REPORTABLE

CASE NO.: SA 32/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF MINES AND ENERGY	**FIRST APPELLANT**
PERMANENT SECRETARY OF MINES AND ENERGY	**SECOND APPELLANT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**THIRD APPELLANT**

And

PETRONEFT INTERNATIONAL LTD	**FIRST RESPONDENT**
GLENCORE ENERGY UK LTD	**SECOND RESPONDENT**
NATIONAL PETROLEUM CORPORATION OF NAMIBIA (PTY) LTD	**THIRD RESPONDENT**
NAMCOR PETROLEUM TRADING & DISTRIBUTION CORPORATION OF NAMIBIA (PTY) LTD	**FOURTH RESPONDENT**
NAMCOR INTERNATIONAL TRADING LTD	**FIFTH RESPONDENT**
NAMCOR INTERNATIONAL LTD	**SIXTH RESPONDENT**

Coram: Shivute CJ, Maritz JA *et* O'Regan AJA

Heard on: 03/11/2011

Delivered on: 21/06/2012

APPEAL JUDGMENT

O'REGAN AJA:

[1] This appeal against a judgment of the High Court primarily concerns the question whether the Cabinet of the Government of the Republic of Namibia acted lawfully in October 2010 when it revoked the mandate of the National Petroleum Corporation of Namibia (Pty) Ltd ("Namcor") to import 50% of Namibia's annual requirement of petroleum products.

Factual background

[2] Namcor, the fourth respondent, is a para-statal organisation incorporated under Namibian law tasked amongst other things with advising the Minister of Mines and Energy ("the Minister), who is the first appellant, on matters relating to the importation and distribution of petroleum products in Namibia. During 2004, Namcor was granted a mandate, mentioned above, to procure 50% of Namibia's annual requirement of petroleum products ("the mandate" or "the Namcor mandate"). The fifth respondent, Namcor Petroleum and Trading Distribution (Pty) Ltd Corporation of Namibia (Pty) Ltd (NPTD), wholly owned by Namcor, carried out this mandate on Namcor's behalf. The mandate was given effect to by the Minister in two ways: First, by amending, in terms of regulation 30(10) of the Petroleum Products Regulations 2000,[1] all private oil companies' wholesale

[1] The Petroleum Products Regulations were issued under the Petroleum Products and Energy Act, 13 of 1990.

licences to import fuel so that they were required to purchase 50% of their petroleum requirements from Namcor; and secondly by the issue of a wholesale licence, in terms of regulation 12 of the Regulations, to NPTD, authorizing it to import 50% of Namibia's annual requirement of petroleum products.

[3] In November 2008, Namcor entered into a joint venture agreement with Petroneft International Limited (the first respondent), a company incorporated in the British Virgin Islands, to establish a joint venture company, Namcor International Trading Ltd, the sixth respondent in these proceedings. Namcor and Petroneft had equal shares in Namcor International Trading Ltd. One of the purposes of the joint venture was to source oil for Namibia on the international market.

[4] NPTD then entered into a supply agreement with the joint venture company, Namcor International Trading, whereby NPTD agreed that for a five-year period from April 2009 Namcor International Trading would be its sole supplier of petroleum products. The supply agreement provided that Namcor International Trading could terminate the agreement upon sixty days' notice and also that the agreement would "terminate 90 days after notification by the Government" to NPTD that the government had terminated the mandate.

[5] The second respondent, Glencore Energy UK Ltd ("Glencore Energy"), is a subsidiary of Glencore International AG (who is not a party to these proceedings). Glencore International AG holds a 50% shareholding in Petroneft, the first respondent. The relationship between the second respondent and the first

respondent is therefore indirect. The second respondent is not a party to any of the contracts in these proceedings, nor is it directly related to any of the entities that are parties to those contracts. It is doubtful whether it has *locus standi* in these proceedings at all, but this is not an issue that has to be determined.

[6] A third agreement (in addition to the joint venture agreement and supply agreement, described above) was entered into between Petroneft, Namcor and Namcor International Ltd, the seventh respondent, a private company incorporated in Mauritius and wholly owned by Namcor. This was an agreement of novation whereby Namcor's obligations towards Petroneft under the joint venture agreement were assigned to Namcor International Limited.

[7] It is common cause between the parties that the petroleum products supplied through this joint venture agreement were marketed in Namibia on the basis of the Basic Fuel Price formula. This formula is utilized within the Southern African Customs Union (SACU) as the basis for petroleum products' prices within SACU. It is also common cause that as a result of the differential between the Basic Fuel Price formula and the costs Namcor incurred acquiring petroleum products under the supply agreement, Namcor was suffering substantial losses. The respondents considered the best solution to this problem would be the abandonment of the Basic Fuel Price formula, which would, of course, almost inevitably have resulted in an increase in fuel costs to consumers in Namibia. The Namibian government was not persuaded that this was the correct resolution of the problem.

[8] The dispute in this case arises from a decision taken during October 2010 by the Namibian Cabinet to terminate the mandate. On 21 October 2010, Namcor was informed of the decision that the mandate would terminate with effect from 1 February 2011. In terms of the supply agreement, NPTD then gave notice to the joint venture company, Namcor International Trading, that the supply agreement would be terminated within 90 days as the supply agreement contemplated. Following on the Cabinet decision, the Minister amended the wholesale licences issued to Namcor and to the local oil companies to accord with the new position.

[9] Following the notification of 21 October, Glencore Energy's lawyers wrote to the Minister of Mines and Energy calling upon him to reinstate the supply agreement immediately. The Government Attorney replied to this letter on 13 December 2010 pointing out that the Government was not a party to the supply agreement and that it had no obligation to accede to the demand to reinstate the agreement. Petroneft and Glencore Energy then launched proceedings in the High Court on 23 February 2011.

Proceedings in the High Court

[10] The notice of motion had two parts. The first part sought urgent relief restraining the respondents from implementing both the Cabinet decision to revoke Namcor's mandate as well as the purported decision by the Minister of Mines and Energy, or the Permanent Secretary of the Ministry of Mines and Energy (the second appellant), requiring Namcor to terminate its contractual obligations to the joint venture company, Namcor International Trading Limited.

[11] The second part of the application sought an order from the Court reviewing and setting aside the decision revoking Namcor's mandate, as well as the decision to require Namcor to terminate its obligations to the joint venture company. It also sought orders declaring that Namcor remained authorized to import 50% of Namibia's annual petroleum product requirements and that the supply agreement remained valid and binding.

[12] The Minister of Mines and Energy, the Permanent Secretary of his Ministry and the Government of Namibia gave notice of their intention to oppose the application and lodged answering affidavits on 28 February 2011. They raised a series of preliminary points including the question of urgency, the issue whether there had been adequate service on the non-Namibian respondents, a challenge to the standing of both Petroneft and Glencore Energy, a challenge based on the non-joinder of local oil companies and a challenge to the "clean hands" of the applicants. Namcor and NPTD initially gave notice of their intention to oppose the application but then lodged an affidavit in which they stated that there were not aggrieved by the decision to revoke their mandate as sufficient and fair consultation had taken place before the decision was taken.

[13] The application was heard on 14 March 2011. At the hearing an issue arose as to whether the Court at that hearing was engaged only with the urgent interim relief sought in the first part of the notice of motion or also with the final relief sought in the second part. The High Court concluded that it could also deal with the final relief in the second part of the notice of motion. It explained that it reached this conclusion because the answering affidavit filed by the Minister

asserted that he was dealing with both aspects of the relief, as well as the fact that the government respondents could point to no further factual issues that needed to be traversed before considering the final relief and because all the legal issues had been fully traversed in argument.

[14] On 28 April 2011, the High Court handed down its judgment. It granted Petroneft and Glencore Energy condonation for bringing the application as a matter of urgency; dismissed the preliminary points raising the question of adequate service on the non-Namibian respondents, the non-joinder of local oil companies, the standing of Petroneft and Glencore Energy, the assertion that Petroneft and Glencore Energy were not entitled to approach the Court as they did not have clean hands, as well as the argument that the two companies had delayed too long in launching the review application.

[15] As to the lawfulness of the revocation of the mandate, the Court observed that it was common cause that neither the joint venture company, nor Petroneft or Glencore Energy had been given notice of the revocation of the mandate. The Court held that because the effect of the revocation of the mandate was determinative of contractual rights, the decision to revoke constituted administrative action within the meaning of Article 18 of the Namibian Constitution. The Court reasoned that as Petroneft and Glencore Energy would have been affected by the revocation of the mandate, they had a legitimate expectation that their interest would not be affected without their being notified of the intention to revoke the mandate and to be given an opportunity to make representations in

respect of the revocation. The Court also stated that Namcor International Trading Ltd, the joint venture company, would also have had such an expectation.

[16] The Court concluded therefore that the failure to give interested parties, such as Petroneft, Glencore Energy and Namcor International Trading an opportunity to make representations on the question of the revocation of the mandate render the decision to revoke the mandate invalid. The Court continued by saying that a fair and reasonable procedure, as contemplated by Article 18 of the Constitution, would require the government respondents to have given reasons for the revocation.

[17] The Court also held that the government respondents had not pointed to any statutory authority for the decisions to revoke the mandate and to instruct the termination of the supply agreement. The absence of a legal basis for these decisions, the Court held, also vitiated them. The Court did not decide the question whether the decision to revoke the mandate was unreasonable or arbitrary. In the light of its conclusions, the Court granted the relief sought in the second part of the application in the following terms:

> "2. Reviewing and setting aside the decision by the third respondent through the Cabinet of the Republic of Namibia on or about 21 October 2010 purporting to approve the revocation of the fourth respondent's mandate to import 50% of petroleum products into Namibia.
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> 3. Reviewing and setting aside the decision by the first respondent, alternatively second respondent, on or about 21 October 2010 requiring the fourth respondent to terminate its contractual obligations to the sixth respondents.

4. Declaring that:

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

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

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

[18] The Minister of Mines and Energy, as well as the Permanent Secretary of his Ministry and the Government of the Republic of Namibia are appealing against this order.

Parties' submissions on appeal

[19] In their written heads, the appellants raised seven preliminary arguments. First, they stated that the High Court should not have dealt with the relief sought in the second part of the notice of motion, as the matter had been enrolled for a decision on the interim relief sought in the first part of the notice of motion only. Secondly, they argued that the matter was never urgent, and that therefore the High Court should not have permitted Petroneft and Glencore Energy to proceed by way of urgency. Thirdly, they argued that Petroneft and Glencore Energy had not established that they had standing to seek the relief they sought. Fourthly,

they argued that the fifth and sixth respondents had not been properly served in accordance with Rule 5(1) of the Rules. Fifthly, that the time periods stipulated in section 24 of the High Court Act for service on non-Namibian respondents had not been observed. Sixthly, the appellants argued that the application before the High Court should have failed because the applicants had not joined the local oil companies who have a direct interest in the relief sought. Seventhly, the appellants argued that Petroneft and Glencore Energy did not come to court with clean hands and were therefore not entitled to relief.

[20] At the hearing, however, counsel for the appellants asserted that they were not pursuing those preliminary points that, if successful, would have the effect of remittal of the matter back to the High Court. In response to a question from the Court, counsel stated that they were not persisting with the argument that the High Court should not have dealt with the relief sought in the second part of the notice of motion.

[21] As to the merits of the application, the appellants argued that the revocation of the mandate was a policy choice by the Cabinet that did not constitute administrative action within the meaning of Article 18 of the Constitution; that the termination of the supply agreement followed as a matter of course given the provisions of clause 9.2 of the agreement which stated that the supply contract would terminate within 90 days of the termination of the mandate; that Cabinet had therefore not interfered with the contract, and that if it had, it had not acted unlawfully; and that Cabinet's decision to revoke the mandate was rational and not arbitrary.

[22] The respondents' resisted each of the preliminary points raised by the appellants. On urgency, they submitted that the decision on urgency is to be determined by the court of first instance on the evidence before it, and will only be interfered with on appeal in rare circumstances, not present in this case. On service on the non-Namibian parties and in relation to the relevant time limits applicable to them, the respondents noted that all the non-Namibian parties had, as a matter of fact, received service of process and that accordingly it would be inappropriate for an appellate court to uphold these arguments. They also argued that the question whether to condone non-compliance with the rules is a matter for the court of first instance to determine and not something with which an appellate court should interfere unless it is shown that the exercise of discretion was exercised on wrong facts or legal principles. The respondents asserted that the appellants had not established a basis for interference with the exercise of the discretion.

[23] In relation to the non-joinder point, the respondents argued that there was no disadvantage to the local oil companies and that therefore they need not have been joined.

[24] Counsel also sought to rebut the assertion that Petroneft and Glencore Energy had not come to court with clean hands. They argued that the appellants had not made any allegations of dishonesty, fraud or *mala fides* against the respondents. The only basis for the assertion of "unclean hands" was the fact that Petroneft and Glencore Energy had annexed a confidential Cabinet memo to their

founding papers. This fact, argued the respondents, was not a basis for denying them access to the courts. On standing, the respondents asserted that as the claim raised public law issues, the requirements of standing are more lenient and that their financial and commercial interest was sufficient to establish standing.

[25] On the merits of the application, the respondents argued that the decisions taken which revoked and terminated the mandate was unlawful because:

* there was no legal basis for the decisions;
* a fair procedure was not followed prior to the decisions' being taken;
* the decisions were unfair, unreasonable, arbitrary and irrational; and
* the decisions were taken for improper purposes, and were *mala fide* and biased.

Issues for decision

[26] As mentioned above, during oral argument, the appellants indicated that they did not wish to pursue any of their preliminary arguments, if the consequence would be to refer the matter back to the High Court. For reasons of convenience, therefore, this judgment shall commence by considering the merits of the case, without first considering the preliminary issues raised. On the merits, the following questions arise:

* was the decision by Cabinet to revoke the mandate of Namcor to import 50% of Namibia's annual petroleum product requirements taken unlawfully, either because there was no legal basis for the decision, or

because a fair process was not followed, or because it was unreasonable or arbitrary;

* did Cabinet, or the Minister, unlawfully interfere in the contractual relationship between Namcor and Namcor International Trading Ltd either by instructing Namcor to terminate its relationship with Namcor International Trading Ltd or in any other way; and
* was the decision taken by the Minister to alter the terms of the licences issued to Namcor and the local oil companies to give effect to this decision unlawful, unfair or unreasonable.

Each of these questions shall be considered in turn.

The Cabinet decision to revoke the mandate

(a) Legal basis for decision

[27] The respondents' first argument is that the Cabinet decision to revoke the mandate to Namcor to provide 50% of Namibia's annual petroleum product requirements was unlawful in that there was no legal authority for the decision. Cabinet revoked the mandate following upon its consideration of a confidential briefing memorandum dated 23 September 2010. It is clear from that memorandum that Namcor was in severe financial difficulties in that it could not recover, given the Basic Fuel Pricing formula, the cost of the petroleum products it was importing.

[28] The respondents do not dispute this, but assert that the resolution to Namcor's financial difficulties lay in the restrictions imposed by the Basic Fuel

Pricing formula. Their proposed solution, as mentioned above, was for government to alter or abandon the Basic Fuel Pricing formula, with the apparent consequence of an increase in fuel prices. Cabinet did not accept this solution. It decided to retain the Basic Fuel Pricing formula and to abolish Namcor's licence to import 50% of Namibia's petroleum product requirements and instead permit local oil companies to import 100% of their petroleum product requirements.

[29] The constitutional role of Cabinet is spelt out in the Constitution. Article 27(2) states that the "executive power of the Republic of Namibia shall vest in the President and the Cabinet. Article 40 sets out the duties and functions of Cabinet and, in relevant part, provides that:

> "The members of the Cabinet shall have the following functions:
>
> (a) to direct, co-ordinate and supervise the activities of Ministries and Government departments including para-statal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regard being had to the public interest; …"

[30] The Constitution thus establishes that the executive power vests in Cabinet and one aspect of this authority, as set out in Article 40(a), is the power to direct, co-ordinate and supervise the activities of para-statal enterprises. Namcor is a para-statal enterprise and, subject to the provisions of its constituting statute, thus falls within the mandate of Cabinet specified in Article 40(a). The words "direct, co-ordinate and supervise" are broad in scope and suggestive of a general executive power to issue policy directives pertaining to fiscal, economic, social and other

similar considerations; to co-ordinate the way in which government departments, Ministries and para-statals function and to ensure, by executive supervision, that they work effectively both collectively and individually. Understanding the words in this way is consistent with the overall principle that the executive power of Government resides in the Cabinet.

[31] It is clear from the record that Cabinet was concerned about the financial viability of Namcor. Faced with evidence that Namcor, which was involved with the importation of a significant portion of Namibia's strategically important petroleum products, was facing insolvency, Cabinet acted decisively to resolve the problem, which could otherwise have had serious fiscal, economic, strategic and security implications for the country. It did so by revoking Namcor's mandate to import petroleum products. This decision was consonant with Cabinet's general powers to direct policy on these matters and its responsibility to ensure that Namcor functions effectively. In so doing, Cabinet acted in accordance with its powers to "direct, co-ordinate and supervise" the affairs of Namcor as described in the previous paragraph. The respondents' argument that there was no legal basis for the decision cannot therefore succeed.

(b) Applicability of Article 18

[32] Respondent's counsel then argued that the decision was unlawful because a fair process was not followed and the decision was arbitrary or unreasonable. These arguments are based on the proposition that Cabinet's decision to revoke the mandate constituted a decision that fell within the scope of Article 18 of the Constitution. Article 18 provides:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

[33] The object of Article 18 is to ensure that acts and decisions of administrative bodies and officials are lawful, fair and reasonable. Article 18 seeks to regulate the acts and decisions of *administrative* bodies and officials. What is "administrative" is better defined by a focus on the relevant function rather than on the functionary.[2] For some acts or decisions of bodies or officials, ordinarily considered to be administrative bodies or officials, may not be administrative at all. While some acts or decisions of bodies not ordinarily considered to be administrative bodies may sometimes be administrative.

[34] "Administration", as the Constitutional Court of South Africa has observed, "is that part of government which is primarily concerned with the implementation of legislation".[3] Cabinet's primary constitutional tasks include the initiation of Bills for consideration by the National Assembly[4] and the direction, co-ordination and supervision of Ministries and para-statals.[5] Cabinet may thus not ordinarily be directly concerned with the implementation of legislation but when it is implementing legislation as contemplated in Article 18, its actions must comply with the requirements of that Article. It must be recognized as well that individual

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[2] See *President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) at para 141.
[3] Id. at para 138.
[4] Article 40(b) of the Constitution.
[5] Article 40(a) of the Constitution.

Cabinet Ministers performing their individual portfolios will often be involved with the implementation of legislation in relation to their specific portfolios and may therefore quite often perform tasks that will fall within the scope of Article 18.

[35] For the reasons that follow, it is not necessary to decide in this case if Cabinet's decision to revoke the mandate fell within the purview of Article 18. I shall proceed on the assumption that it did.

(c) Fair process

[36] Turning first to the question of fairness, the decision to revoke the mandate affected Namcor directly. If the decision to revoke the mandate did fall within the scope of Article 18, it is Namcor that was primarily affected by it, and Namcor who would, in the first place, have been entitled to assert the requirement of fair process. Yet, in an affidavit filed in the High Court, the Deputy Chairperson of Namcor stated that Namcor was not aggrieved by the fourth respondent's decision because "sufficient and fair consultation" had taken place before the decision was taken.

[37] The respondents assert that as Namcor International Trading Ltd had entered into a contract with NPTD to supply 50% of Namibia's fuel requirements, and as Petroneft was a joint owner of Namcor International Trading with Namcor, either Namcor International Trading Ltd and/or Petroneft were also entitled to be consulted by Cabinet before the decision to revoke was taken. The respondents also suggested that Glencore Energy was entitled to be consulted, but as it had no direct contractual relationship with NPTD, Namcor International Trading Ltd or

Petroneft, this argument cannot be accepted. I proceed on the basis that Petroneft, as a 50% shareholder in Namcor International Trading Ltd had standing to raise these issues. As will become clear from what follows, it is not necessary to decide whether this assumption is legally correct or not.

[38] The duty to act fairly is not a rigid principle imposing specific obligations upon administrative bodies and officials in an inflexible, invariable way. It is better understood, as it has been described by the South African Supreme Court of Appeal, as an "ever-flexible" concept.[6] As Lord Mustill's widely quoted dictum explains: "What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects."[7]

[39] The question of the requirements of fairness in the context of contractual relationships is particularly vexed.[8] At times in the past, courts have taken the view that the existence of a contract between a public authority and a third party results in the relationship between the public authority and third parties being regulated by the law of contract only.[9] This approach is no longer widely accepted. It is now generally recognized that the existence of a contract does not automatically release the public authority from its duty to act fairly. Nevertheless the circumstances in which the public authority will be released from the duty to

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[6] See *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para 8.
[7] *R v Secretary of State for the Home Department, ex parte Doody* [1993] 3 ALL ER 92 (HL) at 106 d – e.
[8] See, for example, the helpful discussions in Cora Hoexter *Administrative Law in South Africa* (Juta, 2007) at 397 – 404 and Daniel Malan Pretorius "The defence of the realm: contract and natural justice" (2002) 119 *SA Law Journal* 374 – 399.
[9] See the South African decision *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A) in which the majority decision was based on this principle. See, for a different approach, the dissent of Schreiner JA.

act fairly, and the content of the duty to act fairly in the field of contractual relations remain two difficult and contested areas of the law.

[40] For the purposes of argument in this case, let us assume that respondents' counsel is correct in asserting that Cabinet was under a duty to act fairly in relation to Namcor International Trading Ltd and/or Petroneft before revoking Namcor's mandate. It must be emphasized that this assumption may well not be correct. But if Cabinet was under such a duty, the question would be what fairness required of it in the circumstances. There are three main considerations that suggest that Cabinet would not have been required to afford a hearing to either Namcor International Trading Ltd or Petroneft.

[41] The first relates to the fact that the supply agreement itself regulated the consequences of the termination of the mandate. It is clear from the terms of the supply agreement that both parties to the agreement contemplated the possibility of the termination of Namcor's mandate at some future time, and that possibility was regulated in the contract, on the basis that the supply agreement would terminate 90 days after the mandate terminated.

[42] The second relates to the relative bargaining power of the parties. Namcor International Trading Ltd was jointly owned by Namcor and Petroneft. Petroneft is, in turn, half-owned by Glencore International AG, a very large multinational corporation. It cannot be said, in the circumstances, that the supply agreement was characterized by inequality of bargaining power between the parties. Petroneft

was, in effect, "a major commercial undertaking"[10] and not in a position of inferiority or vulnerability vis à vis Namcor when it entered into the supply agreement. There is no reason to conclude that the terms of the supply agreement represent anything other than the genuine consensus of the parties. If that is so, it must be assumed that the parties to the supply agreement will have arranged their affairs in the light of that consensus.

[43] The third and related consideration is the need to take care not unduly to restrict the ability of government to act efficiently and effectively in carrying out the task of government.[11] Were government to be required in all circumstances to give parties with whom it has contracted an opportunity to be heard before terminating a contract, regardless of the fact that the contract itself permitted termination in the applicable circumstances, and where there was no suggestion that the contract related to the provision of services to citizens, the work of government would become unduly burdened. These three inter-related considerations all indicate that in this case, even if Cabinet's decision to terminate the mandate was a decision within the purview of Article 18, government would not have been required to afford either Namcor International Trading Ltd or Petroneft an opportunity to be heard before terminating the contract.

[44] One last issue needs to be considered. Counsel for the respondents argued that Petroneft and Glencore Energy had a legitimate expectation that they

[10] See, the reasoning in *Logbro Properties CC v Bedderson NO and Others*, cited above n 6, at para 10 where the Court held that "a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power."
[11] *Premier, Mpumalanga v Association of State-Aided Schools* 1999 (2) SA 91 (CC) at para 41.

would be consulted prior to the revocation of the mandate and the High Court found that such a legitimate expectation existed. A legitimate expectation of consultation ordinarily only arises where there is an established practice of consultation, or where a promise or representation has been made that consultation will occur.[12] Yet, the respondents did not point to any existing practice of consultation nor any representation by Cabinet, the Minister or Namcor that either Namcor International Trading Ltd, or Petroneft or Glencore Energy, would be consulted prior to the termination of Namcor's mandate. Nor did the High Court point to any such practice or representation. The respondents have not provided any evidence of either an established practice of consultation or a clear representation that consultation would be provided. In the circumstances, the argument that a legitimate expectation of consultation existed must also fail.

[45] Accordingly, Cabinet, even if it was under an Article 18 duty to act fairly towards the first respondent, was not obliged to consult Namcor International Trading Ltd, or either Petroneft or Glencore Energy prior to terminating Namcor's mandate. Namcor International Trading Ltd, and, in turn, Petroneft always knew, as the terms of the supply agreement make plain, that the termination of the mandate was possible. The supply agreement makes provision for that possibility and there is no reason in fairness why that contractual provision should not operate. It is accordingly not unfair, in these circumstances, for Cabinet not to have consulted Namcor International Trading Ltd or either Petroneft or Glencore Energy before taking the decision to revoke the mandate.

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[12] See *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 761 D – G; *Premier, Mpumalanga v Association of State-Aided Schools*, cited above n 11, at paras 33 – 36*; National Director of Public Prosecutions v Phillips and Others* 2002(4) SA 60 (WLD) para 28, cited with approval in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) at para 19.

(d) Unreasonable or Arbitrary?

[46] The final argument made by respondents' counsel was that the termination of the mandate was unreasonable or arbitrary. As mentioned above, the basis upon which the decision to terminate was made was the acute financial difficulties faced by Namcor, arising from the fact that it was not able to recover the costs of importation that arose under the supply agreement. It may well be that there were other ways to resolve the financial difficulties of Namcor, but the fact that there were other ways to address the issue, is not the question this Court must consider.[13] The question this Court must answer is whether it was irrational or arbitrary for Cabinet to have sought to rectify the situation in the manner it did. It seems clear on the evidence before us that the termination of the mandate would ease Namcor's financial difficulties. In the circumstances, it cannot be said that the decision was either unreasonable or arbitrary.

Did Cabinet or the Minister unlawfully interfere with the contractual relationship between Namcor and Namcor Trading International Ltd?

[47] Counsel for the respondents argued that in deciding to revoke the mandate, Cabinet and/or the Minister required Namcor to terminate its contractual relationship with Namcor International Trading Ltd and in so doing interfered unlawfully with the contractual relationship between Namcor and Namcor International Trading Ltd. In substantiation of this argument, counsel pointed to

[13] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 48.

the letter sent to Namcor informing it of Cabinet's decision to revoke its mandate. The letter stated:

> "The Ministry of Mines and Energy would like to inform you about the Cabinet resolution … as follows:
> '1. That Cabinet approves the revocation of Namcor's current mandate of importation of 50% petroleum products. This revocation will take effect from 1 February 2011.
>
> 2. That Cabinet directs the Auditor General to conduct an audit in order to ascertain the extent of Namcor's debt amounting to approximately N$268 miliion, owed to Glencore and the Company's technical insolvency before the Government releases fund form the National Energy Fund (NEF) to bail out Namcor.'
>
> Therefore Namcor is required to clear all its current obligations and commitments with its supplier before the 1 February 2011. A levy of 7,6 cents per litre from NEF was also approved by Cabinet to cater for the company monthly expenditures."

[48] The appellants argued that neither Cabinet nor the Minister required the termination of the supply agreement, which terminated of its own accord, in accordance with a contractual term agreed to between the parties. Accordingly, they denied that Cabinet or the Minister had interfered with the contractual relationship between the parties.

[49] It is clear that one of the effects of the revocation of the mandate by Cabinet was the termination of the supply agreement. This effect, of course, followed from the agreed terms of the contract, which stipulated that the supply agreement would, in the event that Namcor's mandate was revoked, terminate 90 days later. As a matter of fact, neither Cabinet nor the Minister instructed Namcor to terminate

the agreement. The agreement terminated because the contracting parties had foreseen the possibility of Cabinet terminating Namcor's mandate, and had provided that such a termination would result in the termination of the supply agreement. Accordingly, it cannot be said that Cabinet unlawfully interfered with the contractual arrangements between the parties by revoking the mandate. The revocation did have an effect on the contract, but that effect was foreseen and provided for in the contract itself. In these circumstances, the argument that the decision constituted an unlawful interference with the contract cannot be sustained.

The amendment of the licences by the Minister

[50] Once Cabinet decided that the mandate should be revoked, the Minister amended both Namcor's wholesale licence to import fuel in terms of the Act, as well as the wholesale licences of the other local oil companies. The amendment of the licences may well have been action that falls within the scope of Article 18 with the consequence that the Minister would be required to act fairly and reasonably. Namcor, however, does not suggest that the Minister acted unlawfully or unreasonably towards Namcor in terminating the mandate. On the contrary, Namcor asserts that it consider that the decision had been lawfully taken.

[51] Petroneft and Glencore Energy, of course, assert that the Minister acted unlawfully and unreasonably in amending the licences. It is clear that the decision to amend the licences followed upon Cabinet's decision to revoke Namcor's mandate. Even assuming, that Petroneft and Glencore Energy have standing to challenge this decision, the decision was neither unfair nor unreasonable for the

reasons given in paras 34 - 46 above. As those paragraphs make plain, it was not unfair for Cabinet not to have consulted Petroneft and Glencore Energy before terminating the mandate, given the terms of the supply agreement, the relative bargaining strength of the parties to the supply agreement, and the fact that no representation had been made stating that Namcor Trading International Ltd, or Petroneft or Glencore Energy would be given a hearings before the mandate was revoked. For the same reasons it was not unfair for the Minister not to have consulted Namcor International Trading Ltd, Petroneft or Glencore Energy before amending the licences.

[52] Similarly, just as Cabinet's decision to terminate the mandate was neither arbitrary nor unreasonable, nor was it arbitrary or unreasonable for the Minister to have amended the licences. The argument that the Minister's action was therefore unlawful must also fail.

[53] All the arguments on the merits raised by counsel for the respondents must fail. Given this conclusion, it is not necessary to consider any of the preliminary arguments raised by the appellants. The appeal must therefore succeed and the order of the High Court must be set aside.

Costs

[54] Given that the appellants have succeeded on appeal, it is appropriate to order the first and second respondents to pay the costs of the appeal jointly and severally, on the basis of the one paying, the other to be absolved. Given the

nature of this matter, the costs shall include the costs of two instructed and one instructing counsel.

Order

[55] The following order is made:

1. The appeal succeeds.

2. The order of the High Court is set aside and replaced with an order stating:

> "The application is dismissed. The applicants are ordered to pay the costs of the first, second and third respondents, including the costs of one instructed and one instructing counsel, jointly and severally, the one paying the other to be absolved."

3. The first and second respondents shall pay the appellants' costs on appeal, including the costs of two instructed and one instructing counsel, jointly and severally, the one paying, the other to be absolved.

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O'REGAN AJA

I agree.

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SHIVUTE CJ

I agree.

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MARITZ JA

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Instructed by:	Government Attorney
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