REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2016/00233

In the matter between:

NAMIBIA FINANCIAL EXCHANGE (PTY) LTD **APPLICANT**

and

THE CHIEF EXECUTIVE OFFICER OF THE NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY AND REGISTRAR OF STOCK EXCHANGES **1ST RESPONDENT**

THE NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY **2ND RESPONDENT**

THE MINISTER OF FINANCE OF THE REPUBLIC OF NAMIBIA **3RD RESPONDENT**

THE ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA **4TH RESPONDENT**

THE PRIME MINISTER OF THE REPUBLIC OF NAMIBIA **5TH RESPONDENT**

Neutral citation: *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority and Registrar of Stock Exchanges* (HC-MD-CIV-MOT-GEN-2016/00233) [2022] NAHCMD 93 (7 March 2022)

Coram: GEIER, J
Heard: **Determined on the papers**
Delivered: **7 March 2022**

Flynote: Review – Delay in instituting review proceedings – Whether delay was unreasonable – Court finding that delay was unreasonable – Condonation – After considering various factors and after applying certain criteria – such as the prejudice to administrative functionary, effect on administration of justice and the applicant's prospects of success court finding that it was not in the interests of justice to exercise discretion in favour of granting condonation for the unreasonable delay that occurred.

Summary: The facts appear from the judgment.

ORDER

The application is dismissed with costs, such costs to include the costs on one instructed- and one instructing counsel.

JUDGMENT

GEIER, J

[1] This case was triggered by the refusal of the first respondent - The Chief Executive Officer of the Namibian Financial Institutions Supervisory Authority and Registrar of Stock Exchanges - to approve the applicant's application for a second

stock exchange licence for Namibia - a decision communicated to Namibia Financial Exchange Pty Ltd - the applicant - on 9 September 2014.

[2] After a further and subsequent extended engagement between the parties the first respondent then took the view that he could not revisit the September 2014 decision as he had become *functus officio*. This stance was conveyed in letters of 5 February and 11 April 2016 respectively.

[3] The applicant, aggrieved by these decisions launched an application to have the actions and decisions leading up to the decision of 9 September 2014 declared unlawful. The applicant has signalled now, in heads of argument, through its summation of the relief that it now seeks, that the proceedings so launched are also to be regarded as '… review and declaratory proceedings … to set aside the first respondent's purported decision.[1] The applicant is also requesting the court to ultimately grant the remedy of substitution through the issuing of an order compelling the first respondent to consider and award the licence to the applicant to operate a second stock exchange and related relief.

[4] The matter was opposed and essentially it was contended by the first and second respondents[2] that the complained-of decisions were correctly and fairly made in accordance with the underlying statutory requirements set by the Stock Exchanges Control Act, Act 1 of 1985, (hereinafter referred to as 'SECA'), which were never met by the applicant. In addition to a number of technical objections, relating to the change of stance as regards review relief now also sought, the point of undue delay was persisted with.

---

[1] See : Applicant;s Heads of Argument par 2 – compare also *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority and Registrar of Stock Exchanges and Another* 2019 (3) NR 859 (SC), related proceedings before the Supreme Court, where counsel for the applicant had taken the view that : '[22] According to Mr Maleka, the decision of 9 September was, at best, inchoate in view of the following: Even after its CEO's letter of 9 September 2014, NAMFISA continued to engage in correspondence with NFE, even inviting it to furnish further information for it to consider the application. The argument made on behalf of NFE is that, by that conduct, NAMFISA led NFE to assume that a decision on its application would be made if it furnished additional information sought by NAMFISA. Therefore, given that the decision-making was not completed, NFE was entitled to a form of relief which required NAMFISA to take a decision (good or bad) as none had been taken. Accordingly, there was no decision to be 'reviewed and or set aside' in the language of rule 76(1).' Compare also para [2] of Applicant's Heads of Argument.

[2] The second respondent being the Namibia Financial Institutions Supervisory Authority.

Does the defence of undue delay still require determination?

[5] In regard to the claim of undue delay it was however contended on behalf of the applicant that the latter objection was raised once again, notwithstanding that the Supreme Court had dismissed the point.

[6] On behalf of the respondents it was however pointed out that this aspect had not been dealt with by the Supreme Court, that the applicant had failed to provide any reference from the judgment in support of this contention and that it emerged from paragraph [4] of the judgment that only two issues were identified for consideration, namely:

> '[4] Two issues arise for decision in the appeal. The first is whether a party seeking relief against an administrative body is compelled to proceed under the review rule. The second is whether the court a quo's judgment and order upholding the rule 61 objection are appealable.'[3]

[7] Also on my reading of the referred to Supreme Court judgment the argument, raised on behalf of the respondents, is borne out and it would indeed appear that the issue of undue delay still requires the i*n limine* determination by this court.

[8] This objection is of course best determined with reference to the background facts.

The background facts

[9] The applicant submitted its application, for a second stock exchange licence, to the first respondent, on 8 May 2012. After a prolonged engagement, spanning over a period of more than 2 years, the applicant was notified on 9 September 2014 that *'after a thorough assessment'* the application was declined, as the applicant did not provide sufficient information as required in terms of section 8 of the Stock Exchanges Control Act 1985. The applicant was invited to re-submit a compliant application. The parties further engaged each other until the applicant was advised

[3] *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority and Registrar of Stock Exchanges and Anothe*r 2019 (3) NR 859 (SC) at [4].

by letters of 5 February and 11 April 2016 that the first respondent was unable to issue the sought stock exchange licence as he now considered himself *functus officio*. The application was then launched on 26 July 2016.

[10] If one then considers this cursory summary it would appear, at first glance, that, if the delay to launch these proceedings is to be reckoned from the 9th September 2014, then, prima facie, the delay to launch the current proceedings would be inordinate. This picture would obviously improve dramatically if the period within which this application was brought would be calculated from 11 April 2016.

[11] So what exactly transpired during the period 9 September 2014 to 11 April 2016 after the applicant had already been informed on 9 September 2014 that:

'After a thorough assessment of your application, the Registrar found that the information provided in terms of the above requirements is not sufficient and thus declines your application on the following grounds
……

If applicant wishes to resubmit the application for a stock exchange license; please ensure that you adhere to the requirements as laid out in the Act or as may be determined by the Registrar.'[4]

[12] On behalf of the applicant it was initially submitted that the most significant aspects relating to the further engagement between the parties where that :

' … By letter dated 29 September 2014, the applicant notified the first respondent that the information referred to in paragraphs (a) to (c) of his letter of 9 September 2014 ought to have been called for during the 120 review period set out in its Service Level Commitment. The applicant indicated that its then managing director, of Australian citizenship, had stepped down and a Namibian citizen would be appointed as the managing director. The applicant then requested a further meeting. to resolve whatever concerns he still had on the grounds identified by him in the letter of 9 September 2014.[5]

The requested meeting was held on 6 October 2014. At that meeting the idea of a

[4] Founding Affidavit "FA" annexure HKA.
[5] Annexure "**HKA82**".

provisional stock exchange licence was mooted, pending the finalization of whatever concerns the first respondent still had on the application. The first respondent agreed to explore that possibility.[6]

A further meeting was held on 11 November 2014 with the then Minister of Finance in order to see how the plight of the applicant could be resolved. The representative of the first respondent who attended the meeting indicated that she would approach the Attorney-General to provide a legal opinion on whether a provisional stock exchange could lawfully be issued to the applicant in the meantime.[7]

Further meetings and correspondence were exchanged (between) the parties. The critical correspondence was the applicant's letter of 11 April 2016 in which it advised the first respondent that the decision on its application fell within a narrow factual matter. It advised him that the brokers who would be buying and selling securities on its proposed stock exchange is Velocity Trade Namibia and Avior Capital Namibia. It also advised the first respondent that contributions from its shareholders was approximately N$5.6 million, in addition to its capital reserve of N$70 000. It also advised he applicant that it has effected changes to its proposed rules to meet the concerns of the first respondent.[8]

In response to the applicant's letter of 11 April 2016, the first respondent adopted the dramatic stance that he could not issue a stock exchange licence.'

[13] The respondents took a somewhat different view with reference to what was contained in paragraphs 9 to 24 of the first respondent's answering papers where Mr Matomola on behalf of first respondent and second respondents had commenced his answer by stating:

' … Before I respond to the individual paragraphs in the applicant's founding affidavit I first deal with the fact that the applicant has delayed unreasonably in bringing this application.

[14] He then continued by pointing out that :

'a) the impugned decision was conveyed in the letter of 9 September 2014 in which the applicant was informed that if it wishes to resubmit the application it should comply

---

[6] Founding Affidavit: page 55, para 219.
[7] Founding Affidavit: page 56, paras 221 and 222.
[8] Founding affidavit: page 60, para 241.

with the applicable requirements, that the applicant had responded, by letter of 29 September 2014, explaining that the outstanding information and documents identified by the Registrar where not provided in order to protect investor and individual confidentiality and that same would be provided once a provisional licence had been granted. The registrar who had in the interim undertaken to investigate whether a provisional licence could be issued informed the applicant on 15 October 2014 (annexure HKA85) that the Stock Exchanges Control Act of 1885 did not provide for such a licence.The applicant was then informed that if it intended to proceed with the application it would need to provide the necessary information. Once again the detail of what was required was set out.

b) Instead of providing the required information and documentation, the applicant elected to await a legal opinion from the Attorney-General which had been requested by the Minister of Finance. Mr Matomola pointed out in this regard that the Minister of Finance was not the relevant decision maker and thus could not prescribe what decision had to be taken by the first respondent.

c) The applicant then waited for almost one year until during the 1st October 2015 meeting with the first respondent, (acting at the time), it became apparent that the applicant was still mooting a provisional licence, while still making no attempt to submit the outstanding documents.

d) The applicant then approached the Minister of Finance to enquire whether the outstanding opinion had been received. In the respondents' view this approach to the Minister was also totally inappropriate and irregular as it was obviously intended that the Minister should interfere in the decision making and should dictate its outcome. The Minister however elected not to act on this approach.

e) The point was then made that the applicant was legally represented at all times and thus had the benefit of such advice and that it could also have obtained its own legal opinion and thus could have taken the appropriate action at the time to get the desired relief it required.

f) The applicant however elected to wait a further three months - until 15 January 2016 – whereafter it demanded that the licence now be issued – despite its previous acknowledgement - contained in the letter of 7 October 2014, (HKA84) – that the outstanding information, required for such decision, still had not been provided. (The letter of demand was erroneously dated the 15th of January 2015).

g) The letter of demand was also copied to the Chair of NAMFISA, the Prime Minister, the Minister of Finance and the Attorney-General, again with the perceived clear intention to have a decision influenced by any one or more of them.

h) Time was then taken to quote from the letter of demand from which quote the following appears:

> "8. At a meeting held between our client and the Registrar of 6 October 2014, which meeting was called to address our client's concerns, the concept of a provisional or conditional license was mooted by the Registrar. After his inquiry into such provisional or conditional licensing our client was advised that the Registrar would not be able to legally issue such a license. In addition, the Registrar was of the opinion that there was a need for such a legislative provision and initiated a process to amend the current Act. <u>Our client was then given the option to wait for the enactment of the amendment or continue with the application process that the Registrar and his officials were conducting. It follows that either alternative could not be acceptable to client</u>.
>
> 9. Our client was aware of the fact that the Act was silent on the matter of provisional or conditional licensing. Our client's application was also not prepared on that basis. <u>Rather our client expected to be issued with a license as it was in the position to fulfil the requirements set out in section 8 of the Act. As such our client approached the then Minister of Finance to seek her position on the Registrar's determination as our client understood that the process of considering the application for the issue of a stock exchange license was void of administration justice</u>. The Minister of Finance advised that she would approach the Attorney General for an opinion.
>
> 10. Several months lapsed since that meeting. Notably, the outcome of the national elections led to a change in various government portfolios including the Minister of Finance and the Attorney General. In addition, there was the unfortunate and untimely passing of the Registrar of Stock exchanges. <u>Our client was, however, reassured in May 2015 by advice from the successor of the Attorney General that he was of the opinion that he did not foresee any legal impediment to the issuing of a license to carry on the business of a stock exchange and that his written opinion in this regard had been submitted to the Ministry of Finance. Thereafter, our client advised the acting Registrar of Stock exchanges accordingly</u>. No response has been

received from the acting Registrar since." (my underlining)

i) The Attorney-General thereafter apparently tried to set up a meeting for 5 February 2016 ' … to ensure that the process would not be delayed further …'. ('HKA88').

j) On 5 February 2016, and by letter 'HKA90', the first respondent, again set out the history of the application and the reasons for the adopted approach at several stages were given and which letter already pointed out that the Registrar was *functus officio* making it clear then already that the first respondent could not comply with the demand unless a new application would be submitted.[9]

k) The Attorney-General's opinion was disclosed to the first respondent in a letter of 8 February 2016, annexure 'KM1'. The opinion was also to the effect that SECA does not make provision, either expressly or impliedly, for the power to issue of a provisional licence by the Registrar.

l) Mr Matomola then took time out to state that the applicant's actions, after October 2014, when it was first informed that a provisional licence could not be issued to it, where unreasonable, ill- advised and irregular and that its actions were predominantly aimed at having the Registrar's decision influenced and dictated by the Minister of Finance and/or the Attorney-General. Such action cannot be considered as reasonable efforts at avoiding court proceedings.

m) Against this background it was then finally alleged that the resultant delay was not only simply unreasonable but that the delay was also prejudicial particularly to the public who are to be afforded the opportunity in terms of the SECA to comment on an application for a licence. Such comment had been received *in casu* in June 2013, this was some 7 years earlier.[10] Significant developments have occurred in Namibia, which might influence public comment. The information provided by the applicant during the period 2012 to 2016 can no longer be considered current.'

The relevance of the applicant's change of stance regarding relief

[15] Given the divergent views so adopted by the parties in regard to the delay to launch these proceedings, I believe that some consideration should next be given to

---

9 See para 14 of Letter 5 February 2016 – 'HKA90'.

10 Mr Matomola's answering papers where deposed to on 30 June 2020.

the question what is to be made of the applicant's change of stance from initially only seeking declaratory relief to now also seeking review and declaratory relief. This aspect requires consideration in order to determine whether or not the undue delay point should even be considered, given the fact that the unreasonable delay challenge mainly constitutes a defence to review proceedings.[11]

[16] In this regard it becomes clear from prayer 1 of the applicant's notice of motion that declaratory relief was initially sought. I have already mentioned that a change of stance in this regard was signalled in the applicant's main heads of argument, drafted by Adv Maleka.SC.[12]

[17] A further aspect which underscores this change of attack, and the fact that this change was intentional and deliberate and not a mere error, is for example the applicant's reliance on the ground that the first respondent acted *ultra vires* the provisions of sections 8(a) to (d) of SECA when he invoked section 12(1)(a)(ii)(bb) and section 12(1)(m) in his decision. The reliance on the *ultra vires* doctrine is of course a common ground of review.

[18] The failure to amend the notice of motion accordingly thus attracted criticism and objections.

[19] Ultimately however the sought remedy of 'substitution' revealed that what the applicant was seeking, in substance, was the review and setting aside ' … of the actions and decisions of the first and/or second respondents, in arriving at the decision conveyed to the applicant in the letter of 9 September 2014 …' – pursuant to the sought declaratory relief. After all the remedy of 'substitution' is a remedy predominantly available in reviews and appeals.[13]

---

[11] Compare generally, for instance : *Minister of Agriculture, Water & Forestry and Others v Ngavetene* 2021 (1) NR 201 (HC), *China State Engineering Construction Corp v Namibia Airports Co Ltd* 2020 (2) NR 343 (SC), *SA Poultry Assoc v Minister of Trade & Industry* 2018 (1) NR 1 (SC), *Arandis Power (Pty) Ltd v President of the Republic of Namibia* 2018 (2) NR 567 (SC), *Keya v Chief of the Defence Force* 2013 (3) NR 770 (SC) and *Krüger v Transnamib Ltd (Air Namibia)* 1996 NR 168 (SC) to mention but a few;

[12] It is to be noted that the applicant's Supplementary- and Replying submissions where drafted by Adv Ngcukaitobi SC.

[13] Compare for instance : *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) at p775A- B,

[20] Lastly it is to be said on this score that none of the counsel for the applicants took the point that the defence of undue delay could not be raised and should not be available in these proceedings. Accordingly counsel for all parties thus mustered their arguments in support or in defence thereof mainly on the facts and circumstances of this case and with reference to one of the leading authorities, namely the decision made in *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

[21] It so emerges that the defence remains available also in this case and thus falls to be considered.

[22] Even if I were wrong on this, this court has in any event recently, again, in *Confederation of Namibian Fishing Associations and Others v Environmental Commissioner Teofilus Nghitila and Others* 2021 (3) NR 817 (HC) held that :

'[136] It should also be stated immediately that it is not so, as counsel for the applicants have submitted, that :

a) the principles of delay have no bearing on declarators;
and that

b) the authorities relied on NMP where all concerned with review proceedings

as counsel for NMP have relied- and referred in paragraphs 16 and 26 of their main heads of argument[14] - inter alia also to *Kandando v Medical and Dental Council of Namibia* (HC-MD-CIV-MOT-REV-2017/00353) [2018] NAHCMD 287 (3 May 2018) at [55] to [56] where the Court refused to exercise its discretion in favour of applicant to accede to the sought declaratory relief inter alia also on the ground of the substantial and unreasonable delay that occurred in that matter. I am thus not persuaded that, in the circumstances of a matter. were an application for declaratory relief is brought years after the alleged expiry of a licence by operation of law, the question of delay does not arise. Declaratory relief is discretionary. Unreasonable delay remains a factor to be considered in this context. I will thus proceed to consider and apply the principles pertaining to delay also in this matter.'

[14] Footnotes 40 and 68 - Footnote 40 refers to : Baxter, Administrative Law, 715-716; *Kandando v Medical and Dental Council of Namibia* (HC-MD-CIV-MOT-REV-2017/00353) [2018] NAHCMD 287 (3 May 2018); Simana *v The Commissioner General Correctional Services* (A 129/2011) [2012] NAHCMD 57 (09 November 2012).

Was the September 2014 decision inchoate?

[23] Also relevant to the enquiry whether an unreasonable delay has occurred are Mr Maleka's submissions to the Supreme Court that the decision of 9 September 2014 was 'inchoate' – 'not completed' – and that 'the applicant was thus entitled to a form of relief which required NAMFISA to take a decision (good or bad) – as none had been taken' – and that accordingly 'there was no decision to be 'reviewed and or set aside' …'.[15]

[24] Although relevant these submissions – notably - were not persisted with before this court – and - where it has emerged that - under the guise of a declarator – essentially - review relief was now also sought, as I have found above.

[25] It does not take much to fathom why this stance was not perpetuated before this court if one considers the clear language employed in the letter of 9 September 2014 under cover of which the applicant was advised in no uncertain terms that :

> " … the Registrar … thus declines your application on the following grounds ……
>
> … If applicant wishes to resubmit the application for a stock exchange license; please ensure that you adhere to the requirements … *'. (emphasis added)*

[26] Ms Bassingthwaigthe, on behalf of the respondents, was not far off the mark when she submitted in this regard :

> 'It is so that in his letter of 15 October 2014, the first respondent left the door open, so to speak, for the applicant to proceed with its application prior to any proposed amendments being enacted to the Stock Exchanges Control Act, 1985, Act No 1 of 1985 ("the Act") and that it indicated to the applicant what documents it is required to provide. [16] This was barely a month after the applicant had been informed that the application had been declined because it was incomplete.
>
> Instead of providing the information requested in order for the application to be considered, the applicant then pursued the issue of a provisional license for more than a year. When this did not succeed, it sent a letter of demand to the first respondent on 21 January 2015 demanding

[15] *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority and Registrar of Stock Exchanges and Another* op cit at [22].

[16] FA Annexure 85 paras 6 and 8.

that the license be issued. [17]

It does not assist the applicant to argue that the decision of 9 September 2014 was inchoate because the first respondent "invited" the applicant to provide further information. Firstly, there was no such invitation. The applicant was given an option to proceed with the application subject to the condition that it submits the outstanding information. Secondly, the applicant did not take up the option. It then pursued the option of a provisional license. The first respondent was therefore entitled to regard his decision as final.'

[27] Ultimately there is however really no room for doubt that the application for a stock exchange licence - that had been submitted, by the applicant, on 8 May 2012 - was declined on 9 September 2014 – and that this was done in no uncertain terms – and for the reasons given. That the applicant was also given the option to re-submit the application - ie. one that should be bolstered with the requisite documentation and information - is neither here nor there as will appear from the impact of the *functus officio* doctrine on this matter, as will be discussed next.

[28] I thus turn to the consideration of the *functus officio* doctrine and from which it will become apparent that the option to re-submit the application was really irrelevant in view of the decision that had clearly been made. In any event I conclude with reference to the above that the decision communicated by letter of 9 September 2014 was neither inchoate nor incomplete.

Would the first respondent have been entitled to reconsider the decision of 9 September 2014?

[29] It is here that the *functus officio* doctrine comes into play. It has recently been considered by the Supreme Court in *Hashagen v Public Accountants' and Auditors Board* 2021 (3) NR 711 (SC). It did so as follows:

'Essence of *functus officio* doctrine

[27] An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision maker unless

[17] FA Annexure HKA87.

authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision maker and the subject know where they stand. At its core, therefore, are fairness and certainty.[18]

[28] As Pretorius aptly observes:[19]

> 'The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'

[29] What that means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in the matter. It cannot go back on it or assume power again in respect of the same matter between the same parties.

…

[44] As Mr Heathcote for the appellant correctly submitted, the fact that the PAAB invited Mr Ritter to submit a fresh complaint on affidavit does not make that action any less impermissible on the *functus* doctrine. The suggestion that the complaint on affidavit was based on new or additional facts is inimical to the *functus* doctrine. If it holds sway it would mean that the disciplinary process can continue for as long as and every time a complainant can produce 'new facts' relating to the same transaction once his or her complaint is rejected in relation to the same underlying facts.

…

[84] The purpose of the *functus officio* rule is to ensure finality in decision-making. This is important where person's rights are at stake. The PAAB as a body is the supervisory entity in respect of accountants and auditors. In this capacity they must examine charges of

[18] *Pamo Trading Enterprises CC & another v Chairperson of the tender Board of Namibia & others* 2019 (3) NR 834 (SC).

[19] DM Pretorius: *The Origin of the functus officio doctrine, with specific reference to its application in Administrative Law*, 2005 SALJ Vol. 122 at 832-833.

alleged unprofessional misconduct, and if necessary, see to it that disciplinary proceedings are instituted. These proceedings and resultant findings of misconduct can have potentially devastating effects on persons convicted of professional misconduct. In extreme cases, such persons can be banned from further practise with the result that their whole livelihood may be affected.

[85] The structure of the Public Accountants' and Auditors' Act[20] (the Act) is such that accountants or auditors charged with misconduct will be investigated and judged by their peers. These persons know the perils, constraints and circumstances under which accountants and auditors perform their daily tasks and hence also when they have investigated a complaint to the full so as to enable them to make decisions in respect of such alleged misconduct.

[86] I can do no better than to quote from a Canadian case which expressed the *functus officio* rule as follows:[21]

> 'As a *general rule,* once a tribunal has reached a final decision in respect of a matter that is before it in accordance with its enabling statute, that decision cannot be re-visited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances. *It can only do so if authorised by statute* . . .'

[87] It follows that if the PAAB had made a final decision which was communicated to Mr Ritter not to press charges against appellant prior to the decision underpinning the charges forwarded to appellant on 17 August 2016 then it simply did not have the power or authority to level the charges it did in August 2016.'

[30] If one applies these principles to the facts of the present case it appears that the first respondent was indeed vested with adjudicative/decision making powers. These powers affected the applicant's rights to operate a second stock exchange in the sense that the decision of 9 September 2014 was to the effect that such rights would not be conferred on the applicant. Once the decision was given and communicated by letter to the applicant it became subject to the right of appeal or review and the first respondent consequentially lost his jurisdiction in the matter and

---

[20] Act 51 of 1951.

[21] *Chandler v Alberta Association of Architects* quoted in *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 (3) SA 210 (W) at 226A-B.

he was precluded by the doctrine to go back on his decision or to assume power again in respect of the same matter.

[31] Importantly it needs to be taken into account also the Supreme Court considered it impermissible on the *functus officio* doctrine for the complainant, in that case, to submit a fresh complaint on affidavit that would be based on new or additional facts as this would be 'inimical to the doctrine' and as this would mean that the (disciplinary) process could continue for as long as- and every time a complainant can produce 'new facts' relating to the same transaction once his or her complaint is rejected in relation to the same underlying facts.[22] The same can surely be said, *mutatis mutandis*, in regard to the first respondent's invitation to the applicant to re-submit the application augmented by the requisite documentation and information. Here I also cannot detect that any of the exceptions to the rule are of application – and none where pointed out - that would have allowed for a deviation from these general principles and which would have permitted the first respondent to revoke or vary his original decision.[23]

[32] I thus conclude with reference to the above that the first respondent was indeed correct – and thus well within his rights - when he eventually advised on 5 February 2016 - and again on 11 April 2016 - that he was *functus*.

<u>Was the delay unreasonable?</u>

[33] More importantly - and for purposes of determining whether the applicant has delayed unreasonably - this also means – and to borrow a phrase - that 'the clock started to tick', so-to-speak, from 9 September 2014. The application was instituted on 26 July 2016. This is a delay of more than twenty-two and a half months, and thus constitutes a delay of almost two years. On the more benevolent version advocated by Ms Bassinghtwaighte, on behalf of the respondents, the clock started to tick from October 2014. Nothing much however turns on this.

[34] It does not take much to understand that a delay of this magnitude would, per

---

[22] Compare *Hashagen* at [44].
[23] Compare *Hashagen* at [84].

se, be regarded as unreasonable and in circumstances where the courts have considered delays of significantly shorter periods as unreasonable.[24] A court will however have to make this determination on all the facts and circumstances pertaining to a particular case, as each case should be judged on its own facts and circumstances [25], and where the period of delay would obviously only be one of the factors to be taken into account.

[35] It is here that regard to the time line of events will provide the key to the determination of the first enquiry that is to be conducted, namely whether the time it took to institute the proceedings was unreasonable and whether each preparatory step undertaken by the delaying party during the period can be regarded to have been necessary and reasonable.[26]

Argument on behalf of the applicant

[36] The submissions on behalf of the applicant initially where crisp:

'We submit that the on the facts there has not been any unreasonable delay on the part of the applicant. It is common cause that the applicant sought to engage the first respondent immediately after the letter of 9 September 2014, notifying it of the rejection of its application. It is also common cause that the first respondent invited the applicant to submit a further application which met the requirements of the SEC Act, insofar as the first respondent interpreted them.

The applicant took up the invitation of the first respondent and continued to engage it by providing further information called for by the first respondent. It is only when the first respondent claimed that it was *functus officio* and that it could not consider such further information, that the applicant resorted to institute the present proceedings.

We submit that the delay, if any, has properly been explained by the applicant and is not unreasonable, in the circumstances. Moreover, the first respondent has not suffered any prejudice because it is the one who is responsible for the delay by calling for and yet refusing

[24] Compare for instance : *China State Engineering Construction Corp v Namibia Airports Co Ltd* 2020 (2) NR 343 (SC) at [50], *SA Poultry Assoc v Minister of Trade & Industry* 2018 (1) NR 1 (SC) at [46] and [52] to [53].

[25] Compare : *Keya v Chief of the Defence Force* 2013 (3) NR 770 (SC) at [21].

[26] See *Keya v Chief of the Defence Force* 2013 (3) NR 770 (SC) at [28]; *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC) at [18].

to consider further information it invited from the applicant. It is also responsible for the further delay which arose from the ill-fated technical points which were dismissed by the Supreme Court in prior proceedings.

There is also no prejudice to the public interest because no third party has innocently acted upon the decision of the first respondent to refuse the applicant's application, in the belief that that decision was lawful.

We therefore submit that there is simply no unreasonable delay.'

[37] A more detailed effort was made in the 'Applicant's Supplementary Submissions' as drafted by Mr Ngcukaitobi. They were as follows:

> 'The basic facts relevant to the delay issue are these:
>
> 1.1 The application was made on 8 May 2012;
>
> 1.2 The decision was only made more than 2 years later, on 9 September 2014;
>
> 1.3 On 16 September 2014 a letter was addressed to the Second Respondent;[27]
>
> 1.4 On 29 September 2014, a further letter was addressed to the Second Respondent;[28]
>
> 1.5 On 6 October 2014 a meeting was held between the parties.[29] The applicant recorded one of the discussion items as follows:
>
> > "During the discussion of matters pertaining to the relevance of the timing of key information in support of the NamFinX application, it was apparent to all for the reasons presented, that the application process would best be served by this information being made available after the issuance, and in terms of a provisional licence."[30]

---

[27] Record, p934.
[28] Record, p935.
[29] Record, p938.
[30] Id.

1.6 On 15 October 2014 the Second Respondent dealt with the issue of a provisional licence and stated that the law did not provide for one;[31] the letter also requested further information;

1.7 The applicant responded on 8 October 2014, in which it referred to an opinion from the Attorney General's office;[32]

1.8 On 21 January 2015, the attorneys on behalf of the applicant addressed a letter to the Second Respondent addressing the delays in the matter;[33]

1.9 It was only on 27 January 2016 that the Attorney General responded. They stated that they found the delay – which was really on the part of the Respondents – regrettable and suggested a meeting on 5 February 2016.[34]

1.10 It was at this stage – once the Attorney General became involved – that on 5 February 2016 that the Second Respondent alleged that it was *functus officio*.[35]

1.11 It became clear that the matter would not be addressed, that the Second Respondent had no serious intent to engage in a *bona fide* manner, that the applicant decided to institute legal proceedings, as mentioned in its letter of 11 April 2016.[36]

1.12 On 27 April 2016, the Second Respondent alleged (wrongly) that it would not reopen the matter.[37]

1.13 Proceedings were duly instituted within 3 months after.

In these circumstances, it is clear that the stance of the First and Second Respondent was always that it would be willing to entertain the application, subject to submission of further information. <u>Only once the Attorney General took control of the matter did the Second Respondent's attitude change, on 5 February 2016, to allege that the matter is closed</u>. This stance was again confirmed on 27 April 2016.

[31] Record, p939.
[32] Record, p942.
[33] Record, p944.
[34] Record, p950.
[35] Record, p960.
[36] Record, p964.
[37] Record, 967.

There was accordingly no unreasonable delay. The decision remained inchoate and capable of alteration. This is clear from all the correspondence chronicled above. The position became clear on 27 April 2016. This is why proceedings were launched on 27 July 2016.

This cannot be characterized as an unreasonable delay, by any stretch of the imagination.[38] If this is deemed as a delay, it is plain that there are strong factors to overlook the delay.

There is a proper explanation for the delay. The Applicant was always under the genuine belief that the application would be reconsidered. The Heads of Argument of the First and Second Respondents state that the decision was taken on 9 September 2014, and that is when the period should be counted from. We submit that this is an oversimplification of the matter. The parties both engaged in a process to since at least 6 October 2014 to resolve their disagreements. During that process, at no stage did the Registrar say, unequivocally, that the decision would not be reconsidered.

The change in the attitude of the Registrar occurred after the intervention of the Attorney-General. Instead of attending the scheduled meeting on 5 February 2016, the Registrar changed tune and insisted that the matter was closed and would not be reopened. There is no prejudice mentioned. And none can be proved. In these circumstances, the delay defence should be rejected.'

<u>The respondent's argument</u>

[38] On behalf of the respondents the point was initially mounted on the allegations made in paragraphs 9 to 24 of the first respondent's answering papers. They were summarised in paragraphs [13] to [14] supra and on the basis of which it was initially submitted that as a result of that delay and the poor prospects of success the application should be dismissed on this ground alone.

[39] Also on behalf of the respondents a more detailed effort was made in the 'First and Second Respondents' Supplementary Heads of Argument', where the

---

[38] See: *Gqwetha v Transkei Development Corporations Ltd and Others* [2006] 3 All SA 245 (SCA).

following submissions were then made:

'The issue of delay is also relevant in respect of the question whether the court should order substitution. The applicant's position now is that it is challenging the decision of 9 September 2014. It does not challenge any other decision taken subsequent to that date.

As already pointed out above, the applicant actually elected not to take up either of the options given to it in the first respondent's letter of 15 October 2014. It made it clear from October 2014 that it would rather pursue the issue of a provisional license under the existing legislation through the assistance of the Minister of Finance and the Attorney General. It is only in its letter of 11 April 2016 that the applicant took the approach that it wants to revert to its application for a full license.

This is more than a year and a half after the decision was taken to refuse the license and also more than a year and a half after the first respondent was entitled to accept that the applicant did not intend to pursue the issue of a final license by providing the information requested in the 15 October 2014 letter.

At best therefore, for the applicant, the 9 September 2014 decision became final when it made it clear in its correspondence subsequent to the October 2014 letter that it would rather pursue the provisional license option under the existing legislation as it was at that time. Therefore, the question of delay must be considered from October 2014.

It is also important to note that the applicant caused a significant number of delays from the time that it submitted its application. This is clear from what is discussed in paragraphs 38 to 74 of the first respondent's principal heads of argument. In these paragraphs we illustrate that the applicant was responsible for a delay from 8 May 2012 when the application was submitted until 25 June 2012 because it changed its mind about the entity to be used to conduct the stock exchange business. At first, the application was submitted by a company and then when requested to provide the company documents, the applicant took issue with that request because it is permitted to conduct the business as an association (probably because the company was not registered at that time).

At that stage, the approval of the Minister had to be obtained for the number of persons who could undertake the business. This application was submitted on 20 September 2012 and the response was provided to the first respondent on 17 September 2012. The first respondent cannot be blamed for that delay.

The applicant then once again caused the delay in the advertisement of the notice that the rules would lay open for inspection by failing to pay for the advertisements from 24 September 2012 to 12 April 2013. As a result, the rules could not be advertised for inspection until the applicant made that payment.

In the meantime, the applicant was requested to provide a number of documents and information in a letter of November 2012, which included some of the documents required in terms of section 8(a) and 8(c), which remained outstanding as at 9 September 2014 and resulted in the license being refused.

It is clear that the applicant continuously refused to provide the information for various reasons. The applicant was reminded of the request of November 2012 in no less than 7 letters between the period 15 December 2012 to 7 November 2013. Only on 26 February 2014 some of the documents were provided.[39]

By the time that the 9 September 2014 decision was taken, the first respondent had not received the information it needed in order to determine the sufficiency of financial resources, nor had it received the names of the persons who would be carrying on the business as buyers and sellers of listed securities.

It is now almost 10 years since the application was submitted. The information provided by the applicant in the application and in subsequent documents submitted, is stale. So much has changed since 2012. For one, the economic and financial landscape of Namibia has changed significantly and has been greatly impacted by the Covid-19 pandemic, which is a fact that this court can take judicial notice of.

The applicant cannot seriously be arguing that this court can, based on an application which was submitted in 2012 and supplemented subsequently, determine whether the applicant should be issued with a license to conduct the business of a stock exchange…'.

[40] If one then turns to consider these arguments against the facts the following salient aspects emerge :

a) The applicant – even after the 9 September 2014 decision – continued to deliberately withhold outstanding relevant information and documentation purportedly - in order to 'protect investor- and individual confidentiality' – indicating however at the same time that same would be provided once a provisional licence

---

39 Rec p1016 par 26.

would be granted to it. This emerges from the letter dated 29 September 2014;

b) This stance was persisted with even after the advice received in this regard that SECA did not make provision for such a licence. This was since 15 October 2014;

c) Although the requisite outstanding documentation was then again listed for the convenience of the applicant the invitation was not taken up;

d) The applicant then afforded itself the leisure of almost a whole year to await the outcome of an opinion from the Attorney-General, which had been requested by the Minister of Finance, even though the Minister was not the relevant decision-maker and had no role to play in the award of the sought- after licence;

e) At the meeting of 1 October 2015 it became apparent that the applicant was still pursuing the grant of a provisional licence, still not providing the outstanding documentation;

f) Out of the blue - and by letter of demand - dated 15 January 2016 – a further three months later – the applicant's legal practitioners demanded that the licence to conduct a stock exchange now be granted to it, within 14 days of the letter, failing which, legal proceedings would be commenced, in which also 'damages would be sought for the willful delay of the matter as caused by the first respondent and an order that the implicated officials be investigated by the Anti- Corruption Commission for their alleged willful and malicious acts intimating also criminal investigation'.

g) Needless to say, this threat was not followed up within the threatened 14 day period – and – even then - the applicant afforded itself the further leisure of only instituting the threatened proceedings half a year later, on 16 July 2016;

h) Importantly the first respondent reacted by letter to the said letter of demand, indicating for the first time that the first respondent considered himself *functus officio*. This was by letter of 5 February 2016.

i) Also this indication, perceived as wrong by the applicant and considered as a

'dramatic stance', triggered no immediate action.

j) Instead a dramatic *volte face* occurred a further two months down the line, when the applicant, now, by letter of 11 April 2016, attempted to provide the outstanding documentation and information.

k) It was in response to this attempt that the applicant was, for a second time, informed that the first respondent considered himself *functus officio*. This occurred on 27 April 2016.

[41] Given the above it seems at first glance that the applicant eventually instituted the threatened legal proceedings only some further two and a half months down the line on 16 July 2016.

[42] On closer scrutiny it appears however that - on the applicant's own admission - this was actually not so – and - that this actually occurred - at the very least - more than three months later - if regard is had to Ms de Silva's 'without prejudice' letter of 11 April 2016 - which discloses that by the 11th of April 2016 the advice of senior counsel had already been sought *' … with a view to prepare and if necessary institute legal proceedings in the matter …'.* [40] In any event it becomes clear from the facts serving before the court that the period that it took to institute legal proceedings was much longer as the perceived *'dramatic stance'* - which allegedly triggered this application – namely that the first respondent could not issue the desired stock exchange licence because he was *'functus officio'* - was already communicated as far back as 5 February 2016 in response to the letter of demand which had threatened the institution of legal proceedings within 14 days.[41]

[40] Compare annexure 'HKA91' Compare also *Minister of Agriculture, Water & Forestry and Others v Ngavetene* 2021 (1) NR 201 (SC) at [38] where the learned Deputy-Chief Justice writing for the Court stated: ' …Even the delay between when the disputed directors refused to cooperate (which was in early July according to Mr Ngavetene) and when the challengers sought legal advice in 'late July', is not satisfactorily explained. That the legal practitioners would take about two months to prepare an uncomplicated application of the nature that served before the High Court is not reasonable in my view. As the authorities make plain, every step taken must be both necessary and reasonable.'

[41] Compare in this regard *Minister of Agriculture, Water & Forestry and Others v Ngavetene* at : ' [44] Legal practitioners must not drag their feet in launching review proceedings once instructed, especially when it is clear that there is no prospect of an amicable resolution of the matter and all the material for launching a review is at hand. In this case, the averments relating to the actions taken by the legal practitioners (both instructing and instructed) are so vague and evasive and there is no satisfactory explanation for why the instructing counsel took as long as they did and why there was such a long delay before the senior counsel could settle what otherwise are uncomplicated pleadings of which the main affidavit comprises 24 pages dealing with factual matter which is largely common cause.'

[43] The picture that so emerges leaves no doubt, that what occurred was an unreasonable delay, where lengthy periods of inactivity remain unexplained, or which were deliberately allowed to occur, regardless of any consequences and which occurred in circumstances where the applicant had the benefit of legal assistance thoughout. Here it is to be taken into account that the applicant also afforded itself the leisure of inactivity during those periods within which it, impermissibly, attempted to solicit interference from the Prime Minister, the Minister of Finance and the Attorney-General. These steps caused significant delays which were neither necessary nor reasonable. There was most certainly also 'a tardiness' in launching the threatened legal proceedings for which also no reasons where advanced and where legal proceedings where threatened as far back as January 2016 already - and - where on an undisclosed date - but prior to 11 April 2016 - on applicant's own admission - senior counsel had already been engaged to prepare legal proceedings for purposes of instituting same if necessary.[42]

Should the unreasonable delay be condoned?

[44] Here the following further aspects require consideration as they impact on the discretion[43] that should be exercised in this regard:

a) The applicant was legally represented throughout and thus had the benefit of legal advice at all material times. It can thus be accepted that the applicant would have appreciated the underlying policy reasons for instituting proceedings for judicial review or for declaratory relief promptly and without undue delay and that the failure to do so could have adverse consequences as otherwise the underlying public interest considerations and the basis on which third parties may have acted in the interim might be undermined. In such circumstances the delays that the applicant allowed to occur must be viewed as deliberate, ie. they were delays that were allowed to occur knowingly regardless of the consequences;

[42] This could have been on any date between January 2016 and April 2016.

[43] See for instance : *SA Poultry Association & Others v Minister of Trade & Industry & Others* op cit at [44].

b) Also with the benefit of legal assistance the applicant continued to *'flog a dead horse'* for an inordinate period of time in its ill-advised *'crusade'* for a provisional licence. Here it was correctly pointed out that there was absolutely no need to inordinately await the legal opinion of the Attorney-General, when such opinion could have been solicited from its own senior counsel immediately. It is clear that legal proceedings could in such circumstances have been instituted much sooner, if so advised;

c) The letter of demand of 15 January 2016 was copied to the Chair of NAMFISA, the Prime Minister, the Minister of Finance and the Attorney-General. Here it was correctly submitted that this was done with the perceived clear intention to have the decision of the first respondent influenced by any one or more of them. Also the prior approach to the Minister of Finance was correctly perceived as inappropriate and irregular as it was obviously also made with the intention that the Minister should interfere in the decision- making of the first respondent and should dictate the outcome. The Minister however appropriately elected not to act on this approach. Ultimately it appears on this score that the inference was correctly drawn by Mr Matomola, on behalf of the respondents, that the applicant's actions throughout were predominantly aimed at having the Registrar's decision influenced and dictated by the Minister of Finance and/or the Attorney-General and others - and thus – that such actions should not be considered as reasonable efforts at avoiding legal proceedings, which efforts should rather have been aimed at expediting review proceedings in view of a decision that was clearly made and communicated; These actions also reflect negatively on the *bona fides* of the applicant and they leave open the question whether all of this was really done in good faith.

d) The same must surely also be said in regard to when the applicant *'took the gloves off'* and when it tried *'to play the man instead of the ball'* through its threats intimating also criminal investigation and that *' … damages will be sought for the willful delay of the matter as caused by the first respondent and an order that the implicated officials be investigated by the Anti- Corruption Commission for their alleged willful and malicious acts …;.*

e) Then there is the important issue of prejudice. On behalf of the respondents it

was submitted that the delay was prejudicial particularly to the members of the public who were afforded the opportunity, in terms of the SECA, to comment on the application for a second stock exchange licence, as far back as June 2013, which comments had to be taken into account by the first respondent's predecessor in his decision. It was correctly pointed out in my view that significant developments have occurred in Namibia since, which might influence such public comment now and that in any event, and in such circumstances, the 2013 comments can no longer be regarded as current;

f) Also the information provided by the applicant during the period 2012 to 2014 can no longer be considered current, which situation, in turn, compounds the prejudice that will be occasioned to the first respondent, should he now be compelled to determine the same application again; Here it is relevant to take into account that the applicant could quite easily have submitted a fresh application in the interim, bolstered with the requisite information, which in all probability would have been disposed of by now. Given the invitation to do so and given the experience the applicant had gained, it is not unlikely that such a further attempt would have been successful.

[45] These factors already go a far way to indicate that the discretion that is to be exercised would have to be exercised against the granting of condonation for the unreasonable delay.

The consideration of the merits

[46] Although I believe that the delays that occurred in this instance were inordinate and lengthy and occurred for ill-advised reasons, such as the *'wild- goose-chase'* that occurred in the stillborn pursuit of a provisional licence and because of the questionable attempts at soliciting political interference, factors which also impact on the applicant's *bona fides*, and which on their own would have entitled the court to refuse to consider the merits, I will nevertheless do so, *ex abundante cautela* and on the consideration that, to some extent, the inaction of the applicant is ameliorated by the consideration that the first respondent continued to engage the applicant after its September and October 2014 communiques.

[47] If one thus has regard to the merits of the applicant's challenge it must firstly be said that it would have been unlikely that the court would have granted the sought remedy of 'substitution in view of the abovementioned prejudice that would be occasioned to the functionary, the first respondent in this instance; who would be compelled to now make a decision on outdated information and with reference to an application that was submitted some 10 years ago, even if supplemented. It is more than likely in this regard that there is real merit in the submission that 'the regulatory landscape in the financial industry has gone through significant changes since' and that the sought decision that is to be ordered will most probably be impacted upon and will 'be driven by newer policy considerations'[44].

[48] I also believe that the applicant's 'replying submissions' to the effect that the court can take judicial notice of the 'lapse of time' and 'the changed economic landscape' underscore this conclusion. Also what the ultimate effect of the Covid-19 pandemic on all of this is, or would be, can in my view however not be fathomed on outdated papers, despite the submission that the pandemic would 'show the necessity of private sector funding in the economy' and that 'the Namibian economy can only benefit from a second licence, not the other way round'.[45]

[49] If one then turns to the merits of the attack on the to be impugned decision and processes leading up to the decision, whether by way of review or declaratory relief or both, it should firstly be said here that the overall picture that has emerged is that the first respondent and his predecessor and officials, throughout, 'bent over backwards' to accommodate the various requests made to them from time to time even if some of these efforts might be open to criticism such as for example that certain actions, which occurred prior to the September 2014 decision, were *ultra vires* for instance. This point was however not taken in regard to the merits of the September 2014 decision in respect of which even the notice of motion was not amended to expressly seek its revision and setting aside. The case history revealed that the first respondent and his predecessor and officials essentially endeavoured to give *audi* to the applicant at all material times and that they tried their utmost to act

[44] Applicant's Replying Submissions para 13.
[45] Applicant's Replying Submissions para 15.

fairly in response to all the requests that were made to them over a protracted period of time. Critically the applicant acquiesced and participated in all such actions throughout.

[50] Importantly - and secondly - it has however emerged – and actually this was- or should have been common cause between the parties – that the 2012 application for a stock exchange licence – was defective at the material time and also remained defective and non-compliant with the requirements imposed for the issue of such licence by section 8 of SECA at least until April 2016. It is for instance undisputed that the information required by section 8(b) was only provided by letter of 11 April 2016. In regard to the information required by section 8(c) - which the applicant had also not provided by 9 September 2014 - the applicant continued to *'play cat and mouse'* until it eventually indicated in April 2016 that *' … an amount of N$ 5.6 million would be accessible from investors ..',* – whatever that would mean as this averment remained vague – and – where in terms of section 8(c) the applicant had to satisfy the first respondent that it (actually) *' … has sufficient financial resources for the proper exercise or carrying out the powers and duties conferred upon or assigned to a stock exchange…'* which requirement it failed to substantiate in any meaningful way. A further aspect that underscores the correctness of the 14 September 2014 decision is that the applicant only advised subsequently, and on 29 September 2014 only, that the requirements pertaining to foreign directorships, as imposed by section 12(1)(a)(ii)(bb), had been rectified after the fact.

[51] It so becomes clear – also for the other reasons correctly advanced in the letter of 14 September 2014 – that the applicant's 2012 application was defective in material respects at the material time – and - as it was put on behalf of the respondents - the *'jurisdictional facts set by section 8 for the issue of a licence* where not met by September 2014'. Importantly also, in the letter written on behalf of applicant by the applicant's legal practitioner of record, Ms de Sousa, dated 29 September 2014, it was effectively conceded that the applicant had not complied with the requisite provisions imposed by section 8, an aspect reiterated by the first respondent in the letter of 15 October 2014, which aspect was never denied.

[52] It follows from these considerations that the prospects of success of the

application to assail the decision in question on the merits are not good.

<u>The conflict of interest issue</u>

[53] There is however a further underlying aspect that requires consideration. That is the point raised in regard to the perceived conflict of interest which the applicant believes existed between officials of the second respondent who were attending meetings of the board of the Namibia Stock Exchange and which officials also sat in assessment of the applicant's application as a result of which the applicant was allegedly denied a fair hearing. It was submitted in this regard that as these officials where never authorised by law to serve as directors and receive compensation therefore a reasonable perception that they were compromised was created, and therefore that these officials should have been recused and that the failure to do so renders the entire decision making a nullity.

[54] The respondents resisted this facet of the applicant's case by pointing out that the September 2014 decision was taken by a Mr Shiimi, the late predecessor of Mr Matomola. It was pointed out that the issue was raised in regard to other officials and the incumbent first respondent, who participated in the review process, but that they did not take the September 2014 decision, a decision that was made by the late Shiimi, and that Mr Shiimi's decision was thus not a decision that could reasonably possible be viewed as being biased.

[55] Although counsel for the applicant are obviously correct in their fundamental submissions that also administrative decisions can be tainted by bias resulting in nullity I believe that crucially sight was lost of the fact that not every reasonable perception of bias will necessarily achieve that result, an aspect that will also hinge on the facts and circumstances of the perception raised and the manner in which it is addressed. It is for example not uncommon in legal proceedings where the issue arises, whether raised *meru motu* by the judicial officer concerned, or by one- or more of the parties, that the parties are then given the opportunity to consider this aspect and to consult on this with their legal representatives in order to determine whether or not they would/should insist on the recusal of the judicial officer in question. In such scenario it is also not uncommon that the parties agree to continue

before the same judicial officer concerned, which consent, and if acquiesced by the judicial officer, then cures the objection. This is precisely what seems to have occurred in this instance where the applicant initially raised the objection in correspondence and where the applicant then continued to participate in the process after the issue was dealt with and explained in a letter of March 2014. It so appears that also this point is doomed to failure.

[56] All these factors/considerations in my view then militate towards the conclusion that, in this instance, the public interest considerations in the finality of administrative action should prevail and outweigh the other considerations. Ultimately also - and with reference to these considerations - I also cannot see how it would be in the interests of justice to grant condonation.

[57] In the result I believe that it is proper to exercise my discretion against the granting of condonation for the unreasonable delay that has occurred in this instance.

[58] This means in turn that the application is to be dismissed with costs, such costs to include the costs on one instructed- and one instructing counsel

---

H GEIER

JUDGE

APPEARANCES:

APPLICANT: V. Maleka SC (main heads of argument)

T Ngcukaitobi SC (supplementary- and replying heads of argument)
Instructed by De Silva Inc., Windhoek.

1st – 2nd RESPONDENTS: N Bassingthwaighte
Instructed by AngulaCo Inc., Windhoek