

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2017/00086

In the matter between:

**JOSIA TJIROVI**

**APPLICANT**

And

**MINISTER FOR LANDS AND RESETTLEMENT  
THE LAND REFORM ADVISORY COMMISSION  
BERNADETTE BOOIS**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT**

**Neutral citation:** *Tjirovi v Minister for Land and Resettlement* (HC-MD-CIV-MOT-REV-2017/00086) [2018] NAHCMD 56 (19 March 2017)

**Coram:** UEITELE, J

**Heard:** 31 August 2017

**Delivered** 16 March 2018

**Flynote:** Court - Jurisdiction - Exclusion of jurisdiction - Domestic remedies - Nothing in section 41 of the Agricultural (Commercial) Land Reform Act, 1995 suggesting that court's jurisdiction deferred until domestic remedies exhausted – applicant not compelled to exhaust domestic remedies before instituting review proceedings.

Administrative law - Administrative act - Validity of – Allotment of farming unit – Minister having discretion whether or not to accept recommendation by Land Reform Commission. Minister failing to appreciate that the recommendation by the Commission is a jurisdictional fact that must - objectively viewed - exist before he exercises his discretion - Failure to consider the jurisdictional facts leading to invalidity of allotment.

Administrative law – Review - Setting aside of award of tender - Consequences - Such to be fully considered – Interest of all parties to be considered.

**Summary:** The applicant sought an order reviewing and setting aside the Minister's decision to, in terms of the Agricultural (Commercial) Land Reform Act, 1995 published on 9 December 2016, allot Portion 1 of Portion A of Farm Karaam 152, Single Unit, Hardap Region to Bernadette Skrywer-Boois, and an order allotting Portion 1 of Portion A of Farm Karaam Number 152, Single Unit, Hardap Region to him. In the alternative to this order the applicant sought an order directing the Minister to reconsider afresh his decision to allot Portion 1 of Portion A of Farm Karaam, Single Unit, Hardap Region.

The Minister opposed the application, in his affidavit in support of the opposition the Minister raised a point *in limine*, the point *in limine* being that in terms of s 41(8A) of the Agricultural (Commercial) Land Reform Act, 1995 as amended, an applicant who is aggrieved by the decision of the Minister not to allot a farming unit to him, may within 30 days from the date of notice of the Minister's decision, appeal against such decision to the Lands Tribunal. Since the applicant did not appeal to the Lands Tribunal, he is non-suited to launch the current proceedings, contended the Minister.

*Held that* where a statute created an internal remedy, it was a matter of statutory interpretation as to whether that remedy had first to be exhausted before recourse could be had to a court.

*Held that* the language of s 41(8A) cannot be said to, expressly or by necessary implications, prohibit access to court for it does not state that no party may approach a court for relief until the appeal has been completed. It simply states that a party may appeal to the Lands Tribunal. The section, in the court's view provides a party with a choice whether to appeal or seek other judicial remedy.

*Held that* the Lands Tribunal, when considering an appeal against the Minister's decision, is limited to consider whether the decision was correctly taken or not. The Tribunal does not have the power to review the process followed by the Minister in order to establish whether the decision was taken following a fair procedure or not. The court is therefore of the view that the appeal provided for in s 41(8A) will not, in the circumstances of this case, provide the applicant effective relief and to that extent the applicant may approach the Court without having to first exhaust the appeal route provided for in that section. The point *in limine* accordingly failed.

*Held that* the Minister's powers to allot a farming unit was dependent on the recommendation of the Commission, in other words, such a recommendation is a jurisdictional fact.

*Held that* before the Minister is entitled to exercise his power (as conferred upon him by s 41(3) of the Act) to allot a farming unit he must be satisfied that one or more of the conditions set forth in s 41(3) and (6) obtain, and that the procedural step prescribed in s 41(2) and (3) have been executed. It thus follow that one of the possible grounds upon which the exercise of the power granted by s 41(3) may be assailed in a Court of law is the absence of one or more of the conditions listed in subsection (3) of section 41. The Court therefore found that the Minister could not make an allotment of a farming unit where there is no recommendation by the Commission.

*Held that* the purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed and not to give the courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision.

*Held that* in the present case no imputations of bad faith or bias are made against the Minister and no direct charge of bad faith or bias is elaborated upon anywhere on the papers nor was it done in argument. The whole file of correspondence was disclosed and, it contains nothing which in any way savours of bad faith or bias. In the circumstances, said the court, it would be wrong for the Court to decide the issue itself.

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## ORDER

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1. The decision of the first respondent (the Minister) to allot Portion 1 of Portion A of Farm Karaam No. 152, Single Unit, Hardap Region to the third respondent, in terms of the Agricultural (Commercial) Land Reform Act, 1995, published on 9 December 2016 by the first respondent, is hereby reviewed and set aside.
2. The matter is referred back to the first respondent (the Minister) for him to, in accordance with the law deal with the application for the allotment of Portion 1 of Portion A of Farm Karaam, Single Unit, Hardap Region.
3. The first respondent must pay the applicant's costs of this application such costs to include the cost of one instructing and one instructed counsel.
4. The matter is regarded as finalized and is removed from the roll.

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## JUDGMENT

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UEITELE J:

The parties

[1] The applicant in this matter is Josia Tjirovi a farmer who resides at Proefplaas, Hardap Green Scheme in the Hardap Region. (I will, in this judgment, refer to Mr Tjirovi as the 'applicant').

[2] The first respondent in this matter is the Minister responsible for Lands and Resettlement, (I will, in this judgment, refer to the Minister responsible for Lands and Resettlement as the 'Minister'). The second respondent in this matter is the Land Reform Advisory Commission. (I will, in this judgment, refer to the Land Reform Advisory

Commission as 'the Commission'). Where I need to refer to the first and second respondents jointly, I will refer to them as the respondents, but where I need to refer to them individually I will refer to them as the Minister or the Commission.

[3] The third respondent is a certain Ms Bernadette Boois an adult female employed at Old Mutual Namibia. The third respondent did not oppose the application.

#### The background

[4] The background facts to this application are briefly these. During the year 2011, the applicant owned and operated a drilling company. During that period he was allegedly approached by a certain Mr Charles Chiweta and a certain Mr Jan Jarson. Mr Jarson was at that time (that is, during the year 2011) the Regional Councilor for Mariental Rural Constituency. Mr Jarson, at the time that he approached the applicant, represented to the applicant that he was acting on behalf of the Hardap Regional Council. Messrs. Chiweta and Jarson requested the applicant to, at his own costs, assist the resettlement beneficiaries and occupiers of a farm known as Farm Bernafay to rehabilitate the borehole on that farm. Farm Bernafay was a farm that was acquired by the Government of the Republic of Namibia for the purposes of the government's land reform program. From the pleadings it appears that Farm Bernafay has since its acquisition by Government not been utilized because there were no water resources on the farm.

[5] The applicant agreed to the request by Messrs, Chiweta and Jarson but his agreement was conditional. The condition on which the applicant agreed to rehabilitate the borehole on Farm Bernafay was that his livestock would graze on Farm Bernafay and that he be considered for resettlement when such an opportunity arises.

[6] The applicant honored his part of the agreement between him and Messrs, Chiweta and Jarson and drilled a borehole and installed water pumps at a cost of N\$65 000. Because of his investment, Farm Bernafay became functional and productive again after a dormant period of 16 years. The applicant alleges that, prior to and after his agreement with Messrs. Chiweta and Jarson, he unsuccessfully applied on 15 different occasions to be resettled on Farm Bernafay.

[7] During September 2016 the Ministry of Lands and Resettlement, advertised in the local printed media amongst other farming units, a certain Portion 1 of Portion A of Farm Karaam, Single Unit, Hardap Region (I will, in this judgment, refer to this farming unit as Farm Karaam,) for resettlement. In response to the advertisement, the applicant submitted his application for consideration.

[8] Following the submission of the applications by the members of the public, the Hardap Land Reform Advisory Committee (I will, in this judgment, refer to the Hardap Land Reform Advisory Committee as the Regional Committee) considered the applications by various applicants, evaluated the applications and scored the applicants. Based on the scores the applicants attained, the Regional Committee at a meeting held on 1 November 2016 recommended to the Commission persons who were to be allotted Farm Karaam. In respect of Farm Karaam, the Regional Committee recommended three persons for the allotment of Farm Karaam. The three persons who were recommended by the Regional Committee to the Commission were: Jasmine Pauline Mouton, Josia Uaundjaihe Tjirovi and Emgard Amy Tjitendero - Katzao.

[9] The Commission at its 11<sup>th</sup> ordinary meeting held on 25 and 26 November 2016 considered the recommendations that it received reform Regional Committee. After consideration the Commission in turn made its recommendations to the Minister. Amongst the recommendations that the Commission made to the Minister was the recommendation that the Minister must consider to allot Farm Karaam to one of the following persons namely, Jasmine Pauline Mouton, Josia Uaundjaihe Tjirovi and Ms. Emgard Amy Tjitendero- Katzao.

[10] From the record of proceedings placed before me it appears that the Minister, on 5 December 2016 considered the recommendations that were made to him by the Commission. The record further reveals that in respect of Farm Karaam the Minister made the following remarks:

'I noticed that there would be a double allocation to Mrs. Jasmine Pauline Mouton should she be allocated this farming unit. Therefore I would like to recommend Ms Boois Bernadette Skrywer from the Hardap Region as a beneficiary. This will enhance gender balance, inclusivity and accommodate Namibians from different circumstances and backgrounds.'

What is not clear from the record is whether the above comment by the Minister was presented to the Commission and considered by the Commission and what the Commission's reaction to that comment was.

[11] On 9 December 2016 the Ministry of Lands and Resettlement by notice in the local printed media, (Namibian Sun newspaper), made known the successful applicants for the farming units that were advertised between 15 September 2016 and 15 October 2016 (this includes Farm Karaam). In terms of the notice, Farm Karaam was allotted to Bernadette Skrywer-Boois.

[12] Following the advertisement in the Namibian Sun newspaper, the applicant through his legal practitioners of record, on 15 December 2016, addressed a letter to the Minister requesting the Minister to provide him with reasons why he allotted Farm Karaam to Ms Bernadette Skrywer-Boois. The reasons so requested were not forthcoming. Aggrieved by the decision not to allot Farm Karaam to him, the applicant, on 3 March 2017, commenced proceedings in this Court by way of a notice of motion in terms of which he amongst other orders sought:

(a) an order reviewing and setting aside the Minister's decision to, in terms of the Agricultural (Commercial) Land Reform Act, 1995, published on 9 December 2016, allot Portion 1 of Portion A of Farm Karaam 152, Single Unit, Hardap Region to Bernadette Skrywer-Boois;

(b) an order allotting Portion 1 of Portion A of Farm Karaam Number 152, Single Unit, Hardap Region to him. In the alternative to this order the applicant sought an order directing the Minister to reconsider afresh his decision to allot Portion 1 of Portion A of Farm Karaam, Single Unit, Hardap Region.

[13] The Minister and the Commission opposed the application, in his affidavit in support of the opposition, the Minister raised a point in *limine*, the point *in limine* being that in terms of s 41(8A) of the Agricultural (Commercial) Land Reform Act, 1995 as amended ('the Act'), an applicant who is aggrieved by the decision of the Minister not to allot a farming unit to him, may within 30 days from the date of notice of the Minister's decision, appeal against such decision to the Lands Tribunal. Since the applicant did not appeal to the Lands Tribunal he is non-suited to launch the current proceedings,

contended the Minister. I will proceed to consider the point raised *in limine* by the Minister.

The point *in limine*

[14] In his affidavit in support of the opposition to the applicant's application the Minister contends that the applicant does not have *locus standi* to bring this application because s 41 (8A) of the Act provides for an appeal to the Lands Tribunal. In my view reference to *locus standi* is misplaced because *locus standi* refers to the capacity of a person to institute legal proceedings. The fact that the Agricultural (Commercial) Land Reform Act, 1995 provides for an appeal to the Lands Tribunal has nothing to do with Mr Tjirovi's capacity or interest to institute this proceedings. The question is rather whether this Court can hear the applicant's application if he has not first appealed to the Lands Tribunal.

[15] Mr Tibinyane who appeared for the respondents, in my view correctly identified the question to be resolved. He argued that it was unreasonable for the applicant to have rushed to this Court before the internal remedies available to him, under s 41(8A) of the Act had been exhausted. In support of this submission Mr Tibinyane referred me to the matter of *Koyabe and Others v Minister of Home Affairs and Others*<sup>1</sup> where the Constitutional Court of South Africa said:

'Internal remedies are designed to provide immediate and cost effective relief, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigant's access to justice (i.e. court justice), the importance of more readily available and cost effective internal remedies cannot be gainsaid.'

[16] In the matter of *National Union of Namibian Workers v Naholo*<sup>2</sup> this Court per Tötemeyer AJ held that where a statute created an internal remedy, it was a matter of statutory interpretation as to whether that remedy had first to be exhausted before recourse could be had to a court. The mere fact that a statute creates an internal remedy does not imply that access to court is prohibited pending the exhaustion of that remedy.

[17] Discussing the duty to exhaust internal remedies at common law, Hoexter<sup>3</sup> notes the following:

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<sup>1</sup> 2010 (4) SA 327 (CC), paragraph 35.

<sup>2</sup> 2006 (2) NR 659 at paras 50 – 62.

<sup>3</sup> Hoexter C: *Administrative Law in South Africa* (Cape Town, Juta 2007) at 479.



'The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted ...(T)here is no general principle at common-law that an aggrieved person may not go to court while there is hope of extrajudicial redress. In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether.'

[18] Tötemeyer AJ, in the *Naholo* matter identified two criteria relevant to determining whether the remedy needed to be first exhausted before an aggrieved person can approach court. The first relates to the language of the statutory provision, and the second to the time that the internal remedy will take to pursue and whether, given the time that it might take, it would, in effect, deprive an applicant of a remedy as a result of delay. In essence the second question is whether the internal remedy provides an effective remedy. This approach was endorsed and followed by the Supreme Court in the matter of *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated*<sup>4</sup>.

[19] Considering the first of the two criteria identified by Tötemeyer AJ, in the *Naholo* matter the question that arises is whether s 41(8A) expressly or implicitly prevents parties dissatisfied with the decision of the Minister from approaching a court in all circumstances, until the appeal provided for in the section has been exhausted. Section 41(8A) provides that:

'(8A) Any applicant who is aggrieved by a decision of the Minister under this section not to allot a farming unit to him or her or it may, within 30 days from the date of notice of the Minister's decision not to allot a farming unit to the applicant, or such extended period as the Minister in a particular case may allow, appeal against that decision to the Lands Tribunal.' (Italicized and underlined for emphasis)

[20] In my view, the language of the section cannot be said to, expressly or by necessary implications, prohibit access to court for it does not state that no party may approach a court for relief until the appeal has been completed. It simply states that a party may appeal to the Lands Tribunal. The section, in my view provides a party with a choice whether to appeal or seek other judicial remedy.

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<sup>4</sup> 2012 (1) NR 69 (SC).

[21] The second question is whether the appeal provided for in s 41(8A) provides the applicant with an effective remedy. To answer this question one must look at the extent of the remedy and the relief that the applicant is seeking. Section 41(8A) simply states that an applicant who is aggrieved by a decision of the Minister not to allot a farming unit to him or her or it may, within 30 days from the date of notice of the Minister's decision not to allot a farming unit to the applicant, or such extended period as the Minister in a particular case may allow, appeal against that decision to the Lands Tribunal. It is common cause that there is a difference between appeals and reviews. Appeals generally deal with the correctness of the decision maker whereas reviews deals with the lawfulness in the decision making process.

[22] In this case the Minister never communicated his reasons as to why he did not allot Farm Karaam to applicant. The grievance of the applicant is therefore not the correctness or otherwise of the decision taken by the Minister, but the lawfulness of the decision, in other words, whether the decision of the Minister was taken following a fair procedure. In my view the Lands Tribunal, when considering an appeal against the Minister's decision, is limited to consider whether the decision was correctly taken or not. The Tribunal does not have the power to review the process followed by the Minister in order to establish whether the decision was taken following a fair procedure or not. I am therefore of the view that the appeal provided for in s 41(8A) will not, in the circumstances of this case, provide the applicant effective relief and to that extent the applicant may approach the Court without having first exhausted the appeal route provided for in that section. The point *in limine* accordingly fails.

#### The basis of application and the opposition of the application.

[23] The applicant grounds its application in Article 18 of the Namibian Constitution. The applicant avers that the process of allotment followed by the Minister was not fair, transparent and reasonable as required by Article 18 of the Namibian Constitution. The applicant further contends that the Minister did not consider the applicant's right to a fair administration process and legitimate expectation and ignored the recommendations of the Commission. The Minister also failed to take into account the fact that the applicant utilized his personal resources to assist resettlement beneficiaries of a certain resettlement farm on behalf of the Republic of Namibia, states the applicant. He

furthermore avers that in the process of allotting Farm Karaam the Minister did not treat all the applicants equally as required under Article 10 of the Namibian Constitution.

[24] The applicant furthermore basis his application on the fact that the Minister failed or refused or both failed and refused to provide reasons for allotting Farm Karaam to the third respondent instead of allotting it to the applicant, who achieved a higher score than that achieved by the third respondent in the evaluation done by the Regional Committee.

[25] As I have indicated in the introductory part of this judgment, the Minister opposes the application. He opposes it on the ground that his decision to allot Farm Karaam to the third respondent was done after consultation with the Commission and in line with the Act, and in accordance with Articles 10 and 18 of the Namibian Constitution in that it was fair, reasonable and transparent, he expanded by stating that his decision to allot Farm Karaam was made after considering all the applicant's application documents for the allotment of Farm Karaam, including the recommendations of the Regional Committee and that of the Commission.

[26] The Minister further added that he consulted with the Commission prior to allotting the farming unit to the third respondent and this decision was made having regard to each of the 160 (One hundred and sixty) applicants' circumstances, more specifically their gender, social standing, their hardship in maintaining their families and other special considerations. He contends that the applicant did not qualify to meet the special considerations applied to the other applicants, as one of the prominent criteria applied on the 160 (One hundred and sixty) applicants was, gender balance and the objectives of the Ministry of Lands and Resettlement to install gender balance in the Hardap Region. He also added that the applicant's agreement with Messrs Chiweta and Jarson to drill a borehole and install water pumps on Farm Bernafay was rejected and was not considered by him during the deliberations to allot Farm Karaam.

[27] The Minister furthermore admits that he did not provide the applicant with reasons for his decision to allot Farm Karaam to the third respondent but contends that the failure to provide reasons for his decision cannot be a basis to review and set aside his decision, the applicant should rather have approached the Court and sought an order to compel him to provide reasons for his decision. The Minister furthermore contends that the recommendations by the Commission to consider the applicant as one

of the persons to be considered for allotment of Farm Karaam are not binding on him.

[28] Having set out the background of this matter and the grounds on which the application and the opposition to the application is based I will now proceed to consider whether the applicant's right to a fair administration process was infringed.

Did the Minister contravene Article 18 when he allotted Farm Karaam?

[29] It is now axiomatic that the Republic of Namibia is a Constitutional State and in a Constitutional State the principle of legality reigns supreme. What this means is that all State institutions and public officials (there is no denial that the Minister is a public official) may act only in accordance with powers conferred on them by law.<sup>5</sup> This brings me to the main thrust of the attack on the decision by the Minister, namely that; the decision to allot Farm Karaam to the third respondent which is that, the process leading to the decision to allot Farm Karaam to third respondent was done in an unfair and unreasonable manner and in disregard of Articles 10 and 18 of the Namibian Constitution.

[30] The Supreme Court, in the matter of *Rally for Democracy and Progress and Others*<sup>6</sup> stated that the doctrine of legality demands that the exercise of any public power must be authorised by law, either by the Constitution itself or by any other law recognized by or made under the Constitution. The exercise of public power is only legitimate where lawful, said the Supreme Court. The Minister allots farming units in terms of the powers vested in him by the Act. Section 41 of that Act, amongst other matters reads as follows:

'41 Applications for allotment and consideration of applications

(1) Every application for the allotment of a farming unit offered for allotment under this Part shall be made in writing to the Minister in the manner stated in the relevant notice of offer.

(2) ....

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<sup>5</sup> *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC).

<sup>6</sup> *Ibid.*

(3) Every application for the allotment of a farming unit in terms of subsection (1) shall, as soon as possible after the expiration of the closing date specified in the relevant notice of offer, be referred to the Commission, *which shall make recommendations to the Minister thereon*, and if there be more than one application for the same farming unit, *recommend to which applicant the farming unit should be allotted* or, in the case of several farming units, which farming unit or choice of different farming units should be offered to the applicant.

(4) The Commission may, and shall if the Minister so directs, require any applicant for a farming unit to appear before it or any of its members to enable the Commission to obtain more information about the applicant and the applicant's ability to develop and work the farming unit beneficially and carry out and observe the conditions subject to which the allotment is to be made.

(5) The Commission shall not be obliged to recommend any applicant to the Minister.

(6) In the consideration of any application for the allotment of any farming unit regard shall be had to-

- (a) the qualifications of the applicant as set out in the applicant's application or as determined by virtue of the provisions of subsection (4);
- (b) the financial means of, or available to, the applicant or applicants for the use, maintenance and development of the farming unit; and
- (c) any other factors which are relevant to the application.'

[31] It is clear that the Minister's powers to allot a farming unit is dependent on the recommendation of the Commission, in other words, such a recommendation is a jurisdictional fact (I will later on in this judgment expand on what jurisdictional facts are). The Commission's recommendation has to be in accordance with s 41(6) i.e. it must be a lawful administrative action as provided for by Article 18 of the Namibian Constitution – since the Commission has no power beyond that given to it by s 41. It follows from the principle of legality that the Minister cannot accept a recommendation nor make an allotment of a farming unit that does not fall squarely within or comply with the section (i.e. s 41).

[32] Section 41(6) further set out the criteria against which an application for the allotment of a farming unit must be evaluated namely; the applicant's qualifications, the financial means of, or available to, the applicant or applicants for the use, maintenance and development of the farming unit; and any other factors which are relevant to the application. From the record of proceedings I gathered that the Regional Resettlement Committees considered the following factors, age range, gender, full time communal farmer, agricultural experience, literacy, number of livestock and generational worker.

[33] Before the Minister is entitled to exercise his power (as conferred upon him by s 41(3) of the Act) to allot a farming unit he must be satisfied that one or more of the conditions set forth in section 41(3) and (6) obtain, and that the procedural step prescribed in s 41(2) & (3) have been executed. It thus follow that one of the possible grounds upon which the exercise of the power granted by s 41(3) may be assailed in a Court of law is the absence of one or more of the conditions listed in ss (3) of s 41.

[34] The content of this kind of condition (i.e. the condition listed in s 41(3) of the Act) is often referred to as a '*jurisdictional fact*'<sup>7</sup>; in the sense that it is a fact, the existence of which is contemplated by the Legislature as a necessary pre-requisite for the Minister to exercise the statutory power conferred upon him. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid.<sup>8</sup>

[35] Corbett J<sup>9</sup> argued that upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power.

[36] The learned judge continued and said that on the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository

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<sup>7</sup> See *Minister of the Interior v Bechler and Others*, 1948 (3) SA 409 (AD) at p. 442.

<sup>8</sup> See *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C).

<sup>9</sup> *Supra*.

of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. The judge continued to say:

'In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter.'

[37] In the present matter, the jurisdictional facts set out in s 41(3) consists of facts that must exist before the Minister may exercise the power conferred on him by the s 41(3) and the existence or non-existence of the fact is objectively determinable. In the present matter, it is common cause that both the Regional Committee and the Commission did not recommend the allotment of Farm Karaam to the third respondent. It means that the jurisdictional fact required to allot Farm Karaam to the third respondent did not obtain. It thus follows that the power conferred by s 41(3) of the Act on the Minister could not be exercised in favour of the third respondent and any purported exercise of the power is invalid. The allotment of Farm Karaam to the third respondent was therefore not in compliance with Article 18 of the Namibian Constitution because it did not comply with the requirements (namely that the Commission must recommend the allotment of Farm Karaam to the third applicant) of the Act.

[38] Having arrived at the conclusion that the allotment of Farm Karaam to the third respondent was not in compliance with Article 18 of the Namibian Constitution, I find it opportune to make one or two comments in passing. First the plaintiff's claim that he has expended his own resources to rehabilitate the borehole on Farm Bernafay pursuant to an agreement with Messrs Chiweta and Jarson is not a fact which the Minister may in terms of s 41 take into consideration when considering to allot a farming unit. It is irrelevant and the Minister correctly disregarded it. The second comment is that I agree with the Minister that the powers granted to him by s 41 empowers him to accept or reject a recommendation by the Commission but the *caveat* or rider to the exercise of the power to accept or reject a recommendation is that the ultimate decision must strictly comply with the requirements of the statutory provisions in terms of which the power is exercised.

### The appropriate remedy

[39] It is unfortunately not the end of the matter. Mr Phatela who appeared for the applicant argued that in the ordinary course of events, this honourable Court would simply set aside the decision of the Minister and remit the matter for reconsideration, either generally or on the terms and directions determined by the Court. However, this is no ordinary case, argued Mr Phatela, there are special circumstances to justify departure from that rule, those special circumstances commend the grant of a substitution order. He, in his heads of arguments said:

'117 The first respondent [the Minister] has, with respect, manifested an unbridled determination not to allot the farm to the applicant he has gone to great lengths to diminish the application by stating that in any event the applicant is not entitled to be allotted the farm. He has already demonstrated a settled an inflexible attitude towards the merits of the applicant's application for the allotment of the farm. The first respondent has not approached the Honourable Court with an open mind that should the court refer the matter for reconsideration, he would apply his mind in a proper manner and perform his functions as directed by the Honourable Court.

118. There is no reason to suppose that the applicant would be afforded a fair opportunity should the matter be remitted to the first respondent for reconsideration. On this ground, this honourable Court would be entitled to take over the power of the first respondent and make the award itself.

119. A further important factor is that it is in the interest of finality that the decision to allot the farm must be made without further delay.'

[40] There is a general rule that when setting aside a decision of an administrative authority, a review court will not substitute its own decision for that of the functionary, unless exceptional circumstances exist.<sup>10</sup> This general rule was articulated as follows in the matter of *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board, and Others*:<sup>11</sup>

<sup>10</sup> *South African Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 (W) at 390B.

<sup>11</sup> 2001 (12) BCLR 1239 (C).



'The purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested in the Legislature, the executive authority in the Executive and the judicial authority in the Courts.'

[41] In the case of *Johannesburg City Council v Administrator, Transvaal, and Another*<sup>12</sup> the Court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts will depart from the ordinary course in these circumstances:

'(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.

(ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again..'

[42] The South African Supreme Court of Appeal in the matter of *Gauteng Gambling Board v Silver Star Development Limited and Others*<sup>13</sup> seems to have added another consideration, namely whether the court was in as good a position as the administrator to make the decision. For this, it noted that the administrator is '*best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision.*'<sup>14</sup>.

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrative body

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<sup>12</sup> 1969 (2) SA 72 (T).

<sup>13</sup> 2005 (4) SA 67.

<sup>14</sup> *Ibid* at para 29.

or official. The approach must be informed not only by the deference courts have to afford an administrative body or official but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator. Professor Hoexter<sup>15</sup> explains judicial deference as:

'a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

[44] The Constitutional Court of South Africa in the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*<sup>16</sup> explain that:

'... the use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'

[45] On a plain interpretation of the authorities that I have cited in the foregoing paragraphs the factors that may establish the existence of exceptional circumstances are; (i) foregone conclusion (ii) bias or incompetence (iii) is the court in a better position to exercise the power itself and (iv) the extent to which the exercise by the court of the power will infringe the doctrine of separation of powers.

[46] The question to be answered, therefore, is whether exceptional circumstances exists for the court to depart from the general rule. In the present case no imputations of bad faith or bias are made against the Minister. It is only in the heads of arguments that Mr Phatela refers to the stance taken by the Minister in these proceedings, he refers to it as an 'unbridled determination not to allot the farm to the applicant'. This in my view is

<sup>15</sup> C Hoexter: 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 at 501 - 2.

<sup>16</sup> 2004 (4) SA 490 (CC) at para [48].

more a mode of expression than a serious allegation of bad faith. No direct charge of bad faith or bias is elaborated upon anywhere on the papers nor was it done in argument. The whole file of correspondence was disclosed and, it contains nothing which in any way savours of bad faith or bias. In the circumstances I am of the view that it would be wrong for the Court to decide the issue itself.

[47] With that said, all that is left to be determined is the order that I must make. It is a well-established principle of our law that, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.<sup>17</sup> The court in the *Oudekraal matter*<sup>18</sup> said:

'No doubt a court that might be called upon to exercise its discretion will take account of the long period that has elapsed since the approval was granted, but the lapse of time in itself will not necessarily be decisive: Much will depend upon a balancing of all the relevant circumstances, including the need for finality, but also the consequences for the public at large, and, indeed for future generations, of allowing the invalid decision to stand. In weighing the question whether the lapse of time should preclude a court from setting aside the invalid administrative act in question an important - perhaps even decisive - consideration is the extent to which the appellant or third parties might have acted in reliance upon it.

[48] In the matter of *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*<sup>19</sup> the South African Supreme Court of Appeal opined that, any order, that a court may grant when an administrative decision is reviewed, must be just and equitable. The guideline to grant an order that is just and equitable said the Court:

'...involves striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only.'

[49] With those principles in mind I now turn to the facts of the present matter. The decision to allot Farm Karaam to the third respondent was made public on 16 December 2016. During March 2017 the applicant instituted review proceedings. It thus follow that the applicant did not delay to institute review proceedings. On the material that is before

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<sup>17</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36.

<sup>18</sup> 2008 (2) SA 481 (SCA) at para [22].

<sup>19</sup> 2008 (2) SA 481 (SCA).

me it is by no means clear that the third respondent has acted in reliance of the allotment of Farm Karaam to her. I am therefore unable to balance the interest of the applicant against that of the third respondent.

[50] Finally regarding the question of costs. The applicant has substantially succeeded in its application. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general a rule. I am further more satisfied that the complexity of this matter justifies the employment of two instructed counsel.

[51] For the reasons that I have set out in this judgment I make the following order:

1. The decision of the first respondent (the Minister) to allot Portion 1 of Portion A of Farm Karaam No. 152, Single Unit, Hardap Region to the third respondent, in terms of the Agricultural (Commercial) Land Reform Act, 1995, published on 9 December 2016, is hereby reviewed and set aside.
2. The matter is referred back to the first respondent (the Minister) for him to, in accordance with the law deal with the application for the allotment of Portion 1 of Portion A of Farm Karaam, Single Unit, Hardap Region.
3. The first respondent must pay the applicant's costs of this application such costs to include the costs of one instructing and one instructed counsel.
4. The matter is regarded as finalized and is removed from the roll.

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SFI Ueitele  
Judge

## APPEARANCES:

## APPLICANT:

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Instructed by AngulaCo Legal Practitioners, Windhoek.

## RESPONDENT

L Tibinyane

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