REPORTABLE

CASE NO.: SA 18/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE MINISTER OF MINES AND ENERGY **FIRST APPELLANT**

ANCASH INVESTMENTS (PTY) LTD **SECOND APPELLANT**

and

BLACK RANGE MINING (PTY) LTD
RESPONDENT

Coram: STRYDOM, AJA, CHOMBA, AJA *et* DAMASEB, AJA.

Heard on: 24/03/2010
Delivered on: 15/07/2010

APPEAL JUDGMENT

STRYDOM, AJA: [1] This appeal concerns an application for review filed on 1 February 2007 by Erongo Nuclear Exploration (Pty) Ltd (Erongo) and respondent to

review and set aside certain decisions of the first appellant. In terms of these decisions, taken on 25 August 2006 and 9 October 2006, the first appellant refused applications by Erongo to prospect and explore for nuclear fuels, such as uranium, on Exclusive Prospecting Licences (EPLs) in four areas known as EPL's No's 3547, 3548, 3549 and 3550. Simultaneously, application was also made to review and set aside the decision by the first appellant, taken on 23 October 2006, in terms of which he awarded 4 EPL's to the second appellant authorizing it to explore for nuclear fuels over EPL's which covered the same geographical area in respect of which Erongo's application was unsuccessful and over which the respondent held EPLs to prospect for certain base metals and precious stones.

[2] It is necessary to set out the background history of the matter to show how respondent became involved in the matter and also because the challenges by appellants on respondent mainly concerned the latter's 'moral' standing in these proceedings to bring the application for review. Both the first and second appellants urged the Court to find that this was an instance where the Court should not set aside the decision by the first appellant even though that decision might have been reviewable. This line of argument followed after it became clear that the first appellant, in granting the said EPL's to the second appellant, neglected to comply with the provisions of sec. 69(2)(g) of the Minerals (Prospecting and Mining) Act, Act No. 33 of 1992, (the Act). I will later deal more fully with these provisions. The appellants further alleged that the respondent did not come to Court with clean hands and that it should not be allowed to benefit from its own wrongs. These submissions are based on the

background history of the matter.

[3] Mr. Corbett represented the first appellant whereas Mr Trengove, assisted by Mr. Barnard, appeared for the second appellant. Mr. Odendaal, assisted by Mr Tötemeyer, represented the respondent.

[4] An Australian mining company, Reefton Mining NL, has two wholly owned subsidiaries in Namibia, namely Reefton Exploration (Pty) Ltd and the respondent, Black Range Mining (Pty) Ltd. The respondent has been, since 2000, the holder of the four above- mentioned EPL's issued to it in terms of the provisions of the Act and in respect of which the respondent was licenced to prospect for Base and Rare Metals, Industrial Minerals, Precious Metals and Precious Stones. The Licences did not permit the respondent to prospect for nuclear fuels such as uranium. (sec. 67(1)(a).)

[5] The EPL's of the respondent covered, amongst others, an area known as Hakskeen. On 18 March 2005 Reefton publicly announced that the respondent had discovered a new uranium deposit at Hakskeen. As a result of this announcement, the shares of Reefton increased significantly. It also took the opportunity to effect a new public share issue on 16 June 2005 by which it raised UA$3 million.

[6] On 27 July the first appellant issued a public statement in which he accused Reefton that it, through its subsidiary, the respondent, was prospecting for uranium in breach of their EPL's. In the meantime, and on 18 March 2005, the respondent applied for an amendment of its EPL's to include prospecting for nuclear fuel. On 21 July 2005 the first appellant turned down the application. This in turn caused the price of Reefton's

shares to fall. All this further led to de-listing of Reefton from the London Stock Exchange's Alternative Investment Market and led to an investigation by the Australian Securities and Investments Commission into the affairs of Reefton. Nothing untoward was found against Reefton as a result of the latter investigation.

[7] In the interim two applications were made by the respondent to amend its EPL's to include nuclear fuel minerals. Both applications were refused on 20 July 2005 and in his public statement, of 27 July 2005, the first appellant stated that he had done so as a result of the unlawful prospecting for uranium by the respondent.

[8] On 5 October 2005 officials of Reefton held discussions with the first appellant and on 6 October 2005 the respondent submitted new applications for EPL's in order to include the prospecting for nuclear fuels. This new application was likewise turned down by the first appellant on 8 November 2005.

[9] Thereafter some companies were set up which were wholly owned by Namibian citizens. These were Philco 24 (Pty) Ltd which later became Intaka Investments (Pty) Ltd and Philco 27 (Pty) Ltd which later became Erongo Nuclear Exploration (Pty) Ltd and which was a wholly-owned subsidiary of Intaka. A Mr. Haikali, who was also the deponent to an affidavit on behalf of Erongo in these proceedings, was the main shareholder.

[10] On 28 April 2008 Reefton Exploration (Pty) Ltd entered into a joint venture

agreement with Intaka and Erongo, represented by Mr. Haikali, in terms whereof Erongo undertook to apply for nuclear fuel EPL's. If the applications were successful, Reefton undertook to make an initial contribution of N$1, 5m to Erongo to fund its costs of exploration. As a *quid pro quo* Reefton would get 60% of the shares in Intaka. Thereafter the Namibian shareholders would have to make an election, either to carry 40% of the ongoing exploration costs, or to transfer a further 15% of the shares in Intaka to Reefton in which case it would make a further contribution of N$1 m towards Erongo's working capital. In the applications for these EPL's mention was made of the role of Reefton and the joint venture agreement with them.

[11] In May 2006 Erongo duly applied for the four EPL's to prospect for nuclear fuel minerals. The applications were scrutinized and considered by various bodies and persons put in place by the first appellant. In each instance there was a recommendation that the applications be granted. This was also the attitude of the Mining Commissioner. He, however, in a note, referred to the previous problems with Reefton. The applications were refused by the first appellant and as reason for the refusal he stated the joint venture agreement and Reefton's previous actions in relation to nuclear fuels.

[12] Before the matter was heard in the High Court, Erongo withdrew from the proceedings which then also brought an end to their application to review the decision of the first appellant not to grant Erongo the EPL's in regard to nuclear fuels. The respondent remained as the only applicant before the Court *a quo* and the only issue for

determination was the review of the EPL's granted by first appellant to second appellant which EPL's were over the same geographical area as those applied for by Erongo and over which the respondent held EPL's for minerals other than nuclear fuels.

[13] The issue which this Court must decide, apart from the appellants' challenge to the 'moral' standing of the respondent, remains the reviewability of the grant of the EPL's to the second appellant. For this reason it will also be necessary to look at the background and the process by which this grant was made.

[14] In the founding affidavit reliance was placed, by the respondent, *inter alia,* on various grounds such as the non-compliance by the first appellant with the provisions of sec 69(2)(g) s. sec. (i) to (iv) which brought into play the *audi alteram partem* rule in instances where an EPL is granted over the same prospecting area of another holder of an EPL albeit for a different group of minerals. This failure, it was alleged, also resulted in the first appellant not properly applying his mind when he came to grant these EPL's to the second appellant. Other grounds raised by the respondent were the alleged violation of its rights to fair and reasonable decision-making in terms of Art. 18 of the Constitution and its rights to freely carry on its trade or business in terms of Art. 21(1)(e) of the Constitution. Some of these grounds were not pursued before us and it is therefore not necessary to deal therewith.

[15] After the records in the review proceedings were filed by the first appellant, a number of irregularities and shortcomings were discovered in the applications made by

the second appellant. These irregularities were pointed out in a supplementary affidavit and relied upon by the respondent in the proceedings before the High Court. This was done in terms of High Court Rule 53(4). These other issues relied upon by the respondent were non-compliance by the first appellant with sec. 68(c) which required the inclusion of certain particulars in the applications, such as a plan and map of the area. Non-compliance with secs. 68(h) and 69(2)(c)(i) which deal with certain particulars to be included in the applications, and concern the intended prospecting operations and expenditures. It was also alleged that there was not compliance with sec. 68(g) which required particulars of technical and financial resources. It was further complained that sec 6(1) of the Act, concerning secrecy in regard to the records of Erongo, was transgressed. I will deal with these, and other similar issues, more fully later in this judgment.

[16] It is inevitable that there would be some overlapping in the arguments presented by counsel for the first and second appellants and in such instances I shall deal with the arguments simultaneously. Although Mr. Trengove, as the senior counsel, argued first on behalf of the second appellant, I shall follow the sequence of the parties as they appear in the proceedings.

[17] Mr. Corbett firstly pointed out the pivotal role played by the first appellant in the administration of the Act and his obligation to ensure “that Namibia’s considerable mineral wealth is rationally utilized for the benefit of the development of our country” and

submitted that the Court should practise a measure of deference towards the decisions taken by him. (See *Logbro Properties CC v Bederson NO and Others,* 2003 (2) SA 460 (SCA).) This would also apply to matters of a highly technical nature which the first appellant was required to consider in order to achieve these goals. (See *Ekurhuleni Metropolitan Municipality v Dada NO,* 2009 (4) SA 463 (SCA).)

[18] Counsel relied on the following excerpt from the *Logbro Properties* case, *supra*, p471, par. 21, where Cameron, JA, stated the following:

> "It is just in such circumstances that a measure of judicial deference is appropriate to the complexity of the task that confronted the committee. Deference in these circumstances has been recommended as '... judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies. ....This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped, not by unwillingness to scrutinize administration action, but by a careful weighing up of the need for – and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies, not to cross over from review to appeal.'"

(This is a citation from an article by Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-502, citing A Cockrell "Can you Paradigm?" 1993 *Acta Juridica* 227.)

[19] Although I have no quarrel with the principle set out above, the *Logbro Properties* case does not support first appellant's contentions. The circumstances to which Cameron, JA, referred to, at the beginning of the citation, differ materially from the present case. In that matter the High Court ordered a tender committee to reconsider a tender to buy property which the appellant had submitted two years earlier. The lapse

of time was due to previous successful proceedings brought by the appellant when he was not awarded the tender in the first instance. When the committee reconsidered the matter two years later it decided not to accept the tender of the appellant, which was now the highest, but decided that, because of the increase of property values in the Richards Bay property market since the tenders were obtained, to call for fresh tenders. The appellant went back to Court but was this time unsuccessful. Hence the appeal. The Court of Appeal stated that the appellant was entitled to a lawful and procedurally fair process and an outcome which was justifiable in relation to the reasons given for it. Even if the tender process entitled the committee to withdraw the Richards Bay property they could do so only with due regard to the principles of administrative justice. The Court found that but for the mistake committed in 1995 the appellant would in all likelihood have received the benefit of a property acquisition judged against the then market values. The question was then to what extent the right to administrative justice entailed exemption from prejudicial effects of a functionary's mistakes. As the mistake made was neither based on bad faith or administrative perversity the mistake committed was an innocent one. The committee, when they considered the situation in 1997, had to do so by not only giving fair consideration to the appellant's tender but had also to consider its broader responsibilities which included the public benefit to be derived from obtaining a higher price by re-advertising the property. In these circumstances the Court stated that a measure of judicial deference was appropriate and refused to set aside the decision of the committee for this reason.

[20] Notwithstanding its finding, set out above, the Court, in the *Logbro Properties* case, set aside the decision to re-advertise for tenders because the Court was of the opinion that procedural fairness demanded that the committee, in considering to re-

advertise, should have afforded those tenderers, whose tenders complied, an opportunity to make representations before they took their decision to re-advertise. In the present case it would not only have been fair to afford the respondent an opportunity to make representations to the first appellant, considering that second appellant's EPL's covered the same area as those of the respondent, the first appellant was by Act of Parliament required to do so and he failed to comply.

[21] With reference to the case of *Oudekraal Estates v City of Cape Town,* 2004 (6) SA 222 (SCA) both counsel submitted that the Court had a discretion in judicial review proceedings either to uphold an invalid administrative act or to set it aside. Counsel submitted, albeit for different reasons, that this was an instance where the Court should uphold the decision by the first appellant to grant nuclear fuel EPL's to the second appellant, even if it was found to be invalid. In pa. [36] of the *Oudekraal* case the following was stated by the Court, namely:

> "(A) court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide."

[22] This finding is based on what is accepted in our law that even an invalid administrative act "…….(is) capable of producing legally valid consequences for so long as the unlawful act is not set aside." (*Oudekraal* case, *supra,* pa. [26].) (See further *Standing Tender Committee v JFE Sapela Electronics,* 2008 (2) SA 638 (SCA); *Seale v Van Rooyen NO,* 2008 (4) SA 43 (SCA); *City of Cape Town v Helderberg Park Development,* 2008 (6) SA 12 (SCA) and *Chairperson, Eskom Holdings v New Reclamation Group,* 2009 (4) SA 628 (SCA).)

[23] In deciding whether to uphold or set aside an invalid administrative act, the cases show that there are various factors which the Court must consider when exercising its discretion. In the *Sapela* case, *supra,* a tender was awarded to a firm Nolitha after the latter was allowed to change its tender some two months after the closing of tenders. The Court of first instance set aside the award of the tender to Nolitha, because of this irregularity, and on appeal it was found that the acceptance of the tender of Nolitha and the award of the contract to it, were correctly held to be reviewable. The Court, however, continued and stated that that was not the end of the matter but given the effluxion of time, and the extent of the work already performed by Nolitha by the time the relief was granted, the issue was whether the Court's order, whereby Nolitha's grant was set aside, was capable of practical implementation. The Court investigated the matter and found [pa. 27] that if the order of the Court *a quo* was implemented it was likely not only to be disruptive but to give rise to a host of problems, not only in relation to a new tender process, but also in relation to the work to be performed and it added that, apart from prejudice caused to the respondent, that there was a public interest element in the finality of administrative decisions. It stated that two further considerations should be added where a Court had to exercise its discretion whether to uphold or set aside an invalid administrative act, namely pragmatism and practicality. [pa. 28]. The Court upheld the invalid administrative act and allowed it to stand.

[24] An example of where the Court exercised its discretion against the upholding of an invalid administrative act was the case of *Eskom Holdings, supra, paras. [15] to [18].*

In the present instance neither the first appellant nor the second appellant have set out any facts to show that the setting aside of the decision of the first appellant will cause prejudice to the second appellant as a result of the effluxion of time and/or that because of the work done by the second appellant in regard to the EPL's a stage was reached which would render it impractical to reverse the situation. Consequently, there is no basis on which the Court can exercise its discretion in favour of upholding the decision by the first appellant should it conclude that it was invalid.

[25] However, Mr. Corbett referred the Court to an affidavit made by one Esme Trollip, the approved accredited agent of the respondent, from which it was clear that the respondent, through some misunderstanding, neglected to apply timeously for the renewal of its EPL's. Such application had to be filed 90 days before the expiry of any licence of an EPL. (Sec. 72(2)(a).) The D-day for such applications was 20 March 2009. The above section of the Act empowers the first respondent to condone any late application for renewal of a licence provided that the application for condonation is submitted before expiry of the licence. In this instance that date was 20 June 2009. In a supplementary affidavit, handed in on the date of hearing of the appeal, Ms. Trollip stated that the respondent's application was submitted on 11 June 2009. At the time of the hearing of this matter the application was still under consideration by the first respondent.

[26] As the first affidavit by Ms. Trollip only indicated that application for condonation would still be made, Mr. Corbett, in his heads of argument, submitted that there was no

certainty that an application would in fact be forthcoming. This objection has now been taken care of in the supplementary affidavit by Ms. Trollip which showed that the necessary was done by the respondent and was done in time.

[27] Mr. Corbett also submitted that it was speculation for Ms. Trollip to state in her affidavit that good cause was shown in the application. Counsel submitted that the misunderstanding and miscommunication referred to, did not constitute good cause and that the affidavit by Mr. Koep, the legal practitioner for the respondent, that in his experience the first appellant usually condoned late applications, was of no evidentiary value. Counsel consequently submitted that the relief sought was academic and even if the Court should find that the Minister's decision constituted an invalid administrative act it should be permitted to stand for reasons of practicality and pragmatism and also based on the principle of deference practised by the Courts.

[28] It is not the function of this Court to decide whether the first appellant will grant condonation to the respondent or not. However, it seems that in the past the first appellant had no problem to renew the EPL's of the respondent. What is certain in this regard is that in terms of the provisions of sec. 71(3)(a) the licences of the respondent are still valid and will remain so until and unless the applications are refused by the first appellant. In my opinion it could therefore not be said that the issue of the administrative act has become academic and I agree with the conclusion of the Court *a quo* on this point.

[29] Both Mr. Trengove and Mr. Corbett submitted that the application for review should be dismissed because it was not shown that the respondent would suffer any prejudice as a result of the decision of the first appellant to grant EPL's to the second appellant. Whether the issue of prejudice arises, depends of course on whether the administrative act by the first appellant, in granting the EPL's to second appellant, was invalid. Both appellants accepted that there was non-compliance with sec. 69(2)(g)(i) and (ii) and to a certain extent they seem to also accept that the grant was invalid. Hence in argument they concentrated on defences to the application by the respondent rather than stress the merits of the application of the second appellant.

[30] It is therefore necessary to look at the provisions of sec. 69(2)(g) of the Act. The full text of the sub-section reads as follows:

> "Notwithstanding the provisions of subsection (i), the Minister shall not grant an application by any person for an exclusive prospecting licence -
>
> (g) in respect of any prospecting area or retention areas in relation to a mineral or group of minerals other than the mineral or group of minerals to which the exclusive prospecting licence or mineral deposit retention licence issued in respect of such areas relates, respectively, unless –
>
> (i) such person has given notice in writing, not later than on the date on which such application is made, to the holder of the exclusive prospecting licence or mineral deposit retention licence to which such prospecting area or retention area, as the case may be, relates of his or her application or intended application, as the case may be, for such exclusive prospecting licence and has provided the Minister of proof in writing of having done so;
>
> the Minister has afforded the holder referred to in subparagraph (i) a reasonable opportunity to make representations in relation to such application;
>
> the Minister deems it, with due regard to representations made in terms of subparagraph (ii) if

any, desirable in the interests of the development of the mineral resources of Namibia, to grant such licence; and

the Minister is on reasonable grounds satisfied that prospecting operations carried on by virtue of such licence will not detrimentally affect the rights of any holder of an exclusive prospecting licence or a mineral deposit retention licence, as the case may be, in respect of any area."

[31] Both counsel submitted that ordinarily a Court would not set aside an administrative decision on review unless it was shown that the applicant suffered prejudice. (See *Rajah & Rajah v Ventersdorp Municipality,* 1961 (4) SA 402 (AD) 407G – 408A; *Jockey Club of South Africa and Others V Feldman,* 1942 AD 340 at 359; *South African Post Office v Chairperson, Western Cape Tender Board,* 2001 (2) SA 675C at par. 22 and *du Plessis v Prokureursorde, Transvaal,* 2002 (4) SA 344 (TPD) at 350C to E.)

[32] Mr. Trengove pointed out that sec. 69(g) was designed to protect the existing EPL holder against the risk that the prospecting operations of the new licensee might detrimentally affect his rights. He further argued that the respondent did not and could not contend that there was any such risk in this instance as it consented to Erongo's applications for nuclear fuel EPL's. It therefore could not suggest that second appellant's prospecting for nuclear fuel minerals would in any way adversely affect its rights. Counsel further referred to the founding affidavit of Erongo where it was stated that the grant of EPL's to the second appellant detrimentally affected Erongo's rights in that this grant effectively precluded the grant of any EPL to Erongo for nuclear fuel minerals over that area. Counsel submitted that that was the high water mark alleged in the proceedings as far as prejudice went and, as Erongo had withdrawn, that was

also no longer an issue.

[33] Mr. Corbett submitted that the relief sought in this matter was academic. He pointed out that the EPL's of the respondent and that of the first appellant co-existed since 23 October 2006 and that according to the Mining Commissioner no objections of whatever nature had been lodged in the quarterly reports filed by the respondent or in any correspondence with the Ministry. Counsel referred to the statement by Haikali in which he remarked that as far as he was aware, the second appellant had not yet commenced any prospecting activities in terms of the 4 EPL's granted to it and that Erongo and the respondent reserved their rights if the second appellant would in any way infringe those rights. So far no complaints by the respondent have been received. Counsel referred the Court to the case of *Beukes v Director-General, Department of Manpower and Others,*1993 (1) SA 19 (CPD) at 28J – 29C and submitted that the principle that the Court would not consider academic issues applied equally to matters where it was alleged that a decision maker had failed to comply with the *audi alteram partem* rule.

[34] Mr. Odendaal first of all referred to all the instances where the application of the second appellant failed to comply with the provisions of the Act and submitted that an irregularity in proceedings calculated to prejudice a party *prima facie* entitled such party to have the proceedings set aside (See the *Jockey Club* case, *supra,* at p 355 and *Greatex Knitwear (Pty) Ltd v Viljoen and Others,* 1960 (3) SA 338 (TPD) 343 C –E). Counsel further submitted that the onus was strictly on the party who defended an

application for review to adduce evidence and prove that the failure to comply with the requirements of legality did not cause prejudice to the other party. (See, *inter alia, Cohen v South African Pharmacy Council,* 1993 (1) SA 297 (CPD) at 303 H – J; *Grove Primary School v Minister of Education and Others,* 1997 (4) SA 982 (CPD) at 997 H – I and *Financial Services Board and Another v De wet N.O. and Others,* 2002 (3) SA 525 (CPD) at 616F). It was therefore incumbent on the appellants to produce evidence showing that no prejudice was suffered by the respondent, and that as they had not done so, the issue of prejudice failed at the first hurdle. (See *inter alia, SA Geneeskundige en Tandheelkundige Raad v Kruger,* 1972 (3) SA 318(AD) at 326 F – G and *Rajah and Rajah v Ventersdorp Municipality, supra,* at 407G – 408A).

[35] A reading of sec. 69(2)(g) shows that the provisions are couched in peremptory language…."*(the) Minister shall not grant an application by any person for an exclusive prospecting licence…….unless."* The section first of all prohibits the granting of EPL's for the same minerals, or group of minerals, over an area where there are existing EPL's. It furthermore prohibits the granting of such EPL's unless notice of the application was given to the holder of the existing EPL's in writing by the new applicant and proof thereof was provided to the Minister. The Minister was then required to afford the existing holder a reasonable opportunity to make representations to him in relation to the application. The Minister in turn must consider the representations for two reasons. Firstly to decide whether, with reference to the representations, it is desirable in the interest of the development of the mineral resources of Namibia, to grant such licence, and secondly, he must be satisfied that the prospecting operations carried on

by virtue of such new licence will not detrimentally affect the rights of any existing holder of the EPL's. There is a clear correlation between the two duties of the Minister because interference with the rights of an existing holder may affect in many ways the development of a particular mineral resource by the existing holder of the EPL's and may therefore not be desirable in the interests of Namibia. By not affording respondent an opportunity to make representations, the first appellant deprived himself from fulfilling the statutory duties which were entrusted to him by the Act. This is also relevant to Mr. Corbett's argument that the Court must show deference to the difficult technical decisions which the first appellant is required to make in order to develop mineral resources to the benefit of the Country. By not calling for representations from the respondent, the first appellant could not properly fulfil this function and the issue does therefore not arise in this instance.

[36] Mr Trengove's argument that by consenting to Erongo's applicdations for EPL's over the existing EPL's held by it, the respondent could not now suggest interference with its rights where second respondent was concerned, loses sight of the fact that in the first instance, in terms of its agreement with Erongo, respondent would have been in control of the operations. That is not the case where the EPL's are in the hands of second appellant over whom he has no control. I also agree with Mr. Odendaal that Erongo's claim that it was prejudiced by the granting of the EPL's to second appellant, in the sense that it was now precluded from applying for those EPLs itself, applies only to Erongo and it does not reflect upon the respondent.

[37] Mr. Corbett's submission that the respondent has never complained about interference by the second appellant with its rights, begs the question in the light of Haikali's allegation that as far as he knew no prospecting had yet been done by second respondent. This statement, which is part of the founding affidavit, was clearly made before the second appellant's applications were filed as part of the proceedings before the first appellant. Once it was clear that the applications were flawed in many respects, reliance was placed on these aspects and it was indicated in the supplementary affidavit to what extent representations could have been placed before the first appellant in regard thereto.

[38] For that reason counsel's reliance placed on the *Beukes* case, *supra,* is not helpful. The facts of that case were exceptional and distinguishable from the present case. In that matter the applicant claimed certain protection which he was not entitled to by virtue of the provisions of an Act of Parliament, which excluded persons, such as the applicant, from claiming reliance on the Act. When this was raised in the affidavit of the respondent the applicant merely replied that he had no knowledge thereof but that in any event he did not accept the correctness of the allegations. The Court nevertheless found that applicant should have been afforded an opportunity to make representations. The futility of allowing the applicant to make representations in the light of the provisions of the Act and his own lack of knowledge, regarding his position, prompted the Court to find that even if he had been given an opportunity to make representations it was clear that there was nothing that the applicant could have added to change the situation and he therefore did not suffer any prejudice. That, as I will attempt to show later, is not the

position in the present matter.

[39] At this stage it would be convenient to refer to the instances in which the applications of the second appellant fell short of the requirements of the Act. These shortcomings were not only concerned with a lack of information which was required by the Act but also contained misleading statements. These shortcomings were over and above the fact that there was no compliance with sec 69(2)(g). In the following respects the applications of the second appellant did not comply with the Act or did not comply fully therewith, namely:

(a) Sec. 68(c) requires that an application for an EPL shall contain a detailed plan of the area to which the application relates with reference to the magisterial districts over which it applies and the names and number of each farm situated within the areas as well as reference to the extent of such area by reference to identifiable physical features. It was pointed out by Mr. Odendaal that no plan or map was submitted and in one instance the name and numbers of the farms concerned were not provided. I also agree with counsel that the first appellant's contention that these were not requirements of the Act has no substance. The purpose of this requirements is to assist the first appellant and to demonstrate to what extent the granting of the EPL's applied for may overlap and infringe upon the rights and activities of an existing EPL holder. This is one of the issues which the first appellant must consider before granting a licence.

(b) Non-compliance with secs. 68(h) and 69(2)(c)(i). As pointed out by counsel these sections require details concerning the envisaged prospecting programme, the duration of prospecting activities and the expenditure to be incurred in respect thereof. This

would be a further demonstration of what impact such activities may have on the existing EPL's. The significance of this requirement is further underscored by sec. 72(3) which requires that the Minister shall not renew an EPL unless he is satisfied on reasonable grounds with the manner in which the programme of prospecting operations has been carried out or he is satisfied with the expenditure expended in respect of such operations. It follows from this that if there is not a detailed programme of operations and expenditure that the Minister, when it comes to the renewal of the EPL, will have no means against which he can determine rate of prospecting operations or compare the expenditure expended in respect of the operations. It is seemingly for this reason that sec. 69(2)(c)(i) requires that the Minister shall not grant an EPL unless he is satisfied on reasonable grounds with the proposed programme of prospecting operations or the proposed expenditure to be expended in respect thereof. Although both appellants deny non compliance with these sections a reading of the second appellant's applications proved the inadequacy of the information supplied.

(c) Non-compliance with sec. 68(g). This section concerns documentary proof, or such other proof as may be required by the Commissioner, of the technical and financial resources of, or available to the person carrying on the prospecting operations. The second appellant's compliance with this requirement consists of a signed letter by one Von Palace in which he undertook to provide N$10m on behalf of a named company. There was no indication whether Von Palace was authorized by the company to make such offer or any indication of whether Von Palace or the company had the means to make good on its offer. In this regard it was admitted on behalf of the first appellant that Von Palace was unknown to the Mining Commissioner and the first appellant.

(d) Further complaints by the respondent were the irregular copying of information of its application forms contained in the applications of the second appellant as well as the fact that first appellant relied on and approved second appellant's EPL's on the basis of a recommendation by the Mining Commissioner which in turn was based on an exploration programme set out by the second appellant which was completely different to the area for which the EPL were ultimately granted. The description was of an area falling totally outside the area applied for by the second appellant and in certain respects was more that a 100 kilometres away from it. The explanation for this by the first appellant was unacceptable.

[40] Where it has been proved that an irregularity has been committed which *prima facie* is calculated to prejudice the other party the onus to prove that that party has not suffered prejudice is on the party opposing the review, in this instance the

appellants. (See *Jockey Club of South Africa and Others v Feldman,* 1942 AD 340 at 359; *S.A. Geneeskundige en Tandheelkundige Raad v Kruger,* 1972 (3) SA 318 (AD) at 326E-G; *Grove Primary School v Minister of Education and Others,* 1997 (4) SA 982(CPD) at 997F-I and *Financial Services Board and Another v De Wet NO and Others,* 2002 (3) SA 525 at E-G).

[41] In this instance it was conceded that the first appellant did not comply with its statutory duty in terms of sec. 69(2)(g) by inviting the respondent to make representations to him before he granted the EPL's to the second appellant. Non-compliance with the *audi alteram partem* rule, where that was necessary, constituted an irregularity which is *prima facie* calculated to prejudice the party requesting review (i.e. the respondent). A reading of the cases shows that potential prejudice would suffice to set aside a decision on review and I agree with the Judge *a quo* that the respondent was prejudiced by not having had an opportunity to put representations before the first appellant. There was much which it could draw attention to, uninhibited by the rules of the law of evidence. All this was pointed out in the affidavits on behalf of the respondent. I therefore do not agree with counsel that there was no prejudice suffered by the respondent and that the application for review was academic. If the respondent was given an opportunity to place representations before the first appellant there is in my opinion little doubt that the outcome of second appellant's application might have been different.

[42] Both appellants also raised the defence of "unclean hands" and submitted that

the respondent's application should be dismissed on these grounds. The background to this defence is the irresponsible and misleading public announcement made by Reefton concerning respondent's "new discovery" of uranium at the farm Hakskeen and further action taken by the respondent and Reefton flowing from this announcement. Both counsel further submitted that the respondent targeted uranium from the very start notwithstanding the fact that it did not hold any rights to prospect for nuclear fuel minerals. Counsel submitted that once it discovered uranium, the respondent did not notify the mining inspector of its find, as required by the Act, and continued to concentrate its prospecting activities on that metal.

[43] Although there is no evidence that the respondent targeted uranium as such from the start of its activities I will accept for purposes of the judgment the arguments and the submissions of counsel for the appellants that there is evidence that once the discovery was made, the respondent did not inform the mining inspector immediately of its find and, that thenceforth, its activities were very much aimed at prospecting for uranium. I also agree with the criticism, made by counsel for the appellants, against the announcement made of the "new discovery" and which favourably influenced the shareholding of Reeftons.

[44] Counsel on behalf of both appellants also criticized the way in which Erongo's application was used by Reefton and/or respondent to get its hands on nuclear fuel minerals by using Erongo, as a fully owned Namibian company, to apply for EPL's for nuclear fuel minerals whereas once the EPL's were granted, the joint venture

agreement would allow Reefton, through its subsidiary, Black Range, to acquire the majority shareholding in Erongo's holding company. In this way Reefton would in effect become the holder of the EPL's. At least the respondent and Erongo did not hide Reefton's involvement with Erongo and, when called for, provided the first appellant with the joint venture agreement. The allegation that the agreement was purposely kept away from the first appellant is no more than speculation.

[45] Mr. Odendaal submitted that the Court should reject the reliance placed on the doctrine of "unclean hands". Firstly counsel submitted that the doctrine found its application in the fraud, dishonesty or mala fides of a party approaching a court for the protection of his rights. There is no allegation on the affidavits of the appellants that the respondent was guilty of any of these requirements in regard to the rights which the respondent sought to enforce in these proceedings. Secondly, counsel submitted that, for the doctrine to apply, there should be a *nexus* between the alleged wrongful conduct and the basis for the relief sought. This *nexus,* counsel submitted, was absent from the present matter.

[46] All counsel were in agreement that the doctrine would apply in circumstances where there was some or other dishonesty on the part of the person who claimed protection for his rights. They were also in agreement that primarily the doctrine found its application in the field of unlawful competition where an applicant sought to interdict a competitor for unlawful conduct in circumstances where the applicant himself was trading dishonestly and nevertheless sought protection from the Court which would then

allow him to continue his dishonest trading. (See in this regard *Tullen Industries v de Sousa Costa (Pty) Ltd & Others,* 1976 (4) SA 218 (TPD) at 221 E – H and *Mqoqi v City of Cape Town & Another,* 2006 (4) SA 355 (CPD) at para [140].)

[47] The only issue now before the Court, as was also pointed out by counsel for the first appellant, is the grant of nuclear fuel EPL's to the second appellant over the existing EPL's of the respondent. It follows from that that the only right in respect of which the respondent could claim protection for is its rights to explore for base and rare metals, industrial minerals, precious metals and precious stones which it holds in terms of those EPL's. That is also the only basis on which the respondent could have *locus standi* to continue with the application after the withdrawal of Erongo. The criticism levelled at the respondent by the appellants concerned the respondent's dealings with the so-called new discovery of uranium and its attempts to acquire EPL's for nuclear fuel minerals. That this has nothing to do with its existing EPL's, and its rights flowing therefrom, was also recognized by the first appellant when it renewed the respondent's application for the extension of these EPL's in 2008 and was found, correctly by the Court *a quo*, to be of significance in coming to the conclusion that it should reject the appellants' defence based on the doctrine of "unclean hands". Mr. Odendaal's submission that there is no allegation of impropriety as far as the respondent's rights to prospect for the minerals and metals it holds in terms of its existing EPL's is concerned, is correct.

[48] In the matter of *Schuster v Guenther,* 1933 SWA 19 at page 25, v.d. Heever, J (as he then was) stated the following:

> "A man who has entered into a contract which is prohibited by law, or which though in itself

> permissible, was entered into for mischievous purposes, or for purposes prejudicial or offensive to the public or to third parties, is not deprived of legal remedies in regard to his innocent transactions. "

[49] Likewise in the matter of *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (*Pty*) Ltd,* 1989 (4) SA 31 it was held that false allegations made by a litigant during the course of litigation which were unrelated to the basis upon which relief was sought by that party in the proceedings, were irrelevant. The learned Judge said the following on p60 C-D:

> "There is nothing to suggest that it may emerge that Drakensberg Botteliers and the JJ Vermooten Trust have not approached the Court with clean hands. The fact that it may be shown that Vermooten junior falsely denied having consented to the transfer of shares to Tjospomie Boerdery cannot alter that conclusion. The Snyman's *coup* is the basis of the conclusion that a winding-up order is just and equitable. Any such false denial by Vermooten junior was quite irrelevant. It played no part in arriving at the relevant conclusion of justice and equity. Therefore it cannot be used to suggest that Drakensberg Botteliers and the JJ Vermooten Trust have not approached the Court with clean hands. It is simply irrelevant."

[50] Although the remarks made by v.d. Heever, J, in the *Schuster* case, *supra,* was in connection with the enforcement of a contractual right *and* the present case deals with the protection of a right, the principle applied is the same, namely, that a Court does not deny a person access thereto in respect of the enforcement of his rights, or the protection thereof, if not contaminated by some or other act of dishonesty or other impediment as referred to by v.d. Heever, J. To do otherwise will run counter to the principle that the Court will not close its doors to a litigant except in exceptional circumstances such as was, *inter alia,* mentioned by the learned Judge. To do so in

unjustifiable circumstances will also run counter to Art. 12 of our Constitution where that right is guaranteed.

[51] In the present matter the rights which the respondent seeks to protect are his rights in terms of his existing EPL's. Those rights are not contaminated by any act of dishonesty, or fraud or mala fides and neither was it alleged that that was the case. The issue around the applications for nuclear fuel minerals, and the acts flowing therefrom, are simply irrelevant, and play no role in the litigation which the Court must adjudicate, namely the review of the granting of EPL's to the second appellant.

[52] For the same reasons the defence based on the doctrine that a person should not be allowed to benefit from his own wrongs cannot be sustained. No wrong was committed by the respondent in regard to his existing EPL's and the respondent has consequently not been benefiting from any wrong committed by it.

THE CROSS-APPEAL.

[53] The cross-appeal concerns an application to strike out various parts of the founding and replying affidavits of Haikali, the deponent on behalf of Erongo. The application was successful in its entirety and the Court *a quo* ordered the respondent to pay the costs of the application on a scale as between attorney and client.

[54] The matter was somewhat complicated by reason of the fact that the first appellant's answering affidavit was filed late which necessitated a further replying affidavit by Haikali. The respondent appealed against the entire order by the Court *a quo* and asked that it be dismissed with costs.

[55] Mr. Barnard, on behalf of the second appellant, submitted firstly that the striking

out order by the Court *a quo* was interlocutory and was not appealable as of right. Counsel submitted that it was not a judgment or order as required by sec. 18(1) of the High Court Act, Act 16 of 1990. He referred to the matter of *Namibia Grape Growers and Exporters Association and Others v The Minister of Mines and Energy and Others,* 2004 NR 194 (SC) where the Court stated as follows at p222F:

> "For the reasons set out above the third respondent's cross-appeal against certain costs orders made by the Court *a quo* during the course of the proceedings is also not properly before the Court as no leave to appeal was sought in those instances. Counsel for the respondent conceded also that the matters could not be heard by this Court and they are likewise struck from the roll."

[56] A reading of that case, as was also pointed out by Mr. Tötemeyer, showed that the Court was there dealing with appeals against costs orders only which were made during the proceedings where interim orders were granted or refused by the Court *a quo*. Such orders were not appealable as of right in terms of sec. 18(3) of Act 16 of 1990 and as no leave to appeal was obtained they were struck off the roll. In the present instance Mr. Tötemeyer submitted that the appeal does not only concern a cost order made by the Court *a quo* but it is an appeal against an order made by that Court in terms of which certain portions of allegations made by Erongo were struck out by the Court. In that regard this cross-appeal is different from what the Court was dealing with in the *Namibia Grape Growers* case, *supra.*

[57] Generally, interlocutory orders are not appealable as of right as they lack the attributes required for a judgment or order which is appealable in terms of sec. 18(1) of Act 16 of 1990. (See *Zweni v Minister of Law and Order,* 1993 (1) SA 523 (AD) at

533G-H and 536A-C which was applied with approval in the case of *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy,* 2005 NR 21 (SC) at 29 A-E). However, if the striking out order was final in effect, and although it may lack some of the attributes of a judgment or order, required for an appeal as of right, it may nevertheless have a definitive and final bearing on the rights of the parties, in which instance it would be appealable as of right. See in this regard *Moch v Nedtravel (Pty) Ltd t/a American express Travel Service,* 1996 (3) SA 1 (AD), where the Appeal Court, dealing with a refusal by the Judge *a quo* to recuse himself, Hefer, JA, stated the following with reference to the general test for appealability as set out in the *Zweni* case:

> "On the other hand, because it is not definitive of the rights about which the parties are contending in the main proceedings and does not dispose of any of the relief claimed in respect thereof, it does not conform to the norms in the cited passage from the judgment in *Zweni's* case and thus seems to lack the requirements for a 'judgment or order'. However, the passage in question does not purport to be exhaustive or to cast the relevant principles in stone. It does not deal with a situation where the decision, without actually defining the parties' rights or disposing of any relief claimed in respect thereof, yet has a very definitive bearing on these matters." (p10E-F).

[58] Similar views were expressed in the case relied on by Mr. Tötemeyer namely *Phillips v National Director of Public Prosecutions,* 2003 (6) SA 447 (SCA) where Howie, P, stated as follows:

> "[20] Counsel for the respondent is right, in my view, in submitting that a restraint order is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect as envisaged in *Zweni.* Plainly, a restraint order decides nothing final as to the defendant's guilt or benefit from crime, or as to the propriety of a confiscation order or its amount. The crucial question however, is whether a restraint

order has final effect because it is unalterable by the Court that grants it.

[21] …

[22] Absent the requirements for variation or rescission laid down in s 26(10)(a) (and leaving aside the presently irrelevant case of an order obtained by fraud or in error) a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unalterable situation is, in my opinion, final in the sense required by the case law for appealability."

[59] An application to strike out certain allegations in a pleading or affidavit can, under certain circumstances, have a final effect on a party's case where the allegations to be struck out concern the cause of action, or evidence to support such cause, of a party's case. On the other hand the fact that allegations have been struck out from a pleading or affidavit may have little or no effect on the issues to be decided by a Court.

[60] According to the case law the above distinction determines whether the striking out was final and definitive of the rights of the parties, and therefore appealable as of right, or whether it was interlocutory in which case leave to appeal was necessary. In the case of *Harper v Webster,* 1956 (2) SA 495 (FC) the following was stated on p. 504 by Clayden FJ, namely:

> "….the decision on the application to strike out, based as it was not on the contention that the claim was unjustified in law but on the manner in which it was pleaded, was an interlocutory order."

[61] The above excerpt was cited with approval by Miller, JA, in the matter of *South African Motor Industry Employers' Association v South African Bank of Athens Ltd,* 1980

(3) SA 91 (AD) at 98D-F where the learned Judge also applied the principle to exceptions. A further instance where the *Harper* case, *supra,* found application was *Charugo Development Co. (Pty) Ltd v Maree N.O.,* 1973 (3) SA 759 (AD) where Botha, JA, remarked as follows on p. 764A-C:

> "It is clear from the judgment of the learned Judge *a quo* that the order striking out annexure "B" and all the words after "Chiddy" in para. 3 of the declaration, was based not on any consideration that the plaintiff's claim was bad in law, but on the manner in which it was pleaded in para. 3.
>
> ……..The order to strike out being therefore, clearly based on the manner in which the claim was pleaded in para. 3, it was purely interlocutory and, therefore, not appealable save with the necessary leave."

[62] The case of *Caroluskraal Farms (Edms) Bpk and Others v Eerste Nasionale Bank van Suider-Afrika Bpk,* 1994 (3) SA 407 (AA) dealt with motion proceedings. In the Court *a quo* the respondent, then as applicant, applied for the liquidation of the appellants. The respondents, now the appellants, availed themselves with certificates issued in terms of sec. 21(1) of Act 28 of 1966 whereby all actions to recover debts from the holder of the certificates were suspended. The parties further agreed to request the Court to adjudicate the point *in limine* separately. The Court of first instance found that such certificates were not a bar to the liquidation proceedings. The appellants thereupon launched an appeal against such finding and because of the nature of the proceedings the parties were requested to also deal with the issue of appealability. Hefer, JA, stated that although the decision by the Court *a quo* did not have the attributes required for a judgment or order, as far as the appellants were concerned, the judgment was final in effect and therefore appealable. The following was stated by the

learned Judge at p416 C-E:

> "Wanneer dit dan – hetsy in 'n aksie of in mosieverrigtinge – gaan om 'n spesiale verweer wat afsonderlik verhoor is, kom dit my logies voor om te let op die effek van die uitspraak op die regshulp wat deur die *verweerder* of *respondent* aangevra is. In wese is die Verhoorhof in so 'n geval gemoeid met 'n versoek van die verweerder of die respondent om die eis van die hand te wys op grond van 'n verweer wat niks te make het met die meriete van die saak nie. Dit is die regshulp wat op hierdie stadium ter sprake is.

In die onderhawige geval was die Verhoorhof ook slegs gemoeid met 'n versoek van die destydse respondent om die likwidasie-aansoeke van die hand te wys op grond van die sertifikate. Soos reeds aangedui, is daardie versoek uitdruklik en onherroeplik van die hand gewys. Wat vorm sowel as effek betref, is 'n geskilpunt wat spesiaal deur die destydse respondent geopper is met 'n versoek om die aansoeke op grond daarvan van die hand te wys, finaal uitgeskakel. Myns insiens is die bevel wat gemaak is inderdaad 'n 'bevel' wat vatbaar is vir appel."

(When – either in an action or motion proceedings – it concerns a special defence which is adjudicated separately, it seems logical to me to consider the effect of the judgment on the relief claimed by the *defendant* or the *respondent.* In essence the Trial Court is in such an instance dealing with a request by the defendant or the respondent to dismiss the claim on the bases of a defence that has nothing to do with the merits of the case. That is the relief which at that stage is to be considered.

In the present instance the Trial Court was only dealing with a request by the erstwhile respondent to dismiss the liquidation applications on the bases of the certificates. As pointed out earlier that request was expressly and irrevocably rejected. Regarding its form as well as its effect, an issue which was specially raised by the erstwhile respondent with the request to dismiss the applications on that bases, was finally ruled out. In my opinion the order that was made was indeed an 'order' which is appealable.) (my free translation)

[63] Applying the above principles to the striking out application in this matter it is clear that it does not have the attributes, referred to in *Zweni's* case, to be a judgment or order. It does not deal with the merits of the case and consequently is not definitive of the rights about which the parties are contending in the main application, nor does it dispose of any of the relief claimed in respect thereof. This poses the question whether

it can nevertheless be said that the order has a final and definitive bearing on the rights of the parties. In my opinion not. It was firstly never intended to finally bring to an end the relief claimed by the respondent in the main application for review. Secondly the form and effect of the striking out order, in this instance, had no bearing on the relief claimed by the respondent in the main application. Notwithstanding the striking out order the respondent was successful in the Court *a quo* as well as in this Court. The application, based as it was on alleged hearsay matter, vexatious and scandalous matter and new evidence, concerned the way in which this evidence was 'pleaded' or presented and not on considerations that the application lacked grounds to sustain the relief claimed. I am therefore of the opinion that the application to strike out was interlocutory and that in terms of sec 18(3) of Act 16 of 1990 it was necessary for respondent to obtain leave to appeal from the Court *a quo*, or, if that was refused, to petition the Chief Justice for such leave. As no leave to appeal was obtained the cross-appeal is not properly before us and must be struck off the roll.

[64] For the reasons stated herein before I have come to the conclusion that the appeals of the first and second appellants must be dismissed and that the cross-appeal must be struck off the roll. In my opinion the issue concerning the striking out did not require the attention of two instructed counsel and I shall only allow the costs of one such counsel. It was further clear that the learned Judge *a quo* mistakenly referred to pa. 3.1 of the notice of motion instead of pa. 1.3 when he issued the order in this matter and this must be corrected.

[65] In the result the following orders are made:

A. THE APPEALS.

1. The appeals of the first and second appellants are dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

2. Paragraph 1 of the order of the Court *a quo* is hereby amended by deleting the numbers 3.1 where they appear in the paragraph and to substitute therefore the numbers 1.3.

B. THE CROSS-APPEAL.

The cross-appeal is struck off the roll with costs such costs to include the costs of one instructing and one instructed counsel.

_____

STRYDOM, AJA

I agree,

_____

CHOMBA, AJA

I agree,

_____

DAMASEB, AJA

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Instructed By:	Government Attorneys
Counsel on behalf of Second Appellant:	Mr. W. Trengove, SC
Assisted By:	Mr. T. Barnard
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Counsel on behalf of the Respondent:	Mr. F. H. Odendaal, SC
Assisted By:	Mr. R. Tötemeyer
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