.1-8.2.7.

3. The latest application has been brought against the backdrop of proceedings to enforce (in the interim, pending the review and the constitutional challenge, which the parties at the time agreed might take two or more years to achieve finality<sup>5</sup>) measures promulgated by the Minister under the Namibia National Reinsurance Corporation Act 22 of 1998 (‘the Act’). Earlier this month the Supreme Court set aside its own dismissal (by Frank AJA sitting in chambers) of an application by the respondents for leave to appeal against the judgment by Masuku J “*staying*” the Act. It granted leave, holding (para 119) that the respondents have “*more than reasonable*” prospects of setting aside Masuku J’s order<sup>6</sup>. The litigation history is helpfully summarised in that judgment. It aptly describes the pursuit of litigation by the applicants as a “*cause*”.<sup>7</sup>

4. In June 2017 the applicants instituted a so-called “*access to information application*”. This despite the explicit holding previously by the Supreme Court of what is apparent on a mere reading of the Constitution: that the Bill of Rights includes no such right.<sup>8</sup> That application (the first of the three interlocutories brought by the applicants) was launched in the course of a year-long public consultative process about measures that the Minister was at the time considering implementing, but before the Minister had taken any decision to do so.

5. In that case the applicants sought an order directing Minister to deliver various categories of documents to their legal practitioners.<sup>9</sup> Part of the latest application replicates exactly the same relief, this while the first application remains undetermined and therefore pending.<sup>10</sup>

6. What followed last year was a second (interlocutory) application in which relief was sought to cross-examine the Minister

*“on whether or not he had in his possession all or some of the documents and information referred to in paragraph 1 of the Notice of Motion dated 30 June 2017, prior to the*

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<sup>5</sup> This was on the record in August last year in the implementation proceedings. Clearly, with neither the review nor the action even enrolled yet for hearing in the High Court, the estimation of two years was optimistic.

<sup>6</sup> The Supreme Court’s judgment is available at [http://www.ejustice.moj.na/Supreme%20Court/Judgments/Judgments/Minister%20of%20Finance%20v%20Hollard%20Insurance%20Company%20of%20Namibia%20Limited%20\(P8-2018\)%20%5B2019%5D%20NASC%20\(28%20May%202019\).docx](http://www.ejustice.moj.na/Supreme%20Court/Judgments/Judgments/Minister%20of%20Finance%20v%20Hollard%20Insurance%20Company%20of%20Namibia%20Limited%20(P8-2018)%20%5B2019%5D%20NASC%20(28%20May%202019).docx).

<sup>7</sup> At para [77].

<sup>8</sup> *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC and Another* 2017 (1) NR 1 (SC).

<sup>9</sup> Case No. HC-MD-CIV-MOT-GEN-2017/00220.

<sup>10</sup> Record p 4 para 1.4.



*publication of the notice of 14 February 2017, and if he was in possession of any such documents or information, to identify such documents and information.”*

7. This Court dismissed (with costs) that application to cross-examine the Minister.<sup>11</sup> The applicants applied for leave to appeal against this order. Their application was refused.<sup>12</sup> The applicants have since filed a petition to the Chief Justice for leave to appeal their second interlocutory. That petition is pending.

8. During November 2017, before the Minister had taken a decision regarding the measures that were the subject of the public consultative process, the applicants instituted the action proceedings challenging the constitutionality of the Act. This is notwithstanding the fact that a Full Bench of this Court previously declared the Act to be constitutionally valid in application proceedings brought by the private insurance industry. That was two decades ago (the industry not appealing the judgment).<sup>13</sup> The action, too, is pending.<sup>14</sup> As noted, the applicants chose to institute those proceedings separately from the review, and by way of action.

9. On 29 December 2017, following a year-long public consultative process, the Minister published notices in the *Government Gazette* to give effect to sections 39 and 43 of the Act.<sup>15</sup>

10. In April 2018, four months after the measures were gazetted, the applicants instituted the application to review and set them aside. It is the review to which this, their third interlocutory application, relates.<sup>16</sup> The Minister has filed the record of his decision to promulgate the measures, together with the reasons in terms of rule 76(2)(b).

11. The applicants thereafter delivered a rule 76(6) notice demanding the production under that rule, not by way of any general discovery entitlement, of an extensive list of documents which they contend should be produced in the pending review (the ‘rule 76 notice’).<sup>17</sup> In the rule 76 notice the applicants alleged that they “*believe there were additional*

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<sup>11</sup> *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00220) [2018] NAHCMD 411 (15 November 2018).

<sup>12</sup> *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00220) [2019] NAHCMD 136 (02 April 2019).

<sup>13</sup> *Namibia Insurance Association v Government of the Republic of Namibia* 2001 NR 1 (HC)

<sup>14</sup> Case No: HC-MD-CIV-ACT-OTH-2017/04493.

<sup>15</sup> *Hollard Insurance Company of Namibia Limited v Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00220) [2018] NAHCMD 411 (15 November 2018) para 26.

<sup>16</sup> Review Record pp 555 – 570.

<sup>17</sup> Index record to interlocutory application (“record”) pp 41 - 47.

*documents in the possession of the first respondent which were relevant to the decisions sought to be reviewed.*"<sup>18</sup>

12. The Rule does not prescribe that the response to such a notice must be under oath. The Minister freely chose however to respond by way of an affidavit.<sup>19</sup> He produced a transcript of a public meeting held at the conclusion of the consultative process showing that the applicants had had, to the last, every opportunity to deal with whatever had been received in the process. The sole representative's presence at the meeting was not to seek documents. It was solely in order to record that the applicants would not be participating). The Minister also explained on oath why the applicants have no basis to demand production of the balance of the documentation sought.<sup>20</sup>

13. The applicants, dissatisfied with the Minister's response, have launched the present application.'

[7] Counsel also differed on the principles which the Court should apply when deciding the various issues which are raised in the present application. It is thus necessary to also set out their respective contentions in this regard.

#### Written argument on behalf of the applicants

[8] In this part of the Heads formulated by counsel it was submitted that :

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<sup>18</sup> Record p 42.

<sup>19</sup> Record: p 48ff.

<sup>20</sup> Record pp 48 – 77.

'12. This discovery application engages several important legal principles and issues. The first fundamental principle engaged in the current dispute, is the authority and duty of the courts to enable the discovery of the truth so that justice may be done between the parties. The principle is engaged because the Minister's response to several requests was that, contrary to the applicants' assertions, he had not considered the documents requested by the applicants and therefore the documents do not form part of the record he is required to produce under rule 76. The Minister did not state that the documents requested by the applicants do not exist. This Honourable Court is therefore called upon to decide whether it should leave the process of discovering the truth in the hands of the Minister alone by simply relying on his *ipse dixit*, as the Minister contends, or whether the court should direct the Minister to produce the documents requested by the applicants, so that the court may determine for itself whether the truth is to be found in or with reference to the documents. The applicants have asserted and will argue that the latter is the correct position.

13. On the facts before court, it will be demonstrated that the court should direct the Minister to produce the documents requested by the applicants, so that the court can perform its constitutional duty. The applicants accept that the Minister (and Cabinet, as appears clearly from the approach it adopted in 2016) was frustrated by the absence of implementation of the 3 pillars of the NamibRe Act between 1998 and 2016; and that the Minister was advised that he need not disclose the documents and information requested by the applicants in connection with his decisions and the stages that led to and informed his relevant decisions in 2016, 2017 and 2018. However, the Minister's frustration and views, and the views of those advising him, no matter how genuinely held, neither affect the Minister's duty to meet his statutory and constitutional obligations, nor the court's constitutional authority and duty to promote the discovery of the truth. In the present case, the court's authority and duty are given effect to by the court's conducting of an object assessment into the relevance of the documents, to enable the discovering of the truth. The duty is engaged by the (rather unusual) facts that led to the application for the review and setting aside of the 2017 Notices, as briefly summarized above and detailed in the papers filed on record.

14. The second principle engaged in this dispute is the Minister's duty to make available to the applicants all documents which are by reference incorporated in the material that had served before him. The applicants believed this principle would not be disputed considering the clear holding to this effect in Johannesburg City Council v The Administrator of Transvaal and Another<sup>21</sup> as approved in Namibia amongst others in Pieters v Administrateur, Suidwes Africa<sup>22</sup> (reference in Aonin) and in Aonin Fishing v Minister of Fisheries and Marine Resources:<sup>23</sup>

“Mr Eloff, for the Administrator, has, however, questioned whether the phrase "record of proceedings" in Rule 53 can properly be said to include the documents of the previous application. The words "record of proceedings" cannot be otherwise construed, in my view, than as a loose description of the documents, evidence and arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision plus the deliberations of the Executive Committee are as little part of the record of the proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it. Thus the previous decision of the Administrator and the documents pertaining to the merits of that decision, could not have been otherwise than present to the mind of the Administrator-in-Executive Committee at the time he made the second decision. If they were not, he could not have brought his mind to bear properly on this issue before him, which is of course denied by the respondents.” (emphasis supplied)

15. The applicants have asserted, we submit correctly so, that there is no lawful basis for the Minister to have refused copies of materials requested by the applicants, which the Minister stated

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<sup>21</sup> 1970 (2) SA 89 (T) 91.

<sup>22</sup> 1972 (2) SA 220 (SWA).

<sup>23</sup> 1998 NR 147 at 150 B-F.

“is contained in the written submissions made by ... (NamibRe) and the Society of Actuaries”

and

“The specific documents now sought were footnoted in the NamibRe submissions”<sup>24</sup>

16. The third fundamental issue in dispute is the application of the indisputable requirement in our law that relevance in the context of rule 76(6) and an entitlement to a full and complete record in terms of rule 76(2)(b) must be widely interpreted and means the Minister must produce “every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially” (emphasis provided). The test is thus “throwing light”, directly or indirectly. This third issue arises from the Minister’s refusal to produce the documents requested in paragraphs 6 to 9, and 11 to 12 of the rule 76(6) notice, and addressed in paragraphs 13 to 18 of the Minister’s reply to the rule 76(6) notice. It will be argued that the Minister’s position in this regard is untenable, based largely on the established principles applicable to delivery of a record and discovery in reviews.

17. Additional support for the applicants’ position in this respect is to be found in the recent persuasive interpretation of the content of a “record” under South Africa’s rule 53, the equivalent of our rule 76, and application of this interpretation by the South African Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*.<sup>25</sup> The Constitutional Court reasoned, amongst others, that the filing of a full record under rule 53, is necessary for the enjoyment of an applicant’s rights of access to courts and to equality of arms before court.<sup>26</sup> This accords with the Namibian position as pronounced in *Aonin’s* case. *Aonin’s* case emphasized that:

*Articles 18 of the Namibian Constitution, as well as the requirement of a fair hearing as entrenched Article 12, are engaged in review proceedings;*<sup>27</sup>

*This is all the more the case where a fundamental freedom entrenched in Article 21 is in issue;*<sup>28</sup>

*The above underlines the need for a generous interpretation of the production of a review record.*<sup>29</sup>

<sup>24</sup> Minister’s Reply to the applicants’ rule 76(6) notice, paras 9 and 10.

<sup>25</sup> 2018 (4) SA 1 (CC).

<sup>26</sup> *Ibid* par 15.

<sup>27</sup> 150 G-H.

<sup>28</sup> 150 I-J.

<sup>29</sup> 151 B.

### Written argument on behalf of the respondents

[9] On behalf of the respondents it was submitted that Rule 76(6) has four requisites. They submitted further that:

'14. In terms of rule 76(2)(b), a decision-maker is obliged to file the record of proceedings sought to be reviewed and set aside. The rule reads as follows:

*“(2) An application referred to in subrule (1) must call on the person referred to in that subrule to –*

*(b) within 15 days after receipt of the application, serve on the applicant a copy of the complete record and file with the registrar the original record of such proceedings sought to be corrected or set aside together with reasons for the decision and to notify the applicant that he or she has done so.”*

15. In terms of rule 76(6):

*“(6) If the applicant believes there are other documents in possession of the respondent, which are relevant to the decision or proceedings sought to be reviewed, he or she must, within 14 days from receiving copies of the record, give notice to the respondent that such further reasonably identified documents must be discovered within five days after the date that notice is delivered to the other party.”*

16. Rule 76(6) has no explicit source in South Africa's Uniform Rule 53, which previously applied in Namibia, and from which Rule 76 is obviously drawn. Its origin is interesting and has great significance for the present dispute.

17. When the new High Court Rules were drawn up in Namibia, the opportunity was taken to spell out, and to state expressly, the solution devised in Namibian case-law for a formal *lacuna*. The formal *lacuna* was that Rule 53 did not expressly provide for what should happen if an applicant for review disputed that the entire review record had been produced.

18. In a still-leading judgment of this Court (more accurately, of its predecessor), Hoexter J (later JA) devised a solution<sup>30</sup>. It was that in such circumstances an applicant might invoke Rule 35(11) “om deur **voorlegging** van die ontbrekende stukke die leemtes in die

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<sup>30</sup> *Pieters v Administrateur*, SWA 1972(2) SA 220 (SWA). Exactly that solution is still in use under Rule 53 in South Africa, with *Pieters supra* still the authority for it: see Erasmus *Superior Court Practice* (2<sup>nd</sup> ed, 2017 rev.) D1-709.

*respondent se oorkonde te vul*".<sup>31</sup> The question is: is the record incomplete ("onvolledig").<sup>32</sup> The Court emphasises that the process it authorises is "*voorlegging en nie blootlegging nie*".<sup>33</sup>

19. From this root follows a correct understanding of Rule 76(6). It is not a licence for discovery (let alone to fish). It is a means to *complete* the true *record of decision*. Unless there is a basis to contend that

- *identifiable documents exist,*
  - *which have been excluded from what was the true record of decision*
  - *are relevant to the decision; and*
  - *are now in the possession of the decision-maker*
- there is no responsible basis to bring an application to *produce* them.

20. There are thus four obvious requirements laid down by Rule 76(6) – obvious both on its wording, and regard being had to its derivation from *Pieters supra*.

21. The first is a *belief* by the applicant. It is trite that when a statutory provision requires a belief, at a minimum that belief must be genuine, rational, founded on some factual basis. Where, in contrast, statutes require only a *suspicion*, they say so. (Even then the suspicion would have to be a reasoned, if not reasonable, one.)

22. Clearly, in the context, an applicant would have to have *some factual basis* for any such belief, for the court to entertain it<sup>34</sup>. Rule 76 cannot be sensibly construed as admitting a claim based on conjecture, or paranoia, or presumed dishonesty by the decision-maker. Even if the belief were to be based not on indisputable fact, but on inference, the inference would have to meet the double test long-established<sup>35</sup>. It will be shown that in multiple respects the applicants' claim is based on express conjecture: they repeatedly say what *may* be the case in relation to the further documents.

23. The second is that the belief must be that the documents in issue "*are*" (the present tense is explicit) "*in the possession of the defendant*" – not in the possession of a third party. Again, there must be a basis genuinely to believe this. If the rule had intended to impose the

<sup>31</sup> At 226A-B: "*by production to fill the gaps in the respondent's record*" (our translation). *Voorlegging, ie production*, is reiterated at 227H *ad finem*.

<sup>32</sup> At 227H *ad finem*.

<sup>33</sup> At 228 C ("*production not discovery of documents*": our translation and emphasis).

<sup>34</sup> *Competition Commission v Wilmar Continental Edible Oils and Fats (Pty) Ltd and others* [2018] 3 All SA 517 (KZP) para 56.

<sup>35</sup> This is the rule in *Govan v Skidmore* 1952 (1) SA 732 (N), followed in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) para 30.

startling procedural obligation on the decision-maker to extract documents from others (the Rule itself gives him no power to do so), it would have said so. Such an interpretation moreover would be at odds with the context and purpose of Rule 76, which is to oblige the decision-maker to produce what *he* has, as foundational to *his* decision. Not what other parties to the review have. (Significantly the applicants seek no order, under Rule 76 or otherwise, against NamibRe to produce anything). Or to produce what he did not have, but which the applicant contends was vital to his decision. (If that is the applicant's case, it must make it in the review: it is a confusion of thought to badger the decision-maker to *produce* what was not before him and which he did not consider).

24. As with "*belief*", lawgiver has used a term with established content. "*Possession*" connotes actual factual control (*detentio*) by the holder. Where a wider concept is intended, as in discovery formulations, such as "*possession or control*" that phrase is used. As discussed below, it certainly does not extend to what is held by the governments of Morocco and Uganda, the Society of Actuaries (one of the several other participants in the consultative process), or NamibRe itself.

25. Third, the "other documents" must be *relevant to the decision*. Only that part of the record *relevant* to the *decision* taken need be produced.<sup>36</sup> This, too, the applicant must show. It is not for the respondent to demonstrate that they are not relevant. And it is not for the respondent to have to produce (as demanded in this case) proof of receipt of documents (or, remarkably, instructions for gazetting etc, given *after* the decision was taken).

26. Fourth, the documents demanded must be "*reasonably identified*". It is not enough, we show, for instance to refer to "judgments" or "legislative provisions" of Uganda.

27. It will be demonstrated below that the applicants' claim is defective in each of these four respects.

#### THE PURPOSE OF RULE 76

28. Rule 76, to summarise, does not establish a general right of discovery in motion proceedings – or, as Hoexter J stressed in *Pieters supra*, even discovery at all. If it had intended discovery, particularly a general discovery, it would have said so – much more simply. It is accordingly not to be interpreted in a way which confuses it with discovery, *per se*. (Discovery in motion proceedings, it is to be noted, is itself unusual, and only granted in

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<sup>36</sup> *Muller v The Master* 1991(2) SA 217 (N) at 220D-F; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) at 233D.



exceptional cases.<sup>37</sup> This Court has said so.<sup>38</sup> )

29. The clear distinction between *discovery* and Rule 76 *production* by the decision-maker is borne out by case law. In *City of Cape Town v South African National Roads Authority*<sup>39</sup> the South African Supreme Court of Appeal considered the distinction between discovery and the production of documents under South African Uniform Rule 53 (the equivalent to rule 76). It affirmed that the purpose of rule 53 is to oblige the decision-maker to produce the “*record of the proceedings of a body whose decision is taken on review*”.

30. In the South African case of *Johannesburg City Council v The Administrator, Transvaal (1)*<sup>40</sup> the Court described the “*record of proceedings*” as follows:

*“The words ‘record of proceedings’ cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. were”* (our emphasis).

31. The phrase “*before the tribunal*” is to be noted. This is exactly the phrase used by the Minister to which the applicants seek to attach a sinister meaning. They suggest the Minister is artfully referring not to what he had in his possession, but only what he himself chose to look at. To the contrary, the term is the usual one in review affidavits, and denotes,

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<sup>37</sup> This Court has said so: *South African Poultry Association and Others v Ministry of Trade and Industry and Others* 2015 (1) NR 260 (HC) paras 39 - 41.

<sup>38</sup> *South African Poultry Association and Others v Ministry of Trade and Industry and Others* 2015 (1) NR 260 (HC) paras 39 - 41. “[39] ..... observed that in —

*[39] ... [in] application proceedings we know that discovery is very, very rare and unusual procedure to use and I have no doubt that that is a sound practice and it is only in exceptional circumstances . . . that discovery should be ordered in application proceedings’.*

*..... that discovery would only be allowed in motion proceedings in ‘exceptional circumstances’...*

*[40] Even in the case of action proceedings, conscious of the oppressive effect that excessive and disproportionate discovery claims may have on parties engaged in litigation, the rule-maker has ordained that discovery must be ‘proportionate to the needs of a case’. That makes the case for general discovery even harder in motion proceedings; and where asked is an indication of a fishing expedition. Therefore, to obtain discovery in motion proceedings, the party seeking it must show exceptional circumstances and, as a rule, must make out the case for specific information or documents subject to relevance and proportionality to the needs of the case. Once such a case has been made out, the normal rule is ‘full inspection’*

*[41] Against the above backdrop, discovery entitlement in motion proceedings must be a rarity. It follows that there is no right to general discovery such as is the case in action proceedings”* (our emphasis and footnotes omitted.)

<sup>39</sup> 2015 (3) SA 386 (SCA) at 415G–417A. See also *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) the majority at 15B–C.

<sup>40</sup> 1970 (2) SA 89 (T) at 91G–92A followed in *Aonin Fishing (Pty) Ltd v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC) at 150A-F. See too: *Helen Suzman Foundation v Judicial Service Commission supra* para 17.

simply put, all the material the decision-maker had.<sup>41</sup> Its meaning is clear. There is no basis for a twisted construction of what the Minister says.

32. The content and the extent of the record of the proceedings will depend upon the facts or circumstances of the case<sup>42</sup> and *only the relevant part of the record* must be produced.<sup>43</sup> This Court<sup>44</sup> further has held that the word “relevant” (in the context of ordinary rules of discovery in action proceedings) refers to “*documents having any tendency in reason to establish the matter in question.*”

33. It has also been held that where a party, whether in a review or in action proceedings, deposes to an affidavit answering a request for further discovery, a court will ordinarily not go behind what is stated on oath.

34. Courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made.<sup>45</sup>

35. We turn to deal with the categories of documents sought by the applicants’ in their notice of motion.’

[10] For purposes of deciding the issues so placed before the court it may - as a useful point of departure- be apposite to distill- and summarise some of the applicable legal principles from the authorities relied on by the parties and where

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<sup>41</sup> Thus see further the first authoritative text in this field: Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 25-6.

<sup>42</sup> *Johannesburg City Council v Administrator Transvaal* 1970 (2) SA 89 (T); *Lawyers for Human Rights v Rules Board for Courts of Law* 2012 (3) All SA 153 (GNP) para 22.

<sup>43</sup> *Muller v The Master* 1991 (2) SA 217 (N); Erasmus *et al* *Superior Court Practice* (2<sup>nd</sup> ed) D1-708.

<sup>44</sup> *Telecom Namibia Ltd v Communications Regulatory Authority of Namibia* 2015 (3) NR 747 (HC) para 8.

<sup>45</sup> *Waltraut Fritzche t/a Reit Safari v Telecom Namibia Ltd* 2000 NR 201 (HC) at 205I quoting with approval *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H; *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia* 2008 (2) NR 742 (HC) para 33; *Kanyama v Cupido* 2007 (1) NR 216 (HC).

those are divergent to determine the approach to be adopted, against which principles - and with reference to the context of the litigation pending between the parties - the individual requests will then be considered and determined one by one.

### The applicable principles

[11] Firstly I agree with counsel for the applicants that the case, overall, engages certain general fundamental principles: They are:

- a) the authority and duty of the courts to enable the discovery of truth, (also in reviews), so that justice may be done between the parties;<sup>46</sup>
- b) that it may generally be said that there is a duty to also make available documents which are by reference incorporated in the material which served before the decision-maker; and
- c) that, as a general proposition, it is correct that relevance – also in the context of rule 76(6) – and the entitlement to a full and complete record in terms of rule 76(2) (b) must be widely interpreted as it has authoritatively been held that a decision-maker must produce *‘every scrap of paper throwing light ... however indirectly, on what the proceedings were, both procedurally and evidentially...’* and thus regardless of the format *‘ ... it may be a formal record or dossier of what has happened before the tribunal but it may also be a disjointed indication of the material*

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<sup>46</sup> Compare also generally the comments made by the *Constitutional Court in Helen Suzman Foundation v Judicial Service Commission and Others* 2017 (1) SA 367 (SCA) on the South African Rule 53 where the Court stated : '[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court. It is established in our law that the rule, which is intended to operate to the benefit of the applicant, is an important tool in determining objectively what considerations were probably operative in the mind of the decision-maker when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision. By facilitating access to the record of the proceedings under review, the rule enables the courts to perform their inherent review function to scrutinise the exercise of public power for compliance with constitutional prescripts. This, in turn, gives effect to a litigant's right in terms of s 34 of the Constitution — to have a justiciable dispute decided in a fair public hearing before a court with all the issues being properly ventilated. Needless to say, it is unnecessary to furnish the whole record irrespective of whether or not it is relevant to the review. It is those portions of a record relevant to the decision in issue that should be made available. A key enquiry in determining whether the recording should be furnished is therefore its relevance to the decision sought to be reviewed.'

*that was at the tribunal's disposal...'*. It is thus correct to state that the test is what has to be produced is all material '*... throwing light ... directly and indirectly...'* on the decision which was made;

d) The extent of the record of proceedings - and thus - what will ultimately have to be produced – will also depend on the facts and circumstances of the case.

[12] When it comes to the constitutional principles referred to certain general statements as made by the Constitutional Court in the cited *Helen Suzman Foundation* decision (in course of deciding whether the blanket non-disclosure claimed there by the Judicial Service Commission could be upheld}, can also be embraced without difficulty as they are of equal application in this jurisdiction as well, namely:

a) that '*... generally the only way to test the legality of the exercise of this power (public power} completely and thoroughly is to afford an applicant for review access to all material relevant to that exercise of power. If a public functionary can withhold information relevant to the decision, there is always a risk that possible illegalities remain uncovered and are thus insulated from scrutiny and review. That is at variance with the rule of law and our paramount values of accountability, responsiveness and openness. This affects not only the individual litigant, but also the public interest in the exercise of public power in accordance with the Constitution. It must, therefore, be in truly deserving and exceptional cases that absolute non-disclosure should be sanctioned.'*

and

b) '*Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.'*<sup>47</sup>

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<sup>47</sup> Ibid [67] and [68].

[13] Counsel for the respondents have focused more closely in certain specific principles. They are:

- a) that the rule is not a licence 'to fish' or to obtain general discovery but rather is a means to complete a record;
- b) that the requested documents must exist and that they have been excluded from the record which was produced;
  - i) in this regard the applicant must 'hold a belief';
  - ii) which 'belief' must be 'genuine, rational, or founded on some factual basis';
- c) that in this regard assistance can be obtained by proving that such further documents exist if this can be shown either
  - (i) from the discovery affidavit itself, and/or
  - (ii) from the documents referred to in the discovery affidavit, and/or
  - (iii) from the pleadings in the application, and/or
  - (iv) from any admission made by the party making the discovery affidavit, and/or
  - (v) from the nature of the case or the documents in issue, and/or
  - (vi) by reason that a party has misconceived the principles upon which the disclosure should have been made;
- d) that such additional documents/material must be relevant to the decision; ie. those '*documents should have any tendency, in reason, to establish the matter in question ...*';
- e) that they must be in the 'possession' of the decision-maker;
- f) the documents should be reasonably identified.

The aspect of 'possession'

[14] Counsel for the respondents also argue in this regard that the concept of 'possession', as used in rule 76(6), should be restrictively interpreted to signify that only those documents in the 'actual possession' of a respondent - ie. those under the factual control (*detentio*) of the holder and not those in the possession of a third party - have to be produced as otherwise the rule-maker would have employed the wider concept of "possession or control" in the framing of the rule. They point out in addition that the rule also gives no explicit power to a respondent to extract any such documents from others.

[15] Although these are highly persuasive arguments I have to disagree to an extent. To limit the concept of 'possession' to its literal meaning and to 'actual possession' only and not to a purposive one would surely defeat the object and purpose of the rule whose central aim is to procure the completeness of a record to enable the ultimate achievement of the discovery of the truth so that justice can be done between the parties. The decision-maker in this instance is a Minister. Surely he will not keep every scrap of paper or file in his office and he can thus, by virtue of his authority, through which he exercises control within his Ministry, easily call upon the officials in his Ministry to make available any missing part of the record, should such official have any such document in his or her custody or control. To hold otherwise would result in the absurd situation that a decision-maker would be able to hide behind the simple fact that any such relevant document is no longer in his or her actual physical possession. I therefore hold that the concept of 'possession', as used in rule 76(6), also includes all facets of 'control' available to the decision-maker by virtue of the powers he or she has as, otherwise, the main object of the rule might not be achieved and the effectiveness of the rule could be circumvented by a technicality.

[16] I do however have to agree with the argument that the rule stops short in that it does not seem to intend to include documents in the possession or under the control of third parties - as otherwise the rule-maker would have employed the wider concept of "possession or control" in the framing of the rule. It was correctly pointed out in this regard also that the rule gives no explicit power to a respondent to extract any such documents from third parties. Whether, and in what circumstances, any such additional documents could be extracted from third parties in reviews at all, or

by way of a *subpoena duces tecum*, as was suggested, I am however not required to determine.

### The aspect of 'relevancy'

[17] The respondents in this instance have also submitted that the word 'relevant' (in the context of ordinary rules relating to discovery in action proceedings, refers to '*documents having any tendency in reason to establish the matter in question*' and that relevance in reviews should thus be established along similar lines with reference to the applicants' pleaded case, being the founding affidavit, which comprises not only their evidence but also their pleading. They have reminded the court with reference to *South African Poultry Association and Others v Ministry of Trade and Industry and Others* 2015 (1) NR 260 (HC)<sup>48</sup> that there is no *carte blanche* right to discovery in motion proceedings, where '*... discovery is a very rare and unusual procedure ... ordered only in exceptional circumstances ...*'. and that a clear distinction should be made between discovery in general, on the one hand, and the specific Rule 76(6) production of additional relevant parts of a record, by a decision-maker, on the other.

[18] All these general guidelines are obviously to be kept in mind - and might even constitute useful points of departure - in the general determination of any questions raised in terms of Rule 76(6). These general principles do however not sufficiently cater for the important differences between discovery in motion proceedings and those in reviews. These differences were highlighted in the *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) decision, on which the applicants rely. The approach followed by the Constitutional Court, in the course of having to determine the extent of a review record, is apparent from the cited following dictum:

[25] The JSC submitted that relevance should be determined with reference to the pleaded case. I do not agree. Rule 53 envisages the possibility of a review applicant supplementing the papers, including the very cause of action, upon being furnished with the record.<sup>49</sup> That much is plain from the fact that an applicant may supplement not only the

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<sup>48</sup> at [39] to [40].

<sup>49</sup> In *Jockey Club* above n9 at 661G – H the court held: 'More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to amend, add to or vary the terms of his notice of motion and supplement

affidavits, but also the notice of motion. That means an applicant may add to or subtract from the grounds of review.<sup>50</sup> Then, if information could be excluded on the basis of being irrelevant to the pleaded case, this would negate a substantial part of the purpose of the rule 53 record.<sup>51</sup> What must be disclosed is information relevant to the impugned decision. Unsurprisingly, a review applicant may not have pleaded certain issues that bolster her or his challenge exactly because she or he was not aware of their existence.

[26] It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.'

[19] I can only but respectfully agree. Madlanga J, writing for the Constitutional Court, (Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurring), has hit the nerve. Also Namibia's Rule 76:

a) envisages the possibility of a review applicant supplementing the papers, including the very cause of action initially relied on, upon being furnished with the record. That much is plain from the fact that in terms of Rule 76(9) '... an applicant may supplement not only the affidavits, but also the notice of motion; ie. in the words of the rule an applicant may *'amend, add to or vary and supplement the supporting affidavit ...'*;

b) the import of the rule is therefore to the effect that an applicant may not only add to but also subtract from the original grounds of review;

c) thus, if information could be excluded on the basis of it being irrelevant to the originally pleaded case, this would negate a substantial part of the purpose of

the supporting affidavit.'

<sup>50</sup> *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243; [2006] ZASCA 112) para 32: 'The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available.'

<sup>51</sup> Requesting the full record in a bona fide attempt to determine what factors were probably operative in the decision-maker's mind does not amount to a 'fishing excursion'. See *Johannesburg City Council* above n20 at 93C – D.



making available the rule 76 record; as a review applicant may not have pleaded certain issues that bolster her or his challenge exactly because she or he was not aware of their existence, originally.

[20] Accordingly what must be disclosed is all information relevant to the impugned decision as otherwise the provisions of Rule 76 would be rendered meaningless. The Rule in any event requires this in express terms. The rule also clearly envisages the grounds of review changing later. 'Relevance' should thus be assessed as it relates to the decision sought to be reviewed, not with reference to the case pleaded originally in the founding affidavit. In this regard it can thus be said that, what must be disclosed - and it is here that I would think that the material change comes in - are all those '*... documents/materials that could have any tendency, in reason, to establish any possible/potential review ground in relation to the decision to be reviewed, ie. all materials relevant to the exercise of the public power in question ...*'. It follows - and I thus uphold the submission - that the word 'relevance' as used in Rule 76(6) is 'wide(r) in its scope and meaning' in these respects. The concept thus differs in its scope and the way and from how it is applied in action- and also in motion proceedings in general. It is thus also not limited only to the actual material serving before the decision-maker but it so also includes all material available to the decision-maker – whether considered or not – for as long as it is relevant to the decision to be reviewed - and in any event it includes the material that is incorporated by reference. In this regard it was thus correctly submitted that '*an applicant in a review will be entitled to documents that are relevant to the case pleaded in the founding affidavit, and/or(my insertion) to any other information that relates to the decision sought to be reviewed even if the relevance does not specifically appear from the pleadings*'.

#### The tendered additional affidavits

[21] Finally it should be mentioned that in response to the applicant's rule 76(6) application the First Respondent deposed to an answering affidavit. In that affidavit he declared his stance in respect of the various requests for disclosure made by the applicant in the Notice of Motion filed on 5 March 2019. Subsequent to the striking of the Rule 76(6) application from the roll on 11 June 2019, two further affidavits were tendered on behalf of the First Respondent. As the Rule 32(9) and (10) process for

the necessary admission of these additional affidavits was not completed, and as the court thus did not grant leave for the filing of these further affidavits, this application will have to be determined without reference thereto.

### Resolution

[22] This brings me to the consideration of the various requests made. Counsel for the applicants have categorized the various requests made on behalf of the applicants. Counsel for the respondents have responded seriatim to each request made. I will follow the lead presented on behalf of the applicants in the course of which I will then also deal with the grounds of opposition advanced by the first respondent.

The first category of documents in respect of which the Minister claimed that they were not relevant as he did not consider same

[23] The entitlement to the production of this category of documents was motivated as follows:

‘18. In paragraphs 2, 3 and 5 of the applicants’ rule 76(6) notices, the applicants requested the following documents and information:

“2. The specific documents which served before and which were created by the Cabinet of the Republic of Namibia, dealing with the implementation or enforcement of the Namibian National Reinsurance Corporation Act, 22 of 1998 (“the Act”), being:

2.1 The agenda, minutes and resolutions of the Cabinet meeting(s) where the decisions referenced in NamibRe’s letter of 28 September 2016, were taken. The letter appears at 243 of the first review record;

2.2 Any similar documents evidencing the revocation of the decision referenced in par 2.1 above: This is relevant because, recently, the Supreme Court in *Arandis Power (Pty) Ltd vs President of the Republic of Namibia and others* (SA 40/2016), held that executive decisions (i.e. the Cabinet decisions referred to) ‘existed and was to be followed unless and until set aside or withdrawn’ [at paragraph 35].

3. The documents on which the Minister relied to arrive at his decisions reflected in GN266 and 267 of 2016 (“the 2016 notices”). The notices are included at 375-377 of the first review record.

.....

5. The documents, if any exist, requested in paragraph 1 of the Notice of Motion in the Information Application.”<sup>52</sup>

19. The Minister stated under oath that he did not consider these documents and information in arriving at his decision in respect of the 2017 Notices, therefore the documents and information need not be produced. This response does not properly inform the issue at hand at all. An entitlement to a record in a review context includes, as shown<sup>53</sup>:

*19.1 “every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially”;*

*19.2 “all documents before the .... (the decision maker) .... as well as all documents which are by reference incorporated in the file before it;”*

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<sup>52</sup> The applicants sought access to the following documents in the Information Application:

1.1 All regulatory impact assessments or cost-benefit analyses which the first respondent and/or those advising him considered and/or used before the first respondent published the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages, on 14 February 2017.

1.2 All financial reports which the first respondent and/or those advising him considered and/or used before the first respondent published the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages, on 14 February 2017.

1.3 Feasibility study reports which the first respondent and/or those advising him considered and/or used before the first respondent published the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages, on 14 February 2017.

1.4 Actuarial reports which the Minister and/or those advising him received, considered and/or used before the first respondent published the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages, on 14 February 2017.

1.5 Micro and macroeconomic impact study reports (on consumers, the insurance industry, and the broader Namibian economy) which the Minister and/or those advising him considered and/or used before the first respondent published the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages, on 14 February 2017.

1.6 Comparative studies on the social and economic impact of similar initiatives sub-regionally, regionally, and/or internationally which the Minister and/or those advising him considered and/or used before the first respondent published the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages, on 14 February 2017.

1.7 All further documents, representations or reports in the first respondent’s possession or under his control that would allow the applicants to understand why exactly the first respondent proposed what he did on 14 February 2017 in the proposed Notices and amended Regulations under the Namibia National Reinsurance Corporation Act, 22 of 1998, including but not limited to the specific percentages.

<sup>53</sup> See Aonin’s case 150A-F and the authorities on which it is based as referred to above

19.3 “documents pertaining to any previous decision that is relevant to the decision sought to be reviewed, as these ‘could not have been otherwise than present to the mind of ... (the decision maker) .... at the time he made the second decision. If they have not, he could not have brought his mind to bear properly on this issue before him ...”.<sup>54</sup>

20. It is submitted that the above definition of a record would include documents on which considerations that moved the Minister to take his decision were based. Whether he actually considered the original text of those same documents that underlie those considerations or had the source documents before him when he took his decision, is irrelevant.

21. It may be appropriate at this juncture to quote the following passages from the Constitutional Court’s persuasive decision in *Helen Suzman Foundation* as cited above. In our submission, the passages demonstrate that and explain why an applicant in a review has a far wider entitlement to documents than a litigant in an action in the ordinary discovery context.

“[25] The JSC submitted that relevance should be determined with reference to the pleaded case. I do not agree. Rule 53 envisages the possibility of a review applicant supplementing the papers, including the very cause of action, upon being furnished with the record. That much is plain from the fact that an applicant may supplement not only the affidavits, but also the notice of motion. That means an applicant may add to or subtract from the grounds of review. Then, if information could be excluded on the basis of being irrelevant to the pleaded case, this would negate a substantial part of the purpose of the rule 53 record. What must be disclosed is information relevant to the impugned decision. Unsurprisingly, a review applicant may not have pleaded certain issues that bolster her or his challenge exactly because she or he was not aware of their existence.

[26] It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit. It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are

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<sup>54</sup> Aonin’s case 150 E-F.

discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.”<sup>55</sup>

22. Considering the nature and purpose of review applications, the guarantees of Article 18, and the imperatives of securing access to justice and equality of arms, we submit the aforementioned passages effectively mean that an applicant in a review will be entitled to documents that are relevant to the case pleaded in the founding affidavit, and to any other information that relates to the decision sought to be reviewed even if the relevance does not specifically appear from the pleadings.

23. From the parties’ affidavits, the following material facts are largely undisputed or have not been disputed in a manner that creates a genuine dispute of fact. These facts underlie the applicants’ claims for the documents and information requested in paragraphs 2, 3 and 5 of the rule 76(6) notice:

*23.1 The documents and information requested in paragraphs 2, 3 and 5 exist. If they did not exist, the Minister would simply have said so. He did not.*

*23.2 The documents requested in paragraphs 2 and 3 of the rule 76(6) notice formed the foundation of the 2016 Notices:*

23.2.1 Before the 2016 Notices were gazetted in November 2016, NamibRe had informed the applicants that Cabinet had taken a decision to implement the three pillars and that there would be “no scope for engagement on the terms or implementation of the measures.”<sup>56</sup> This allegation was also made in the 2016 Review application and has never been denied;

23.2.2 It is thus clear that the Cabinet’s decision may well have featured prominently in the Minister’s decision making. The documents underlying the Cabinet’s decision would – on the above wide definition of a record – form part of the review record. Whether the Minister actually considered the documentation underlying or evidencing the Cabinet decision, or had it before him when he decided, is irrelevant. What he clearly would have considered,

<sup>55</sup> Helen Suzman Foundation *supra* at par 26.

<sup>56</sup> Founding Affidavit in review, par 26. Also see Annexure “JL3” to that affidavit.

is the Cabinet decision. If that is so, the Cabinet decision and the documentary material, which informed or evidences the Cabinet decision, would form part of the review record;

23.2.3 Cabinet does not take decisions without an agenda, minutes and resolutions or supporting documents to inform its decisions. This follows both as a matter of logic from Cabinet's high constitutional mandate, and because the existence of these documents was not denied by the Cabinet member who must have been present and was responsible to implement Cabinet's 2016 decision. The Minister did not dispute the applicants' detailed factual allegations in this respect, made in paragraphs 8.2.1 to 8.2.6 of the founding affidavit in this discovery application;

23.2.4 In his response to the applicants' 2016 review applications concerning the 2016 Notices, the Minister stated in his press release of 14 February 2017 that the proceedings had been launched "on largely technical grounds".<sup>57</sup> As the Minister's decision was also attacked at length on substantive grounds, which could never have been termed "technical grounds", it follows that there must have been documentation which the Minister considered to support the substantive validity of the 2016 Notices. Surely the Minister could not have made such weighty decisions without research to support his decision to promulgate the 2016 Notices, or without any documentary guidance for the multitude of relevant considerations. The Minister has never denied the existence of such documents. These documents, given the close connections between the 2016 Notices, the Valentine's Day 2017 invitation, and the ultimate December 2017 Notices now sought to be reviewed, and the nature and details of the parties' exchanges between 2016 to the date of the Minister's decision, would form part of the review record in this matter.

*23.3 The "outcome of the alleged consultation (i.e. the December 2017 Notices) is largely the same as when the industry was not consulted at all."<sup>58</sup>*

*23.4 One would assume that the Minister contends that he did not act arbitrarily, in other words without a sound foundation, when he arrived at the detailed percentages and other information in the 2017 draft Notices. The draft Notices must have been informed by some information, and in all*

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<sup>57</sup> Minister press release of 14 February 2017, Founding affidavit in review, Annexure "JL8", par 4.

<sup>58</sup> Founding affidavit in discovery application, par 8.3.3.

*probability by information contained in documents of the nature specified by the applicants in paragraph 1 of the notice of motion in the Information Application.*

24. If one assumes for a moment that the Cabinet resolution specifies the same or very closely related percentages of compulsory cession and reinsurance percentages as now contained in the 2017 Notices; or the information in any of the documents that served before Cabinet or the Minister in 2016, or the Minister in 2017, demonstrate that the measures will clearly have an overall adverse impact on the Namibian insurance industry and/or consumers, the Namibian economy and/or the Namibian public, or demonstrate another reason which would make the measures irrational or arbitrary; or that the documents reveal information adverse to the applicants, which they should have had the opportunity to address, and which influenced the Minister's decision, and which information was not revealed during the consultation process. If any of these hypotheticals are accurate, the court would be entitled to grant the relief, or parts thereof at the very least, in the notice of motion in the review application.

25. If all the requested and extant documents are placed before the court, but *only then*, the court would be able to investigate the lawfulness of the Minister's decision *objectively*.<sup>59</sup> Without the documents, the applicants and the court will be left in the dark on the truth, only to speculate what the documents may or may not contain and what effect the documents may have had on the lawfulness of the decision of the very person who has the documents, or had the documents, or has the power<sup>60</sup> to produce these documents. Leaving the applicants and the court in the dark and thus forcing them to resort to speculation, is the antithesis of the purpose behind rule 76, and strikes at the heart of the Constitutional guarantees in Article 18, the constitutional promises of access to justice and equality of arms, and the democratic values of transparency and accountability.<sup>61</sup>

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<sup>59</sup> *Consolidated Power Projects Namibia (Pty) Ltd v Namibia Power Corporation and others*, NAHCMD 281 (22 September 2017) par 39.

<sup>60</sup> *South African Sugar Association v Namibia Sugar Distributors (Pty) Ltd* 1999 NR 241 (HC) at 245C-D. Although decided in the context of ordinary discovery in action proceedings, we submit the "power" to produce documents in action proceedings can be equated to the requirement of an administrative decision-maker to produce "materials at the tribunal's disposal" as found in *Johannesburg City Council*.

<sup>61</sup> See, for example, this court's affirmation of these as foundational values of the Namibian democracy in *Director General Namibia Central Intelligence Service and another v Haufiku and others* 2018 (3) NR 757 (HC) at par [72].

26. We therefore respectfully submit the court should direct the Minister to produce the documents to allow the applicants, and more importantly the court, to perform an objective assessment of their relevance to the Minister's decision. If the documents never existed, then the Minister should say so.'

[24] The first respondent defended his stance as follows:

*Paragraph 1.2: the alleged "Cabinet" documents*

14. The applicants demand that the Minister produce "*specific documents which served before and which were created by the Cabinet of the Republic of Namibia, dealing with the implementation or enforcement of [the Act], being ... [1] the agenda, minutes and resolution of Cabinet meeting(s) where the decisions referenced in NamibRe's letter of 28 September 2016, were taken; and [2] any similar documents evidencing the revocation of decision referenced in par 2.1 above*".

15. There is no basis for this demand either, both as regards the 2016 decision and as regards its revocation.

16. Firstly, the Minister is not the Cabinet, or the Cabinet secretary: he is not the keeper and repository of Cabinet documents. Simply to say that a line Minister was a member of Cabinet at a particular time is not to lay any factual basis for contending that he or she is in "*possession*", as Rule 76 requires, of *Cabinet* documents. To the extent that a litigant wishes to lay claim to the latter, it must use whatever remedy it may have (for instance, by way of *subpoena duces tecum*) against Cabinet as a third party (and be met with such defences founded on confidentiality as Cabinet may muster). The litigant cannot try to winkle out an entitlement to Cabinet documents by trying to invoke Rule 76 against an individual Minister.

17. Secondly, the documents are not relevant to the review of the decision at issue in this matter, namely the 2017 decision. The claim is founded on an affidavit filed in the applicants' challenge to measures promulgated in 2016 but subsequently withdrawn.<sup>62</sup> The 2017 decision was taken after (a) the publishing of notices *in new terms* (b) a *new consultative process* (c) as a consequence, the effecting of changes to the terms notified.

18. In the challenge to the 2016 measures the applicants sought to advance a contention that the Minister – who is the only person empowered under the Act to implement measures – acted under the unlawful dictates of Cabinet when gazetting certain measures under the

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<sup>62</sup> Record: p 78ff.



Act in 2016. (Reckless allegations to the same effect in the implementation application before Masuku J were in fact struck out as vexatious). This was asserted not on the basis of anything said by the Minister, but simply on the basis of a letter from NamibRe which contained references to Cabinet having resolved to implement measures under the Act.<sup>63</sup>

19. The Minister has however expressly stated that the 2017 decision to implement the measures was his alone<sup>64</sup>, and that “[he] did not consider any such documents” (ie those set out in paragraph 44 above) . They “[a]ccordingly do not form part of the record of [his] decision”.<sup>65</sup> Again, there is no basis established to go behind his oath. There is therefore no basis for the demand.

Paragraph 1.3: The 2016 proceedings

20. The applicants seek an order compelling the Minister to produce not only the Cabinet documents of 2016 but also all “the documents on which the first respondent relied to arrive at his decisions reflected in GN266 and 267 of 2016”.<sup>66</sup>

21. The applicants contend in their heads of argument that these documents must be produced under Rule 76. They rely for this on a passage in the judgment of *Johannesburg City Council v The Administrator of Transvaal*,<sup>67</sup> (referred to in *Aonin Fishing (Pty) Ltd v Minister of Fisheries and Marine Resources*<sup>68</sup>).

22. That case concerned two applications for the rezoning of land. The first application was refused. The second application (which was an attempted renewal<sup>69</sup> of the first application – i.e. a *reinstatement* of the first application) was also refused. In that case the court held that the record of the refusal in the first instance (in 1965) was relevant to the review of the second refusal (in 1966). That was because in effect the two applications were the same.<sup>70</sup> Nor was that all. The court there pertinently found as a fact in the particular and peculiar<sup>71</sup> circumstances of that matter that “the documents pertaining to the merits of that

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<sup>63</sup> Record: p 95.

<sup>64</sup> Record: p 32ff.

<sup>65</sup> Record: p 50, para 6.

<sup>66</sup> Applicant’s heads of argument, paras 14

<sup>67</sup> 1970 (2) SA 89 (T) at 91.

<sup>68</sup> 1998 NR 147 at 150B-F.

<sup>69</sup> *Johannesburg City Council supra* at 9 0H.

<sup>70</sup> *Johannesburg City Council v The Administrator Transvaal* (1) 1970 (2) SA 89 (T) at 92A-D.

<sup>71</sup> See 91A (“on questionable grounds”, and “also make strange reading”), 91E (“acted in an unusual manner”), 91F (the reasons were “nowhere disclosed on the papers before me”).

[first] decision could not have otherwise than been present to the mind of the the Administrator".<sup>72</sup>

23. Palpably this is no authority for the proposition that the record of the Minister's decision in respect of *different measures* promulgated in 2016 should be produced in the review of the measures promulgated in December 2017 that are now sought to be reviewed.<sup>73</sup> No case has been made out that the 2017 measures are simply a *reinstatement* of the 2016 measures. In fact, the facts are to the contrary: here the first decision was revoked, new notices in new terms were published for public consultation, the final measures were materially different as a consequence. No adequate case has been made out by the applicants to put themselves within the same factual setting of *Johannesburg City Council*.

24. The applicants have thus failed to make out a case that the record of the Minister's decision in early 2016 bears in any way on the Minister's decision on 29 December 2017. The latter followed an extensive public consultative process on the actual text of the measures proposed.

25. In any event, the Minister has stated on oath that he did not consider any of the 2016 documentation demanded in taking his decision in 2017. There was no such statement under oath before the court in *Johannesburg City Council, supra*. Again, that is the end of it: the 2016 documentation did not form part of the record.<sup>74</sup>

Paragraph 1.5: Documents sought in the "information application"

26. The applicants also demand a long list of documents, originally sought in the so-called information application, the first interlocutory, comprising documents relating to the text of the draft notices put out for public comment:

26.1. *"regulatory impact assessments or cost benefit analyses which [the Minister] considered and/used";*

26.2. *"financial reports which [the Minister] and/or those advising him considered and/or used";*

26.3. *"feasibility study reports which [the Minister] and/or those advising on used";*

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<sup>72</sup> At 92A-B.

<sup>73</sup> Applicants' heads of argument, para 19.3.

<sup>74</sup> Record: p 152, para 8.

26.4. “comparative studies on the social and economic impact of similar initiatives sub-regionally, regionally, and/or internationally which the Minister and/or those advising him considered and/or used”;

26.5. “further documents, representations and reports in [the Minister’s] possession or under his control that would allow the applicants to understand why the first respondent proposed what he did on 14 February 2017”.

27. This applicants’ persistence in demanding production of the broad categories of documentation sought under this item of their notice is similarly an abuse of process.

28. Firstly, that is a separate application. It was instituted first (in June 2017). The relief repeated in the present application is thus *lis pendens*. The applicants have no right to multiply court procedures for the same relief.

29. Secondly, the documentation sought pertains to the text of notices put out for public comment. At that stage the Minister had not taken a decision susceptible to judicial review. The requirement or relevance is not met. Relevance had to be assessed with reference to the decision under review, which postdates and supersedes what was put out for comment.

30. Thirdly, there is again no foundation laid for any belief. The applicants simply speculate about whether these documents exist, with no proper basis for doing so having regard to the Minister’s reasons or the record of his decision. There is simply no factual basis established that the reams of documents conjured up in the applicants’ interrogatory were before the Minister.’

#### Resolution : re : the ‘first category’ of documents requested

[25] When it comes to the determination of the requests underlying this category of documentation I should firstly generally state that I have to agree, for the reasons apparent, with the submissions that the documents and information requested in paragraphs 2, 3 and 5 of the notice of motion seem to exist. If they did not exist, the Minister could simply have said so. He did not.

[26] I also find that:

a) The documents requested under paragraphs 2 and 3 of the notice of motion formed the foundation of the 2016 notices;

b) Both the 2016 notices and the 2017 notices were/are aimed at implementing the three pillars of the NamibRe Act. Both notices, for example, set certain specific percentages relating to the compulsory cessions, by each insurer to NamibRe, to be calculated with reference to the value of each insurance policy or the value of each reinsurance contract placed by one insurer with any other insurer. These percentages, although different, are reflected in the 2016 notices, the so-called 'Valentine Day Invitation' proposals for consultation and in the consequently promulgated 2017 notices;

c) The 2016 notices were determined by Cabinet directive and thus also the percentages contained in it;

d) When the Minister then made his decisions relevant to the 2017 notices and when he thus fixed the percentages set therein, the 2016 notices and the relevant the cabinet decision and directive surely '*... could not have been otherwise than present in his mind ... at the time that he made the decisions relating to the 2017 notices ... If they were not, he could not have brought his mind to bear properly on the on the issues before him ...*'.

e) These similarities, and the link created thereby, amongst others, in general, support the applicants entitlement to all documentation/materials available to the Minister, which, on a 'wider' definition of the record, would or should have formed part of the decision making relating to the 2016 notices, the entitlement to the documents, which moved the 'Valentine's Day Invitation' which all led up to the December 2017 notices; In this regard I therefore uphold the applicants' reliance on the *Johannesburg City Council v The Administrator of Transvaal & Ano* decision, as in my view the said similarities, albeit to a different degree, disclose sufficiently close similarities between the 2016 notices, the Valentine Day Invitation proposals and those contained in the eventually promulgated 2017 notices, which place them within the 'applicable setting' of the *Johannesburg City Council* case;

f) It can further legitimately be expected that Cabinet would not take decisions without an agenda, supporting documentation, minutes and

resultant resolutions. The documentation which so informed the Cabinet decision and which resulted in the said directive would thus form part of the material relevant to the decision now taken on review;

g) It is also correct that the Minister may not be the official keeper or repository of Cabinet documents, as was argued, and that Rule 76(6) does not extend to compelling the production of relevant documents to a record which is in the possession of a third party. The Minister is however a member of Cabinet. He attends cabinet meetings and would thus, for this purpose, be placed in possession of all relevant documents such as agendas, together with all relevant supporting documents to such agendas and the minutes of all meetings once they become available. Surely a Minister will have a file, whether in electronic format or in hard copy, containing such material. In any event this has not been denied. Such a file and its contents must be in his possession or under his control. Those parts contained in it, as relevant to the 2016 notices, surely can be produced by him. They are clearly relevant, as I have found above. In such circumstances it also becomes irrelevant whether or not the Minister actually considered such material;

h) I have already considered the relevance of the documentation underscoring the Minister's 'Valentine Day Invitation' above. A further ground on which the respondents seek to resist the making available of the documentation, sought in paragraph 1.5 of the notice of motion, is on the basis of the principle of *lis pendens*. It is indeed correct, as was contended in this regard, that there is a further application pending before the Court – that is the so-called 'information application' in which the applicants demand a long- and similar list of documentation, pertaining to the documentation – as they labelled it - contained in the 'Minister's briefcase'. That application is specific and it was made with reference to the Minister's 'Valentine Day Invitation' alone, In this review this particular request is made in the context of the review that was brought to procure – and which was made with the clear aim to achieve the setting aside of the December 2017 notices. The particular category of documents requested in terms of paragraph 1.5 of the notice of motion in this application thus constitutes only a fraction of the overall documentation which is relevant to the decision now taken on review in this

case. The special plea of *lis alibi pendens* is a discretionary one, in which considerations of convenience and fairness also play an important part.<sup>75</sup> To exclude this facet of documentation, clearly relevant to the overall record in the present review, from the overall disclosure sought, on the application of the *lis pendens* principle, would, in my view, not only be wrong, but would also be inconvenient and unfair in such premises. I exercise my discretion accordingly.

[27] It is for all these reasons that I consider the request for the first category of additional documentation, as made in paragraphs 1.2, 1.3 and 1.5 of the applicants Rule 76(6) notice well founded and I will thus grant each such requests.

The second category of documents: documents referenced in the material which served before the Minister but which the Minister claims were not before him when he took his decision and thus do not form part of the record

[28] The requests made under this category were motivated as follows:

'27. In paragraphs 4 and 13 of the applicants' rule 76(6) notice, the Minister was requested to produce the following documents incorporated by reference in the file before him:

"4. The specific documents, emanating from three African countries with allegedly similar or comparable compulsory reinsurance dispensations, namely Ghana, Kenya, Tanzania and Morocco and those countries referred to in the footnotes of the NamibRe submission discovered in the first review record at pages 66-67 and 91-93, which the Minister considered in arriving at his decisions that underpin and are reflected in the impugned December 2017 notices, including:

4.1 the specific constitutional and legislative provisions (some by treaty) of the countries referred to;

4.2 the specific documents containing commentary on the comparable constitutional and legislative provisions of the countries referred to;

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<sup>75</sup> See for instance : *Vlasiu v President of the Rep of Namibia* 1994 NR 332 (LC) at 336A, *Ex Parte Momentum Group Ltd and Another* 2007 (2) NR 453 (HC) at [36] and *Kalipi v Hochobeb* 2014 (1) NR 90 (HC) at [31].

4.3 the specific judgments from the countries referred to, dealing with review proceedings, where the provisions of the legislation were implemented by administrative decisions;

4.4 the specific judgments from the countries referred to where the legislative provisions were constitutionally attacked;

4.5 the regulatory impact analyses or cost benefit analyses in respect of the allegedly comparable dispensations in any of the countries referred to;

4.6 the feasibility study reports in respect of the allegedly comparable dispensations in any of the countries referred to;

4.7 the actuarial reports in respect of the allegedly comparable dispensations in any of the countries referred to;

4.8 the documents reflecting or comparing the stage of development and maturity of the Namibian insurance market on the one hand, and the insurance markets of each of the relevant countries on the other, with respect to local retentions; and

4.9 the micro and macro-economic impact study reports (on consumers, the insurance industries, and the broader economies of the countries referred to).

13. The documents referred to at 91 of the first review record that are not publicly available, namely:

13.1 NamibRe's Actuarial Valentine's s for 2014, 2015 and 2016; and

13.2 The "various other internal documents provided by the Corporation."

28. At paragraphs 9, 10 and 19, the Minister acknowledged that the documents were referenced in the material before him, but declined to produce them. The Minister neither claimed that the documents were irrelevant, and could obviously not, nor that the documents were confidential. He simply asserted that the applicants “are not entitled to require me to produce it, in terms of rule 76(6), or otherwise.”

29. We submit the Minister “has misconceived the principles upon which” his affidavit in response to the rule 76(6) notice should have been made. This response does not accord with the applicable test, which shows that, if documents were referenced in the material before him (as the Minister himself acknowledged) then this should be made available as part of the record.

30. The Minister is also obliged to produce the documents which he had the power to call for, if he does not have them or did not have them.<sup>76</sup> There can be no question that it was and remains within the Minister’s power to request the documents from the parties who made the submissions to him and which submissions be, on his own version, considered. Documents which underlie these submissions form part of the record.’

31. In the premises we respectfully submit that an order directing the Minister to produce the documents sought in paragraphs 4 and 13 of the applicants’ rule 76(6) notice should be granted.’

[29] The Minister’s opposition to the production of this category of documents was motivated as follows:

*‘Paragraphs 1.4 and 1.12: Documents in NamibRe’s submissions*

31. The applicants demand that the Minister produce a shopping list of documents pertaining to “*African countries with allegedly similar or comparable compulsory reinsurance dispensations, namely Ghana, Kenya, Tanzania and Morocco and those countries referred to in the footnotes of the NamibRe submission discovered in the first review record ... and which [the Minister] considered in arriving at his decisions that underpin and are reflected in the impugned December 2017 notices...*”.<sup>77</sup>

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<sup>76</sup> *Continental Ore Construction* at 597H-598A, as implicitly approved in *South African Sugar Association supra* at 245 C-D.

<sup>77</sup> Record: p 3-4.



32. This is followed by no less than nine sub-categories of documentation which include:
- 32.1. *“specific constitutional and legislative provisions” (and “commentary” on those provisions);*
  - 32.2. *“specific judgments from the countries referred to, dealing with review proceedings, where the provisions of the legislation were implemented by administrative decisions”;*
  - 32.3. *“judgments from the countries referred to where the legislative provisions were constitutionally attacked”;*
  - 32.4. *“regulatory impact analyses or cost benefit analyses...”;*
  - 32.5. *“feasibility study reports”;*
  - 32.6. *“actuarial reports”;*
  - 32.7. *“documents reflecting or comparing the stage of development and maturity of the Namibian insurance market on the one hand, and the insurance markets of each of the relevant countries on the other, with respect to local retentions”;* and
  - 32.8. *“the micro and macro-economic impact study reports (on consumers, the insurance industries, and the broader economies of the countries referred to”.*
33. This is another attempt at interrogation under the guise of the authority of the rule. It provides no such authority. The attempt is to elicit an extraordinarily broad demand for documents not rooted in the record produced by the Minister (or even the reasons given by him for his decision). If the materials were not *“before”* the Minister, in the proper sense of the authority the applicants themselves cite, how is Rule 76’s requisite of relevance met?
34. The applicants’ answer is again on the particular wording of *Johannesburg City Council supra*. This is where Marais J held that the record comprised all documents before (again using that term) the decision-maker *“as well as all documents which are by reference incorporated in the file before it.”*<sup>78</sup>

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<sup>78</sup> At 92B.

35. But that was so because of the very next sentence. It is the one we have already quoted (in para 52 *ad finem*): on the facts of that matter, there was in essence a single renewed application, so how could the (single set of) merits *not* be present to the decision-maker's mind? Thus, all documents "*by reference incorporated in the file*" were before him.

36. In contrast, in the present case the Minister did *not* incorporate all Namibre's supporting material. To the contrary, he records that he did not read up whatever Namibre cited in its footnotes. He took in good faith what Namibre conveyed regarding similar systems in the indicated other countries. (If the applicants wish to contend that it is a review ground for a decision-maker to rely on the input in this way, or that Namibre's facts were wrong, it can make that endeavour in the review court).

37. On the applicants' reading of the "*incorporated by reference*" observation by Marais J, itself cited in *Aonin supra*, this lays down an inflexible principle that a decision-maker is bound by Rule 76 to produce that which it itself does not have in its possession, did not itself consider, and which (on the applicants' claimed list) is entirely without specified number or limit.

38. The claim is absurd. The logic of judicial review is that an administrative decision cannot be justified by the material before – in the correct sense analysed above – the decision-maker. Not by what the decision-maker *could* or *might* have had.<sup>79</sup> The record is an actual thing. It is not an attribution: the Minister is not *deemed*, by the Rule, to have before him what, for instance, the Society of Actuaries or Namibre had as cited statistical or narrative support for their own submissions.

39. The Rule does not require a decision-maker to *fetch* from those who made submissions materials not in the actual possession of the decision-maker. The applicants seem to accept in this instance the Minister's statement under oath that he does not possess them – but they suggest Marais J's remark (on the particular facts before him) has the effect that possess means "*must procure*". This without the Rule according any power to the decision-maker to do so. The applicants forbear to suggest how the Minister must procure what he does not have from Morocco, the Society of Actuaries, or Namibre.

40. The same applies to the demand for Namibre's "*Actuarial Valuations for 2014, 2015 and 2016*" as well as other "*internal documents*" of Namibre referred to in the latter's

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<sup>79</sup> See again Rose-Innes *op cit* 27-8.

submissions. To the extent that the applicants have (or had) a right as against NamibRe to procure these, they have failed to exercise it. They seek no relief against NamibRe.

41. In summary, we submit that it is an abuse of process for the applicants to persist in seeking an order compelling *the Minister* to produce these documents (assuming they even exist) on the basis of footnotes and other references in *NamibRe's submissions* in the consultative process.

42. Firstly, there is no reason to presume from the footnotes (these, we reiterate, in the submission) to presume that all the documents pertaining to other African jurisdictions even exist. Thus, the first requisite, a foundation for the required *belief*, has not been laid, in respect of most of the items here sought.

43. Secondly, and in any event, the Minister has stated on oath that what he considered was NamibRe's submission, not any of the documents referred to by the applicants in this item of their interrogative list.<sup>80</sup> Thus the second requirement of possession is also not established.

44. Thirdly, the requirement of *reasonable identification* is not met. The notice of motion in this regard labours under the comical misconception that the requirement is met by inserting the word "specific" before unbounded categories – of "legislative provisions". "documents", "judgments". "reports".

45. It remains to address the residual attempt to contend that in fact, Rule 76 *does* reach beyond actual possession, to a deemed, imputed and thus fictive possession. The applicants namely contend that the Minister should nevertheless be compelled to produce these documents as he *could have* called on NamibRe to produce them. The case of *Continental Ore Construction* is cited as authority for this proposition.<sup>81</sup>

46. The applicants' reliance on this case is entirely misplaced. Again, the misreading of the judgment is striking. The matter concerned an action brought by the plaintiff seeking a declaratory order that the defendant was bound by an agreement to supply it with vanadium. An issue arose in that case about rule 35(3) of South African Uniform Rules. In the passages referred to in the applicants' heads of argument the court simply recorded a trite proposition concerning discovery in action proceedings: that the onus of proving the relevance of documentation sought to be discovered rests on the party seeking discovery.

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 598E-G. See the applicants' heads of argument, para 30.

47. This case is not about *discovery* in an *action*. The case is not authority for the proposition contended for, namely that in proceedings for judicial review the decision-maker may be ordered to call upon a party who made submissions in the course of a consultative process to produce documents referred to in those submissions which the decision-maker has expressly stated on oath were not before him when he took his decision. If they were not before him, they were not before him. They form no part of the record, because he did not take them into account. There is once again neither principle nor precedent supporting the illogical claim. To the contrary, the rule (South African Uniform Rule 53, and thus by extension rule 76) “*does not lend itself naturally or properly as a mechanism for obtaining documents from third parties*”.<sup>82</sup> But that is exactly what the applicants seek to contrive. What they advance is at odds, again, with the function of Rule 76; with practicality; with the difference between discovery and production of a review record; and most simply, the wording of the Rule itself.’

[30] And in regard to the request made under paragraph 1.13 it was argued :

Paragraph 1.13: documents “evidencing compliance” with section 12 of the Act  
 103. The applicants seek an order compelling the Minister to produce “*documents evidencing compliance with the provisions of section 12 of the Act, relevant to any NamibRe Board meetings convened for the purposes of taking the resolutions regarding the implementation or enforcement of, or giving effect to, sections 39, 40, 43 and 47 of the Act, and forwarded to [the Minister]*”.

104. Section 12 of the Act concerns “*meetings and proceedings*” of NamibRe’s board. The Minister has stated on oath that no documents responsive to the applicants’ request as regards NamibRe’s “*compliance*” with unspecified sub-sections of section 12 of the Act was before him when he took his decision.<sup>83</sup> There is yet again no basis advanced as to why this Court should go behind what the Minister has stated under oath.

105. This demand is one of the more stark illustrations as to why the application is an abuse. Rule 76 has four requirements. The basis for not a single one is laid here.

106. The Rule is intended to put before the court and the applicant the basis for the challenged decision. It is not a licence to ferret out procedural non-compliance by another

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<sup>82</sup> *Stevens v Swart NO* 2014 (2) SA 150 (GSJ) para 22.

<sup>83</sup> Record: p 155, para 21.

party (NamibRe) as regards meetings *it* conducted. This when no basis for any such belief is stated.'

Resolution – re : the 'second category of documents' requested

[31] As far as this category is concerned it would seem that it is common cause that the documents requested were referenced in the material serving before the Minister but that it was contended that such material was not before him 'in the proper sense' and because in the circumstances of the present matter - as distinguished from those prevailing in the *Johannesburg City Council* case - there was not in essence a single renewed application serving before the Minister. I have already rejected this argument on the ground that there was a sufficiently close link between the 2016 notices, the Valentine Day invitation and the 2017 notices for the *Johannesburg City Council* principles to find application also in this case.

[32] It has also appeared from my findings made so far that it is irrelevant to these requests made under Rule 76(6) that the Minister did not consider or read up whatever was cited in NamibRe's footnotes. Such material was clearly available to him and was material which he could have called for. That the submissions made by NamibRe are of direct relevance to the decision taken on review is also beyond doubt. Why should the footnotes and the information, on the basis of which such submissions were made, now not be of relevance? Surely this is information relevant to the- to be impugned decision.

[33] I have already upheld the argument that Rule 76(6) does not empower a decision-maker to compel the production of materials which are not in the actual possession of the decision-maker or under his control, ie. from those third parties who made submissions to him. In regard to the additional documentation requested, as referenced in the NamibRe documentation, for instance, or in that submitted by the Society of Actuaries or that as referenced in the documentation of any other third party, although relevant, any order requiring the Minister to produce these, must be a qualified order, limiting the production of those documents to those in the Ministers possession or to those under his de facto control only. It is relevant in this regard to note that it was pointed out that the applicants have sought no relief against NamibRe, for instance.

[34] I also do not find the argument persuasive which place into doubt the existence of documentation pertaining to African countries when such documentation has been referenced pertinently in footnotes. I believe that such referencing provides a sufficiently sound basis for the 'required belief' that such further documentation is indeed in existence.

[35] The criticism arguing that the 'reasonable identification requirement' was not met by applicants and that the prefix of the word 'specific' before 'unbounded categories of documents, such as legislative provisions, judgments or reports', does also not hold water as each request must obviously be seen in relation to the specific context in which it was made, which reference can then be narrowed down – enabling reasonable identification – with reference to the specific text to which it refers as read with the related footnote, and where all information should obviously be read in conjunction through which reasonable identification can be achieved.

[36] As far as the request made in paragraph 1.13 is concerned, the request for documents evidencing compliance with section 12 of the NamibRe Act, relevant to any of NamibRe's board's meetings regarding the implementation or enforcement of, or relating to the giving effect of sections 39, 40, 43 and 47 of the Act, I uphold the argument that the particular request is overbroad as the Minister was called upon to produce documents in regard to NamibRe's compliance with reference to unspecified sub-sections. Section 12 has 10 sub-sections, section 39 has 8, section 40 has 6, section 43 has 3 and section 47 has 2.

[37] It so emerges that I am inclined to grant the requests made in terms of paragraphs 1.4 and 1.12 of the notice of motion and that I will generally decline to grant the overbroad request that was made in terms of paragraph 1.13.

[38] It however appeared further that the applicant also dealt with the request made under paragraph 1.13 under the heading 'the fourth and final category of documents: documents to prove NamibRe's compliance with relevant statutory provisions' where the additional argument was mustered to the effect that:

'45. Under this last category of documents, the applicants requested the Minister to produce documents that evidence that NamibRe had complied with its statutory duties required for the lawful implementation of sections 39, 40, 43 and 47 of the NamibRe Act. The Minister declined to produce any of the requested documents since he claimed "they were not before him" when he made his decision and thus need not be produced. He did not deny their existence.

46. In terms of sections 39(5) and (8), and 43(2), the Minister could only specify the percentages of compulsory reinsurance under section 39 or exempt any insurer from the requirement to reinsure the specified percentage, or direct the percentage commission payable to NamibRe under section 43, on recommendation to that effect by the NamibRe Board. The NamibRe Board recommendations would have had to be valid recommendations, and therefore would have had to comply with section 12, at the very least, of the NamibRe Act. The Minister would have had to be satisfied that the recommendations were valid before he could exercise his powers. And the Court must be satisfied that the recommendations were validly made. Otherwise the Minister's decisions would be unlawful. As such the request for the documents in paragraph 16 (*this actually seems to be a reference to 1.13*) of the applicants' rule 76(6) notice is valid and the court should order their production.'

[39] This further argument is persuasive as it demonstrates the potential relevance underlying this request. At the same time it also illustrates the point that the actual request was couched in too wide terms. If the applicants intended the Minister to produce documentation evidencing that he had received valid recommendations, (made in compliance with section 12), for purposes of exercising his functions in terms of sections 39(5) and (8), and 43(2) of the NamibRe Act, the request should have specified this.

[40] The respondents' further submission to the effect that the relied upon rule is '*...not a licence to ferret out procedural non-compliance(s) by another party (here NamibRe) as regards meetings it conducted ...*' is misdirected as that was not the aim for which the request was made when it was clearly stated that the request was made because of its potential relevance to the decision taken on review and where this request was illustrated with reference to examples underscoring this purpose.

[41] As the Minister did not deny the existence of these documents I am inclined to

nevertheless grant this request on its narrower compass only.

The third category of documents: The documents relating to the Minister's consideration of the material before him and his ultimate decision to publish the Notices

[42] For this category applicants' counsel have conveniently summarized each request, the Minister's answer to each such request and the applicants' position in respect of each answer given. For ease of reference I have put these stances in columns. I will then turn to deal with these positions together with the arguments mounted for and against for purposes of determining each request.

<b>THE REQUEST as per paragraph 1.1 of the Notice of Motion</b>	<b>The First Respondents ANSWER to 1.1</b>	<b>The Applicants' Reply</b>
<p><b>"1. Drafts prepared for the Minister or by the Minister to file his reasons referred to above. As well as documents indicating when (i.e. the date) the reasons were finalized."</b></p>	<p>"5. I am advised by my legal practitioners that the reasons for my decision were duly filed, pursuant to the requirements of Rule 76, on 6 June 2018 in accordance with Rule 76. The applicants are not entitled by way of general discovery, nor in terms of Rule 76, to "drafts prepared for the minister or by the minister to file his reasons", or documents "indicating when (ie the date) the reasons were final[s]ed" (to the extent that any such materials may exist)."</p>	<p>8.1.1 The reply is unacceptably and unnecessarily ambivalent. The minister was required to state whether the documents requested exist or not. He chose to avoid the question. The fact that the Minister did not deny the existence of the documents makes plain that they do exist.</p> <p>8.1.2 If the documents did not, the simple answer would have been just that – they do not exist.</p> <p>8.1.3 The factual existence of the documents is supported by the nature of the issues at hand, on which the first respondent was required to make decisions. It is highly unlikely that the first</p>



		<p>respondent made up his mind on all of the issues in one go, and all in his head, and personally typed his decisions and reasons perfectly on his first attempt.</p> <p>34.2. The documents will “throw light, directly or indirectly, on what the proceedings were, both procedurally and evidentially”, and would thus form part of the record.</p>
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[43] I uphold these requests for the following reasons:

- a) It would firstly seem that the various documents, as requested here, may still be in existence;
- b) It would also seem that such documents may still be in the possession of the Minister alternatively in the possession of officials within his Ministry and such documents would thus still be under his control;
- c) I uphold the persuasive arguments made in reply in these regards;
- d) The requested documents are- or may still become relevant to the decisions which are sought to be reviewed as they would- or could tend to indicate what was considered - and at what stage - *en route* to the decisions made; ie. each scrap would or could throw light '*directly or indirectly*' on the decisions which were made ultimately;
- e) I also agree that given the nature of the issues at hand, on which the first respondent was required to make decisions, it is highly unlikely that the first respondent made up his mind on all of the issues in one go, and all in his head, and personally typed his decisions and reasons perfectly on his first attempt, as was

submitted. Although in the strict sense no factual basis for this argument was provided the request is nevertheless based on sound logic, a high degree of probability and the inferences to be drawn from the facts and circumstances pertaining to this particular request;

f) The argument - although eloquently made - that there is no basis for this request afforded by Rule 76 and that '*... there is no precedent where a decision-maker, for purposes of a review, must produce his first scriblings on a notepad, or what is a first stab at a typed text ...*' – also seems to be negated by the novel approach followed by the Constitutional Court in the *Helen Suzman Foundation* case when it directed the Judicial Service Commission to produce the recording of the private post-interview deliberations in respect of which confidentiality had been claimed. The Constitutional Court ultimately acceded to the production of the recording as it was relevant to the decision it preceded.

g) The reasoning applied by the Constitutional Court is indeed instructive:

[23] Surely, deliberations are relevant to the decision they precede and to which they relate. Indeed, HC Sanral correctly says so. They may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like. Absent disclosure, these irregularities would remain hidden. Deliberations are the most immediate and accurate record of the process leading up to the decision.

[24] If this is true of deliberations in general, it must surely be true of JSC deliberations as well. The JSC's own practice of distilling reasons for a decision from the deliberations is indication enough that JSC deliberations are of relevance to the decisions. They clearly bear on the lawfulness, rationality and procedural fairness of the decisions. ...'

h) It so emerges that, in the course of the Court's reasoning, the point is made that deliberations 'may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like'. The requested documentation/materials in this instance obviously may do the same. They will shed light on the decision making process, and the requested materials may thus have a bearing on the lawfulness, rationality and procedural fairness of the decisions taken

on review.

i) This analogy illustrates why the argument, mustered on behalf of the Minister, that he has complied with his obligation to furnish the reasons for his decision and that the drafts requested did not form part of the record, cannot be upheld.

<p><b>“1.6. A copy of the file prepared for the Minister (“the Minister’s file”). Containing the documents and using the same pagination as referred in paragraphs 2, 16, 18, 20, 22 and 27 of the memorandum (“Counsels’ Memorandum”) included at 481-504 of the first review record. The documents now discovered appear to be from the file of the Government Attorney, not those on which the minister worked.”</b></p>	<p>“13. The documents are from the file which was before me in taking the decision.”</p>	<p><b>(The applicants’) RESPONSE</b></p> <p>8.6.1 The reply says nothing, I respectfully submit. There is not a single note, comment or inscription anywhere on the discovered file. There is no indication whatsoever on the discovered file that it was in the Minister’s possession or that he worked on it. And the Minister has declined to address the clear factual basis for the request.</p> <p>34.4. The documents will “throw light, directly or indirectly, on what the proceedings were, both procedurally and evidentially”, and would thus form part of the record. The requested material will also inform what was before the Minister when he took his decision, as well as all those documents which were incorporated by reference in them.</p>
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[44] It would indeed seem that the Minister's statement under oath must prevail in this regard, although it remains inexplicable that the discovered documents show no inscription or notes for instance.

<p><b>“1.7. The documents evidencing delivery to the Minister of the Minister’s file and Counsels’ Memorandum.”</b></p>	<p>“14. The documentation “evidencing delivery” to the Minister sought in this paragraph is irrelevant to my decision. The applicants are not entitled to it, whether pursuant to Rule 76 or general or particular discovery. The documentation was delivered by email by the offices of the Government Attorney to my office.”</p>	<p><b>(The applicants’) RESPONSE</b></p> <p>8.7.1 The first respondent has not annexed the alleged email and offers no explanation for not doing so. Assuming the documents were delivered, the key question is when the documents were delivered and when they were printed for the Minister, if at all, to apply allow him to apply his mind and make the critical decisions. The Minister does not say when he considered the documents or when he made his decisions.</p> <p>8.7.2. The documents are certainly relevant. Proof of delivery, and the timing of the delivery, is absolutely relevant, otherwise it may prove that the first respondent never had the documents before him, and everything was done for him by others. The exact date of delivery to the Minister (and the Minister himself says he has the email) may prove to be after the minister</p>
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		<p>allegedly took his decision.</p> <p>34.6. The documents will “throw light, directly or indirectly, on what the proceedings were, both procedurally and evidentially”, and would thus form part of the record.</p>
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[45] Firstly it becomes clear that the referred to documentation was delivered by e-mail.

[46] Secondly it is taken into account that it was disclosed that it was agreed on behalf of the Minister, during the Rule 32(9) meeting held on 11 June 2019 to make available these documents in order to limit the issues pertaining to this interlocutory application, which tender was seemingly withdrawn subsequently as the stance was then taken that the request, which was considered frivolous and vexatious, would have a material bearing on costs.

[47] Thirdly proof of delivery thus exists.

[48] Fourthly I find that the arguments made in response to the Minister’s stance persuasive. I thus disagree with the contention that the requested documentation is irrelevant to the Minister’s decision. The constitutional trend to enable the testing of the legality of the exercise of public power, completely and thoroughly, by affording an applicant in a review access to all material relevant to the exercise of that public power underscores this stance. The information sought is relevant to the decision for all the grounds advanced on behalf of the applicants. The documentation sought could clearly found a possible further ground of review based on any of the grounds as formulated in the applicants’ reply. If they do not, then, at least, there can be no basis for any suspicion that a possible irregularity has remained uncovered or has remained isolated from scrutiny and review. The request is clearly underscored also

by the constitutional imperative applicable to reviews, which requires the exercise of public power to be in accordance with the Constitution through which the applicants should be afforded a reasonable opportunity to advance their case.

<p><b>“1.8. The documents evidencing the instructions to the legal drafters to finalize the impugned December 2017 Notices.”</b></p>	<p>“15. The documentation sought in these paragraphs post-dates my decision. It is accordingly irrelevant. To the extent it may exist, the applicants are not entitled to it as any part of the Rule 76 decision or by way of general or particular discovery.”</p>	<p><b>(The applicants’) RESPONSE</b></p> <p>8.8.1 It is simply not sufficient to say that the documents sought “post-date” the Minister’s decision. The question remains what is the date of the Minister’s decision. The applicants’ case is indeed that the Minister has simply followed Cabinet’s instruction; so the Minister “took” his decision even before he received any documents from the Government Attorneys. The point is that the exact date of the instructions to the legal drafters may even pre-date the date on which the Minister allegedly received the documents from the Government Attorneys.</p> <p>34.8. The documents will “throw light, directly or indirectly, on what the proceedings were, both procedurally and evidentially”, and would thus form part of the record.</p>
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[49] The first basis on which this request is opposed is on the basis of relevance, as the documents requested, post-date the Minister’s decision. The second ground is based on the argument that the requested documents were thus not before him at the relevant time.

[50] These grounds of opposition in my view however cannot prevent the disclosure of the sought documentation, which are clearly relevant to the applicants

pleaded case that the Minister simply followed the Cabinet decision and took his decision before the receipt of documents from the Government Attorney. In addition and in any event such documentation may also become relevant to the applicants' possible supplemented case and the grounds of review changing later or being subtracted therefrom.

[51] An applicant under Rule 76 is entitled to all material relevant to the exercise of the public power in question. That is the best possible way in which the exercise of such power can be tested. While there may very well be a speculative element in the applicants' request, as was submitted, the court, will seriously have to take into account also the valid interests the applicants may have in being placed in the best possible position to advance their case in regard to the decisions which they have challenged. In such circumstances it would appear that also the respondents' argument that the basis of this demand was based on speculative assertions, cannot prevail.

[52] Ultimately I also agree that the requested documentation may *'throw light directly or indirectly on what the proceedings where, both procedurally and evidentially'*.

[53] I will thus grant this request.

<p><b>“1.9. The documents evidencing the instructions to the publishers of the Government Gazette, in which the impugned December 2017 Notices were published.”</b></p>	<p>“15. The documentation sought in these paragraphs post-dates my decision. It is accordingly irrelevant. To the extent it may exist, the applicants are not entitled to it as any part of the Rule 76 decision or by way of general or particular discovery.”</p>	<p><b>(The applicants') RESPONSE</b></p> <p>8.9.1 In light of the nature of the engagements between the parties since 2016 as I have already documented, the first respondent's answer leaves several question that demonstrate the inaccuracy of his position. What if the draft notice was ready well before the consultation was completed? What does post-date mean in this</p>
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		<p>context? When exactly did the first defendant make the decisions? With respect, the Minister must know whether such documents exist. And, given his ambivalent answer, they clearly do exist.</p> <p>34.10. The documents will “throw light, directly or indirectly, on what the proceedings were, both procedurally and evidentially”, and would thus form part of the record.</p>
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[54] This request is acceded to on the same reasons and grounds, *mutatis mutandis*, on which the previous request was granted.

<p><b>“1.10 The minutes of all meetings between the Minister and NamibRe’s representatives including but not limited to its Board, and between the Minister and all persons advising the Minister or consulting with Minister, regarding any of the matters reflected in the December 2017 notices:</b></p> <p><b>1.10.1 before and after the Minister received the industry submissions contained in the first review record; and</b></p> <p><b>1.10.2 before and after the Minister received Counsels’ Memorandum.”</b></p>	<p>“17. No “minutes of ... meetings” between “the Minister and NamibRe’s representatives”, or between the Minister “and all persons advising...or consulting with the Minister regarding any of the matters reflected in the December 2017 notices” to my knowledge exist, or were considered or otherwise form part of the record of my decision.”</p>	<p><b>(The applicant’) RESPONSE</b></p> <p>8.10.1 With respect, the Minister’s answer is this: He is not sure minutes exist, but even if they exist, he did not consider the minutes and therefore the documents are not part of the record of his decision. But, with respect, the minutes do exist; they contain only the information conveyed to him at the meetings, and he cannot and does not say that he “erased” the information from his mind before he took a decision. In his reasons the minister acknowledges that he</p>
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		<p>consulted with (unidentified) senior members of his staff.</p> <p>34.12. The documents will “throw light, directly or indirectly, on what the proceedings were, both procedurally and evidentially”, and would thus form part of the record.</p>
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[55] It is firstly to be noted that this request is not resisted on the grounds of relevance. I thus accept that the required relevance is given.

[56] It further seems correct that the Minister’s response is ambivalent, as was pointed out on behalf of the applicants. It would have been an easy matter for the Minister to deny the existence of the requested minutes and memoranda – and if unsure to then deny their existence after the relevant enquiries and search had been made and then to have this fact recorded in his answer. In this regard it was submitted that the Minister has a duty to make such enquiries. I agree. It can thus also not be said that no basis exists for the request. The answer furnished provides that base and places this request on firm ground. The ‘assertions made’ in this regard are clearly also not ‘unreasoned’ as was submitted.

[57] In such premises the analysis of the Minister’s answer, as made in reply, will have to be upheld and the request be granted.

<p><b>“1.11 The notes, draft documents, calculations and decision documents produced by or on behalf of the Minister before and after receiving the industry submissions and Counsels’ Memorandum.”</b></p>	<p>“18. No such “notes and documents, calculations and documents produced by or on behalf of the Minister” as surmised were before me in taking my decision. My decision</p>	<p><b>(The applicants’) RESPONSE</b></p> <p>8.11.1 The Minister, in this paragraph, like in many others in his reply,</p>
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	<p>was taken on the basis of what has been produced as the review record. The applicants are not entitled to the documentation sought in terms of Rule 76, or by way of general or particular discovery.”</p>	<p>seems to emphasise the word “before”. Perhaps these documents were not physically before him. The word “before”, in this paragraph of the Applicants’ request as in all other paragraphs, does not mean “physically in front of”. Instead, it means the document exist, and the information contained therein was shared with the Minister [if that were to be the case – then these documents, on the wide test referred to above – fall within the definition of the record.]</p> <p>8.11.2 The impugned Government Notices, including GN333, GN334 and GN335, GN336, GN337 and GN338, all contains facts and figures. Surely these were not randomly and arbitrarily included by the Minister. If so, this alone would serve as a basis to review and set aside the relevant Government Notices. The Minister must surely have – after receipt of industry submissions and the referred to Memorandum, applied his mind , also to the facts and figures which ultimately found their way into the relevant notices, and before the publication thereof.</p> <p>8.11.3 According to the Minister’s reasons for his decisions, he consulted</p>
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		<p>throughout with senior members of his staff. I say that documents, whether in the form of formal briefing documents or less formal notes and scriblings, must have preceded these consultations and must have been produced during or after these consultations.</p> <p>8.11.4 Further, the requested documents will serve to indicate the Minister's application of the mind to the submissions which were, in fact, made.</p> <p>8.11.5 Notably, the Minister does not deny the existence of the documents sought."</p>
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[58] Again it is to be noted firstly that the existence of the documents requested here is not denied.

[59] Secondly, the Minister has not claimed confidentiality in respect of any of the requested documents.

[60] Thirdly, the Minister, on his own version, consulted throughout with senior members of his staff. It is therefore more than likely that 'documents, whether in the form of formal briefing documents or less formal notes and scriblings, must have preceded these consultations and must also have been produced during or after these consultations'.

[61] Fourthly, such documents, would have been drawn up in order to assist in the promulgation of the intended Government Notices.

[62] Fifthly, these documents did not have to be physically in front of the Minister. They were documents or materials available to him. They are clearly relevant to the

Government Notices under attack, such as GN 333, GN 334 and GN 335, GN 336, GN 337 and GN 338, as all 'contain facts and figures' as it was put. These 'facts and figures' surely would have been – or should have been - in the Minister's mind when making his decisions. They are thus relevant thereto. They are also clearly relevant to the ultimate decisions made in respect of the various Government Notices - which they precede and to which they relate - and accordingly they will have to be discovered.

### Costs

[63] It will already have emerged that the applicants have substantially been successful in this Rule 76(6) application and should thus be regarded as the successful party for purposes of cost considerations. The heads of argument filed on behalf of the parties are silent in regard to whether or not the resultant costs order should be capped in terms of Rule 32(11). The costs order sought by applicants, as encapsulated in the notice of motion, prays however for an order not limited to N\$ 20 000,00 and it requested that such order also include the costs of one instructing- and two instructed counsel, where so engaged. The answering affidavit filed on behalf of the first respondent does not contain a costs prayer or an indication what the first respondent's stance on this would be.

[64] I am however inclined to grant the costs order as sought by the applicants. Not only did this matter engage important legal principles breaking new ground in our jurisprudence, thus warranting the engagement of two instructed counsel and one instructing counsel, but it has also appeared that both parties have seen it fit, due to the importance of the outcome of the litigation between them, to engage senior and junior counsel in all litigation currently pending between them.

### Conclusion

[65] In the result I make the following orders:

1. Prayers 1.1, 1.2, 1.3, 1.4, 1.5, 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12 of the Notice of Motion, dated 5 March 2019, are hereby granted

2. The request made in paragraph 1.6 of the Notice of Motion, dated 5 March 2019, is refused.
3. The request made in paragraph 1.13 of the Notice of Motion, dated 5 March 2019, is hereby granted in part and is limited to those documents evidencing compliance with Section 12 of the Namibia National Insurance Corporation Act, Act 22 of 1998 relevant to any NamibRe Board meetings convened for the taking of resolutions regarding the implementation or enforcement or giving effect to Sections 39(5) and (8), and 43(2) of the said NamibRe Act;
4. This Order is limited to the production of those documents in the First Respondent's actual possession or under his control, alternatively to those documents which are in the possession or under the control of officials within the First Respondent's Ministry and in any event this order is to apply also to all those documents/materials which the Minister's may be able to obtain by virtue of the powers vested in his office;
5. Prayers 2, 3 and 4 of the Notice of Motion, dated 5 March 2019, are also granted.
6. The case is postponed to 19 February 2020 at 08h30 for a Status Hearing.
7. The parties are to file a joint status report indicating their proposals on the way forward.

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H GEIER  
Judge

FOR

1<sup>st</sup> and 2<sup>nd</sup> APPLICANTS: R Heathcote SC (with him R Maasdorp  
Instructed by Francois Erasmus & Partners,

3<sup>rd</sup> – 11<sup>th</sup> APPLICANTS: Van der Merwe-Greeff Andima Inc

12<sup>TH</sup> APPLICANTS: Instructed by Engling, Stritter & Partners,  
Windhoek

1<sup>st</sup> RESPONDENT: JJ Gauntlett SC QC, with him (L C Kelly  
& E Nekwaya)  
Instructed by Government Attorney, Windhoek

2<sup>nd</sup> RESPONDENT:

S Namandje

Sisa Namandje & Co. Inc.