CASE NO: A 10 / 2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KATAPI TRADING CC	**APPLICANT**
and	
THE MINISTER OF MINES AND ENERGY	**1ST RESPONDENT**
SHELL NAMIBIA LIMITED	**2ND RESPONDENT**
PAULO COIMBRA	**3RD RESPONDENT**
JOAO COIMBRA	**4TH RESPONDENT**
SANDRA MARIA COIMBRA	**5TH RESPONDENT**
OSWALDO MENENDES	**6TH RESPONDENT**

CORAM: **SCHICKERLING A.J.**

Heard on: 25 October 2011

Delivered on: 28 October 2011

JUDGMENT

SCHICKERLING, A.J:

[1] During February 2011 the applicant initiated an application against the first to fifth respondents, seeking the relief detailed in the notice of motion dated 4 February 2011) ("the original notice of motion").

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[2] After the main application was launched, the sixth respondent was joined to this application and augmented relief was sought by means of an amended notice of motion dated 6 June 2011 ("the amended notice of motion").

[3] In terms of the amended notice of motion, the relief sought was divided into parts A and B. Part A seeks interdictory relief against the third and sixth respondents. This relief is not relevant to the present interlocutory application. Part B of the amended notice of motion seeks the following relief:

> *"1. Calling upon the respondent's – in terms of rule 53 – to show cause why-*
>
> ***1.1 The first respondent's decision, taken on or about 27 July 2009, to grant a retail license to the sixth respondent in respect of the Wenela Shell retail outlet should not be reviewed, corrected or set aside by the above Honourable Court, alternatively that the decision be deemed null and void as being in conflict with article 18 of the Namibian constitution and be set aside on that basis;***
>
> ***1.2 The second respondent's decision to enter into agreements with the third/or sixth respondents and relating to the Wenela Shell retail outlet should not be reviewed and set aside;***
>
> ***1.3 The agreements referred to in 1.2 supra should not be set aside."***[1]

[1] Record: p. 11, para 1.1 – 1.3

11.4 In the alternative to the relief sought as per 13.2.1 (a) supra, the applicant seeks an order that the first respondent be ordered to exercise his discretion, in terms of regulation 31 (2) of the Petroleum Regulations, as to whether or not to cancel the retail license issued to the sixth respondent on the grounds of the sixth respondent's non compliance with regulations 9 (1) and 9 (3) of the Petroleum Regulations."

[4] The first and second respondents, in the amended notice of motion, were called upon to dispatch (and in so far as they had not already done so), within 15 days of receipt of the notice of motion, to the registrar of this Honourable Court, the record of the proceedings of the decisions sought to be reviewed or set aside (and as *per* the amended notice of motion), together with such reasons as they by law are required to or desire to give or make, and to notify the applicant that they have done so.

[5] The second respondent failed to comply with the aforementioned requirement precipitating the present application.

[6] In the present application the applicant prays for an order in the following terms:

"1. Compelling the second respondent to – within 5 (five) after service of this Order upon the second respondent – dispatch to the Registrar the record of proceedings sought to be corrected and/or set aside in respect of the second respondent's decision as set out in prayer 1.2 of the applicant's amended notice of motion dated 6 June 2011, and comprising annexure "DLS 1" to the applicant's founding affidavit herein, and to notify the applicant's legal practitioners of record that it has done so.

2. That the second respondent be ordered to pay the costs of this application, including the costs of one instructing and two instructed counsel." [2]

[2] Record: p. 1 - 2

[7] I interpose here to record that in its replying affidavit the applicant raised the point *in limine* that the second respondent's answering affidavit was late and out of time and not in compliance with the order issued by this court on 20 September 2011.[3] On the 14th of October 2011, prior to the applicant's replying affidavit having been filed the second respondent served and filed an application for condonation. At the commencement of the proceedings on 25 October 2011 Counsel for the applicant, Mr. Tötemeyer indicated that the applicant does not oppose the application and I granted the second respondent's application for condonation.

THE DEALER AGREEMENT:

[8] It is common cause between the parties that the applicant (trading under the name and style of Zambezi Shell in Katima Mulilo) (i) is one of the second respondent's franchisees; (ii) It holds a retail license issued in terms of the applicable provisions of the Petroleum Products Regulations ("the Regulations"), promulgated in terms of the Petroleum Products and Energy Act, No. 13 of 1990 (as amended) ("the Act"). The second respondent in turn, is part of a global group of energy and petrochemical companies and in Namibia, operates as a franchisor and wholesale supplier of petroleum products. During May 2007, the applicant entered into a franchise- and lease agreement (the second respondent is the owner of this site) and a supply agreement (cumulatively constituting and termed "the dealer agreement"). This agreement remains, as tacitly relocated, of full force and effect on date hereof. I shall later hereinafter return to the dealer agreement.

[9] Clause 2(A) of the franchise agreement incorporates by reference the provisions of section 4A of the Petroleum Products and Energy Act, Act 13 of 1990

[10] Clause 3.4 of the lease agreement in turn refers to clause 2A of the franchise agreement. I shall later hereinafter return to clause 3.2 of the lease agreement.

THE FACTUAL BACKGROUND TO THE APPLICATION FOR REVIEW:

[11] The main application was principally precipitated by the following: During October 2010 it was determined (from records held at the first respondent's Ministry) that a

[3] Replying affidavit, p. 3 - 4, para 5 - 8

retail license had been granted by the first respondent to the third respondent in July 2009 (retail license number R/376/2009) and in respect of the site described as Ngwezi Shell (also located in Katima Mulilo). It subsequently transpired that the first respondent's records did not reflect the true state of affairs in that the retail license (number R376/2009) was, in fact, issued by the first respondent to the sixth respondent;[4] When the record of the proceedings (incomplete) was provided by the first respondent during these proceedings, it appeared that the first respondent did not, in fact, grant a retail license to the third respondent in respect of a retail outlet named Ngwezi Shell located in Katima Mulilo, but that such retail license was granted to the sixth respondent in respect of an outlet named Wenela Shell. This notwithstanding, the retail outlet was at all times to be located at Erf 545, Ngwezi Mpatcha Road, Katima Mulilo, in close proximity to the applicant's current Shell retail outlet. The wholesale supplier for the Wenela Shell retail outlet is reflected as being the second respondent (with reference to annexure SC22 to the additional founding affidavit). The written confirmation by the second respondent to the effect that it would be the wholesale supplier in respect of the sixth respondent was already signed by a representative of the second respondent on the 12th of June 2009.[5]

[12] The second respondent's conduct, so it is alleged, was contradictory to certain undertakings it gave to the applicant. The second respondent also failed to disclose to the applicant that the sixth respondent was the licensed operator of Wenela Shell – information which it must have been intimately aware of given the sequence of events described in the founding papers.[6]

[13] The application alleges that second respondent never informed the applicant of its intention to establish a Shell retail outlet in close proximity to the applicant's Shell retail outlet, and which would be operated by an operator other than the applicant.[7] Furthermore, the second respondent did not bother to engage the applicant concerning the development of a new Shell retail outlet in Katima Mulilo. The first respondent also simply proceeded to issue the retail license and without affording the applicant an opportunity to be heard in that regard, and further without also, in a proper manner (if at all), considering the criteria set out in the Petroleum

4 Volume 2, p 78, para 37, Volume 2, p 345, para 17

5 Volume 2, p. 352, para 10; Volume 2, p 367; Volume 2, p 356, para 20

6 Volume 2, p 356, para 21; Volume 2, p 356 to 357, para 21; Volume 2, 355, para 19

7 Volume 2, p 355, para 18

Regulations, which detail the criteria to be considered when issuing a retail license. Reference is made to regulation 6 (1) of the Petroleum Regulations;[8]

[14] In the main application the applicant contends that the second respondent is collaborating with the third and the sixth respondents in opening and operating a new Shell retail outlet in Katima Mulilo. The second respondent's conduct militates against its obligations owed towards the applicant in terms of the applicable provisions of the Act and in terms of the dealer agreement existing between the applicant and the second respondent.[9]

[15] Wenela Shell has been operational since or about 7 March 2011. The second respondent's branding and marks already appear publically at the site in question and by now, the second respondent (on the one hand) and the third and/or sixth respondents (on the other hand) have, in all likelihood, entered into agreements (including a supply agreement) pertaining to the Wenela Shell retail outlet and regulating the relationship between them pertaining thereto.[10]

APPLICANT'S CASE IN THE REVIEW APPLICATION:

[16] Although the second respondent, with reference to clause 3.2 of the lease agreement[11] reserved the right to grant similar rights to persons at any other premises, the second respondent, in exercising the aforementioned discretion, is (and was at all material times) required to act in terms of the applicable provisions of clause 2A of the franchise agreement,[12] including the relevant provisions of section 4A of the Act. This, so it is alleged, the second respondent failed to do. The second, so applicant alleges, is in flagrant disregard of the very clear and pertinent provisions of clause 2A of the lease agreement, read with section 4A of the Act, more particularly, so it is submitted: (i) The exercise of a discretion by the second respondent in terms of clause 3.2 of the lease agreement (i.e a decision to open a new Shell franchise in close proximity to Zambezi Shell) will have an adverse effect on the rights and interests of the applicant as contemplated by clause 2A of the lease agreement and section 4A of the Act; (ii) As a result, the second respondent

8 Volume 2, p 355, para 19

9 Volume 2, p 358, para 22

10 Volume 2, p 358, para 23

11 Record: 169

12 Annexure "CS5"

was required to comply with the peremptory provisions of clause 3.2 of the lease agreement and section 4A of the Act in the exercise of any such discretion and before deciding to conclude an agreement with the sixth respondent, which would grant the latter similar rights to the second respondent at premises in close proximity to the applicant's site; (iii) No notice whatsoever was given to the applicant regarding the exercise of the second respondent's discretion to establish a further Shell retail outlet in Katima Mulilo; (iv) There was no compliance with the principle of providing the applicant a reasonable opportunity to be heard. In fact, no opportunity of whatsoever nature was given to the applicant. The applicant was kept in the dark and, through its own investigations, managed to uncover what is now contained in the founding papers in the main application; (v) The second respondent did not act in good faith and did not take into account clearly established facts and circumstances – it could not have done so because it did not even bother granting the applicant an opportunity to be heard; (vi) The second respondent is required in terms of section 4A of the Act to follow, in addition to the above, fair and reasonable practices and procedures in the exercise of such discretion; (vii) the second respondent did not apply any fair and reasonable practices and procedures and, in fact, acted *mala fide*; (viii) It is not justifiable and reasonable, under the circumstances, to depart from the requirements of section 4A(a)(b)(iii) of the Act; (ix).[13]

[17] In addition, section 4A(a)(1)(e) of the Act provides that a dealer agreement must ensure "promotion of security of tenure". This, the applicant respectfully submits, entails that a dealer agreement requires to be of a sufficient duration and effect in order to provide the retailer with adequate security to be able to run the retail business in a sufficient and sustainable manner and to allow a retail operator to not only recoup its investment but also obtain a reasonable return on such investment. The second respondent's conduct undermines the principle of the promotion of security of tenure and breaches the applicable provisions of the Act read with the dealer agreement.[14]

[18] In the circumstances, so it is submitted: (i) The first respondent's decision to grant a retail license to the sixth respondent stands to be reviewed and set aside alternatively the first respondent should be ordered to exercised its discretion as to whether or not to cancel the retail license issued to the sixth respondent on the

[13] Volume 2, p 82 – 84, para 44

[14] Volume 2, p 84 – 84, para 46

grounds advanced in the founding affidavit read with the augmented affidavit; (ii) ***The second respondent's decision to enter into agreements with the third respondent and/or the sixth respondent and relating to the Wenela Shell retail outlet, stands to be reviewed and set aside***; (iii) The aforementioned agreements referred to in the proceeding paragraphs stand to be set aside.[15]

[19] Applicant already in it's additional founding affidavit reserved the right in terms of rule 53 (4) the rules of this Honourable Court, to, within 10 (ten) days after the registrar made the full and complete record available, amend, add to or vary the terms of its notice of motion and supplement the supporting affidavit, and in so far as same pertains to the review relief. The second respondent was, as stated, called upon to avail the full and complete record envisaged in rule 53 (1) (b) of the rules of this Honourable Court, and in light of the relief sought in the amended notice of motion.[16]

THE FACTUAL BACKGROUND TO THE CURRENT APLICATION:

[20] I have already indicated above that the review application was initiated on 4 February 2011; On 23 February 2011 the first respondent filed an incomplete record of proceedings.

[21] It is also common cause on the papers before me that on 25 February 2011 the *dies* expired for the first and second respondent to make available records in terms of Rule 53(1)(b); On 18 March Applicant requested further information from the first respondent and that after a follow-up letter dated 24 March 2011 first respondent, more particularly on 18 April 2011 filed a supplementary record; On 23 March 2011 the applicant served and filed a notice of application to join the sixth respondent to the current proceedings; This application was served on the second respondent and set down for hearing on 3 June 2011 when it was granted.

[22] It is common cause that up and until that time the second respondent did not file a record as envisaged by Rule 53(1)(b). Second respondent instead elected to, on 6 June 2011 serve and file a review application answering affidavit in response to the

[15] Applicant's Heads of Argument, p 16 – 17, para 17

[16] Applicant's Heads of Argument, p. 17, para 19

original notice of motion and founding affidavit. Already in that affidavit, the second respondent's Davis Maphosa stated the following:

> **"*There is no record of decision-making in relation to the decision taken by Shell to enter into a supply agreement with Mr. Oswaldo Mendez. The question of a record of proceedings accordingly does not arise in this context. In any event, in light of the fact that the decision sought to be impugned is a purely commercial decision, Rule 53(1)(b) of the Rules of this Honourable Court is not triggered. I accordingly deny that Shell is obliged to provide any record in terms of Rule 53"***

[23] What transpired after this is set out in the papers filed in the application to compel second respondent to deliver a record in terms of rule 35(1)(b), which I have to decide.

THE APPLICATION TO COMPELL THE RECORD:

[24] On 21 September 2011 the applicant served and filed the current application.

[25] The applicant's founding affidavit, deposed to by applicant's legal practitioner of record incorporates, paragraphs 10, 14, 18 – 23, 30 and 32 of its additional founding affidavit deposed to on 18 May 2011, after the first respondent had, on 23 February 2011 availed to the Registrar of this court an incomplete record, and its supplementary record on 18 April 2011. The applicant incorporates into its affidavit filed in support of the current application paragraphs 21 – 27, 29, 37, 39, 40, 41, 44 and 46 of its founding affidavit deposed on 1 February 2011 for the purpose of demonstrating that Rule 53 applies to the relief sought by the applicant against the second respondent in this matter.[17] I shall later return to these paragraphs

[26] In the founding affidavit to this application the applicant's legal practitioner of record states the following:

> ***"On 21 July 2011 a letter was addressed to Engling, Stritter & Partners, legal practitioners for the second respondent, demanding the dispatch of the required record to the Registrar and notification to the applicant that it has so dispatched the record. A copy of the***

[17] Record: 6, para 3

aforesaid letter forms annexure "DLS2" hereto. The response received from Engling, Stritter & Partners, dated 4 August 2011, forms annexure "DLS3" hereto. In the premises, this application is unavoidable." [18]

[27] In annexure "DLS3" annexed to the founding affidavit, the second respondent's legal practitioner of record, Mr. Mark Kutzner replied inter alia as follows to "DLS2":

"In regard to your demand, we reiterate what has already stated in this regard by our client in the answering affidavit filed of record on 1 June 2011. For ease of reference, we quote from this affidavit:

'There is no record of decision-making in relation to the decision taken by Shell to enter into a supply agreement with Mr. Oswaldo Mendez. The question of a record of proceedings accordingly does not arise in this context. In any event, in light of the fact that the decision sought to be impugned is a purely commercial decision, Rule 53(1)(b) of the Rules of this Honourable Court is not triggered. I accordingly deny that Shell is obliged to provide any record in terms of Rule 53'

We place on record – as our client did in its answering affidavit filed on 1 June 2011 – that your client has been extremely dilatory in launching this application. The same applies to your client's prosecution of this review application. The application was launched on 4 February 2011. The 15 days within which - on your client's version- our client was required to file the record expired on 25 February 2011. It has taken your client a further 5 months to demand that our client file the record. It is in this context-and with the view of expediting matters- that our client filed an answering affidavit, in the light of the fact that your client was many months out of time to compel the filing of the record (assuming for the moment that your client indeed had such a right).

[18] Record: 6, para 4

We further confirm that any application brought by your client to compel our client to file the "record" will be opposed."[19]

[28] It is further stated by the deponent Sauls that the record was requested, and is required, to enable the applicant to further proceed with the application initiated by it, and wherein relief delineated in the amended notice of motion is sought. The applicant, so it is stated, is prejudiced as a result of the record not being furnished. The second respondent is obliged to deliver the record, but refuses to do so.[20]

[29] The deponent, Sauls submits in the affidavit that applicant *"is entitled to be availed of the record of the decision sought to be corrected and/or set aside…in terms of and as contemplated by Rule 53 of the Rules of Court;* and *"The Applicant further relies on the provisions of section 4A of the Petroleum Products Energy Act 1990 (as amended)."*

[30] It is also alleged that in terms of annexure "DL2" the Applicant's legal practitioner of record requested the second respondent's legal practitioners of record to file *"…the record contemplated by the amended notice of motion…before close of business on Wednesday, 3 August 2011…"*[21] By virtue of clause 1.2 of the amended notice of motion it is of cause the *"Respondent's decision to enter into agreements with the third and/or sixth respondents and relating to the Wanela Shell retail outlet."*[22]

[31] On 14 October 2011 the second respondent served and filed its answering affidavit to the application to compel. This affidavit also is deposed to by Mr. Davis Maphosa. In the answering affidavit to the application to compel the deponent Maphosa inter alia quotes what he has stated in the review answering affidavit of the second respondent,[23] reiterates what Mr. Kutzner stated in his letter dated the 4th of August

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19 Record: p 54

20 Record: 6, para 5

21 Record: p. 52

22 Record: 11, para 1.2

23 Answering Affidavit, p. 2, para 4

2011[24] and expressly reserves the right to advance the argument that the applicant's delay in brining the current application was extremely dilatory and should be dismissed for that reason alone.[25]

[32] At the hearing of the current application Counsel for the second respondent did not pursue this point and I shall not express myself thereon.

[33] On page 4 of the second respondent's answering affidavit the deponent Maphosa continues as follows:

> ***"However and with Shell's express reservation of its rights aforesaid and to expedite this matter, Shell intends to, by way of its affidavit, indicate the applicant and to the Registrar of this Honourable Court what "record of proceedings" (To use the applicant's nomenclature) it has in its possession.[26]***
>
> ***I have done a full search of the records held by Shell and there is no documentation in Shell's possession relating to a "decision to enter into agreements with the third and/or sixth respondents and relating to the Wenela Shell retail outlet." This includes e-mail correspondence, letters and notes and other documents. This is consonant with the general approach of Shell that most of the business discussions around supply agreements are concluded orally and only when an agreement is finally reached is it reduced to writing and signed by the parties concerned.[27]***
>
> ***The only document which I am aware of which relates to the decision (which is in fact not on file at Shell) is the document signed by shell on 12 June 2009 stating that Shell would be supplying "Oswaldo Mendez: with fuel "in the event of a successful application" (annexure "SC 24" to the applicant's additional***

[24] Answering Affidavit, p 3, para 5 & 6

[25] Answering Affidavit, p 3 - 4, para 7

[26] Para 8

[27] Para 9

founding affidavit). This referred to an application made by the sixth respondent to the first respondent for a retail license to Shell Petroleum products. This was a decision conditional upon Mr. Oswaldo Mendez obtaining a retail license to sell petroleum products. For ease of reference this document is annexed as "DM 2."[28]

For applicant to suggest that there must be a "record of proceedings" simply underlines the obvious difficulties the appellant has to dress up Shell's business dealings and the commercial undertakings and agreements flowing therefore as administrative acts in the public domain. This is a fundamental flaw to these proceedings. It also underlines the futile nature of the relief sought in the review application against shell."[29]

[34] In paragraphs 5 to 8 the applicant raises the point in limine that the second respondent's answering affidavit was filed late and out of time which point, given the application for condonation was, as I have indicated above, not persisted with.

[35] In paragraphs 9 to 13.5 the applicant in essence contends that: second respondent fails to appreciate, and properly address, the impact and application of section 4A of the Act and its undeniable impact on what the second respondent wrongly terms a *"purely commercial decision";* it denies that the decision sought to be impugned is purely a *"Commercial decision";* it denies that Rule 53(1)(b) is inapplicable; or that second respondent is not obliged to provide any record in terms of rule 53. Paragraph 14 and 15 of the replying affidavit deals with the alleged dilatoriness of the application and is no longer relevant.

[36] I shall later hereinafter deal with paragraph 16.4 of the replying affidavit.

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[28] Para 10

[29] Answering Affidavit, p 4 - 5, para 11

[37] The applicant denies that it has any difficulty to dress-up shell's business dealings and commercial undertakings and agreements as administrative acts in the public domain or that it is fundamental flawed as alleged by the second respondent.[30]

[38] The applicant submits in conclusion that the issue of reviewability of Shell's decision must be determined at this stage of the proceedings. It is stated by Sauls that *"It is imperative that the mechanism provided for in rule 53 (including that pertaining to availing the record of proceedings by the second respondent) must be given effect to at this stage. Should this not be done, the applicant's procedural rights in terms of rule 53 will be undermined."*[31]

[39] At the hearing of the application to compel Counsel for the second respondent also did not pursue the point that this application should be postponed for hearing with the main application.

THE APPLICANT'S LEGAL CONTENTION:

[40] The applicant in its heads of argument contends that:

(i) The Act, read with the Regulations promulgated thereunder, sets up an elaborate machinery that regulates the petroleum industry and the functions and the conduct of the business of various role players therein, including operators (i.e retailers, such as the applicant) and wholesalers (i.e such as the second respondent). Their manner of operation and duties, particularly in this instance, are specifically circumscribed by statute. *(Absa Insurance Brokers v Luttigh and Another NNO* , [32] *Herbert Porter and Another v Johannesburg Stock Exchange,*[33] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another*[34]*)*

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30 Replying Affidavit, p 21 - 22, para 17.1 and 17.2

31 Replying Affidavit, p 22, para 18.2

32 Applicant's Heads of Argument, p 17, para 19; *1997 (4) SA 229 (SCA) at 239 B – D*

33 *1974 (4) SA 781 (W) at 791 B – D*

34 *1988 (3) SA 132 (A)*

(ii) Section 4A(1) of the Act, by statutory imperative, requires - in peremptory terms – that a dealer agreement (including any supplementary provisions to such an agreement) shall be based on and comply with, and in so far as the dealer agreement or any provision supplementary thereto provides for the exercise of any discretionary powers which adversely affects rights or interests, such discretion shall, subject to the other provisions of this section be exercised in accordance with fair and reasonable practices and procedures, which shall include (unless justifiable and reasonable to depart from same – which exception is inapplicable in this matter) –

(a) the giving of adequate notice of the exercise of the discretion and the nature and purpose thereof, as well as the furnishing of reasons for a decision (if requested thereto);

(b) Compliance with the principle of providing the other party reasonable opportunity to be heard;

(c) Acting in good faith having regard to clearly established facts and circumstances only.

(iii) By operation of statute, the wholesaler (in this instance, the second respondent), was therefore required to apply the principles of fair and reasonable administrative action.

(iv) Although the second respondent is clearly not an organ of State, licensing legislation such as the Petroleum Act, by its nature, imposes statutory control upon private entities that accords certain rights, powers, functions and duties. Decisions taken by bodies of this nature are subject to judicial review by the Courts (*a fortiori* it is submitted where the manner of their decision-making is strictly circumscribed by the Act). *(Dawnlaan Beleggings v Johannesburg Stock Exchange.)*[35]

[35] *1983 (3) SA 344 (W) at 360E – 361B; Herbert Porter, supra, at 791B-G*

(v) The above accords with the principle that whether or not particular conduct constitutes administrative action, depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. *(Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works,*[36] *Kouga Municipality v De Beer,*[37] *Transnet Ltd & Others v Chirwa,*[38]

(vi) The above principles also find application in the constitutional context. The Namibian Constitution requires that, where applicable, natural and legal persons other than organs of the State should comply with Chapter 3 of the Constitution (which would thus include compliance with Article 18). In this case, this constitutional requirement finds application by virtue of the provisions of section 4A of the Act, which requires compliance by the second respondent with Article 18.

(vii) As a result the second respondent's decision is reviewable in a Court of law and is accordingly also reviewable in terms of the procedure provided for by Rule 53 of the High Court. This renders Rule 53 (1) (b) applicable regarding the second respondent's obligation to make the record of its decision-making available.

(viii) Even if the second respondent's decision in question cannot be regarded as an administrative act, both section 4A of the Act and clause 2A of the lease agreement introduces essential principles of administrative fairness into the contractual setting between the parties. The private contractual sphere governing the relationship between the applicant and the second respondent is therefore governed by the principles underlying fair and reasonable administrative action, as embodied in section 4A of the Act and clause 2A of the dealer agreement. On this basis, so it is submitted: (i) The position of the second respondent, and given the contractual discretionary powers vested in it in terms of the dealer agreement, is akin to that of a domestic tribunal; (ii) The exercise of a contractual discretionary power by the second respondent,

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[36] 2005 (6) SA 313 (SCA) at 323, para [24]

[37] 2008 (5) SA 503 (E) at 508G

[38] 2007 (2) SA 128 (SCA), 208 at para [14]

renders same susceptible to review in accordance with the principles traditionally applied to domestic tribunals. *(LAWSA,[39] Marlin Durban Turf Club and Others,[40] Turner v Jockey Club of South-Africa,[41] Blacker v University of Cape Town and Another,[42] National Union of Namibia Workers v Naholo[43])*

(ix) The role of the Court in review matters is therefore not confined to statutory bodies. On this basis the Courts, and on the basis of the above common law principles, have frequently exercised their common law jurisdiction to review decisions of tribunals, bodies or persons who, by contract, are required to act fairly and/or reasonably. *(Jockey Club of South Africa v Feldman,[44] Theron v the Ring van Wellington van die NG Sendingkerk in SA,[45] Blacker v University of Cape Town*,[46]*)*

(x) It has further been held that Rule 53 finds application in cases where the Court exercises its aforementioned common law jurisdiction. On that basis the applicant is entitled to the record of the second defendant's decision-making. *(Blacker, supra, 407 G; Jockey Club of South Africa v Forbes[47]*

SECOND RESPONDENT'S LEGAL CONTENTIONS

[41] The second respondent, on the other hand, contends in its heads of argument that:

(i) the decision taken by the second respondent sought to be reviewed and set aside does not constitute administrative action; accordingly there is no record

39 2nd Ed; Volume 1, para 634

40 1942, AD 112

41 1974 (3) SA 633 (A) at 645H

42 1993 (3) SA 402 (C) at 406f-407I

43 2006 (2) NR 659 (HC) at 683E-684D

44 1942 AD 340 at 351

45 1976 (2) SA 34 (A), 21D-F

46 *Supra*, at 403I – 404B

47 1993 (1) SA 649 (A) at 659C-E

to be furnished and the issue of a *"record of proceedings"* in terms of Rule 53(1)(b) does not arise;[48] alternatively

(ii) Should the Court find that the decision taken by the second respondent does indeed constitute administrative action, then the second respondent states that there is no documentation in its possession relating to the "*decision to enter into agreements with the third and/or sixth respondents relating to the Wenela Shell retail outlet*".[49]

(iii) The exercise of the power by the Second Respondent to take a decision to enter into a supply agreement with a third party is one derived from contract.[50]

(iii) Those powers, so second respondent submits are derived from the contractual powers to be found in clause 3.2 of the franchise agreement.[51]

(iv) It is evident from clause 3.2 that where Shell would wish to grant similar rights to other persons in other areas of the Premises, Shell shall first offer the Franchisee the right to operate.

(v) By Shell reserving its rights to grant similar rights (i.e. franchise rights) to other persons at any other premises, Shell is indicating in clear terms that the franchise agreement entered into between it and the Applicant was not an exclusive franchise agreement. The fact that the terms of the franchise agreement do nowhere grant exclusive franchise rights to the Applicant renders this clause superfluous. However, what it does mean is that there can be no doubt that Shell is at liberty to enter into franchise agreements with any other person on "*any other premises*", which would mean at any other premises in Katima Mulilo. This involves Shell's right of freedom of contract and its right in terms of the Namibian Constitution to practice its trade in a manner, which it deems fit and which makes commercial sense to it.

(vi) In exercising this right and making a decision to enter into a franchise agreement with a third party, such as the Sixth Respondent, Shell is not

[48] Second Respondent's Heads, p 2, para 1; p 6, para 9; Answering Affidavit, p 2 – 3, para 4;

[49] Second Respondent's Heads of Argument, p 2, para 2.2; Answering Affidavit, p 4, para 9

[50] Second Respondent's Heads of argument, p 3, para 5

[51] Second Respondent's Heads of Argument, p 4, para 6

taking a decision necessarily in terms of the franchise agreement. This discretion can be exercised outside of the franchise agreement purely because the franchise agreement entered into between the Applicant and the Second Respondent was a non-exclusive agreement. The Applicant accordingly has no right to insist that Shell only do business with itself at Katima Mulilo. [52]

(vii) This interpretation is fortified by the further provisions of the franchise agreement wherein numerous paragraphs in the franchise agreement and the attached "*Shell Property Lease Agreement"* and the "*Shell Petroleum Products Supply Agreement"*, clauses refer to "*discretionary powers which adversely affect the rights or interest of the Franchisee"* and specifically make reference to the applicability of clause 2(a) of the agreement having application to such clauses.[53]

(viii) It is accordingly apparent that the Applicant and the Second Respondent have agreed which clauses of the agreement would incorporate clause 2A, incorporating, by reference as this clause does, the provisions of Section 4A of the Act. In other words, the parties have agreed which clauses of the franchise agreement and the related agreements would depart from requirements containing clauses 2A.1 and 2A.2 and the first part of 2A.3 on the basis that to do so whilst "*justifiable and reasonable under the circumstances"*.

[42] At the heart of the dispute between the parties are the provisions of Rule 53 of the Rules of Court, Clause 2A and 3.2 of the agreement and section 4A of the Petroleum Products and Energy Act, 13 of 1990.

[43] Rule 53(1)(a) and (b) of the Rules of Court provides as follows:

> ***"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of***

[52] Second Respondent's Heads of Argument p 5, para 7

[53] Record, Volume 2, p 169 clause 4.4; p 170 clause 6.2; p 171 clause 1.2; p 195 clause 10.12

the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."

THE APPLICANT'S APPLICATION AS IT STANDS:

[44] Mr. Tötemeyer argues that Rule 53(1)(b) is peremptory and must be complied with. As such, so he submits, the second respondent is compelled to make the record available. What has been provided by the second respondent is not the record. Initially second respondent took the stance that there is no record; then evidently, so he submits, annexure "DM2" surfaced. If one has regard to that document, so he argues, it reveals the existence of further documents, also if one has regard to the record. He relies for this proposition on the contents of paragraph 16.4 of the replying affidavit.

[45] In paragraph 16 of the replying affidavit the applicant refers to annexure "DM2"[54] annexed to the answering affidavit in the interlocutory application, documents which allegedly accompanied the applicant's own application for a dealership agreement,[55] the agreement concluded between second respondent and sixth respondent,[56] board minutes which *"should"* be in possession of the second respondent,[57] documents obtained from the first respondent's record and which refers to franchise training,[58] Regulation 4(2)(d) of the Petroleum Products Regulations which provides

[54] Replying Affidavit, p 14, para 16.4.1

[55] Replying Affidavit, p 14 – 15, para 16.4.2, 16.4.3

[56] Replying Affidavit, p 15, para 16.4.3

[57] Replying Affidavit, p 15, para 16.4.4

[58] Replying Affidavit, p 16, para 16.4.5

for written confirmation by a supplying wholesaler,[59] an EIA obtained from first respondent's record,[60] statements by Mr. Maphosa in the review answering affidavit,[61] such as Maphosa's *"belief"* that there was room for another outlet in Katima,[62] that the correct *"situation"* was that Mr. Mendes was the owner of the site; [63] shell being *"convinced*" that there is room for two economically viable Shell outlets in Katima Mulilo;" *"financial modeling and research undertaken"*;[64] the *"decision"* by second respondent being *"conditional upon Mr. Oswaldo Mendez obtaining a retail license"*[65] from which, by inferential reasoning it is inferred that documents forming part of a decision making process must or should exist.

[46] Asked by the court as to why all of this appears in the replying affidavit for the first time, Counsel for the Applicant referred me to ***Aonin Fishing (Pty) Ltd and Another v Minister of Fisheries And Marine Resources,***[66] in which the High Court held that –

"It suffices however to quote from the judgment of Marais J which was followed by Hoexter J:

> ***'Mr Eloff, for the Administrator, has, however, questioned whether the phrase "record of proceedings" in Rule 53 can properly be said to include the documents of the previous application. The words "record of proceedings" cannot be otherwise construed, in my view, than as a loose description of the documents, evidence and arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is***

[59] Replying Affidavit, p 16, para 16.4.7

[60] Replying Affidavit, p 17, para 16.4.8

[61] Replying Affidavit, p 17, para 16.4.9

[62] Replying Affidavit, p. 19, para 16.4.10

[63] Replying Affidavit, p 18 - 19, para 16.4.13

[64] Replying Affidavit, p 19, para 16.4.14 and 16.4.15

[65] Replying Affidavit, p 19, para 16.4.16

[66] 1998 NR 147 (HC

analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision plus the deliberations of the Executive Committee are as little part of the record of the proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it. Thus the previous decision of the Administrator and the documents pertaining to the merits of that decision could not have been otherwise than present to the mind of the Administrator-in-Executive Committee at the time he made the second decision. If they were not, he could not have brought his mind to bear properly on this issue before him, which is of course denied by the respondents."

He submitted that in terms of Rule 53(1)(b) the first step compels second respondent to avail a record; only once this has been done can a request for specific further documents be made. Once specific documents have been provided then and only then can applicant supplement its papers and only then is the respondent supposed to answer. He submits that what one doesn't do is to deny that there is a record.

[47] He argues that "DM 2" signifies that an agreement was reached; that implies a decision of some nature and it is reasonable to expect that a decision of some nature must have been taken. In the ordinary course of business, so the argument goes, decisions to enter into agreements are taken by the Board of directors. He poses the question: *"What constitutes such decision?"* Relying on the Aonin-decision he answers: *"Every shred of paper which sheds light on the decision."* That, so he submits includes for ex. annexure "DM 2" which in turn identifies also other documents not availed.

[48] He argues that regard being had to paragraphs 16.4.1 onward it reveals that there are various other documents which should exist; that the second respondent's stance is duplicitous in that, on the one hand second respondent, in stating that it is not obliged to deliver the record, accepts that a record exists. On the other hand second respondent takes the stance that there is no record. On the second respondent's own version he must at the very least make available a record in the form of annexure "DM 2" annexed to the interlocutory answering affidavit.

[49] Mr. Frank on the other hand argues in reference to the documents identified in the replying affidavit that applicant is at great pains to persuade the court that the parties are still in the first stage of the proceedings. He submits that if these documents were identified in the founding affidavit, as they should have been, the second respondent would have been put in a position to answer to or explain same; He points out that what the second respondent had stated in the review answering affidavit as early as 1 June 2011 was this: "*There is no record of decision-making in relation to the decision taken by Shell to enter into a supply agreement with Mr. Oswaldo Mendez. The question of a record of proceedings accordingly does not arise in this context. In any event, in light of the fact that the decision sought to be impugned is a purely commercial decision, Rule 53(1)(b) of the Rules of this Honourable Court is not triggered. I accordingly deny that Shell is obliged to provide any record in terms of Rule 53*"[67] and submits that there is nothing ambivalent in the such statement at all; that Annexure "DM 2" does not in any manner whatsoever contradict the second respondent's earlier statement in the review answering affidavit; that second respondent throughout alleged that no franchise agreement was entered into; that second respondent instead entered into a supply agreement with sixth respondent; [68] that sixth respondent is the owner of the property; that he has made all the improvements on the property; and had asked for fuel to be supplied. Regulation 4(2)(d), so Mr. Frank argues, requires written confirmation of a supply agreement prior to the application for a retail license and that is all that had happened. He submits that prima facie annexure "DM 2 follows upon and is not part of a decision making process; that no such list as referred to therein exists because what the second respondent had entered into was simply a supply agreement, not a franchise agreement.

[50] According to Mr. Frank "every scrap of paper" refers to paper which forms part of the decision making process, not documents following upon a decision.

[51] Mr. Tötemeyer submits in reply and in reference to the statement in paragraph 77 on page 267 that this is the premature answering affidavit and it only goes to show how

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[67] Record, p 267

[68] Record 266, para 73

misguided the second respondent is; that the proposition at page 267 is wrong and the result of this application. He also pointed out that on 15 July 2009 applicant's Susan addressed a letter to the second respondent of and concerning the granting of a license to sixth respondent and submits that such document already constitutes part of the decision making process;[69] that a further indication clearly showing that there is a record of decision making and which runs contrary to Mr. Frank's argument is to be found in DM 2 which records: *"…find the attached list of all buildings, structures, and plant and such other items or assistance as we are currently providing / intend to provide in the case of a successful application."*

[52] In am respectfully of the view that there is nothing ambivalent in the second respondent's approach to this matter. The second respondent had already on 1 June 2011 stated in the review answering affidavit: "*There is no record of decision-making in relation to the decision taken by Shell to enter into a supply agreement with Mr. Oswaldo Mendez"* In addition to that second respondent stated: *"In any event, in light of the fact that the decision sought to be impugned is a purely commercial decision…"* The applicant wants to read these statements as contradictory. They are not in my view contradictory at all. I also find it difficult to see how the letter addressed by applicant's Susan can form part of a decision making process by second respondent; It is in any event in applicant's possession.

[53] The clear stance taken by the second respondent in its review answering affidavit that there is no decision making record, also, in my view, is seemingly the very reason why the second respondent at the time opted to file the review answering affidavit. In the particular circumstances, I find nothing misconceived or untoward in the second respondent, having at that stage, served and filed the review answering affidavit. It is plainly consistent with the stance taken right from the inception of the main application. It is in my view appropriate in the circumstances, as was explained by Mr. Maphosa, in the answering affidavit to applicant's application.

[54] In their subsequent letter dated the 4th of August 2011 the second respondent's legal practitioners reiterated that stance – in fact quoting what was stated in the review answering affidavit.

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[69] Record; p 212

[55] It is trite that an applicant must stand and fall by his/her/its founding affidavit. The applicant knew at least since the filing of the review answering affidavit what the second respondent's stance was, particularly as regards the non-existence of an alleged decision making record. Despite this applicant elected to approach, not dealing, as it belatedly does in the replying affidavit, with the existence of the alleged decision making record, at all.

[56] In its answering affidavit in the current application the second respondent's Maphosa, reiterates once again, that there is no decision making record; that he has done a full search of the second respondent's record and that the only document which *"I was aware of which relates to the decision making (which is in fact not in Shell's possession) is the document signed by Shell on 12 June 2009 stating that Shell would be supplying 'Oswaldo Mendes' with fuel 'in the event of a successful application)…".*

[57] Given the clear stance taken by second respondent since inception of the review application, it was not competent for the applicant to have approached this court, as far as the alleged existence of the decision making record is concerned, on the skeleton case and then attempt in the replying affidavit, to make out a case that such record exists.

[58] I have no reason to go behind the affidavit of the second respondent and must accept Mr. Maphosa's statement that the second Respondent does not have a decision making record pertaining to its agreement to supply fuel to the sixth respondent and that "DMM 2 is not in the second respondent's possession.

THE REVIEWABILITY OF THE SECOND RESPONDENT'S "DECISION":

[59] Before dealing with Counsel's argument it is necessary to first revert to the provisions of the act and the terms of the agreement.

[60] Section 4 A of the Petroleum Products Energy Act, 13 of 1990 provides as follows:

"4A Agreements between operators and wholesalers

(1) Any dealer agreement concluded between a wholesaler and an operator, and any supplementary provisions to such an agreement, shall be based on and comply with the following:

(a) Any law, including a provision of the common law, applicable in Namibia regarding competition and fair contractual procedures and practices;

(b) In so far as the dealer agreement or any provision supplementary thereto provides for the exercise of any discretionary powers which adversely affects rights or interests, such power shall, subject to the other provisions of this section be exercised in accordance with fair and reasonable practices and procedures, which shall include-

(i) the giving of adequate notice of the exercise of the discretion and the nature and purpose thereof, as well as the furnishing of reasons for a decision (if requested thereto);

(ii) compliance with the principle providing the other party reasonable opportunity to be heard;

(iii) acting in good faith having regard to clearly established facts and circumstances only;

unless it is justifiable and reasonable under the circumstances to depart from the requirements set out in this paragraph;

(c) notwithstanding paragraph (b), in so far as the dealer agreement or any provision supplementary thereto provides for the termination of the agreement in the event of a breach thereof-

(i) in the case of a non-material breach, written notice shall be given that such non-material breach has occurred and a reasonable period shall be allowed to rectify such breach prior to termination of the agreement;

(ii) in the case of a material breach, the agreement may be terminated without prior notice or opportunity to rectify the material breach if it is fair and reasonable under the circumstances to do so, and for the purposes of this paragraph-

(aa) only a breach of the agreement which relates to a fundamental and substantive term of the agreement shall be deemed to be a material breach; and

(bb) no agreement shall contain a provision deeming all provisions; of the agreement to be material;

(d) reasonable access to correspondence, documents and property only in so far as they relate to the business of operating an outlet in terms of the dealer agreement; and

(e) promotion of security of tenure, but subject thereto that a reasonable probationary lease period may be provided for in the case where a dealer agreement is concluded with a new operator.

(2)(a) Without derogating from any other right a person may have in terms of any other law or with regard to access to a court, <u>where a party is of the opinion that a provision in a dealer agreement does not comply with a principle set out in subsection (1), such party may refer the matter for arbitration as provided in paragraph (b)</u>.

(b) The Minister shall by notice in the Gazette determine the arbitration procedure which shall apply with regard to a matter referred to in paragraph (a) and the Minister may by regulation prescribe any matter supplementary to such arbitration procedures.

(3) The provisions of this section, in so far as they provide for a limitation on the right to conduct business relating to the petroleum industry by

any person, are enacted upon the authority of Article 21(2) of the Namibian Constitution.

(4) Section 21 of this Act shall not apply to subsection (1) of this section.

(5) For the purposes of this section-

(a) "wholesaler" means any person who imports or distributes petrol or diesel for purposes of the wholesale thereof by that person in Namibia or who exports petrol or diesel;

(b) "operator" means any person who conducts business for the sale of petrol and diesel at an outlet."

[61] It is in my view apparent that the provisions of section 4A provide protection, not only to the retailer but also wholesalers within the industry. It is in my view wrong to assume that Section 4A (1) is aimed solely at the protection of the retailer. Regard being had to the provisions of section 4A(2)(a) it is apparent that what is envisaged is that when any party to a contract is dissatisfied with a term in the agreement, he/she/it is entitled to request that such term be referred for determination by way of arbitration. What section 4A, in my view, primarily aims at is to "level the playing field", so to speak, primarily during the negotiation stages of the agreement. By that it lays down certain standards by which the contents of an agreement must comply. It is in my view, still open to parties to, in their agreements, negotiate and contract specifically as to which powers shall be subject to and which powers shall be excluded from the operation of section 4A(1).

[62] Clause 2A of the franchise agreement, in turn, provides as follows:

*"**PETROLEUM PRODUCTS AND ENERGY ACT 13 OF 1990***

2A Each provision in this Agreement shall be interpreted in accordance with the provisions of Section 4A of the Petroleum Products and Energy Act 13 of 1990, as amended. In particular any provision in this Agreement which provides for the exercise by Shell of discretionary powers which adversely affect the rights or interests of the Franchisee, shall only be exercised by Shell in accordance with fair and reasonable practices and procedures including:

2A.1 the giving of adequate notice of the exercise of the discretion and the nature and purpose thereof, as well as the furnishing of reasons for the decision (if requested thereto);

2A.2 compliance with the principle of providing the Franchisee with a reasonable opportunity to be heard;

2A.3 the acting in good faith having regard to clearly established facts and circumstances, unless it is justifiable and reasonable under the circumstances to depart from these requirements in Clauses 2A.1, 2A.2 and in this sub-clause 2A.3."

[63] Clause 3.2 of the Franchise agreement however provides as follows:

"Shell reserves the right to grant similar rights to other persons at other areas of the Premises in cases where the Franchisee is for any reason not operating all of the available business opportunities on the Premises within the Shell Retail Franchise, provided that Shell shall first offer the Franchisee the right to operate all available business opportunities within the Shell Retail Franchise on the Premises. In addition, Shell reserves the right to grant similar rights to other persons at any other premises."

[64] Mr. Tötemeyer argues that the fuel industry is highly regulated by legislation; it *inter alia* requires compliance with the provisions of section 4A of the act; it is a regime that entails both procedural and substantive fairness. Where an agreement provides for an exercise of discretionary powers the exercise of such discretion must be fair and reasonable; this includes adequate notice, opportunity of being heard and acting in good faith unless certain circumstances prevail. The second respondent's decision is reviewable for any one of two important considerations: (1) Despite 2nd respondent being a private corporate entity its decision is reviewable because it involves the exercise of statutory powers and obligations; (2) The agreement incorporates certain statutory provisions as a result of which the parties agreed that decisions taken by the second respondent must adhere to procedural and substantive fairness. Clause 3.2, so he argues is a provision which governs the

exercise of discretion by the second respondent in the nature as contemplated by section 4A of the Act.

[65] He argues that it is implicit in the agreement that the one party will not undermine the rights of the other party and that if one reserves the right to in fact grant similar rights to persons occupying other premises those rights should be exercised with due compliance with the fairness regime it being required by statute and reinforced in terms of the agreement. Because of this obligation it matters not whether or not the decision taken is classified as administrative action or not. On this basis this court is entitled to review that decision in terms of its inherent common law power. Courts have in the past exercised that jurisdiction because in terms of the contract the parties were bound to act in a procedural and substantively fair manner. For that reason rule 53 is applicable.

[66] In dealing with the judicial review of private and domestic tribunals *Baxter*[70] states as follows:

> ***"There is an essential difference between the rules that constitute and empower such bodies*** (i.e. private and non-statutory bodies, such as disciplinary tribunals of churches, trade unions and clubs, or to arbitrators) ***and those that relate to public authorities. The former are based on the voluntary, contractual agreement of their subscribing members, whereas the latter are based upon statute. In order to apply the principles of the review the court must deduce what is required, not from a statute, but from the terms of the agreement, express or implied…***
>
> ***This 'voluntariness is often considered to be of crucial significance in distinguishing the scope of review of public authorities from that of private bodies. Yet paradoxically this has induced two opposing conclusions:***

[70] Administrative Law; 1st Ed; at 341 .

On the one hand, a number of judges have stated that the voluntary nature of the agreement – fiction though it is in so many cases – is an important reason for construing the agreement as strictly as possible, thereby inhibiting review. On the principle of caveat subscriptor the complainant ought to have known what he was letting himself in for; and the courts have as such refused to read into the agreement such implications as a duty to provide a fair hearing before disciplinary action is taken.

On the other hand, the private nature of the agreement has enabled some courts to adopt a more expansive view of the scope of review. They have seemed more prepared to read into the agreement provisions of fairness and reasonableness as these concepts are interpreted at common law…based partly on the realization that members of private organizations have little or real choice over the terms of their agreements at all, including those relating to penal and disciplinary provisions."

[67] It is apparent that it is particularly in the latter context (i.e penal and disciplinary decisions) that some courts have adopted a more expansive view. As for the rest courts have insisted on a strict approach.

[68] As for the first school of thought, Baxter refers in particular to *Mustapha v the Receiver of Revenue*[71] and *Hebert Porter & Company v Johannesburg Stock Exchange;*[72] As for the second proposition he refers to *Thereon v Ring van Wellington van die NG Sendingkerk van Suid-Afrika,*[73] *Dawnlaan Beleggings (Edms) BPK v Johannesburg Stock Exchange*[74] and *Jockey Club of South-Africa v Feldman*[75].

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71 1958 (3) SA 343 (A) at 375A

72 1974 (4) SA 781 () at 788D; Carr v Jockey Club of South-Africa, 1976 (2) SA 717 (W)

73 1976 (2) SA 1 (A) at 9C-G, 21D-F

74 1983 (3) SA 344 (W) at 360B – 365B

75 1942 AD 340, 350-1

[69] Mr. Frank has started off his argument by referring to the following statement of Corbett J in *L F Boshoff v Cape Town Municipality*[76]

> *"**In determining whether this Rule*** (i.e. Rule 53) ***applies to the proceedings initiated by the company by way of summons, it is to be noted that it applies to all proceedings to review the decision or proceedings "*****of any inferior court and of any tribunal, board or officer"****. Pausing here for a moment, it is clear that in the present case the only one of these categories which could possibly apply to the Municipality is a "board" and the question is whether that term, interpreted in its context, does so apply. The remainder of the portions of the Rule quoted above give a clear indication of what sort of body was intended to be included in the term "board". Firstly, it must be one performing judicial, quasi-judicial or administrative functions. Of these functions only the latter two could be performed by a board.*
>
> *…. All these provisions indicate that this Rule was intended to apply where a decision has been arrived at by, inter alios, a board, presided over by a chairman, after something in the nature of proceedings (of which a record is kept) have taken place before it. The proceedings might be quasi-judicial, e.g. the proceedings of a local transportation board ….*
>
> *These provisions indicate the type of board, which is contemplated in Rule 53 and, in my opinion, a corporate body such as the Municipality, acting in the capacity in which it did in this case is not such a board. I, therefore, hold that Rule 53 does not apply and that accordingly the summons cannot be set aside for want of compliance with that Rule."*

[70] Mr Tötemeyer has submitted in reply that had the *Boshoff*-case been decided under the Namibian constitutional dispensation the outcome would have been much

[76] 1969 (2) SA 274E-H

different. As was stated by Cameron J in *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Municipality and Others:*[77]

> ***"[37]…The constitutional status of local authorities was therefore different from the pre-constitutional era…"***

[71] I agree with this submission – as far as local authorities are concerned. In my view it by no means changes the position as far as private commercial transactions between two private individuals or entities are concerned.

[72] Mr. Frank submits that in the first instance the decision taken by the second respondent to supply fuel to the sixth respondent is not an administrative function at all and such proceedings did not occur in the current matter. There is not even, so he argues, a suggestion to that effect in the current matter; that the act itself, so he argues, acknowledges that infringements on constitutional rights may occur. Authority for that, so he argues, is to be found in sub-sections (2) (3) and (4) of section 4A of the Act. He poses the question: *"Is the act expressly implied into the terms of the agreement."* He submits no – *"there is no duty outside the duty created in the contract and one cannot go beyond the duty in the contract."* This is so because the party has a right to contract with whomever he wants to contract.

[73] As was stated in by Coetzee J in *Herbert Porter*-case:

> ***"That Stock Exchanges not only exist in modern developed capitalistic economies but that they are indispensible is a simple fact of life. It is equally true that public interest demands that they should be orderly and fairly conducted, which is ensured by a measure of statutory control. To refer however to the Stock Exchange Control Act, 7 of 1947, as its 'empowering Act'…is inaccurate…Neither directly nor indirectly, does the Stock Exchange Control Act create statutory stock exchanges. This act falls nicely in the general pattern of South-African enacted to***

[77] 2007 (4) SA 276 (SCA)

> ***control a large variety of financial institutions such as banks, building societies, pension funds, benefit funds, insurance companies etc. It is fundamentally licensing legislation. Any stock exchange which functions as such requires to be licensed under the Act. Its rules must conform with certain standards laid down in the act, and must be approved by the registrar of Financial Institutions. A board of appeal is established by section 11 of the Act, to which appeals may be made under section but this does not affect the purely contractual relationship between a licensed exchange and its listed companies….this does not detract from the contractual quality of its subsequent relationship with such company. The J.S.E. is no more a creature of statute than any bank or building society, and I am not going to approach these problems of construction as if they arise in the field of public law."***[78]

[74] The remarks of Coetzee J, in my view, apply in point to the relationship between the applicant and the second respondent. Both are required to be licensed in terms of the Act. That license is issued by the Minister. In terms of section 4A of the Act any agreement entered into between a wholesaler and a retailer must comply with certain standards. If a party to an agreement is dissatisfied with a term of the agreement he/she/it may request that the determination of such term(s) be referred for arbitration. The above however does not in any manner whatsoever affect the relationship between the applicant and the first respondent.

[75] In my view the following statement by Malan AJA in *Reddy v Siemens Telecommunications (Pty) Ltd* [79]2007 (2) SA 485 (SCA) at par 15 is in point:

> ***"…the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta sunt servanda".***

[78] 1974 (4) SA 781 (W) at 791 B - F

[79] 2007 (2) SA 485 (SCA) at para [15]

[76] I am respectfully of the view that the authorities relied upon by the Applicant do not support the proposition that purely because the Act introduces certain requirements for agreements between wholesalers and retailers, that any decision taken in terms of such agreement is for that reason reviewable. Such an approach would in my view operate harshly against wholesalers within the industry and can only serve to stifle the industry. In any event, *ABSA Insurance Brokers (Pty) Ltd v Luttig and Another NNO* was concerned with an agreement between an agent and an insurer authorising the agent to deal with premiums in contravention section 20bis(3) of the Insurance act which prohibited such manner of dealing. It was not concerned with a review at all.

[77] *Herbert Porter and Co Ltd. and Another v Johannesburg Stock Exchange*[80] *was* concerned with a tribunal or adjudicating body created by agreement, charged with the duties to decide. The remedies for this breach Coetzee J held: *"are those which an innocent party usually has ex contractu".*[81]

[78] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another* was concerned with the power of the president of the J.S.E to suspend the listing of shares under section 17(3) of the Stock Exchange Act and the court had set aside the power exercised by its president. It is clear it was reviewed on the same basis as the other stock exchange cases.

[79] In *Dawnlaan Beleggings (Edms) Bpk. v Johannesburg Stock Exchange and Others*[82] the review was entertained purely because the Stock Exchange Act had imposed a public duty on a governing body created by agreement.[83]

[80] *Grey's Marine Hout Bay (Pty) Ltd and Others v The Minister of Public Works*[84] was concerned with the decision of the Minister to lease a portion of land. It was

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80 1974 (4) SA 781 (T)

81 At 795 E - F

82 11983 (3) SAS 344 (W)

83 At 365 B

concerned with the Promotion of Administrative Justice Act, 3 of 2000. It was there held: *"Administrative action is conduct of the bureaucracy in carrying out daily functions of State that necessarily involves application of policy with direct and immediate consequences to persons."*

[81] *Kouga Municipality v De Beer and Another*[85] where it was held by Cameron that in a constitutional dispensation *"our constitution has not only enhanced the status of municipalities but accords it powers, which, like other organs of state, can be reviewed by courts."*[86]

[82] *Transnet Limited and Others v Chirwa*[87] concerned a contract of employment concluded between the State and a private individual and it was there held that *"in taking a decision to dismiss an employee the State was not acting as a public authority but merely as an employer"* and that such decision did not constitute administrative action.

[83] In the matter of *Turner v Jockey Club of South Africa*[88] the following was stated:

> ***"It is common cause that the relationship between a jockey licensed under the respondent's rules – such as the appellant – and the respondent, is contractual, and that that relationship is governed by the respondent's rules and regulations, which constitute the terms of the contract between the parties, and the applicable principles of the common law."***

The Court went on further to state:

> ***"It is clear, I think, that the reference to "the nature of the tribunal", in its context in the passage cited, is a reference to the nature of***

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84 2005 (6) SA 313 (SCA)

85 2008 (5) SA 503

86 At 507 G - H

87 2007 (2) SA 198 SCA)

88 1974 (3) SA 633 (AD)

the tribunal's constitution, i.e. according to whether it was created by statute or by contract. In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected …"

[84] In *Blacker v University of Cape Town and Another*[89] it was held that Rule 53 of the Rules were applicable to certain disciplinary proceedings, of an entity which keeps a record of the proceedings conducted before it.

[85] How does one distinguish between a right and discretion in an agreement? Mr. Frank submits that the exercise of discretion inevitably involves the weighing up against one another of all the pro's and cons.

[86] In *Mustapha and Another v The Receiver of Revenue, Lichtenburg & Others*[90] Schreiner J held as follows:

"Although a permit granted under sec. 18(4) of Act 18 of 1936 has a contractual aspect, the powers under the subsection must be exercised within the framework of the Act and the regulations which are themselves, of course controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew or to refuse to grant or renew, the permit, the Minister acts as a state official and <u>not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract."</u>

[89] 1993 (4) SA 402 (C)

[90] 1958 (3) SA 343 (A)

[87] That the Petroleum Products Energy Act regulates the industry and that it provides for certain requirements to which agreements between retailers and wholesalers must conform, is common cause. It is common cause that neither applicant nor second respondent are public bodies and that they are private entities. Their relationship with the Minister is in my view is analogous to those licensing authorities as was referred to by Coetzee J in the *Herber Porter*-case. *Inter se* their position is different; it is purely contractual.

[88] Much of the argument concerned the discretion exercised by the second respondent to have entered into the agreement with the sixth respondent. What does discretion entail?

> ***"Discretion may be defined in various ways, but however defined, it usually involves (1) a choice between alternative causes of action; and (2) that such choice not be made arbitrarily, wantonly, or carelessly, but in accordance with the requirements of the situation; and the definition of a 'discretionary power' adopted by the Council of Europe's Committee of Minister's: 'The term "discretionary power' means a power which leaves an administrative authority some degree of latitude as regards decisions to be taken, enabling it to choose from among several legally admissible decisions the one it finds to be most appropriate."***[91]

[89] As Ronald Dworken states:

> ***"Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding band of restriction. 'Discretion under which standards?' or 'Discretion as to which authority?"***
>
> ***"…Not all decisional referents will be proper, but it is only those factors that the decision-maker has internalized (i.e. those which he***

[91] Baxter: Administrative Law, 1ed; at p 88, footnote 102

considers himself under an obligation to uphold) which will really act as constraints upon his power of decision." [92]

[90] In my view the answer is to the two questions posed above is to be found in the express terms of the agreement between the parties.

[91] It is clear to me that when the parties hereto entered into the agreement in question they had specifically, and by reference, incorporated into the agreement the provisions of section 4A of the Act. Not only did they do that. The agreement in fact states that it has been entered into on the basis of section 4A. They deemed it necessary and they have stipulated in the agreement which clauses shall be subject to the provisions of clause 2A and by that, section 4A of the Act.[93] By doing that they incorporated into their agreement a scheme of fairness and reasonableness as contemplated by section 4A of the Act. It became part of the contractual terms. The second respondent furthermore expressly reserved its common law right to grant similar rights to other parties on different premises. By agreeing to that the parties obviously intended that clause 2A will not apply to clause 3.2 and as a consequence thereof section 4A was excluded from the exercise of such discretion. Having regard to the clear language of the agreement, the parties clearly intended exactly this. It is clear in my view that the agreement was not an exclusive agreement at all. This in my view is a reservation also of the second Respondent's constitutional right to practice any trade in a manner which it deems fit and which makes commercial sense to it. The second respondent could exercise its discretion to award such rights to any other person in respect of any other premises in whatever way it deemed fit and appropriate without involving the applicant.

[92] In my view Mr. Frank correctly submits that a reservation of rights can never amount to a curtailment of rights. What this reservation confirms in my view is that the second respondent has a discretion which can be exercised outside of the agreement, particularly because the agreement does not grant exclusive rights to the applicant. The second respondent's decision (i.e. the exercise of that discretion), is a business decision taken in the ordinary course of business to advance second

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92 Baxter *supra* at 88 - 89

93 Clause 4.4, 6.2, 5.1.1, 5.1.2, page 171 and 169

respondent's own business interest and such decision in my view fall squarely within the statements by Coetzee J to which I have referred above.

[93] Mr. Tötemeyer has submitted in reply that there are various other clauses in the agreement which clearly envisages the exercise of a discretion, but which is not identified and made subject to the terms of the agreement. My view of this is that the parties did not intend those to be subject to the provisions of clause 2A. This is not to say that the applicant cannot demand that such clauses be referred to and possibly be resolved by way of arbitration.

[94] The fact that the parties hereto imported into their contractual relationship a regime providing for a fair and reasonable conduct in certain instances does not by that render the exercise of any discretionary power by either one of the parties reviewable, nor does it bring administration of the agreement into the public domain. It is in my view a purely commercial transaction and so was the decision to supply fuel to the sixth respondent.

[95] As a general matter of interpretation, a court will try to avoid concluding that words in a contract are meaningless.[94] Generally, words in commercial contracts are intended to have business efficacy and should be interpreted consistently with such a purpose. Of course, any interpretation must be consistent with other provisions of the contract, and with the statutory provisions relevant to the contractual relationship. Moreover, in determining the meaning of the provision a court may consider both the conduct of the parties and the ordinary commercial practices of the environment in which they contract.

[
96] There is in my view no other provision in the dealership agreement which conflicts with interpreting clause 3.2, as expressly reserving the second respondent's right to grant similar rights to any other party on any other premises. Consequently, that interpretation would not be repugnant with any other provision of the lease

[94] See *Kühn v Levey and Another* 1996 NR 362 (HC) at 336 C – F. For South African authority on this point, see *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 931 G – H; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670 G - H; *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) at 641 B - F

agreement, nor would it lead to any absurdity. This is because the parties expressly identified those clauses which they deemed to be subject to clause 3.2.

[97] I am fortified in this by the following statements of Mtambanengwe AJA in his dissenting judgment in Southline Retail Centre CC v B P Namibia (Pty) Limited[95] :

> ***"…adopting an interpretation of the clauses that accords with the language used in the contract as a whole, that harmonises clause 2 and clause 4.2 and that accords with what the lessee, according to the language of clause 4.2 and its own conduct…***
>
> ***With respect, it seems to me that the approach taken in the judgment, of reading clause 2 apart from clause 4.2 and straining to find that an irrevocable option was granted to the lessee, amounts to making a contract for the parties… I do not understand the basis of the judgment concluding (paragraph [46]) that "there is no other provision in the lease agreement that would conflict with interpreting clause 2 of the Lease Schedule as affording an option to the lessee". <u>That can only be said by regarding the words of clause 4.2 as completely meaningless.</u> The conduct of the parties,…provides a very strong indication that neither regarded that clause 2 conferred an option upon the lessee (see in particular paragraph [47] of the judgment).***
>
> ***"…one must also assume that both parties were aware of these principles and deliberately chose the language they used in both clause 2 and clause 4.2. Moreover, there is no suggestion on the record, nor did either party submit that either of them negotiated from a position of inferiority to the other. These considerations leave no room for speculation."***

[98] Mr. Tötemeyer has submitted in reply that in terms of rule 53 also the decisions of individuals are in any event reviewable. He relies for this proposition on *Federal Convention of Namibia v Speaker, National Assembly of Namibia*[96]. I do not see how this authority can assist the applicant. The individual there concerned was the Speaker of the National Assembly who had taken a decision to remove a person as

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[95] Unreported judgment: Supreme Court of Namibia, Case No. SA 2 / 9009 delivered on 9 June 2011

[96] 1991 NR69 at

a member of the National Assembly in terms of section 48(1) (b) of the Constitution and to replace him in terms of Article 48(2) with a person nominated by a political party. It was held that the word "officer" in Rule 53 was wide enough to include a person who holds office as Speaker of Parliament. It is clearly within the public domain.

[99] In my view the non-compliance with or a breach of any of the terms and conditions, or for that matter Section 4A will amount to a breach of contract for which the other party has the normal contractual remedies. It may even be that the applicant may have a delictual remedy for unfair competition, but that does not make the second respondent's conditional decision to deliver fuel to the sixth respondent reviewable. Given what I have said above, Article 18 of the Namibian Constitution, in my view, finds no application here.

[100] As was stated in *Carr v Jockey Club of South Africa*[97]*:*

> ***"The Supreme Court however also exercises its powers of review in the case of non-statutory bodies (such as clubs, churches and other voluntary associations). In this type of case such powers are generally more narrowly circumscribed. The reason for this arises not only from the different nature of the tribunal but from the fact that the scope and manner of the exercise of the tribunal's discretion is regulated not by any statutory provisions, but by its own rules. In order to determine the review jurisdiction of the Courts various situations must be distinguished.***
>
> ***(a) In the case of an application by a non-member for membership or for permission (by way for example of the grant of a licence) to use certain facilities of the non-statutory body, the latter may, just as any person may decline to consider an offer to enter into a contract, decide, for whatever reason, not to receive or consider the application. Such decision is in effect not reviewable. It***

[97] 1976 (2) SA 717 (N) at 721 H – 724 A

matters not that membership may be of considerable economic benefit. ---

(b) Where the application is received and the body actually does proceed to consider it then a contractual relationship might be created in terms whereof the applicant is entitled to have the application dealt with in accordance with the rules of such body. (Ricardo v. Jockey Club of South Africa, supra at p. 357). The power of a Court to interfere on review in this situation and the basis on which it does so is the same as that described in para. (c) below.

(c) Where <u>the exercise by the authority of a discretion</u> relates to an existing member thereof or to a person who (e.g. by way of a licence) has been granted the right to use certain facilities of such body, then the Court will interfere on review <u>only if it is shown that such decision was not arrived at in accordance with the rules of such body</u>. This is because such rules form the terms of a contract between the parties and unless there has been a breach thereof no grounds for review arise (Martin v. Jockey Club of South Africa, 1951 (4) SA 638 (T) at p. 647; Anschutz v. Jockey Club of South Africa, supra at p. 80; Turner H v. Jockey Club of South Africa, 1974 (3) SA 633 (AD) at p. 645). More particularly as regards the manner in which non-members become bound by such rules, I refer to what VAN DEN HEEVER, J.A., said in Rowles v. Jockey Club of South Africa and Others, 1954 (1) SA 363 (AD) at p. 364. The learned Judge stated:

> ***'The Club's rules are the domestic statutes of a voluntary association. In order to achieve its objects its rules also refer to the conduct of non-members. But since the rules have no statutory authority they cannot, save in so far as a non-member has bound himself by agreement to observe them, be legally binding upon non-members.***

Similarly, the Club cannot, apart from contract, impose its will upon non-members by legal process. It can do so extra-judicially, however, because it is a powerful organisation, in the same way as a financially strong brewery may factually exercise control over hotel proprietors and the victualling trade'.

It therefore becomes a matter of construction of the rules in order to determine what the terms of the contract are and accordingly whether there has been a reviewable breach thereof. More particularly, as regards whether the rules of natural justice apply, BOTHA, J.A., in Turner's case, supra at pp. 645 - 6, stated:

'In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. (Maclean v. Workers' Union, (1929) 1 Ch.D. 602 at p. 623). The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in the contract as stated in Mullin (Pty.) Ltd. v. Benade Ltd., 1952 (1) SA 211 (AD) C at pp. 214 - 5, and the authorities there cited. The test is of course always subject to the expressed terms of the agreement by which any or all of the

fundamental principles of justice may be excluded or modified. (Marlin's case, supra at pp. 125 - 130).'

COETZEE, J., in Herbert Porter & Co. Ltd. and Another v Johannesburg Stock Exchange, 1974 (4) SA 781 (W) D at p. 788, formulated the test as follows:

'In Marlin v. Durban Turf Club and Others, 1942 AD 112, it was held (at p. 126) that this test of fairness must be applied with due regard to the nature of the tribunal or adjudicating body and the agreement which exists between the persons affected. The relations between the parties are contractual and the rights which such relations give rise to depend on the rules to which Vrede has subjected itself, the written contract between it and the J.S.E. and on the principles of the common law. (See Marlin's case at p. 122). It does not follow that in every case where one of the parties has the right to decide or approve something under their contract the other is entitled to insist that the rules of fundamental fairness be observed by the other in arriving at this decision, or that he may have the remedy of the kind now sought if that be not done. Only when on a proper construction of the agreement a 'tribunal or adjudicating body', which obviously may even be an individual, is created, which is charged with the duty to decide, does this principle apply'.

[101] Having regard to the authorities referred to above and the facts of the matter it cannot be contended that the second respondent falls within anyone of the categories of bodies mentioned in Rule 53(1) nor is the decision it took to supply the sixth respondent with fuel and reviewable administrative action or otherwise, within

the meaning of Rule 53 or otherwise. The decision taken by the second respondent is a purely commercial decision which is not reviewable in terms of rule 53 or otherwise.

[102] Furthermore the second respondent's Maphosa has made it very clear since inception of the review application that no decision making record exists at all. I have no reason to and cannot go behind the affidavit of the second respondent and must accept that the second respondent does not have any decision making record in its possession. I do not agree with Mr. Tötemeyer's submission that at least "DM 2 constitutes a document which forms part of a decision making record.

[103] As was stated by Kriegler AJA in *Jockey Club of South Africa V Forbes*[98]:

> ***"This is a good example of the stultification inherent in reading Rule 53 as a law of Medes and Persians, as Counsel for the Jockey Club would have it…the party whose executive bodies had allegedly infringed Forbe's contractual rights – and was holding his money – was the Jockey Club as such. Forbes was in possession of the records of the hearings before each of the three tribunals and needed production of no more to enable him to put his case fully before the court. He knew what he had submitted to those tribunals, what they had decided and could infer on what grounds they had done so. His founding affidavit sets out his complaints in detail and indicated with precision what his basic legal contentions were."***[99]

[104] I am respectfully of the view that the same applies in point to the approach taken by the Applicant in this matter. What the applicant had done is this; It asked the second respondent to provide a record; when second respondent replied that it did not have record of a decision making proceeding, the applicant disputed this and it lodged the application to compel. The application is, as far as the existence of the alleged record is concerned, founded upon a skeleton case, which applicant then tried to supplement in its replying affidavit – which it cannot do.

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[98] 1993 (1) SA 649 (A)

[99] At 662 H - I

CONCLUSION:

In the result I make the following order:

1. The application by the Applicant to compel the Second respondent to deliver a record as envisaged by Rule 53(1)(b) is dismissed;

2. The Applicant is ordered to pay the Second Respondents costs of the application; such costs shall include the costs of one instructing and two instructed Counsel.

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SCHICKERLING, AJ

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