NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. **A 9/2016**

In the matter between:

WILLEM GEORGE TITUS	**APPLICANT**
and	
THE NATIONAL HOUSING ENTERPRISE	**1ST RESPONDENT**
THE MINISTER OF URBAN AND RURAL DEVELOPMENT	**2ND RESPONDENT**
MR ELTON KHOITAGE !GAOSEB	**3RD RESPONDENT**

Neutral citation: *Titus v The National Housing Enterprise* (A 9-2016) [2016] NAHCMD 225 (29 July 2016)

Coram: ANGULA, DJP

Heard: 17 May 2016

Delivered: 29 July 2016

Flynote: Applications and motions – Administrative Law – Section 10 (4) of the National Housing Enterprise Act, No 5 of 1995 as amended provides for the appointment of any suitable staff member of NHE to act if the post of the chief executive officer became vacant – board appointing one of the directors as acting chief executive officer- Court held the NHE as a creature of statute has no power other than those vested upon it by its constitutive statute- appointment declared invalid.

Summary: Applications and motions – Administrative Law – Section 10 (4) provides that if the post of the chief executive office became vacant the board shall appoint any suitable staff member to act as chief executive officer. The appoint appointing one of the directors as acting chief executive officer. Held that NHE as a creature of the statute has no power other than those powers vested upon it by its constitutive statute and the repository of public powers can exercise no power and perform no functions beyond that conferred upon it by law - An administrative act that has not been authorised by the law is invalid – Consequently the appointment of a director is declared invalid.

ORDER

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1. The designation and appointment of the third respondent as acting chief executive officer of the first respondent is in violation of Section 10 (4) of the National Housing Enterprises Act, Act No 5 of 1994 (as amended), and therefore *ultra vires*, invalid and of no force or effect.

2. The respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.

JUDGMENT

ANGULA, DJP:

Introduction

[1] The applicant is an adult male employed by the first respondent, The National Housing Enterprise. He is a senior manager for operations and business development.

The first respondent is the National Housing Enterprise ("NHE") a statutory body established by Section 2 of the National Housing Enterprise Act, No 5 of 1993, as amended ("the Act"). NHE's main objective is the financing of housing and generally providing for the housing needs of Namibian citizens. The second respondent is the Minister responsible for housing affairs. The third respondent is a member of the board of directors of NHE who, at the time of the hearing this application, was appointed by the board of directors as the acting chief executive officer of NHE.

Background

[2] The term of the contract of employment of NHE's previous chief executive officer expired on 31 August 2015. On 1 September 2015 the board of directors of NHE ("the board") appointed the third respondent as an acting chief executive officer of NHE. The appointment was for a period of two months. After the period of two months had expired, the board extended the acting period for an indefinite period until a substantive chief executive officer was appointed.

[3] On 26 January 2016 the applicant launched this application in which he sought a declaratory order that the designation and appointment of the third respondent as the acting chief executive officer of NHE is in violation of Section 10 (4) of the Act and therefore *ultra vires*, invalid and of no force or effect. The application is opposed by the

first and second respondents. Only the first respondent filed an opposing affidavit. The second respondent chose to oppose the application on legal grounds and did not file an opposing affidavit.

[4] The case for the applicant is fairly straightforward. It is based on the provisions of Section 10 (4) of the Act which stipulate that if the post of the chief executive officer of NHE is vacant, the board shall designate any suitable staff member of NHE to act, until a substantive chief executive officer has been appointed. The first respondent is not disputing what Section 10 (4) provides, instead it denies that the provision is mandatory and contends that it is merely directory. It is further alleged that the board was not satisfied that any staff member was suitable to be appointed as an acting chief executive officer.

[5] The first respondent raises three points *in limine.* The first point is that the applicant unreasonably delayed in bringing the application; secondly that the applicant lacks *locus standi*; and thirdly that the order sought by the applicant is academic and of no practical effect. The second respondent also raises three points *in limine*. The first point is whether the declaratory order sought is an appropriate relief; and the second being whether an administrative decision may be set aside by way of a declaratory order. The third point raised is whether the applicant has *locus standi* to bring the application, a

point which the second respondent points out that it intertwines with the question whether the court has jurisdiction to hear this matter.

Issues for determination

(a) Whether the applicant has the necessary *locus standi* to bring this application;

(b) Whether the court has jurisdiction to hear the matter;

(c) Whether the applicant unreasonably delayed in bringing this application;

(d) Whether the appointment of the third respondent is in violation of Section 10 (4) of the Act; and

(e) Whether the declaratory order sought by the applicant is academic and of no practical effect.

[6] I will consider the issues in the sequence outlined above.

First point *in limine*: Does the applicant have the necessary *locus standi*?

[7] The first respondent disputes that the applicant has the necessary *locus standi* to bring the application. It is then alleged that the applicant has failed to set out sufficient allegations proving that the applicant has a direct and substantial interest in the order sought. Furthermore, that in the absence of the allegations by the applicant establishing his *locus standi* coupled with the inappropriate procedure adopted and the remedy sought, it is alleged that the applicant has no *locus standi*.

[8] It is also contended on behalf of the second respondent that the applicant lacks *locus standi*. In support of this argument, reference is made to the South African Supreme Court of Appeal judgment in the matter of *Muldersdrift Sustainable Development vs Mogale City*[1]. In that matter, the Supreme Court of Appeal confirmed the decision of the court *a quo* dismissing the application by an unincorporated voluntary association for a declaratory order relying on the equivalent of Section 16 (d) of the High Court Act, 1990, that there had been a procedural defect in the appointment of a municipal manager. I will deal with this argument after I have dealt with the first respondent's argument.

[9] The applicant set out in his supporting affidavit the facts upon which his *locus standi* is premised. He points out that he is a senior employee of the first respondent and has been working for the first respondent for the last 15 years. He currently holds the post of

[1][2015] ZASCA 118 (delivered on 11 September 2015)

senior manager for operations and business development, a position he was appointed to on 1 March 2015. He is a member of the executive committee, and reports directly to the chief executive officer. As to the applicant's academic qualifications, he holds a National Technical Diploma, a Bachelor of Business Administration degree, as well as Honours and Master's degrees in the same field. What is significant is that on previous occasions he has been appointed as the acting chief executive officer during the absence of the substantive chief executive officer. The applicant went on to point out that as a senior employee of the NHE, he has an interest that NHE acts lawfully and complies with its own constitutive Act. The applicant points out further that he would have been eligible for appointment as acting chief executive officer had the third respondent not been appointed as acting chief executive officer.

[10] Section 16 (d) of the High Court Act[2] -provides that the court has power-:

> *"(d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*

[2]Act No. 16 of 1990

[11] In my considered view, all those facts referred to above, cumulatively and objectively viewed, qualify the applicant as an interested party within the meaning of Section 16 (d) of the High Court Act. In addition, the facts stated place the applicant in the category of ‘suitable employee’. Furthermore, the applicant states categorically that in the absence of or inability to perform by the chief executive officer, or in the case of vacancy of the post, he would be eligible for consideration to be appointed as acting chief executive officer. In his replying affidavit, the applicant points out that even during the tenure of the third respondent’s period as acting chief executive officer, on two different occasions, two other senior managers were also appointed as acting chief executive officer in the absence of the acting chief executive officer. This, in my view, demonstrates the existence of suitable staff members eligible for the appointment as acting chief executive officer, although the first respondent alleged there to be none at the time of the third respondent’s appointment. The first respondent simply denies that the applicant is a suitable person without advancing any reason. In terms of the rules of this court the first respondent is required to advance facts upon which his conclusion is based. A mere denial will not do. A combination of all these facts demonstrates to me that the applicant has a direct and substantial interest in the appointment of an acting chief executive officer of the first respondent. I have therefore arrived at the conclusion that the applicant has shown that he does have interest in the matter and therefore has the necessary *locus standi* to bring the application. The first respondent’s point *in limine* in this regard is therefore dismissed.

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[12] I now turn to consider the second respondent's legal argument regarding the applicant's *locus standi*. As mentioned above, the issue in the *Muldersdrift* matter was the procedural defect in the appointment of the municipal manager. The applicant sought for a declaratory order that the appointment was invalid. The court pointed out that in order to obtain a declaratory order in terms of Section 21(1) (c) of the South African Supreme Court Act, the applicant must have a direct and substantial interest in the order sought. In that matter the court found that there were insufficient considerations appearing on the papers before it or facts indicating what interest the applicant had in the setting aside the appointment of the municipal manager. The lack of interest was exacerbated by the fact that the application was brought after a period of one year had gone by between the appointment and the challenge. The application was thus dismissed.

[13] In my view the matter under consideration is distinguishable from the *Muldersdrift* matter in a number of respects. Firstly, whereas in the *Muldersdrift* matter the cause complained of was the procedural defect, in this matter the cause complained is the violation of the clear substantive provision of the constitutive statute of first respondent. Secondly, whereas in the *Muldersdrift* matter it was found that the applicant had unduly delayed by one year in bringing the application, in this matter, as will appear below in this judgment, I have taken the view that the applicant had not unreasonably delayed in

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bringing this application. Thirdly, in the *Muldersdrift* matter it was found that the applicant did not make out a case that he had sufficient interest in the matter, whereas I have also in the preceding paragraph 11 found that the applicant has shown that he has interest in the appointment of the acting chief executive officer of the first respondent. The second respondent's point *in limine* on *locus standi* thus fails.

Court lacks jurisdiction?

[14] This question has been raised on behalf of the second respondent and that is whether this court has jurisdiction to hear the matter. It is submitted that "*if the applicant's basis for the necessary interest is an employment then this court is not the appropriate forum.*" The submission continues to say that the only interest the applicant would have in the matter would be an employment interest, in the context that he should have been appointed as acting chief executive officer or that he be considered for the position of the substantive chief executive officer. It is then submitted that in that event the appropriate forum for employment matter would be the office of the Labour Commissioner. Accordingly, so the submission concludes, this court has no jurisdiction.

[15] It is to be noted that the argument started off with the word "If". As to why this is the case, I do not understand. The applicant's case has been pleaded and is on paper. Why make a supposition? As it appears from the applicants papers, that is not the applicant's

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case. The applicant's case is not based on employment. It is not the applicant's case that he should have been appointed as an acting chief executive officer. Counsel for the second respondent correctly notes that the applicant's interest or *locus standi* in the matter is intertwined with the question whether this court has jurisdiction to hear the matter. I have already found that the applicant has interest in the matter. The issue for determination in this matter is not the employment of the applicant as chief executive officer or appointment as acting chief executive officer, but the validity or otherwise of the appointment of the third respondent by the first respondent as acting chief executive officer. This clearly is not an employment issue but an ordinary case where a declaratory order is sought. This court has the power vested in it by law to adjudicate and determine whether such declaratory order should be granted or not. This court therefore has the necessary jurisdiction to hear this matter. The point is accordingly dismissed.

Third point *in limine*: delay in bringing the application

[16] The first respondent's next point *in limine* is that the applicant unreasonably delayed in bringing this application. In this respect it is argued that the applicant waited for about 4 months before he launched the application; that the applicant should have brought an application for condonation, and failing to do so is fatal to his application. It is

further pointed out that during the intervening period, the third respondent has been taking decisions which might have bound the first respondent; affected the first respondent and also affected third parties. In countering, this the applicant points out that the initial appointment of the third respondent was only valid for 2 months; that the new cause of action arose when the third respondent was appointed on 1 November 2015 for an indefinite period until a substantive chief executive officer would be appointed. It is then argued that less than 3 months passed from 1 November 2015 to 26 January 2016 when the application was launched, and that that period did not constitute an unreasonable delay in the circumstances.

[17] One of the factors taken into account by the court in considering the effect of unreasonable delay is prejudice caused by such delay in that steps might have been taken by the institution whose decision is being challenged or by members of the public, based on the decision being challenged after a long delay. It is argued on behalf of the first respondent that the third respondent has been taking decisions which might affect third parties. It would appear that the argument is misplaced if regard is had to the fact that the applicant is not seeking for the review and setting aside of such decisions; the decisions shall stand and be valid. In the current matter all that the applicant is asking is that the decision taken to appoint the third respondent as acting chief executive officer of NHE be declared invalid, without a further relief that the decision be set aside. It is my considered view that there would be no prejudice to anyone at all if the decision to

appoint the third respondent as acting chief executive officer is declared invalid, as the declaratory order would not have consequential effects of the kind mentioned above. Taking into account the court recess period between 15 December and 15 January, I am prepared to exercise my discretion in favour of the applicant and to accept that the period of about two months' delay in instituting the application, in the circumstance of this matter, was not unreasonable so as to non-suit the applicant. The first respondent's second point of delay must thus fail.

The validity of the appointment of the third respondent as the acting Chief Executive Officer of the first respondent.

[18] The applicant is seeking a declaratory order that the appointment of the third respondent as an acting chief executive officer is in violation of Section 10 (4) of the Act and therefore invalid and of no force or effect. Section 10 (4) reads as follows:

> *"(4) If the chief executive officer is absent or unable to perform his or her functions or if the post of chief executive officer is vacant, the board shall designate any suitable staff member of the NHE to act, during such absence or incapacity or until a chief executive officer is appointed, as chief executive officer and to perform such functions of the chief executive officer as the board may determine.*" (my underlining for emphasis)

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[19] The deponent to the first respondent's affidavit admits that the section makes provision for the appointment of any suitable staff member of NHE; he however denies that the provision is mandatory and asserts that it is simply directory. He went on to argue in the alternative, that even if the applicant's interpretation that the provision is mandatory is correct, the mere non-compliance with the provision of the section will not be visited with an illegality or invalidity.

[20] As if Baxter envisioned the respondent's argument, he aptly put it this way:

> "*But public authority cannot flout 'directory' requirements, any more than it can flout 'mandatory' requirements without running a risk of attracting some or other sanction such as interdict mandamus or interdictory order*"[3]

In my view, that statement puts to bed part of the first respondent's contention.

[21] I now proceed to consider the provisions of Section 10 (4). The section has a history: it was amended during the year 2000 by Section 7 (c) of the National Housing Enterprises Amendment Act, No 32 of 2000. The original version of Section 10 (4) read as follows:

[3]Baxter: *Administrative Law*, 3rd edition p 451

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> *"If the chief executive officer is absent or unable to perform his or her functions or if the post of chief executive is vacant, the board shall designate* <u>*any director or employee*</u> *of the NHE to act, during such absence or incapacity or until a chief executive officer is appointed, as chief executive officer and to perform such functions as the chief executive officer as the board may determine*". (my underlining for emphasis)

[22] It is clear from the two versions that there was a deliberate and intentional intervention by the legislature when the phrase "*any director or employee*" in the original version was replaced with the phrase *"any suitable staff member*". The change in wording clearly demonstrates the legislature's deliberate change in intention, namely to do away with the situation whereby a director is appointed as an acting chief executive officer in the absence of the substantive chief executive officer. Simple words have been used by the legislature which do not require any interpretation as suggested by the first respondent. Furthermore, the use of the word *"shall*" has always been understood and interpreted by the courts to denote a mandatory and not a merely directory effect as suggested by the first respondent.[4] It follows therefore in my view that the argument on behalf of the first respondent that the wording of Section 10 (4) is not mandatory but merely directory cannot stand and is rejected. It is also clear that prior to the amendment, any director or employee could be appointed as an acting chief executive

[4]Messenger of the Magistrate's Court, Durban v Pillay. 1952 SA (3) 678 at 683 D.

officer. After the amendment however, a director cannot be appointed. Furthermore, not simply any staff member can be appointed, but only a suitable staff member can be so appointed.

[23] The clear and unambiguous intention of the legislature as reflected in the change of wording of Section 10 (4) is that a director of NHE is disqualified and shall not be not appointed as an acting chief executive officer of NHE. It is not in dispute that the third respondent is not a staff member of the first respondent. It is further not in dispute that the third respondent is a member of the board of directors of the first respondent. Finally it is not in dispute that the third respondent has been appointed to the position of acting chief executive officer of the first respondent. The only justification proffered by the first respondent for the appointment of the third respondent is that of the alleged circumstance prevailing at the time of his appointment, namely the board was not satisfied that any of the staff members was suitable to act as a chief executive officer. The alleged ‘prevailing circumstances’ have not been specified or spelled out. In any event the legislature made a determination as to who shall be appointed as acting chief executive officer. It is not competent or permissible for the board to make its own determination contrary to the legislature’s clear and unequivocal determination. An appointment made contrary to the clear provisions of the Act is invalid. It follows therefore as a matter of law that the appointment of the third respondent by the board of

the first respondent as acting chief officer is a blatant violation of the provisions of Section 10(4) of the Act.

[24] I proceed to deal with the first respondent's argument that the non-compliance with the provisions of Section 10(4) cannot be visited with illegality and invalidity because the board could not find a suitable employee to act as an acting chief executive officer. I must say upfront that there is no merit in this argument as will become apparent shortly.

[25] Counsel for the applicant in support of this proposition cited the recent judgment by Masuku J in the matter of *Kondjeni Nkandi Architects v The Namibian Airports Company Ltd*[5] where the court, based on the maxim *ex turpi causa non oritur actio,* (from a dishonourable cause no cause of action arises), refused to enforce a claim based on an agreement which was concluded in contravention of the provisions of the Architects and Quantity Surveyors Act 1979. In my view that maxim is more applicable in the realm of the law of contracts as opposed to violation of statutes. In the course of the judgment, the court cited a passage from the judgment in the matter of *Pottie v Kotye* [6] which I found to be on point in this matter, where the court expressed itself as follows:

[5](I 3622-2014) [2015} (NAHCMD 223 (11September 2015)
[6]1954 (3) SA 719 (A) 727

> "*The usual reason for holding a prohibited act to be invalid [is] the fact that recognition of the act by the court will bring about or give recognition to, the very situation which the legislature wishes to prevent*".

[26] It is trite law that a creature of the statute has no power other than those powers vested in it by the empowering statute and the repository of public powers can exercise no power and perform no functions beyond that conferred upon it by law[7]. It is further trite law that an administrative act that has not been authorised by the law is invalid.[8]

[27] The first applicant has no power to appoint a director to act as acting chief executive officer under any conceivable circumstance. The justification the first respondent sought to rely on cannot stand in the face of the clear provisions of Section 10(4). The appointment is contrary to the clear provisions of the Act and is therefore invalid.

Order sought is academic and of no practical effect or is inappropriate

[28] After this matter was argued and judgment reserved, it appeared in the public domain through the print media that the first respondent has in the meantime proceeded to appoint a substantive chief executive officer. I directed a query to the legal

[7]Dowles Manor Properties Ltd v Bank of Namibia 2005 NR 59
[8]Baxter *Administrative Law*, 3rd edition p355

practitioners for the parties involved whether the court can take judicial notice of those developments. Regrettably, I did not receive a response from any of the legal practitioners for the parties. It then happened that the appointment of the new substantive chief executive officer was challenged by one of the senior managers of NHE. The matter came before this court and was heard by Van Wyk, AJ. I have had the benefit of perusing the judgement by Van Wyk AJ in that matter. The application was dismissed. The hearing of that application by this court, challenging the appointment of the substantive CEO by the first respondent, removed the doubt this court was entertaining regarding whether it could take judicial notice of that appointment. The application was before this court; it became a fact within the knowledge of this court and therefore as a result, the issue of whether the court may or may not take judicial notice became moot or unnecessary.

[29] Before I proceed to consider the remaining issue I feel obliged to make an observation about the conduct of the first respondent. I must confess that I was surprised that the first respondent proceeded with the appointment of the chief executive officer while this judgment was awaited from this court. Before the board proceeded with the appointment, one would have expected, even as a matter of courtesy, for the board either to wait for the delivery of the judgment, (after all the board through its legal practitioner knew the date to which the judgment was reserved); alternatively for the board to first settle the matter with the applicant which would have

resulted in the issue being moot or to have withdrawn its opposition to the order sought by the applicant. The first respondent's conduct was the core issue for adjudication before this court. For the first respondent to simply forge ahead with the appointment while a judgment was awaited about its conduct, in my view, leaves a bad image for the respect of the court and the rule of law by the first respondent, which is a public institution. In my view it conveys a sense of disdain and disrespect for the court an attitude not to be expected from such institution who ideally should act on proper advice.

[30] Having, so to say, got that off my chest, I now proceed to consider the issue of whether the order sought is academic and of no practical effect or is inappropriate as suggested by the respondents. The dismissal of that application by Van Wyk AJ to a certain extent served as confirmation for the finality of the appointment of the substantive chief executive officer. Its unintended consequence is that it added another dimension or extra weight to this question.

[31] It is argued on behalf of the first respondent that the order sought is academic and of no practical effect; that the applicant will not benefit anything practically from the order; and that for all intents and purposes it makes the court's functions advisory. Along the same line it is submitted on behalf of the second respondent that the mere fact that the applicant disagrees with the interpretation placed by the respondents on the

provisions of Section 10 (4), the court should not exercise its discretion to advise the parties as to which party's interpretation is correct in law. The respondents' combined argument is that a declaratory order alone without simultaneous prayer for an order reviewing and setting aside the appointment of the third respondent would not be sufficient or appropriate.

[32] In countering the respondents' contentions, counsel for the applicant correctly points out that this court has the power in terms of Section 16 (d) of the High Court Act[9] to entertain matters where a declaratory order is sought. I have already earlier in this judgment quoted the relevant part of Section 16 (d) of the Act.

[33] In the matter of *Vaatz v The Council of the Municipality of Windhoek* [10] the court said the following:

> "*In our law an applicant seeking to challenge an act of an administrative body or administrative official may bring a proper application before the Court for adjudication. I use the word 'proper' advisedly. Such applicant may 'seek a declaratory order instead of reviewing the (already completed) act following the procedure set out in rule 53 of the Rules of Court' and this approach appears 'to be the preferred option in the context of local government' (JR de Ville, Judicial*

[9]Act 16 of 1990
[10](A287/2010) [2011] NAHC 178 (22June 2011)

> *Review of Administrative Action in South Africa (2003): pp. 338-339 and the cases there cited; L Baxter, Administrative Law (1984): pp 698-704 and the cases there cited****)"***

[34] It is now a well-established principle that the granting of a declaratory order is within the discretion of the court. First the court must be satisfied that the person seeking for a declaratory order is a person interested in an existing, future or contingent right or obligation; and secondly the court must consider it appropriate to grant the declaratory order in the circumstance of that particular case. Furthermore the relief sought must not be abstract, or academic or of hypothetical interest only and it must afford the litigant tangible advantage. Where an order does no more than restate general principle of law and does not determine existing future or contingent right, it is not appropriate for a court to grant a declaratory relief. Such a declaratory order would be an "exercise in futility".[11]

[35] With regard to the first question namely whether the applicant is an interested person in an existing, future or contingent right or obligation, I have already found early is this judgment that the applicant, as a senior manager of the first applicant, has an interest, obligation and indeed a civic duty to ensure that the first respondent acts lawfully and in compliance with the provisions of its constitutive Act. After all, the

[11]Southern Engineering v Council for the Municipality of Windhoek 2011 (2) NR 385 SC; See also; Prosecutor-General of the Republic of Namibia v Gomes & Others 2015 (4) NR 1035 SC; New African Methodist Episcopal Church in the Republic of Namibia Cooper 2015 (3) 705 HC.

applicant had previously on more than one occasion been entrusted by the board to occupy the highest position of the first respondent as an acting chief executive officer. Based on such previous appointments, I think it is fair to say that the applicant has a contingent right to being re-appointed again in future as acting chief executive officer.

[36] As to the second inquiry whether this is a proper case where the court should exercise its discretion to grant a declaratory order, it has been held that the fact that a case that has become moot between the parties should not constitute an absolute bar to the justiciability of an issue.[12]

[37] In my view, the issue between the parties has not become moot. All that happened is that the first respondent has appointed a substantive chief executive officer; the first respondent did not concede its position that the appointment of a director as an acting chief executive officer was not in violation of Section 10 (4). That issue remains unresolved between the parties. What is more, the first respondent was supported in his stance by the line Minister, the second respondent. It would appear to me that if the issue is left unresolved there is a real likelihood that the first respondent will in future appoint a director as an acting chief executive officer in contravention of its constitutive Act. I consider it to be in the public interest for this court to pronounce itself on the matter in order to create legal certainty. For that reason it is the considered view of this

[12]Prosecutor- General v Gomes supra (par 23)

court that the determination of that issue will not be academic but will have a practical effect for the parties and avoid this question having to serve before this court in future at the expense of tax payers. It is thus necessary to put this matter to bed once and for all. I am therefore of the considered opinion that the court, in the exercise of its discretion, should grant the declaratory order sought by the applicant.

[38] There remains the issue of costs. As it appears from the facts in this judgment, the applicant brought the application in his personal capacity, asserting his right as a senior employee of a public institution. He expended his personal resources to see to it that the first respondent complies with the provisions of its constitutive statute. The applicant has succeeded in that lonely but noble crusade. I cannot see any reason why he should not be indemnified for his expenses.

[39] In the result I make the following order:

1. The designation and appointment of the third respondent as acting chief executive officer of the first respondent is in violation of Section 10(4) of the National Housing Enterprises Act, Act No 5 of 1994 (as amended), and therefore *ultra vires*, invalid and of no force or effect.

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2. The respondents are ordered to pay the applicant’s costs, jointly and severally, the one paying the other to be absolved.

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Angula, DJP

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APPEARANCE:

APPLICANT	**Mr Tjombe** Instructed by Tjombe-Elago Inc.
RESPONDENTS	**Mr Namandje** Instructed by Sisa Namandje & Co. Inc.