

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2017/00423

In the matter between:

JULIUS GAWESEB

APPLICANT

and

COUNCIL OF THE MUNICIPALITY OF WINDHOEK

1st RESPONDENT

SENIOR BUILDING INSPECTOR

2nd RESPONDENT

ANDREW IMALWA IMALWA

3RD RESPONDENT

PAULINE NAUSIKU IMALWA

4TH RESPONDENT

ROLF WILHELM PAUL HANS BÜCKING

5TH RESPONDENT

ONESMUS SHIKONGO AKWENYE

6TH RESPONDENT

JÜRGEN GEORG MENGE**7TH RESPONDENT**

Neutral Citation: *Gaweseb v Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-GEN-2017/00423) [2018] NAHCMD 346 (29 October 2018)

CORAM: PRINSLOO J

Heard: 10 August 2018

Delivered: 29 October 2018

Reasons: 31 October 2018

Flynotes: Administrative law – Administrative action – Applicant aggrieved by decision of local authority to revoke building permit approved by the first respondent's office – First and second respondent of the view decision taken not reviewable on the basis that permit had lapsed when decision to revoke was made – Court to determine whether decision is an administrative action or not – Principle in *Oudekraal* revisited.

Summary: The applicant instituted an urgent application pending a review of the first and second respondent's decision to revoke a building permit approved by the first and second respondent. The third to seventh respondents however brought a counterapplication seeking an to interdict the applicant from further completing its construction activities on Erf 506, Pioneerspark, Windhoek, Namibia and to have the first and second's decision be declared null and void.

The applicant based its application on the grounds that the second respondent had no right to cancel the building plan approval as it has become *functus officio*; further that even if it had the said power to cancel the building plan approval, it had no rational and reasonable basis to make such a decision and that he did not act in accordance with the relevant law; further that the applicant was not given a reasonable and fair opportunity to make representation as to why the building plan approval should not be cancelled and lastly that the decision made by the second respondent was in consistent with the provisions of Article 18 of the Namibian Constitution.

The first to second respondent were of the view that the applicant has in law no title to the relief sought, if such relief is predicated on the letter authored by the second respondent on 25 October 2017, which purportedly revoked the approval of the applicants building plan. They were further of the view that the decision as communicated to the applicant on 25 October 2017 does not amount to a decision capable or competent of review and setting aside by this court as the said decision had no weight or force in law.

The third to seventh respondents held that although they had enduring concerns with the construction carried out on the applicant's property, they never received responses from the first respondent regarding the queries they made on the rezoning of the applicant's property. In the result, the third to seventh respondents submit that they did not know whether there was approval for the structure being built on the property and what exactly was being built.

The third to seventh respondents further submit that the building permit was approved on 29 December 2015 and in terms of Regulation 10 of the Municipality of Windhoek building regulations of 1969 as amended, any erection of a building had to be completed within twelve months and any building to be continued under construction subsequent thereto, the building permit had to be renewed. In the circumstances, the third to seventh respondents submit that in the result, the applicant does not have an approved building permit of building plans and the relief sought by the applicant is moot in that he in any event has to apply for new building plans and permit.

Held – There is no doubt that the conduct of the respondents in approving the building plans of the applicant in terms of the empowering provisions of the relevant regulations, subject to conditions, amounts to administrative action and that its decision affects the legal rights of an individual. Hereafter the second respondent unilaterally revoked the original decision. Such decision therefore is an administrative act and/or decision.

Held further – The court is of the considered view that the third to seventh respondents have not shown sufficient reason for the relaxation of the rule requiring a review to be brought within a reasonable time. The court found it hard to belief that the relevant respondents only managed to find out how the building plan was approved only in November 2017/January 2018, after the alleged unlawful construction started two years ago already.

ORDER

Main Application: (Ruling to be uploaded on E-Justice)

1. The decision by the Second Respondent on 25 October 2017 is set aside.
2. The decision by the First and/or the Second Respondent to revoke building approval under Building Permit nr. 3005/2015 is irregular and null and void and is therefore set aside with costs.
3. Costs to include cost of two legal practitioners.

Counter Application:

4. The conditional counter application by Third to Seventh Respondents dismissed with costs.
5. Cost to include the costs of two legal practitioners.

6. The matter is referred back to the First and/or Second respondents to consider and comply with the principles of natural justice and *audi alteram partem* rule.
7. The matter is removed from the roll: Judgment Delivered.

JUDGMENT

PRINSLOO J:

Introduction

The main application:

[1] As I will deal with the main and counter-application in this judgment I will for purposes of convenience refer to the parties throughout as they are they are cited in the main application. The applicant, on 23 November 2017 filed an urgent application to be heard on 15 December 2017, in terms whereof he sought an order against the first and the second respondent to be restrained from further implementing their decision of 25 October to cancel the building permit granted and issued to the applicant. The interim order was granted by this court, pending the finalisation of Part B of the Notice of Motion in which the applicant is seeking two substantive orders, i.e.:

1. Reviewing, correcting and setting aside the decision taken by the second respondent on 25 October 2017.
2. Declaring that the first respondent's decision to cancel the applicant's Building Plans approval under Building Permit no. 3005/2015, unlawful, irregular and null and void and setting aside such decision.'

[2] Consequently, after the applicant obtained the interim relief from this court on 15 December 2017, the third to seventh respondents approached this court and they were granted a stay of the interim relief pending the new respondent's application to intervene the applicant's review application against the first and second respondents.¹ Following consultation between the parties, and by agreement, the parties mutually agreed to keep the interim relief in abeyance and to dispose of the main application and the counter application brought by the third to seventh respondents.

The counter application:

[3] The third to seventh respondents brought a conditional counter application in which they pray that this court review and set aside the first and second respondents (in the main application) decision of 29 December 2015 to approve the applicant's building plans, in the following terms:

2. That the order which was granted by this Honorable court on 15 December 2017 in case HC-MD-CIV-MOTH-GEN-2017/00423, without the applicants in the counter application having been joined be and is hereby rescinded and set aside in terms of Rule 103(1)(a), on the basis that necessary parties had not been joined.

3. That pending the determination of the review relief sought in the main application by the first respondent, be and is hereby interdicted and restrained from carrying out further unlawful construction activities in accordance with the Building Plans which were purportedly approved by the first respondent/second respondent on 29 December 2015.'

Founding affidavit of the Applicant

[4] In his founding affidavit the applicant sets out a detailed background to the application as follows:

¹ As per the judgment by Angula DJP in *Andrew Imalwa & four others v Julius Gaweseb & two others* under case number HC-MD-CIV-MOT-GEN-2018/00004, this court is now called upon to determine the relief sought by the parties in this matter.

On or about 29th day of December 2015, the first and second respondents approved a building permit for the applicant to commence construction on Erf 506, Pioneerspark, Windhoek. As a result of the approval of the building permit, the applicant engaged third parties to commence construction as per the building permit and the approved building plans.

[5] After a period of two years, a letter was send to the applicant on 25 October 2017 by the second respondent instructing the applicant to cease all building and construction activities on the basis that the building permit “had been processed without the required signatures of consent of the immediate involved neighbours” and that amongst others, the approval of the said plan is revoked with immediate effect. The letter further indicated that the building permit was approved without having the objections lodged against the building permit application investigated first before approval.

[6] The applicant, dismayed with this new development, addressed a letter through his legal representative, Mr. Namandje, on 06 November 2017 placing the first respondent on terms to reinstate the applicant’s building plan approval and to allow the applicant to commence with his construction on or before 10 November 2017, failing which the applicant would approach the High Court of Namibia on an urgent basis to seek the necessary relief. No reply was received from the first and/or second respondent resulting in the application *in casu*.

[7] The applicant maintains that the decision by the respondents were unlawful and should be set aside on the following grounds:

7.1 that the second respondent had no right after the approval of the building plans and after he became *functus officio* to cancel the building plan approval;

7.2 that even if he had the said power to cancel the building plan approval that he had no rational and reasonable basis to make such a decision and that he did not act in accordance with the relevant law;

7.3 that he (the applicant) was not given a reasonable and fair opportunity to make representation as to why the building plan approval should not be cancelled.

7.4 that the decision made by the second respondent was in consistent with the provisions of Article 18 of the Namibian Constitution.

[8] The applicant maintains that the construction is at a critical stage and substantial costs have been incurred during the construction and construction was set to be completed by end of January 2018. The applicant further stated that he would suffer irreparable harm in the event that the construction cannot commence and continue.

[9] Applicant therefore prays that the relief as prayed for in Part B of the Notice of Motion be granted as prayed for.

Answering affidavit on behalf of the First and Second Respondents

[10] The answering affidavit was deposed to by the second respondent on behalf of both the first and second respondent. The second respondent is a senior building inspector in the employ of the first respondent and in the answering affidavit the following was submitted:

10.1 that the applicant has in law no title to the relief sought, if such relief is predicated on the letter authored by the second respondent on 25 October 2017, which purportedly revoked the approval of the applicants building plan.

10.2 that the decision as communicated to the applicant on 25 October 2017 does not amount to a decision capable or competent of review and setting aside by this court as the said decision had no weight or force in law. In this regard the second respondent elaborated as follows:

10.2.1 It is conceded that on 25 September 2015 the applicant submitted building plans;

10.2.2 On 29 December 2015 the application was approved in terms of the first respondent's Building Regulations, in terms of which Building Permit 3005/2015 was granted and issued;

10.2.3 In terms of the building permit the permit was valid for a period of 12 months reckoned from dated of approval, i.e. 29 December 2015 culminating on 30 December 2016;

10.2.4 The correspondence on 25 October 2017 to the applicant was some 10 months after the permit/plans lapsed;

10.2.5 According to regulation 10 of the Building Regulations it is required that the construction be completed within 12 months from date of commencement.

10.2.6 The construction activities were still taking place after the expiry of 12 months, as admitted in the applicant's founding affidavit. The said construction activities were not sanctioned by the respondents and therefore the construction activities of the applicant after the lapse of the 12 months was unlawful as no application for extension was received;

10.3 that the second respondent's decision was inconsequential and the application by the applicant is frivolous and vexatious;

10.4 that even if the court finds that the first respondent's decision should be set aside it would not allow the applicant to proceed with his construction since his plans/or permit lapsed alternatively are invalid.

10.5 that the principle of *functus officio* in respect of the cancellation of approval of the building plans is remote and misplaced, since the first respondent did not cancel the approval of the permit/building plans as at the time the building plans lapsed and expired, and therefore invalid. In light thereof the second respondent was not enjoined to afford the applicant any representation before making or communicating the decision.

10.6 that there is no merits in the contention that there was a violation of the Article 18 of the Namibian Constitution.

Answering affidavit on behalf of the Third to Seventh Respondents

[11] The third to seventh respondents (applicants in the counter application) are owners adjacent to and bordering on Erf 506 Aschenborn Street, Pioneerspark, Windhoek. As such, the third to seventh respondents submit that they had a long standing concern with the activities carried out on Erf 506. One of the main concerns bordered on the aspect that the applicant operated an extensive business operation at the premises wherein the respondents had not given their consent thereto. The third to seventh respondents further indicated that during 2015, they were approached by a company called Plan Africa Consulting CC with a questionnaire for the respondents to indicate their position regarding the rezoning of Erf 506 and consent for accommodation establishment while the rezoning is in progress. The third to seventh respondents, as owners of neighbouring properties, objected to the proposal on the basis that constructions on the property commenced without the building plans having been approved prior and that there were irregularities surrounding the approval of the building permit.

[12] The third to seventh respondents further point out that looking at the building plans that were approved, such were approved on or about 29 December 2015, which is after objections by the various neighbouring owners of Erf 506 were lodged, however, no communication was made from the local authority that the rezoning of Erf 506 had been allowed. The third to seventh respondents are further of the view that as the building plans were approved in 2015, where construction activities already commenced in 2014 and continued on into 2016, such building plans became obsolete as having been expired in terms of clause 20 of the Windhoek Town Planning Scheme and regulation 10 of the Building Regulations of 1969 (as amended) published under official gazette no. 2992 of 28 April 1969 (GN 57 of 1969). Therefore in a nutshell, the third to seventh respondents were never consulted when the purported building plans were approved contrary to the practice and requirements of the local authority and further that the proposed construction would hinder the right to privacy of some of the adjacent erven owners surrounding Erf 506 and as a result the construction could not have commenced in the manner in which it did without the proper consent.

Argument on behalf of the applicant

[13] In respect of the main application and having regard to the second respondent's decision, the applicant is of the view that such decision is one that can be easily set aside for it breached a well-established rule that an administrative official cannot seek to withdraw a final decision adversely affecting a private individual unless he or she is statutorily authorised to do so and provided that he or she has given the adversely affected individual *audi*. The applicant is further of the view that even if the second respondent could revoke its decision, then the second respondent failed to act fairly and reasonably as contemplated under Article 18 of the Namibian Constitution. As such, the decision by the second respondent is liable to be reviewed and set aside.

[14] On the conditional counter application by the third to seventh respondents, the applicant is of the view that such fails to clear the first hurdle, which is that it was

unreasonably delayed. The applicant is of the view that during March 2016, the third to seventh respondents knew or suspected that the construction on the applicant's property was commenced without building plans having been approved, yet they did not approach this court for an interdict of any appropriate remedy in that regard.

[15] The applicant further bases the third to seventh respondents knowledge in this regard by stating that they alleged that the building activities already commenced in 2014 without the appropriate approvals and at this point, the applicant submits that the respondents ought to have taken steps already in order to stop construction activities. The applicant submits that the respondents have at least since 2015 known that "unlawful" construction was going on. In the result, the applicant is of the view that the third to seventh respondents cannot now at this stage approach this court seeking the relief that they seek against the applicant's building permit and construction.

[16] The applicant is further of the view that the remedy sought by the third to seventh respondents is difficult in that the building constructions are almost complete and the fact that they did not seek relief to demolish the structure built so far, if the court is to grant the relief sought it would only be academic and of no practical effect.

[17] The applicant thus concludes that, in light of the fact that the construction of the buildings sought to be constructed are almost complete, and that it acted on the approval of the building permit by the second respondent and the fact that the third to seventh respondents delayed in bringing their counter-application, and further if the court is to find that the approval by the second respondent was invalid, this court should not set aside the decision taken by the second respondent.

Argument on behalf the first and second respondent

[18] The first and second respondents are of the view that the second respondent's decision is not one capable of review and setting aside as it has no weight in law, further that the second respondent's decision has no legal effect in that the applicant's

building plans had an expiry date of 12 months when approved after its issuance in December 2015, which was on 30 December 2016.

[19] Despite this expiry, the applicant continued with its construction activities without applying for an extension in terms of Regulation 10 of the Building Regulations of 1969 as amended² and as a result, the first and second respondents are of the view that the applicant's building permit had expired, hence the applicant's conduct being unlawful.

[20] The first and second respondents are further of the view that the applicant ought to have approached them to apply for an extension of the building permit. The first and second respondents submit that the applicant failed to do so, and thus his conduct amounted to a violation of the Windhoek Town Planning Scheme and Regulations. In this light, the first and second respondents are of the view that the applicant thus had no right to be heard, as there was no decision to be taken affecting his rights, nor his legitimate expectation to be heard.

[21] In respect of the decision by the first and second respondent, the first and second respondents submit that when a party is aggrieved by the decision made by an administrative body or official, such party must first exhaust all internal remedies before approaching the court for a remedy. The first and second respondents submit that in light of that, the applicant failed to show cause why they should instead adhere to the letter of demand written by the applicant through his legal representative while taking cognizance that his building permit had already lapsed and thus had no valid ground in law to demand that his building plans be reinstated. The first and second respondents are therefore of the view that the decision taken on 25 October 2017 is neither *ultra vires*, arbitrary or predicated on ulterior motives, hence the applicant failed to establish the basis to invoke Article 18 of the Namibian Constitution.

² Under official gazette no. 2992 of 28 April 1969 (GN 57 of 1969).

Argument on behalf of the third to seventh respondent

[22] The third to seventh respondents submit that although they had longstanding concerns with the construction carried out on the applicant's property, it is only the fifth respondent who was aware on how the building plans were approved until about 10 January 2018 when the file concerned was obtained. They further submit that they never received responses from the first respondent regarding the queries they made on the rezoning of the applicant's property. In the result, the third to seventh respondents submit that they did not know whether there was approval for the structure being built on the property and what exactly was being built.

[23] The third to seventh respondents thus submit that they only had a much clearer picture of the situation as it was when they obtained the file concerned, which is how they approached the court during January 2018. In this regard, the respondents submit that they could not as a result approach the court during 2014.

[24] The third to seventh respondents further submit that it is clear that the building permit was approved on 29 December 2015 and in terms of Regulation 10 of the Municipality of Windhoek building regulations of 1969 as amended, which indicates that any erection of a building must be completed within twelve months and any building to be continued under construction subsequent thereto, the building permit must be renewed. In the circumstances, the third to seventh respondents submit that as present the applicant does not have an approved building permit of building plans and as a result, the relief sought by the applicant is moot in that he in any event has to apply for new building plans and permit.

[25] The third to seventh respondents further take the point made by the applicant that the third to seventh respondents did not seek relief for the demolition of the structure presently constructed on the property. The third to seventh respondents submit that the applicant only poured a concrete slab and that the first floor was not yet

constructed at the time the construction was stopped, evidently that that the building is not “almost” complete as the applicant argues.

[26] The third to seventh respondents are therefore of the view that the main bone of contention was that of their privacy to be invaded should the first floor be constructed on the applicant’s property, which would have direct lines of sight into the respondents’ properties. In this light, the third to seventh respondents submit that the applicant can keep the current structure built, provided that the applicant simply constructs a roof where he intended to build the first floor.

The legal principles relating to the review of administrative action or decisions

[27] Article 18 of the Namibian Constitution has been quoted in all the cases where decisions or actions of administrative bodies were impugned but I will nonetheless quote it here, it provides as follows:

‘Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.’

[28] In the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) O’Reagan AJA stated at page 736 para 31:

[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness

has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

[29] In applying the aforesaid principles to the matter at hand it would be necessary to consider both the permit granted to the applicant as well as the letter directed by the second respondent to the applicant revoking the approval of the permit.

[30] This is further necessary in light of the arguments advanced on behalf of the respondents that the correspondence directed to the applicant is not administrative act capable or competent of review and setting aside by this court.

[31] The first and second respondents base their argument mainly on the fact that at the time when the applicant was informed of the decision the building plan/permit already lapsed due to operation of law and therefore it was not an administrative act competent of review or setting aside.

[32] It is common cause that a decision was taken by the Manager: Building Control on 29 December 2015 to approve the building plan and permit of the applicant. The permit reads as follows:

'TO: MD VON KASCHKE/J GAWASEB

BUILDING PERMIT NO.: 3005/2015

With reference to your application of 2015/9/25 you are hereby notified in terms of Regulation 8 of Council's Building Regulations that the plans submitted showing the proposed ADDITION to be carried out on:

ERF 506 OF PIONIERSPARK have been approved subject to the undermentioned conditions:

THE PERMIT WILL BE VALID FOR TWELVE MONTHS FROM DATE OF APPROVAL.

29/12/2015

BY ORDER

Signed

MANAGER: BUILDING CONTROL'

[33] The subsequent correspondence dated 25 October 2017 directed to the applicant by the second respondent reads as follows:

'RE: OBJECTION AGAINST APPROVED BUILDING PLAN – ERF 506 PP

The latest building plans approved on erf 506 Pioneerspark, Building Permit No. 3005/2015 had been processed without the required signatures of consent of the immediate involved neighbours.

The Town Planning Scheme requires that any proposed building, encroaching into the 3 metre building restriction area and in the case of double storey buildings, which encroaches into the 5 metre building restriction line, need to be consented to in writing, by the immediate involved neighbours.

Further to the above, objections regarding the proposed buildings were received and should have been investigated, before approval could have happened.

In light of the above, approval of the said plans is therefore revoked with immediate effect. You are herewith ordered to cease all construction on erf 506 Pioneerspark, immediately, until further notice. (*my emphasises*)

I hope this will meet your serious consideration and compliance.

Thank you

Signed

O Loots

Senior Building Inspector.'

[34] One would at first glance note that the issue raised in the letter by the second respondent is not to address the fact that the applicant continued with construction in contravention with the Building Regulations, if that was indeed the case. It clearly indicates that the approval of the applicant's plan was revoked with immediate effect. The decision to revoke thus relates to the original decision reached to grant the building permit. I fully agree that at first glance it would appear that the building permit expired or lapsed but this matter does not turn on that fact. The parties are not in agreement as to the interpretation of regulation 10 of the Building Regulations but for purposes of this judgment I would not be required to deal with the interpretation of this regulation.

[35] There is no doubt that the conduct of the respondents in approving the building plans of the applicant in terms of the empowering provisions of the relevant regulations, subject to conditions, amounts to administrative action and that its decision affects the legal rights of an individual. Hereafter the second respondent unilaterally revoked the original decision. Such decision therefore is an administrative action and/or decision.

[36] The decision of the second respondent to revoke the applicant's building permit is apparently based on the fact that there were objections lodged regarding the proposed building plans that were not investigated or considered in reaching the decision, which it is maintained, resulted in an incorrect decision. In spite of an omission on the part of the first and second respondent the applicant's building permit was lawfully granted.

[37] Even if one accepts for argument sake that the applicant's building permit was erroneously or even unlawfully granted, it can still not entitle the first and/or second respondent to revoke such decision. As far as validity of decisions are concerned, common law does not support a general exception allowing administrators to revoke their own unfavorable decisions.

[38] The decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*³ has been referred to with approval in a number of cases in this jurisdiction. The 'Oudekraal principle' entails that once an administrator has made a decision it has no power to change it or set it aside, ie that defective decisions of administrators remain binding until they are set aside through judicial review.

[39] In the case of *Minister of Finance v Merlus Seafood Processors (Pty) LTD* 2016 (4) NR 1042 (SC) Mainga JA discuss the principle as follows:

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter *Administrative Law* at 355:

"There exists an evidential presumption of validity expressed by the *maxim omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.

'At other times it has been explained on little more than pragmatic grounds. In *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) (i)n a sense delay would . . . 'validate' a nullity. Or as Lord Radcliffe said in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 769 – 70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 88):

"An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

[40] The issuing of the building permit constitutes an administrative action which remains valid until set aside and any act performed in terms of such permit remains

³ 2004 (6) SA 222 (SCA).

valid until set aside.⁴ The decision made by the first and/or second respondent on 29 December 2015 has legal consequences that affected the interest of an individual. The applicant acted in terms of the said building permit and is therefore not the product of an unlawful act.

[41] The court in the *Oude Kraal* matter essentially requires organs of State to apply for the review and setting aside of their own erroneous decisions upon learning of them, where applicants for the decisions wish to rely upon them. These principles are further in line with the principle underlying the term *functus officio*, which entails that once an administrator has made a decision it has no power to change it or set it aside.⁵

[42] This decision of the second respondent clearly adversely affects the rights of the applicant because even if the building permit lapsed effectively preventing the applicant from continuing with construction, where does it leave the applicant in respect of the partially constructed building when the permit is revoked. There is no prayer by the respondents that the partially constructed building be demolished. The counter application of the third to seventh respondents if successful would therefore be academic in nature.

[43] The applicant would effectively have a partially constructed building that for all intents and purposes would be unlawful as the original building permit, which was lawfully issued, is revoked.

[44] It is interesting that if the first and second respondents are so convinced that his decision dated 25 October 2017 is not one capable of review and setting aside as it has no weight in law, why did the second respondent go through the trouble to revoke a permit that does not exist?

⁴ Oudekraal Principle supra as referred to and applied in *Fernandes v Baleia Do Mar Industrial Safety Supplies CC* (HC-MD-CIV-MOT-GEN-2017/00204) [2018] NAHCMD 337 (17 October 2018) at [44].

⁵ Lawrence Baxter *Administrative Law* (1984) at 372-380 and Hoexter in *Administrative Law in South Africa* at 278-281.

[45] In *in Kersten t/a Witvlei Transport v National Transport Commission and Another* 1991 NR 234 (HC) at 239G – I Du Toit AJ said:

“Effective judicial review must in many cases depend on the Court being properly informed as to what moved the administrative body to decide as it did. It seems to me that a body which is required to act ‘fairly and reasonably’ can in most instances only do so if those affected by its decisions are apprised in a rational manner as to why that body has made the decision in question. (See, generally, Baxter: Administrative Law at 228).”

[46] Having regard to the facts surrounding this application it is clear that the unilateral decision taken by second respondent on 25 October 2017 to revoke the prior approval of the applicant’s building plans is not in the spirit of Article 18 of the Namibian Constitution, which requires administrative officials to act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation. This decision was made without affording the applicant an opportunity to make representation or to be heard leaving the applicant with far reaching consequences.

The Conditional Counter Application

Extraordinary Delay:

[47] In the counter-application the third to seventh respondents seek firstly, that the decision of the first respondent or the second respondent purportedly taken on 29 December 2015 to approve the building plans in respect of Erf, 506, Aschenborn Street, Pioneerspark be declared unlawful, null and void and be set aside. Secondly that applicant be interdicted and restrained from carrying out further unlawful construction activities in accordance with the Building Plans which were purportedly approved by the first respondent/second respondent on 29 December 2018.

[48] The counter-application was brought on 25 January 2018. Counsel for the applicant submits that conditional counter application should fail at the first hurdle,

which is that the application was unreasonably delayed by the third to seventh respondents.

[49] When considering the issue of inordinate delay in bringing review proceedings it should be born in mind that no period is stipulated within which review proceedings need to be brought but it is well established that an application for review must be within a reasonable time. What is reasonable would depend on the circumstances. Where the delay is found to be unreasonable, the court may decide to condone it if the applicants (in counter application in this instance) give a satisfactory application for the delay. The court will also take into account other factors, especially any prejudice caused to the other party. Investigation in the reasonableness of the delay is distinct from the discretion to condone unreasonable delay but both questions may entail value judgments.⁶

[50] The two stage approach were discussed by Smuts J in the matter of *South African Poultry Association And Others v Minister Of Trade And Industry And Others* 2018 (1) NR 1 (SC) as follows:

[17] In the course of a thorough survey of the legal principles governing the issue of delay in review proceedings, the court a quo referred to both decisions of this court and of the High Court which have dealt with this question. In particular, the High Court cited the approach consistently followed in this court in *Krüger v Transnamib Ltd (Air Namibia) and Others*,⁷ *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*⁸ and the succinct summary of the two-stage enquiry which is to be applied as set out in *Keya v Chief of the Defence Force and Others*.⁹

“[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its

⁶ Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) paragraph 48.

⁷ 1996 NR 168 (SC).

⁸ 2004 NR 194 (SC).

⁹ 2013 (3) NR 770 (SC) in paras 21 and 22.

discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the high court has held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.”

[51] It was argued by Mr. Namandje that on the admissions of the third to seventh respondents they are owners of the properties adjacent to that of the applicant and that they have had a long-standing concern with the development being carried out on the applicant's property.

[52] In fact the third and fourth respondents alleged that the applicant started constructing without a building permit in 2014 already. It is the submissions of the applicant that if the respondents knew in 2014 already commenced with the alleged construction, which the applicant denies, they ought to have taken steps to stop the construction activities.

[53] The attack is launched on the decision of the first and/or second respondent which was taken more than two years ago. Furthermore an attack is launched on the building permit which was granted and issued on 29 December 2015.

[54] From their papers it appears that the third to seventh respondents' version is that the fifth respondent discovered that the building plans were approved in an irregular manner in November 2017 and as for the rest of respondents became aware on or about 10 January 2018.

[55] The third to seventh respondents rely on the fact that they corresponded with the offices of first respondent to get clarity regarding the approval of the rezoning of the property and the nature of the structure being build but only manage to obtain copies of the building plans in 2018.

[56] This is in spite of the fact that the respective respondents (third to seventh respondents) directed correspondence to the first respondent as far back 15 January 2016 already, making allegation of irregularities in relation to the manner in which the building permit was granted to the applicant.

[57] What makes matters worse is that the third to seventh respondents, who have their properties adjacent to that of the applicant sat idly by observing the construction process. The question must be asked: if there were suspicions of unlawful conduct on the part of the first and second respondents, and the applicant for that matter, as far back as January 2016 why did the relevant respondents leave this be for a period of more or less two years before launching the application?

[58] Counsel sought to suggest that the several months that lapsed before launching the review challenge was a reasonable delay and that the respondents did not know there was approval for the structure being built on the property and what exactly was being build. If that that was indeed the case one would have reasonably have expected

that the respondents would have acted immediately when the alleged 'unlawful' construction commenced in 2016.

[59] In the *Keya* matter¹⁰ referred to *supra* the Damaseb JP referred to the steps that should precede a review challenge:

'It is now judicially accepted that an applicant for review need not rush to Court upon his cause of action arising as he is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he has good reason to think they exist and they are necessary to support the relief desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable. In some cases it may be required of the applicant, as part of the preparatory steps, to identify and warn potential respondents that a review application is contemplated. Failure to so warn a potential respondent may lead to an inference of unreasonable delay.'

[60] I am of the considered view that the third to seventh respondents did not show sufficient reason for the relaxation of the rule requiring a review to be brought within a reasonable time. What I can make out from the several letters filed no notice was given to the first and/or second respondent and/or the applicant that at any stage did the third to seventh respondents write correspondences challenging the decision of the first and or second respondent or threatening legal action. I find it hard to belief that the relevant respondents only managed to find out how the building plans were approved in November 2017/January 2018, after the alleged unlawful construction started two years ago already.

[61] In light of the discussion above I must conclude that the delay in launching the review proceedings was unreasonably long in nature.

¹⁰ Case No. A 29/2007 (NmHC) (unreported) delivered on 20 February 2009 at paragraph 17.

[62] The next question that arises is whether that delay should be condoned. Having considered the reasons advanced for the delay I cannot find that there is a reasonable explanation for the delay. It is therefore not possible to conclude that this is a case in which the undue delay should be condoned.

[63] As the counter-application is determined on the point *in limine* of unreasonable delay it is not necessary for me to address the remainder of the counter application.

[64] For these reasons set out above the counter application must be dismissed.

In conclusion

[65] Having regard to the Regulation 10¹¹ of the Building Regulations of 1969 as amended,¹² the building permit approved on 29 December 2015 and whereas construction commenced in 2016 the said permit lapsed in all probability. Therefore, even though this review is decided in the favor of the applicant he will not be able to pick up his construction where he left stopped. Due compliance will be required the relevant Building Regulations.

[66] My order is therefore as follows:

Main Application: (Ruling to be uploaded on E-Justice)

1. The decision by the Second Respondent on 25 October 2017 is set aside.

¹¹ Regulation 10 of the Municipality of Windhoek Building Regulations, 1969 (as amended) published under Official Gazette No. 2992 of 28 April 1969 (Government Notice 57 of 1969):

‘ 10. The erection of any building must be completed within twelve months after the commencement of building operations. If for any reasons a building cannot be completed within a period of twelve months authority for extension of the period shall be obtained from the Council before the twelve months elapsed.’

¹² Under official gazette no. 2992 of 28 April 1969 (GN 57 of 1969).

2. The decision by the First and/or the Second Respondent to revoke building approval under Building Permit nr. 3005/2015 is irregular and null and void and is therefore set aside with costs.
3. Costs to include cost of two legal practitioners.

Application:

4. The conditional counter application by Third to Seventh Respondents dismissed with costs.
5. Cost to include the costs of two legal practitioners.
6. The matter is referred back to the First and/or Second respondents to consider and comply with the principles of natural justice and *audi alteram partem* rule.
7. The matter is removed from the roll: Judgment Delivered.

JS Prinsloo

Judge

APPEARANCES:

APPLICANT:

S Namandje
of Sisa Namandje & Co. Inc., Windhoek

FIRST AND SECOND RESPONDENTS:

P Muluti
of Muluti & Partners, Windhoek

THIRD to SEVENTH RESPONDENTS:

G Narib
instructed by Delport Legal Practitioners,
Windhoek