REPORTABLE

CASE NO.: SA 13/2010 and

SA 21/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

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

and

MEDICAL ASSOCIATION OF NAMIBIA LIMITED	**1ST RESPONDENT**
DR PC PRETORIUS	**2ND RESPONDENT**

Coram: MAINGA JA, STRYDOM AJA *et* LANGA AJA

Heard on: 31/03/2011

Delivered on: 21/06/2012

APPEAL JUDGMENT

STRYDOM AJA:

[1] Until 1965 the selling and dispensing of medicine was the sole domain of pharmacologists. Then in 1965, by virtue of sec. 22A of the Medicines and Related Substances Control Act, Act 101 of 1965, the right to sell and dispense certain categories of medicine was also extended to medical practitioners. The provisions of the Act were applied to the territory of the then South West Africa by sec. 39 of the Act. Act 101 of 1965 ("the 1965 Act") further survived the transition of South West Africa into an independent Namibia by virtue of the provisions of Article 140 of the Constitution.

[2] This was the position until Parliament passed the Medicines and Related Substances Control Act, Act No. 13 of 2003 ("the Medicines Act") which was published on 28 August 2003 in Government Notice 192 of 2003, in Government Gazette 3051.

[3] Prior to the publication of "the Medicines Act" a National Drug Policy ("NDP") was published in 1998. This was done after consultation with various institutions and health professionals from the public as well as the private sector. Certain proposals made by it are relevant to some of the issues to be decided in this matter. They are:

(a) a permit system for the importing and exporting of medicines, which allows only holders of permits to import medicine;

(b) where there were not adequate pharmaceutical services, medical practitioners and nurses in private practice were to be issued with a licence to dispense medicine;

(c) in certain instances pharmacists and nurses in private practice may be licensed to prescribe certain specified medicines where there were no adequate

medical services.

[4] The “Medicines Act” incorporated many of the proposals contained in the “NDP”. The Medicines Act established the Medicines Regulatory Council (“the Council”) with various functions and duties, *inter alia,* to comply with sec. 31(3) of the Medicines Act, namely to grant licences to medical practitioners to sell medicines, subject to such conditions which may be imposed by the Council.

[5] Because sec. 31(3) requires medical practitioners to be licenced in order to sell medicine, which was not a requirement in terms of the 1965 Act, the Medicines Act provided for a three months moratorium within which medical practitioners could regularize their position and apply for a licence. This period started to run from the commencement of the Act and medical practitioners who applied for a licence within the three months were allowed to continue selling medicine until finalization of the application. In terms of sec. 46(3), finalization included a possible appeal by a medical practitioner to an appeal committee established by sec. 34(8). See sec. 46(4).

[6] The Medicines Act further provided that the Medicines Control Council, (the 1965 Council) established in terms of the 1965 Act, was to perform the functions of the Regulatory Council up to a day preceding the day on which the Minister of Health and Social Services (“the Minister”) appointed the members of the Council. (Sec. 46(1A)(a)). This meant that members of the 1965 Council, who were members

immediately before the commencement of the Medicines Act, would continue in office until the day preceding the day on which the Minister appointed the members of the Council. (Sec. 46(1)(a)).

[7] The Medicines Act further required that certain steps be taken and institutional arrangements be put in place before the new system could come into operation. Some of these steps were to be provided for in the regulations to be published by the Minister. The Medicines Act provided that before regulations could be finalized, draft regulations had to be published for comment by interested parties (sec. 44(2)) and the Council had to be consulted by the Minister (sec. 44(1)).

[8] The draft regulations were published after the Medicines Act had been passed and published, but before it was brought into operation.

[9] The Medicines Act was brought into operation on 25 July 2008 and, simultaneously, regulations were published in the same Government Gazette under Government Notice 178.

[10] It is common cause that certain members of the first respondent did not apply to the Council for a licence to sell medicine within the period of three months laid down by sec. 31(3) of the Medicines Act; it follows also that on the expiry of this period they were no longer permitted to sell medicine as they were now not licenced to do so.

[11] Certain members, who seemingly were aware of the provisions of the Medicines Act, applied for licences to dispense medicine. Every licence so applied for was refused by the Registrar of Medicines ("the Registrar") on the basis that there was a pharmacy operating in the vicinity of the medical practitioner's practice and as pharmacists were better qualified to dispense medicine there was no need to grant a licence to the medical practitioner. In certain instances extensions of the 3 month period were granted to medical practitioners by the Registrar. It is common cause that these actions by the Registrar were invalid as the authority to consider applications for a licence by medical practitioners vested in the Council. All parties were agreed that these abortive decisions by the Registrar should be set aside and this was done by the Court *a quo.*

[12] An attempt was made by the first respondent to get an extension of the three month period laid down in sec. 31(3) as it was realized that those practitioners who did not avail themselves of the three month period within which they were required to apply for licences to sell and dispense medicine were now, after its expiry, prohibited by the Medicines Act from doing so without a licence. The attempt to get an extension of the three month period failed.

[13] Certain members appealed against the refusal of their licences but at that time an appeal committee had not yet been appointed by the Minister.

[14] Following on the refusal to extend the period of three months the respondents launched the present proceedings by way of notice of motion, claiming the relief set out hereunder, namely-

> "1. Calling upon the respondents (now appellants) 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 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;
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> 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.
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> 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.

4. Ordering the respondents who oppose this application, jointly and severally, to pay the costs of this application."

[15] We were further informed that during argument of the matter in the Court *a quo* a new point was raised by the respondents, namely that the Minister, and not the President, was the relevant authority to appoint the members of the 1965 Council in terms of the provisions of the 1965 Act. Notwithstanding objection by counsel for the appellants the Court allowed the point to be raised on the basis that it was a legal point.

Findings of the Court *a quo*

[16] The application by the respondents was successful in the Court *a quo* and that Court set aside the regulations in their entirety. This was firstly done on the basis that there had not been a properly established 1965 Council, as required by the 1965 Act, because the Minister, and not the President, published the names of the 1965 Council in the Gazette. A further result of this finding was that there was not a validly established 1965 Council which the Minister could consult before publication of the draft regulations, as required by sec. 44(1) of the Medicines Act. Secondly the Court set aside the regulations because the draft regulations, which were published for comment by interested parties, were so published before the commencement of the Medicines Act and, bearing in mind the provisions of sec. 12(3)(c) of the Interpretation

of Laws Proclamation No. 37 of 1920, this was not permissible. Because no valid publication of the draft regulations for comment took place, it followed that the regulations subsequently published, on the same day that the Medicines Act became law, did not allow time for consultation by the Minister with the Council and were therefore invalid. The Court further set aside the decisions taken by the Registrar in terms of which he dealt with applications for licences by medical practitioners.

[17] The Court also granted an order in terms of prayer 3 of the notice of motion in a slightly amended form by suspending the operation of sec 46(3) of the Medicines Act until such time as the Minister had made and published new Regulations in terms of sec. 44. The Court further ordered that the three month transitional period would run afresh from the date that the Minister issued new regulations.

[18] This order did however not solve the problem as it created a *lacuna* during which those medical practitioners, who did not submit applications for licences in time when the moratorium was in operation, could now not have the protection thereof until such time as the new regulations were promulgated by the Minister. The respondents then applied for a variation of the order which was duly granted and the Court further ordered that an appeal by the appellants would not suspend the operation of the order.

[19] The relief granted in terms of the variation order forms the subject of a separate appeal by the appellants which was heard together with the main appeal. I shall later deal with the submissions in this regard.

The Appeal before this Court

[20] The appeals before this Court were set down for hearing on the 31 March 2011. However, on the 18 February 2011 the respondents served an application on the appellants in which they claimed that the Notice of appeal, filed in the main appeal, be declared null and void, alternatively, that the allocation by the Registrar of the Supreme Court of a date in the main appeal be declared *ultra vires* and null and void. They also claimed costs. This application was launched in the High Court. Attempts were then made by the respondents to get the appellants to agree to a postponement of the appeal pending the finalization of their application in the High Court. In this the respondents were not successful but they were advised to get directions from the Chief Justice. This they did and by letter dated 7 March 2011 the Registrar of the Supreme Court informed them as follows:

> "The Honourable Chief Justice has directed that the parties in the matter be advised that the appeal will be called on the date of set down and, on that occasion, the Court will entertain the appeal and/or all matters or arguments ancillary or incidental thereto properly brought before the Court for consideration."

[21] This direction by the Chief Justice cleared the air and the appeals were duly argued on 31 March. However, the application launched by the respondents in the High Court then found its way into the record of appeal and was thus placed before us unbeknown to the parties. Mr Heathcote also attached a copy of the application to his heads of argument. This was not the proper way to place evidence before this Court, as was pointed out by Mr Budlender, assisted by Mr Marcus for the appellants. Mr Heathcote, assisted by Ms Schneider, for the respondents, conceded this and stated that we should ignore the application. How it happened in the first place that a copy of this application was put before us is not clear to me and normally this Court would censure such irregularity with an appropriate order of costs. It seems, however,

that the record of the application was attached to a letter by the Legal Practitioner of the respondents to the Registrar of the Supreme Court in which the Registrar was requested to ask for a direction from the Chief Justice. From this it seems that it was not the intention to place the application before the Court of Appeal and that it found its way into the record by mistake. As a result of this mishap we allowed Mr Budlender to place two short affidavits, by the Minister of Justice and the Attorney General, before us in which they dealt with the authority of the Government Attorney to have launched the appeal in this instance. However, in so far as this application in the High Court was also attached to the heads of argument of the respondents the costs occasioned thereby, if any, shall form part of the costs of the appeal.

The arguments and findings by this Court on the merits of the main appeal

[22] The appellants appealed against the whole of the judgment and orders by the High Court. This would include orders (d) and (e) of the Court's Order dated 28 June 2010, dealing with the invalid decisions taken by the Registrar, i.e. the third respondent. It is clear that that was never the intention and I will leave it at that. However, full heads of argument were placed before us that enabled counsel to shorten their oral arguments for which this Court expresses its appreciation.

[23] In his heads of argument Mr Heathcote gave notice of certain objections he intended to raise *in limine* against the appeal. Both counsel dealt with these issues during the presentation of their arguments on the main appeal and not necessarily at the outset of their arguments. However, I intend to deal with these objections at the outset. Some of the objections, raised in respondent's heads of argument were wisely

abandoned by Mr Heathcote. Those remaining are:

> "(i) that the Government attorney was not authorized to bring an appeal on behalf of the appellants; and
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> (ii) that the appellants failed to furnish security, as required by the Rules of the Court, and that as a result thereof the appeal was deemed to have been withdrawn."

(i) The lack of authority by the Government Attorney to institute the appeal

[24] In his heads of argument Mr Heathcote still urged this Court to consider the application which was brought in the High Court and whereby it was insisted that that application should first be heard and disposed of before the appeal could be heard. He, however, did not persist in this argument and informed the Court that it could ignore what was set out in that application. This was, in my opinion, a wise decision. The issues raised in the application before the High Court concern non-compliance with rules of the Supreme Court. The Supreme Court is the only Court which can condone, in appropriate circumstances, non-compliance with its own rules or can censure parties with costs orders etc. for a failure to do so. In short the Supreme Court is the guardian of its own rules and is therefore the forum to deal with any objections or complaints of non-compliance with those rules.

[25] The gist of counsel's argument regarding the lack of authority by the Government Attorney to launch the appeal is that he cannot do so without a proper mandate by the appellants and that the circumstances are indicative that no such specific mandate was obtained. I agree with Mr Heathcote's submission that no further evidence is necessary in order to argue this point in this Court. It is clear from the notice of appeal that the appeal was launched within hours after the Court *a quo* handed down its order on the 28 June 2010. Furthermore we allowed the appellants

to hand up two affidavits by the Minister of Justice and the Attorney General concerning the issue of authority of the Government Attorney. From these affidavits it transpired that at the time when the appeal was launched they were not aware thereof but they expressed their approval of the launching thereof and confirmed and supported what was done by the Government Attorney. Mr Heathcote relied on the affidavits to argue that that was clear evidence that there was, at the time the notice of appeal was filed, no mandate given to the Government Attorney to do so. Counsel further relied on the following authorities concerning the functions of the Government Attorney, namely *Commissioner of Inland Revenue v Baikie,* 1932 AD 184, *MEC for Economic Affairs, Environment and Tourism v Kruizenga and Another,* 2010(4) SA 122 (SCA) and *Xatula v Minister of Police, Transkei,* 1993(4) SA 344 (TK).

[26] Mr Budlender submitted that the issue was not properly raised and that the respondents should therefore not be allowed to argue it. I, however, agree with Mr Heathcote that the affidavits by the Minister and the Attorney General put the issue beyond any doubt and that nothing more is necessary to enable the respondents to bring their objection before this Court. That is not the end of the matter as there is authority that the Government Attorney holds a general authority to act on behalf of the Government because of the statutory position he holds.

[27] This was decided in the case of *Dlamini v Minister of Law and Order and Another,* 1986(4) SA 342 (D). In this matter counsel for the Minister entered into a settlement agreement with the legal representative of the plaintiff. The matter was

then postponed and on the extended date another counsel, appearing for the defendant, argued that the settlement was invalid on the grounds that the Deputy State Attorney did not have authority to have instructed counsel to enter into the settlement. In regard to the authority of the Deputy State Attorney the Court, Friedman, J, remarked as follows at page 348 to 349:

> "It is common cause that counsel who concluded the settlement had been duly and properly instructed by the Deputy State Attorney in Durban. The first respondent, although he says he was not aware of this particular application, does not suggest that the Deputy State Attorney had no authority either to act on his behalf or to brief counsel on his behalf. Indeed, the authority of a Deputy State Attorney to act on behalf of a Minister or any State official, sued in his capacity as such, emerges from the provisions of s 3 of the State Attorney Act 56 of 1957. It is no doubt because of these provisions that, even where powers of attorney would otherwise be required to be filed, a State Attorney is not required by Rule 7 (5) (a) to file a power of attorney before acting on behalf of a State official.

The present case has to be decided, of course, simply upon the basis of the probabilities. In the absence of any express statement to the contrary by the respondents, and in the absence of any evidence to the contrary, I consider that it is extremely improbable that the Deputy State Attorney of Durban would act on behalf of either of the respondent or brief counsel on their behalf if he did not have general authority to act on their behalf in proceedings of this kind. It seems to me overwhelmingly likely, in the absence of evidence to the contrary, that the Deputy State Attorney, both himself in the role he played in the settlement and in briefing counsel to appear on behalf of the Minister, did so because of a general authority conferred upon him to act in matters of this kind. There is no suggestion that he did what he did contrary to or in defiance of any express instruction."

(See further *Moult v Minister of Agriculture and Forestry, Transkei* 1992(1) SA 688 at 692 B – E.)

[28] Prior to independence the State Attorney at Windhoek was a branch office of

the office of the State Attorney, Pretoria, in terms of the State Attorney Act, Act No. 56 of 1957. (Sec. 3(2) of Act 56 of 1957.) However by State President's proclamation R161 of 1982 the Windhoek branch office was converted into the Government Attorney's office for the Territory of South West Africa. It did not repeal Act 56 of 1957 but amended certain words to bring it in line with the Proclamation. Sec. 4 of the Proclamation sets out the functions of the Government Attorney which, in general, are the same as set out in sec 3 of Act 56 of 1957,

[29] The Government Attorney occupies a different relationship to its only client, the Government of Namibia, than a legal practitioner in private practice representing a client. His salary is paid by the Government and as such he is employed by the Government to fulfill its functions on behalf of the Government. Similarly the rules of the High Court (Rule 7(5)) and that of the Supreme Court (Rule 5(4)(c)) do not require the Attorney–General or the Government Attorney to file powers of attorney where they act on behalf of the Government of Namibia or a Minister or other officer or servant of the Government.

[30] The cases relied upon by Mr Heathcote do, in my opinion not support the contention of counsel that in all circumstances the Government Attorney can only act after he had been expressly mandated by the Government to do so. Nor do the cases relied upon by counsel contradict what was stated by Friedman, J, in the *Dlamini*–case, *supra.*

[31] The case of *Commissioner of Revenue v Baikie, supra, was* a review of taxation by the Taxing Officer of the Court concerning two bills of costs. The Court analysed the then applicable Act, Act 25 of 1925, and concluded that the object of the Act was to put the Government Attorney, in the exercise of his functions as an attorney of the Government, in the same position, generally speaking, as that of an attorney in private practice (p187). In other words the Government Attorney can institute actions or defend actions etc. as if he/she was an attorney in private practice. The question whether he/she could only act on a specific mandate was not decided nor was it necessary to decide it as the authority of the Government Attorney to act was not an issue before the Court.

[32] In the case of *Xatula v Minister of Police, supra,* the plaintiff claimed damages for loss of support by her son who was killed by the police. The Minister admitted the killing of the deceased by the police but denied liability. One of the points raised by counsel for the plaintiff was that the issues of liability and *quantum* were settled by the parties. The Court allowed evidence by affidavit on this issue. One such affidavit was by the person in the office of the State Attorney who acted in the matter. He confirmed that a settlement, as alleged, was entered into. An affidavit by the Minister was to the effect that although he mandated the Government Attorney's representative to conclude a settlement he was misled by such person and that the matter must therefore go to trial.

[33] With reference to the *Moult* case counsel for the plaintiff argued that the

Government Attorney held a general mandate to act on behalf of the Government and consequently the settlement must be upheld. In this regard the learned Judge stated the following at p 352F:

> "Although a Government Attorney does not require a power of attorney on behalf of a government department I do not think that s3 of the Act gives him general authority to conclude a settlement agreement on behalf of his client. For that he would require a specific mandate from his client."

It seems to me that counsel misunderstood what was stated by the Court. The Court did not say that sec. 3 did not give a general authority to institute or defend cases. The Court specifically referred to the fact that it was not necessary for the Government Attorney to file a power of attorney. What it in fact said was that general authority was not enough and that, in order to conclude a settlement agreement, specific authority to that extent was necessary. The Court indeed referred to the *Dlamini* case, *supra*, with approval. The Court then found that there was such specific authority and granted judgment for the plaintiff. The Court's finding that in order to conclude a settlement a general authority to institute or defend cases was not enough, and that specific authority to that extent was necessary, is based on a line of cases which were to the effect that steps taken by a legal representative, which might prejudice his client, had to be specifically authorized. This principle is put in perspective in the third case referred to by Mr Heathcote, namely *MEC for Economic Affairs, Environment and Tourism v Kruizenga and Another, supra.*

[34] The *MEC* case concerned a claim for damages instituted by two property owners who alleged that a fire, which started on provincial government land, and

which spread to the adjoining properties, was the result of the negligent failure of employees of the government to take preventative measures to contain the fire. At the first of two rule 37 pre-trial conferences the State Attorney admitted liability for the damages caused by the government employees. At the second conference the State Attorney admitted some of the claims for damages. The Court thereupon granted judgment in those claims which were admitted. Thereafter, and in an attempt to reopen the government's case on the merits, the appellant launched an application to rescind and to set aside the court order and to withdraw the admissions made by its legal representative at the rule 37 conferences. This was done on the basis that the State Attorney was not authorized to settle the matter on behalf of the appellant. The application was unsuccessful and on appeal to the Supreme Court of Appeal the Court found that, in the absence of special circumstances, the appellant was estopped from resiling from an agreement deliberately reached at a rule 37.

[35] During its discussion of the case the Court of Appeal stated that it was now settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client's approval (para. 7). The Court also discussed various cases where this principle was either applied or distinguished and not followed. It also referred to cases where it was held that the authority of the State Attorney was broader than that of an attorney in private practice. The case however, lends no support for the submission made by counsel for the respondents and the authority of the State Attorney to defend the matter was never an issue between the parties.

[36] In the result I am not persuaded that the Government Attorney did not have authority to appeal in this matter. The Government Attorney acted *bona fide* and in the interests of its client, the Government of Namibia. Also, in regard to appeals on behalf of the Government, the Government Attorney is exempted from filing a power of

attorney and in my opinion the same rules must apply in regard to his general authority as would apply in the High Court. There is no contrary evidence that the Government Attorney acted in defiance of any express instruction. That is clear from the affidavits handed in by Mr Budlender. The other party who might have objected to the appeal is the Minister of Health and Social Services and he is a party to the proceedings. In this instance the Government Attorney used his powers in terms of the provisions of the Government Attorney's act to suspend the order of the Court *a quo* and he did so in haste to avoid the chaos which would have resulted because of the order of the Court that all regulations made by the Minister were invalid.

(ii) The failure to enter into good and sufficient security by the Government Attorney

[37] Mr Heathcote argued that although rule 8(5) exempted the Government from the obligation to enter into security the Government of Namibia was not cited as a party to this appeal. Counsel submitted that the rules drew a clear distinction between the Government of the Republic of Namibia and its Ministers and other officers and/or servants, and, so it seemed, the logical conclusion to this argument was, that if the proceedings were not in the name of the Government but in the name of a relevant Minister or other officer, employed by the Government, the exemption did not apply. This conclusion is reached by counsel applying the wording of rule 5(4)(c) which, in the words of counsel, draws a clear distinction between the Government, on the one side, and its officers, such as a Minister. The rule on which counsel relied reads as follows:

> "5(4)(c)No power of attorney shall be required to be filed by the Attorney-General, the Government Attorney or any attorney instructed in writing or by telegram by or on behalf of the Attorney-General or the Government Attorney in any matter in which the Attorney-General or Government Attorney is acting in his or her capacity as such or on behalf of the Government of Namibia or any Minister, Deputy Minister or other officer or servant of the said Government."

[38] Rule 8(5) of the Supreme Court, exempting the Government from giving security, is not as complete as rule 5(4)(c) and merely states that it shall not be necessary for the Government to give security.

[39] A Government is an amorphous body consisting of various ministries, departments and institutions. Some Acts require that a particular officer or Minister should be cited where proceedings are instituted against a particular ministry or an officer of such a ministry. Where an Act does not require the citation of a specific officer the Government is usually cited or the relevant Minister or both. The purpose of rule 5(4)(c) is to exempt the Government from filing a power of attorney and, by referring to the other mutations by which the Government may be cited, the rule makes it clear that where an officer or Minister is cited in his or her capacity as such, acting on behalf of the Government, he or she is part and parcel of the Government. This seems to me to be a logical conclusion which exists solely because those officers are cited in their capacities as representatives of the Government acting for and on behalf of the amorphous body that is the Government. Therefore far from distinguishing between the Government and its officers the rule tells us that they are

all the same, namely the Government of Namibia.

[40] I am therefore of the opinion that where the word Government is used in rule 8(5) it bears the same meaning ascribed to it in rule 5(4)(c). This it seems to me is not only a conclusion which follows logically but it also accords with the rule of interpretation that where the same word or words are used in a statute they must be given the same meaning unless a contrary intention is clear from the context in which those words appear. (See *Schwikkard v Liquor Licensing Board for Area 32,* 1970(4) SA 222 at p 226E–227A.) There is in my opinion no indication that the use of the word Government in rule 8(5) was intended to give it a different meaning from its use in rule 5(4)(c). Furthermore the purpose of rule 8(5) is, as rule 5(4)(c), to exempt the Government from a requirement which the rule places on ordinary litigants, namely to give security. The underlying reason seems to be that a private citizen may turn out to be a man of straw who may not be able to pay the costs of an unsuccessful appeal. This reason is absent where it concerns the Government. An interpretation that on the chance that a party cited the Government, and not a Minister or other officer, no security needs be put up but where a Minister or other officer is cited, representing the Government, it is necessary for the Government to give security, would in my opinion give rise to an absurdity. There is also nothing in the context in which the word Government is used in rule 8(5), or in regard to all the other rules, which suggests a different meaning.

[41] Mr Heathcote further submitted that even if the Court should find that there was

proper compliance as far as the Minister and the Attorney-General were concerned then it can by no means be said that the Council and the Registrar qualified as employees or institutions of the Government and that therefore they were required by the rules of this Court to file powers of attorney and to put up security. I shall accept without deciding that this submission by counsel is correct. But in my opinion it does not take the matter any further. All the appellants were represented by the same legal practitioner and counsel. It therefore does not involve any extra costs. The Registrar of the Supreme Court was entitled to allocate a date of hearing in this Court because of the fact that the Minister and the Attorney-General were properly before this Court and were entitled to have their appeal heard and adjudicated.

The main Appeal on the Merits

Was the 1965 Council validly appointed?

[42] Although the respondents initially were of the opinion that the members of the 1965 Council were wrongly appointed by the President, in terms of the 1965 Act, and that they should have been appointed by the Minister, the parties were now agreed that the Council was correctly appointed by the President because of the provisions of the Executive Powers Transfer Proclamation (General Provisions) 1977, Proc. No 7 of 1977 which proclamation only applied amendments to the 1965 Act, brought about in South Africa, up to the time of its transfer to the administration of the Administrator-General. A later amendment of the 1965 Act in South Africa, which empowered the Minister to make the appointments, instead of the President, did not apply to the then South West Africa or, after Independence, to Namibia.

[43] Bearing in mind the provisions set out above, it is now common cause that sec. 3(2) of the 1965 Act required the President to appoint the members of the 1965 Council. However, on an interpretation of AG Proclamation 7 of 1977 and AG

Proclamation 14 of 1977, it was contended by Mr Heathcote that the word “Minister” where it appears in sec 4(3) of the 1965 Act must now be read as a reference to the President of Namibia and that it was the President, and not the Minister, who was required to publish the names of the members of the 1965 Council in the Government Gazette. It is however common cause that notice as required by sec 4(3) was not given by the President but by the relevant Minister. This led counsel to submit that the Minister, in publishing the names of the members of the 1965 Council, acted *ultra vires* his/her powers and it followed that the members of the 1965 Council were not validly appointed.

[44] Mr Budlender submitted that there was no indication in the 1965 Act which required publication of the names of the members of the Council as a pre-requisite for the validity of the appointments made by the President. He pointed out that the issue of publication appeared in a different section of the Act.

[45] He further submitted that the purpose of the publication of the names of the members of the 1965 Council, appointed in terms of the 1965 Act, was to give notice to the public that the said Council was established. The purpose for which the 1965 Council was established is set out in the 1965 Act and is many faceted.

[46] The parties therefore agreed that the 1965 Council appointed by the President in terms of the 1965 Act was, on the basis of Art. 140(4), correctly so appointed by him. Furthermore, it seems to me that the purpose for which publication was

necessary was achieved notwithstanding the fact that it was the Minister and not the President who was instrumental in the publication thereof. I could also not find any indication that publication was a prerequisite for the legality of the 1965 Council. There is no sanction for non-compliance with this requirement, and also no time set within which publication should be made. Although the publication of the names of the 1965 Council is couched in peremptory language, cases such as *Nkisimane and Others v Santam Insurance Co Ltd,* 1978(2) SA 430 (A) at 433H–434E, and *Weenen Transitional Land Council v van Dyk,* 2002(4) SA 653 at pa. 13, show that this issue is not so easily determined and that various factors may have to be considered to determine whether a particular provision in a statute is “peremptory” or “directory” as was argued by counsel.

[47] For the reasons set out hereunder I need not decide the issue on these grounds. Both counsel accepted the rationale by the Court *a quo* as to why it was necessary that publication of the establishment of the 1965 Council and the names of its members should have been published by the President in the Gazette, notwithstanding the fact that sec. 4(3) of the 1965 Act empowered the Minister to do the publication. The ratio of the learned Judge *a quo* is based on the wording of the said proclamation 7 of 1977 whereby references in any South African Act, so transferred to the Administration of the Administrator-General, wherein reference is made to a Minister was to be read as reference to the Administrator-General. Furthermore Article 140(5) equated the Administrator-General, where-ever there is reference to him in legislation enacted by his administration, to the President and on

the strength of this Article it was accepted that where the word Minister was amended in sec 4(3) in the 1965 Act, to read Administrator-General, that that was a clear indication that the President was intended where such references were made in legislation in general.

[48] Because both counsel accepted that for the word "Minister", where it appears in sec 4(3) of the 1965 Act, must be read "President", no argument was presented to the Court on whether this was a correct interpretation made by the Court *a quo.* Closer scrutiny of the provisions of the Constitution, and more particularly Article 140 thereof, threw some doubt on whether the Court *a quo* came to a correct conclusion. Consequently counsel were invited to submit further written argument dealing with the following issues:

> "Was the Court *a quo* correct to read for the word 'Minister', where it appears in s 4(3) of Act 101 of 1965 (Medicines and Related Substances Control Act), firstly the word 'Administrator-General' and for the word 'Administrator-General' the word 'President', seemingly on an interpretation of the provisions of Article 140 of our Constitution read with certain proclamations by the Administrator-General, having regard to the answers to the following questions:
>
> (a) Instances where reference in an enactment to the 'Administrator-General' must be read for 'President' are set out in Article 140(5). Are those instances not limited to '….legislation enacted by such Administration….'?
>
> (b) Is Act 101 of 1965 legislation enacted by the Administrator-General or is it an enactment of the South African Parliament?
>
> (c) Does the Constitution spell out the instances where reference in an enactment

should be read as reference to the President, see e.g. Articles 140(4) and 140(5), and whether, in the light thereof, and further bearing in mind the answers to questions (a) and (b) above, was the Court *a quo* correct in finding that the 'corresponding official of the Administrator-General after independence, as envisaged in Article 140(2) of the Constitution, is the President of the Republic of Namibia'?

(d) Furthermore, did the deeming clause in Article 140(5) not, by necessary implication, do away with references to the Administrator-General in legislation administered by him, such as Act 101 of 1965, by deeming that the Government of the Republic of South Africa shall include the administration of the Administrator-General?

(e) Did the Minister therefore act *ultra vires* his powers when he published the appointment of the Medicines Control Council in terms of sec 4(3) of Act 101 of 1965 bearing in mind that the section empowers specifically the Minister to do so?"

[49] Both parties availed themselves of the opportunity to hand in further written argument dealing with the above questions. The Court wants to thank them for the promptness in delivering these Heads which were of great help.

[50] In the supplementary heads, filed on behalf of the appellants, Mr Budlender submitted that Article 140(5) limits instances where reference to the Administrator-General should be read as a reference to the President to instances where laws were enacted by his administration. Consequently it is only in those instances where reference in those laws to the Administrator-General could be read as a reference to the President. Furthermore, the fact that the administration of the Administrator-General was deemed to be included in the administration of the Government of the

Republic of South Africa, it did away with any reference to the Administrator-General in those laws not so enacted by his administration. Counsel therefore submitted that the publication of the appointment of the 1965 Council was correctly made by the Minister of Health and Social Services.

[51] Mr Heathcote referred the Court to its decision in the matter of *Müller v President of the Republic of Namibia and Another,* 1999 NR 190 (SC) where it was stated at p194E-G that reference in the Aliens Act to the Administrator-General must be read as a reference to the President of the Republic of Namibia. The Aliens Act, as the 1965 Act, is an act by the South African Parliament which was transferred to the administration of the Administrator-General. The authority is therefore relevant to the present issue as it supports the submissions made by Mr Heathcote. See also *S. v Tcoeib,* 1999 NR 24 (SC) at 29H-30D. I will later come back to these two cases.

[52] Counsel further submitted that Art. 140(1) of the Constitution dealt with all the laws in force at the time of the Independence of Namibia. That included enactments by the Administrator-General. That is also the effect of Sub-Arts. 140(2), (3), (4) and (5). After, having enacted Arts. 140(1) – (4) the Founding Fathers realised that there was also a body of legislation by the Administrator-General wherein there would be no reference to the President. In regard to legislation by the Administrator-General and his administration, it was therefore necessary to set out in Art. 140(5) that references to him, in such legislation, must be read as references to the President.

[53] Counsel therefore submitted that sec 3(1)(a) of the General Transfer Proclamation AG 7 of 1977 had the effect of reading for the word Minister in sec. 4(3) of the 1965 Act, the word Administrator-General which in terms of the provisions of Art 140 of the Constitution must now be read as a reference to the President.

[54] Counsel are in agreement that the 1965 Act was not an enactment by the administration of the Administrator-General but was an act of the South African Parliament.

[55] Article 140 of the Constitution is the provision whereby Government power was transferred from the South African Government to the new Government of Namibia. To ensure a smooth transfer of such powers and not to create a hiatus in the administration of Namibia, sub. art. (1) of Art. 140 provides that all laws previously in force in Namibia shall remain so until repealed or amended by an Act of Parliament or declared unconstitutional by a competent Court. Sub-art (2) deals with the vesting of such powers created by the existing laws. Where in such laws there is reference to the Government or a Minister or other official of the Republic of South Africa it shall be deemed to be a reference to the Government of Namibia or a corresponding Minister or official. Sub-art. (3) deems anything done under these laws by the Government, a Minister or other official of the Government of South Africa to have been done by the Government of Namibia or a corresponding Minister or official.

[56] The relevant parts of Sub-arts (4) and (5) of Art 140 need to be set out fully as

the findings of the Court *a quo* and the arguments presented by Counsel mainly turn on the wording of these Sub-articles. They provide as follows:

> "(4) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia.
>
> (5) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia."

[57] A reading of Art. 140 shows that it is a comprehensive provision to achieve a complete and full transfer of the powers vested in the South African Government to the new Government of the Republic of Namibia. To that extent the Governmental hierarchy of South Africa with a State President and Ministers and/or other officials was basically the same as that of the new Government of Namibia with a President, Ministers and other officials so that such transfer could be easily achieved without the possibility that somewhere or somehow powers vested in some or other obscure person or institution were going to be left out. However, there was in the hierarchy of South Africa or in the independent Republic of Namibia no such designation as an Administrator-General.

[58] Article 140 (2), (3) and (4) clearly set out when reference to the President or a Minister or other official of the Republic of South Africa shall be a reference to the President, a Minister or an official of the Republic of Namibia. No mention is made of the Administrator-General. This, in my opinion, was deliberately done because Sub-art. (5) deals exclusively with the Administrator-General and his administration of Namibia and it sets out when, in terms of enactments by such administration, references to the Administrator-General or a Minister or other official must be deemed to be a reference to the President, a Minister or other official of the Republic of Namibia. This was limited to enactments by the administration of the Administrator-General and there is, in my opinion, no reason why these words should not bear their ordinary grammatical meaning. The effect of this is that only where there are in enactments of the administration of the Administrator-General reference to the Administrator-General will such reference be a reference to the President of the Republic of Namibia. To read into Sub-art. (4) reference to “other official” as a reference to the Administrator-General is clearly contextually wrong and would be in conflict with the provisions of Sub-art. (5).

[59] As I have previously pointed out the fact that there was no reference to the Administrator-General in Sub-arts (2), (3) and (4) was deliberate and not done by mistake or per *incuriam.* After all the administration of the Administrator-General forms an important part in the political history of this country and during his term of eleven years various enactments were promulgated by his administration. If it was the

intention of the Founding Fathers to deal differently with this Administration it is my opinion that Sub- arts. (4) and (5) would have been differently worded. If it were the intention to have all references in any Act to the Administrator-General to be a reference to the President of the Republic of Namibia the Constitution would have stated so. This could easily have been achieved by including into Sub-Art. (4) also reference to the Administrator-General or to state in Sub-art. (5) that any reference in any law to the Administrator-General would be a reference to the President of the Republic of Namibia, rather than to leave it to extensive interpretation to read into the words "other official", in Sub-art. (4) of Art. 140 the words Administrator-General just because in regard to enactments by him he is equated with the President of the Republic of Namibia.

[60] Because reference to the Administrator-General is to be regarded as a reference to the President of the Republic of Namibia only in regard to enactments by such administration, it follows, as a matter of necessary implication, that references in enactments by the South African Parliament to the Administrator-General, as a result of sec 3(1) of AG Proc. 7 of 1977, were done away with. This achieved the further purpose that references to the President, a Minister or other official of the Republic of South African were, in terms of the Constitution, now a reference to the President or a corresponding Minister or official of the Government of the Republic of Namibia without reference to the words Administrator-General.

[61] This brings me to the cases referred to by Mr Heathcote in the matters of *Müller* and *Tcoeib*. In none of these cases was it an issue before the Courts whether it was the President or a Minister who had to act in a particular instance. In the *Müller* case, where I wrote the judgment, there was no argument concerning this aspect of the case and, as far as I could determine, the same goes for the *Tcoeib* case. I must point out that in the latter case, where the Court dealt with the Prisons Act, Act No. 8

of 1959, an Act by the South African Parliament, extensive amendments to the Act were brought about by Act No. 13 of 1981, an Act by the Administration of the Administrator-General. The sections which the Court was called upon to interpret were all part of the 1981 Act which was, as I have mentioned an Act by the administration of the Administrator-General. It is therefore doubtful whether *Tcoeib's* case supports the contention of Counsel. In regard to the former case where the Court dealt with sec. 9(1) of the Aliens Act, Act No 1 of 1937, the section made reference to the State President which was only amended by the Aliens Amendment Act of 1981 to read Minister. (See sub.sec. (6)). This amendment was subsequent to the transfer of Act 1 of 1937 which had occurred by Proc. AG 9 of 1978 and it was therefore not applicable to Namibia. Reference to the President, after Independence was therefore correct but the Court's argument based on Art. 140(5) instead of Art. 140(4) was incorrect. I am satisfied that the clear meaning of Art. 140(5) is that only where reference was made to the Administrator-General in enactments by his Administration that that was meant as a reference to the President of Namibia.

[62] I have therefore come to the conclusion that reference to the Minister in sec. 4(3) of the 1965 Act means the corresponding Minister of Health and Social Services in the Government of the Republic of Namibia and that the said Minister did not act *ultra vires* his powers when he published the names of the members of the 1965 Council in the *Official Gazette.*

[63] I further find that the Court *a quo* should not have declared all regulations,

enacted in terms of sec. 44 of the Medicines Act, to be null and void for the reasons set out in his judgment on this point. In my opinion the 1965 Council was validly appointed by the President of Namibia and that publication thereof by the Minister of Health and Social Services did not act outside his powers in terms of the Medicines Act when he published the names of the 1965 Council in the Government Gazette.

[64] The Court *a quo further* found that the draft regulations, published in terms of the Medicines Act, were also invalid because they were so published before the Act became law. This finding was based on the provisions of sec 12(3) of the Interpretation of Laws Proclamation, Proclamation No. 37 of 1920. The Court *a quo* found that the draft regulations, which were published on 9 November 2004, were prematurely published as the Act only became law when it was promulgated on 25 July 2008. They were therefore published at a time when the Act did not have the force of law. Mr Heathcote did, correctly in my view, not support the findings by the learned Judge *a quo* but neither did he abandon them and I shall deal shortly with the findings by the Court *a quo.* Instead counsel submitted that the Minister, when he published the regulations, incorrectly referred to sec 44 of the Medicines Act as the source for his power to draft and promulgate regulations. Counsel submitted that he should have referred to the provisions of the Interpretation Proclamation as his source. There is really no substance in this submission. The regulations were not issued in terms of the provisions of the Interpretation Proclamation nor did those provisions empower the Minister to draft and promulgate regulations.

[65] Mr Budlender submitted that the Court *a quo* erred in regard to its findings and that sec 12(3) was specifically providing for a situation where certain action had to be taken before the proclamation of a law but after it had already been passed. Counsel submitted that this was clear from an interpretation of the section as well as a matter of logic.

[66] Section 12(3) of Proc. No. 37 of 1920 provides as follows:

> "(3) Where a law confers a power –
>
> (a) to make any appointment; or
>
> to make, grant or issue any instrument, order, warrant, scheme, rules, regulations or bye-laws; or
>
> (b) to give notices; or
>
> to prescribe forms; or
>
> to do any other act or thing for the purposes of the law;
>
> that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof, subject to this restriction that any instrument, order, warrant, scheme, rules, regulations or bye-laws, made granted, or issued under the power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation."

[67] The Court *a quo*, with reference to the definition of the word "law" in sec. 2 of the proclamation, concluded that the word "law" as used in sec. 12(3) of the

Proclamation, means and includes any law "having the force of law." However, as was pointed out by Mr Budlender, the definition clause is subject to a qualification and states in its introduction as follows:

> "The following expressions shall, *unless the context otherwise requires* or unless in the case of any law is otherwise provided therein, have the meanings hereby respectively assigned to them……" (My emphasis.)

[68] Purely on the grammatical meaning of the words used in sec. 12(3) it seems to me that the "context otherwise requires" that the word "law" does not bear its meaning as "having the force of law" where that word was used in sec. 12(3) If the power conferred by the sec 12(3) could only be exercised where a law has the force of law then it seems to me that the whole section was unnecessary because where such a power is conferred by a law, having the force of law, nothing further is necessary to give effect thereto

[69] The equivalent of our sec 12(3) is to be found in sec 14 of the South African Interpretation Act, Act 33 of 1957. In various cases, where sec. 14 of the South African Interpretation Act was interpreted, the Courts found that the steps taken by the particular legislator, before the enactment had the force of law but was passed, was necessary in order to render the legislation operative at its commencement. (See *inter alia, R v Magana,* 1961(2) SA 654 (TPD); *S v Manelis,*1965(1) SA 748 (AD) and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others,* 2000(2) SA 674 (CC).) Similarly

it was necessary to publish the draft regulations prior to the Medicines Act coming into operation. The reason for this was that various institutions and persons were to comment on the regulations and provide amendments or additions thereto before publication of the regulations proper. In this instance it was necessary that the Act and the regulations become operative at the same time to avoid a situation where the Act was operative but could not be implemented without its regulations. Furthermore bodies created by the Act had to become immediately operative on its promulgation in order to be able to deal with issues such as the registration of medicine and drugs, medical practitioners etc. This had to be achieved through the regulations. (See the *Pharmaceutical Manufacturers, supra,* at paragraph [66]). There is therefore no doubt in my mind that, in order to render the Medicines Act operative, it was necessary to publish the draft regulations prior to the coming into operation of the Medicines Act and that the publishing thereof, after the Act had already been passed, was valid in terms of the provisions of sec 12(3) of Proclamation 37 of 1920.

[70] There is yet a further ground submitted by Mr Heathcote why the regulations promulgated in terms of the Medicines Act should be declared null and void and that is that there was not proper consultation between the Minister and the Council, regarding these regulations, as required by sec. 44(1) of the Medicines Act.

[71] In the founding affidavit of Dr. Pretorius, the second respondent, he stated that he posed written questions to some of the members of the Council. From the answers received the deponent concluded that there never was any consultation by the

Minister with the 1965 Council and that consequently a pre-condition required by the Medicines Act was not complied with as a result of which the regulations promulgated were *ultra vires* the Medicines Act and therefore invalid.

[72] This was denied by the Minister; minutes of the 1965 Council meetings were attached and showed that this Council had on various occasions taken the opportunity to discuss the draft regulations and also made proposals to the Minister prior to the publication thereof. The Minister further stated that he liaised with the Council through the third appellant, the Registrar, and he was informed by the Registrar that his predecessor did so as well. This was confirmed by the Registrar.

[73] In their replying affidavits the respondents changed tack by stating that there was no proper consultation because the Minister was not present in person to consult with the Council. With reference to the case of *Administrator Transvaal, and Others v Theletsane and Others,* 1991(2) SA 192 (AD) Mr Budlender submitted that it was not permissible for the respondents to make out a different case in their replying affidavits from that made out in their founding affidavits.

[74] In the *Theletsane* case the applicants had sought an order that their dismissal from the employ of the Administration had been unlawful because they had not been afforded a hearing before their dismissal. In reply the respondents were able to show that the applicants had indeed been given a hearing. This was met by the applicants by stating in their replying affidavits that the hearing had not been adequate. The

Court of Appeal found that the adequacy of the hearing was not a matter which the respondents were called upon to answer and that they consequently did not address the issue in their answering affidavits. The applicants were therefore not permitted to rely on the allegations which now, for the first time, appeared in their replying affidavits.

[75] Likewise, in this instance, the respondents alleged in their founding affidavit that no consultation took place between the Minister and the 1965 Council. This was denied by the Minister and various Minutes of meetings of the Council wherein the regulations were discussed were attached to the Minister's affidavit and confirmed by the Registrar. That caused the respondents to change their stance and they now alleged in their replying affidavits, that the Minister did not himself consult with the Council. That was not the case which the Minister was called upon to answer and as a result the answering affidavit was not directed at that issue. It would in my opinion be unfair to the appellants to allow the respondents to change their case in their replying affidavits. This is aptly illustrated by the complaint of Mr Heathcote that although there are various instances where references were made in the affidavits to discussions of the draft regulations with various role players and institutions but nowhere was it stated that this included the Minister. The answer to this is not far to seek. The complaint concerning the Minister was only raised in the respondent's replying affidavit and he was not called upon to answer it.

[76] I, however, agree with Mr Budlender that consultation between the Minister and

the 1965 Council did take place before publication of the draft regulations. Section 44(1) of the Medicines Act mandates the Minister to publish draft regulations "after consultation with the Council". The phrase "after consultation' was interpreted to mean that consultation must take place but the repository of the power need not agree with those he was called upon to consult. In *Van Rooyen and Others v The State and Others,* 2001(4) SA 396 (T) at 453 the following was stated in this regard:

> "The meaning of the phrases 'in consultation with' and 'after consultation with' are now well established. 'In consultation with' requires the concurrence of the other functionary (or person) and if a body of persons, that concurrence must be expressed in accordance with its own decision-making procedures. 'After consultation with' requires that the decision be taken in good faith after consulting and giving serious consideration to the views of the other functionary (or person). In the former case the person making the decision cannot do so without the concurrence of the other functionary (or person). In the latter case he or she can."

[77] It was furthermore stated in the case of *Hayes v Minister of Housing, Planning and Administration Western Cape,* 1999(4) SA 1229 (C) at 1242 H-J as follows:

> "In ordinary legal parlance, a consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered. The parties or their representatives could be physically present at such a meeting or conference, but not necessarily so. In these times of advanced communication technology, persons or parties can consult with one another in a variety of ways, such as fax or e-mail or, in a somewhat less sophisticated way, by correspondence."

[78] I agree with what is stated in these cases. In the present instance the Minister had the minutes of the meetings of the Council as well as the input by the Registrar.

What is required of the Minister in these circumstances is to keep an open mind, act *bona fide* and to give serious consideration to the views of the Council. There is no allegation that he did not do so. It must be pointed out that the Court *a quo* did not find that there was no, or inadequate consultation. The Court found that there was no consultation with the1965 Council because there was no Council validly appointed to consult.

[79] In the result I am satisfied that no grounds existed whereby the Court *a quo* could declare all the regulations made by the Minister invalid and that finding by the Court must be set aside.

The validity of regulation 34(a), (c), (d) and (e).

[80] This brings me to the validity, or otherwise, of regulation 34(3)(a), (c), (d) and (e). This regulation deals with the licensing of medical practitioners who wish to dispense and compound medicine. Section 31(3) of the Medicine's Act provides that the Council may issue a medical practitioner with a licence authorizing him or her to sell medicine "if the Council is satisfied that granting such licence is in the public need and interest". The words "in the public need and interest" were further defined as "the health care needs and interests of the greater Namibian community in respect of availability and equitable access to health care services".

[81] Both counsel referred the Court to the judgment of the Constitutional Court of South Africa in the matter of *Affordable Medicines Trust and Others v Minister of Health,* 2006(3) SA 247 (CC). This matter came before the Constitutional Court as an application for leave to appeal against a judgment of the Pretoria High Court dismissing a constitutional challenge by the applicants against certain aspects of a licensing scheme whereby health care providers, such as medical practitioners and

dentists, were required to be licensed in order to dispense and compound medicine. The relevance of the case for the present matter is that the regulations found to be invalid by the Constitutional Court are identical to our regulation 34 which the respondents successfully challenged in the Court *a quo.* As is the case in Namibia, those regulations were also published in terms of the South African Medicines Act.

[82] The relevant parts of regulation 34(3) provides as follows:

> "(3) In considering an application referred to in sub-regulation (1) the Council must have regard to the following –
>
> (a) the existence of other health facilities licensed in terms of the Hospital and Health Facilities Act (Act No. 36 of 1994), or the Veterinary And Para-veterinary Profession, Proclamation, 1984 (Proclamation No. AG 14 of 1984) in the vicinity of the premises from where the acquisition, possession, prescription, use, sale or dispensing, as the case may be, of scheduled substances is intended to be carried out;
>
> ...
>
> The geographical area served by the applicant;
>
> The estimated number of health care users in the geographical area referred to in paragraph (c);
>
> Demographic considerations, including disease patterns and health status of the users to be served; and
>
> ...."

[83] There is no doubt in my mind that certain of the findings of the Constitutional Court in regard to their regulation 18(5) (the equivalent to our regulation 34(3)) are also applicable to the present instance.

[84] In paragraphs [118] to [122] the Constitutional Court dealt with the provisions of regulation 18(5) and concluded that they reflected the National Development Policy of the Government, i.e. to limit the rights of medical practitioners to dispense medicines where there are pharmacies in their vicinity, and the Court further found that the purpose of these regulations were manifestly to protect pharmacies against competition from medical practitioners. The Court concluded that such change of policy was not discernible from the provisions of their Medicines Act and found that those provisions (Regulation 18(5)) were *ultra vires* the empowering statute.

[85] Mr Heathcote submitted that the appellants did not suggest that our reg. 34(3), with same wording, would have a different meaning or purpose. Counsel submitted that, on their own version, that is how these regulations should be understood and he referred to various excerpts from the affidavit of the Minister which supported his submission, namely, that it was necessary for the Council -

(i) to establish the existence of a pharmacy in the vicinity of the premises from where the sale or dispensing of scheduled substances is intended to be carried out;

(ii) that it is not in the public interest for patients to receive medicine from a medical practitioner where there is a pharmacy in the vicinity;

(iii) that it is sound practice for a different health professional to dispense

medicine from the one who prescribed it;

(iv) that pharmacists are better qualified to dispense medicine than medical practitioners;, and

(v) that when the prescriber becomes the dispenser the rational use of medicine may be compromised.

To this can be added the further statement that dispensing of medicine by medical practitioners may cause a pharmacy to face financial ruin.

[86] Mr Budlender submitted that whether there was a pharmacy in the vicinity of a medical practice was only one of the criteria to be considered by the Council in deciding whether to grant a licence to a medical practitioner or not and that those other criteria may overshadow the criteria of a pharmacy in the vicinity.

[87] Although our own NDP does not, unlike that of the Republic of South Africa, state emphatically that medical practitioners shall not be granted the right to dispense medicine in the vicinity of pharmacies; it required that persons, other than pharmacists, would require a licence to dispense medicine.

[88] However, it seems to me that regulation 34(3) speaks for itself. The criteria set out therein are what the Council must consider before granting a licence to a medical

practitioner. One such criterion is that the Council must establish, before granting a licence to a medical practitioner, whether there is a pharmacy in the vicinity of the medical practitioner's practice. The provisions, similar to our sub-regs. (c), (d) and (e), were found by the Constitutional Court to form a discreet cluster which were designed to provide criteria for implementing, what the Court called, a discarded policy. Far from providing separate criteria to ameliorate the effect of reg. 34(3)(a), they serve to facilitate its implementation. I also agree that if these criteria were to serve any other purpose they would not have appeared in a regulation which contains factors intended to influence a decision whether or not to grant a licence. (See para. [114].) In considering whether to grant a licence or not the Council is obliged to consider these criteria and cannot ignore them and once it has found that there is a pharmacy in the vicinity of the practice of an applicant medical practitioner it will have to give effect to reg. 34(3)(a). If this were not the purpose of reg. 34(3) then it is difficult to find any purpose why it was included in a regulation where guidance is given to the Council whether to grant a licence or not. This must further be seen against the background of the Minister's justification of Reg. 34(a), (c), (d) and (e) as was pointed out by Mr Heathcote. A further pointer in this direction was the action of the Registrar who refused applications for licences on this very ground. I am mindful of the fact that it was not for the Registrar to grant or not to grant licences but the way in which he dealt with those applications is significant. After all as Executive Officer of the Council his actions can be seen as a reflection of the policy of the Council. Neither the Minister nor the Registrar himself attempted to repudiate this action other than to agree that the Registrar was not empowered to consider the applications.

[89] However, Mr Budlender submitted that the situation in Namibia was different from that in South Africa. Counsel based this submission on the existence of sec. 31(3) in the Medicines Act whereby the Council is empowered to issue a licence to a medical practitioner when it was in the public need and interest to grant such a licence. Council pointed out that no such provision appears in the South African Act with the result that the Minister was, in that instance, not empowered to make regulation 18(5), the equivalent of our reg. 34(3). Council was confident that if a similar provision, like our sec. 31(3), was part of the South African Act that regulation 18(5) would have passed muster and would have been valid.

[90] I do not agree with counsel. In my opinion the words “in the public need and interest,’ as further amplified by its definition, do not empower the Minister to protect pharmacists from competition with medical practitioners. What is in the public need and interest may differ from one instance to another. In cases such as *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd,* 1948(4) SA 480 (WLD) and *Leicester Properties (Pty) Ltd v Farran,* 1976(1) SA 492 (DCLD) mention was made, of the uncertain meaning of the phrase and that the phrase “in the public interest” does not always “permit of a clear and comprehensive definition” as was stated in the *Leicester Properties* case p 494H. At p 495A, of the same case, Miller, J, (as he then was) said:

> “I respectfully agree with Herbstein, J, that the Court must take ‘a broad

> commonsense view of the position as a whole' and that it must be considered whether 'the public would be better served if the applicant were to be allowed to proceed with its scheme, than by a continuation of the existing state of affairs.'"

[91] In my opinion the words "in the public interest" are not significantly changed by adding the word "need". Nor was this achieved by the definition of the words "in the public need and interest" in sec. 1 of the Medicines Act. In my opinion the meaning of the words "in the public need and interest" must first be determined in relation to the context in which it appears in a statute because in that context it could be limited to a specific section of the public or the public of a particular area or could apply in general and secondly regard must be had to the subject matter which, in terms of the statute, it relates to. This is illustrated in instances where the subject matter may have a debilitating effect on the public, such as intoxicating liquor. In that instance the words "public interest" were interpreted to have a limiting effect in order to protect the public from the effects of liquor. (See, *inter alia Simpson v Lewin,* 1956(4) SA 486 (R) and *Riach v Liqour Licencing Board Rhodesia,* 1969(1) SA 342.)

[92] It seems to me that it is immediately clear that the public need and interest to receive medicine is very much different from the public interest to have access to intoxicating liquor. Where in the first instance a restrictive interpretation was placed on the words "public interest" the dispensing of medicine does not require such restrictive interpretation. The purpose for the dispensing of medicine is to heal or to bring relief to people who are ill or in pain and in need of treatment for their illnesses. There exists no need to limit access to medicine to pharmacists to the exclusion of

medical practitioners, and there is in my opinion also no reason why people should not have a free choice whether to obtain their medicine from a medical practitioner or a pharmacy. The general statements by the Minister, referred to herein before, (see para. 89), is in my opinion too unspecific and vague to allow for an interpretation which would restrict dispensing of medicine to pharmacists in order to protect them from competition by medical practitioners. Mr Budlender submitted that pharmacists are better qualified to dispense medicine. I accept that that is so but for that reason they can dispense and compound all medicines contained in the various schedules of the Medicines Act whereas medical practitioners can only dispense medicine up to the 4th Schedule. Nothing was put before the Court that they were not well qualified to do what they were permitted to do for the past 40 years or more.

[93] The meaning of the words “in the public need and interest” together with its definition, set out in sec. 1 of the Medicines Act, does not allow for an interpretation whereby a drastic change of policy was introduced by the Minister through regulation 34(a)(c)(d) and (e). This drastic change is not discernible from the provisions of the Medicines Act and must be set aside.

[94] In the result I have come to the conclusion that the Minister was not empowered by the Medicines Act to introduce, by way of regulation, a drastic change of policy and regulation 34(3)(a), (c), (d) and (e) must be declared *ultra vires* the powers of the Minister. As was pointed out in the *Affordable Medicines*-case, *supra,* these regulations form a cluster to facilitate the implementation of this invalid policy.

Their excision from the regulations will not hamper the implementation of the other regulations regarding the application for licences by medical practitioners to dispense medicine and will allow medical practitioners to continue to so apply.

[95] Mr Budlender also submitted that the review proceedings were not commenced within a reasonable time and that the respondents should have attacked the provisions of the Act and not the regulation. The short answer to these submissions is that it was not discernible from the provisions of the Act what the Minister intended to do. In my opinion this only became clear when the Registrar refused applications based on the regulations. There was therefore also no need to attack the provisions of the Medicines Act because it was regulation 34(a), (c), (d) and (e) which caused the problem and not the Act.

[96] The conclusion to which I have come renders it unnecessary to consider the various constitutional points raised by the respondents in connection with regulation 34(3). (See in this regard *Kauesa v Minister of Home Affairs and Others,* 1995 NR 175 (SC); (1996(4) SA 965.)

The second appeal

[97] The second appeal concerns the amendment to the 3rd order issued by the Court *a quo.* In this regard the Court suspended the operation of sec 46(3) of the Medicines Act whereby a moratorium was granted, inter alia to medical practitioners, to apply for licences to dispense medicine. The operation of the section was suspended until new regulations were promulgated afresh by the Minister. However it was realized that those practitioners who did not avail themselves of the three

months period in the first place were now not able to dispense medicine until the three months period again started to run when the new regulations were promulgated. The respondents then applied for an amended order which was granted and the effect of which was to allow medical practitioners who did not avail themselves of the three months period provided for in sec 46(3) to continue to dispense medicine. Mr Budlender submitted that this order amounts to an amendment of the Medicines Act which falls outside the powers of the Court and the Court was consequently not competent to make such an order. Mr Heathcote argued that in the light of the Constitutional findings by the Court *a quo* and because the Court wanted to protect the rights of medical practitioners during the transitional period when there were no regulations, it had no option but to mould a right under Art. 25(2).

[98] I agree with Mr Budlender. The constitutionality of sec. 46(3) of the Medicines Act was not challenged by the respondents. Even if the purpose thereof was to protect the rights of practitioners that opportunity was given to them to regularize their position and to apply timeously for a licence and, which, in the light of my finding above, they can continue to do albeit without the protection of the moratorium. What the Court's order amounts to is to amend the provisions of the Medicines Act to allow, notwithstanding that sec. 46(3) is constitutional and not being challenged, practitioners to dispense medicine contrary to the provisions of the Medicines Act.

[99] The purpose of sec 46(3) is in my opinion clear. It affords medical practitioners, who were not in terms of the 1965 Act required to be licenced to dispense medicine, an opportunity to regularise their position by applying for such licence and to allow them to continue to dispense medicine until finalization of their applications, which included appeal procedure in terms of the Medicines Act, provided that they so applied within the period of three months laid down by the Act. This is a transitional provision which was not intended to go beyond the three months laid down and was a once-off provision which would have served its purpose at the lapse of the three months period. It was never intended to extend the period of three months nor did it afford any medical practitioner a right to insist on further extension thereof. It applied equally to all medical practitioners and there is no complaint that the period of three months was too short or was not properly publicized. It seems to me that this was an

instance where the first respondent, the body looking after the interests of the medical profession, should have alerted its members to this very important provision. If they had done so then *caedit questio.* If they have not then the Act is not to be blamed.

[100] The order of the Court *a quo* not only suspended the application of sec 46(3) but amended the Medicines Act to allow for an indeterminate period within which medical practitioners could apply for licences after lapse of the three month period provided for by the Act and still enjoy the protection of the moratorium. In my opinion even the Minister did not have this power and could only extend or suspend this period on the say so of Parliament. I therefore agree that the Court *a quo* was not competent to make this order. The function of a Court is to interpret the law and not to make it. None of the exceptions where a Court could read words into a law or ignore certain words are applicable in this instance because the purpose and effect of the section is clear and there is no need to read in words or ignore words in order to give it meaning. The literal meaning of the section also does not lead to a glaring absurdity or gives rise to a meaning contrary to what Parliament intended. (See in this regard *Engels v Allied Chemical Manufacturers and Another,* 1993(4) SA 45 (Nm) and the cases cited therein.) It is the order of the Court *a quo* which is not reflecting the intention of Parliament as I have tried to show herein before.

[101] In the result the second appeal must succeed and the order by the Court *a quo* must be set aside.

Costs

[102] Concerning the costs of these appeals I am of the opinion that the appellants were substantially successful. They not only had to fend off various objections, some serious and some not so serious, but they also succeeded in re-instating the bulk of the regulations with the exception of reg. 34(3) (a), (c), (d), and (e). The appellants were also successful in their appeal against the order suspending and extending the effect of sec 46(3) of the Medicines Act. However, as far as the proceedings in the Court *a quo* were concerned the respondents had to come to Court to set aside the abortive decisions taken by the third appellant and to declare regulation 34(3)(a),(c), (d) and (e) *ultra vires* the powers of the Minister. Under the circumstances it seems to me fair to order the appellants to pay half the costs of the respondents, in that instance the applicants in the Court *a quo.* I am also satisfied that this was a case where it was competent to appoint two instructed counsel to represent the parties.

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

The main appeal

1. The appeal succeeds to the extent set out hereunder, with costs including the costs occasioned by two instructed counsel and one instructing counsel.

2. The order of the Court *a quo* is set aside and the following order is substituted therefore:

    2.1 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 is hereby declared unlawful and *ultra vires* the powers of the Minister in terms of sec. 44(2) of the said Act and it is hereby set aside.

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

2.3 The respondents are ordered to pay half the costs of the applicants such costs to include the costs occasioned by the appointment of two instructed counsel and one instructing counsel.

2.4 All other relief claimed by the applicants in their Notice of Motion is dismissed.

The second Appeal

The appeal succeeds with costs such costs to include the costs occasioned by the appointment of two instructed counsel, and one instructing counsel and the order of the Court *a quo* is set aside and the following order is substituted therefore, namely:

The application by the applicants, as amended, is dismissed with costs such costs to include the costs of two instructed and one instructing counsel.

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STRYDOM AJA

I agree.

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MAINGA JA

I agree.

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LANGA AJA

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