

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-MOT-REV-2021/00103

In the matter between:

EKUNGUNGU (PTY) LTD

APPLICANT

and

NATIONAL HERITAGE COUNCIL OF NAMIBIA

1ST RESPONDENT

MINISTER OF MINES AND ENERGY

2ND RESPONDENT

MINISTER OF ENVIRONMENT TOURISM AND FORESTRY

3RD RESPONDENT

ZERAEUA TRADITIONAL AUTHORITY

4TH RESPONDENT

ZANITE INVESTMENT CLOSE CORPORATION

5TH RESPONDENT

ONGEYAMA MINING CC

6TH RESPONDENT

Neutral citation: *Ekungungu (Pty) Ltd v National Heritage Council of Namibia* (HC-MD-CIV-MOT-REV-2020/00337) [2023] NAHCMD 240 (2 May 2023)

Coram: TOMMASI J

Heard: 14 July 2022

Oral Submissions: 14 July 2022

Delivered: 2 May 2023

Flynote: Civil – Action – Applicant replying affidavit challenges answering affidavit of the respondent – Issue is that it does not establishing authority to oppose application.

Statutory compliance –applicability and use of exception.

Administrative decision – essential characters thereof.

Summary: Applicant is holder of EPL and Mining licence and such is operational. Applicant file application for review and set aside decision by first and second respondent. Answering affidavit of respondent challenged by the applicant on basis that it does not establish authority to oppose review application. Applicant challenges appointment of council members, if such confirmed, their decision becomes unlawful.

Held that: the resolution filed by the respondent is sufficient evidence of authority.

Held that: statutory exception provides that an act or decision of council is not invalid only because of a defect or irregularity in or in connection with the appointment of member of the council.

Held that: administrative decision must be final in nature and effect and must have direct external effect on the rights of the applicant.

Held that: the decision by the respondents not final in nature and effect and the applicant application to review and set it aside was premature, rendering the decision not reviewable.

Held that: Application is dismissed with costs.

ORDER

1. The application is dismissed with costs.
-

JUDGMENT

TOMMASI J:

Introduction

[1] The applicant, on 25 March 2021 filed a notice of motion, founding affidavit and supporting annexures. On 26 October 2021, after the record was disclosed, the applicant amended its notice of motion.

[2] The applicant in terms of the amended notice of motion seeks an order for:

(a) Reviewing and setting aside of the decision taken by the first and second respondent on or about 16 February 2020 to undertake a joint archaeological assessment study at Otjohorong and Gross Kandjou Farm, Erongo Region;

(b) Reviewing, correcting and setting aside a decision dated 26 November 2020 taken by First and Second Respondents;

(c) Declaring that all decisions of the first and second respondents underpinned by the joint archaeological assessment study to be contrary to the applicant's guaranteed rights per article 18 and article 10 of the constitution and to declare all such decisions null and void ab initio and are to be set aside.

Alternatively;

(d) Declaring that the members of first and second respondents were appointed contrary to the provisions of section 8 (1)(a), (b) and (c) and section 8(3) read with section 8(5) of the Public Enterprises Governance Act, 1 of 2019;

(e) Declaring that all decisions made by first and second respondents from the date of their appointment being sometime in January 2020 up to 26 November 2020 are unlawful, null and void ab initio and are set aside.

(f) Directing that those who oppose the application pay the costs of this application, including the costs of one instructing and one instructed counsel where employed, jointly and severally, the one paying the other to be absolved.'

Background

[3] A summary of the facts which forms the backdrop to the dispute between the parties, is set out hereunder. These facts are not disputed unless so indicated.

[4] The applicant is the holder of an EPL (Exclusive Prospecting Licence) 4891 which covers approximately 4 194.40 hectares. At the behest of the applicant, an environmental impact assessment was conducted by an independent company. A final report was produced during December 2017 in order to comply with the provisions of the Environmental Management Act, 2007 and was granted an Environment Clearance Certificate for EPL 4891 on 12 October 2017. It is common cause that this area forms part of the area known as Otjohorong Granite Hill.

[5] The applicant lodged an application for a Mining licence 184 which covered a portion of EPL 4891 and was granted a notice of preparedness to grant mining licence 184. The environment clearance certificate was granted for the mining licence 184 on 8 March 2018 and is valid for 3 years.

[6] The applicant commenced the construction of a processing plant at the site of its mining operations on ML184. This was in response to the growing pressure from the Government for mining companies to invest in processing and value addition activities.

To this end export levies were imposed to sanction the export of raw unprocessed granite blocks during 2019.

[7] The applicant submitted an application for the amendment and renewal of the environment clearance certificate which application was pending at the time this application was brought.

[8] On 24 March 2020 an article appeared in the “Republikein” newspaper which disclosed that the first and second respondents have undertaken a study to investigate the impact of the mining at Otjohorong Granite Hill and Farm Gross Okahandjou on the archaeological resources in that area. Mr Sasamba, the director of the applicant, attempted to obtain a copy of the report referred to in the article but was unable, initially, to obtain the report. The applicant’s legal practitioners raised its concerns that the said report was being distributed publicly but the applicant whose operations may be directly impacted by the study, was not provided with a copy of the said report.

[9] On 31 March 2020 the applicant’s legal practitioners addressed a letter to the first respondent demanding a copy of the report and confirmation that one Beverly, an employee of the second respondent, had permission to share the report with the journalist.

[10] The second respondent’s legal representative replied hereto and confirmed that the second respondent was approached for an interview with the journalist on 19 February 2020 after a site visit in the Otjohorong Granite Hill and Gross Okahandjou Farm. The letter explains that the Marketing and Public Relations Officer erroneously furnished recommendations extracted from a draft recommendation to the journalist who was requested not to publish same as it was not discussed with all the stakeholders involved in the site visit.

[11] In respect of the demand for the copy of the report, the second respondent politely declined to provide a copy of the report to the applicant as the report was not

discussed with all the stakeholders at that time. The second respondent however suggested that a round table meeting be held where Mr Simon of the Ministry of Mines and Energy (Ministry of Mines) would also be in attendance.

[12] On 9 June 2020 the applicant met with the first and second respondent at the office of the Ministry of Mines. It is not clear whether the Mr Simon was also present at that meeting. The respondents refused to share the study with the applicant and undertook to discuss its finding with the applicant prior to implementation of the outcomes of the study.

[13] On 17 June 2020 the applicant managed to obtain a copy of the study which was dated February 2020 from a third party to whom the report was given. It is evident from this report that the second respondent was approached by the Otjohorongo community and the owner of Gross Okahandjou Farm with complaints of systematic disturbances and possible damages to an archaeological heritage landscape as a result of dimension stone mining activities.

[14] The report confirms that the site visit took place during 5 – 17 February 2020. This report indeed confirm that the second respondent received the complaints and made a decision to, jointly with representatives of the Ministry of Mines and the Ministry of Environment, Tourism and Forestry (Ministry of Environment) visit the site and to compile a joint study. A report was compiled after the site visit giving the findings and recommendations for protection and conservation of the heritage resources. The findings were that Otjohorongo Granite Hill is a major archaeological heritage site, that it has been directly impacted by mining activities in that there has been outright destruction and disruption of the cultural landscape, its sites and objects in place; that irreversible damage translating into permanent loss of archaeological resources has already taken place; and that the remaining portion remains highly vulnerable to mining threats. The recommendations were 17 in total.

[15] The report was compiled by Dr Nankela, an archaeologist of the second respondent, Mr Moongela, Archaeology Curator from the National Museum of Namibia and Mr Jerimiah Simon, a Geoscientist from the Ministry of Mines and Energy.

[16] On 18 June 2020 the legal practitioner addressed a letter to the second respondent's legal practitioners pointing out that the applicant has not been given the opportunity to be heard before this damning report was circulated and that the report is flawed. He further points out that his client is aware of many more archaeological sites on other mining claims which are not recorded in the report nor is there a report of the extensive damages caused to the area specified in the study by the holders and operators of another mining claim. He indicates that the study does not distinguish between activities and impacts caused by separate right holders and that the applicant strongly objects to the manner in which the study muddles its operation with those of more recent neighbouring mining operations, which have in fact caused all of the visibly exposed and permanent new damages on previously unaffected areas. In conclusion, the applicant request an urgent confirmation that the study will be shared with mineral rights holders.

[17] On 6 July 2020 the legal practitioners of the second respondent confirmed that the report was a draft and that a meeting with all the stakeholders will be held. At the said meeting the study will be shared with each stakeholder inclusive of the applicant. The letter states that the Ministry of Mines and Energy shall send out an invitation to all Mining Companies to attend the meeting of all Stakeholders and advised the applicant to direct and address its queries to Mr Simon.

[18] During July and September 2020 there were police inspections of the mining site operated by the applicant at the behest of the second respondent.

[19] On 23 September 2020 the applicant's legal practitioner addressed a further letter to the second respondent's legal practitioner requesting a written response to the deliberate omissions of highly relevant localities within the area of study and other flaws

in the study which were pointed out in the letter dated 17 June 2020. The applicant demanded to be informed of the next step and complained that the report has still not been disclosed. The second respondent's legal practitioner insisted that the report is still in draft form, awaiting submission of documents requested from the Ministry of Environment and Ministry of Mines. The second respondent indicated that the next step is to finalise the study and thereafter conduct the stakeholder's workshop.

[20] The respondent's position was that the report remained incomplete until the Environmental Impact Assessment Reports were obtained from the Ministry of Environment. The respondent's stated that once these were obtained, it became evident that: no heritage impact assessment was conducted prior to the mining operations of the applicant; and the environmental report failed to recognize the National Heritage Council Act as an important piece of governing legislation and the second respondent as an affected party in the Environmental Impact Assessment process. According to the respondents the applicant failed to comply with the Environmental Impact Assessment Regulations, the Environmental Management Act as well as the National Heritage Act. The respondents pointed out that this ought to be considered in light of the fact that there are 27 archaeological sites in the concerned area with over 523 figures in and around the area covered by the applicant's mining licence 184 and that the mining activities by companies such as the applicant are large-scale operations with direct negative impact involving outright destruction of archaeological resources.

[21] The applicant claims that these are serious adverse findings made against the applicant, emanating directly from the study carried out by the respondents without giving the applicant the opportunity to be heard and to make representations.

[22] During February 2021, the applicant became aware of an invitation to a stakeholder's meeting, extended by the second respondent to the Zaria Traditional Authority and scheduled for 13 February 2021. The applicant gleaned from the contents of this invitation that a meeting was held on 23 November 2020 where it was resolved that all the environment clearance certificates and mining licences in the two areas be

withdrawn. It further appears *ex facie* this invitation that a finding was made that the applicant and other mining operations are responsible for the disturbances and destruction of the archaeological site at Otjohorong Granite Hill and that the current heritage resources are with the mining licence 184 (applicant's mining licence). It is not disputed that the applicant was not notified of the "shareholders" meeting which took place on 23 November 2022 and the applicant was therefore unaware that the meeting took place, not having been invited to attend.

[23] The applicant filed, as an annexure, a letter from the legal practitioner dated 2 March 2021 seemingly in response to a letter received from the applicant's legal practitioner on 16 February 2021. The second respondent's position in the said missive was that the stakeholders meeting which took place on 23 November 2020 was not an open meeting but rather one with only the institutions which were part of the joint assessment. The second respondent declined to comment on the contents of their invitation addressed to the Zeraeua Traditional Authority as this was not meant for the applicant. The legal practitioners referred the applicant to the Ministry of Environment for any queries regarding its Environmental Clearance Certificate, stating that second respondent is only in a position to advise on matters related to culture and heritage. It was after receiving this letter that the applicant brought the application on 25 March 2021.

[24] The respondents maintain that the Ministry of Mines and the Ministry of Environment were at all times present at the meetings and they are responsible for the issuing of Mining licences and the Environment Clearance Certificate. Their position is that the respective ministries were the responsible institutions who were to inform the proponents, including the applicant, that all their Environment Clearance Certificates and mining licences will be withdrawn and suspended indefinitely. They further submit that the failure to invite the applicant to the meeting held on 23 November 2020 was not attributable to any culpable remissness on the part of the first or second respondent who operated, rightly, under the impression that the concerned Ministries would engage right holders.

[25] After the filing of the record, the applicant amended the notice of motion and filed a supplementary affidavit. The Ministry of Mines and the Ministry of Environment and Zanite Investment CC were removed as parties and Adaptabiz Investment was added as a party. The relief which is sought is only against first and second respondents and the other parties are cited for the interest they may have in the matter.

[26] The focus now shifts to the meetings held on 16 February 2020 and 26 November 2020 respectively. The applicant now perused the documents disclosed by the respondents and noted that on 26 November 2020 the first and second respondents made the following decisions which are detrimental to the applicant:

1. NHC must write a letter to MEFT to request the withdrawal of all the Environment Clearance Certificate at the two sites as soon as possible.

2-4...

5. In the meantime, NHC must seek legal opinion from (the) Attorney General's Office regarding the possible implications of withdrawing all the Environment Clearance Certificate (ECC) from METF and subsequent cancellation mining licences for 6 proponents from NME.

6 -13 ...

14. A different meeting regarding the damage done and possible mitigations measures as recommended in the joint report at the affected sites to be convened by between (sic) NHC, MME, and METF to discuss these technicalities.

15. The proponent must be informed officially as soon as possible by the responsible institutions (METF and MME) that all their ECC's and Mining Licences will be withdrawn and suspended indefinitely, However, they should be given time to remove their mining equipment. (1month?)'

[27] The applicant holds the view that this was the final study report and highlights an e-mail dated 15 January 2021 from Alma Nankela which refers to a request made to the Environmental Commissioner sometime in December 2020, for the withdrawal of the applicant's Environmental Clearance Certificate to show the implementation of the report.

[28] The respondents deny that a decision was made by first or second respondent at the meeting of 26 November 2020. It was merely resolved that the second respondent would request the withdrawal of the Environment Clearance Certificate from the Ministry of Environment at the relevant sites. The final decision thus lay with the Ministry of Environment and not with the first or the second respondent. The role of the respondents was merely that of an advisor regarding the cultural and national heritage sources in Namibia which is their mandate in terms of the National Heritage Act.

[29] The last meeting which took place was the community feedback meeting which was held on 13 February 2021. The applicant avers and it is not disputed, that the applicant was not invited to any of the meetings which took place nor were those decisions and the steps taken to enforce it, disclosed to the applicant.

[30] The respondents confirm that they, during June 2021, notified the applicant of its intention to recommend to the Minister that the Otjohorong Granite Hill be placed under a provisional protection order and the applicant was asked to make submissions regarding the placement of this site under a provisional protection order.

[31] The applicant in its supplementary affidavit states that it employs 25 – 30 employees and the shareholders invested the sum of fifty million Namibian dollars to ensure that the applicant is able to do business. The applicant is only able to do business if it is the holder of a mining licence. The cancellation of the mining licence or the applicant's Environmental Clearance certificate would grind the business to a total halt and it would result in the loss of employment and the monies invested. The applicant submits that the clear and adverse effect of a cancellation of either the mining license or the ECC is plain on the facts. The applicant submits that the decision(s) taken on 26 November 2020 was made by first and second respondents and that these decisions are detrimental to the applicant.

Striking out the answering affidavit of the respondent

[32] The applicant, in the replying affidavit takes issue with the absence of the necessary averments in the answering affidavit to establish authority to oppose the application. The applicant therefore raises an exception in the application proceedings on this focus point and prays that the answering affidavit should be struck out in the circumstances.

[33] The deponents, the director of second respondent, Erica Ndalikokule, makes the averment that she is duly authorised and able to depose to the affidavit on behalf of the first respondent, which in terms of the amended notice of motion is the second respondent.

[34] The respondent, without applying for the filing of a supplementary affidavit, filed a resolution after the point was taken.

[35] Mr Chibwana, counsel for the applicant submits, referring to *Beuke v The Namibia Employers' Association*,¹ and *Standard Bank Namibia Limited v Nekwaya*² that the lack of averments regarding the authority to oppose the review should result in the striking out of the answering affidavit. In the *Standard* bank matter, *supra* the following is stated:

'[18] Authorisation of proceedings is a serious matter, and is not just an idle incantation required for fastidious reasons. The court must know, before it lends it processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.'

The *Beuke* matter, *supra*, the court cites with approval the following from *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298 (HC) where it was

¹*Beuke v The Namibia Employers' Association* (HC-MD-CIV-MOT-REV-2018/00013) [2019] NAHCMD 227 (4 July 2019).

²*Standard Bank Namibia Limited v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089) [2020] NAHCMD 122 (26 March 2020).

emphasised that it is not the authorisation to depose to an affidavit but the authorisation to institute and the prosecution thereof which must be authorised. Mr Chibwana further referred to *The Chairperson of the Council for the Namibia Qualifications Authority v Shadonai Beauty School*³, where the court held that the allegation of authority is mandatory and the omission thereof can be fatal even if that omission is contained in the answering or opposing papers.

[36] The respondents argue that the court must not lose sight of the reason why a party must be authorised to act on behalf of an artificial person i.e that the Court must be satisfied that such artificial person cannot avoid a cost order and that the litigant is not on a reckless, self-serving frolic of his or her own. The respondents argue that the evidence before the court is that the deponent is a director of the second respondent and confirmatory affidavits of the first respondent and Alma Nankela were filed in support thereof. The respondents submits that these facts show that the director is authorised to oppose the application.

[37] Relying on *Smith v Kwanonquebela Town Council*⁴ the respondents argue that a party to litigation does not have the right to prevent the other party from rectifying a procedural defect and the respondents filed a special resolution on 31 May 2022.

[38] The respondents final point in opposing the exception taken by the applicant is that the applicant itself has laid no grounds upon which they aver that the respondents lack the authority to oppose the application citing in support *N.U.N.W v Peter Naholo*⁵ and *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration*⁶ where Hannah J referred with approval to *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*⁷ in which Watermeyer J stated at 352 A – B as follows:

³ *The Chairperson of the Council for the Namibia Qualifications Authority v Shadonai Beauty School* (HC-MD-CIV-MOT-REV-2020/00337) [2021] NAHCMD 530 (12 November 2021).

⁴ *Smith v Kwanonquebela Town Council* 1999 (4) SA 947 (SCA).

⁵ *N.U.N.W v Peter Naholo* A 16/2006 delivered on 7 April 2006.

⁶ *Duntrust (Pty) Ltd v H Sedlacek t/a G M Refrigeration* 2005 NR 147 HC.

⁷ *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C).

'Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before Court, then I consider that a minimum of evidence will be required from the applicant.'

[39] In the case of *Nangolo v Metropolitan Namibia Ltd and Another*⁸ Hoff J, as he then was, was confronted with the same legal question and extensively dealt with the issue. Like in this matter the issue of lack of authority was raised for the first time in the replying affidavit of the applicant and no application was made by the respondents for leave to file further affidavits. The difference however was that the respondent in that matter made the averment under oath that it is authorised to oppose the application whereas such an averment in this matter is completely lacking.

[40] The director of applicant herein in his replying affidavit, indicates as follow:

'I have perused paragraphs 1 up to 1.3 of the answering affidavit and my perusal of those paragraphs reveals the fact that no allegation is made by the deponent alleging that she is authorised to oppose the review application.'

[41] In paragraph 33 of the *Nangolo* case Hoff J states as follow:

'It however depends upon what factual allegations, if any, are put before Court which will determine the response by the opposing party and whether a Court will subsequently be satisfied that enough has been placed before it or not, regarding the issue of authority.'

[42] The applicant herein has not offered any factual allegations to support an averment that the respondents do not have the requisite authorisation. In the *Mall* case, *supra*, at page 352 A the court states the following:

'The best evidence that the proceedings have been properly authorised will be provided by an affidavit made by the official at the company annexing a copy of the resolution but I do not consider that form of proof necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the

⁸ *Nangolo v Metropolitan Namibia Ltd and Another* 44 of 2009) [2010] NALC 2 (13 August 2010).

conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.'

[43] Mindful of the cases cited above, I am of the considered view that this court should exercise its discretion in favour of the respondents. Although the allegation has not been made under oath I find that the resolution filed provides sufficient evidence of authority to oppose the application in light of the complete lack of facts by the applicant that the respondents lack such authority. Even if the court is said to have wrongly exercised its discretion, it is my considered view that the absence of an answering affidavit in this matter would not detract from the onus which rests on the applicant to prove that an administrative decision has been taken herein. The objection raised against the authorisation of the respondents to oppose the application is therefore dismissed.

Appointment of the first and second respondents

[44] The applicant challenges the appointment of the first and second respondents and submits that the council as a non-commercial public enterprise must comply with the provisions of the Public Enterprise Governance Act, 1 of 2019. The applicant submits that no recommendations were made as contemplated by section 8(1)(a), (b) and (c) of the Public Enterprises Governance Act No 1 of 2019. In addition hereto there was also non-compliance with s 8(5) of the National Heritage Act due to the fact that the review record does not disclose any consultation between the Minister and Cabinet.

[45] The response in the answering affidavit hereto is as follow:

'Pages 242 to 255 contain the appointment letters of the members of the 2nd Respondent. The appointment letter states that the appointment is done pursuant to s 4(1)(b) of the National Heritage Act 27 of 2004. By virtue thereof, the appointments were carried out pursuant to what is stated in the National Heritage Act as well as the Public Enterprises Governance Act.'

[46] Mr Makando, counsel on behalf of the respondents submits that the maxim *omnia praesumtu rite esse* or the presumption of regularity is applicable. For reasons set out hereunder this argument was not considered.

[47] The review record indeed contains the appointment letters of the members of respondent's council. All the letters save as for one, reflects that the appointments were done on 13 December 2019. The undated letter reads precisely as the others and a reasonable assumption is that it was written on the same day. Although the Public Enterprises Governance Act, 1 of 2019 was assented to on 30 April 2019 the date of commencement was on 16 December 2019. The appointment of the members of second respondent thus took place three days before the commencement of the Public Enterprises Governance Act, 1 of 2019 and compliance therewith is therefore not required. Although this issue was not raised in argument, this court is of the view that it cannot exact compliance with the provisions of a statute which was not yet in force.

[48] It was required that the Council had to be appointed in accordance with, and for a period determined under sections 14 and 15 of the Public Enterprises Governance Act 2 of 2006. It was not the case of the applicant that there was non-compliance with the 2006 act. Even if I am wrong on this score then s 11(8) provides that an act or decision of the Council is not invalid only because of a defect or irregularity in or in connection with the appointment of a member of the Council.

[49] In light hereof the court finds that the applicant has not made out a case on this ground and the alternative claim prayed for in the applicant's application stands to be dismissed.

Administrative review

[50] The applicant maintains that the second respondent is an administrative body that is subject at all times to compliance with the requirements imposed by article 18 of

the Constitution and to at all times uphold and respect the rights and freedoms of the applicant.

[51] The respondent's position is that the council is the national administrative body responsible for the identification, protection, conservation and management of Namibia's cultural and natural heritage resources. The respondents claim that all steps taken by the council in this matter were within the purview of its enabling legislation and deny that they acted inconsistent with what is contained in the National Heritage Act.

[52] The applicant's main ground for procedural review was the fact that the applicant was not afforded an opportunity to participate meaningfully in the process or make any form of representations prior or even after the conclusion of the study, that they failed to inform the applicant of any reservation they have in respect of its mining activities, that they did not disclose the report and they failed to afford the applicant an opportunity to be heard before making decisions. The applicant submitted that this conduct infringed on the applicant's rights in terms of article 18 of the Constitution and the applicable common law including the principle of *audi alteram partem*.

[53] In respect of the substantive review the applicant submitted that the initiation, conduct and completion of the study and more specifically the recommendations in the report for the study are irrational, unreasonable and arbitrary since the manner in which the study was conducted was not transparent or fair and that there is a clear bias against the applicant. The applicant further aver that the area has not been registered as an archaeological or heritage site in terms of the Act and the second respondent is not entitled to exercise those functions provided to it by the statute, that no notice required by s 27(1)(b) [the correct section should be s 36(1)(b)] was given in respect of Otjohorong Granite Hill and that the second respondent therefore had no jurisdiction in the circumstances. The applicant further submits that Act or the Regulations does not authorise the carrying out of the study and in the event that the statute makes provision for the study, the applicant submits that the manner in which the study was conducted violates the express provisions of the Act.

[54] The following supplementary grounds for review were raised:

(a) The first and second respondent intentionally denied the applicant its right to a hearing and to make representations;

(b) There was an intentional and concerted effort and conduct by the respondents to hide the fact that a decision was made on 26 November 2020 which was implemented and which was adverse to the interest of the applicant.

(c) The intentional conduct of the respondents demonstrates bias in favour of the complainants who the applicant avers have ulterior motives.

(d) The respondents did not act in a transparent and accountable manner when the respondents purported to be exercising public power when they refused to answer to correspondence and to address the queries over a period stretching almost a year.

The applicant concludes that the conduct of the respondents was not reasonable in the circumstances as a reasonable decision maker would have notified a party of a decision that is adverse to that party's interests as opposed to making a decision and then hiding that decision from the person; and that the conduct by the first and second respondent is irrational, unfair, unreasonable and arbitrary.

[55] The applicant points out that the first and second respondent admit that the second respondent is an administrative body that operates subject to legislation. They therefore exercise public power and are as a result subject to Article 18 of the Constitution. The applicant submit that the second respondent is required to provide a hearing whenever they seek to make any decision that is adverse to the interests of a private party. The respondents however acted without regard to the guaranteed rights of the applicant. The applicant insists that the first and second respondents were the decision makers who made adverse decisions against the applicant.

[56] Mr Chibwana submitted that both acts and decisions are administrative actions and are reviewable relying on *Chaune v Ditshabue*⁹. The applicant submit that there is nothing private or personal about the power exercised by the second respondent as the

⁹ *Chaune v Ditshabue* A5/2011 [2013] NAHCMD 111 (22 April 2013).

second respondent is an administrative body responsible for the “identification, protection, conservation and management of Namibia’s Cultural and natural heritage resources.

[57] The applicant holds the view that the second respondent, relying on the complaints, made a decision during February 2020 to exercise its functions and investigate those complaints. The applicant submits that these functions exercised by the second respondent are those contemplated in s 5(1)(b) and (e) of the act and that the outcome of that decision was a draft report in relation to that ongoing investigation. Written requests to participate, make representations regarding omissions and misrepresentations contained in the report and for disclosure, were ignored. Finally, a stakeholders meeting was held to discuss the final study report and specific decisions were made which were also not disclosed to the applicant. The implementation of decisions commenced without allowing the applicant an opportunity to make representations and in breach of its undertaking to grant the applicant that opportunity.

[58] The applicant submits that the respondents acted dishonestly alternatively violated an undertaking it had made in its capacity as an administrative body to a person subject to its power, that they were not afforded an opportunity to make representations and the decision which the respondents took was hidden from the applicant. By 13 February 2021 the decisions were already a *fait accompli*.

[59] In the additional heads of argument filed at the behest of the court, the applicant highlighted the fact that the council applied and utilized the provisions of s 55(5)(b) of the act for the purpose of carrying out the investigation. Section 55(5)(b) reads as follow:

‘If the Council has reason to believe that any activity or development is being carried out in or on any area of land which is believed to be an archaeological or palaeontological or meteorite site without a permit under section 52 and that the activity or development may destroy, damage or alter that site, the Council may-

- (a) ...;
- (b) carry out or cause to be carried out an investigation for the purpose of obtaining information on whether or not an archaeological or palaeontological site exists on the land and whether the activity or development may adversely affect that site;'

[60] The applicant submits that the council issues the permit under s 52(1) and is the decision maker in relation to this permit and not any other administrative official. Mr Chibwana submits that the respondents are seeking a provisional protection order and the purpose thereof is to have the site declared a protected place. He further submits that the council is the body which may, in its discretion, allow the applicant to carry out its mining activities on the basis of s 52 permit. He further argues that the second respondent has already made a determination that the applicant is culpable for damaging and destroying the archaeological sites. The applicant submits that the report is reviewable because it makes a determination on culpability, that the prejudice is inevitable and insofar as an investigative process is concerned, there is no other avenue open to exonerating the applicant.

[61] Applicant raised the issue whether an investigation is subject to review. Citing the *Public Protector v Mail & Guardian Ltd and Others*¹⁰, *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*, the applicant submits that the investigation or study of the second respondent is subject to review.

Respondent's case

[62] The respondents submit that the Minerals (Prospecting and Mining) Act 33 of 1992 is relevant and referred this court to the sections 5, 10, 47, 48, 55, and 69 of the said act which deals with the powers and functions of the mining commissioner, the minerals board and the minister's power in respect of *inter alia* the granting, renewal and cancelation of mineral licenses. The respondents argue that it cannot be said that the respondents made a final decision which was detrimental to the applicant's right by

¹⁰ *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA); *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC).

embarking on a study. The respondents submit that the study merely formed part of a larger legislative framework and was a preliminary step before a final decision ultimately was to be made by the relevant minister in terms of the Minerals Act. After receipt of the study and the advice proffered by the respondents, the Minister may still act in accordance with any of the provisions contained in the Minerals Act.

[63] The respondents argue that the matter is not ready or ripe for adjudication since no administrative action had taken place. The study according to the respondents constitutes an intermediary step in the process and the ultimate and final decision lies with the decision of the Minister.

[64] The respondents further submits that the respondents performed a legislative function when it carried out the joint archaeological report and that action does not amount to a decision for the purpose of an administrative review, as it is not an administrative action. The study is therefore not final, nor is it determinative.

[65] The respondents denied that their conduct was furtive in any way as the applicant knew that it ought to contact the Ministry of Environment and the Ministry of Mines regarding its environment clearance certificate and its mining licences respectively. The respondent insists that these Ministries are the overseers of the applicant and they were tasked with contacting the applicant.

[66] The respondent herein challenges both prayers for the review and setting aside of the decision of the first and second respondents to conduct a joint study and the decisions made by the first and second respondents on 26 November 2020 on the ground that these are not administrative decisions which are subject to review. The grounds are simply that the decision to undertake a joint study forms part of the functions of the second respondent and is a preliminary step in the making of a final decision which is not reviewable. The grounds for opposing the decisions taken on 26 November 2020 is that the decision to withdraw or cancel the licence and the certificate is made by the respective Ministries and not the first and second respondent and it is in

any event premature as no such decision has been taken by the respective ministries; and the application for the review of the first and second respondents decisions to be taken in respect of the National Heritage Act does not constitute a reviewable decision as it is prematurely brought.

Discussion

The decisions

[67] The applicant approached the court to review and set aside two “decisions” namely the decision by the second respondent to undertake a joint study and the decision(s) by the respondents taken on 26 November 2020. The decisions taken on 26 November are numerous but for purposes hereof only those which are highlighted by the applicant are considered.

[68] The applicant relies on Article 18 of the Constitution which requires that administrative bodies and administrative officials must act fairly and reasonably and to comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation. It also provides that persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

[69] Rule 76 (1) of the Rules of the High Court envisaged that a litigant may bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official.

[70] In *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*¹¹, O'Reagan AJA stated in para 31:

¹¹ *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

'What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

The decision to undertake a joint Archaeological Assessment study and to obtain a provisional protection order from the Minister of Culture

[71] There is no dispute that the second respondent received complaints from the Otjohorong Community and the farm owner of Gross Okandjou that there was systematic disturbances and possible damages to archaeological heritage landscape as a result of dimension stone mining activities.

[72] It is further not in dispute that the respondents failed to inform the applicant of the various meetings, that they refused disclosure of the draft and final report, and that the applicant was afforded the opportunity to make representations or to be heard before they reach a conclusion adverse to the applicants. These rights are enshrined in the constitution and the common law. It can be said that there has been a denial of these rights by the second respondent. This however is not the end of the enquiry. The court must determine whether the act or conduct complained of is reviewable

[73] It cannot be disputed that the applicant is an administrative body as it performs public functions and utilise public funds¹². The relevant functions which the second respondent is required to perform provided for in s 5(1) are the following:

(a) to advise the Minister on the state of Namibia's heritage resources and on any steps necessary to protect and conserve them;

(b) to identify, conserve, protect and manage places and objects of heritage significance;

(c) ...;

(d) to initiate measures for or with respect to-

(i) the conservation of;

(ii) the provision of access to;

(iii) the presentation of;

(iv) the publication of information concerning,
places or objects of heritage significance;

(e) to introduce measures and exercise control aimed at preventing the destruction, removal or injudicious treatment of, or deterioration or damage occurring in, places that have or may have heritage significance or special interest;

(f) to advise government ministries, offices and agencies, local authorities and public authorities on matters relating to the conservation and protection of places and objects of heritage significance;

(g) ...;

(h) to advise the Minister or any other authority involved in administering any law relating to planning on proposed planning schemes or amendments to planning schemes which may affect the protection of places or objects of heritage significance.'

¹² See section 19 of the National Heritage Funds.

[74] The nature of the decision to undertake a joint archaeological study can thus be described as a decision to determine how best to manage, protect and to conserve the heritage resources. These functions were exercised in terms of s 5(1)(b) and (e) of the National Heritage Act. These steps are taken in accordance with the second respondent's mandate. The complaint is that the applicant was excluded from participating in the joint study, not invited as an interested party to make recommendations before arriving at certain conclusions and failure to disclose such findings to the applicant. In the same vain the second respondent must endeavour to protect and conserve hence the decision to obtain a provisional protections order.

[75] It appears that the applicant's complaint is not that the decision to embark on a joint study was an invalid decision but that such a decision set in motion a process which the applicant terms "an ongoing investigation" which culminated in the decisions made on 26 November 2022 and which the applicant aver the second respondent commenced to implement. The nature of the proceedings the applicant seeks to review is the investigation conducted by the second respondent. It is indeed so that the second respondent made a conclusion of the applicant's culpability and this conclusion was arrived at without giving it the opportunity to be heard and without disclosing its findings. The applicant gave undertakings to this effect but thereafter shifted responsibility to the Ministry of Mines and Ministry of Environment. It is further also clear that the second respondent have concluded that the mining operations of the respondent should stop.

[76] In *Chaune v Ditshabue*¹³, *supra* the following was stated:

[12] In the present matter the applicant alleges that the decision to remove him was taken at a meeting held on 02 October 2009. It is common cause that the meeting of 02 October 2009 was a meeting of the second respondent. The second respondent was established pursuant to the provisions of section 2 of the Traditional Authorities Act, 2000⁵. Since the second respondent is a creature of statute its acts or decisions would ordinarily qualify as administrative actions and thus reviewable, but the courts have cautioned that it is not so much

¹³ See footnote 9 above.

the functionary as the function that matters⁶. The question is whether the task itself is administrative or not. In the South African case of *President of the Republic of South Africa v South African Rugby Football Union*⁷ the Constitutional Court said the following:

“[141] In s 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*⁸, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’[my emphasis]

[77] In this matter the first task complained of was the decision to embark on a joint study to identify whether the sites are heritage sites and investigate the allegations of damage and destruction to the sites by mining companies. In the event that the second respondent ascertain the need for conservation and protection, its function is to introduce measures and exercise control aimed at preventing the destruction, removal or injudicious treatment of, or deterioration or damage occurring in, places that have or may have heritage significance or special interest. These functions falls squarely within the mandate of the second respondent and the decision to embark on a joint study has as its source the enabling act. The nature thereof is investigative. The question is whether the respondents under these circumstances were required to act fairly. In *Van der Merwe and Others v Slabbert NO and Others*¹⁴, Booyesen J, stated the principle that:

‘It is so that bodies required to investigate only need in general not observe the rules of natural justice and that bodies are required to investigate facts and make recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice, depending on the circumstances.’

¹⁴ *Van der Merwe and Others v Slabbert NO and Others* 1998 (3) SA 613 (N).

[78] *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others*¹⁵ the court stated the following:

'[14] There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts. As Sachs LJ pointed out in *Re Pergamon Press*:

'In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. . .

It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate . . . the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.'

[79] The applicant citing the following from *Namibian Marine Phosphate (Pty) Ltd v Minister of Environment and Tourism and Others*¹⁶:

'I have no qualms with the legal principles enunciated in the cases to which Mr Maleka referred me. I furthermore accept the statements that the requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. What procedural fairness requires depends on the circumstances of each particular case and that the *audi* is not a one size fits all but a flexible principle, are as a general rule accurate statements of our law. But it is so that there are certain requirements that a hearing must comply with for it to be considered a fair hearing. Those requirements were recognised more than a century ago in the English case of *Board of Education v Rice* where Lord Loreburn LC said:

¹⁵ *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA).

¹⁶ *Namibian Marine Phosphate (Pty) Ltd v Minister of Environment and Tourism and Others* 2019 (1) NR 90 HC para 50.

“In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind. . . . In such cases the Board . . . will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for doing that is duty lying upon everyone who decides anything. But I do not think they are bound to treat such question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.” [Emphasis added.]

[80] The aim is to protect and conserve the site but it invariably would have an impact on claim holders such as the applicant.

[81] The National Heritage Act provides for the declaration and registration of site/objects which in turn provides that these places and objects would be defined as protected sites or objects. Once so declared, registration thereof serves to protect and conserve. It has far reaching implications for owners and right holders. The second division, (ss 28-34), deals with the procedure for declaration and registration of a site or object as a national heritage site or object by the Minister of Culture whilst division 4 deals with the granting of a provisional protection order by the minister (ss 41-45).

[82] The role of the second respondent in the procedure for a permanent declaration and registration of a site or object is, to make a recommendation to the Minister of Culture to declare the site a national heritage site. The second respondent must give notice of its proposed recommendation to the owner in terms of s 30 (1)(a) of the place or object and advise the owner that he may make submissions or request a hearing. In terms of s 34 (2) the second respondent is compelled to conduct a hearing into a proposed declaration, if a person with a real and substantial interest in the place requests a hearing. The second respondent is then called upon to make a determination whether or not the place or part thereof is of heritage significance and should be included in the register. Section 34(7) provides that: ‘Upon making a determination under this section the Council must provide a report to the Minister on the proposed declaration,

including a report on any submissions considered or hearing conducted and the Council's determination concerning the declaration which the Council recommends should be made by the Minister in relation to the place or object.'

[83] Section 41(1) however does not prescribe any procedure to be followed by the second respondent when applying for a provisional protection order and simply provides that: 'The Minister, on recommendation of the Council, may make a provisional protection order in relation to a place or object if, in the opinion of the Minister, it is necessary or desirable to do so for the purposes of this Act.'

[84] *In South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another*¹⁷ the court when considering a similar provision for the giving of a provisional protection order held that, while the procedure prescribed in s 29 for the issuing of a provisional protection order did not require the owner of the property to be consulted prior to the issuing of the order, s 10 of the Act gave effect to the provisions of s 33(1) of the Constitution of the Republic of South Africa, 1996,¹⁸ which enshrined the right to administrative action which was lawful, reasonable and procedurally fair.

[85] The respondents indicated that the applicant has been provided with a notice of the respondent's intention to apply for a provisional protection order and invited the applicant to make submissions. This has not been disputed by the applicant. The nature of this procedure, which the respondents commenced, would call on the second respondent to make a determination and the Minister of Culture would make the final decision therein. The latter procedure is determinative and adjudicative.

[86] The respondents submit that the election by the respondents to conduct the report does not amount to an administrative action for purposes of article 18 of the Namibian Constitution, that there is no decision(s) taken which is final and

¹⁷ *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another* 2007 (2) SA 461 (C).

¹⁸ The corresponding provision is article 18 of the Namibian Constitution.

determinative. The onus is on the applicant to show that good ground exists to review the conduct complained of.¹⁹

[87] In *Hashagen v Public Accountants' and Auditors' Board* [2019] NAHCMD 336 (10 September 2019) the court dealt the same argument i.e that the matter was prematurely brought and as a result, the decision sought to be set aside is not, at that juncture reviewable.²⁰ Although the matter was reversed on appeal²¹, Damaseb DCJ (concurring) state the following in paragraph 3:

'The appeal is not about the correctness of the otherwise admirable exposition by the court a quo of the law on premature challenge to administrative action and the failure to exhaust internal remedies. It is about whether that court was correct to overlook the jurisdictional challenges to the respondent's administrative action, raised by the appellant.'

[88] In the *Hashagen*²² matter the applicant was asked to respond to charges of professional misconduct. The court stated the following in paragraph 27 – 28:

'In *PG Group Ltd and Others v National Energy Regulator of South Africa and Another* court, referring to the work of Professor Hoexter, adopted the reasoning that for an act to constitute administrative action, it must be a decision 'which adversely affects the rights of any person and which has a direct, external legal effect'. The court quoted what the learned Professor ascribes to the words 'direct external legal effect' as follows:

'In her discussion, of the meaning "direct, external legal effect", Professor Hoexter, in her seminal work *Administrative Law in South Africa* (ed) at 227-228, states that the phrase was a last-minute addition to the definition borrowed from the German Federal administrative law, and quotes the following comment from certain German writers regarding the position in that country:

"If for example, a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all the previous steps taken within the sphere of public

¹⁹ *Mbandero Traditional Authority and another* 2008 (1) NR 55 SC.

²⁰ *Hashagen v Public Accountants' and Auditors' Board* [2019] NAHCMD 336 (10 September 2019 Paragraph 17.

²¹ *Hashagen v Public Accountants' and Auditors' Board* 2021 (3) NR 711 (SC).

²² See footnote 20 above.

administration lack direct effect, and only the last decision may be taken to court for review. This applies for instance, to many planning or licence granting processes where a sequence of procedural decisions leads to a final decision against which a legal remedy is available. Therefore, all the preparatory decisions are in principle not reviewable by the administrative courts'

The question, applying the Professor Hoexter formula, which commends itself to me as insightful and sensible, is the following: can it be said that the decision by the respondent to charge the applicant constitutes a decision that is final in nature and effect and one that can be regarded to have direct external effect on the rights of the applicant?

[89] The court asking the same question herein comes to the same conclusion i.e that the decision taken by the second respondent to conduct a joint study was not final in its nature and effect and neither can it be said that it has a direct external effect on the rights of the applicant.

[90] I am therefore of the considered view that the decision to embark on a joint archaeological study, as well as its decision on 26 November 2020 to place both sites under a provisional protection order, were preliminary steps and not final in nature. To hold otherwise would hamstring the second respondent in performing its functions. The application for review is thus premature and cannot be entertained at this stage.

Other decisions made on 26 November 2020

[91] There are a number of decisions which were taken on 26 November 2020. The case made out in the founding papers of the applicant suggests that the decision to cancel or withdraw the mining licence and the withdrawal of the clearance certificate must be reviewed and set aside. The applicant motivates the losses which it would suffer if the mining licence and the clearance certificate would be cancelled or withdrawn and referred to an e-mail by the second respondent to the Ministry of Environment for the withdrawal of the applicant's clearance certificate. All of these facts point to the fact that the applicant's case is that a final decision has been taken and has been implemented without offering it the opportunity to make representations or to be heard.

[92] It is undisputed that the applicant is the holder of a mining licence and an Environmental Clearance Certificate. No averment is made by the applicant that the Ministry of Mines and Energy made a decision to cancel the applicant's mining licence or that the Environment Clearance Certificate has been withdrawn even though the Ministry of Environment was called upon by the second respondent to do so.

[93] The first and second respondents are not the repositories of this statutory power hence their request for the respective ministries to do so. Furthermore there is no evidence presented by the applicant that second respondent took a decision to cancel the mining licence or withdraw the environmental clearance certificate.

[94] For completeness sake it is expedient to mention that the procedure for cancelling or suspension of an environmental clearance certificate is prescribed in s 42(5) of the Environmental Management Act 7 of 2007 which requires that the Environmental Commissioner must follow the prescribed consultative process referred to in s 44 of the same act. The Minister of Mines and Energy similarly is bound by s 55(2) of the Minerals (Prospecting and Mining) Act 33 of 1992 to give notice in writing and call upon the holder to make representations.

[95] The applicant under these circumstances opted, correctly in my view, to amend its notice of motion by removing the two ministries as parties to the application for review. There is no evidence which support a conclusion that the concerned ministries had taken a final decision at the time of bringing the application.

[96] The second respondent thus cannot lawfully make the decision to cancel the mining licence and or to withdraw the clearance certificate. The respondents, although they have resolved that the respective ministries must do so, agreed that it does not have the power to give effect to such a decision. This concession is correctly made.

[97] There is no evidence that the Ministry of Energy and/or the Ministry of Environment has taken a determinative or final decision to cancel the mining licence or to withdraw the environmental clearance certificate and the application for the review and setting aside of this decision must consequently also fail as must the prayer for the declaratory order.

Costs

[98] The costs herein follow the result and the applicant must therefore pay the respondents costs herein.

[99] In the result, the following order is made:

1. The application is dismissed with costs.

M A TOMMASI
Judge

APPEARANCES:

APPLICANT: Advocate Chibwana
Instructed by Koep & Partners, Windhoek

FIRST RESPONDENT: Advocate Makando
Instructed by Conradie Incorporated, Windhoek

SECOND AND THIRD
RESPONDENT: Jabulani. Ncube
Office of the Government Attorney
Windhoek