REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 217/2012

In the matter between:

THE MEDICAL ASSOCIATION OF NAMIBIA	**1ST APPLICANT**
DR. R. SIEBERHAGEN	**2ND APPLICANT**

and

THE MINISTER OF HEALTH AND SOCIAL SERVICES	**1ST RESPONDENT**
MEDICINES REGULATORY COUNCIL	**2ND RESPONDENT**
THE REGISTRAR OF MEDICINES	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation: *The Medical Association of Namibia v The Minister of Health and Social Services* (A 217/2012) [2013] NAHCMD 362 (27 November 2013)

CORAM: UEITELE, J
Heard: **06 December 2012**
Delivered: **27 November 2013**

Flynote:

Constitutional law — Right to practise business or profession in terms of art 21(1)(j) — Appellants challenging licensing scheme introduced by s.31(3) of the Medicines and Related Substances Control Act, 13 of 2003 — Regulation of practice of profession not necessarily infringement of art 21(1)(j) — Regulation should be rational

— However, such regulation should not be so invasive as to constitute barrier to practising profession.

Constitutional law -Right to have civil obligations determined by an independent tribunal as contemplated by Article 12(1)(a) of the Namibian Constitution –Factors to be considered whether a body is tribunal as envisaged by Article 12(1)(a) - Firstly, the tribunal must have the ability to make final, legally enforceable decisions. Secondly, it must be independent from any departmental branch of government. Thirdly, the nature of the hearings conducted in tribunals must be both public and of a judicial nature, while not necessarily subject to the stringent formalities of a court of law. Fourthly, tribunal members must be in possession of specific expertise, in the field of operation of the tribunal as well as judicial expertise. Fifth, there must be a duty on tribunals to give clear reasons for their decisions, and lastly that there must be a right of appeal to a higher court on disputes regarding points of law.

Constitutional law Fundamental rights - Dignity - What constitutes -The minimum content of the right to dignity has three elements: The first is that every human being possesses an intrinsic worth merely by being human. The second is that the intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent or required by respect for this intrinsic worth. The third element is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being.

Summary:

The applicants challenged the validity of the provisions of sections 29(7) (*b*), 29(9)(*b*), 29(13)(*b*) and 29(19)(*b*) and 31(3) of the Medicines and Related Substances Control Act, 13 of 2003, on the basis that:

> ‘(a) those provision (especially section 31(3)) of the Medicines Act, bestows on the Council the discretion to prohibit the applicants to continue with their “manifested right to practice their profession”. The exercise of the discretion is not law as envisaged in articles 21(2) and 22 of the Constitution.
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> (b) the Council established by section 2 of the Medicine Act is an administrative body and not a court or tribunal as envisaged in Article 12 of the Constitution and is as such a contravention of the article 12 of the Constitution.

(c) the impugned provisions and licensing scheme abolishes and abridges the applicants property rights.

(d) the impugned provisions and the licensing scheme violate the applicants' dignity.

(e) the impugned provision and the licensing scheme transgress the Government's International Treaty obligations.'

The applicants' content that their right to dignity is infringed. The applicants allege that for an administrative body to have a discretion to determine civil rights and obligations, on arbitrary, irrelevant and irrational criteria is a violation of the applicant's dignity. They further content that the licensing scheme introduced by the Medicines Act has the effect that what was previously an ordinary day to day activity, and which was accepted as natural, is now a criminal offence and carries with it the seeds of humiliation and is thus an affront to the applicants' dignity. The applicants furthermore allege that their dignity does not stand alone, it is allegedly intertwined with the applicants' duty to keep their patient's illnesses privileged. To compel a medical practitioner to reveal to a pharmacist what illness the patient suffers from unlawfully compels the patient (and doctor) to disclose his or her illness to third parties (so the applicants contend).

The minister argues that, the background that gave rise to the Ministry of Health Social Services initiating the enactment of the Medicines Act is that, the irrational use of drugs has increased the costs of medicine to the public and undermines the safety, quality and efficacy of the medicines that are dispensed to patients. He says that bad dispensing practices compromise and place in jeopardy the health of patients and that of the public at large and constitute a denial of access to health care to the public.

That factors to be considered whether a body is tribunal as envisaged by Article 12(1) (a) of the Namibian Constitution : Firstly, the tribunal must have the ability to make final, legally enforceable decisions. Secondly, it must be independent from any departmental branch of government. Thirdly, the nature of the hearings conducted in tribunals must be both public and of a judicial nature, while not necessarily subject to the stringent formalities of a court of law. Fourthly, tribunal members must be in possession of specific expertise, in the field of operation of the tribunal as well as judicial expertise. Fifth, there must be a duty on tribunals to give clear reasons for their

decisions, and lastly that there must be a right of appeal to a higher court on disputes regarding points of law.

That in any complaint that the right to dignity has been infringed, the court must consider whether any of the three basic elements of the right to dignity has been diminished. In this regard in the present matter, the questions that arise for determination are whether the challenged provisions-

(a) disregard the intrinsic worth of the medical practitioners?
(b) disrespect the intrinsic worth of the medical practitioners?
(c) are inconsistent with respect for the intrinsic worth of the medical practitioners?

Held, that the applicants have not in this matter demonstrated how section 31(3) of the Medicines Act disregards the intrinsic worth of the medical practitioners, or disrespect the intrinsic worth of the medical practitioners or is inconsistent with respect for the intrinsic worth of the medical practitioners or that the State does not realize that it exist for the sake of the individual. The State exists for the sake of individual, but it is also correct to state that, the State must act in the interest of the greater majority reconciling and balancing the conflicting interest of the people in a reasonable just fair manner.

Held, that the policy and object of section 31 (3) of the Medicines Act is to regulate the selling of scheduled medicines. Held further that, there is nothing unreasonable, unjust and unfair in the challenged provisions.

Held, that the licensing scheme does not infringe the dignity of the applicants. The licensing scheme introduced by section 31(3) of the Medicines Act does not infringe the right to the dignity of medical practitioners.

Held, that the licensing scheme introduced by section 31 (3) regulates the practise of the medical profession, but it regulates the practice in a manner that, viewed objectively, does not affect the choice of that profession by any person, in any negative manner. What section 31 (3) does, is, merely to require that, if the practice of

medicine is to involve the selling of scheduled medicine, this should be done by a medical practitioner in respect of whom a licence to sell medicine has been issued.

Held, in the circumstances, the applicants have not established that the licensing scheme constitutes an infringement of Art 21(1) (j).

Held, that section 31 (3) of the Medicines Act does not interfere with medical practitioners' right to own, dispose of or destroy any medicine. Held further that, what the section does is simply to regulate who may and who may not sell, dispense or compound Schedule1, Schedule 2, Schedule 3 or Schedule 4 medicines.

Held, that the mere fact that the Council is not an administrative body does not absolve it from acting fairly and reasonably and comply with the requirements of the rules of natural justice and the requirements of any relevant legislation There is no doubt that the Council is a statutory tribunal which derives its authority and power from statute. Therefore there is no doubt that the Council is a tribunal as envisaged by article 12(1) (a) of the Namibian Constitution.

Held, that the application is dismissed and held further that applicants are ordered to pay respondents' costs, which will include the costs of one instructing and one instructed counsel.

ORDER

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1 The application is dismissed.

2. Applicants are ordered to pay respondents' costs, which will include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE, J

A INTRODUCTION

[1] The first applicant is the Medical Association of Namibia Ltd, a company with Limited liability, incorporated in terms of s 21 of the Companies Act, 1973 (Act No 61 of 1973). The first applicant has as its members medical practitioners who practice the profession of medicine either on their own account or in partnership.

[2] The second applicant is a medical practitioner and psychiatrist who practices in Windhoek, he is also a member and the chairperson of the first applicant. I will in this judgment refer to the first and second applicants simply as the applicants.

[3] The first respondent is the Minister of Health and Social Services (I will in this judgment refer to the first respondent as the "Minister.") The second respondent is the Medicine Regulatory Council, which was established by the Medicines and Related Substances Control Act, 1965[1] and its existence was continued by section 2 of the Medicine and Related Substance Control Act 2003[2]. The third respondent is the Registrar of Medicine and the fourth respondent is the Attorney General of the Republic of Namibia.

[4] The applicants approached this court on an urgent basis, initially seeking an order by Notice of Motion staying and suspending section 31 of the Medicines and Related Substance Control Act, 2003. The Notice of Motion was however, amended and the applicants are now seeking the following orders:

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1 Act 101 of 1965.

2 Act 13 of 2003.

'1. That the applicant's non-compliance with the Rules of Court is condoned and this matter is heard on an urgent basis as envisaged in Rule 6(12);

2.1 The provisions of sections 29(7)(*b*), 29(9)(*b*), 29(13)(*b*) and 29(19)(*b*) of the Medicines and Related Substance Control Act, 2003 be declared unconstitutional, of no force and effect and be set aside.

2.2 That the provisions of section 31(3) of the Act be declared unconstitutional, of no force and effect and be set aside, alternatively to prayers 2.1 and 2.2.

3.1 The provisions of the Medicines and Related Substances Control Act, 13 of 2003 referred to in sub-paragraphs 3.1.1 and/or 3.1.2 below are stayed and suspended, pending the finalization of an action (or any other process as the Court may direct), in terms of which the applicants will seek to declare the impugned provisions referred to in paragraph 2.1 and 2.2 *supra* of no force and effect. The impugned provisions to suspend are:

3.1.1 The words "**who holds a licence contemplate in section 31(3), subject to the conditions in that licence**" wherever these words appear in section 29(7)(*b*), 29(9)(*b*), 29(13)(*b*) and 29(19)(*b*) of the Medicines and Related Substances Control Act, No 13 of 2003 – "the Act".

3.1.2 The whole of section 31 (3)'.

B THE BACKGROUND TO THE APPLICANTS' CLAIM

[5] Prior to 1965, the selling and dispensing of medicine was the sole domain of pharmacists[3]. During 1965, the Parliament of South Africa enacted the Medicines and Related Substances Control Act. Section 22A of that Act, conferred the right to medical practitioners to sell and dispense certain categories of medicines. Section 39 of the Medicines and Related Substances Act, 1965 made that Act applicable to the

[3]See paragraph 1 of the judgment in the matter of *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another* 2012 (2) NR 566 (SC).

then territory of South West Africa. Article 140(1) of the Namibian Constitution provides as follows:

> '140(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.'

This means that the right conferred on medical practitioners to sell certain categories of medicines would continue until Parliament decides otherwise (but subject to the provisions of the Constitution).

[6] It is common cause that at the independence of Namibia in 1990, the Government of the Republic of Namibia created different Ministries to take care of the different challenges that the country was and is still facing. One of the Ministries so created is the Ministry of Health and Social Services.

[7] The respondents say that what prompted the Ministry of Health and Social Services to embark on a legislative reform process were problems which were not unique to Namibia. The problems identified by the respondents are: the high cost of medicine (the respondents opine that drug prices in the private sector are high and the percentage mark-up system gives incentives to sell expensive medicines), wide spread and irrational use of drugs by prescribers, dispensers, patients and a lack of unbiased information on drugs for health workers and consumers.

[8] The Ministry of Health and Social Services realised that the laws regulating the dealing in drugs needed revision so that it suits the changed conditions in an independent Namibia[4] and also to deal with problems such as the high cost of medicine, wide spread and irrational use of drugs by prescribers, dispensers, patients and lack of unbiased information on drugs for health workers and consumers[5].

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[4]See: 'The Foreword to the National Drug Policy for Namibia' published in August 1998 page (ii). (i.e. at page 1231 of the record).

[5]See paragraph 14 of the answering affidavit page 1169 of the record.

[9] In pursuit of that realization and to deal with the problems so identified by the Ministry (and referred to in paragraph 7 above), the Permanent Secretary of the Ministry of Health and Social Services established a Drug Policy Committee (which consisted of health professionals from both the public and private sectors) and tasked that committee to draft a National Drug Policy for Namibia.[6] During April and May 1997 the first draft of the National Drug Policy was sent out to 'stakeholders' for comments. During December 1997, a national seminar was convened by the Ministry of Health and Social Services to consider the first draft of the National Drug Policy for Namibia and the comments received from the 'stakeholders'. The seminar resulted in the final National Drug Policy of Namibia which was published in August 1998.[7]

[10] The National Drug Policy for Namibia consists of sixteen (16) sections. Sections 2 and 3 set out the main policy goals and objectives and outline's the policy's key principles. The aim of the policy is set out in the following terms:

> 'The aim of the National Drug Policy is to guide and develop pharmaceutical services to meet the requirements of the Namibian people in the prevention, diagnosis, and treatment of prevailing diseases, using **efficacious, high quality, safe** and **cost effective** pharmaceutical products. The National Drug Policy will also serve as the guiding document for legislative reforms, human resources planning and development and management improvement.'[8]

The guiding principles are amongst others 'to promote the rational use of drugs through sound prescribing, good dispensing practises and appropriate usage.'[9]

[11] Section 4 of the Policy addresses 'Legislation, Regulation and Quality Assurance.' The aim of this section is set out as follows:

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[6]See: Preface to National Drug Policy for Namibia page (iv). (i.e. at page 1233 of the record).

[7]*Supra* pages (iv – v).

[8] See page 1240 of the record.

[9] *Op cit*.

> 'To ensure that medicines reaching the people of Namibia are safe, efficacious, of good quality and available at affordable prices.'[10]

In subsection 4.4 the Policy envisages that:

> 'Medical practitioners and nurses in private practice with proven competency in dispensing medicines may be issued with a licence by the licensing authority to dispense medicine in the absence of adequate pharmaceutical services.'[11]

[12] In 2003, the National Assembly passed the Medicines and Related Substances Control Act, 2003 (I will, in this judgment, refer to this Act as the Medicines Act). The President of the Republic of Namibia assented to that Act, on 13 August 2003, but the Act was only to come into operation on a date to be determined by the Minister responsible for health by notice in the Gazette. It is now common cause that the Minister determined 28 July 2008 as the date on which the Act would come into operation.

[13] The Act introduced a licensing scheme whereby a medical practitioner, dentist or veterinarian who wishes to sell schedule 1, 2, 3 or 4 medicine to his or her patients had to apply, in the prescribed form to the second respondent for a licence authorising that medical practitioner, dentist or veterinarian to sell Schedule 1, Schedule 2, Schedule 3 or Schedule 4 medicines to his or her patients (I will, in this judgment, refer to the second respondent as the Council). The form and conditions which must be met for one to qualify for a licence are set out in the Regulations promulgated by the Minister under section 44 of the Medicines Act.

[14] Section 46(3)[12] of the Medicines Act made provisions for transitional matters, which amongst others gives a medical practitioner, dentist, veterinarian or pharmacist,

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[10] See page 1241 of the record.

[11] See page 1244 of the record.

[12] Section 46 (3) provides as follows:

'(3) A person, who immediately before the commencement of this Act -

(a) was practising as a medical practitioner, a dentist, a veterinarian or a pharmacist; or

who, at the time when the Act came into operation, was acquiring, keeping, using, supplying, selling or prescribing scheduled medicine to continue to acquire, keep, use, supply, sell or prescribe those medicine, without a licence for a period of three months beginning with the date of commencement of the Act. Those who wished to continue to acquire, keep, use, supply, sell or prescribe those medicine after the three months grace period were to apply to do so before the expiry and may continue to acquire, keep, use, supply, sell or prescribe those medicine until the application for a licence is granted or refused, or if refused until the decision of an appeal (if noted) is communicated to the medical practitioner, dentist, veterinarian or pharmacist concerned.

[15] The applicants were aggrieved by certain provisions of the Regulations promulgated under section 44 of the Act, and on 12 June 2009 (i.e. approximately eight months after the Act came into operation), and as a result of the grievance, launched an application for review in terms of Rule 53 of the High Court Rules, seeking, amongst others, the following relief:

> ‘1. Calling upon the respondents in terms of Rule 53 to show cause why –
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> 1.1 the publication of the purported Regulations relating to Medicines and Related Substances, published by the first respondent in Government Gazette No. 187 of 2008, purportedly in terms of section 44 of the Medicines and Related Substances Control Act No. 13 of 2003, should not be declared *ultra vires* section 44(1) and/or section 44(2) of the Medicines and Related Substances Control Act (Act No. 13 of 2003) and consequently *null and void*.
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> 1.2. The Regulations relating to Medicines and Related Substances, should not be declared *ultra vires* the provisions of Article 18 of the Constitution of the Republic of Namibia, as well as section 44 of the Medicines and

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(b) was the holder of a permit issued under section 22A(12) of the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965),

and was acquiring, keeping, using, supplying, selling or prescribing, as the case may be, scheduled medicines, the acquisition, keeping, use, supply, sale or prescription of which must be licenced under this Act, may continue to acquire, keep, use, supply, sell, or prescribe, those medicines without a licence during the period of 3 months beginning with the date of commencement of this Act.’

related Substances Control Act No 13 of 2003 (Act No. 13 of 2003) in that the Appeal Committee, envisaged in section 34(1) of the said Act has never been lawfully established, and be set aside;

1.3 Regulations 34(3)(a), 34(3)(c), 34(3)(d) and 34(3)(e) of the Regulations relating to Medicines and Related Substances, should not be declared *ultra vires* the provisions of section 44(1)(f) of the Medicines and Related Substances Control Act No 13 of 2003 (Act No. 13 of 2003) and be set aside.

2. Declaring the decisions taken by the third respondent in respect of the applicant-members' applications in terms of section 31(3) read with section 34 of the Medicines and Related Substances Control Act (Act No. 13 of 2003) *ultra vires* and null and void.

3. Declaring that the time period as envisaged in section 46 of the Medicines and Related Substances Control Act No. 13 of 2003, shall commence to run-

3.1 from the date of this Court order;

3.2 alternatively, from the date on which the Namibia Medicines Regulatory Council and the Appeal Committee, envisaged in section 34(1) of the Medicines and Related Substances Control Act (Act No. 13 of 2003) have been lawfully established.'

[16] This court set aside the entire regulations, promulgated by the Minister. The Minister, appealed against the decision of this court. In a judgment delivered by the Supreme Court that court partly allowed the appeal. The Supreme Court found that:

'a) The provisions of Regulation 34(a), (c), (d) and (e) made and published in terms of the Medicines Act, 2003 by Government Notice No 178 in Government Gazette 4088, were *ultra vires* the powers of the Minister in terms of sec. 44(2) of the Medicines and Related Substances Control Act (Act No. 13 of 2003) and were set aside.

b) All the third respondents' decisions on applications for licences made by medical practitioners were unlawful and *ultra vires* and not in compliance with sec. 31(3) as read with sec. 34 of the Medicines Act 2003 and are set aside.'

[17] Between 12 June 2012 and 18 August 2012, the applicants attempted to agree with the Council to allow medical practitioners who did not have licences as contemplated in section 31(3) of the Medicines Act, to continue to sell medicines to their patients. The attempt by the applicants bore no fruits and on 28 August 2012 the first applicant received a legal opinion to challenge the constitutionality of certain provisions of the Medicines Act. On 3 October 2012, this application was launched.

C THE BASIS ON WHICH THE PROVISIONS OF THE MEDICINES ACT ARE IMPUGNED

[18] The applicants are challenging the validity of the provisions of sections 29(7)(*b*), 29(9)(*b*), 29(13)(*b*) and 29(19)(*b*) and 31(3) of the Act, on the basis that: (I repeat the averments verbatim):

'(a) those provision (especially section 31(3)) of the Medicines Act, bestows on the Council the discretion to prohibit the applicants to continue with their "manifested right to practise their profession". The exercise of the discretion is not law as envisaged in articles 21(2) and 22 of the Constitution.

(b) the Council established by section 2 of the Medicine Act is an administrative body and not a court or tribunal as envisaged in Article 12 of the Constitution and is as such a contravention of the article 12 of the Constitution.

(c) the impugned provisions and licensing scheme abolishes and abridges the applicants property rights.

(d) the impugned provisions and the licensing scheme violate the applicants' dignity.

(e) the impugned provision and the licensing scheme transgress the Government's International Treaty obligations.'

[19] I pause here to make an observation as regards the orders sought by the applicants. The inclusion of an alternative prayer is superfluous. I say so because if I were to find that the disputed provisions are unconstitutional, that will be the end of the matter, and if I were to find that the disputed provisions are constitutional, I do not see how I can stay and suspend the operation of those provisions. Having made this observation, I now proceed to consider the various grounds on which the provisions of the Medicines Act are challenged.

Do the challenged provisions of the Medicines Act violate the applicants' right to dignity?

[20] I proceed to some of the principles articulated by the courts and legal writers when dealing with the right to dignity. In the case of *Afshani and Another v Vaatz*[13], Maritz, J said:

> 'Article 8(1) demands respect for *human dignity* and entrench that right in peremptory language: 'The dignity of all persons shall be inviolable.' One only has to refer to the articulation of this value in the first paragraph of the Preamble to the Constitution to understand why *human dignity is a core value,* not only entrenched as a fundamental right and freedom in ch 3, but also permeating all other values reflected therein.'

[21] In *Exparte Attorney General, Namibia In Re Corporal Punishment*[14] the late Mohamed, AJA (as he then was) said:

> 'The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect *for human dignity,* protection of liberty and the rule of law. Practises and values which are inconsistent with or which might subvert this commitment are vigorously rejected.' {My Emphasis}

[13]2006 (1) NR 35 (HC) page 48 at para 28.

[14]1991 (3) SA 76 at page 78.

[22] While our courts have emphasized the concept of human dignity, the South African Constitutional Court has gone further and outlined the content of the right to dignity. It[15] said the following as regards the dignity of persons:

> 'The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which *human dignity* for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy *respect for the intrinsic worth of all human beings*.' {My Emphasis}

[23] In *Khumalo and Others v Holomisa* [16] the South African Constitutional Court said the following:

> 'In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama)* and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.'

[24] Neethling *et al* [17] argue that dignity may be defined as *'the recognition of the spiritual–moral value of the human being as the crown of creation'.* From this definition and the above exposition by the constitutional court in *Khumalo and Others v*

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[15] In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at* para *35.*

[16] *Khumalo and others v Holomisa* 2002 (5) SA 401 page 418 at para 27.

[17] Neethling J, Potgieter J M & Visser P J *Neethling's Law of Personality* 2nd at page 28.

Holomisa[18] it is, thus possible to extrapolate the content of the right to dignity. Christopher McCudden[19] said:

> '…we perhaps see the outlines of a basic minimum content of "human dignity", that all those who use the term historically and all those who include it in human rights texts appear to agree as its core, whether they approve of it or disapprove of it. This basis minimum seems to have at least three elements. The first is that *every human being possesses an intrinsic worth merely by being human.* The second is that *the intrinsic worth should be recognized and respected by others*, and some forms of treatment by others are inconsistent or required by respect for this intrinsic worth. The third element is the claim that *recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being*. {My Emphasis}

[25] From the nature and content of the right to human dignity outlined in the preceding paragraphs, I conclude that in any complaint that the right to dignity has been infringed, the court must consider whether any of the three basic elements of the right to dignity has been diminished. In this regard, in the present matter, the questions that arise for determination are whether the challenged provisions-

(a) disregard the intrinsic worth of the medical practitioners?

(b) disrespect the intrinsic worth of the medical practitioners?

(c) are inconsistent with respect for the intrinsic worth of the medical practitioners?

[26] The applicants' contention that their right to dignity is infringed is set out in paragraphs 57 to 61 of the founding affidavit. In those paragraphs, the applicants allege that for an administrative body to have a discretion to determine civil rights and obligations, on arbitrary, irrelevant and irrational criteria, is a violation of the applicant's dignity. They further content that the licensing scheme introduced by the Medicines

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18 *Supra* at footnote 16.

19 *European Journal of International Law* (2008)19 (4) p 655.

Act has the effect that what was previously an ordinary day to day activity, and which was accepted as natural, is now a criminal offence and carries with it the seeds of humiliation and is thus an affront to the applicants' dignity. The applicants furthermore allege that their dignity does not stand alone, it is allegedly intertwined with the applicants' duty to keep their patient's illnesses privileged. To compel a medical practitioner to reveal to a pharmacist what illness the patient suffers from unlawfully compels the patient (and doctor) to disclose his or her illness to third parties (so the applicants contend).

[27] Mr Heathcote, who appeared on behalf of the applicants, in oral arguments submitted that medical practitioners have for over 40 years been regarded as having the competence to sell medicines to their patients, but with the introduction of section 31(3) that acknowledgement disappears. He argued that this was so because the Council when considering whether to grant or refuse a section 31(3) licence, has to be satisfied that the doctor has the required competence to dispense. He thus submitted that to doubt a person's competence without good reason or evidence is to diminish the public's estimation of that person or the worth of value of that person in the public eye and amounts to an attack on the dignity of that person.

[28] To drive his point home, Mr Heathcote gave a hypothetical case of two neighbouring patients who have been receiving medicines from their doctors for the past five years. On a good day, the one patient hears that the doctor is prohibited from giving medicines but the neighbour's doctor is not so prohibited. Mr Heathcote then submitted that "for the man in the street, who does not know about the new licensing scheme, the question will immediately arise why his doctor is prohibited and his neighbour's doctor not. Logically, "he might doubt his own doctor's competence and even consider changing doctors". He further argues that this hypothetical example demonstrates how a doctor's dignity stands to be negatively affected by the licensing scheme.

[29] What Mr Heathcote does not tell the court is whether his 'man in the street' is a reasonable person of ordinary intelligence. It is now well established that the test to be applied when considering whether a person's right has been infringed or not is an

objective test.[20]I do not think that a reasonable fair minded person of average intelligence would doubt his doctor's competence simply, because that doctor does not have a license to sell scheduled medicine as is required by the relevant laws.

[30] I have earlier observed that section 22A of the repealed Medicines and Related Substances Control Act, 1965 conferred the right to medical practitioners to sell and dispense certain categories of medicines, that section in material terms provides as follows:

> '**22A CONTROL OF MEDICINES AND SCHEDULED SUBSTANCES**
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> (1) Subject to the provisions of this section, no person shall sell any medicine or Scheduled substance unless he is the holder of a licence issued in terms of an ordinance of a provincial council or the territory on the prescribed conditions, or he is employed by the holder of any such licence: Provided that nothing in this subsection contained shall be construed as requiring a medical practitioner, dentist, pharmacist or veterinarian to hold any such licence to sell any medicine or Scheduled substance in the course of lawfully carrying on his professional activities.
>
> (2) …
>
> (3) Any Schedule 1 substance, not being any such substance prescribed for the purposes of this subsection, shall not be sold by the holder of a licence referred to in subsection (1): Provided that any Schedule 1 substance shall not be sold to any person apparently under the age of sixteen years except upon a prescription issued by a medical practitioner, dentist or veterinarian and dispensed by a pharmacist, trainee pharmacist or unqualified assistant or by a medical practitioner or dentist or veterinarian or on a written order which discloses the purpose for which such substance is to be used and bears a signature known to the seller as the signature of a

[20] The reasonable persons test was formulated as follows in *R v Camplin 1978 AC 705* A Reasonable person-

'means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.

person known to such seller and who is apparently over the age of sixteen years, and such order shall be retained by such seller for a period of not less than six months after the relevant sale.

(4) Any Schedule 2 substance shall not be sold-

(a) by any person other than a pharmacist or a trainee pharmacist or unqualified assistant acting under the personal supervision of a pharmacist; and

(b) to any person apparently under the age of sixteen years except upon a prescription issued by a medical practitioner, dentist or veterinarian and dispensed by a pharmacist, trainee pharmacist or unqualified assistant or by a medical practitioner or dentist or veterinarian or on a written order which discloses the purpose for which such substance is to be used and bears a signature known to the seller as the signature of a person known to such seller and who is apparently over the age of sixteen years; and

(c) unless the seller enters in a prescription book required to be kept in the prescribed manner, all the prescribed particulars of such sale.

(5) Any Schedule 3 substance shall not be sold-

(a) by any person other than a pharmacist or a trainee pharmacist or unqualified assistant acting under the personal supervision of a pharmacist, upon a written prescription issued by a medical practitioner, dentist or veterinarian or on the verbal instructions of a medical practitioner, dentist or veterinarian who is known to such pharmacist; or

(b) to any person other than a medical practitioner, dentist, veterinarian or pharmacist; and

(c) unless the seller enters in the prescribed manner in a prescription book required to be kept in the prescribed manner, all the prescribed particulars of such sale; and

(d) in the case of a sale as provided in paragraph (a), in a quantity greater than that stated in the prescription or instructions referred to in that paragraph: Provided that such sale may, upon such prescription or instructions, be repeated for use in terms of such prescription or instructions during a period not exceeding six months as from the date of the first such sale.

(6) A Schedule 4 substance shall not be sold-

(a) by any person other than a pharmacist or a trainee pharmacist or unqualified assistant acting under the personal supervision of a pharmacist, upon a written prescription of a medical practitioner, dentist or veterinarian or on the verbal instructions of a medical practitioner, dentist or veterinarian who is known to such pharmacist: Provided that a medical practitioner, dentist or veterinarian who has given such verbal instructions shall within seven days after giving such instructions furnish to such pharmacist a written prescription confirming such instructions; or

(b) to any person other than a medical practitioner, dentist, veterinarian or pharmacist; and

(c) unless the seller enters in the prescribed manner in a prescription book required to be kept in the prescribed manner, all the prescribed particulars of such sale; and

(d) in the case of a sale on a written prescription as provided in paragraph (a), in a quantity greater than that stated in the prescription: Provided that such sale may, if the person who issued the prescription indicated thereon the number of times and the intervals at which it may be dispensed, be repeated accordingly: Provided further that every seller shall endorse on the prescription the date of sale and the quantity of the said substance sold, and that the last seller shall retain the prescription for a period of not less than three years as from the date of the last sale.

[31] In my opinion section 22A, is not concerned with the competency or incompetency of medical practitioners to dispense or sell medicines. I am further of the view that, that section does not confer an eternal right on medical practitioners to sell scheduled medicines. That section simply regulates who may and who may not sell scheduled medicines.

[32] Section 31(3) of the Medicines Act, which regulates the sale and dispensing of scheduled medicines, provides as follows:

> **'31 Licences and permits**
>
> (1) The Council may issue a licence on application in the prescribed form by a person, who lawfully performs a health service, other than a person referred to in subsection (2) or (3), authorizing that person to-
>
> (a) acquire;
> (b) possess; and
> (c) prescribe, use in respect of, or sell to, his or her patients,
>
> specified Schedule 1, Schedule 2 or Schedule 3 substances, subject to such conditions as the Council may determine, if the Council is satisfied that granting such a licence is in the public need and interest and that the person possesses the required competence to possess, prescribe, use, or supply those scheduled substances.
>
> (2) …
>
> (3) The Council may issue a licence on application in the prescribed form by a medical practitioner, a dentist or a veterinarian, authorising that medical practitioner, dentist or veterinarian to sell Schedule 1, Schedule 2, Schedule 3 or Schedule 4 substances to his or her patients, subject to such conditions as the Council may determine, if the Council is satisfied that granting such a licence is in the public need and interest and that the medical practitioner, the dentist or the veterinarian has the required competence to dispense those scheduled substances'.

[33] The applicants contended that the requirement to apply for a licence whenever a medical practitioner, a dentist or a veterinarian intends to sell Schedule 1, Schedule

2, Schedule 3 or Schedule 4 substances to his or her patients interferes with the right to dignity. I have indicated above that in order to establish that a given practise or law violates Article 8(1) of the Constitution, it must be proven that the practise or law disregards the intrinsic worth of the complainant, or disrespect the intrinsic worth of the complainant or is inconsistent with respect for the intrinsic worth of the complainant and that the State does not realize that it exist for the sake of the individual.

[34] The applicants have not in this matter demonstrated how section 31(3) of the Medicines Act disregards the intrinsic worth of the medical practitioners, or disrespect the intrinsic worth of the medical practitioners or is inconsistent with respect for the intrinsic worth of the medical practitioners or that, the State does not realize that it exist for the sake of the individual. The State exists for the sake of individual but it is also correct to state that the State must act in the interest of the greater majority reconciling and balancing the conflicting interest of the people in a reasonable just fair manner. The following statement by Strydom, CJ in *Muller and Another v President of the Republic of Namibia*[21] is thus apposite:

> '. . . 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.'

In my opinion the policy and object of section 31 (3) of the Medicines Act is to regulate the selling of scheduled medicines. Regulating the professional activities of medical practitioners, I must say, is for the common good of the Namibian people. There is nothing unreasonable, unjust and unfair in the challenged provisions and I hold that the licensing scheme does not infringe the dignity of the applicants.

[35] Ms. Rosalia Annette Nghidinwa, who deposed to the affidavit on behalf of the minister, says that, what prompted the licensing scheme are bad dispensing practises by medical practitioners. These practices include the irrational use of drugs by prescribers, dispensers, patients and a lack of unbiased information on drugs for

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[21] 1999 NR 190 (SC) at 199 H.

health workers and consumers, the high cost of medicine and the temptation to private medical practitioners to prescribe inappropriately so as to increase their income. She thus stated that the purpose of section 31(3) is to promote the rational use of drugs through sound prescribing, good dispensing practises and appropriate usage of drugs[22].

[36] The applicants' response to Ms. Nghidinwa's statement is that the respondents could not cite one example of the "wide spread irrational use of drugs" and that they support the rational use of drugs. In my view, the adoption of the National Drug Policy is in itself recognition and testimony of the fact that there are problems with the dispensing, selling and use of drugs in Namibia therefore, I do not find any need for the respondents to cite instances or examples of irrational use of drugs. Secondly, the statement that the applicants support the rational use of drugs is an admission of the need to regulate the selling, dispensing and use of drugs.

[37] The licensing scheme introduced by section 31(3) of the Medicines Act does, in my view, not infringe the right to the dignity of medical practitioners. This conclusion is buttressed by the dictum of Ngcobo, J in *Affordable Medicines Trust and Others v Minister of Health and Others* [23] , which dictum I accept, when he said-

> 'I cannot conceive of anything that would harm the medical profession if those medical practitioners who wish to dispense medicines as part of their practises are required to comply with good dispensing practises in order to promote access to affordable medicines that are safe for consumption by the public. If anything, this should enhance their dignity in the eyes of the public that they serve.'

Do the challenged provisions of the Medicines Act violate the applicants' right to practise their profession?

[38] The other basis on which the provisions, particularly section 31(3), of the Medicines Act is challenged is the allegation that that section prohibits medical

[22]See paragraphs 14-18 of the affidavit on behalf of the Minister.

[23]2006 (3) SA 247 (CC) at para [104] p 287.

practitioners to sell Schedule 1, Schedule 2, Schedule 3 or Schedule 4 substances to their patients, without a licence thus prohibiting the medical practitioners to practise their trade and profession. The argument of Mr Heathcote which, I repeat verbatim, was as follows:

> 'Until 1965 the selling and dispensing of medicine was the sole domain of pharmacologists. Then, in 1965, by virtue of section 22A of the Medicines and Related Substances Control Act, 1965 (Act 101 of 1965) the right to sell medicines was extend to medical practitioners–this included practicing doctors. This was the position until 2008 when Parliament passed the 2003 Act, 2003 which introduced a licensing scheme, in terms whereof, inter alia medical practitioners were forthwith prohibited to sell Schedule 1,2 3, and 4 substances to their patients.'

[39] Mr Heathcote further argued that, with a stroke of a pen, doctors are prohibited from continuing to practise their trade and profession as before. He argued that it now lies within the absolute discretion of the Council to decide to what extent a doctor may continue to practise his or her profession. Before I proceed to consider the submission against the relevant constitutional provisions I must, at the outset, state that the Medicines Act does not confer absolute discretion on the Council.

[40] Mr Heathcote's argument is misplaced first, because the phrase *'absolute discretion'* does not appear anywhere in the section, secondly in our current constitutional dispensation every administrative body, administrative officials, tribunal or body of persons imbued with the power of adjudicating civil obligations is subject to the constitution and the principle of legality. This truism was stated more than one hundred years ago in the English case of *Sharp v Wakefield*[24] namely that:

> '… "Discretion" means when it is said that something is to be within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: …according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular.'

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[24] 1891 AC 173 at p179.

[41] My conclusion in the preceding paragraph is buttressed by Baxter[25] who argues that:

> 'In any constitutional state "unfettered discretion" is a contradiction in terms. The courts have long recognized that discretionary power must be exercised according to certain minimum standards; even those judges who have employed the misleading adjectives that create the impression of unfettered power themselves recognize that such powers cannot be exercised arbitrarily or capriciously.'

The vacuity of the adjectives 'absolute', 'free' and 'unfettered' was emphasized in the English case of *Padfield v Minister of Agriculture, Fisheries, and Food*[26] where Lord Upjohn said:

> 'My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellant's claim is one of the fundamental matters confounding the Minister's attitude, *bona fide* though it may be. First, the adjective nowhere appears in section 19… Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But to use that adjective … can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act, and its scope and object in conferring a discretion on the Minister rather than by the use of adjectives.'

[42] The right to practise a profession is guaranteed by the Namibian Constitution in the following terms:

> **'Article 21 Fundamental Freedoms**
>
> (1) All persons shall have the right to:
>
> (a) …

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[25] Baxter L *Administrative Law* 1984 at p 409.

[26] 1968 AC 997 at p 1060.

(j) Practise any profession, or carry on any occupation, trade or business.'

[43] The Supreme Court has articulated the approach which must be adopted when inquiring into whether a law infringes the Article 21(j) of the Namibian Constitution as follows[27]:

> 'That approach must recognise, as this Court did, in *Africa Personnel Services* that the right in art 21(1)(j) does not *'imply that persons may carry on their trades or businesses free from regulation'.* This approach must be correct for nearly all trades, professions and businesses are regulated by law. Article 21(1)(j) thus does not mean that regulation of a profession will, without more, constitute an infringement of the right to practise a profession that will require justification under art 21(2), because professions are regulated and regulation will often constitute no barrier to practising the profession at all.
>
> [26] As the High Court observed in *Namibia Insurance Association*, any regulation of the right to practise must be rational but that is not the end of the enquiry. Even if the regulation is rational, if it is so invasive that it constitutes a material barrier to the right to practise the profession, the regulation will be an infringement of the right to practise that will have to be justified under art 21(2). In determining whether a regulation that does constitute a material barrier to the right to practise is permissible under art 21(2), a court will have to approach the question as set out in *Africa Personnel Services.*
>
> [27] The approach thus has three steps: the first is to determine whether the challenged law constitutes a rational regulation of the right to practise; if it does, then the next question arises which is whether even though it is rational, it is nevertheless so invasive of the right to practise that it constitutes a material barrier to the practise of a profession, trade or business. If it does constitute a material barrier to the practise of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of art 21(2).'

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[27]Per O'Regan, AJA in *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at paragraphs 25 to 28 p 735.

[44] I have earlier set out the background that gave rise to the Ministry of Health Social Services initiating the enactment of the Medicines Act. In a nutshell the minister argues that the irrational use of drugs has increased the costs of medicine to the public and undermines the safety, quality and efficacy of the medicines that are dispensed to patients. He says that bad dispensing practises compromise and place in jeopardy the health of patients and that of the public at large and constitute a denial of access to health care to the public.

[45] According to the minister, the licensing scheme is directed at addressing these bad dispensing and compounding practises and their consequences. The underlying objective behind the licensing scheme is to rationalize the use of medicine in the Namibia. The applicants do not dispute the stated government purpose, or its legitimacy. Instead, the applicants have sought to challenge the means used by the government to achieve its objective to increase access to medicines that are safe for consumption. They contended that the means used by the government to achieve its objective are unconstitutional. I am therefore, of the view that applicants do not dispute the right of government to regulate the practise of the medical profession. The need to regulate economic activities was articulated as follows by Ngcobo, J:

> '…we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. Provided it is in the public interest and not arbitrary or capricious, regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it is to be both expected and welcomed.'

The vexed question, however, is whether section 31 (3) is so invasive of the right to practise the *medical* profession that it constitutes a material barrier to the practise of that profession.

[46] The licensing scheme introduced by section 31 (3) regulates the practise of the medical profession, but it regulates the practice in a manner that, viewed objectively, does not affect the choice of that profession by any person in any negative manner. I therefore do not accept Mr Heathcote's submission that the requirement of a licence

does take away the right to choose to practise medicine or that it constitutes a barrier for those who want to practise the medical profession. What section 31 (3) does is, merely to require that, if the practice of medicine is to involve the selling of scheduled medicine, this should be done by a medical practitioner in respect of whom a licence to sell medicine has been issued.

[47] The applicants have furthermore not placed evidence on the record that the licensing requirements constitute a barrier to the practice of the profession, such that medical practitioners withdrew from the practice of the profession, because of the requirement to have a licence to sell medicine. What does appear from the record, is that there are medical practitioners (although in the minority) who practise the medical profession without selling medicine. In the circumstances, the applicants have not established that the licensing scheme constitutes an infringement of Article 21(1) (j).

Do the challenged provisions of the Medicines Act violate the applicants' 'property right'?

[48] The applicants contended further that the licensing scheme introduced by section 31(3) also infringes the rights to property. Mr Heathcote argued that the medical practitioners' immaterial rights comprised of goodwill and earning capacity, which they enjoyed and exercised prior to the introduction of section 31 (3), which section infringes those immaterial rights. He further argued that the medicine, which doctors have in stock at any given time, becomes valueless once the doctor is prohibited from selling it. He further argued that the licensing scheme deprives medical practitioners of assets in the form of goodwill and earning capacity. Their medicine stock become valueless, thus their right to ownership is expropriated.

[49] The hollowness of that argument, with respect, becomes apparent if one has regard to the interpretation and application of Article 16 of the Namibian Constitution which provides as follows:

'**Article 16 Property**

(1) All persons *shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees*: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.' { My Emphasis}

[50] In my view Article 16(1) of the Namibian Constitution simply confers the right on any person to own and dispose of property (movable, immovable, real, incorporeal tangible and intangible). This was recognised by this Court in the matter of *De Roeck v Campbell and Others (2)*[28] when Levy, J said:

> 'The right to own property is a fundamental human right found in our common law and now entrenched in our Constitution (art 16 of the Constitution of Namibia Act 1 of 1990). Ownership includes the right to possess one's own property, the right to dispose of it and even the right to destroy it. If anyone else lays claim to such property or to interfere with any one of those rights which are comprehended by ownership, the onus is on such person to justify his claim. Where a creditor obtains a judgment sounding in money the law makes provision for the attachment by him of his debtor's property and the sale in execution thereof. Even under such circumstances the laws of execution are so framed so as to protect the debtor's rights subject only to the creditor's rights in terms of his judgment.

[51] I fail to see how section 31 (3) of the Medicines Act interferes with medical practitioners' right to own, dispose of or destroy any medicine. What the section does is simply to regulate who may and who may not sell Schedule1, Schedule 2, Schedule 3 or Schedule 4 medicines. Mr Maleka, who appeared for the respondent's, argued that as a matter of law the applicants do not have a right, in law, to a regulatory scheme, which protects a commercial goodwill of their medical practises above the

[28] 1990 NR 126 (HC).

legitimate governmental purpose of controlling the dispensing of medicines. Mr Maleka referred me to the dictum of Sachs, J in the matter of *New Clicks South Africa (Pty) Ltd and Others*[29] where he said:

> '…the mere fact that a government measure could result in service-providers losing their competitive edge so as to face being driven out of business would not in itself be enough to make a measure legally inappropriate (unreasonable). The maintenance of 'business as usual' is not a constitutional principle, and the concept of reasonableness should not be used as an apparently neutral instrument which, regarding the *status quo* as the settled norm, serves to block transformation and freeze challengeable aspects of our public life.'[30]

[52] I accept Sachs, J's dictum as a correct statement of the law and so I adopt it. Indeed, I do not know of any rule of law and none was referred to me, to the effect that because a system or a scheme has been in existence for forty years, it cannot for any good reason be changed without violating the right of those who benefitted from the scheme or system. It is furthermore so that when the licensing scheme was introduced medical practitioners were given a three months opportunity to acquire a licence, allowing to sell Scheduled medicine. During that three months period, they could either apply for a licence or in a manner they deemed appropriate deal with the medicines they held in stock. I thus hold that the licensing scheme introduced by section 31 (3) of the Medicines Act does not infringe any property rights of the applicants as contemplated in Article 16 of the Namibian Constitution.

Do the challenged provisions of the Medicines Act violate the applicants' right to have their civil rights and obligations determined by a competent Court or Tribunal?

[53] The applicants contended further that the licensing scheme also infringes the right to have their civil rights and obligations determined by a competent Court or Tribunal. The right to have one's civil rights and obligations adjudicated upon by a

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[29] *New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae), Minister of Health and Another NO:* 2006 (2) SA 311 (CC).

[30] Supra at para 660.

competent Court or Tribunal is contained in Article 12(1)(a) of the Namibian Constitution which provides as follows:

> **'Article 12 Fair Trial**
>
> (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[54] The argument on behalf of the applicants in this regard is as follows: The power entrusted to the Council to consider applications in terms of section 31 (3), amounts to it (the Council) exercising a *quasi*-judicial function. Mr Heathcote further argued that, there can be no doubt that section 31(3) gives the Council a discretion whether to grant a licence or not. The only manner in which the exercise of that discretion is guided, is by the criteria contained in Regulation 34(3)(b) and (f), which remained standing after the Supreme Court judgment. There is no word in the Act itself, which either purports to restrict or direct the discretion given to the Council and that is an absolute discretion – there are no rational criteria left to guide the Council in its decision-making process. He, therefore, submitted that: (I again verbatim repeat what he said):

> 'It is reasonable to conclude that, in the circumstances, the discretion to grant a section 31(3) licence or not, is exercised in a unilateral and arbitrary fashion. There is no statutory provision that the NMRC must keep records when considering applications. There is no statutory provision for a right of appearance. The effect of such an absolute discretion is stated in the *dictum* in *Judes v Registrar of Mining Rights.*
>
> > "Where the statutory discretion in regard to the decision of any matter was intended to be an absolute discretion, the court will only interfere where it is satisfied that there has been no decision – that the question referred to the

> public body or official has not been considered; or where the decision has been arrived at under the influence of corrupt, fraudulent or wholly improper motives; or where the direct provisions of the statute have been disregarded."

[55] His argument went on as follows: The effect is that, as the law currently stands, the *quasi*-judicial function of the Council (which would normally require the observance of elementary duties commonly referred to as the rules of natural justice and expressed by the maxim *audi et alteram partem* and *nemo iudex in sua causa*) is fulfilled by the exercise of an absolute discretion, reviewable on very limited grounds. He further argued that the medical practitioners thus find themselves in a position that their existing civil rights and obligations are determined by a body which cannot be said to act as a court or tribunal.

[56] Mr Heathcote further submitted that, after the Supreme Court struck down Regulations 34(3)(a), 34(3)(c), 34(3)(d) and 34(3)(e) of the Regulations relating to Medicines and Related Substances, there is no word in the Medicines Act itself which either purports to restrict or direct the discretion given to the Council and that this is an absolute discretion. He also submitted that there are no rational criteria left to guide the Council in its decision-making process and that the discretion to grant an section 31 (3) licence or not, is exercised in a unilateral and arbitrary fashion.

[57] The above arguments lose sight of a number of important facts; the first fact is that section 8 (9) of the Medicines Act obliges the Council to keep a record of its proceedings[31]. Furthermore an arbitration under the Labour Act, 2007 [32]is a tribunal. There is no statutory right of appearance by legal practitioner at an arbitration tribunal created under the Labour Act, 2007. It is within the discretion of the arbitrator to permit or not to permit legal representation. It cannot solely for these elements, seriously be

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[31] Section 8(9) provides as follows:

'(9) The chairperson must cause a record to be kept of the proceedings of every meeting of the Council and must cause that record to be submitted to the Minister as soon as is practicable after a meeting of the Council.'

[32]Act No.11 of 2007.

argued that an arbitration tribunal under the Labour Act, 2007 is not a tribunal within the meaning of article 12(1) of the Namibian Constitution. In the case of *Disciplinary Committee for Legal Practitioners* v *Slysken Sikiso Makando*[33] Parker, J said the following:

> '…I hold that the applicant is not an administrative body within the meaning of Article 18 of the Namibian Constitution, and *a priori*, Article 18 does not apply to the applicant. I hasten to add that I do not for a modicum of a moment propose that the applicant is not bound to act fairly and reasonably and comply with the requirements of the rules of natural justice and the requirements of the LPA. The Court is not an administrative body but it must, in determining any matter, act fairly and reasonably and comply with the requirements of the rules of natural justice and the requirements of any relevant legislation. In this regard, one must not lose sight of the fact that those noble requirements are not peculiar and exclusive to the application of Article 18 in respect of administrative bodies and administrative officials: they bind courts and other tribunals because, as I say, they are not peculiar and exclusive to Article 18.

The reasoning of Parker, J applies to this matter and I accept it. I am of the opinion that the mere fact that the Council is not an administrative body does not absolve it from acting fairly and reasonably and comply with the requirements of the rules of natural justice and the requirements of any relevant legislation.

[58] It is correct that the Council is not a court as envisaged in Article 78(1) (a) of the Namibian Constitution, which reads as follows:

> **'Article 78: The Judiciary**
>
> (1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:
>
> (a) a Supreme Court of Namibia;
>
> (b) a High Court of Namibia;
>
> (c) Lower Courts of Namibia.'

[33] An unreported judgment of this court: Case No: A 370/2008 delivered on 18 October 2011.

[59] But does it also mean that it is not a tribunal as envisaged in article 12(1) (a) of the Namibian Constitution? I do not think so; in my opinion the Council is a tribunal as envisaged by article 12(1) (a) of the Constitution. My finding is buttressed by the following. Armstrong[34] argues that:

> 'Tribunals are informal investigative or quasi-judicial bodies which deal almost exclusively with administrative law, and usually on a highly specialized level.'

Professor K Govender[35] quoting Professor Farmers argues that a tribunal, by definition should possess the following characteristics:

> 'Firstly, they should have the ability to make *final, legally enforceable decisions*. Secondly, they should be independent from any departmental branch of government. Thirdly, the nature of the *hearings conducted in tribunals should be both public and of a judicial nature*, while not necessarily subject to the stringent formalities of a court of law. Fourthly, *tribunal members should be in possession of specific expertise, in the field of operation of the tribunal* as well as judicial expertise. Fifthly, there should be a *duty on tribunals to give clear reasons for their decisions,* and lastly that there should be *a right of appeal to a higher court on disputes regarding points of law.'*

[60] I, have, earlier stated above that the Council was established by section 2 of the now repealed Medicines and Related Substances Control Act, 1965 (Act 101 of 1965) and its existence was continued in terms of section 2 of the Medicines Act and it has the powers conferred to it by the Medicines Act, including the power to issue a licence on application in the prescribed form by a medical practitioner, a dentist or a veterinarian, authorizing that medical practitioner, dentist or veterinarian to sell Schedule 1, Schedule 2, Schedule 3 or Schedule 4 substances to his or her patients. I am therefore, of the view that the Council conforms to the first requirement of a tribunal namely; the requirement of enforceability and finality.

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[34]Gillian Claire Armstrong '*Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison'* A Thesis presented in partial fulfilment of the requirements for the degree Master of Laws at the University of Stellenbosch: December 2011.

[35]Devenish G E, Govender K, Hulme D *Administrative Law and Justice in South Africa*., 2001 p 445.

[61] The Council further meets the second and fourth requirements of a tribunal because the Council consists of three medical practitioners, three pharmacists, two veterinarians, one legal practitioner, one registered nurse; one medical practitioner who, in the opinion of the Minister, has sufficient knowledge of medicines and related substances; and one other person. Out of the eleven members, who are appointed to the Council, only four are employed by the State and the other seven come from the private or public sector. The composition of the Council confers on it a degree of independence. The members must also have expertise in the field in which the Council operates. It is common cause that the Council is required to give reasons for its decisions and its decisions are appealable. So the Council also conforms to the fifth and sixth requirements.

[62] That submission is, in, my view misplaced and I reject it. I say the submission is misplaced for the following reason: There is no doubt that the Council is a statutory tribunal which derives its authority and power from statute. As I have already found, every act or decision of the Council will therefore, be subject to review by the courts either under the Constitution or common law grounds. There is thus not 'very limited' grounds for review. I therefore have no doubt in my mind that the Council is a tribunal as envisaged by article 12(1) (a) of the Namibian Constitution.

[63] As far as costs are concerned, the issues raised by the applicants were genuine constitutional questions, which raised matters of broad public concern. Although the matter concerns constitutional issues and constitutional rights, it does not, in my view, fall within the ambit of cases in which it would be unfair or would lead to an injustice, should costs follow the outcome of the case. I therefore exercise my discretion by ordering that costs will follow the outcome.

[64] I therefore make the following order:

1. The application is dismissed.

2. Applicants are ordered to pay respondents' costs, which will include the costs of one instructing and one instructed counsel.

SFI UEITELE
Judge

APPEARANCES

APPLICANTS:	R Heathcote SC Instructed by Francois Erasmus & Associates
RESPONDENTS:	V Maleka SC Instructed by N Marcus Public Office