

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2020/00140

In the matter between:

ZELNA HENGARI

APPLICANT

and

THE MINISTER OF ENVIRONMENT, FORESTRY AND TOURISM

1ST RESPONDENT

THE MINISTER OF PUBLIC ENTERPRISES

2ND RESPONDENT

NAMIBIA WILDLIFE RESORTS LIMITED

3RD RESPONDENT

CHAIRPERSON OF THE BOARD OF DIRECTORS

4TH RESPONDENT

OF NAMIBIA WILDLIFE RESORTS LIMITED

Neutral Citation: *Hengari v The Minister of Environment, Forestry and Tourism* (HC-MD-CIV-MOT-GEN-2020/00140) [2021] NAHCMD 183 (23 April 2021)

CORAM: MILLER AJ

Heard: 16 February 2021

Delivered: 23 April 2021

Flynote: Written Agreement of Employment - Article 18 of the Constitution – Section 15 of the Public Enterprises Governance Act, No 2 of 2006

Summary: The applicant and the third respondent concluded a written agreement of employment. In terms of that agreement the applicant was appointed as the managing director of the third respondent. The agreement further provided that applicant's appointment as managing director would endure for a fixed term of five years. It is common cause that upon the expiry of the fixed term, the contract was not renewed, with the consequence that the applicant's position of managing director came to an end.

Aggrieved by the decision not to renew her contract, the applicant approached this Court for various relief. The matter was opposed by the respondents and the issues this Court had to determine was; whether the Board of the third respondent or rather the appointment of the members of the Board, including the fourth respondent was a nullity as it was alleged that the "Board" could not in law have made a decision not to renew the contract once it expired; and whether the decision not to renew the contract was taken without affording her a fair process as required by Article 18 of the Constitution.

Held, it is apparent from a reading of section 15 of PEGA (Public Enterprises Governance Act, No. 2 of 2006) that the legislature intended to create a uniform procedure for the appointment of board members of State-owned enterprises.

Held, the procedures envisaged in section 15 are part of an integrated and consequential process, in the order in which section 15 determines the processes to be followed. Each step in the process is dependent upon the completion of the process preceding it.

Held further, the requirements in section 15 of PEGA that the names of the board members must be published cannot be read disjunctively from the other provisions of section 15. It forms

part and parcel of the whole process. I conclude for these reasons that the applicant's reliance on the failure to publish the names of the board members is misplaced

ORDER

1. The application is dismissed.
 2. The applicant is ordered to pay the costs of the respondents including the costs of one instructing and one instructed counsel where employed.
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JUDGMENT

MILLER AJ:

[1] On 17 April 2016 the applicant and the third respondent concluded a written agreement of employment. The agreement was signed by the applicant and the fourth respondent.

[2] In terms of that agreement the applicant was appointed as the managing director of the third respondent. The agreement further provided that notwithstanding the date of signature, applicant's appointment as managing director commenced on 16 July 2014 and would endure for a fixed term of five years until 15 July 2019.

[3] It is common cause that upon the expiry of the fixed term, the contract was not renewed, with the consequence that the applicant's position of managing director came to an end.

[4] Aggrieved by the decision not to renew her contract, the applicant approached this Court for the following relief:

'TAKE notice THAT ZELNA HENGARI (hereinafter called the applicant) intends to make application to this court for an order:

1. An order declaring that the second respondent in failing to cause the ministerial determinations to be published in the Government Gazette as is required by section 14(3) read section 14 (a) of the Public enterprise governance act, 2006 (hereinafter "PEGA 2006"), acted unlawfully and violated his Constitutional functions and duties as prescribed by Article 40 (k) of the Namibian Constitution, and further violated his oath of office as outlined in article 38 read with schedule 2 (Part B) of the Namibian Constitution).
2. An order declaring that the first respondent in failing to cause the appointment of the board of the third respondent to be gazetted as is required by section 15 (7) of the PEGA 2006, acted unlawfully and violated his Constitutional functions and duties as prescribed by Article 40 (k) of the Namibian Constitution, and further violated his oath of office as outlined in Article 38 read with schedule 2 (Part B) of the Namibian Constitution.
3. A declaratory order in which this Honourable Court declares that the appointment of the board of the third respondent by the first respondent was done unlawfully.
4. Ordering that the decision taken by the board as communicated to the applicant on 15 January 2019 to not renew the contract of employment of the applicant to be declared unlawful and set aside.
5. An order for condonation for the delay in filing the application in the event this Honourable Court finds that there was unreasonable delay.
6. Further and alternative relief that this Honourable Court may deem fit and appropriate in the circumstance.

and that the accompanying affidavit of Zelna Hengari will be used in support thereof.

TAKE NOTICE FURHTER that the applicant has appointed Henry Shimutwikeneni & Co Inc of c/o 66 John Meinert Street & Hosea Kutako Road, Windhoek, Khomas, Namibia, 9000. At which he or she will accept notice and service of all process in these proceedings.

TAKE NOTICE FURHTER that if you intent to oppose this application you are required to-

1. notify applicant's legal practitioner in writing within 15 days from date of service of this application, of your intention to oppose this application, by service a copy of your intention to oppose on applicant at the address stated herein and filing the original at the registrar.
2. and within 14 days of the service of notice of your intention to oppose, to file your answering affidavits, if any and further that you are required to appoint in such notification an address within a flexible radius from the court, referred to in rule 65(5) at which you will accept notice and service of all documents in these proceedings.

If no notice of intention to oppose is given, the application will be moved on the 19th day of June 2020 at 09:00 AM.'

[5] The matter is opposed by the respondents. Apart from that, the third and fourth purportedly brought a counter application.

[6] As a first leg in support of the application, the applicant in effect seeks to make the case that the Board of the third respondent or rather the appointment of the members of the Board, including the fourth respondent was a nullity. Consequently it is alleged that the "Board" could not in law have made a decision not to renew the contract once it expired.

[7] As a second string to her bow, the applicant alleges that the decision not to renew the contract was taken without affording her a fair process as required by Article 18 of the Constitution. In any event it is stated that there was in existence the so-called "Directors Framework" which applied to the third respondent.

[8] The centre piece of the first leg of the argument is Section 15 of the Public Enterprises Governance Act, No. 2 of 2006. I will refer to it as PEGA. This section was the subject of some subsequent amendments, which are not material for present purposes. I will for purposes of this judgment quote section 15 in the form in which it currently exists. It reads as follows:

'15(1) With effect from a date to be specified by the Minister by notice in the Gazette whenever it is necessary the appoint members of the board of a state-owned enterprise, and then upon a first Constitution of a board, and a new term of the board, or for filling a vacancy, staff members designated by the Minister must after consultation with the portfolio Minister and with due regard to Section 14(2) make a report to the Minister containing;

- (a) recommendations on
 - (i) the number of members, including executive members of any to be appointed.
 - (ii) the terms for which the members in particular position has to be appointed; and
 - (iii) the expertise required in the 'membership' of the board
- (b) the names of persons, equal to at least one and half times the member of members recommended under paragraph (a)(i) who are qualified to be members of the board and as to are recommended as being most suited to serve on the board; including the persons recommended to serve as executive members, if any, together with reasons why they are recommended; and
- (c) in relation the persons recommended under paragraph (b) particulars of;
 - (i) their personal details
 - (ii) their knowledge; experience and skills concentrating issues relevant to the functions of the State-owned enterprise concerned; and
 - (iii) their commitment if any in relation to positions held on boards of other State-owned enterprise and interest held in private undertakings; and
- (d) any other information that may be relevant to enable the Minister to make the determinations and give the advice contemplated in Section 14(2).

(2) The procedure prescribed in subsection (i) applies also in respect to the appointment of alternative members of the board

(3) For the purposes of subsection (i)(b) a person is qualified to be a member of the board of a state-owned enterprise if the person-

(a) is not disqualified in terms of the establishing Act or the constituent document, or the Articles of Association of the State-owned enterprises, as the case may be, from being appointed a member of the board of a State-owned enterprise; and

(b) is not disqualified in terms of the Companies Act, No. 61 of 1973 from being appointed as a director of a company

(4) When advising a portfolio Minister or potential candidates, whom the Minister consider most suited for appointment as members or alternate members of a board the Minister is not bound by the recommendation at the designated staff members referred to the subsection (i)

(5) The portfolio Minister appoints

(a) the members of the board of a state-owned enterprise.

(b) the chairperson and vice-chairperson of the board; and

(c) the alternate members of the board, if any

(6) A person must not serve as a board member for more than two boards of state-owned enterprises

(7) The portfolio Mister must cause notice to be given in the Gazette of the appointment of members of the board of a state-owned enterprises and of the date and period of their appointment.'

[9] It is common cause that there was no publication in the Gazette of the names of the board members of the third respondent.

[10] The applicant argues that the word "must" is indicative of a peremptory provision and that non-compliance has the effect that the appointment of the board of the third respondent was unlawful and invalidated by the non-publication.

[11] Counsel for the applicant relied mainly on the judgment in *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd*¹ and *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*² as to how I should approach the interpretation of the legislation.

[12] I did not understand counsel for the respondents to advance a different approach.

[13] Counsel for the respondent advanced a somewhat different argument. They argue that the requirements enacted in section 15 are and remained suspended. This is so because of the introductory words of Section 15 (1) which read: "With effect from a date to be specified by the Minister in the Gazette..." No such date was published by the Minister or anybody else concerned when the appointment of the board of the third respondent was effected. Therefore the provisions of particularly subsection (1) of section 15 were not in operation when the board of the third respondent was appointed. Until that notice was published the appointment of the board of the third respondent was governed by the relevant provisions of the Namibia Wildlife Resorts Company Act, Act No. 3 of 1998. In support of the submission counsel relies on Section 48 of Act 2 of 2006 as amended which contains savings and transitional provisions pending the publication of the date to be specified in section 15(1). It reads as follows;

'Substitution of section 48 of Act No. 2 of 2006:

3. The following section is substituted for section 48 of the principal:

"Savings and transitional provisions

48(1) Despite the amendment by section 49 of the laws specified in Schedule 2 to this Act and any other provisions to the contrary of this Act, the provisions so amended of any such law, and the provisions of the constituent document or the memorandum of association and articles of association of any State-owned enterprise not established by or under that law or to which such constituent document or such memorandum of association and article of association relate, the appointment of the members or alternate members of such board, the term of office and conditions of office of such members, the filling of casual vacancies in the number of such appointed members or

¹ *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC)

² *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* [2015] NASC 10

alternate member, the appointment of the chairperson and vice-chairperson of such board continue to be applicable until the date specified by the Prime Minister under section 15(1).

(2) With effect from the specified date referred to in subsection (1) person who immediately before that date held office of chairperson, vice chairperson, member or alternate member of a board of a State-owned enterprise is deemed to have been appointed in accordance with the provisions of this Act for the unexpired period of his or her office as determined by or under the relevant establishing Act, constituent document or the memorandum of association and articles of association of the State-owned enterprise, and on the conditions as applied to him or her as a member immediately before that specified date.'

[14] To place the issue into perspective requires a consideration of the provisions of section 15. It is apparent from a reading of section 15 of PEGA to which I referred that the legislature intended to create a uniform procedure for the appointment of board members of State-owned enterprises. The procedures envisaged in section 15 are part of an integrated and consequential process, in the order in which section 15 determines the processes to be followed. Each step in the process is dependent upon the completion of the process preceding it. The processes provided for in section 15 requires as a first step the publication specified in section 15(1). The further processes can only be undertaken once the date has been determined. It is exactly for that reason that it was necessary to enact the transitional provisions one finds in section 48 as substituted and which I referred to earlier. It provides for a situation that the lasting regimes for the appointment of board members will remain in place until the publication of the date mentioned in section 15(1). The requirements in section 15 of PEGA that the names of the board members must be published cannot be read disjunctively from the other provisions of section 15. It forms part and parcel of the whole process. I conclude for these reasons that the applicant's reliance on the failure to publish the names of the board members is misplaced.

[15] That leaves for consideration the question whether the board of the third respondent failed to afford the applicant any rights she claims to have in accordance with Article 18 of the Constitution, when it was decided not to renew the contract of employment. In the case of *Permanent Secretary of the Ministry of Finance vs Ward*³ the court concluded that whether the cancellation of a contract amounted to an administrative act was an issue to be considered in the context of the matter at hand and concluded that in the context of that case that the appellant was not exercising a public power when it cancelled a contract with the respondent. In the context of the case before me a contract of employment was concluded which provided for a fixed term of five years. The decision not to renew the contract cannot be labelled as the exercise of a public power, but instead the implementation of the terms of an agreement. The Court in the *Ward* case cited with approval the case of *Chirwa vs Transnet and Others*⁴. As far as the so-called 'directors framework' is concerned there is nothing to indicate that its provisions formed part and parcel of the contract of employment or were intended to be so.

[16] It follows that the applicant's claims stand to be dismissed. There is consequently no need to consider the orders sought in the counter-application. I mention that no counter-application as such was filed.

[17] In the result I make the following orders:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the respondent including the costs of one instructing and one instructed counsel where employed.

K MILLER
Acting Judge

³ *Permanent Secretary of the Ministry of Finance vs Ward* 2009 (1) NR 314 SC

⁴ *Chirwa vs Transnet and Others* 2008 (4) SA 367 CC

APPEARANCES:

APPLICANTS:

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1st & 2nd RESPONDENTS:

H Harker

Government Attorneys

3rd – 4TH RESPONDENTS:

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