

Judgment on phosphate appeal in December

August 11, 2017



Roland Routh

Windhoek-Judge Shafimana Uitele yesterday reserved his judgment on an appeal lodged by Namibia Marine Phosphate against the decision by Environment and Tourism Minister Pohamba Shifeta to withdraw an environmental clearance certificate issued by Environmental Commissioner Teofilus Nghitila.

Judge Uitele said he will endeavour to deliver the judgment on or before December 15.

Namibia Marine Phosphate (NMP) lodged the appeal after Shifeta withdrew the clearance certificate in response to the public outcry that followed the announcement. The subsequent appeal hearing determined that no or very little public consultations were held on the issue.

NMP argues that the withdrawal of the certificate and its prosecution was irregular, improper and in violation of the applicable regulations governing such appeals. According to them, NMP was not afforded an opportunity to provide additional information, as provided for in the regulations and that the appeal was lodged late.

They further felt the environment minister erred in law in hearing the appeal and adjudicating thereon, or alternatively erred in not dismissing the appeal as it was lodged in contravention of the applicable regulations.

According to Senior Counsel Reinhard Totemeyer, assisted by Advocate Deon Obbes and instructed by Charles Visser, who appeared on behalf of NMP, the minister exercised appeal powers in circumstances where NMP was not informed of the appeal in a manner compliant with the applicable regulations.

NMP was not notified of the appeal hearing or afforded an opportunity to make representations thereat, nor to make representations of any nature to the minister on additional grounds of appeal that were irregularly and improperly introduced by consumer lobbyist Michael Gaweseb at the appeal hearing, which served to violate NMP's rights in terms of Articles 12 and 18 of the Constitution.

NMP argued that Gaweseb had no right to lodge and prosecute the appeal, that the minister did not attach sufficient weight to correspondence submitted to him by NMP and that the Ministry of Fisheries and Marine Resources had been afforded the opportunity to make representations on the application for the environmental clearance certificate.

They further stated that the law requires a party to be properly heard before a decision of such nature contemplated is taken. Procedurally fair administrative action is required, which means a party is entitled to reasonable opportunity to make representations – which in this case did not happen.

He asked the court to set aside the decision of the minister to withdraw the clearance certificate and to award costs to NMP for one instructing and two instructed counsel.

South African Senior Counsel Vincent Maleka, who appeared on behalf of the minister on instruction from Advocate Werner Boesak on instructions from the Government Attorney, pointed out that the issue at hand is whether public consultations on the awarding of the certificate were held.

According to him, the huge public outcry was testament to the fact that such consultations were not held.

He said the decision of the minister on the fact that there was no sufficient consultation before Nghitila granted the certificate is not a question of law, so as to merit the appeal to the court, unless NMP shows that the decision of the minister was so perverse, on the facts, that no reasonable decision-maker would have made that decision.

Maleka went on to say the opportunity to appeal a decision of the minister under the applicable law is limited to points of law only and not on matters of fact, expression of expert opinion, or implementation of policy on environmental matters by the minister as a statutory repository of appellate powers.

He submitted that the purpose of the Environmental Management Act and the values to be promoted by it are vital in the determination of the scope of an appeal and one such value is public consultation.

Maleka argued that the decision of the minister was based on fact and not law; as such, the current appeal has no merits and stood to be dismissed with costs for one instructing and two instructed counsel.