



**REPORTABLE**

CASE NO: SA 19/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MINISTER OF FINANCE** **First Appellant**

**NAMIBIA NATIONAL REINSURANCE**

**CORPORATION LIMITED** **Second Appellant**

and

**HOLLARD INSURANCE COMPANY OF NAMIBIA**  
**LIMITED** **First Respondent**

**HOLLARD LIFE NAMIBIA LIMITED** **Second Respondent**

**SANLAM NAMIBIA LIMITED** **Third Respondent**

**SANTAM NAMIBIA LIMITED** **Fourth**

**Respondent**

**TRUSTCO INSURANCE LIMITED** **Fifth Respondent**

**TRUSTCO LIFE LIMITED** **Sixth Respondent**

**OUTSURANCE INSURANCE COMPANY**  
**OF NAMIBIA LIMITED** **Seventh Respondent**

**OLD MUTUAL LIFE ASSURANCE COMPANY**

<b>NAMIBIA LIMITED</b>	<b>Eighth Respondent</b>
<b>JACOBUS CELLIERS LAMPRECHT</b>	<b>Ninth Respondent</b>
<b>ANDRE VERMEULEN</b>	<b>Tenth Respondent</b>
<b>TERTIUS JOHN RICHARD STEARS</b>	<b>Eleventh Respondent</b>
<b>FRANCO GEOFFREY FERIS</b>	<b>Twelfth Respondent</b>
<b>QUINTON VAN ROOYEN</b>	<b>Thirteenth Respondent</b>
<b>ANNETTE BRANDT</b>	<b>Fourteenth Respondent</b>
<b>NANGULA KAULUMA</b>	<b>Fifteenth Respondent</b>
<b>KOSMAS HEINRICH EGUMBO</b>	<b>Sixteenth Respondent</b>

**Coram:** DAMASEB DCJ, HOFF JA and MOKGORO AJA

**Heard:** 11 October 2019

**Delivered:** 9 December 2019

**Summary:** Certain insurance companies elected to defy compliance with the compulsory cession of insurance business to NamibRe as required by regulations and notices published by the minister in terms of Part V of Act 22 of 1998 (the Act). The non-compliance followed in the wake of the respondent companies' constitutional challenge of the Act and review challenge of the regulations made under it.

The appellants approached the High Court on an urgent basis to obtain an 'interim' declarator, pending finalisation of the pending constitutional challenge and review, that the Act is of 'full force and effect' and to be allowed to approach the High Court on the same papers, duly amplified, for an order of committal of the respondent companies' chief executive officers, in the event of continued disobedience of the law.

The respondent companies invoked the court challenges as collateral challenge to the enforcement application.

The High Court chose not to determine the collateral challenge and instead ordered a stay of the operation of the Act and regulations, until finalisation of pending court proceedings.

On appeal, *held* that the High Court had no jurisdiction to stay implementation of an Act of parliament and that, in any event, such an order was not pleaded or asked for by parties;

*Held* further that remedy of declarator exists to clarify legal uncertainty and for the court to clarify parties' respective rights and duties and to state the correct legal position; that in the present case there is no uncertainty as the Act and the regulations made under are of full force and effect; that the real issue was to exact compliance with law but that same was provided for in written law and common law;

*Held* further that remedy of declarator also not appropriate in view of collateral challenge which was not yet ripe for determination;

*Held* that order of committal of employees in any event not competent in law as the defiance is conduct attributable to directors and not servants of company.

Accordingly, order of stay set aside but appeal dismissed, with costs.

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## APPEAL JUDGMENT

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DAMASEB DCJ (HOFF JA and MOKGORO AJA concurring):

### Introduction

[1] This is an appeal, with leave of this court, against a judgment and order of the High Court in which that court made an order in relation to an urgent application by the appellants, in the following terms:

- ‘1. The application and implementation of the impugned provisions of the Namibia National Reinsurance Act No. 22 of 1989 (the ‘Act’) and Government Notices 333,334,335,336,337 and 338, promulgated on 29 December 2017 in terms of the Act...published in Government Gazette No. 6496 be and are hereby stayed, pending the determination of the following cases presently pending before [the High Court], namely, HC-MD-ACT-CIV-OTH-2017/04493 and HC-MD-CIV-MOT-REV-2018/00127.
2. The Applicants are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel’.

[2] The case that served before the High Court and is now on appeal is concerned with the enforcement of Part V<sup>1</sup> of the Namibia National Reinsurance Corporation Act 22 of 1998 (NNRCA). An important purpose of the NNRCA as stated in its preamble, is ‘to provide for a legal cession of policies and reinsurance contracts issued by registered insurers and registered reinsurers’, to the second appellant (NamibRe<sup>2</sup>). That objective is achieved through Part V of the NNRCA.

[3] The heartbeat of Part V are the provisions contained in ss 39, 40, 41 and 43 of the NNRCA. Section 39 (1) empowers the first appellant (the Minister) to issue a notice requiring every registered insurer and reinsurer to cede ‘in reinsurance to [NamibRe] a percentage of the value of each policy issued or renewed in Namibia . . . ’ by such insurer or reinsurer. Subsec (2) thereof authorises the Minister to ‘specify the class or classes of insurance business and the percentage of the value of each policy in respect of each class of insurance business to be ceded. . . and shall specify the date on which the requirements of that notice shall take effect.’ Under subsec (3), ‘every registered

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<sup>1</sup> Titled ‘Provisions Governing Compulsory Reinsurance to Corporation’. The ‘corporation’ is the second appellant.

<sup>2</sup> Established by s 2 of the NNRCA.

insurer and registered reinsurer shall in prescribed manner pay to [NamibRe] an equal percentage of the premium due on each policy ceded. . . to NamibRe. . .’

[4] In terms of subsec (4), the Minister is empowered to issue a notice requiring every registered insurer and reinsurer to ‘cede in reinsurance to [NamibRe] a percentage of the value of each reinsurance contract placed by a registered insurer or registered reinsurer with any other insurer or reinsurer, whether within Namibia or outside Namibia...’; and subsecs (5) and (6) may be used by the Minister, respectively, to determine and specify the percentage value of each reinsurance contract to be ceded and the terms and conditions of payment to NamibRe.

[5] Section 40 grants to NamibRe a ‘pre-emptive right’ in respect of reinsurance business ‘remaining after a registered insurer or registered reinsurer has ceded a percentage of the value of a policy or reinsurance contract to NamibRe’.

[6] Section 41 empowers NamibRe to, ‘by written notice’ require a registered insurer or reinsurer ‘to furnish or submit in writing, within a period specified in that notice, such information or returns as [NamibRe] may specify in that notice relating to any insurance business ceded or offered to [NamibRe]. . .’

[7] Section 43 provides for ‘just compensation’ payable by NamibRe for insurance business ceded to it. It provides:

‘(1) [NamibRe] shall, in respect of each class of insurance ceded or offered to it by a ...insurer or ...reinsurer ...in the prescribed manner pay to ...the insurer or... reinsurer concerned just compensation in the form of a reinsurance commission

at such rate as may be determined and specified by the Minister in a notice issued in terms of subsection (2);

- (2) The Minister shall from time to time, on the recommendation of the Board and by notice in the Gazette, published at least 60 days before the requirements of that notice take effect, determine and specify the rate of the reinsurance commission payable to the registered insurers and registered reinsurers in terms of subsection (1), and shall also specify the date on which such rate shall become applicable for the purposes of that subsection.
- (3) No profit commission on profits, if any, accruing to [NamibRe] from any insurance business ceded to [it] in terms of the provisions of this part, shall be payable to registered insurers and registered reinsurers.'

[8] The Minister is authorised by s 47(1) of the NNRCA to, amongst others, make regulations on the following after consultation with the Board<sup>3</sup> of NamibRe:

- '(a) the payment by registered insurers and registered reinsurers to [NamibRe] of premiums in terms of sections 39(3) and (6) and 40(2), including offences in respect of any failure to pay such premiums;
- (b) the payment by [NamibRe] to ...insurers and reinsurers of reinsurance commission in respect of ...insurance business ceded or offered to [NamibRe]...
- (c) the regulation and control of methods of ceding and offering insurance business to [NamibRe]
- (d) the returns and information to be supplied by registered insurers and registered reinsurers to [NamibRe]...'

### Factual matrix

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<sup>3</sup> Created by s 4 of the NNRCA.

[9] The NNRCA was passed into law in 1998. The material provisions of Part V were then challenged in 1999 by some members of the insurance industry as being unconstitutional. That challenge failed when a full bench of the High Court held that the NNRCA passed constitutional muster.<sup>4</sup> That set the stage for the implementation of Part V of the NNRCA. In November and December 2016, the Minister gazetted Government Notices 266,267 and 291 (the 2016 notices) providing for a regime of compulsory cession to NamibRe of insurance contracts and insurance business by registered insurers and reinsurers in conformity with Part V of the NNRCA.

[10] The 2016 notices were challenged by the insurance industry, including the present corporate respondents, citing the Minister and the second appellant (NamibRe). The challenge alleged, in part, that the insurance industry was not afforded the opportunity to make representations before the 2016 notices were issued. In the face of the challenge, the Minister on 14 February 2017 withdrew the 2016 notices to allow for representations before he could issue a new set of notices.

[11] Considering the review application moot in the light of the Minister's withdrawal of the 2016 notices, the Minister and NamibRe tendered wasted costs to the respondents in connection with their then pending review application. There is some dispute on the papers whether or not the challenge to the 2016 notices is still pending, but nothing turns on it for purposes of the present appeal.

[12] Then followed a protracted series of correspondence between the appellants and the respondents, the latter accusing the former of not affording them sufficient

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<sup>4</sup> *Namibia Insurance Association v Government of Namibia and others* 2001 NR 1: Teek JP and Silungwe J.

opportunity and information to make meaningful representations; and the former accusing the latter of dither and obstructive behaviour aimed at frustrating the implementation of a law meant to achieve important national objectives. During the course of the correspondence, the respondents alleged that both the proposed notices and the NNRCA are unconstitutional and threatened to mount court challenges to them.

[13] In the event, in November 2017 several insurance companies, including the first to eighth respondents, challenged the constitutionality of the NNRCA on the grounds that the material provisions of Part V are: 'irrational; conduce to arbitrariness; violate the respondents' constitutional rights; foreign-investment unfriendly; authoritarian; oppressive; retrogressive, and prejudices Namibian insurance consumers and the Namibian economy.' It is said that the NNRCA 'coerces the respondents by way of compulsory cessions (sections 39 and 40) to associate, agree and do business with NamibRe against their will or choice.' The allegation further goes that the regulatory scheme enacted by the Minister 'constitutes a barrier to Article 21 rights, constitutes a limitation or restriction as envisaged in Article 21(2) and 22 of the Constitution'. That the impugned provisions breach the respondents' and the insured's Article 16 property rights and do not pass muster because they 'expropriate' property by 'means which surpasses permissible forms of regulation'.

[14] It is further alleged that the 'so-called just compensation' provided for under the NNRCA 'is determined in the unguided discretion of the Minister. That kind of discretion is not constitutionally permissible.' The challengers of the NNRCA further assert that the NNRCA 'sets out no principle or procedure in which an independent court or tribunal can determine what 'just compensation' means. Reliance is also placed on Article 10 of



the Constitution alleging that the NNRCA Chapter V regime is 'discriminatory'. It is then stated that the limitation of the respondents' Article 21(1) (j) right to trade is invalid because there is no 'ascertainable extent of the limitation' and that it 'negates the essential content of the right' of the respondents to trade as insurers.

[15] Even after the constitutional challenge, several insurance companies and other interested parties made representations to the Minister on the proposed notices; and ultimately, participated in a consultative meeting called by the Minister on 20 October 2017. The purpose of the consultative meeting was, according to the Minister, 'to afford those who had made representations on the proposed measures to make oral representations on any specific issues arising from the written representations received.' The respondents sent a representative to the consultative meeting but, as the Minister alleges, 'unfortunately... not to contribute to the process in a single respect... [but] for the singular purpose of recording their position that they would not make representations'.

[16] According to the Minister, the deliberations of 20 October 2017 had an 'important effect on his decision. In multiple respects, they informed it, and led to what might have been a decision in different terms had there not been an open, inclusive consultative process with vigorous participation'.

[17] Informed by the deliberations of the consultative meeting, the Minister alleges, he revised the 2016 notices and gazetted the new ones on 29 December 2017 under GN 332 (the December 2016 regulations and notices). These notices formally gave

effect to ss 39 and 40 and 43 of the NNRCA. The December 2017 regulations and notices also created offences as set out in para 66 below.

[18] On 24 April 2018, the respondents launched proceedings in the High Court to review and set aside the December 2017 regulations and notices. They were challenged on both procedural and 'substantive' review grounds. As to the former, the respondents maintain that prior to the enactment of the regulations and notices, they were not afforded an opportunity to 'participate meaningfully in a constitutionally compliant process prior to (or even after) the publication of the draft February 2017 notices'; the Minister failed to inform the respondents of any reservation he may have harboured against the 'detailed facts and submissions provided to him' (with the assistance of experts) as regards the notices and that they were not afforded the opportunity to be heard on any 'negative considerations' the Minister entertained on those submissions; the respondents were not provided by the Minister with 'copies of the documentary information' adverse to them and considered by the Minister in arriving at the regulations; the Minister was 'publicly hostile to the respondents for no valid reason'; the purported consultation process was a '*fait accompli*' intended to reprise and sanitise the defective November 2016 Notices'; that the Minister was acting under the dictates of Cabinet and that he was not exercising an independent judgment in issuing the notices.

[19] As regards the 'substantive review grounds' the respondents allege that the notices are irrational, unreasonable, unfair, vague and an infringement of the respondents' fundamental rights. The respondents set out very detailed reasons in support of each of the substantive review grounds which are not necessary for present

purposes to elaborate on. What is significant for the purposes of the present dispute is that it is alleged that, although aware of the grounds, the Minister did not engage with them.

[20] The Minister filed reasons for his decision in the wake of the review application, stating, *inter alia*, that the absence of the regulations ‘has limited NamibRe’s ability to grow its balance sheet and to grow its reinsurance capacity for the benefit of the entire industry, and the Namibian economy.’ That ‘similar measures have been implemented in various other African jurisdictions as a means to develop local reinsurance capacity for the benefit of the domestic insurance industry. That he is ‘enjoined under the [NNRCA] to implement measures that advance the interests of the entire industry and the Namibian people. The commercial interests of the private insurers must be weighed up against the imperative to achieve the objects of the [NNRCA] in the broader public interest.’

[21] The December 2017 regulations and notices took effect on 27 June 2018. On 28 June 2018, the date after the notices took effect, the respondents and other insurance companies, wrote a letter to the Government Attorney, acting for the Minister and NamibRe, recording that they had ‘no other option, but to, not comply with the impugned notices’.

[22] Four of the insurance companies (Momentum Short Term Insurance Limited, King Price Insurance Company Insurance Ltd, Bonben Assurance Namibia Ltd<sup>5</sup>, and Nedbank Life Assurance Ltd) that challenged the December 2017 regulations and notices, however elected to comply. They did so, ‘against their will, without prejudice to

<sup>5</sup> T/a Bonlife.

any of their rights, under protest and on condition that, if they are successful in impugning the notices, the regulations or the targeted provisions of the [NNRCA], they shall institute a claim for loss of profit against NamibRe and/ or the Government of Namibia’.

[23] The present corporate respondents that chose to not comply with the law however tendered ‘to file the unconstitutional, but compulsory bordereaux<sup>6</sup>. . .without prejudice to their rights. . .for record purposes, but no money will be paid over.’ These defiant respondents placed on record that NamibRe will not ‘take out any reinsurance’ in respect of them as ‘no money will be paid over’ by them to NamibRe.

[24] Since then, the respondents have resisted every effort by the Minister and NamibRe to make them comply with the December 2017 regulations and notices.

[25] Frustrated by the respondents’ defiance of the law, the Minister and NamibRe approached the High Court on urgent basis seeking, *inter alia*, the following relief (the enforcement application):

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

2.1. the Namibia National Insurance Corporation Act, 22 of 1998 (“the Act”);

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

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<sup>6</sup> Being a detailed statement accounting for compulsory cessations.

- 2.3. The regulations promulgated on 29 December 2017 in terms of the Act, and published in Government Notice No. 332 in Government Gazette No.6496 (“the Regulations”);
3. Ordering that pending the outcome of the pending proceedings, the respondents are obliged to comply with the provisions of the Act, the Notices and the regulations with immediate effect;
4. Authorising herewith the applicants, failing compliance with prayer 3 above by any respondent, to apply to this Court forthwith on the same papers, duly amplified if required, for an order of committal for contempt in respect of any such breach of this Court’s order, of such respondents or respondents’ chief executive officer, being the ninth to sixteenth respondents”.

The respondents opposed the enforcement application.

[26] It is the High Court’s order relative to the enforcement application that is the subject of the present appeal.

[27] In support of the relief sought in the enforcement application, the Minister avers in his founding affidavit that the December 2017 regulations and notices paved the way for NamibRe ‘to hire additional staff and engaged the services of technical experts at significant costs.’ In addition, the Minister adds, his ‘own Ministry... proceeded on the basis that the implementation would take place as from 27 June 2018. Its future planning, including important budgeting issues, and departmental forward-planning, has been done on that basis’.

[28] The Minister asserts further that the respondents’ defiance of the December 2017 regulations and notices has the effect that the ‘financial planning of both

Government and NamibRe is severely disrupted by this defiance'. He maintains that the relief sought is necessary to 'affirm the principle of the rule of law and to uphold Article 1(1) of the Namibian Constitution, and to ensure that the measures...are implemented by all those subject to them to achieve the objects of the [NNRCA]'.

[29] According to the Minister, the defiance also has deleterious macro-economic consequences in that 'capital flows from Namibia in respect of reinsurance is set to continue, irrecoverably, at some N\$ 1billion a year for an indefinite period.' The Minister also states that defiance of the notices will 'likely result in ratings agencies downgrading NamibRe credit rating' and result in it losing 'business and increasing [its] borrowing costs' to the detriment of the Namibian economy generally.

[30] Besides, the Minister says, if the defiance by the respondents is countenanced, there is 'every reason to apprehend that those who are currently complying will cease to do so' and that a precedent will be set for others who are subject to regulatory schemes and Government tax laws, to do likewise.

[31] As regards the anticipatory committal for contempt relief sought against the CEOs of the corporate respondents, the Minister states that since certain of the corporate respondents are foreign-controlled, in the absence of an order that the appellants can approach the court on an 'urgent' basis to commit the CEO's for contempt, there is a 'real risk' that the corporate respondents will continue to defy the law.

[32] The Chief Executive Officer of NamibRe makes common cause with the Minister on behalf of NamibRe and supports the relief sought in the enforcement application. Mrs Petronella Martin states that since the enactment of the December 2017 regulations and notices NamibRe has made significant investments in staff recruitment and training, restructuring of the organisation and sourcing consultancy expertise to carry out its mandate. She confirms that if the respondents are not ordered to comply with the law NamibRe will suffer 'financial harm' over the next five years averaging over a billion Namibia dollars and peaking at N\$1,157,114.997 in 2023. The result will be loss of revenue from compulsory cessions for NamibRe.

[33] NamibRe relies on this revenue to sustain its operations. The legal cessions achieve the following objectives: to increase the retention capacity of the country and to preserve scarce foreign exchange; to protect national insurance companies from external competition. The deponent asserts that NamibRe was created to reduce capital from the insurance industry leaving Namibia so that Government and other local companies can have access to funds to reinvest in the local economy and to develop public infrastructure. Retention of funds locally also ensures that the Government has access to affordable funds to borrow.

[34] Additionally, the defiance by the respondents has the result that Government loses funds in the form of taxes (PAYE and VAT) and dividend as a shareholder of NamibRe.

The opposition to the enforcement proceedings

[35] First to eighth respondent companies are in the insurance business. Ninth to sixteenth respondents are the respective chief executive officers of the corporate respondents. It is common cause that the CEOs are not applicants in the constitutional challenge and the review application. The latter are therefore cited as employees of the corporate respondents. As the Minister makes clear, they are cited so that in the event that the relief is granted and the defiance persists, they can be committed to prison for the conduct of their employers.

[36] The respondents have mounted a joint defence to the enforcement application and the ninth respondent deposed to the main opposing affidavit on behalf of all the respondents.

[37] The respondents maintain that the NNRCA forces the corporate respondents 'against their will and better business acumen, to do business with NamibRe.' They describe the Chapter V regime as 'oppression' which they have the 'constitutionally entrenched right to resist'. The respondents set out in great detail the effect the December 2017 regulations and notices have on their insurance business. I will highlight only some. For example, they say, the regulatory scheme forces them to insure their entire 'insurance book' when according to sound insurance practice the percentage of the insurance book 'which is reinsured will depend by and large on the financial resources and the risk appetite of the insurer'. It may well be that in some cases a registered insurer 'will be able to retain the risk on its own balance sheet through its reserves' without having to take out reinsurance. A registered insurer will only selectively reinsure against risk undertaken and place reinsurance with a 'reinsurer directly or do so through an insurance broker'.



[38] The respondents state that s 43(3) of the NNRCA prohibits any payment of profit commission to the insurer although they are 'compelled against their will, in respect of all classes of insurance, to reinsure with NamibRe. NamibRe is thereby geared to make huge profits at the expense of the insurers.' It is alleged that this 'constitutes clear expropriation or "taking" without compensation'. The respondents also allege that the 'compulsory requirement of individual cession of each and every policy would eat into the [insurer's] net profits. This would amount to ...expropriation without just compensation.'

[39] The respondents maintain that the effect of the NNRCA and the December 2017 regulations and notices is that 'NamibRe raises revenue for Government ... through the unbridled discretion provided by the Act to the Minister. This method of fundraising is not permitted by the Constitution and is in breach of Article 63(2)(b) of the Constitution. The [NNRCA] makes no provision for parliamentary oversight in the raising of revenue by the Minister.'

[40] According to the respondents, reinsurance 'is not obligatory in the free market'; yet the NNRCA makes it to be. If an insurer is 'able to absorb the risk and honour their respective commitments to their policy holders without (re-)insuring such risks, an insurer's proprietary interests are served by not reinsuring it'.

[41] According to the respondents, the Part V regulatory scheme also forces the insurer to have only one insurer in respect of 'treaty reinsurance' when the industry 'practice is rather to spread the risk amongst three or four reinsurers'. It is alleged that

'NamibRe has seldom acted as lead treaty insurer. Typically, lead reinsurers are large international reinsurance companies, with which even NamibRe reinsures, such as MunichRe and SwissRe.'

[42] The respondents maintain that the December 2017 regulations and notices were issued while there was a pending direct challenge to the NNRCA. That compelled them to bring a review challenge to those notices.

[43] The respondents' answer to the Minister's contention that their defiance is unjustified considering that four insurers have elected to comply with the law is that the complying companies are 'smaller insurance companies' which 'do not have the required balance sheet to absorb losses without taking out high percentages of reinsurance'. However, their compensation in the form of profit sharing commission, are much higher when received from other reinsurance companies.'

[44] The respondents state that it was inappropriate for the appellants to seek urgent relief in the circumstances and that constitutional issues should not be determined on an urgent basis. They assert further that the Minister wants the entire Act declared valid in the interim while they only impugn certain provisions of the Act. It is alleged that never before has the Government approached any court to declare an Act valid because it wants to uphold the rule of law. It is alleged in that respect:

'That is exactly why there are criminal sanction provisions in every Act which Parliament creates. If someone transgresses a provision of an Act which creates a criminal offence, and any person feels that he or she may lay criminal charges without facing a common law claim for malicious proceedings, he or she may exactly do so.

Such complainant does not approach the High court to declare the relevant Act valid, and then institute civil contempt proceedings. The constitutional principle of separation of powers prohibits such an approach.'

[45] The respondents state further that 'Namibian Law does not know the concept of an 'interim declaration' which is of 'full force and effect' and that under Namibian law 'not even a final declaration, let alone an interim declaration, can be used as a foundation for an order of 'committal for contempt'.

[46] Since a declaration is a discretionary remedy, the respondents urge the court not to come to the appellants' assistance because:

- (a) the appellants are seeking 'final relief under the guise of interim relief which may be so final that the CEOs will be incarcerated';
- (b) the appellants have alternative remedies under the criminal law;
- (c) the State will have to prove guilt beyond a reasonable doubt in such criminal proceedings after a fair trial as envisaged in art 12 of the Constitution;
- (d) in such criminal proceedings, the accused will be presumed innocent until proven guilty;
- (e) that coming to court in the way they have, the appellants are circumventing art 12 of the Constitution and avoiding to prove the respondents' guilt beyond reasonable doubt;
- (f) by relying, in these civil proceedings, on the presumption of constitutionality of the NNRCA, the appellants are casting the onus on the respondents to displace the presumption, and if they fail, to be incarcerated;

- (g) thus considered, the appellants would achieve the result of having the respondents imprisoned by proving their case on balance of probabilities whilst if they prosecute they would have to do so beyond a reasonable doubt;\_
- (h) in criminal proceedings, the respondents will have the constitutional right to mount a collateral attack against the relevant provisions of the NNRCA and to seek stay of the criminal proceedings pending the finalisation of the constitutional challenge to the NNRCA;
- (i) the respondents invoke their challenge to the NNRCA and the review relief against the December 2017 regulations notices in the pending High Court proceedings, as their collateral attack to the appellants' enforcement proceedings. Since a collateral attack is not competent against a court order, the court should exercise its discretion not to grant the declaration sought, together with the anticipatory relief for committal. More so because the respondents lodged the pending constitutional action before the Notices were published';
- (j) the appellants have failed to respond to the 'triable issues' that the respondents have raised in the pending constitutional challenge and the review and that the presumption of constitutionality relied on by the appellants does not avail the appellants. As they say: 'the applicants do not ... discuss or remotely seek to discredit the merits of the respondents' constitutional action, or the merits of the respondents' main review'.

[47] It is against the backdrop of (a) the pending constitutional challenge to the NNRCA, (b) the pending review challenge against the December 2017 regulations and notices, (c) the competing allegations made by the protagonists in the enforcement application, and (d) the collateral challenge invoked by the respondents relying on the pending challenges, that the High Court considered the urgent enforcement application.

#### The High Court's approach

[48] The High Court took the view that although the collateral challenge was properly raised, it was an inappropriate case to decide the collateral challenge because of the enormity and complexity of the issues raised in the pending constitutional challenge and the review. The learned judge considered that it would 'be fitting that all the important matters of law, and fact, where applicable, and which accordingly may require the adduction of oral evidence in the action proceedings, would be best dealt with in the pending proceedings'. The High Court considered that it would be unfair to the respondents if the collateral challenge were deferred to the pending proceedings when they had taken 'pre-emptive' measures through the pending proceedings.

[49] The judge *a quo* also resisted the invitation to determine the collateral challenge because a different result might well be reached by another judge when the pending proceedings are ultimately heard. The learned judge *a quo* reasoned:

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

[50] The court below was satisfied that the respondents to the enforcement application had made out a *prima facie* case in respect of the constitutional challenge and the review. The judge reasoned that the Minister and NamibRe had also not 'fully replied' to some of the contentions and allegations of the respondents having a bearing

on the constitutionality of the law. The court made special mention of the fact that, for example, the Trustco respondents were also affected by the regulations and the notices when they 'do not transmit any money outside the country at all'.

[51] It was for those reasons that the High Court made the order that it did, staying the operation of the NNRCA and the December 2017 regulations and notices.

#### The appeal

[52] Firstly, the appeal lies against the High Court's 'stay' of the NNRCA and the December 2017 regulations and notices. Secondly, the appellants submit that they had made out the case for the granting of the interim declaration and an order allowing them to approach the court to have the CEOs committed for contempt in the event that the defiance is persisted with. Since the High Court did not deal with that relief in view of its order of stay, the appellants urge this court to grant that relief.

#### The order of stay

[53] The present appeal is a sequel to the recusal application and an application for leave to appeal that served before this court earlier this year: *Minister of Finance and another v Hollard Insurance Co. and others*<sup>7</sup> (*Hollard1*). In *Hollard1*, we granted leave to appeal the High Court's order, having concluded that the appellants had a reasonable prospect of success on appeal. We set out at paras [109] - [118] the reasons for coming to that conclusion.

[54] We are satisfied that on appeal the respondents have not made any significant contribution to the debate to persuade us to come to a contrary result. Accordingly, we

<sup>7</sup> (P8/2018) [2019] NASC 13(28 May 2019): Damaseb DCJ, Hoff JA and Nkabinde AJA.

confirm the *prima facie* views on prospects we expressed in relation to the order of stay and will allow the appeal on that score. What remains to consider is whether the Minister and NamibRe made out the case for the interim declarator and the order for the anticipatory committal for contempt.

#### Summary of submissions on appeal

##### *The appellants*

[55] The appellants' departure premise is that the NNRCA is a duly enacted law which must be observed by all; more so because a challenge to it in 1999 had failed and the law was validated by a competent court. The December 2017 regulations and notices are the product of consultation and input from those who took up the Minister's offer to make representations. The Minister considered the inputs and in fact adjusted the original 2016 notices based on the suggestions received. The respondents chose not to participate in the consultative process initiated by the Minister and can now not claim that they were not afforded the opportunity to make representations.

[56] The appellants maintain that the respondents' allegations that the law is vague is countered by the fact that four companies have chosen to comply. If the respondents' defiance of the law is countenanced, it will set a constitutionally indefensible precedent as others may follow the same example and disobey the laws of the land relying on their belief that the law is unconstitutional. It was also argued that the relief sought is important to protect two very important national objectives of the NNRCA: to create a viable insurance industry for the benefit of all Namibians and the economy, and to stem capital flight from the country which amounts to over N\$1 billion every year for as long as the respondents' defiance continues.

*The respondents*

[57] The respondents maintain that the appellants failed to make out the case for the relief that they seek. It is argued that the relief sought is all the more misplaced because the respondents had made out a *prima facie* case of constitutional inconsistency of the impugned provisions. In that regard, they maintain that the appellants elected not to engage with the grounds advanced by the respondents in the pending constitutional challenge and the review.

[58] According to the respondents, at the time that the appellants approached the court on an urgent basis to enforce the December 2017 regulations and notices, the constitutional challenge and the review were already pending and that made the relief the appellants seek inappropriate. The respondents assert further that the reliance on the 1999 judgement of the High Court is not a good one because that court incorrectly applied the test for the constitutional invalidity of the NNRCA. The respondents argued that since they had invoked the constitutional challenge and the review as a collateral challenge to the enforcement application, the court must determine the merits of the challenge and find that the NNRCA and the December 2017 regulations and notices are bad in law and therefore unenforceable.

[59] The respondents also submitted that s 42 of the NNRCA affords the appellants an enforcement avenue and that the relief they seek is not appropriate in the circumstances. On behalf of the Trustco respondents it was argued that the mischief sought to be redressed through the December 2017 regulations and the notices does



not apply to those respondents because they do not place any insurance business outside Namibia.

### Discussion

[60] The first issue we have to resolve on this appeal is whether a declaration is an appropriate remedy on the facts before us. In that respect, we have to consider the respondents' claim that the facts they have presented make that remedy inappropriate. But it is necessary that I first discuss the nature of the remedy in our and South African law which is on all fours with the approach of the English courts. According to De Smith<sup>8</sup>:

'A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what are the rights of the parties. A declaration is to be contrasted with an executory... coercive judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example to pay damages or to refrain from interfering with the claimant's rights. If the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaration, on the other hand, pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant.' (Footnotes omitted).

[61] The remedy was also considered by the South African Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and others*.<sup>9</sup> The court in that case distinguished a declaratory order envisaged under the South African Constitution

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<sup>8</sup> Woolf, H, Jowell, J and Le Seur, A. 2007. *De Smiths Judicial Review*, 6<sup>th</sup> ed. London: Sweet and Maxwell, p 899, para 18-038. See also: Hoexter, C. 2007. *Administrative Law in South Africa*. Juta & Co. p. 394 where the author states: 'The declaration of rights is essentially a non-invasive and thus rather toothless remedy: it clarifies the legal position rather than requiring action to be taken.'

<sup>9</sup> 2005 (2) SA 359 (CC) para 108.

from one under the common law. A declarator under the Constitution can, because of its special nature aimed at declaration of constitutional inconsistency<sup>10</sup>, and the enforcement of constitutionally protected rights<sup>11</sup>, be accompanied by mandatory or prohibitory relief.<sup>12</sup> What is clear though is the ordinarily non-coercive nature of a declarator. As O'Regan J put it at para [108]:

'It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave it to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.' (Underlined for emphasis).'

[62] In other words, the default function of a declarator is for the court to state the law, to declare what constitutes the law so as to remove uncertainty, to tell the parties what their respective rights and obligations are.

[63] In the enforcement application, although couched as 'interim' pending the finalisation of the pending proceedings, the declarator sought by the Minister and NamibRe is, in reality, both final and coercive because it is a precursor to the inevitable incarceration of the chief executive officers cited. The threatened incarceration is not depended on the finalisation of the case although the declaration is. Such is the backdrop against which on this appeal we must consider the discretionary remedy of a declaration. In so doing, the question to be answered is this: In the case before us, what is the legal uncertainty to be resolved?

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<sup>10</sup> In terms of s 172(a) of the South African Constitution.

<sup>11</sup> In terms of s 38 of the South African Constitution.

<sup>12</sup> *Railway Commuters Action Group* (n 9) paras [106]- [107].

[64] I will demonstrate below that the NNRCA and the December 2017 regulations and notices are of full force and effect and the Minister must enforce it through the mechanisms available in the written law and common law. Where a statute provides for remedies for a breach, that should ordinarily be the first port of call. The remedy of a declarator that the Minister seeks is a discretionary one. It is important therefore that we be satisfied that the appellants have no alternative or adequate remedy which will serve the same purpose.

#### The NNRCA enforcement machinery

[65] Section 42 of the NNRCA contains a cocktail of remedies available to enforce the law and to exact compliance. It provides:

- '42 (1) A registered insurer or registered reinsurer which-
- (a) Contravenes or fails to comply with a provision of section 39(1) or (40) (b);  
or
  - (b) fails to furnish or submit to the Corporation any information or returns required in terms of section 41; or
  - (c) furnishes or submits information or returns required for the purposes of section 41, knowing such information or returns to be false in any material respect,

shall, notwithstanding the penalty contemplated in subsection (2), be guilty of an offence and on conviction be liable to a fine not exceeding N\$150 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

- (2) A registered insurer or registered reinsurer which fails to comply with a provision of section 39(1), (3), (4) or (6), 40(1)(b) or (2) or 41, as the case may be, shall be liable to a fine of N\$ 1000 for each day during which such failure continues.

- (3) Any amount of penalty payable in terms of subsection (2) shall constitute a debt due to the Corporation by the registered insurer or registered reinsurer concerned and may be recovered by the Corporation by means of proceedings instituted in any competent court.'

[66] The December 2017 regulations provide in part that:

'11. (1) A registered insurer or registered reinsurer commits an offence if [it]-

(a) fails to comply with the provisions of regulation 4, 5 or 6; or

(b) ...

- (2) A person convicted of an offence in terms of subregulation (1), is liable to a fine not exceeding N\$ 15000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.'

[67] Regulation 4 governs returns and information to be supplied by the registered insurer or reinsurer. Regulation 5 concerns notification by the registered insurer or reinsurer to NamibRe on Annexure 2 to the regulations of the risk accepted. Regulation 6 concerns notification by a registered insurer or reinsurer to NamibRe on Annexures 3 and 4 to the regulations of a claim or loss event.

[68] The combined effect of these provisions is that not only does NamibRe have a civil claim for moneys due and payable, but those who disobey the notices are criminally liable and subject to fines and or imprisonment.

[69] In terms of s 332(1) of the Criminal Procedure Act 51 of 1977 (CPA), a corporate body can be held criminally liable for the acts of its directors and servants. And in terms of s 332(5), in circumstances where a corporate body is criminally liable:

'When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.'

[70] In so far as that section also imposed criminal liability on a 'servant' of the corporate body, this court held in *Attorney-General of Namibia v Minister of Justice and others*<sup>13</sup> that such liability is unconstitutional. In other words, although directors may be charged for the criminal wrongdoing of a corporate body, employees (such as the CEO's of the corporate respondents *qua* 'servants') may not be.

[71] The offence can be either statutory or in terms of the common law and can comprise an omission or failure by a director or employee to do something which had to be done, as long as the unlawful conduct took place during the exercise of powers or execution of the duties of the director or employee or with the intention of advancing the interests of the corporate body.<sup>14</sup>

[72] Why no recourse was had by the Minister and NamibRe to s 42 and regulation 14 to exact compliance with the law remains unexplained. Therefore, what we are faced with is not a situation where the Minister and NamibRe are without an alternative remedy; rather that they prefer remedies other than those that the legislature has

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<sup>13</sup> 2013 (3) NR 806 (SC) at 849-850, paras 74-75.

<sup>14</sup> Kruger, A. 2013. *Hiemstra's Criminal Procedure*. LexisNexis. 33-7 [Issue 2].

provided them; and without placing on record why the statutory remedies are considered inappropriate.

*Private law claim for damages: breach of a duty imposed by law*

[73] It is not suggested that the penal regime under the NNRCA is in substitution for any civil claim that the Government (or indeed NamibRe) may institute against defaulting insurers and re-insurers for financial losses suffered. The causes of action the section gives to NamibRe would not have been possible without it being specifically recognised under statute. Those claims therefore are separate and distinct from those that the Government representing the State and the public has for losses suffered from no-compliance with the law.

[74] At common law, a person for whose benefit a statutory provision operates may have a claim for damages against one who breaches the statutory duty. The elements to be proved in such a case are:

- (a) that the relevant statutory measure provided the plaintiff with a private law remedy;
- (b) that the plaintiff is a person for whose benefit and protection the statutory duty was imposed;
- (c) that the nature of the harm and the manner in which it occurred are such as are contemplated by the enactment;  
that the defendant in fact transgressed the statutory provisions; and
- (d) that there was a causal nexus between the transgression of the statutory provision and the harm'.<sup>15</sup>

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<sup>15</sup> Neethling, J, Pottgieter JM, Visser, PJ, Knobel, JC. 2006. *Law of Delict* (5<sup>th</sup> ed) Durban: LexisNexis Butterworths, pp. 69-70.

[75] The evidence of both the Minister and NamibRe's chief executive officer demonstrates the potentially quantifiable loss occasioned by the respondents' defiance of the law. Proof of those losses will, no doubt, be facilitated by the bordeaux that the defiant respondents have committed themselves to file, albeit that the amounts due thereunder will not be paid over.

*The collateral challenge is alive*

[76] The Minister approached court on an urgent basis to seek the present relief, whilst there is pending before the High Court a fully-blown contest about the constitutionality of the legislative scheme. Apart from saying that the collateral challenge is a rehash of the unsuccessful 1999 challenge to the NNRCA, the Minister does not suggest in the present proceedings that since the first challenge failed, it is no longer open to the respondents to challenge the NNRCA. Had he done so, that issue would have been considered. On the contrary, during oral argument Mr Gauntlett SC QC for the appellants accepted that a collateral challenge to primary legislation was competent.

[77] Besides, since the Minister has not engaged with the grounds on which unconstitutionality is pegged by the respondents, we are unable to form a view that the collateral challenge is unmeritorious.

[78] The concept of a collateral challenge is best understood by first appreciating the common law's (both Roman-Dutch and English) approach to the consequences

produced by a completed administrative act. In a *dictum* approved by this court<sup>16</sup>, that approach was stated as follows by Howie JP and Nugent JA in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and others*<sup>17</sup>:

‘[I]t is clear ...that the Administrator’s permission was unlawful and invalid at the outset.

...

But the question that arises is what consequences follow from the conclusion that the administrator acted unlawfully. Is the permission that was granted simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all the consequences merely because it believed that they were invalid provided that its believe was correct? In our view, it was not. Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’

[79] This court recognised in *Rally for Democracy and Black Range Mining* that the rule of law will be undermined if that were not so. Yet, it offends the values that underpin our Constitution if the subject were to be made to suffer the consequences of unlawful administrative action without demur. The answer in our constitutional state is the collateral challenge. Thus, if officialdom, relying on an impugned administrative act, coerces the subject to comply therewith, it opens itself to being resisted with a collateral challenge. *Forsyth* explains it thus:

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<sup>16</sup> *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* 2010 (2) NR 487 (SC) at 528 at para [68]; *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and others* NNO 2014 (2) NR 320 (SC) at 329, para [18].

<sup>17</sup> 2004 (6) SA 222 at 24, para [26].



'Only where an individual is required by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence.<sup>18</sup>

[80] As already mentioned, counsel for the Minister accepted during oral argument that the shield of a collateral challenge is not confined to the realm of administrative decision-making and may, in an appropriate case, be invoked in defence against primary legislation.

#### Disposal

[81] The s 42 penal provisions and regulation 14 establish defined criminal sanctions resulting from a violation of the NNRCA. What is sought through the enforcement application is curious in a very important respect. The Minister and NamibRe seek to carve out an alternative criminal enforcement remedy which will expose the company executives to criminal liability which the legislature has chosen not to grant under s 42: imprisonment of servants of companies for contempt for an indefinite period of time.

[82] There is a persuasive line of authority from England representing both old<sup>19</sup> and new cases that where the legislature grants a right and remedy *uno fatu*, those remedies must take precedence.

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<sup>18</sup> Wade, W. and Forsyth, C. 2004. *Administrative Law* (7<sup>th</sup> ed). Oxford: Clarendon Press Oxford, p 109.

<sup>19</sup> *Cook v Ipswich Local Board of Health* (1871) L.R. 6 Q.B. 451; *Wake v The Mayor, Alderman, and burgesses of the borough of Sheffield* (1883) 12 Q.B.D. 142; *Vestry of St James and St John, Clerkenwell v Feary* (1890) 24 Q.B.D. 703.

[83] *Barraclough v Brown and others*<sup>20</sup> is authority for the proposition that where a statute gives a right and remedy to be pursued in a forum other than the High Court, that will exclude a declaration being sought. The question on appeal was whether the High Court had jurisdiction to entertain the claim except by way of an appeal from a court of summary jurisdiction. It was argued on behalf of the appellant that even if not entitled to recover the expenses by action in the High Court, he was at all events entitled to come to that court for a declaration that on the true interpretation of the statute he had the right to recover the debt. The High Court held that the appellants had no other remedy than that given to it by statute, i.e. to seek redress from a court of summary jurisdiction embedded in s 47 of the Act. That conclusion was confirmed on appeal. Lord Watson held (at 622) that the right and remedy conferred by s 47 could not be dissociated from one another and that the summary court had exclusive jurisdiction to determine both quantum and liability of the debt. The court added that the High Court had no power to make declarations of rights in the circumstances.

[84] Like with most legal rules, in an appropriate case the rule that statutory remedies must take precedence instead of seeking a declaration can be departed from<sup>21</sup> but the party seeking the declaration as opposed to the statutory remedy must show why the declaration should prevail. For example, if the statutory remedy is ineffective.

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<sup>20</sup> [1897] A.C. 615.

<sup>21</sup> As was the case in *Re Al-Fin Corporation's Patent* [1970] Ch.160. In this case, the court granted a declaration as opposed to the statutorily granted remedy as the issue involved a difficult question of law. In *Pyx Granite Co. Ltd v Ministry of Housing and Local Government* [1960] A.C 260 at 285 to 287, it was held that unless the statute makes clear that the statutory remedy is the only remedy given, a declaration will be competent.

[85] In my view, the true test is whether granting a declarator in the face of (a) readily available remedies, and (b) the collateral challenge, would constitute an injustice to the parties against whom it is sought, intertwined as it is with an anticipatory order of committal. More so when the Minister put up no contention on affidavit to enable the court to make an assessment whether the respondents' assertion of the unconstitutionality of the NNRCA and the regulations made under it is, on the face of it, meritless.

[86] The Minister and NamibRe ask of the court to declare that the NNRCA is of 'full force and effect'. But why should that be necessary? What is the legal uncertainty that the declaration is intended to cure? In the case before us, it seems there is no uncertainty because it is common cause that the NNRCA and the notices are binding on the respondents. The defiant respondents know and accept as much. In fact, they have opted to obey part of the law by undertaking to submit the bordeaux. Besides, four of the respondents' complying counterparts are in fact obeying the law, albeit in protest.

[87] I am fortified in that view by the appellants' correct foundational premise that a duly enacted law must be complied with, until it is set aside in terms of the Constitution. Once a law is enacted, has been assented to and comes into force, it unquestionably represents the law of the land on the subject it covers. I do not get the impression that the respondents suggest otherwise. In my view, the fact that the NNRCA is being challenged is, rather than casting doubt on its formal legal validity, proof of it having assumed the full force of law. An order seeking a declaration of unconstitutionality such as the respondents have done in the constitutional challenge of the NNRCA, relates only to legally valid laws, duly passed by the legislature and assented to by the

president. The declaratory order the minister seeks is therefore superfluous. There is no legal uncertainty to be resolved through a declaration. That makes the declaration sought an inappropriate remedy in the present case.

[88] But there are other considerations which make the granting of the relief sought inappropriate. I turn to those next.

*Collateral challenge is an obstacle*

[89] The collateral challenge was not decided by the High Court and remains pending; as are the constitutional challenge and the review. As a matter of principle, we cannot accede to respondents' counsel's plea that this court instantly decides the collateral challenge as that issue is not yet ripe for decision as recognised by the High Court. The fact that we cannot now determine the collateral challenge is all the more reason why the declarator is not an appropriate remedy because to grant it we have to be satisfied that the collateral challenge has no merit, in other words pre-judging an issue yet to be decided by the High Court.

[90] Since the High Court did not decide the collateral challenge, this court is bereft of the benefit of the views of the first instance court. The collateral challenge raises important constitutional issues which we are now called upon, effectively, to decide at first and final instance. It is a situation about which this court stated as follows in *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others*<sup>22</sup>:

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<sup>22</sup> 2010 (2) NR 487 (SC).

This court, constitutionally positioned at the apex of the judiciary, is primarily a court of appeal. Being a court of ultimate resort, it will be slow to entertain litigation as if a court of first instance. Constitutionally, the High Court is differently positioned. In all important matters, it is a court of first instance. Albeit in another context, some of the resulting differences have been highlighted in *Schroeder and another v Solomon and 48 others* (2009 (1) NR (SC) at 12F-13A:

“The Constitution conferred original jurisdiction on the High Court to hear and adjudicate upon all civil disputes and criminal proceedings; its rules and structures are designed to entertain such matters as a court of first instance; ...Moreover, proceedings in the High Court accord the parties ample opportunity to ventilate the disputes between them; allows for those disputes to be referred to oral evidence in appropriate cases and for the court to make credibility findings where necessary; serve to distil the most pertinent issues to be debated in legal argument and to be pronounced upon. The intellectual and judicial contribution of the judges of that court in the adjudication of ...matters have also been of great value to this court in the hearing of appeals following thereon.”(my underlining)

*Committing ‘servants’ of companies bad in law*

[91] The real concern of the appellants is the enforcement of the law in the face of defiance by persons who have taken the view that it is unconstitutional. The remedy sought of committing the chief executive officers to prison for contempt could just as well be achieved by holding the directors criminally liable in terms of s 332(5) of the CPA for the breach of the NNRCA. Although, surprisingly, the issue was not raised during oral argument on behalf of the CEOs, what concerns me, as a matter of law, is that servants of the defiant companies are, through the contempt citation, going to be held criminally liable for their employers’ alleged criminal conduct when that cannot be done by charging them in terms of s 332(5) of the CPA.

[92] The singling out of the CEOs for punitive action is also curious given that, as servants of the corporate respondents, they are answerable and accountable to the

directors, who it must be assumed, are the driving force behind the litigation and whether or not the law is to be obeyed.<sup>23</sup> The articles of association of a company ordinarily stipulate that the business of the company must be managed by the directors and empower the directors to exercise all the powers of the company other than those required by the Companies Act or the articles of association to be exercised by the company in general meeting. So, even if it were ordered that the CEOs be imprisoned if the corporate respondents do not comply, it could well be that it does not lie within their competence to comply with the court order, rendering the court's order impossible of execution.

[93] By suggesting that since the corporate respondents are foreign-controlled and that therefore the chief executives must bear the brunt, the appellants are imputing to the companies' servants, powers and responsibilities which not even an individual director enjoys. Unless a particular power is specifically delegated to an individual director, the powers of a company are exercised by the directors collectively.<sup>24</sup> The suggestion that an employee of the company has the responsibility to ensure that the employer complies with a court order which the directors are resisting, is not supported by legal principle. That directors are the ones in control of the business of the company is clear from the *ratio* of this court in *Attorney-General of Namibia v Minister of Justice*<sup>25</sup>; hence the imputation of a company's criminal liability on them.

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<sup>23</sup> See Schedule 1, Tables A (public companies) and B (private companies) for the powers ordinarily given to directors under articles of association.

<sup>24</sup> *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD at 168 at 217; *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 (2) SA 257 (W) at 267-8; *Rosebank Television and Appliance Co (Pty) Ltd v Orbit Sales Corp (Pty) Ltd* 1969 (1) SA 300 (T) at 303.

<sup>25</sup> 2013 (3) NR 806 at 846, paras [70] – [71].

[94] I am satisfied that the remedy of a declaration is not suited for the purpose the Minister and NamibRe approached court and that is the order the High court should have made had it proceeded to consider that relief. The committal order is dependent on the success of the declaration and since the latter fails, it too must fail.

#### Caution

[95] The opinion that the respondents have about the unconstitutionality of the NNRCA does not make them immune to the enforcement mechanisms it provides, unless a court makes such a finding through due process of law. The respondents labour under the belief that the view they take of the unconstitutionality of the NNRCA entitles them not to obey it. That issue is not properly before us and we need not express any view on it now. It is a proposition that must be tested before a court where the enforcement mechanisms are prayed in aid.

[96] Only a court properly seized with the matter will be able to consider whether such a defence should prevail, if regard is had to the fact that the law being disobeyed was previously challenged and validated by a competent court and has been the law of the land for over 20 years unless and until it is one day reversed by a competent court.

[97] That court will also consider the implications for the rule of law, as suggested by the Minister in these proceedings, for persons to ignore legally binding laws that have not been set aside by a competent court: In other words, can one choose which laws to comply with and which ones not to? Only a court properly seized with the enforcement of the law can decide whether the respondents' defiance is legitimate legal strategy, or brinkmanship. Also, whether the respondents can successfully resist those enforcement

mechanisms through a collateral challenge (or stay of proceedings) is a matter for the courts before which enforcement must be sought. In that regard, the court will consider the public interest to be served by a stay if asked for, considering that the sole source of revenue for NamibRe is the revenue from the ceded insurance business.

[98] The High Court had granted the appellants' application to strike certain allegations made by the respondents from the founding affidavit deposed to by the eighth respondent. The respondents lodged a cross-appeal against the High Court's striking order. The respondents did not file heads of argument in respect of the counter-appeal within the time period prescribed by the rules and did so on the eve of the hearing. The appellants urged the court to either strike or dismiss the cross-appeal on account of the respondents' non-compliance with the rules of court. That objection was properly taken and the cross-appeal stands to be struck off the roll, with costs.

#### Costs

[99] I can think of no good reason why costs should not follow the result, both a *quo* and on appeal. Costs should also follow the result in respect of the cross-appeal being struck off the roll.

#### Order

[100] I would accordingly make the following order:

1. The appeal succeeds in part only. The order of the High Court is hereby set aside and substituted for the following:

“1. The application is dismissed.



2. The first and second applicants shall bear the first to sixteenth respondents' costs, jointly and severally, the one paying the other to be absolved; such costs to include the costs of instructing counsel and such number of instructed counsel employed by each respondent."
2. The first and second appellants shall bear the first to sixteenth respondents' costs of the appeal, jointly and severally, the one paying the other to be absolved; such costs to include, in respect of each respondent, the costs of instructing counsel and the costs of such number of instructed counsel employed by each respondent.
3. The cross-appeal is struck from the roll with costs against the first to sixteenth respondents, jointly and severally the one paying the other to be absolved, consequent upon the employment of one instructing and as many instructed counsel engaged by the appellants.

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**DAMASEB DCJ**

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**HOFF JA**

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**MOKGORO AJA**

## APPEARANCES

- 1<sup>ST</sup> APPELLANT: J J Gauntlett, SC QC (with him U Hengari and L C Kelly)  
Instructed by Government Attorney
- 2<sup>ND</sup> APPELLANT: S Namandje (with him E Nekwaya)  
of Sisa Namandje & Co
- 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 4<sup>TH</sup>, 7<sup>TH</sup>,  
9<sup>TH</sup>, 10<sup>TH</sup> 11<sup>TH</sup>, 12<sup>TH</sup> &  
15<sup>TH</sup> RESPONDENTS: R Heathcote (with him F Pelsler)  
Instructed by Francois Erasmus & Partners  
Instructed by Van der Merwe-Greeff Andima Inc
- 5<sup>TH</sup>, 6<sup>TH</sup>, 13<sup>TH</sup>  
& 14<sup>TH</sup> RESPONDENTS: M Chaskalson, SC (with him R Maasdorp)  
Instructed by Van der Merwe-Greeff Andima Inc
- 8<sup>TH</sup> & 16<sup>TH</sup> RESPONDENTS: R Töttemeyer (with him D Obbes)  
Instructed by Engling Stritter and Partners