REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-APP-ATL-2018/00003

In the matter between:

AUAS VALLEY RESIDENTS ASSOCIATION	**FIRST APPELLANT**
HARMONY MOUNTAIN VILLAGE (PTY) LTD	**SECOND APPELLANT**
RESIDENTS OF TRANQUILITY (PTY) LTD	**THIRD APPELLANT**

and

MINISTER OF ENVIRONMENT & TOURISM	**FIRST RESPONDENT**
SQUARE FOOT DEVELOPERS	**SECOND RESPONDENT**
ZIVELI (PTY) LTD	**THIRD RESPONDENT**
THEOFILUS NGHITILA N.O.	**FOURTH RESPONDENT**

Neutral citation: *Auas Valley Residents Association v Minister of Environment & Tourism* (HC-MD-CIV-APP-ATL-2018/00003) [2018] NAHCMD 267 (4 September 2018)

Coram: PARKER AJ
Heard: **13 August 2018**
Delivered: **4 September 2018**

Flynote: Statute – Rule of court, rule 119(1) – Interpretation of – Rule providing time limit within which notice of appeal in terms of Act 7 of 2007 be delivered – Notice of appeal against decision of Minister made in terms of that Act – Court held

that the critical date from which one ought to calculate the rule 119(1) time limit is the date on which a party received or could reasonably have received the decision and not the date on which the decision in question was made.

Summary: Statute – Rule of court, rule 119(1) – Interpretation of – Rule providing time limit within which notice of appeal in terms of Act 7 of 2007 be delivered – Notice of appeal against decision of Minister made in terms of that Act – Second and third respondents contending *in limine* that the time limit runs from the date the decision was made – Minister made his decision on 31 October 2017 but admits he sent to a wrong address the communication of the decision meant for appellants – Appellants asserting that they received the decision on 12 February 2018 – Court finding that no relevant and convincing challenge was put up against appellants' assertion – Consequently, on the facts and the probabilities, court accepting appellants' assertion that they received the decision on 12 February 2018 as they averred – Accordingly, court finding that appellants delivered their notice of appeal within the time limit – Consequently, court rejecting second and third respondents' point *in limine* on the issue.

Flynote: Appeal – In terms of Act 7 of 2007 against Minister's decision – Appellants averring Minister denied appellants *audi* when he took the decision – Appellants contending that they had legitimate expectation that Minister would give them fair opportunity to present oral evidence through themselves and/or their witnesses in an oral hearing on top of their written submission – Respondents contending contrariwise that Act 7 of 2007 does not provide for oral hearing – Court finding that Form 3, which was promulgated under s 50 of Act 7 of 2007 forms part of the appeal procedure – Court finding further that the Act makes representation through the vehicle of Form 3 that parties who wish to appeal to the Minister shall be given fair opportunity to present, by themselves or witnesses, in an oral hearing oral evidence before he decided – Court concluded that it becomes crystal clear and incontrovertible that legitimate expectation arose in the present case, because there was a statutory 'representation' made by Form 3 – Court held that the absence of a hearing in a case where it should have been given must be fatal – Consequently, the validity of the Minister's decision was vitiated and so could not be allowed to stand.

Summary: Appeal – In terms of Act 7 of 2007 against Minister's decision – Appellants averring Minister denied appellants *audi* when he took the decision – Appellants contending that they had legitimate expectation that Minister would give them fair opportunity to present oral evidence through themselves and/or their witnesses on top of their written submission – Respondent contending contrariwise that Act 7 of 2007 does not provide for presentation of oral evidence and that the appellants written submission was all that the Minister required in order to decide – Court found that the Act makes representation through the vehicle of Form 3 that parties who wish to appeal to the Minister shall be given fair opportunity to present, by themselves or witnesses, oral evidence before he decided – Court concluded that legitimate expectation arose in the present case, because there was a statutory 'representation' made by Form 3 – Minister having denied appellants *audi* the validity of the decision was vitiated and so could not be allowed to stand – Consequently, this appeal succeeds and the decision of the Minister is set aside and the matter is remitted to the Minister for him to reconsider within a reasonable time appellants' appeal in terms of s 50 of Act 7 of 2007 in accordance with the law.

ORDER

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1. The appeal succeeds, and the decision of the Minister made on 31 October 2017 is set aside.

2. The matter is remitted to the Minister (first respondent) for him or her to reconsider within a reasonable time appellants' appeal in terms of s 50 of Act 7 of 2007 in accordance with the law.

3. Second and third respondents, jointly and severally, and first respondent are to pay appellants' costs in respect of the appeal; such costs include costs of one instructing counsel and two instructed counsel; except that first respondent shall pay only 60 per cent of such costs having not been part of point *in limine* (a) and point *in limine* (b).

4. Second and third respondents, jointly and severally, are to pay appellants' and first respondent's wasted costs for 13 July 2018; such costs in favour of appellants include costs of one instructing counsel and two instructed counsel, and in favour of first respondent include costs of one counsel.

JUDGMENT

PARKER AJ:

Introduction

[1] This is an appeal by the appellants in terms of rule 119 of the rules of court against the decision of the Minister of Environment and Tourism ('the Minister') (first respondent) upholding the decision of the Environmental Commissioner (fourth respondent).

[2] Second and third respondents have raised two preliminary points, namely, (a) that there is no appeal properly before the court, and (b) non-joinder of the Windhoek Municipal Council. I now proceed to consider them in turn.

When did appellants receive the Minister's decision?

[3] For reasons which will become apparent in due course and in order to put the present appeal in its proper context, I note the following. The parties in the appeal are Auas Valley Residents Association (first appellant), Harmony Mountain Village (Pty) Ltd (second appellant), and Residents of Tranquillity (Pty) Ltd (third appellant) versus Minister of Environment and Tourism (first respondent), Square Foot Developers (second respondent), Ziveli (Pty) Ltd (third respondent), and Theofilus Nghitila N.O (fourth respondent). After appellants had noted the appeal, the second appellant Harmony Mountain Village (Pty) Ltd, as applicant, instituted interim interdictory proceedings against eleven respondents. Some respondents are parties in the present appeal, namely, Square Food Developers (second respondent in the appeal), the Minister (first respondent in the appeal), Ziveli (Pty) Ltd (third

respondent in the appeal), and the Environmental Commissioner (fourth respondent in the appeal). In the interlocutory proceedings, the applicant Harmony Mountain Village (Pty) Ltd sought an order to interdicting and restraining Square Foot Developers from proceeding with its development on Portion 8 (a portion of Portion 4) of Farm Aris, No. 29 (also known as Ziveli Lifestyle Village), pending the final determination of the applicant's appeal to the High Court (and/or any subsequent appeal) against the Minister's decision.

[4] I have set out the foregoing background facts and circumstances in order to note the following conclusions:

(a) This court is entitled to pore over all the papers relevant to the appeal, including the papers filed of record in the interlocutory proceedings.

(b) This court is entitled to consider any relevant facts that arise on the papers filed of record, including the papers filed of record in the interlocutory proceedings.

(c) A fact does not become relevant in an interlocutory matter and irrelevant in the main matter.

[5] The three foregoing conclusions in para (3)(a), (b) and (c) and the factual findings in para 6 below are crucial in assisting the court in determining the question as to when appellants received or could reasonably have received the Minister's decision.

[6] On the papers, I make the following factual findings that are relevant in determining whether appellants noted the present appeal within the prescribed time limit, as appellants contend, or out of time limit, as second and third respondents contend:

(a) The Minister took the decision upholding the decision of the Environmental Commissioner (fourth respondent) on 31 October 2017 ('the Minister's decision').

(b) The Minister's decision was not communicated to appellants immediately: the decision 'was delivered to the wrong address'. The Minister apologized sincerely for not communicating his decision to appellants' correct address.

(c) As at 24 January 2018 appellants had no knowledge of the Minister's decision.

[7] The appellants aver that they received the Minister's decision on 12 February 2018. The appellants gave notice to that effect to all the respondents on 12 March 2018 in their notice of appeal. It follows that all the respondents had notice of appellants' assertion on 12 March 2018. The first and fourth respondents ('the GRN respondents') got the notice and did not do anything to challenge or contradict appellants' assertion, apparently because they accepted appellants' assertion. Indeed, at the hearing of this appeal, Mr Chibwana (assisted by Mr Kadhila), counsel for the GRN respondents, appeared to concede the point that appellants received the Minister's decision on 12 February 2018. That leaves second and third respondents.

[8] The challenge, which Square Foot Developers (second respondent) mounted against appellants' assertion that they received the Minister's decision on 12 February 2018, is expressed in these tepid paragraphs in Square Foot Developers' papers in the interlocutory matter:

'107. The Applicant is well aware, and particularly from the public consultation that the developer had with interested and affected person including the Applicant, that the construction activities on the development were halted until the decision of the Minister in respect of the appeal against the decision of the Environmental Commissioner.

108. It is unreasonable in the circumstance that the Applicant has admitted knowledge of the resumption of construction activities to deny constructive notice of the decision of the Minister in respect of the appeal against the decision of the Environmental Commissioner.

109. I therefore deny the Applicant became aware of the decision of the Minister in respect of the appeal against the decision of the Environmental Commissioner only on 12 February 2018.'

[9] With respect, I do not see anything convincing to write home about that is capable of dislodging appellants' firm assertion that they received the Minister's decision on 12 February 2018. The second respondent says this. Appellants (or at least second appellant) were aware that construction activities were halted until the decision of the Minister in respect of the appeal against the decision of the Environmental Commissioner (fourth respondent). Appellants (or at least second appellant) admitted knowledge of the resumption of construction activities. Ergo, appellants cannot say they received the decision on 12 February 2018.

[10] Such argument smacks of what in Logic is called the fallacy of the undivided middle (see *Stuart v Diplock* 43 Ch. D. 343 at 352). With the greatest deference to second respondent, such fallacious deductive reasoning cannot assist second and third respondents. The fact that appellants were aware of 'resumption of construction activities', cannot without more, on any pan of scale – logic or reasonableness – lead inevitably to the conclusion that appellants received or could reasonably have received the Minister's decision at or about the time that construction activities resumed. Besides – and this is significant – the respondents, without justification, conflates the date of the making of the Minister's decision and the date on which the Minister's decision is received by an interested party. The two activities are polar apart and are unconflatable. As I demonstrate in paras 15-18 below, on a proper construction of the time limit provisions in rule 119(1), the time limit begins to run on the date on which a party received or could reasonably have received the Minister's decision. Second respondent's illogical and unreasonable argument cannot take the second and third respondents' case any further than where it is, namely, that they have not put up any relevant and convincing challenge to appellant's assertion that they received the Minister's decision on 12 February 2012. In the result, on the facts and in the circumstances, I hold that it is more probable than not that appellants received the Ministers decision on 12 February 2012, as they aver.

[11] Mr Kauta submits:

‘46. The Appeal in terms of section 51 of the Act was lodged on 12 March 2018 against the decision of the Minister that was taken on the 31 October 2017 in violation of Rule 119(1) of the High Court Rules which provides that such notice “be delivered within 20 days after the date of such decision”.

47. We submit that this is a classic case of late prosecuting of appeal, and there is no appeal properly before the court to adjudicate upon. Consequently, the appeal must be struck from the roll with costs.’

[12] Thus, for second and third respondents, the critical date from which one ought to calculate the rule 119(1) time limit is the date on which the decision in question was made, and not the date on which a party received or could reasonably have received the decision in question. But they are palpably wrong, as I have demonstrated.

[13] Based on these reasons, I conclude that on the probabilities it is satisfactory and safe to conclude that appellants received the Minister’s decision on 12 February 2018. Following upon that, appellants filed the notice of appeal on 12 March 2018. Therefore, the next question to consider is whether there is an appeal properly before the court.

Is there an appeal properly before the court?

[14] Keeping these findings and conclusion in my mind’s eye, I proceed to the next level of the enquiry. It is to consider second and third respondents’ related challenge that there is no appeal properly before the court for the court to adjudicate on, because, they aver, as previously mentioned, that appellants noted the appeal outside the statutory time limit. The starting point of this enquiry should perforce be the interpretation and application of rule 119(1) of the rules of court. Rule 119 provides:

‘(1) Notice of an appeal to the court from the decision of a statutory body must, unless otherwise provided in an applicable law, be delivered within 20 days after the day of such decision, but where the reasons for the decision of the body are given on a later date the notice may be delivered within 20 days of that later date.’

[15] In interpreting the material provisions of rule 119(1) of the rules, we should go to the basics, in virtue of the construction that Mr Kauta seeks to put on those provisions. It is trite that -

'… words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it will be permissible for a court of law to depart from such a literal construction, for example where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. …'

[*Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2009 (2) NR 793 (HC), para 7]

[16] The words prescribing the time limit in rule 119(1) cannot be given 'their ordinary, literal or grammatical meaning' because it is 'apparent that such a literal construction' will lead to a manifest absurdity and hardship and a result contrary to the rule maker's intent. (See *Rally for Democracy and Progress and Others*, loc. cit.) If the time limit for delivering a notice of appeal were to run from simply the date of the decision, it would undoubtedly lead to an obvious absurdity and occasion immeasurable hardship, which the rule maker could not have intended. Indeed, any such interpretation of rule 119(1) can be *reductio ad absurdum* in this way. Take this illustration, for example: Minister or public authority **X** takes a decision on 1 June 2018. **X** does not want his decision to be appealed from in terms of rule 119 of the rules of court; and so, **X** keeps his decision to himself, that is, without communicating the decision to interested parties **Y** and **Z**, until the 20 days' time limit has elapsed. Equally minded Ministers and other public authorities follow this seemingly attractive practice.

[17] If the interpretation Mr Kauta seeks to place on rule 119(1) was accepted, I dare say, no or only a handful of decisions of administrative bodies or officials can be appealed from, even if the applicable Act provides for such internal appeal remedy. I do not think it was the intention of the rule maker that the time limit within which a party must deliver a notice of appeal should run simply from the date the decision was made, irrespective of the date on which the concerned party received or could

reasonably have received the decision. With respect, I should say, any contrary view will be clearly fallacious, as is contrary to the intent of the rule maker. Indeed, accepting such wrong interpretation of rule 119(1) will be setting a very dangerous precedent, considering the illustrative scenario that I have sketched in para 16 above and the conclusion I have reached there.

[18] In my judgment, appellants noted the appeal in compliance with the time limit that rule 119(1) prescribes. Having so concluded, I hold that there has not been late delivery of the notice of appeal, requiring condonation. This holding vindicates appellants' filing of a conditional application for condonation. As counsel for appellants, Mr Heathcote SC (assisted by Mr Dicks), said, the condonation application was conditional upon the court finding that there has been a late delivery of the notice of appeal. Since the court has held otherwise, as I say, there is no need for a condonation application. Consequently, it is with firm confidence that I respectfully reject Mr Kauta's submission. It has, with the greatest deference to Mr Kauta, not a title of merit. I hold that the twenty-day time limit prescribed by rule 119(1) of the rules of court runs from the date on which the interested party received or could have reasonably received the decision in question, and not the date on which the decision was made. This conclusion is sentient and logical no doubt.

[19] It follows that the appeal is properly before the court for the court to adjudicate on, as I do. Accordingly, I reject point *in limine* (a) as having no merit. I now proceed to consider point *in limine* (b).

Non-joinder of the Municipal Council of Windhoek ('the Council'):

[20] Mr Kauta submits that the Council 'is a necessary party in the current proceedings'. I do not agree. Appellants appeal from an act of the Minister, i.e the Minister's decision in terms of Act 7 of 2007. Appellants are not appealing from an act of the Council in terms of Act 7 of 2007; *a fortiori*, the order this court makes as the outcome of the instant appeal cannot be *brutum fulmen* as respects the Council. (See *Namibia Farm Workers Union (NAFWU) v Angula* (A 290/2015) [2016] NAHCMD 252 (8 September 2016).) With respect, point *in limine* (b) is singularly

lacking of substance and merit. Accordingly, it is, rejected. If the truth be told, this preliminary point borders on the vexatious and frivolous.

[21] Having got the preliminary objections out of the way, I now proceed to consider the appeal on the merits.

The grounds of appeal

[22] Appellants noted a number of grounds of appeal on which they rely. For obvious reasons, I shall deal first with ground 2.2, which Mr Kauta described aptly as the 'crux' of the matter, because the upholding of the ground will be dispositive of the appeal. I add that Mr Chibwana also addressed the court on the merits. After all, the appeal concerns, as I have said more than once, the Minister's decision.

[23] The bone and marrow of this ground revolves essentially around a charge of non-compliance by the Minister with the *audi alteram partem* rule ('*audi*') or hearing, before the Minister took the Minister's decision. Mr Heathcote relies on the developed offshoot of the *audi alteram partem* rule, that is, the doctrine of legitimate expectation. All counsel agree that the *audi alteram partem* rule is flexible. In my view, when courts say the rule is flexible, what they mean is that courts cannot prescribe a restrictive way a decision maker should follow in order to comply with *audi*. The requirements of *audi* must depend on the facts and circumstances of the case at hand; and it does not always entail an oral hearing.

[24] The Supreme Court, per the high authority of Strydom CJ, tells us that -

'In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act (Baxter). Consequently the Board need not, in each instance, give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.'

[*Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 174H]

[25] The fact that the Minister, as Mr Chibwana submitted so eloquently, had high-level consultations with scientific minds on such highly scientific matter and also had various public consultations cannot whittle away appellants' common law and constitutional right to *audi*. It is not the case of appellants that the Minister did no such thing. They have come to court to vindicate their right to *audi*. With respect, it is not good enough to say that because the Minister exercised discretion he could decide in what way he would comply with *audi*. The Minister could do so in 'the absence of any prescription of the Act' (see *Frank and Another* (SC) loc. cit.)). For a hearing to comply with the natural justice rule of *audi*, there must truly be a hearing. The nature of the hearing will depend on the facts and circumstances of the particular case; and above all, the procedure must be fair and it must not defeat the purpose of the Act in question. (*Frank and Another* (SC))

[26] Appellants aver that there was truly no hearing because they were not given the opportunity to present oral evidence before the Minister before he took his decision on their appeal; yet, according to them, they had legitimate expectation that they would be given such opportunity. It is not in dispute that the Minister did not give them that opportunity.

[27] The concept of legitimate expectation gives the basis for challenging the validity of a decision of a public authority on the ground of the public authority's failure to observe the rule of natural justice. (*Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A)). The first and fourth respondents and second and third respondents deny that appellants have a right to be given opportunity to present evidence orally to the Minister. They reject appellants' reliance on the concept of legitimate expectation.

[28] Act 7 of 2007 provides for hearing by way of written submission. Nevertheless – and this is important – the Act does not close the door to oral hearing, as Mr Kauta and Mr Chibwana appear to suggest. On the contrary, the Act envisages the application of oral hearing in addition to any written submission; otherwise, for what purpose would the Act require, in peremptory terms, the following from interested parties who wish to appeal from the Commissioner's (fourth respondent's) decision, namely, that they must duly complete and submit Form 3 to the Minister. One should

not lose sight of the fact that Form 3 is not simply a piece of some optional administrative paper. Form 3 is statutory and peremptory; and what is more, Form 3 partakes of the procedure that the Legislature has determined shall govern appeals to the Minister in terms of s 50 of the Act. Form 3 places a peremptory burden on those who desire to appeal to the Minister. The irrefutable fact is, therefore, this: Form 3 is a crucial aspect of the procedure governing appeals to the Minister. Form 3 is part of the 'prescribed form and manner' contemplated in s 50(2) of Act 7 of 2007. Doubtless, one cannot just take Form 3 as an insignificant aspect of the implementation of the Act, as Mr Chibwana does in his nonchalant dismissal of the cruciality of Form 3, which by all account is a statutory requirement, as I have said more than once. And with the greatest deference to Mr Kauta, Mr Kauta misses the point. Counsel says:

'Form 3 is not cast is (in) stone and may be modified even by the Appellant. It does not take away from the powers of the Minister but give(s) expression to it. From 3 cannot therefore be interpreted to restrict the powers of the Minister.'

[29] I should say this. An appellant could not modify a requirement in the directions prescribed by Form 3. 'This form must be completed fully in writing in accordance with the directions specified in the form', the Act demands peremptorily; except that the appellant must respond to the requirements in the directions in a form substantially corresponding to Form 3. Thus, it is the Form that an appellant may modify, not the requirements in the directions, which, as I have said previously, the Act, through the vehicle of the Form, demands in peremptory terms. In that regard, it is important to note that such allowance is not uncommon to our statute law. See, e.g., rule 21 of the Labour Court Rules (GN 279 of 2008):

'**Forms**

Any reference in these rules to a numbered form is a reference to the corresponding form set out in Annex 2, provided that *a substantially similar form may be used*.' (Italicised for emphasis)

[30] Thus, the requirements in the directions that an appellant must satisfy when completing those Forms under the Labour Court rules remain peremptory despite the

allowance, just as the requirements in the directions that an appellant must satisfy when completing Form 3 remain peremptory, despite the allowance. Lest we forget, it is not the case of appellants that the Form 3 has taken away the discretion of the Minister; neither is it their case that Form 3 has restricted exercise of discretion by the Minister. Their case is that the Legislature has represented to the world that the Minister expects appellants who appeal to the Minister in terms of Act 7 2007 to present oral evidence to him and that he will give an opportunity to appellants to present such oral evidence. One cannot seriously interpret Form 3 reasonably and fairly in any other way. In sum, in the instant case, there is the presence of 'prescription of the Act' as to the form of *audi* that must be complied with. That is the kind of 'prescription by the Act" that Strydom CJ is referring to in *Frank and Another* loc. cit.

[31] The requirements in the directions in the selected items in Form 3 that I have set out below are significant and instructive. They vindicate the correctness of the foregoing observations I have made with regard to the essence and cruciality of Form 3 in appeals to the Minister in terms of Act 7 of 2007, namely that Form 3 constitutes a 'prescription' of the requirement of oral hearing before the Minister took a decision in an appeal in terms of s 50 of Act 7 of 2007. The requirements in the directions in the selected items in Form 3 point irrefragably to this reasonable and inevitable conclusion, namely, that the requirement of *audi* that Act 7 of 2007 contemplates is not restricted to written submission. The Act makes representation through the vehicle of Form 3 that parties who wish to appeal to the Minister shall, not may, be given fair opportunity to present – by themselves or witnesses – oral evidence (See *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 (2) NR 781 (SC).) That, in my judgment, is the basis of the appellants' legitimate expectation. The aforementioned selected items and their requirements in Form 3 are as follows:

'<u>Item 5</u>

"5. The grounds of appeal are:…."

<u>Item 6</u>

"6. A detailed description of the matter to which the appeal relates is as follows…."

Item 7

"7. A description of each document or thing the appellant intends to produce at the hearing is as follows:…."

Item 8

"8. The name, address, telephone number, fax number and title of each witness the appellant intends to call on his behalf at the hearing is:…"
[Italicised for emphasis]

(*a fortiori*), Item 9

"9. The particulars of evidence to be given by the witnesses are: …."

'**Please note:**
This form *mus*t be completed *fully* in writing in accordance with the directions specified in the form and lodged with the Secretary of the Appeal Panel.'
[Italicized for emphasis]

[32] Without beating about the bush, I will say this. It is nothing short of fallacious and self-serving for anyone, who reads item 8 in Form 3 contextually with the rest of the aforementioned items in Form 3, as one should, to persist, as Mr Kauta and Mr Chibwana do, that it is not legitimate for an appellant to expect the Minister to invite him or her to call his or her witnesses to give oral evidence on his or her behalf, on top of any written submission he or she has submitted, when the Minister decided on his or her appeal.

[33] In *Petroneft International Ltd and Others*, the Supreme Court enunciated in para 44 the principle that -

'A legitimate expectation of consultation ordinarily only arises where there is an established practice of consultation, or where a promise or representation has been made that consultation will occur.'

[34] If the *Petroneft* principle is applied to the facts and circumstances of the instant case, this emerges inevitably. It becomes crystal clear and incontrovertible that legitimate expectation arose in the present case, because there was a statutory 'representation' by Form 3, which was promulgated under s 50 of Act 7 of 2007 and

which forms part of the appeal procedure, as I have established previously. That is the answer to Mr Chibwana's and Mr Kauta's untenable argument. The Minister was indubitably obliged by The Act to give appellants the opportunity to present oral evidence through themselves and their witnesses before he took his decision on their appeal because, as I have said more than once, the Act, through the vehicle of Form 3, has represented that the Minister would do so, if regard is had to the aforementioned telltale items in Form 3. This is important. 'Oral evidence' for the purposes of s 50 of Act 7 of 2007 entails simply the presentation in an oral hearing of evidence by an appellant and/or his or her witnesses as envisaged so clearly by the requirements in the directions prescribed by the items in Form 3. I should say this. With respect, no right-minded and right-thinking persons would equate the required oral hearing with the adducing of evidence in court or tribunal proceedings. The two procedures could not be the same.

[35] In sum, in my view, the facts and the circumstances of the instant case dictate that the requirement of hearing will only be satisfied if an appellants was given real opportunity to present written statements and to present oral evidence, if he or she so wished, on top of the appellants' written submission. (*Ridge v Baldwin* 1964 AC 40 (HL) at 182; and *Frank and Another*) The Minister denied the appellants that opportunity, but appellants were right in having legitimate expectation that the Minister would give them that opportunity before he took the decision.

[36] Based on these reasons, I conclude that the Minister clearly denied the appellants *audi*. The 'absence of a hearing in a case where it should have been given' stated Goldstone J, 'must be fatal to the validity of the decision made'. The validity of the Minister's decision was vitiated; and so, it cannot be allowed to stand. (*Traube and Others v Administrator, Transvaal and Others* 1989 (1) SA 397 (W) at 404f) The Minister's decision offends natural justice no doubt. It offends *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC).

[37] In virtue of these conclusions, it is otiose to consider the other grounds of appeal. These reasons and conclusions dispose of the appeal; whereupon, I order as follows:

1. The appeal succeeds, and the decision of the Minister made on 31 October 2017 is set aside.

2. The matter is remitted to the Minister (first respondent) for him or her to reconsider within a reasonable time appellants' appeal in terms of s 50 of Act 7 of 2007 in accordance with the law.

3. Second and third respondents, jointly and severally, and first respondent are to pay appellants' costs in respect of the appeal; such costs include costs of one instructing counsel and two instructed counsel; except that first respondent shall pay only 60 per cent of such costs having not been part of point *in limine* (a) and point *in limine* (b).

4. Second and third respondents, jointly and severally, are to pay appellants' and first respondent's wasted costs for 13 July 2018; such costs in favour of appellants include costs of one instructing counsel and two instructed counsel, and in favour of first respondent include costs of one counsel.

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C Parker

Acting Judge

APPEARANCES:

APPELLANTS:	R Heathcote (with him G Dicks) instructed by Engling, Stritter & Partners, Windhoek
FIRST RESPONDENT:	T Chibwana (with him F Kadhila) of Government Attorney, Windhoek
SECOND AND THIRD RESPONDENT:	S O Ogunronbi (with him P Kauta) instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek