

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2017/00136

In the matter between:

LUXURY INVESTMENTS NO. 6 (PTY) LTD

FIRST APPLICANT

AQUARIUS INVESTMENTS 150 CC

SECOND APPLICANT

and

**MINISTER OF WORKS, TRANSPORT AND
COMMUNICATION**

FIRST RESPONDENT

THE ROADS AUTHORITY

SECOND RESPONDENT

HANS KAMUHANGA

THIRD RESPONDENT

VICTORIA KONGORE

FOURTH RESPONDENT

THEODOR !GAEB

FIFTH RESPONDENT

ERNA BEUKES

SIXTH RESPONDENT

CHRISTINA BEUKES

SEVENTH RESPONDENT

VINUEL BEUKES

EIGHTH RESPONDENT

LIZOLETTE BEUKES

NINTH RESPONDENT

MARIA BEUKES

TENTH RESPONDENT

GOTFRIED BEUKES

ELEVENTH RESPONDENT

BERNARD BEUKES

TWELFTH RESPONDENT

Neutral Citation: *Luxury Investments No6 (Pty)Ltd v Minister of Works Transport and Communications* HC-MD-CIV-MOT-REV-2017/00136 [2020] NAHCMD 153 (7 May 2010)

MASUKU J:

Heard: 29 November 2019

Delivered: 7 May 2020

Flynote: Civil procedure – application to strike out – when granted - Administrative Law – the right to be heard before an adverse decision is made and the right to object before an adverse decision is made – duty to give reasons – whether decisions underlying a main decision always need to be attacked – duty on Ministers and other public officials to respond to enquiries by members of the public - Legislation – Roads Ordinance (Ordinance 17 of 1972) – whether person affected by application for proclamation of a public road has a right to direct notice or notice in the Gazette and newspaper suffices.

Summary: The applicants are owners of certain farms within the Municipality of Windhoek. The respondents, who own a neighbouring farm applied to the Minister in terms of the Roads Ordinance, to be allowed to traverse the applicants' farms. No notice was given to the applicants of the respondents' application. The Minister adopted the position that since the notice of the application for a proclamation was published in the Government Gazette and a newspaper circulating in Namibia, that was sufficient, and constituted substantial compliance with the provisions of s 16 of the Ordinance.

Held: the provisions of s 16 of the Ordinance require direct service on an owner, occupier or lessee of a farm, together with publication of the notice in the Government Gazette and newspaper. Failure to give direct notice as envisaged if the address of the person is known, is fatal.

Held that: in the present circumstances, the applicants' addresses were not unknown to the Ministry and that the applicants were entitled to direct notice and that the other forms of notice prescribed on their own, do not suffice and do not amount to substantial compliance with the Ordinance.

Held: that persons who require information from public officials, are entitled to a response and timeously so. The failure to respond, is frowned upon by the court because in many cases, it leads to people approaching the court for redress when that may not have been necessary in some cases.

Held that: the Minister cannot rely on the point of delay in launching the proceedings, in the circumstances when the said delay was precipitated by his failure to give direct notice of the application for proclamation to the applicants.

Held further that: some allegations in the Minister's affidavit were not supported by the persons with knowledge of same and thus amounted to inadmissible hearsay. To that extent, the offensive paragraphs or portions thereof are liable to be struck out.

Held further that: it is not every procedural decision, which ultimately results in the main decision that should be challenged on review. The test for the decision liable to challenge, is whether the said decision, 'has a direct external legal effect' on the subject.

Held: that the procedural decisions made by other bodies in the instant case, did not have a direct external legal effect on the applicants' rights and need not, for that reason, have been challenged on review.

Held that: the failure to cite the chairperson of the Second Respondent, in view of the outcome and the other issues discussed, paled into significance.

The application for review of the Minister's decision, was thus granted with costs.

ORDER

1. The decision of the Minister of Works, Transport and Communications, to proclaim Farm Road 1252, District of Windhoek contained in Government Gazette No. 46 of 2014, published in Gazette No. 5349, dated 1 April 2014, is hereby reviewed and set aside.
2. The First and Second Respondents are hereby ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Presently serving before court is an application for review. Two entities, namely Luxury Investments No. 6 (Pty) Ltd and Aquarius Investments CC, approached this court seeking the review and setting aside of what is referred to as the proclamation issued by the Minister of Works, Transport and Communications, in respect of Farm Road No.46, District of Windhoek. This proclamation was published in Government Gazette No. 46 of 2014 *vide* Gazette No. 5439 dated 1 April 2014.

[2] The application is opposed by the Minister and the Roads Authority on grounds that shall be traversed as the judgment unfolds.

[3] There are essentially three principal active parties in this matter, namely, Luxury and Aquarius and the Minister cited above. For ease of reference, I shall refer to the applicant entities as 'the applicants' and to the Minister as such. Where it becomes necessary to refer to any other party, the appellation used in the citation will be employed in this judgment.

[4] I should mention, for the sake of completeness, that the 3rd respondent is Mr. Hans Kamuhanga an adult male Namibian, whose particulars are to the applicants unknown but who resides at Farm Kranzneus 219, in the Municipal Area of Windhoek. Mr. Kamuhanga did not oppose the application nor file any papers in opposition. He simply did not feature at the hearing of the matter. The inference to be drawn in this regard, is that he will abide by the judgment.

[5] In the course of time, the applicants applied for an amendment of their notice of motion. This application was not opposed and accordingly, this is the order that will be granted if the court does find for the applicants at the end of the matter.

[6] In the new notice of motion, dated 11 August 2017, the applicants applied for the following order:

'1. Reviewing and setting aside the proclamation by the First Respondent of Farm Road 1251, District of Windhoek, in Government Gazette Notice No. 46 of 2014, published in Government Gazette No. 5439 of 1 April 2014.

2. That the First and Second Respondents, and any other respondent opposing this application be ordered to pay the costs, jointly and severally, the one to pay and the other to be absolved, the costs to include the costs of instructing and instructed counsel.'

Background

[7] The applicants' application is predicated on a founding affidavit deposed to by Mr. Jesko Woerman, who describes himself as a businessman, C/O Woerman Brock & Co, (Windhoek (Pty) Ltd. The address is described as

165 Paul van Harte, Khomasdal, Windhoek. His affidavit is confirmed, in material terms by Mr. Jaco Stephanus Strydom, who is a member of Aquarius.

[8] According to the applicants, three farms are relevant to this matter and they are situated to the East of the B1 Highway, South of Windhoek and they fall within the Municipal area of Windhoek. Farm Kranzneus is the most northerly of the three farms. Portion 2 of the Farm Verdruk 268, is the property of Aquarius and it borders the farm Kranzneus to the South. The 1st applicant's property on the other hand, borders on portion 2 of the farm Verdruk, to the South.

[9] Mr. Woerman deposes that the 1st applicant became of the owner of Portion 1 of farm Verdruk 268 in the beginning of the year 2010. He deposes further that early in the same year, 2010, four people approached him, namely, the 3rd respondent, a Mr. Manuel Beukes, Mr. Manuel Pieters and Ms. Victoria Konjore. Their main mission was to request from Mr. Woerman access over portion 1 of farm Verdruk 268 to enable them to traverse across the Eastern Portion of Farm Kranzneus 219. The route if agreed, would be across portion 1 in a north, north-easterly direction.

[10] It is Mr. Woerman's case that he informed the party that in the recent past, the 1st applicant had lost property on the farm to the value of N\$ 250 000, which had been pilfered by unknown persons. For that reason, he informed the party that he would not allow unbridled access to the farm by the party. He further pointed out that the southern part of the property, was bordered by communal land, which could render it difficult to apportion blame should any of the 1st applicant's property go from the farm.

[11] Mr. Woerman further pointed out in his affidavit that the owners of Kranzneus do not need to traverse the applicant's property to engress theirs. This is because, he alleges, there is a proclaimed road, which does not run over portion 1 of Verdruk. The road, he further claims, could run in a northern direction to Kranzneus.

[12] He deposes further that the 3rd respondent and thirteen others who claimed to be co-owners of Kranzneus filed an application with this court under Case No. A 2181/2011, which the applicant opposed. The application was dismissed by this court. This application was to allow the said persons to traverse portion 1 of Verdruk from a westerly to easterly direction along the length of the farm.

[13] After the dismissal of the application, he further deposes, the Minister intervened and sought to broker an agreement amongst the parties. This culminated in a number of meetings *inter partes*. The first of such meetings, he deposes further, was on 9 August 2012, in which the Minister and his deputy were present and the parties were allowed to state their respective positions regarding the matter of access. The meeting did not, however, resolve the impasse.

[14] The meeting was followed up by another one on 24 September 2012, also called by the Minister. He states that after certain discussions, he agreed that the owners of Kranzneus could access portion 1 of Verdruk on certain conditions, namely, that (a) access would be preceded by a prior request; (b) no other persons would use the road and (c) that such people accessing the property, had to stick to the road and do no damage to the property in the process. His proposal to exchange parts of the property to obviate the access was not accepted, he further stated.

[15] The following day, 25 September 2012, Mr. Woerman wrote a letter to the Deputy Minister stating that Mr. Strydom of the 2nd applicant had not been part of the meeting and that his position is that he will not agree to any condition unless he is consulted in the entire process. Mr. Woerman also asked the Deputy Minister to provide a list of the persons who would be eligible to access the 1st applicant's farm. Lastly, he also requested a guarantee that only the people on the list would be allowed access and use of the road, without any shortcuts or traffic over the fence. He also required an assurance that the applicants' property would not be damaged in the process.

Last, but by no means least, he requested the Minister to facilitate talks about the exchange of parts of the properties involved. There was no response to this letter by the Minister or his lawful Deputy.

[16] In the due course of time, as a result of the successful opposition to the application referred to above, the applicants in that matter did not pay the applicant's costs. This resulted in Farm Kranzneus being attached for sale in execution as no movable property could be found on the farm. Before the sale, it is Mr. Woerman's case that he was summoned by the Minister of Lands and Resettlement.

[17] At this meeting, the said Minister was aggressive towards him and asked for an explanation for the sale in execution, which Mr. Woerman gave to the Minister, who eventually accepted same. The outstanding costs were paid not long after that meeting. The burning issue of access was not raised nor discussed in that meeting.

[18] Mr. Woerman deposes further that some time later, around October 2016, a gentleman by the surname Beukes sought to access the applicant's property after dusk and the former's foreman, on his instructions, refused access and explained that the access was being sought in this instance, contrary to terms of the agreement. There had been no prior notice or arrangements made for the access in that instance.

[19] On 13 October 2016, a Mr. Steenkamp of the 2nd respondent, the Roads Authority, together with members of the Namibian Police stationed at Aub Police Station attended on the 1st applicant's farm and demanded that the gate remains unlocked permanently. This was refused by Mr. Esterhuizen, the 1st applicant's supervisor on Mr. Woerman's instructions.

[20] A week later, a letter was dispatched to the 1st applicant from the 2nd respondent. The letter stated *inter alia* that the 1st applicant had illegally closed its farm and thus prevented other landowners from accessing their property. The letter further stated that the said farm road 1251 is a proclaimed

road and may not therefor by legislation, be closed or barred unless in accordance with the stipulations in law. The 1st applicant was called upon to open the gate across proclaimed Farm Road 1251 within 21 days from the date of the letter, failing which the 2nd respondent would act in accordance with the legislation quoted, namely, the Roads Ordinance (Ordinance 17 of 1972).

[21] Investigations ensued at the instance of the 1st applicant to determine what had happened regarding this matter. This unearthed the fact that an application, dated 10 October 2012 by the 3rd respondent, for the proclamation of farm road 1251 which application, was granted. The application alleged that that was the only route by which he could pass.

[22] It is the applicants' case that they were unaware of this application and that the only communication they were aware of was a letter sent via email to Mr. Woerman dated 23 July 2013 and which he received on 30 September 2013. In response to that letter, the 1st applicant wrote a letter stating their disagreement with the application, as the road was a private one and that the applicant has experienced problems in the past with the use of road by the public. Next, he learned that the letter dated 17 October 2016 had been issued proclaiming the road as a public road.

[23] It is the applicants' case that both of them never, at any stage, received notice of the application by the 3rd respondent to enable them to object to the said application before the proclamation was made. It is further contended by the applicants that upon receipt of the letter dated 23 July 2013 in September 2013, as stated earlier, they could not, by then properly exercise their rights, which had been stated were to be exercised within thirty days from publication of the notice.

[24] Lastly, the applicants state that having regard to the schedule, which accompanied the letter received, it is not clear what route the road will follow. Enquiries in this regard yielded no fruit, as the 1st applicant was not granted

access to the relevant maps, notwithstanding requests for access thereto. As indicated, the 2nd applicant confirms the allegations made by the 1st applicant.

[25] Another development took place before the answering affidavit could be filed. The applicants filed an application for the joinder of further respondents to the application. The said application was granted on 12 April 2018. These new respondents are cited as the 4th to the 12th respondents, and are alleged to have an interest in the order sought from the court. It appears that the application was not opposed by them as there are no papers filed at all.

The Minister's position

[26] In opposing the application, the Minister took the point, first of all, that the applicants unreasonably delayed in launching this application for review. Furthermore, charged the Minister, the applicants failed to proffer a reasonable explanation for the delay. The matter, continued the Minister, was worsened by the fact that the applicants did not object to the application for the proclamation, which resulted in the decision now sought to be set aside on review.

[27] Secondly, the Minister took the point of law, *in limine*, to the effect that the relief sought by the applicants is bad in law for the reason that the proclamation by the Minister, does not stand on its own. It is premised on underlying decisions, recommendations and other statutory and administrative decisions, which were made by the 2nd respondent. Setting aside the Minister's decision, without attacking the validity of the underlying decisions, is academic. The Minister accordingly applied for the application to be dismissed on these points of law.

[28] On the merits, the Minister stated that the applicants did not cite the Chairperson of the 2nd respondent, which is a fatal defect. This is because the Chairperson is the repository of power with regard to procedural and other statutory steps prior to the recommendations made to the Minister in respect of the proclamation of a road in terms of the Ordinance.

[29] Regarding the letter calling upon the applicants to open the gate to the road in question, the Minister states that it is the duty of the Roads Authority to deal with roads that have been unlawfully closed. He also points out that there is a distinction between the Roads Authority and the Roads Board. It is the Minister's stance that the Roads Board was the entity involved in the consideration of the application for a proclamation of the road in question. It was his view that there was nothing untoward in the Roads Authority enforcing the terms of the Ordinance.

[30] Regarding the alleged lack of notice by the applicants, the Minister takes the view that the notice was published in the Government Gazette and newspapers and that, in terms of the law, constitutes good and sufficient notice. The Minister proceeds to say that in any event, the 1st applicant was notified of the issue on 23 July 2013, as reflected in the review record.

[31] The Minister denied that the applicants did not receive the notice. He calls those allegations not only false, but also strange. It is the Minister's case that if the 1st applicant did not receive the notice in question, publication in the Gazette and newspapers is sufficient and amounts to substantial compliance in terms of the law. He also denies that the 2nd applicant was entitled to personal notice, persisting in his contention that in any event, the publication in the Gazette and newspapers sufficed.

Issues for determination

[32] It would appear that the adjudication of this matter revolves around the following questions of law, or those of them that will have to be answered. The said questions are:

- (a) did the applicants unreasonably delay in launching this application; if so, is a case made for the court to condone same?
- (b) the effect of the failure to attack the underlying decisions made by the Roads Board on the present application for review;

- (c) the failure to cite the Chairperson of the 2nd respondent; and
- (d) whether the notice issued in the Government Gazette and newspapers suffices, to the exclusion of personal service on the owners of the property affected by the proclamation.

[33] I have thought long and hard about the above questions and it appears to me that some of the questions posed above are mutually destructive of each other. For that reason, it may be necessary to deal with those questions first and then proceed to deal with the others in their turn, depending on the effect the finding on the first ones has on the entire application.

[34] It appears to me, following what is stated in the immediately preceding paragraph that the questions in para (a) and (d) above, are mutually destructive. For that reason, it appears to me that they have to be dealt with together. If the conclusion is that the applicants were entitled, all said and done, to personal service and that notice in the Government Gazette and the newspapers did not suffice in the circumstances, then it follows, as night follows day, that the applicants cannot be held to have delayed inordinately in launching the application for review as they did.

Was notice in the Government Gazette and newspapers of the application for the proclamation of the road as a public road sufficient?

[35] It will be recalled that the parties in this matter, adopt two diametrically opposed legal positions. The applicants allege that they were not aware of the application for the proclamation until such time that the email was received and this, it would seem, was after the fact. The time for noting an objection had passed.

[36] The applicants accordingly argue that by the time they received the notice regarding the proclamation of the road, via, email, which is when the proverbial stables were locked, the horses had already bolted. The Minister, for his part, alleges that the notice issued in the Government Gazette and the newspapers, was sufficient. He argues, in any event, that such notice

amounted to substantial compliance, thus obviating the need for personal service on the applicants, which is their chief complaint.

[37] It would appear that central to the determination, in this regard, are the provisions of s 16(4) of the Ordinance. The provision records:

‘The chairperson shall further make known the application by forwarding a copy of the notice referred to in subsection 3 to the owner, lessee or occupier of the each farm which is or will be crossed by the road to which such application refers and whose address is known to him and, if such road terminates on the boundary of ant farm, to the owner, lessee or occupier of the farm immediately adjacent to such road, and whose address is known to him.’

[38] At para 8 of his answering affidavit, the Minister stated that the applicants had received the relevant notice because it was published both in the Government Gazette and in the media, on or about 15 August 2013. He proceeds to state the following:

‘This was to allow all interested parties to lodge objections if they so desired. As is usually the case, this is sufficient, reasonable and fair opportunity to any affected party, including the Applicants. They do not have to invariably receive personal and/or direct notice. Notice by publication in the Government Gazette and the media is sufficient or at least substantially compliant.’¹

[39] The question is whether the Minister is correct in this assertion. To answer this question, it is important to mention that a Minister’s views or submissions in this regard, carry trifling, if any weight, when the statute speaks for itself. Does the current one speak for itself?

[40] I am of the considered view that the provision in question, is very explicit in its terms. It requires the owner, lessee or occupier to be apprised of the application by forwarding the application for the proclamation to his or her, and to its known address, if it is a legal person. I am of the considered view that there can be no clearer intention by the legislature of requiring direct

¹ Para 8 of the Minister’s answering affidavit.

notice to be given to the person whose rights and interests are likely to be affected or prejudiced by the granting of the application for proclamation.

[41] In the instant case, I am of the considered view that the applicants required and were entitled, in terms of the prejudice they stood to suffer if the application was granted, to direct notice. There is no allegation by the Minister nor any official involved that they did not know or have the address of any of the applicants. If they did not know the address, they would have sought other means to ascertain their addresses. This would not have been a Herculean exercise, considering that the applicants and the Minister had previously engaged in serious discussions geared to resolve this very impasse.

[42] In the premises, it would sit ill in the mouth of the Minister, to claim that he did not know the applicants' addresses and that being the reason why they were not directly notified. Fortunately, the Minister does not adopt that narrative and properly so, if I may add.

[43] I do not agree with the Minister's position that direct notice was not required. This interpretation finds no iota of support from the legislative language employed. There are sound public policy considerations that require the owner, occupier or lessee of property to be given notice of the application for the proclamation. This is because their rights and enjoyment of the property, is likely to be affected by any such proclamation. It is clear that allowing a road to traverse one's property, is likely to result in the diminution of that person's property rights. It is for that reason that the legislature required direct notice.

[44] Whilst on this issue, it is important, in my considered view, to observe that it is not only owners who are entitled to the direct notice. Occupiers and lessees, whose rights are far less than those of the owners, are nonetheless recognised as worthy of protection by requiring that they also receive direct notice. That being the case, it stands to reason that the position of parties in the shoes of the applicants, who are owners of the properties that stand to be affected by the proclamation, have an even higher right than occupiers and

lessees. This is because they would feel the diminution of their property rights more directly and more permanently, than an occupier or lessees, who would, all things being equal, be expected to occupy the property for a stipulated period of time.

[45] In the circumstances, I am of the considered view that the question of substantial compliance does not assist the Minister in view of the considerations above, particularly that the persons in occupation require direct notice. The legislation, in my considered view, is very fair in its requirements. It encapsulates the rules of natural justice, which require that a person, whose rights and interests are likely to be prejudicially affected by a decision, is entitled to notice thereof. More importantly, that person should be afforded a reasonable opportunity to lodge an objection to the proposed action contemplated or application filed.

[46] Mr. Barnard, for the applicants, in this regard, referred the court to *Gavric v Refugee Status Determination Officer, Cape Town and Others*.² Theron J stated the applicable law to a fair hearing as follows:

[79] It is nevertheless necessary to state that a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the maxim *audi alteram partem* (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.

[80] In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way. In *Foulds*, Streicher J held that a decision maker was under an obligation to disclose adverse information and adverse policy considerations, and give an affected person an opportunity to respond thereto. If an administrator is minded to reject the

² (CT 217/16) [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) 28 September 2018), para 80 -81.

explanations of an interested party, she should at least inform the party why she is so minded, and afford that party the opportunity to overcome her doubts.'

[47] I am of the considered view that the sentiments expressed by the learned Judge and her views on the requirements of administrative justice, echo and resonate most profoundly with the law in this jurisdiction, as well. I accordingly incorporate them as useful nuggets in the instant case.

[48] If the legislature had been of the considered opinion, in its wisdom, that the notice required to be placed in the Government Gazette and the local newspaper was sufficient, it would not have taken the trouble to include the requirement of personal notice at the known address of the person concerned.

[49] It is a fact of life that many people, including those in business, do not habitually buy the Government Gazette out of curiosity and an expectation that their personal property or interests therein may be in jeopardy. By saying so, I do not, however, by any stretch of imagination, demean the instances where the legislature states in peremptory terms that notice in the Government Gazette is, without more, good, sufficient and proper service. This is not one of those cases.

[50] The same may well apply to newspapers, where people ordinarily buy the newspapers to read the main news on the events of the day or time. Very few people would be expected, where there is no particular reason, to comb through the advertisements for possible notices that may impinge on their rights to property or interests therein. The fact that the lawgiver required direct notice to owners, lessees and occupiers, is an *inducium* that reliance only on publication in the Government Gazette and the newspaper, does not suffice. The argument of substantial compliance, should not, in the circumstances, avail the applicant, particularly in the face of the language used by the lawgiver.

[51] The applicants' case that the first and only notice they received, was after that fact and hence illusory is poignant. That notwithstanding, they, as

soon as reasonably practicable, filed the notice of objection. This renders it clear that the question of delay raised by the Minister cannot avail him. The delay would have to be computed from the day on which the applicants received notice and therefor, had a duty to act. To capitulate to the Minister's untenable position, would allow him to benefit from his own wrong. This is so because the Minister failed to afford the applicants proper and legal notice, and in a *volte face*, conveniently turns around and claims that the applicants are guilty of an egregious delay, when they reacted immediately to the late notice they received.

[52] In view of the foregoing considerations, I am of the considered view that the proper finding to return, is that the Minister failed to comply with the mandatory provisions of s 16(3) by not affording the applicants direct notice of the application by the 3rd respondent. To this extent, the Minister is on the wrong side of the law and the applicants would, subject to the consideration of the other issues, entitled to the application for review as prayed.

[53] Mr. Barnard, counsel for the applicants, made reference to other provisions of the Ordinance, including ss 16(7) and 22(1) thereof. In the light of the conclusion reached above, which is in my view quite unmistakable in the circumstances, it is unnecessary consider the effect of these provisions on the matter. No mention of them, nor their consideration, shall be undertaken in the premises in this judgment. *Cadit quaestio*.

No reasons proffered for the decision

[54] Another basis upon which the applicants seek the decision of the Minister to be set aside, is that no reasons for the Minister's impugned decision, were furnished. This is so, it must be stated, notwithstanding that the applicants requested to be furnished with reasons, amongst other issues. In this regard, the applicants caused a letter to be written to the Minister, dated 11 November 2016. No such reasons were furnished.

[55] The failure or refusal by some Ministers, to respond to enquiries genuinely made by members of the public and on official issues, is a bane

that causes the courts much consternation. Not long ago, Sibeya AJ, in *Mouse Properties 98 CC v Minister of Urban and Rural Development*³ was impelled to comment adversely on this very vice, as follows:

‘When the Minister is confronted in this application with all the above unanswered letters addressed to his office by the applicant, he responded that a letter of courtesy to reply and acknowledge the applicant’s letters should have been done . . . The response of the Minister is very shallow, lacks detail for not responding to damning letters and can therefore not be condoned. It is disheartening to even imagine that a public officer entrusted with public power at such an elevated level would ignore letters calling upon him or her to take a decision, more so where there are allegations that the delay in making a decision prejudice (*sic*) another party.’

[56] It is hoped that with this issue highlighted once again, Government Ministries will, henceforth take this dissatisfaction seriously. This is because a lot of decisions and subsequent actions may, to a large extent, depend on the response, and I may add, timeous response, returned by the Minister. Where this is not done at all, or belatedly, it may cause unnecessary panic buttons to ring, in many cases, impelling the unanswered and frustrated members of the public to rush to this court for redress. This should be avoided like a plague.

No attack of underlying decisions and recommendations by the applicants.

[57] The next line of attack adopted by the applicant is that the application for review is bad in law for the reason that the applicants have contented themselves with impugning the decision of the Minister only. It is the Minister’s argument that his decision, so to speak, does not stand in a vacuum. To reach it, he had to rely on some decisions, recommendations and administrative and other statutory decisions by his underlings. Without applying to have those set aside, so the argument ran, the setting aside of the Minister’s decision, is nothing short of an academic exercise.

³ (HC-MD-CIV-MOT-REV-2018/00173) [2020] NAHCMD 42 (6 February 2020), para 24.

[58] In his argument, Mr. Namandje, relied on the cases of *Nelumbu And Others v Hikumwah and Others*⁴ and *Seale v Van Rooyen NO and Others: Provincial Government, North-West Province v Van Rooyen and Others*.⁵ In the former case, he placed a lot of store on paragraph 59 of the Supreme Court judgment, where the court reasoned as follows:

‘Two points should be made about that submission. The first is that it does not advance the cause of the respondents given our finding, that no proper basis was established for impugning the queen’s decision-making. Second, the process undertaken by the committee stands unchallenged and no attempt at all was made to set it aside. It is trite that administrative action remains valid until set aside. . . The queen acted on the committee’s findings which were the result of deliberations in which the respondents participated without objection. The outcome of those proceedings established that they were, amongst others, guilty of sowing division in the community and undermining the queen.’

[59] I have read the *Nelumbu* case and I agree with the decision and am, in any event bound by the reasoning of the Supreme Court. This includes the quotation above. The judgment makes very good law. It is, however, important, to mention, that good law must always be viewed from the prism of the applicable facts in that case. Once viewed from that perspective, one is unlikely to get lost in properly applying the precedent in question.

[60] In *Nelumbu*, the queen in that case had removed certain persons from positions of authority. The removed persons took the decision to this court, arguing that they had been denied *audi* and that generally, their Article 18 rights had been violated in the process of their removal from office. It is important to mention that the queen had appointed a body to deal with the disciplinary proceedings of the respondents and the said committee recommended that she should remove them from office, which she did.

[61] Critically, the queen did not play any role in the conduct of the proceedings. She was literally faced with what can be aptly described as a *fait*

⁴ 2017 (2) NR 433 (SC).

⁵ 2008 (4) SA 43 (SCA).

accomplii from the committee. For all intents and purposes, the decision was not that of the queen, but that of the committee. It is in appreciation of that important fact that the Supreme Court, in my considered view, made the remarks that it did. It would have made no sense merely to apply to set aside the decision of the queen when it is clear that it was primarily, if not exclusively based on and found its life and being, in the proceedings of the committee she had appointed.

[62] It is important to mention, in this regard, that it is not every body or persons who may have contributed to the process of making the final decision that should be cited. In dealing with this particular question, I can do no better than to quote the works of the luminary Professor Cora Hoexter, which were cited with approval in *PG Group Ltd and Others v Energy Regulator of South Africa and Another*.⁶

[63] The Supreme Court of Appeal of South Africa in the above judgment, stated that for a decision, to constitute administrative action, it must be one ‘which adversely affects the rights of any person and which has a direct, external legal effect.’ (Emphasis added). In dealing with the underlined words above, the court then said:

‘In her discussion, of the meaning “direct, external legal effect”, Professor Hoexter, in her seminal work *Administrative Law in South Africa*, at 227-228, states that the phrase was a last minute addition to the definition borrowed from the German Federal administrative law, and quotes the following comment from certain German writers regarding the position in that country:

“If for example, a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all the previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review. This applies for instance, to many planning and licence granting processes where a sequence of procedural decisions lead to a final decision against which a legal remedy is available. Therefore, all the preparatory decisions

⁶ (150/2017) [2018] SAZCA 56; [2018] 3 All SA 150 (SCA) (10 May 2018), para 31. See also

are in principle not reviewable by the administrative courts'. See also *Hashagen v Public Accountants and Auditors' Board*.⁷

[64] The court, in the above-mentioned case, *Hashagen*, adopted the reasoning of the learned Professor, which was cited with approval. That being the case, the question that needs to be answered in the instant case is this: are the procedural decisions that Mr. Namandje refers to, capable, on their own, of prejudicially and directly of affecting the right of the subject, in this case the applicants? Put differently, can it be properly said that those decisions on their own, are capable of having a direct, external legal effect on the applicants' rights in this case?

[65] I am of the considered view that the only answer that can be returned in this case is in the negative. The decisions and recommendations that were made in this case by the Ministry's officials, are in my considered view, merely of a procedural nature and probably constitute internal advice to the Minister. They are thus incapable, of their own, to have a detrimental direct and external effect on the applicants' rights.

[66] Properly considered, it in fact, the Minister's decision that had a deleterious and telling effect on the applicants' rights and which is why the applicants were correct in challenging the Minister's decision first and foremost. I accordingly do not agree with Mr, Namandje on this issue and this point of law is thus dismissed.

[67] I may, for completeness, add that the approach adopted by the Minister's representatives that all the bodies and individuals who may have participated in the process of reaching the ultimate decision should be cited might herald headaches and difficulties if applied across the board. It would mean that an applicant would have to get a list of all the internal and procedural decisions taken, attack each one of them in the papers, culminating, in the final analysis, in attacking the decision with a telling effect

⁷ (HC-MS-CIV-MOT-REV-2017/00210) [2019] 336 (10 September 2019), para 27 and 28.

on the subject. On the facts of this case, Mr. Namandje's reasoning does not apply, in my considered view.

Failure to cite the Chairperson of the Second Respondent

[68] Mr. Namandje argued that the applicants did not cite the chairperson of the 2nd respondent and that failure is fatal to the proceedings. This is an issue that he did not deal with in his written submissions. All that needs to be stated in this regard is that where a necessary party has not been cited, the court would normally stay the proceedings and order the said party to be joined accordingly.

[69] In the peculiar circumstances of this case, and considering the fact that it is the Minister's decision that had a direct, external legal effect on the applicants' rights, as discussed above, it would serve no useful purpose to stay the proceedings, when the Minister's case, as shown above, is devoid of any leg to stand on. I will, accordingly not stay these proceedings as the entire process, should, based on the outcome, commence *de novo*, if the respondents wish the due process to ensue.

Notice of motion to strike out

[70] The applicant, in addition to the issues they raised, also issued a notice of motion to strike out certain paragraphs from the Minister's answering affidavit. This was chiefly because it was alleged that same contained offensive hearsay material.

[71] I should point out that I am of the considered view that there is a lot of merit in the applicants' application to strike out. This is an issue that should have been dealt with anterior but having regard to the manner in which the matter has been dealt with, particularly the findings above, I am of the considered view that it would serve no useful purpose to deal exhaustively with the application.

[72] It is, however, plain that the Minister was guilty of making allegations in some of the paragraphs of his answering affidavit of which he clearly has no personal knowledge. That on its own, may not always be fatal. It becomes fatal, as here, where the Minister does then not attach the affidavits of the persons or officials who have the knowledge that the Minister acutely lacks. Such allegations have one destiny, namely, being the gun fodder of a striking out order, for containing inadmissible hearsay evidence.

[73] By way of example in this regard, para 7 of the Minister's affidavit states:

'I have been advised that once the application for the proclamation of the concerned road within the jurisdiction of the local authority is made, as it happened in this case as per the Record, as notice to affected parties (including the Applicants) the application was published in terms of section 16(3) through a notice in the Government Gazette, and in the media'.

[74] Clearly, the Minister has no personal knowledge of the allegations that he makes and which appear to be the central pillar of his case. The above paragraph clearly contains inadmissible hearsay evidence. So is the statement, for instance, in para 8, where the Minister says, 'This is confirmed on the Review Record at page 10 that the relevant notice was published both in the Government Gazette and the media on or about 15 August 2013.'

[75] The Minister, unfortunately does has not have any independent knowledge of this and the officials responsible therefor did not make an affidavit confirming same. There are other paragraphs in the same mould, namely paras 9, 17, and a portion of para 18. In the latter for instance, the Minister, states that, 'I cannot attach a confirmatory affidavit from Mr. Engelbrecht who sent the email, as he has since retired and I do not know his whereabouts.' Clearly, the application to strike out has merit and the said paragraphs are struck out therefor.

Conclusion

[76] On a mature consideration of this case, it does appear to me that the applicants have made a good case for the granting of an order reviewing and setting aside the Minister's decision. Despite Mr. Namandje's very valiant efforts, the respondents' case is a very bad one in which the fundamental principles regarding Article 18, were treated with levity. The result is thus unmistakable.

Costs

[77] The law on costs needs no elaboration. Generally, costs should follow the event. This does not, however, take away the court's discretion in matters of costs. In the instant case, it is clear that the Minister and the First respondent were responsible for the impugned decision. The other respondents, including the 3rd respondent, did not file any papers in opposition. In the premises, the 1st and 2nd respondents are ordered to pay the applicants' costs.

Order

[78] In view of the court's decision, as conveyed above, the proper order to issue in the premises, is the following:

1. The decision of the Minister of Works, Transport and Communications, to proclaim Farm Road 1252, District of Windhoek contained in Government Gazette No. 46 of 2014, published in Gazette No. 5349, dated 1 April 2014, is hereby reviewed and set aside.
2. The First and Second Respondents are hereby ordered to pay the costs of the application, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANTS

P. Barnard

Instructed by:

Etzold Duvenhage Inc.

1ST AND 2ND RESPONDENTS

S. Namandje

Instructed by:

The of the Office Government Attorney