ARTHUR FREDERICK UFFINDELL T/A ALOE HUNTING SAFARIS v GOVERNMENT OF NAMIBIA AND 4 OTHERS

CASE NO. (P) A. 141/2000

2009/04/20

Maritz, J.

PRACTICE
CONSTITUTIONAL LAW
EVIDENCE

Practice - *Locus standi* – Common Law – aspect of procedural law – flexibility in allowing – "direct and substantial interest" – scope and ambit not capable of exact delineation –to be assessed with reference to circumstances of each case

Practise - *Locus standi* – Article 25(2) of Constitution – meaning of "aggrieved persons" – purposive approach to ensure enjoyment of the full measure of protection of fundamental rights entitled to – public interest character of rights protected – entitlement to relief to be assumed in assessing standing - approach to standing wider than under common law

Practice – different requirements for interim and final interdicts – differences in assessing facts at interim and final stage of proceedings discussed

Constitutional law – Article 10(2) – suspect classification – burden of proof to justify

Constitutional law – Article 10(1) – right to equal treatment – mere differentiation permissible for persons not similarly situated – differentiation amounting to discrimination in pejorative sense – intelligible differentia - rational connection test

Constitutional law – principle of equality – differentiation made to redress disadvantage occasioned by earlier administrative decision – differentiation intended to redress disadvantage permissible

Constitutional law – Article 18 – right to administrative fairness and reasonableness – legitimate expectation to be heard – principle and objective application discussed

Evidence – burden of proof - Article 10(1) of Constitution – right to equal treatment - differentiation amounting to discrimination in pejorative sense – differentia not intelligible – no rational connection between measure and legitimate governmental objective

CASE NO.: (P) A. 141/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ARTHUR FREDERICK UFFINDELL t/a

ALOE HUNTING SAFARIS **Applicant**

and

GOVERNMENT OF NAMIBIA **First Respondent**

MINISTER OF ENVIRONMENT AND TOURISM **Second Respondent**

MINISTER OF FINANCE **Third Respondent**

KENNETH MORRIS **Fourth Respondent**

BYSEEWAH HUNTING SAFARIS (PTY) LTD **Fifth Respondent**

CORAM: **MARITZ, J.**

Heard on: 2001/03/05

Order on: 2001/03/05

Reasons on: 2009/04/

REASONS

MARITZ, J.: [1] What follows are the reasons for the order in which the Court discharged a rule *nisi* earlier granted in favour of the applicant; dismissed the balance of his application for interdictory relief and ordered him to pay the respondents' costs.

[2] The cause of discontent between the litigants lies the sale of a trophy hunting concession in the Mamili National Park under the provisions of the Nature Conservation Ordinance, 1975 (the "Ordinance"). Limited and strictly regulated concessions of that nature had been approved in principle by Cabinet as a means to utilise wildlife resources on a sustainable manner in game parks and reserves on State land and to remove crop-raiding and problem animals in communal areas adjacent thereto. Moreover, an amendment to the Ordinance in 1996 allowed indigenous communities to establish conservancies on communal land and to obtain permits to hunt limited numbers of certain species of game thereon. The sale of those quotas to trophy hunters proved to be the most beneficial means of utilising of the rights granted under the permits: comparatively, it generated the highest income; it constituted an effective, economical and viable means to remove animals either too old to reproduce or approaching the end of their natural lives from game populations; the meat of hunted trophy game remained the property of the conservancy and could be distributed amongst its members as food and the income generated could be deposited in the Game Products Trust Fund for distribution to the relevant communal conservancies and Wildlife Counsels, to finance appropriate communal area developments and to compensate neighbouring communal farmers who had suffered damages caused by problem animals from adjacent game parks and reserves.

[3] The sale of trophy hunting concessions in those areas by tender (during 1992-1994) and public auction (since 1995) had been an important stimulus and source of income for the rapidly developing and highly profitable trophy hunting industry. The applicant, a registered professional hunter trading under the name and style of Aloe Hunting Safaris, held successive concessions during the period 1994 - 1999. The sale of further concessions for the first 3 years of the new millennia were approved by Cabinet on 9 December 1999 and auctioned off on 9 March 2000 at Windhoek. The applicant was one of the bidders at the auction but his bid for a concession in the Mahango Game Park was unsuccessful. In the result, he was left without a trophy hunting concession on State land for the next three years and, as may be imagined, without the financial benefit he had hoped to gain from its exploitation.

[4] Although he lost to a higher bidder, the applicant at least had the satisfaction of knowing that he had been accorded an equal opportunity to compete with others for hunting concessions at the auction. The fourth and fifth respondents were denied that opportunity. They had received invitations from the Ministry of Environment and Tourism to attend the auction and the fourth respondent, also a professional hunter and former concession holder, was keen to win a concession at the auction. He travelled on short notice from Outjo to partake in the auction at Windhoek - only to be informed by a certain Mr Beytel during the registration process immediately preceding the auction that he would not be allowed to either register or to bid at the auction. Beytel, a Deputy Director in the employ of the Ministry, told him that the decision was not his but had been taken by the Director of Resource Management in the Ministry. When he and Beytel enquired from the Director about her reasons for the decision, she told them that her decision was final and that she was not willing to

discuss the matter any further. During a subsequent conversation, Beytel speculated that the decision might have been based on issues which had arisen in the course of a previous concession held by him. The fourth respondent's assurances that those issues had been resolved with the Government Attorney long before the auction and his objections against exclusion, were to no avail: He was not allowed to bid at the auction - neither in his personal capacity nor on behalf of the fifth respondent.

[5] Aggrieved by – what they believed to be - their unjustified and unlawful exclusion, they launched an urgent application in this Court to interdict implementation of the concessions sold at the auction pending the outcome of an application to review the decision which resulted in their exclusion; for a declarator that the impugned decision was unconstitutional; for an order that the agreements entered into pursuant to the sale by auction should be set aside and that the Ministry should be directed to auction the concessions afresh. The application cited the Government, the Minister of Environment and Tourism, the Director of Resource Management, the Permanent Secretary of the Ministry and the seven successful bidders as respondents. The founding papers alleged that the impugned decision was taken in violation of their fundamental right to equality; to fair administrative justice and to freely practice a profession or occupation and carry on a business. They succeeded in obtaining a rule *nisi* and interim interdict along the lines of the relief prayed for. Pending the return day of the rule, the Minister and the other cited officials in the Ministry consulted the Government Attorney and met with the legal representatives of the successful bidders. The consensus at that meeting was that the decision to exclude the fourth respondent from the auction was indeed unconstitutional and, for that reason, unlawful. In settlement of – what he accepted to

be - a lost cause and to avoid further prejudice to the successful bidders (who were not to blame for the predicament occasioned by the decision), the Minister, acting upon a written recommendation of the Director: Resource Management and the Permanent Secretary in the Ministry, decided to make a further trophy hunting concession available in the Mamili National Park and to sell it by private treaty to the fourth respondent subject to the same conditions applicable to the other hunting concessions sold at the auction. In the negotiations that followed, the matter was settled on that basis subject to Treasury approval under the State Finance Act, 1991, which was obtained subsequently. For the sake of brevity, I shall hereunder refer to this application as the "Morris-application"

[6] Unfortunately, the settlement of one dispute - like cutting off one of the Hydra's heads – spawned, in this instance, two more: the current application being one and an application brought by one Allan Cilliers being the other. The applicant feels himself aggrieved by the decision of the Minister to grant and sell a trophy hunting concession in the Mamili National Park to the fourth respondent by private treaty for, what he claimed to be, an "extremely low price". The concession, he said, should have been offered for sale on auction in accordance with a "fixed policy and practise for many years". The sale by private treaty in settlement of the issues in the Morris-application violated his right to equality protected under Article 10 of the Constitution; detracted from his right to fair administrative action under Article 18 thereof; impinged and prejudiced his right to practise his profession as a professional hunter protected under Article 21(2)(j); contravened the Tender Board Regulations; derogated from the legitimate expectation he had to be heard before deviating from the policy which had been followed for many years regarding the sale of concessions

and, finally, was unjustified because there was no factual or legal basis for the settlement of the dispute in the first place.

[7] The applicant applied, amongst others, on an urgent basis for – and obtained - a rule *nisi* and *interim* interdict in the following terms:

> "1. A rule *nisi* is issued calling upon the respondents to show cause …, why-
>
> 1.1 the decision, taken by the first, second and third respondents to settle or approve the settlement of (the settled application) by selling and granting to the fourth or fifth respondent a trophy hunting concession in the Mamili National Park, should not be reviewed and set aside or, alternatively, should not be declared to be unconstitutional, invalid and unlawful;
>
> 1.2 the first and second respondents should not be interdicted from entering into, in consequence of the settlement referred to in paragraph 1.1, any agreement with the fourth or fifth respondent or from otherwise implementing the decision to so settle that matter by selling and granting a trophy hunting concession in the Mamili National Park or elsewhere to the fourth or fifth respondent;
>
> 1.3 the first, second and third respondents and, in the event of the fourth or fifth respondent opposing the application, the fourth and/or fifth respondent (as the case may be), should not to pay the costs of this application jointly and severally, the one paying the other to be absolved.
>
> 2. Pending the final adjudication of this application-
>
> 2.1 the first and second respondents are interdicted from entering into, in consequence of the settlement referred to in paragraph 1.1 above, any agreement with the fourth or fifth respondent or from otherwise implementing the decision to settle that matter by selling and granting a trophy hunting concession in the Mamili National Park or elsewhere to the fourth or fifth respondents;

2.2 the fourth and fifth respondents are interdicted from commencing any hunting activities in the Mamili National Game Park in consequence of the aforesaid settlement or any agreement entered into in terms of that settlement."

[8] At the outset of the rule *nisi*-proceedings, the respondents' counsel challenged the applicant's *locus standi* to bring this application. However, later in argument she informed the Court that the respondents did not object to the rule *nisi* being issued (albeit in a slightly amended form) subject to their right to resist confirmation thereof on the return day, *inter alia*, on the question of standing. At that stage of the proceedings, their objection was mainly against interdictory relief being granted in the interim.

[9] Because standing was a threshold issue[1] and the relief contemplated in the interim interdict would essentially be repeated - albeit in the form of a final interdict - had the rule *nisi* been made absolute on the return date, the Court had to decide thereon before it could consider the applicant's entitlement to the rule and interim relief. It held that, on the papers filed during that stage in the proceedings, the applicant had the requisite standing to move the relief prayed for. By reserving their rights on standing, the issue remained alive and had to be finally decided on the return day after consideration of all the affidavits which had been filed in the application. The affidavits filed and discovery made after the rule had been issued did not add much to the issue of standing and, because it has not been pressed in argument on the return day, it will suffice for purposes of these reasons to capture the essence of the

[1] See: Baxter: *Administrative Law*, p. 648

Court's findings on the issue in its earlier judgment and, where necessary, expand thereon.

[10] Initially, it was contended on behalf of the respondents by Ms Engelbrecht that the applicant had no *locus standi* to take issue with the Minister's decision because he had no direct or substantial interest in the Morris-application. He was not cited as a party to it and, had he been, it would have been tantamount to a misjoinder. By parity of reasoning, she argued, he could not be said to have any interest in the settlement of that application – which he was, in effect, seeking to set aside in this application. The argument loses sight of one important consideration: Whereas the relief prayed for in the Morris-application was limited to prevent implementation of the sale of concessions at the auction pending judicial review of the decision to preclude the fourth and fifth respondents from participating, the subsequent settlement went well beyond that. It introduced an element that did not form part of the relief originally sought in the application, i.e. the sale by private treaty of a hunting concession to the fourth respondent in an area that had not been one of the concession areas available for auction. Had the terms of the settlement remained within the four corners of the relief prayed for, Mr Van der Byl SC argued on behalf of the applicants, they would not have had any quarrel with it or, for that matter, any standing to question it. It is precisely to the extent that the terms of the settlement went beyond the relief contemplated, that it impacted on the constitutional rights and legal interests of the applicant and had given them standing to bring this application.

[11] I agree with the distinction drawn by counsel, but it is only one of consequence if a rational connection is shown to exist between the challenged

administrative action and the constitutional rights and legal interests of the applicant allegedly affected by it which, in a constitutional setting, must be sufficiently direct and substantial to confer upon the applicant the legal right to challenge it under Article 25(2) of the Constitution as an "aggrieved person".

[12] Under common law, the question of standing (in the sense of an actionable interest) has always been regarded as an incidence of procedural law. The assessment of the concept as an aspect of procedural (rather than substantive) law allows the Court a greater measure of flexibility[2] in determining whether, given the facts of the particular matter, the substance of the right or interest involved and the relief being sought, *locus standi* has been established. Moreover, although the nature of the interest to be shown for standing is captured in the clipped phrase "direct and substantial", the scope and ambit thereof are not capable of exact delineation[3] by rules of general application which are cast in stone.[4] Whether a litigant's interest in the subject matter of the litigation justifies engagement of the Court's judicial powers, must be assessed with regard to the peculiar facts and circumstances of each case. What will generally not suffice, is apparent from the illuminating judgment of Botha AJ on the issue of *locus standi* in *Jacobs en 'n Ander v Waks en Andere,* 1992 (1) SA 521 (A) at 533J – 534C[5]: an interest which is abstract, academic, hypothetical or

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[2] Compare for example: *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*, 1933 AD 87 at 103; *Ex parte Mouton and Another*, 1955 (4) SA 460 (A) at 463H.

[3] See: *Financial Services Board and Another v De Wet NO and Others*, 2002 (3) SA 525 (C) at 579I-580A.

[4] *Kolbatschenko v King NO and Another*, 2001 (4) SA 336 (C) at 346H.

[5] Where he said: "'In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas omlynde grense nie. Die gebruiklikste manier waarop die vereiste beskryf word, is om te sê dat 'n eiser of applikant 'n direkte belang by die aangevraagde regshulp moet hê (dit moet nie te ver verwyderd wees nie); andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenswoordige belang moet wees (nie hipoteties nie) …"

simply too remote[6]. Considerations such as that the interest is "current", "actual" and "adequate" are vital in assessing whether a litigant has standing in the circumstances of a case.

[13] These common law principles and the measure of flexibility they allow the Court is an important reference, but not the true criteria, for deciding standing when litigants claim that their fundamental rights and freedoms protected under the Constitution have been infringed, derogated from or diminished. Whilst it is accepted for purposes of this judgment on the basis of the *Dalrymple*-case[7] that our law does not recognise standing on the basis of a citizen's action to vindicate the public interest, the Court has relaxed the common law criteria to establish standing in appropriate circumstances. It has done so where the liberty of another individual is involved[8] (although it has been regarded as more of an exception to the rule) and (in Britain) when it is necessary *ex debito justitiae*[9] to curb an abuse of public power. But, it is especially within the context of the protection and promotion of human rights values after the new constitutional dispensation created on Independence, that a more purposive approach must be adopted to accord individuals and classes of individuals standing to enjoy the full benefit of their entrenched rights and to effectively maintain and enhance the values expressed therein.

[14] Albeit in a different constitutional dispensation, this is also the approach which has been adopted by the majority of the Constitutional Court in South Africa. Under s. 7(4)(a) of the South African Constitution, a person referred to in paragraph

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[6] C.f. *Geldenhuys and Neethling v Beuthin,* 1918 AD 426 at 441; *Ex parte Mouton and Another*, *supra,* at 464A-B.
[7] *Dalrymple and Others v Colonial Treasurer,* 1910 TS 372 at 390.
[8] *Wood and Others v Ondangwa Tribal Authority and Another,* 1975 (2) SA 294 (A).
[9] Discussed in Wade and Forsyth, *Administrative Law* (7th edition) at 696 – 718.

(b) thereof is entitled to apply to a competent court of law for appropriate relief (which may include a declaration of rights) when "an infringement of or threat" to any fundamental right entrenched in the Constitution is alleged. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, 1996 (1) SA 984 (CC) at 1082G-H] Chaskalson P expressed the views he held on the approach to *locus standi* under the South African Constitution as follows at par [165]:

> "Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled….".

The reasons why a broader approach should be adopted are also to be found in the reasoning of O'Regan J in the same case at par [229] on p.1103E-H of the same judgment:

> "This expanded approach to standing is quite appropriate for constitutional litigation. Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all

> non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation…."

[15] It may be argued that s.7(4)(a) of the South African Constitution – especially if read with par (b) thereof – has been cast in broader terms than Article 25(2) of our Constitution which provides:

> "Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom …"

That, however, does not detract from the underlying principle that this Court, in giving effect to its constitutional duty under Article 5 to respect and uphold the fundamental rights and freedoms enshrined in Chapter 3 of the Constitution, must also interpret Article 25 (which is part of Chapter 3 and the rights contemplated thereunder) in a broad, liberal and purposive way – as this Court and the Supreme Court have held on numerous occasions in respect of other Articles in the same Chapter.[10] It has been held that "aggrieved persons" do not include those who sue on the basis of derivative rights (such as a sub-contractor or sub-lessee)[11] but judicial precedent on the interpretation of that phrase is limited and will undoubtedly require further judicial elaboration in future to determine which persons and classes of

[10] Compare, for example: *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*, 2004 NR 194 (SC) at 209G; *Government of the Republic of Namibia and Another v Cultura 2000 and Another,* 1993 NR 328 (SC) at 340B - D (1994 (1) SA 407 (NmS) at 418F – G; *Minister of Defence, Namibia v Mwandinghi,* 1993 NR 63 (SC) at 68 - 71; *S v Acheson,* 1991 NR 1 (HC) at 10A – C and *S v Zemburuka (2)*, 2003 NR 200 (HC) at 208A-E.

[11] As this Court held in *Kerry McNamara Architects Inc. and Others v The Minister of Works, Transport and Communication and Others* (delivered on 6 March 1997 in case no. A 297/96

persons (or their representatives) are accorded the right to seek protection or enforcement of their fundamental rights from the Courts. With the cautionary remarks of Dumbutshena AJA in *Kauesa v Minister of Home Affairs,*[12] that "(c)onstitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time" in mind, I shall, in the analysis what follows go no further than the exigencies of this case require.

[16] Whereas the applicant does not stand in a "direct administrative-law relationship" with the first, second and third respondents (such as the one created by the settlement between the second and fourth respondents), he claimed that his rights and interests flowing from his general relationship with that authority had been directly affected by the agreement between those respondents. "This will be the case, for example, where a concession is granted by one person and the interests of another are affected by the granting of the concession".[13]

[17] The Court cannot lose sight of the fact that the concession allows for the exploitation of natural resource falling in the public domain. There is a pressing environmental and economical need that those resources should be managed responsibly and, ultimately, for the public benefit. To that end, it has been established by the applicant that a policy was developed and applied by the first respondent for the sustainable exploitation of game on State land in the form of concessions to which a particular category of persons (i.e. professional hunters) had equal access. That policy, intended to bring about administrative fairness and transparency in the management of that natural resource, it appears, has been consistently applied since

[12] 1995 NR 175 (SC) at 184B.
[13] Wiechers, *Administrative Law*, p 278.

1992. I do not need to express any views on the 1998 affirmative action grant except to point out that affirmative action is, in its essence, not a concept separate and distinct from the equality-principle entrenched in our Constitution - it is an integral part thereof aimed at bringing about true equality of historically disadvantaged and minority groups. The Government has clearly demonstrated its commitment to redress social, economical and educational imbalances in Namibian society arising out of past discriminatory laws or practices by adopting and implementing a policy of affirmative action. Inasmuch as the 1998 affirmative action grant might have constituted a deviation from the established practise regarding the granting of concessions, it may well have been done in compliance with that policy and the express empowering provisions contained in Article 23 of the Constitution.

[18] The application of the policy and practise in relation to concessions have been reaffirmed in December 1999 when the second respondent recommended to Cabinet (and Cabinet apparently approved) that trophy hunting concessions for the 3 years that follow should be sold "by auction to Namibian registered persons who comply with the conditions for sale". Given, what at least *prima facie* appears to be a consistent practise of allowing persons falling within the aforementioned category to have equal access to the acquisition of concessions, those persons have an interest - more immediate and substantial than those of the public in general - to be aggrieved if the second respondent unlawfully deviates from it. I must note here in passing that, in deciding the question of the applicant's standing, the Court has to assume that the administrative action, which is the subject matter of the review, is a nullity[14]. When

[14] As Botha, J.A remarked in *Jacobs en 'n Ander v Waks en Andere*, *supra* at 536A "… om die vraag na *locus standi* uit te maak moet daar, as 'n kwessie van logika, veronderstel word dat die besluit wel ongemagtig en nietig is". (…to decide the question of *locus standi*, it must be assumed, as a matter of logic, that the decision has indeed been impermissible and void – free translation)

the second respondent purports to act on an administrative decision which is assumedly void *ab initio* by unlawfully granting a hunting concession by private treaty to the fourth respondent, the applicant and other persons similarly qualified as professional hunters who manifested an interest in obtaining trophy hunting concessions have reasonable grounds to feel themselves aggrieved for having been denied the opportunity to compete on an equal footing for the concession. In seeking a review of that decision, they would not assert their grievances as mere taxpayers or citizens generally, but as registered professional hunters with a special interest in the management and sustainable utilisation of that public resource; as persons who have previously held trophy hunting concessions and who, by participation in the earlier auction, have manifested an interest in again competing for one on an equal footing with others similarly situated. Even if the phrase "aggrieved persons" is not to be applied on the basis of a subjective assessment - and I expressly refrain from finding that, on a purposive approach, it may not be so understood - but falls to be assessed by the more stringent standard of reasonableness, I am satisfied that a reasonable person in the applicant's position would have had cause to be aggrieved and to claim that his or her fundamental rights have been infringed or threatened by the assumedly unlawful decision of the second respondent. For these reasons, the applicant had adequate cause to be aggrieved and to claim enforcement or protection of his fundamental rights as contemplated in Article 25(2) of the Constitution. It is on this premise that the Court proceeded to consider the merits of the application and made the order it did.

[19] The enquiry into the merits of the application seeks to ascertain whether the unlawfulness of the administrative action, which has been assumed in assessing the

applicant's *locus standi*, has indeed been established, regard being had to the requirements for a final interdict, the incidence of *onus* and the approach to be adopted by the Court in evaluating the evidence as a whole and deciding on the factual disputes raised in the affidavits of the contesting litigants in particular.

[20] It is common cause that the practices and policies around trophy hunting concessions on State land were developed around the provisions of sections 28(1)(a), 36(1)(a) and 78(f) of the Ordinance. They provide as follows:

> ""28. (1)(a) Subject to the provisions of Chapter IV no person shall, without the written permission of the Minister, hunt any huntable game, … or exotic game or any other wild animal on any land, including communal land, owned by the Government of the Territory or a representative authority.
>
> 36. (1)(a) Notwithstanding anything to the contrary in this Ordinance contained, the Minister may allow any person from any country or territory under a permit granted by the Minister to hunt species of game, and the number (but not exceeding two) of each such species determined by the Minister and mentioned in such permit, in the territory for the sake of trophies."
>
> "78. The Minister may –
>
> (a) …
>
> (f) take the measures which it may deem necessary or desirable for the purchase and sale of wild animals, exotic game …, whether alive or dead;"

The constitutionality of these provisions is not in issue. It is also not contended by the applicant that the sections do not provide an adequate legislative framework for the sale of trophy hunting concessions. His grievance relates to the manner in which they have been applied, i.e. in selling a concession to the fourth respondent by private treaty rather than by auction to the highest bidder. It is the second respondent's

decision to do so which, the applicant says, derogated from his right to equality, fair administrative action and the freedom to practise his profession protected under Articles 10, 18 and 21(1)(j) of the Constitution; which infringed his legitimate expectation to be heard before the Minister deviated from the longstanding practice and policy regarding the sale of hunting concessions; which conflicted the Tender Board Act, 1996 and the regulations thereunder and which was made without any factual or legal basis. In what follows, I shall deal with each of these contentions in the order in which they have been mentioned.

[21] Mr Van Der Byl argued on behalf of the applicant that the second respondent was obliged to apply the provisions of the Ordinance fairly and reasonably in granting concessions and, as the Government had done for more than 10 years, to treat all interested and qualified persons on an equal basis without favour or prejudice. He contends that even before constitutional entrenchment of the right to equality the Courts have held that a law should not be construed to achieve apparently purposeless, illogical and unfair discrimination or differentiation between persons who might fall within its ambit.[15] Referring to the "rational connection", "reasonable classification" and "intelligible differentia" criteria developed in local and international law around the principle of constitutionally entrenched equality,[16] he submits that the second respondent's decision to sell a concession to the fourth respondent by private treaty differentiated between the latter and other professional hunters without there being a rational connection to a legitimate governmental purpose for the differentiation. The applicant complained that he found himself in

[15] Referring to *Lister v Incorporated Law Society, Natal*, 1969(1) 431 (N) at 434 and *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk*, 1966(4) SA 434 (A) at 443.
[16] Discussed in *Harksen v Lane NO and Others*, 1998(1) SA 300 (CC), Warwick McKean, *Equality and Discrimination under International Law,* p 237 and Sieghart, *The International Law of Human Rights*, p 262.

exactly the same position in this application as the one in which the fourth respondent had been in the Morris-application, yet, whereas the fourth respondent was rewarded with a concession, the applicant's application was "vehemently opposed". Mr Smuts, who appeared with Ms Engelbrecht for the respondents on the return day, took issue with the contention that the applicant and the fourth respondent were similarly situated. Not all forms of differentiation violate the constitutional demand for equality, he contended,[17] and are permissible if persons are not similarly situated[18].

[22] It is common cause that the administrative decisions regarding the sale of trophy hunting concessions differentiated between the applicant and the fourth respondent. But, to assess the legality of the differentiation only with reference the Minister's decision to sell a concession to the fourth respondent by private treaty rather than by public auction, would ignore the history behind the decision. It is in the events which preceded the Minister's decision that the *ratio* of the differentiation is to be found. The applicant's contentions lose sight of the fact that the fourth respondent was the only professional hunter interested in acquiring a concession who had been denied an opportunity to competed for one; that the Court held in the Morris-application that his exclusion had been *prima facie* unlawful; that the Minister was constrained to concede that the fourth respondent had an unassailable case of unfair discrimination and treatment and, finally, that the Minister's decision to settle the case, which is the subject matter of this application, was clearly intended to remedy the disadvantage suffered by the fourth respondent as a consequence of his unlawful exclusion from the auction. If the differentiation complained of was simply a

[17] With reference to *Prinsloo v Van der Linde and Another,*1997 (3) SA 1012 (CC) at paragraphs [17], [23] – [25]; *Harksen v Lane NO and Others*, *supra,* par [45] and [46] and *Jooste v Score Supermarkets Trading (Pty) Ltd,* 1999 (2) SA 1 (CC).
[18] Citing *Mwellie v Ministry of Works, Transport and Communication and Another*, 1995 (9) BCLR 1118 (NmH) in support.

mechanism to rebalance the scale of equality by adding the same measure as that by which the fourth respondent had been unlawfully disadvantaged earlier, it could hardly be contended that the differentiation amounted to constitutionally impermissible discrimination – in principle, no more than affirmative action is permitted within the ambit of the fundamental right to equality as a means to redress the disadvantages suffered by persons as a result of past discriminatory policies and practices. The fourth respondent was disadvantaged *vis-à-vis* the other professional hunters by his unlawful exclusion from the auction: the others could compete on an equal basis (although not all equally successful) for concessions, only he was unlawfully denied the opportunity to do so. It is within this context that the legality of the differentiation complained about falls to be decided.

[23] The nature of the differentiation cannot be brought within the ambit of one or more of the enumerated classifications mentioned in Article 10(2) of the Constitution "which, historically, were singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics".[19] This is therefore not a case of a differentiating classification which is suspect by its nature and the person or body which has made it bears the burden to prove that it does not amount to constitutionally impermissible "discrimination" in the pejorative sense or that it is otherwise authorised under Article 23 of the Constitution. The applicant's case to be limited to the contention that the differentiation violated his right to "equal treatment before the law" entrenched in Article 10(1) of the Constitution.

[19] Per Strydom CJ in Muller v President of the Republic of Namibia 1999 NR 190 (SC) at 199H

[24] In dealing with Article 10(1), the Supreme Court[20] approved the following *ratio* in *Prinsloo v Van der Linde and Another*:[21]

> "…in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality, and freedom. . . . In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. . . . Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it."

This approach, it seems, conforms to one of the authorities relied on by the applicant. Warwick McKean, *op.cit.*[22], in discussing equality under the Indian and American constitutions summarised the position as follows:

> ""The equal protection clause has never been thought to require the same treatment of all persons despite different circumstances. Rather, it prevents states from arbitrarily treating people differently under their laws. Whether any such differing treatment is deemed to be arbitrary depends on whether or not it reflects 'an appropriate differentiating classification among those affected'. Thus the Courts have evolved a doctrine of 'reasonable classification'.

[20] *Ibid.*, at 199C-F
[21] 1997 (3) SA 1012 (CC) at paras [24] - [26].
[22] At 237

> To be reasonable, a classification must always rest upon some real and substantial distinction bearing a reasonable and just relation to things in respect of which the classification is made, which includes all who are similarly situated and none who are not."

[25] Differentiation, without more, does not detract from the applicant's right to equal treatment under the law. For differentiation to be constitutionally impermissible under Article 10(1), it must amount to discrimination in the pejorative sense by being "unfair" or "unreasonable" in the circumstances. It is not measured by a mathematical formula to establish whether there had been identity of treatment, but is assessed with reference to a legal model based on the values of reasonableness and fairness: It requires that the differentiation must both be intelligible and rationally connected to the legitimate governmental objective advanced for its validation[23]. The burden to prove that the differentiation is not intelligible or rationally connected to a legitimate governmental objective is borne by the person who challenges the constitutionality thereof. In *Mwellie v Ministry of Works, Transport and Communication and Another*[24] this Court referred with approval to an extract from Willis: *Constitutional Law,* (1) 1st ed., at 579 in which the author expressed the view that the "(o)ne who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis." The Court held that the *onus* was on the plaintiff who challenged the constitutionality of a statutory limitation for the institution of claims and continued:

> "If therefore, in the present case, the onus is on the plaintiff to prove the unconstitutionality of Section 30(1) on the basis that it infringes the plaintiffs right of

[23] Compare: Sieghardt, *op. cit.,* p262; *Müller v President of the Republic of Namibia*, *supra*, at 200A-B; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paragraphs [45] and [54]; *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)*, 2006 (4) SA 230 (CC) at par [49].
[24] 1995 (9) BCLR 1118 (Nm) at 1138E-H

equality before the law, it will, on the findings made by me, have to show that the classification provided for in the section is not reasonable, or is not rationally connected to a legitimate object or to show that the time of prescription laid down in the section was not reasonable. Until one or all of these factors are proved it cannot be said that there was an infringement of the plaintiff's right of equality before the law. This, in my opinion is because I have found that the constitutional right of equality before the law is not absolute but that its meaning and content permit the Government to make statutes in which reasonable classifications which are rationally connected to a legitimate object, are permissible."

[26] It is in this context that I must deal with a realted argument advanced by counsel on behalf of the applicant. The respondents filed short answering affidavits prior to the hearing on the interim relief. In those affidavits they incorporated by reference the more extensive answering affidavits filed by them in opposition to the pending Cilliers-application. That application was essentially for the same declaratory relief and, in effect, raised the same factual and legal issues as this one. Although the respondents had reserved their rights to amplify their answering affidavits in this application should the Court grant a rule *nisi* and interim relief, they did not avail themselves of that right. Their failure to do so, counsel for the respondents submitted, means that the case which the applicant had established on a *prima facie* basis for the interim relief became "conclusive" against the respondents on the return day.

[27] This argument loses sight, not only of the different criteria by which the evidence is measured on the return day for final interdictory relief[25], but, more

[25] Succinctly stated as follows in *Absa Bank Ltd v Dlamini,* 2008 (2) SA 262 (T) at 267C-E par [10]: "As far as a final interdict is concerned, the requirements are: a clear right; an injury actually committed or reasonably apprehended; and an absence of similar or adequate protection by any other ordinary remedy. As far as an interim interdict is concerned, the requirements are: a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is finally granted; that the balance of convenience favours the applicant for the granting of the interim interdict; and that the applicant has no other satisfactory and adequate remedy." See also: *Bahlsen v Nederloff and Another*, 2006 (2) NR 416 (HC) at 424C-F.

importantly, the very different approach the Court takes in evaluating the evidence at the interim and final stages of the proceedings respectively. The approach which the Court will take in assessing the evidence at the interim stage is succinctly summarised with reference to a long line of judgements in point[26] by Nicolson J in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others.*[27] In summary, the Court's approach to factual disputes on the affidavits at the interim stage will be as follows[28]:

> "3. Even if there are material conflicts of fact the Courts will still grant interim relief. The proper approach is to take the facts as set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at a trial.
>
> 4. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he should not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'.
>
> 5. If there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the mean time, subject of course to the respective prejudice in the grant or refusal of interim relief."

The facts - and factual disputes in particular – will be adjudicated differently on the return day, which, in a sense, is the converse of approach adopted at the interim stage.

> "It is trite law that any dispute of fact in application proceedings should be adjudicated on the basis of the facts averred in the applicant's founding affidavits which have been admitted by the respondent, together with the facts alleged by the

[26] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another*, 1973 (3) SA 685 (A) at 691C - G, *Webster v Mitchell*, 1948 (1) SA 1186 (W) at 1189 - 90, *Gool v Minister of Justice and Another*, 1955 (2) SA 682 (C) at 688E - F, *Hix Networking Technologies v System Publishers (Pty) Ltd and Another*, 1997 (1) SA 391 (A) at 398I - 399A and *Hydro Holdings (Edms) Bpk v Minister of Public Works and Another*, 1977 (2) SA 778 (T). See also: *Setlogelo v Setlogelo*, 1914 AD 221

[27] 2001 (3) SA 344 (N)

[28] At 353H-354A

respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise a real, genuine or bona fide dispute of fact or a statement in the respondent's affidavits is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers."[29]

[28] The differing approaches may be best illustrated by reference to one important factual dispute in this application. Although the respondents denied it, the Court had to accept for purposes of deciding on the interim relief the applicant's allegation that the quota of 4 elephant bulls, 4 buffalo bulls, 2 male lions and 4 hyenas was worth "far more" than the N$408 624 *per annum* payable under the concession by the fourth respondent and that, had the concession been offered for sale at an auction, the applicant would have offered "well in excess of N$½ million for it. This allegation strongly suggested that the Minister had acted irresponsibly in disposing of natural resources in the pubic domain; that his decision, contrary to his duty under Article 18 of the Constitution, conferred a benefit on the fourth respondent which was so disproportionate that it could only be unfair and unreasonable in the context of Cabinet's policy of equal treatment and that the applicant and other professional hunters had been treated unequally under Article 10(1). On the return day, however, the Court had to adjudicate the issues on the basis of the respondents' affidavits in which it was stated that the value of each species of animal sold in terms of the concession had been determined with reference to the average price pertaining to such species obtained at the auction. In the calculation, which appears from an attached memorandum to the Minister, the lower prices obtained for the Waterberg and

[29] *Kauesa v Minister of Home Affairs and Others,* 1994 NR 102 at 108G – J. This approach has been applied in many other judgments of this Court and the Supreme Court, e.g. *Grobbelaar and Another v Council of The Municipality of Walvis Bay,* 2007 (1) NR 259 (HC) at 263A-C and *Oppermann v President of the Professional Hunting Association of Namibia,* 2000 NR 238 (SC) at 251H-252B. See further: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* 1984 (3) SA 623 (A) at 634E-635C; *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd,* 1957 (4) SA 234 (C) at 235E-G; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte BÌckereien (Pty) Ltd en Andere,* 1982 (3) SA 893 (A) at 923G-924D.

Mangetti concessions were disregarded for purposes of calculating the average because the one did not include elephant and lion and the other had a history of very low prices. This evidence belied the allegations on which the interim relief had been granted and, in the final adjudication, impacted significantly on the perception of unequal, unfair and unreasonable treatment which the applicant sought to establish in his founding papers.

[29] In applying this approach to the affidavits in this matter, the first question to be answered is whether the applicant has shown on a balance of probabilities that the differentiation between the fourth respondent and him was not intelligible[30]. As Warwick McKean reasoned in the quotation referred to earlier, "the equal protection clause has never been thought to require the same treatment despite different circumstances". In *Mwellie*[31]'s-case, this Court referred to the "similarly situated" criterion in constitutional claims for equality in the following manner:

> "On the basis that reasonable classifications do not militate against Article 10(1) of the Constitution it is first of all necessary to determine whether the classification in the present instance accord the plaintiff worse treatment *than others in a similar position*."
> (The emphasis is mine)

Notwithstanding applicant's contentions to the contrary, it is apparent that he and the fourth respondent were not similarly situated. The applicant had an opportunity to compete for a concession at the auction. The fourth respondent was denied that opportunity. The differentiation which resulted from the Minister's decision was

[30] In Mwellie's case, *supra,* Strydom JP quoted the following passage from Willis with approval: "One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."
[31] At 1138B-C

made to redress the disadvantage he had suffered as a consequence of an official's unlawful decision to deny him participation. The *ratio* for the differentiation made by the Minister was therefore clearly intelligible.

[30] The next enquiry is whether the applicant proved that the differentiation was not rationally connected to a legitimate governmental objective. The objective of the settlement was to redress by a calculated measure the extent to which the fourth respondent had been disadvantaged by his exclusion from participation in the auction for trophy hunting concessions on State land in breach of his fundamental right to equal treatment, to administrative fairness and of the Cabinet's policy to transparency and equality in the grant of those concessions. The predicament of the Government caused by the official's decision to exclude the fourth respondent and with which the Minister was faced in the legal proceedings against him was apparent from the advice he had received: The Government was, on a consensus of opinion, in the wrong; its cause in the pending proceedings was lost; continued resistance to confirmation of the rule would only have served to delay the inevitable, escalate costs for the Government and detract from its constitutional commitment and responsibility to uphold fundamental rights. Moreover, given the terms of the interim interdict in the Morris-application, the auctioned concessions could not be exploited pending finalisation of the application; win or lose, the longer the delay, the greater the Government's exposure to claims for damages by the concession-holders (who could not be blamed for the predicament) and the greater the loss of income to be derived by the State from the concessions. If the Morris-application would ultimately succeed against the Government, the potential of further claims for damages from previously successful bidders would be a likely result: if they had to pay more for the same concession, they

would endeavour to recover the difference and, if those concessions would be sold to higher bidders, their claims would be for the loss of profits on the concessions which they previously held.

[31] In these circumstances, the expeditious settlement of the Morris-application was clearly a legitimate governmental objective. The applicant suggested that, in settlement, the Minister should have had the Mamili concession auctioned instead of granting it to the fourth respondent by private treaty. The suggested course, in my view, would not have remedied the disadvantage which the fourth respondent had suffered: he would then only have the opportunity to compete for one concession whereas the applicant (and the other professional hunters similarly situated) would also be entitled to bid on that one in addition to the many others auctioned earlier. Moreover, the applicant's suggestion seems to be somewhat self-serving: Having been unsuccessful to win a concession at the auction, he would normally have had to wait a further three years to compete afresh for one. However, when the Minister made a further concession available to address the fourth respondent's unlawful exclusion from the auction, he saw an opportunity to get a further bite at the proverbial cherry.

[32] Other than to offer financial compensation for the damages suffered by the fourth respondent's in consequence of the official's unlawful decision, the Minister was not left with other apparent choices but the one he ultimately opted for. Whether the former would have been preferable to the latter is not the issue which this Court must decide. What it must examine is whether the applicant proved that there was no rational connection between the differentiation complained of and the objective of the

settlement. For the reasons I have given, the applicant clearly failed to discharge that burden.

[33] The second ground on which the applicant sought to assail the Minister's decision is based on his right to fair and reasonable administrative action protected under Article 18 of the Constitution. The applicant alleged that, in selling and granting the Mamili-concession to the fourth respondent without calling for tenders or offering it for sale by way of auction, the Minister acted unfairly. In argument, his counsel submitted that in attempting to remedy the alleged wrong committed to the fourth respondent, the Minister perpetrated yet another: one against the applicant and other professional hunters similarly situated. As "two wrongs cannot make a right", counsel contended, the Minister should to have done one of three things instead: he should have persisted with his opposition to the Morris-application or conceded the relief prayed for and auctioned all the concessions afresh or, after having obtained Cabinet approval, auctioned the Mamili-concession.

[34] It is of some significance to note that the applicant's affidavit does not seek to establish unreasonableness with reference to specific common law grounds of review - such as when a person has acted "*mala fides* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute".[32] Even if I were to accept, without deciding, that the basis for interference with administrative decisions under Article 18 may be wider[33] than under the common law, the Court is not entitled to

[32] Mentioned by Innes CJ in *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651.

[33] Compare the decisions in *Derby-Lewis and Another v Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission and Others,* 2001 (3) SA 1033 (C) at 1065E – F; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others,* 2000 (2) SA 674 (CC) at 708 para [85]; *Nieuwoudt v Chairman,*

substitute its decision for that of the functionary simply because it would have chosen another from the bouquet of available lawful options.

[35] Earlier in this judgment, I have discussed the predicament the Minister was faced with in the Morris-application. In the course thereof, I dealt with all three the options mentioned by the applicant's counsel and demonstrated the potentially unacceptable or unpalatable implications they could have. But the question is not whether the ones suggested by counsel would have been preferable to the one which the Minister had decided on: it is whether the Minister acted fairly and reasonably when he decided to sell the Mamili-concession to the fourth respondent by private treaty. There cannot be any quarrel that the Minister, not the Cabinet, was entrusted by the Legislature to exercise the powers, duties and functions contemplated in sections 28(1)(a), 36(1)(a) and 78(f) of the Ordinance – and that he did so. The Cabinet's authority under those sections was brought to an end in 1996 by the promulgation of sections 1 and 12 of the Nature Conservation Amendment Act, No.5 of 1996. Cabinet was at liberty to lay down a general policy to guide the Minister in the administration of the Ordinance, but ultimately, the statutory responsibility to make administrative decisions regarding concessions vested in the Minister and in no other. I have found earlier in this judgment that the Minister's decision was not in conflict with either the Cabinet's policy or the constitutional principle of equality. The decision was "remedial or restitutionary"[34] action taken within the permissible limits of the equality concept to redress the disadvantage previously occasioned in the case

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Amnesty Subcommittee, Truth and Reconciliation Commission; Du Toit v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission; Ras v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission, 2002 (3) SA 143 (C) at 155F – G on section 33 of the South African Constitution.

[34] To use the words which Moseneke, J thought to be "juridically more consonant" with "regstellende aksie" in equality jurisprudence than "affirmative action". See: *Minister of Finance v Van Heerden,* 2004 (6) SA 121 (CC) at 136A par [29].

of the fourth respondent. In the view I have taken, the Minister's ultimate decision to sell the concession by private treaty was clearly well-advised, rationally connected to the facts underlying it and squarely within his powers.

[36] There is a second reason why the applicant contended that the decision infringed on his right to administrative fairness: Given the Cabinet's policy and the practice which had developed over a period of ten years regarding the sale of concessions, he claimed with reference to *Administrator, Transvaal, and Others v Traub and Others*,[35] that he had a "legitimate expectation" to be heard before the Minister could deviate from the policy and practice. For the reasons I have mentioned earlier, I am not persuaded that the Minister's decision was not in line with the Cabinet's policy of equality: the decision was to sell the concession to the fourth respondent was intended to remedy an earlier deviation from that policy. The conditions which attached to the concession under the sale were exactly the same as those subject to which the other concessions had been auctioned and the price thereof was carefully calculated with reference to the average price achieved for other comparable concessions.

[37] Whether the applicant had expectations that he would be heard on the matter is not the test: it is whether, viewed objectively, the demand for procedural fairness required such a hearing before the decision was taken. The concept of "legitimate expectation" is explained in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[36]:

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[35] 1989 (4) SA 731 (A).
[36] 2000 (1) SA 1 (CC) at 96C-G par [216]

> "The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances. It is for this reason that the English courts have preferred the concept of 'legitimate expectation' to that of 'reasonable expectation'. In *Council of Civil Service Unions and Others v Minister for the Civil Service*, 164 Lord Diplock explained that 'legitimate' should be used rather than 'reasonable':
>
> > '. . . in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences'."
>
> (Footnotes omitted)

[38] Mr Smuts submits on behalf of the respondents that the applicant had the *onus* to establish this ground of review[37] and that, in the circumstances of this case objectively assessed, a legitimate expectation to be heard not did not arise at all. I agree. The practice of selling concessions by auction flowed from the policy of equality and transparency. That policy is, in essence, both the reason for and the basis on which the concession was sold to the fourth respondent. Policies are generally intended to guide public authorities and influence their decisions, not to dictate them:

> "Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At

[37] With reference to *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another,* 1988 (3) SA 132 (A) at 152A and *Davies v Chairman, Committee of the Johannesburg Stock Exchange*, 1991 (4) SA 43(W) at 47G-H.

> most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor."[38]

The Minister's decision, taken within the four corners of the authority conferred on him under the Ordinance, sought to give effect to the underlying policy of equality and to address the Government's exposure in the Morris-application. In the circumstances, his constitutional duty to act fairly and reasonably did not require of him to afford the applicant and all other professional hunters similarly situated an opportunity to be heard on the specifics of the settlement or the principle of a sale by private treaty - in any event not for as long as it was within the flexible framework of the general policy of equality. For these reasons, the applicant's reliance on this ground must also fail.

[39] The final constitutional ground on which the legality of the Minister's decision was attacked is based on the provisions of Article 21(1)(j) which guarantee the right of every person to "practise any profession, or carry on any occupation, trade or business." No facts or averments are advanced in the founding affidavit from which it could have been gathered in which respect the Minister's decision derogated from or infringed the applicant's rights under the Article. From the heads of argument filed on his behalf, the reason for his complaint became more apparent: a lucrative business developed around the system of trophy hunting concessions and, by awarding concessions in an arbitrary fashion, the Applicant's right to practice his profession as a professional hunter "has obviously seriously been affected". Both the principle and

[38] Per Human J in *Computer Investors Group Inc and Another v Minister of Finance*, 1979 (1) SA 879 (T) at 898C-F.

the premise for this submission are untenable. Given the historical and constitutional context and purpose of the freedom to economic activity espoused in by this Court in *Hendricks and Others v Attorney General, Namibia, and Others,*[39] it seeks to protect the values underlying it,[40] not the profitability of those activities. Moreover, the submission is premised on the allegation that the Mamili-concession was arbitrarily granted, which I have found not to be the case. It is therefore not necessary to deal with this ground any further.

[40] Initially, the applicant also challenged the Minister's decision on the basis that it was "contrary to Tender Board Regulations". However, given the provisions of s 7(1) of the Tender Board of Namibia Act, 1996 which make the Tender Board's responsibility as regards the procurement of goods and services subject to the provisions of "any other law" and the respondents' contention that s. 78(f) of the Ordinance which authorises the Minister "to take the measures which (he) may deem necessary or desirable for the …sale of wild animals …" is one such law, counsel for the applicant conceded that the Tender Board Regulations do not apply and abandoned this ground during argument.

[41] The final ground advanced is that no factual or legal basis existed on which the Morris-application could have been settled because the fourth or fifth respondents had "indeed failed to pay annual monies for the full concession period". Although not abandoned, this ground was also not pursued in argument. It does not appear on the papers which amount, if any, the fourth or fifth respondents had failed to pay and, if

[39] 2002 NR 353 (HC) at 357H – 359A

[40] See also the discussion of similar protection under the South African Constitution in *Affordable Medicines Trust and Others v Minister of Health and Others,* 2006 (3) SA 247 (CC) at para [59] and *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at paras [26] – [27].

so, whether they were justified in withholding such payment. The advice which the Minister received constituted the factual and legal basis for his decision – that much is clear from the submissions and recommendations made to him and from the affidavits in this application. Whether the advice which the Minister *bona fide* acted on was correct or not, is not for this Court to determine – and, because the applicant had not been privy to the events and discussions on which the advice had been based, his rather blunt allegation does not give rise to a *bona fide* dispute.

[42] There was also an ancillary dispute regarding incomplete discovery which was not taken any further in argument. The applicant elected to argue the merits of the application on the return day rather than to move the application for further discovery and a postponement of the main application, if successful. Having elected to proceed in that manner, the discovery application was seemingly abandoned.

[43] There was no reason why costs should not follow the result but, because the respondents were initially represented by one instructed counsel and only on the return day by two such counsel, the order of costs had to be formulated accordingly.

[44] It is for these reasons that the Court made the following *ex tempore* order at the time:

> "1. The rule *nisi* is discharged.
>
> 2. The application for interdictory relief is refused.

3. The Applicant is to pay the Respondents' costs, such costs to include the costs of two instructed counsel for today."