



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: A 168/2013

In the matter between:

EXPEDITE AVIATION CC

APPLICANT

and

**THE MINISTER OF WORKS AND TRANSPORT
DIRECTORATE OF CIVIL AVIATION**

**1ST RESPONDENT
2ND RESPONDENT**

Neutral citation: *Expedite Aviation cc v The Minister of Works and Transport* (A 168/2013) [2013] NAHCMD 184 (30 May 2013)

Coram: GEIER J
Heard: 30 May 2013
Delivered: 30 May 2013

Flynote: Administrative law - Administrative act - Invalidity of - Consequences of invalidity - Until invalid administrative action set aside by court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.

Administrative law - Administrative act - Invalidity of - Consequences of invalid decision taken by Permanent Secretary – would Minister be entitled to disregard the

Permanent Secretary's decision and replace same with his own as a result of being the nominal head of the Director of Civil Aviation – who should have made the decision in the first place – Court holding that he was not so entitled and that the decision of the Permanent Secretary – even if irregular - would have to stand until set aside in proceedings for judicial review – until such time it continued to exist in fact and would have legal consequences -

Summary: Applicant sought an order directing the 1st respondent to forthwith exercise his discretionary powers to decide whether permission should be granted to the applicant to land its Bell helicopter at an inspected site at the Windhoek Show Grounds and for such helicopter to remain static at such site during the duration of the Namibian Tourism Expo and thereafter to allow such Bell helicopter to take off from such site at the conclusion of such Tourism Expo – Permanent Secretary in the 1st Respondent's Ministry had refused such permission which should have been granted by the Director of Civil Aviation –

Held: That in the absence of proceedings setting aside the Permanent Secretary's decision such decision could not be disregarded and had to be considered valid until set aside.

Held: That also Minister as nominal head of the Director of Civil Aviation and by virtue of his powers of delegation could not just second-guess Permanent Secretary's decision just because he may take the view that the Permanent Secretary's decisions in this regard were wrong and simply, through the stroke of the pen, correct them according to his perceptions – Court holding that he was not entitled to do so.

Held: In the circumstances of the case and where the decisions regarding the planned activities relating to the applicant's Bell helicopter thus continued to stand -

and were to be regarded as legally valid - in the absence of any review challenging these decisions – court not prepared to grant the relief that was sought by the applicant – application accordingly dismissed with costs.

ORDER

The application is dismissed with costs, such costs are to include the costs consequent to the employment of two legal practitioners.

JUDGMENT

GEIER J:

[1] In terms of an amended Notice of Motion the applicant seeks an order:

‘ ... directing the 1st and/or 2nd respondents to forthwith exercise their discretionary powers as to whether permission should be granted to the applicant to land its Bell helicopter on the inspected site at the Windhoek Show Grounds and for such helicopter to remain static at such site during the duration of the Namibian Tourism Expo from 30 May 2013 to 1 June 2013 and thereafter to allow such Bell helicopter to take off from such site at the conclusion of such Tourism Expo as per Annexure A2.’

[2] Applicant also seeks ancillary relief and the applicant seeks this relief on an urgent basis.

[3] In the founding papers the applicant sketches its efforts made since the 3rd of April 2013 to get the necessary permission from the officials of the Directorate of Civil Aviation for the landing, standing and taking off of the Bell helicopter at the Namibian Tourism Expo to be held from the 29th of May to the 1st of June 2013 and for having a flight plan approved to allow the helicopter to film a breakfast run of Harley Davidson motor- cycles on 1 June 2013.

[4] The relief sought in regard to the filming of the breakfast run of the motor-cycles was abandoned at the hearing of the matter in regard to which, the Permanent Secretary in the Ministry of Works and Transport, Mr Peter Mwatile, had refused the necessary permission already by letter dated 24 May 2013.

[5] The applicant being of the view that the officials and the Directorate of Civil Aviation had not yet made a decision in regard to the landing, standing and departure of the Bell helicopter during the Expo, however persisted with the relief sought as per the above mentioned Amended Notice of Motion.

[6] The applicants continued to persist in pursuing this relief even after it was pointed out to them that the Permanent Secretary in the 1st respondent's ministry had subsequently, upon learning that a conditional approval in this regard had been granted to the applicant, directed that such approval be withdrawn, which decision, so it was contented, remained in force.

[7] The applicants were informed in this regard pertinently in the answering papers.

[8] Mr Namandje who appeared on behalf of the respondents submitted that these decisions of the Permanent Secretary would have to stand, not only in view of the presumption pertaining to the validity of administrative acts and decisions until set aside, but also in view of the fact that the applicants did not seek the review and setting aside of the decisions complained of.

[9] He referred the court in this regard to the unreported South African Supreme Court of Appeal decision made in the case of *Member of the Executive Council for Health – Province of the Eastern Cape NO & Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* - case no. 473-12 delivered on 16 May 2013 at paragraphs [19] to [22].

[10] Mr Mouton, who appeared on behalf of the applicant, contended that the mandatory relief sought by his client should nevertheless be granted as on the respondent's own version, the Permanent Secretary in the Ministry of Works was not the designated official to grant the permission sought, but that this was the prerogative of the Director of Civil Aviation, who was an official in the Directorate under the auspices of the said Ministry, which the Minister heads and for which the 1st respondent in this matter was cited as the responsible Minister. Accordingly and if I understand Mr Mouton's submissions correctly, the Minister was still free to make a decision on this matter, if directed to do so by this court.

[11] In response Mr Namandje submitted that the Minister was not competent to make the decision required as Regulation 127.08.06 of the Namibia Civil Aviation Regulation conferred this power on the Director of Civil Aviation, who was not cited as a party before this Court.

[12] Mr Mouton submitted with reference to *Wiecher's Administrative Law*¹ that the powers which the Director of Civil Aviation had, were delegated powers from the Minister, which he, the Minister, could simply exercise himself by virtue of his powers of delegation. These powers could accordingly be exercised once again should the court direct the Minister to do so in terms of the order which should be granted in terms of prayer 2 of the Amended Notice of Motion.

[13] Mr Mouton's argument in this regard can however not be upheld in the face of considerable authority to the contrary. I can do no better than to refer again to the South African Court of Appeal decision made in the *Oudekraal* case², cited with approval in *Member of the Executive Council for Health – Province of the Eastern Cape NO & Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* and also in a number of Namibian cases³ and where the court stated:

[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was

¹at page 57

²*Oudekraal Estates v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1)

³See for instance : *Auas Diamond Co (Pty) Ltd v Minister of Mines and Energy* 2006 (2) NR 406 (HC) at 413, *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at 529 or *Black Range Mining (Pty) Ltd, Minister of Mines and Energy and Another v* 2011 (1) NR 31 (SC) at paras [21] - {22}

correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.⁴

[14] What the applicant, in its continued quest for relief, continues to overlook, in my view, is that the Permanent Secretary's decisions, relating to the Applicant's intended activities relative to the Expo, laudable as they may be, is that the perceived unlawful administrative decisions, taken by the Permanent Secretary, are producing legally valid consequences, for as long as those decisions have not been set aside on review.

[15] It is furthermore clear from the cited authorities that also the Minister cannot just second-guess those decisions simply because he may take the view that the Permanent Secretary's decisions in this regard were wrong and simply through the stroke of the pen correct them according to his perceptions.

[16] Viewed also from this perspective, and were the court to grant the orders sought, such order would transgress these fundamental principles.

[17] Given the circumstances - and where the decisions regarding the planned activities relating to the applicant's Bell helicopter continue to stand - and are to be regarded as legally valid - in the absence of any review challenging these decisions - I cannot see my way clear to accede to the relief that is sought by the applicant.

⁴*Oudekraal Estates v City of Cape Town and Others* at p 241 -242

[18] The application is accordingly dismissed with costs, such costs to include the costs of the employment of two legal practitioners.

H GEIER
Judge

APPEARANCES

APPLICANT: CJ Mouton
Instructed by Mueller Legal Practitioners,
Windhoek.

RESPONDENTS: S Namandje
Sisa Namandje & Co
Instructed by Government Attorney,
Windhoek

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