REPORTABLE

CASE NO.: SA 09/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BLACK RANGE MINING (PTY) LTD **APPELLANT**

and

MINISTER OF MINES AND ENERGY N.O. **FIRST RESPONDENT**

MINING COMMISSIONER OF NAMIBIA N.O. **SECOND RESPONDENT**

JONAS NAKALE N.O. **THIRD RESPONDENT**

Coram: SHIVUTE CJ, STRYDOM AJA and O'REGAN AJA

Heard: **09 November 2012**

Delivered: **26 March 2014**

APPEAL JUDGMENT

SHIVUTE CJ (STRYDOM AJA and O'REGAN AJA concurring):

Background

[1] This appeal concerns a challenge to the decision of an official in the Ministry of Mines and Energy who refused to accept two applications for exclusive prospecting

licences made on behalf of the appellant. On 16 June 2009, a representative of the appellant presented two applications for exclusive prospecting licences (the EPL applications) in respect of the nuclear fuel minerals group for the areas informally known as ‘Sandamap’ and ‘Eureka’ in the Karibib district, Erongo Region at the offices of the Mining Commissioner (the second respondent). The EPL applications were submitted for consideration by the first respondent, the Minister of Mines and Energy (the Minister) who is responsible for the administration of the Minerals (Prospecting and Mining) Act 33 of 1992 (the Act). The third respondent, a former employee in the office of the second respondent to whom the appellant presented the EPL applications, advised the representative of the appellant that the Minister would not accept any application for mineral licences in respect of the nuclear fuel minerals group, because of the existence of 'a two-year moratorium' which prohibited new applications for prospecting or mining of any nuclear fuel group minerals. The third respondent accordingly declined to accept the EPL applications.

[2] Appellant's lawyers wrote to the second respondent on 3 July 2009, expressing their opinion that the ‘moratorium’ was *ultra vires* s 122 of the Act and in effect informing him that should he refuse to receive and consider the applications, the appellant would seek legal redress. No response to this letter was received by the appellant.

[3] The appellant subsequently made application in the High Court seeking an order declaring the decision made by the third respondent declining to accept the EPL

applications to be null and void, alternatively reviewing and setting aside the decision, and directing the respondents to receive the EPL applications. It also sought a costs order against any of the respondents opposing the application. It should be noted that despite the terms of the letter referred to in paragraph [2] above, no relief was sought in respect of the moratorium mentioned by the third respondent. The third respondent did not oppose the application and any reference to 'the respondents' hereafter is reference to the Minister and the Mining Commissioner.

[4] The respondents opposed the application and after hearing argument, the High Court dismissed the application with costs for the reasons stated later in this judgment. The appellant now appeals against the judgment and order of the High Court.

Application for condonation and reinstatement

[5] The appeal record was not lodged within the period prescribed by rule 5(5) of the Rules of the Supreme Court. Furthermore, the appellant neglected to inform the registrar timeously that it had entered security for costs of the appeal as required by rule 8(3) of the Rules. It is now trite that where a litigant has failed to comply with the Rules of Court governing appeals, such appeal will be deemed to have lapsed. It may only be reinstated after the litigant has sought, and the court has granted, condonation.[1]

[1] *Ondjava Construction CC v HAW Retailers t/a Ark Trading* 2000 (1) NR 286 (SC) para 2.

[6] The appellant accordingly made application for condonation and the reinstatement of the appeal. The application is unopposed. The lodging of the record and the notification of security for costs were late by 13 days. It appears from the founding affidavit that the legal practitioner responsible for the prosecution of the appeal neglected to properly consider rule 5(5) of the Rules of Court and relied on a South African text book which dealt with that jurisdiction's rules in terms of which the three-month period for the filing of the record and the giving of security for costs of the appeal is counted from the day the appeal is noted and not (as is the case with rule 5(5)) from the date of judgment. It was apparently for this reason that the appellant's legal practitioner miscalculated the days allowed for delivery of the record and security for costs. He says it was the first time that he had to deal with an appeal in the Supreme Court.

[7] The issue of legal practitioners miscalculating the periods set out in the rules governing appeals due to reliance on South African rules has regrettably occurred twice in the recent past.[2] It is also a matter of grave concern that of late nearly every appeal being heard in the Supreme Court is accompanied by an application for condonation for the failure to comply with one or other rule of the Supreme Court Rules. Legal practitioners intending to practise at the Supreme Court are advised to familiarise themselves with the rules of this Court to ensure that they do not mistakenly conflate them with court rules in other jurisdictions. Nevertheless having considered the reasons given for the delay, the relatively short period of the delay

[2] In *Strauss and Another v Labuschagne* 2012 (2) NR 460 (SC) at para 29 and *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) at para 41.

and the fact that the application for condonation is not opposed, we decided to grant condonation and reinstate the appeal. We then heard arguments on the merits and it is to this aspect that I propose to turn next.

Findings by the High Court

[8] It was common cause among the parties that the 'two-year moratorium' relied upon by the first respondent was contained in *Government Notice* No. 41 of 2007 published in the *Government Gazette* of 15 March 2007 and purportedly issued in terms of s 122(1) of the Act (which will be referred to in this judgment as 'the notice'). The notice was couched in the following terms:

'MINISTRY OF MINES AND ENERGY

No. 41 2007

RESERVATION OF AREA FROM PROSPECTING OPERATIONS AND MINING OPERATIONS IN RESPECT OF NUCLEAR FUEL MINERALS: MINERALS (PROSPECTING AND MINING) ACT, 1992

Under section 122(1) of the Minerals (Prospecting and Mining) Act, 1992 (Act No. 33 of 1992), I declare that no person other than the holder of a reconnaissance licence shall, despite anything to the contrary in that Act or any other law, but subject to any right conferred upon the holder of any mining claim, exclusive prospecting licence, mineral deposit retention licence or mining licence by that Act before the date of this notice, and which exist on the date immediately before the date of this notice, carry on any prospecting operations and mining operations in respect of nuclear fuel minerals in, on or under any area in Namibia until further notice.

E. NGHIMTINA
MINISTER OF MINES AND ENERGY Windhoek, 22 February 2007'

[9] It is to be noted that the notice does not provide for a two-year moratorium but for one of indefinite length, that is 'until further notice'. In dismissing the appeal, the High Court reasoned that the appellant was not entitled to challenge the validity of the notice without seeking express relief in that regard, in other words by means of a collateral attack. In reaching this conclusion, the court relied on South African case law which provides that a person seeking to challenge the validity of an administrative act collaterally may only do so if the relevant administrative act is coercive in its application to that person. The High Court found that the relevant administrative act in this case did not constitute coercive action that would support a collateral challenge. Accordingly, the court held that in the absence of a substantive application to set aside the notice, the court should proceed on the basis that the notice was valid. On the question whether or not the Minister should be directed to accept the EPL applications, the court held that no purpose would be served in directing him to receive the EPL applications in the light of the existence of the notice. It reasoned that to do so would amount to making decisions on academic issues.

Counsel's submissions on appeal

[10] Mr Tötemeyer who argued the appeal on behalf of the appellant, submits that the High Court erred in finding that the appellant could not collaterally challenge the validity of the notice on the basis that no coercive action was employed by the administrative authority to compel the appellant to do or to refrain from doing something. It was contended that the appellant did not wish to attack the validity of

the notice directly but that its validity was raised only because the respondents had relied thereon. Counsel submitted that although the factual matrix in the current matter is not a classic example of the cases in which a collateral challenge was allowed, the circumstances of this case 'are akin' to situations where a collateral challenge can be mounted against the decision of the public authority.

[11] Relying on the opinion of the learned English authors Wade and Forsyth in *Administrative Law*, 9 ed, at p 281, counsel argues that as a general rule a court will allow the issue of the validity of an administrative act to be raised in any proceedings where it is relevant. Counsel argues that the appellant has used the right remedy; is the right person in the right proceedings; no evidence was needed to substantiate the claim; the decision maker is a party to the proceedings, and the claimant suffered direct prejudice as a result of the alleged invalidity of the notice. Counsel argues furthermore that the scheme of s 47 (read with other relevant provisions of the Act, such as ss 67, 68 and 125) is such that once an EPL application has been submitted, it must be accepted (i.e. receipt thereof must be taken) by the Minister or by persons appointed by him or her to act on his or her behalf for that purpose.

[12] Counsel contends furthermore that the High Court agreed with the appellant that the Minister was not precluded by the notice from receiving and considering the EPL applications. Counsel argues that in terms of s 125 of the Act, the respondents were under an obligation to receive the applications and failure to do so would be *ultra vires* the Act. Key to argument on behalf of the appellant, was the contention

that s 125 provides for an order of priority in the consideration of the applications. The chronological sequence determined by the date of the submission of the applications must be followed even after the moratorium had been put in place. As such, the Minister was under an obligation to receive the EPL applications. In the light of this consideration, so counsel contends, the High Court erred in holding that no advantage would be obtained by the appellant if the respondents were to be ordered to receive the EPL applications. Instead, appellant would obtain the benefit of s 125 which accords chronological priority to applications. If the applications were refused, appellant's prior claim based on the date of the submission of the applications would be lost.

[13] It was counsel for the appellant's further submission that the respondents acted *ultra vires* the Act particularly because they could not justify the decision to refuse the EPL applications with reference to a statutory provision. The respondents could not rely on s 122 of the Act since the section only empowers the Minister to prohibit mining or prospecting operations in, on or under a particular land or area in Namibia, and not, as is the case with the notice, in respect of a particular minerals group in the whole country. It was counsel's further argument that it would offend the principle of separation of powers if the Minister were to be allowed to place a moratorium against exploration in respect of the entire country thereby undoing what Parliament had ordained in s 122. Accordingly, counsel urges for a 'constitutionally friendly' form of statutory interpretation that would respect the principle of separation of powers.

[14] In the alternative, counsel raises a constitutional argument that the appellant's constitutional right to do business as enshrined in Art 21(1)*(j)* of the Namibian Constitution would be infringed if a strict construction were to be placed on the relevant provisions of the Act. Counsel argues that the purpose of issuing the notice was not what was intended by the Legislature in terms of s 122 of the Act, as the motivation for the issuing of the notice is contained in the first respondent's reasoning in a letter addressed to the Minister of Justice and Attorney-General wherein considerations different from what is contemplated in the section were stated. The contents of this letter will be considered later on in this judgment when dealing with the pertinent provisions of the Act. For the moment let me summarise the submissions made by counsel for the respondents.

[15] Mr Narib who argued the appeal on behalf of the respondents, contends that the appellant was well aware that the respondents were invoking s 122 of the Act in support of the 'moratorium'. Counsel points out that the appellant was a party to litigation with the respondents in another matter[3] in which it was pertinently advised at the time the present proceedings were instituted in the High Court that the respondents were relying on a moratorium issued in terms of s 122. Reasons for the moratorium were also allegedly availed to the appellant. Notwithstanding being so informed, the appellant did not bring a direct challenge to the Minister's promulgation of the notice. Counsel contends that even though the proceedings in the High Court

[3] On appeal reported as *Minister of Mines and Energy v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC).

were in the nature of a collateral challenge, they were in substance a direct challenge to the validity or lawfulness of the notice. Relying on the *dictum* of the South African Supreme Court of Appeal in *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA) at para 12, counsel argues that there is a difference between a direct challenge and a collateral challenge. In respect of a collateral challenge, the court has no discretion but to allow the raising of that defence. The appellant chose this route to invite the respondents to invoke the notice so that it could then challenge it collaterally. This the appellant allegedly did, because in those circumstances, the court could not exercise its discretion against the appellant as it would in the case of a direct challenge.

[16] Counsel for the respondents continues to argue that in the case of a direct challenge, a court has discretion to refuse the remedy because the remedy asked for by the appellant is in the form of a mandamus coupled with a declaratory order which remains a discretionary remedy. Counsel contends that without the notice being set aside, the appellant cannot submit applications for the grant of licences in respect of any mineral or group of minerals specified in the notice. Counsel submits that the remedy sought by the appellant is not the right remedy as it would be meaningless for the court to exercise its discretion to grant the appellant the relief sought only for it to be faced with the notice. Counsel contends furthermore that the notice cannot be set aside without a substantive application directly challenging its validity. Therefore, it serves no purpose to grant the relief claimed while the notice remained in existence, so the argument goes.

Issues for consideration and decision

[17] Two primary issues arise for decision. These are firstly, whether the appellant should be allowed to mount a collateral challenge against the notice and secondly, in the event that the first issue is answered in the negative, whether the first respondent should nevertheless be ordered to accept the EPL applications. The issue of collateral challenge will be dealt with first.

Collateral challenge

[18] The learned judge in the court below summarised the principles applicable to collateral challenge to administrative decisions. He also correctly recognised that it is a fundamental principle of the *ultra vires* doctrine and of the rule of law that it is for the public administration to justify its acts with reference to a statutory power or authority wherever the existence of its powers or the validity of the exercise of such power is questioned. This is so because as this court observed in *Rally for Democracy and Progress v Electoral Commission of Namibia* 2010 (2) NR 487 (SC) at para 23, the rule of law is one of the principles upon which our State is founded. The principle of legality is one of the incidents that flow from the rule of law. It follows then that by virtue of the presumption of regularity, administrative acts - even those that may later be found to have been invalid - attract legal consequences until they are set aside or avoided.[4] The High Court then held that unless the notice was set aside by a competent court in proceedings for judicial review, it existed in fact and

[4] At para 68

had legal consequences that could not simply be ignored by the officials to whom the EPL applications were sought to be submitted.

[19] In the *Rally for Democracy and Progress* matter at paras 68-69, this Court distilled from case law and academic writing the principles relating to a collateral challenge to the validity of an administrative decision which may be summarised as follows:

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

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

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

the coercive action will most often depend upon the legal validity of the administrative act in question.

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

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

[20] As a general principle, a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. The general thread that runs through the case law is that a collateral challenge may be allowed where an element of coercion exists:[5] a typical example is where the subject is threatened with coercive action by a public authority into doing something or refraining from doing something and the subject challenges the administrative act in question 'precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question'.[6] It must be the right remedy sought by the right person in the right proceedings.[7]

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[5] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) paras 32 and 35; *Head of Department: Department of Education, Free State v Welkom High School* 2012 (6) SA 525 (SCA) at paras 12-14 and 16.
[6] *Oudekraal Estates* at para 35; *Rally for Democracy and Progress v Electoral Commission of Namibia* at para 68.
[7] *Oudekraal Estates* at para 35.

[21] Applying these principles to the facts of the appeal, it has become necessary to consider and decide whether the appellant was in fact coerced into doing or refraining from doing something by the decision of the respondents declining to accept the EPL applications. The term 'coercion' includes both direct and indirect coercion. A form of compulsion must exist to prevent a person from exercising their free will to do or to refrain from doing something. This Court in *Namibian Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) at para 25 accepted the definition in *The Collins English Dictionary Complete and Unabridged* 8 ed where the word 'coercion' was used along with terms such as ‘compulsion by use of force or threat' and 'constraint’.[8] *The Concise Oxford English Dictionary* 10 ed defines ‘coerce’ as: to ‘persuade (an unwilling person) to do something by using force or threats’. This can be distinguished from persuasion or consideration, in the sense that a person is no longer persuaded when he is influenced by another by threat of taking away something he or she possesses or preventing him or her from obtaining an advantage he or she would otherwise have obtained.[9] This distinction between coercion and persuasion was recognised in *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) at 386.

[22] Mr Tötemeyer contends that the appellant was in effect coerced by the notice into not applying for the mineral licences. I am unable to agree that in the circumstances of this case the appellant was in the event coerced by the notice into

[8] Also see *K Golin t/a Golin Engineering v Cloete* 1995 NR 254 (LC) at page 256.
[9] *Ellis v Barker* (1871) 40 LJ Ch 603 at 607.

not submitting the application. I respectfully agree with the learned judge in the court below that the notice was not sought in the proceedings before that court to be applied coercively by the public authority or to provide the foundation for coercive action against the appellant. I respectfully also agree with him that this case is an instance where collateral challenge to an administrative act is not available to the appellant since it is not the right remedy in the right proceedings. In the absence of a direct challenge to have the notice set aside and my finding that this is not an instance where a coercive element was present, it has become unnecessary to decide the argument that s 122(1) does not permit the Minister to reserve land from prospecting or mining operations in respect of the whole country.

[23] From what has been stated herein before, I must not be understood to say that the validity of an administrative act can only be directly challenged in proceedings for judicial review and may not be challenged collaterally in proceedings other than those in which resistance is raised to coercive administrative conduct based on an invalid administrative act. This possible broader scope of raising a collateral challenge was not an issue before us and was neither advanced in the affidavits nor argued by counsel. It will have to stand over for adjudication at an appropriate time where the challenge is made by 'the right person in the right proceedings'. It remains then to consider and decide the question whether the Minister should be directed to receive the EPL applications notwithstanding the existence of the notice.

Should the respondents be compelled to receive the EPL applications?

[24] This issue requires a consideration of certain key sections of the Act. These include ss 47; 69(2)(*f)*; 122; and 125. It is necessary to set out these provisions in full to have a better appreciation of the conclusions that follow.

[25] Section 47 deals with, amongst others, applications for mineral licences or renewal or transfer thereof and provides as follows:

> '(1) Subject to the provisions of this Act, an application for -
>
> (a) a mineral licence or the renewal thereof;
>
> (b) the amendment of a mineral licence; or
>
> (c) the approval of the Minister for the transfer of a mineral licence, or the grant, cession or assignment of any interest in any mineral licence, or to be joined as a joint holder of a mineral licence or such interest,
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> shall be made to the Minister in such form as may be determined in writing by the Commissioner and shall be accompanied by such application fee and such licence fee as may be payable in respect of the licence period or first licence period, as the case may be, of such licence as may be determined under section 123.
>
> (2) Subject to the provisions of this Act, the Minister -
>
> (a) may grant on such terms and conditions as may be determined in writing by him or her, or refuse to grant, an application referred to in subsection (1); or

(b) shall grant an application for the transfer of a mineral licence referred to in paragraph (c) of subsection (1) where such mineral licence is to be transferred from a company which is the holder of such mineral licence to a company which is controlling, controlled by or under common control with such holder, if the Minister is on reasonable grounds satisfied that such holder is not contravening or failing to comply with the terms and conditions of such licence or any other mineral licence held by it or any provision of this Act.

(3) The provisions of section 39(6), (7) and (8) shall apply *mutatis mutandis* in relation to the transfer of a mineral licence or the granting, cession or assignment of any interest in a mineral licence or the joinder of a person as a joint holder of such mineral licence or interest.'

It is not in dispute that an exclusive prospecting licence is a mineral licence as that term is defined in s 1 of the Act.

[26] Section 69(2) states:

'(1) …

(2) Notwithstanding the provisions of subsection (1), the Minister shall not grant an application by any person for an exclusive prospecting licence –

(a) . . .
(b) . . .
(c) . . .
(d) . . .
(e) . . .

(f) in respect of any area of land to which an exclusive prospecting licence or a mineral deposit retention licence relates in relation to a mineral or group of minerals to which such exclusive prospecting licence or such mineral deposit retention licence relates;'

[27] Section 122 is pivotal to this appeal and it provides in full as follows:

> (1) *Subject to the provisions of this section*, the Minister may at any time by notice in the Gazette, if he or she deems it necessary or expedient in the national interest, declare that no person other than the holder of a reconnaissance licence shall, *notwithstanding anything to the contrary contained in this Act or any other law*, but subject to any right conferred upon the holder of any mining claim, exclusive prospecting licence, mineral deposit retention licence or mining licence by this Act before the date of such notice and which exists on the date immediately before the date of such notice, carry on any prospecting operations or mining operations in, on or under any land or area described by the Minister in such notice.
>
> (2) The Minister may in any notice referred to in subsection (1) or by like notice –
>
> (a) if he or she deems it necessary or expedient in the interests of the development of the mineral resources of Namibia or for the better exercise of control over minerals in Namibia*, invite applications* in respect of the whole or any part of the land or area referred to in subsection (1) for any licence in respect of any mineral or group of minerals specified in such notice *for consideration on or after a date so specified*;
>
> (c) if he or she deems it necessary or expedient for the protection of the environment or the natural resources of Namibia or the prevention of the pollution of such environment or damage to the natural resources, declare that any prospecting operations or mining operations may be carried on in, on or under any such land or area by any holder of a non-exclusive prospecting licence, mining claim, exclusive prospecting licence, mineral deposit retention licence or mining licence only with

> the special permission of the Minister and subject to such terms and conditions as may be determined by the Minister.
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> (3) An application for the special permission referred to in subsection (2)(*b*) shall be made to the Minister in such form as may be determined by the Minister and shall be accompanied by such application fee, if any, as may be determined under section 123, together with such documents and information as may be required by the Minister.
>
> (4) Any person who contravenes or fails to comply with a notice issued under subsection (1) shall be guilty of an offence and on conviction liable to a fine not exceeding R50 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment. (Emphasis supplied.)

[28] Section 125 makes provision for the order in which applications, made in terms of the Act, are to be considered and states as follows:

> '*All* applications *made in terms of any provision of this Act and received in the office of the Commissioner, shall be considered by the Minister or the Commissioner,* as the case may be, *in the same order as such applications have been so made and received*: Provided that all applications so received on the same date shall be deemed to have been received simultaneously.' (Emphasis added.)

[29] It is common cause that the appellant had lodged its EPL applications in accordance with the provisions of the Act and complied with all specifications determined by the Mining Commissioner in terms of s 47. The real question is whether the Mining Commissioner or the Minister was authorised to receive EPL applications while the notice remained in existence. As already noted, s 122(2)(*a*) provides that when the Minister issues a notice reserving land from exploration

operations or mining operations, he or she may invite applications for licences in any mineral group or group of minerals specified in such notice. Does this then mean that s 122 overrides s 47 to the extent that the Minister is not authorised to accept applications once a notice issued in terms of s 122(1) is in place, unless the Minister has invited applications in the notice or 'like notice' as contemplated in s 122(2)(*a*).

[30] This point was not initially fully argued by counsel. After the court reserved judgment, it issued a directive calling on the parties to file supplementary heads of argument on two questions firstly, whether s 122(2) overrides s 47 to the extent that the Minister is precluded from accepting applications once a notice issued pursuant to s 122(1) is in place, unless the Minister invites applications as contemplated in s 122(2)(*a*). Secondly, the court invited counsel to present argument as to the interpretation to be given to s 125 in the event that the answer to the first question above is in the affirmative. The court is indebted to counsel on both sides for providing it with useful arguments, which I will endeavour to summarise starting with submissions made on behalf of the appellant.

[31] Counsel for the appellant's principal argument in this regard is that the text of s 122 does not empower the Minister to issue a notice that would curtail the rights of parties to submit applications under s 47. Moreover, so counsel contends, s 122 read together with other provisions of the Act should be interpreted in a manner that does not interfere with the constitutional rights of the appellant or other prospective applicants to apply for mineral licences under the Act. Given this consideration,

counsel argues that there can be no scope for introducing an implied power to refuse to accept 'or consider' applications lodged under s 47. It is furthermore contended that s 122 should be interpreted restrictively and 'contextually' to avoid interference with existing rights. Even if s 122 impliedly authorises the Minister, in addition to prohibiting prospecting or mining operations in an area withdrawn, to refuse to accept or consider applications, the notice does not contain a notification or even an intimation that the Minister intended excising such power. Thus, even if such power had existed, it has not been exercised at all.

[32] Relying on a decision of the South African Constitutional Court in *Pharmaceutical Manufacturers of SA: In re Ex parte President of RSA* 2000 (2) SA 674 (CC) at para 39, counsel submits that administrative action such as the notice should be clear, ascertainable in advance and predictable and not retrospective in operation. Counsel argues that in interpreting the provisions of the Act, due regard should be had to the purpose and scheme of the Act.

[33] Counsel contends that an appropriately restrictive statutory interpretation should not restrict the right of the appellant to submit an application under s 47. Should the notice not be held to be invalid, then the Minister should nevertheless be obliged to consider the appellant's application that has been received by the Mining Commissioner once the notice is no longer in force.

[34] Mr Narib on the other hand urges for a completely different approach. He argues that the power of the Minister to impose restrictions on prospecting operations or mining operations on any land or area is limited only by the terms of s 122 of the Act. This interpretation of s 122(1), according to counsel, is correct because the section starts with the words 'subject to the provisions of this section' which should be read with the phrase 'notwithstanding anything to the contrary contained in the Act or any other law' that appears later in the section. Counsel submits that the words 'subject to' are used in a statutory context to establish which provision is dominant and which subservient. These two phrases, according to counsel, signify that no other provision in the Act may be read to curtail the power conferred on the Minister to reserve land from prospecting operations or mining operations by s 122 of the Act.

[35] Moreover, so counsel contends, s 47 is 'subject to the provisions of this Act', which makes it subservient to any provision in the Act that is in conflict with it. The 'notwithstanding anything to the contrary contained in this Act or any other law' clause in s 122(1) makes that section dominant over s 47 to the extent that there is a conflict between the two provisions. Once the Minister has made a declaration under s 122(1), he may receive applications for mineral licences only if he has invited applications in terms of s 122(2)(*a*). Unless the Minister invites applications in terms of that subsection, so counsel contends, no application for any licence in respect of any mineral or group of minerals in the land or area specified in the notice may be made for consideration while the notice is in place. Once the notice is lifted or amended, applications may be made in the normal course.

[36] As to the order of priority of applications provided for in s 125, counsel for respondents contends that such order is not necessarily in respect of different types of applications made in terms of the Act. He points to the many different types of applications that may be made in the Act, some of which are required to be considered by the Minister whilst others are considered by the Mining Commissioner. The Act also contemplates that some applications have to be considered outside the order of priority. Thus, the order of priority is applicable only when it is relevant or will have the effect of rendering later applications redundant, so the argument developed.

[37] Counsel for respondents argues furthermore that s 122(2)(*a*) does not provide for the procedure to be followed when applications pursuant to that section are made. Counsel contends that the procedure set out in s 122(3) is restricted to the provisions of s 122(2)(*b*), when the Minister has, on account of concerns relating to the protection of the environment or the prevention of damage to the natural resources, imposed a requirement of special permission on which terms and conditions may be imposed by the Minister.

[38] Counsel for respondents contends that the notice was issued for reasons that are in the national interest as may be gleaned from the letter the f*i*rst respondent wrote to the Minister of Justice and Attorney-General (at the time when the two portfolios were combined) on 6 September 2006. This letter sets out the Minister's reasons for issuing the notice. It reads as follows:

'As you may be aware, Nuclear Fuel Minerals (and particularly uranium) are strategic resources both for energy production and nuclear warheads. Due to the demand and supply situation for uranium in the world and combined with our liberal legislation regarding application for mineral licences, my office has been overwhelmed with applications for exploration of nuclear fuel minerals.

It has now become imperative that the Government must adjust its policy and legislative framework towards nuclear fuel minerals applications to my Ministry. I have in fact, already directed that all such applicants must first seek audience with me prior to the applications being accepted by the Office of the Mining Commissioner. My intention is to place a short term moratorium on such applications while I formulate a clear procedure.

Section 122(1) of the Mineral (Prospecting and Mining) Act, 1992 provides for the Minister of Mines and Energy to gazette notices to preserve certain land/areas from prospecting and mining operations. Could you please advise if I can use this section to halt the applications for nuclear fuel minerals until such time that we have devised a clear mechanism to regulate the application and the eventual granting of mineral licences in respect of Nuclear fuel minerals? All applications received prior to the date of change in procedure shall be considered within the existing provisions.

Furthermore . . . [The paragraph concerns a different issue which is not relevant to the present proceedings].

Given the above and assuming that such a move shall not adversely affect our currently favourable investment portfolio, I kindly ask for your advice on how I might go about the two issues without exposing my Ministry and Government to legal challenges.

As usual, I count on your kind and prompt assistance.

Yours truly

ERKKI NGHIMTINA (MP)
MINISTER'

[39] As previously observed, s 122(1) confers on the Minister the power to declare that no person shall carry on any prospecting operations or mining operations in, or under any land or area described in such notice. Such declaration is made 'notwithstanding anything to the contrary contained in this Act or any other law'. A holder of a reconnaissance licence is excluded from the declaration and rights conferred on the holders of any mining claim, exclusive prospecting licence, mineral deposit retention licence or mining licence before the date of the notice are also not affected by the notice. The section provides further that the Minister may issue the notice reserving land from prospecting or mining operations if he or she 'deems it necessary or expedient', which means that the Minister has discretion whether or not to make such declaration. It is evident from the subsection, however, that such discretion has to be exercised in the public interest or in the language of the section, in the national interest.

[40] It is apparent from the content of the letter quoted above that the Minister took due cognizance of the strategic use of nuclear fuel minerals (particularly uranium) in energy production and nuclear warheads. He was concerned about the proliferation of licence applications for nuclear fuel minerals which he attributed to the 'demand and supply situation for uranium in the world' combined with this country's liberal legislation regarding applications for mineral licences. In response to the

overwhelming number of the applications being lodged with his office at the time, the Minister resolved to place a moratorium on such applications to allow Government some time to review its legislative and policy framework in respect of applications for nuclear fuel minerals.

[41] The Minister was uncertain as to how he could impose a moratorium lawfully and without adversely affecting the country's 'favourable investment policy'. He thus sought advice from the Attorney-General. As the functionary entrusted with the responsibility of exercising control over the country's minerals on behalf of the people of Namibia, the Minister was entitled to consider such weighty issues. He bore the ultimate administrative and political responsibility of ensuring that there was a proper policy and legislative framework in place to deal effectively with the increase in applications for nuclear minerals and to ensure that the exploitation of these strategic resources be managed optimally to the benefit of the country and its people. Such considerations are self-evidently in the national interest.

[42] I turn now to the consideration of the issue whether or not the respondents should be ordered to receive the EPL applications. Neither s 122 nor the notice itself explicitly prohibits the receipt of EPL applications during any period of prohibition on prospecting or mining operations. However, as already noted, s 122(1) commences with the words ‘subject to the provisions of this section’ and then subsection (2)(*a*) confers on the Minister the power to ‘*invite applications*' (if he or she deems it necessary or expedient in the interest of the development of the mineral resources of

Namibia or the better exercise of control over minerals in Namibia) for any licence in respect of any mineral or group of minerals specified in the notice '*for consideration on or after a date so specified*'. Such applications may only be made in respect of the whole or any part of the land or area where any prospecting operations or mining operations are proscribed in terms of s 122(1).

[43] As was observed in *S v Marwane* 1982 (3) SA 717 (AD) at 747H the purpose of the phrase 'subject to' is ordinarily:

> '...to establish what is dominant and what is subordinate or subservient; that to which a provision is "subject", is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be "subject to" the other specified one.'

[44] As already noted, the provisions of s 47 are 'subject to the provisions of this Act'. Section 122 is, of course, such a provision. Section 122 thus overrides the provisions of s 47 both because of the use of the phrase 'subject to the provisions of this Act' in both ss 47 and 122(1) as well as the employment of the words 'notwithstanding anything to the contrary contained in this Act' in s 122(1). There appears to be a conflict between s 122 and s 47 to the extent that s 47 provides that an application for a mineral licence must be made to the Minister and s 122(2)(*a*), which says that where a notice prohibiting prospecting operations or mining

operations is in place, an application for a mineral licence in a mineral or group of minerals specified in the notice may be made on invitation by the Minister. Section 122(1) is the dominant provision since the phrase ‘notwithstanding anything to the contrary contained in this Act or any other law’ prevails. It seems to me therefore that where there is a s 122 notice in place, an application for a mineral licence may be made and received only once the Minister has invited applications in terms of s 122(2)(*a*). If the legislature had intended that applications be received in terms of s 47 during the period the prohibition pursuant to s 122 is operative, in my view it would not have been necessary to empower the Minister to invite applications after the declaration contemplated in s 122(1) had been made. The use of the word 'invite' suggests that interested parties who could not otherwise have submitted applications may now lodge applications. On this understanding, the right to lodge applications under s 47 lapses, once a notice has been issued in terms of s 122.

[45] Accordingly, s 122 regulates an exception to the application procedures set out in the Act and provides for a period during which the ordinary rules regulating applications for, consideration and grant of mineral licences do not apply. For these reasons, I am of the view that the intention of the legislature in enacting s 122 (2)(*a*) was to enable the Minister to determine the time when applications may be made for mining licences when a notice issued in terms of s 122 is in operation, hence the use of the phrase ‘invite applications’ in s 122(2)(*a*). During this period, the priority of applications ordinarily regulated by s 125 would not operate, no matter how important that system of priority may be for the mining industry as counsel for the appellant

argued. In my view, the effect of the notice is therefore to preclude the receipt of applications for licences in respect of a mineral or group of minerals affected by the prohibition as long as the restriction is in place unless the prohibition is accompanied by an invitation to make applications for licences in respect of the affected minerals and in respect of the land or area affected by the notice as contemplated under s 122(2)(*a*).

[46] In the view I take of the matter, quite apart from the basis upon which relief was refused in the High Court and with which view I respectfully agree, there is yet a stronger reason why the Minister cannot be directed to receive the EPL applications while the notice remains in existence. This is the effect of the pertinent provisions of the Act as described above. I may nevertheless add in passing that it appears from the letter the Minister has written to the Minister of Justice and Attorney-General that the intention on the part of the Minister was to impose a temporary prohibition on prospecting operations and mining operations in respect of the nuclear fuel group of minerals. This is also evident from the notice itself in that such a prohibition is made 'until further notice'.

[47] In the result, it has been found in this judgment that in the absence of a direct challenge to the validity of the notice, such notice exists in fact and has legal consequences that may not be overlooked. Moreover on a proper construction of the relevant provisions of the Act, the respondents should not be ordered to receive the appellant's EPL applications during the period that the notice is in existence.

[48] One last issue remains to be decided. As mentioned above, counsel for the appellant argued that in construing the provisions of s 122 of the Act, the Court should bear in mind the constitutional rights of the appellant as entrenched in Art 21(1)(j) of the Constitution. That provision entrenches the right of all persons 'to practise any profession, or carry on any occupation, trade or business'. This Court has noted on several occasions that this right does not 'imply that persons may carry on their trades or businesses free from regulation'. (See, for example, *Trustco Insurance Ltd t/a Legal Shield, Namibia and Others v Deeds Registries Regulation Board* 2011 (2) NR 726 at para 25; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 596 (SC) at para 97.) This Court has also held that the regulation of the carrying on of a profession, trade or business must be rational, and not unduly invasive of the rights of the persons concerned. (*Trustco Insurance Ltd t/a Legal Shield, Namibia* at para 26; *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 185H-I.

[49] Mining is a business that *par excellence* requires regulation by government to protect a range of interests, including the environment and the public interest. Given that the appellant did not squarely challenge the validity of the issue of the notice in this case, it cannot complain that the respondent has not fully explained its reasons for issuing the notice. Even so, it is clear from the considerations set out in the Minister's letter (see para [38] above) that he considered it necessary to issue the notice in the public interest given the proliferation of applications for licences in

respect of minerals in the nuclear energy group, a group of minerals of special strategic importance. In my view it cannot be said that the interpretation of s 122 adopted in this judgment (bearing in mind the legitimacy of the regulation of the mining industry), disregards appellant's constitutional right provided in Article 21(1)(*j*). As set out above, that right is not absolute, but is subject to rational regulation. Moreover, it was open to appellant to challenge the issue of the notice on constitutional grounds, but that appellant chose not to do. Accordingly, this Court is not persuaded that appellant has established that the interpretation of s 122 adopted in this judgment is in conflict with its constitutional rights.

[50] For all the above reasons, the appeal ought to be dismissed and I would accordingly make the following order:

1. The application for condonation is granted and the appeal is reinstated.

2. The appeal is dismissed with costs, such costs to include the costs of one instructed and one instructing counsel.

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SHIVUTE CJ

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STRYDOM AJA

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O'REGAN AJA

APPEARANCES

APPELLANT:	Mr R Tötemeyer
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