

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2020/00153

In the matter between:

**HALLIE INVESTMENTS NUMBER FIVE HUNDRED
AND EIGHTY TWO (PTY) LTD
SUSAN MARGARET VAN DER MERWE**

**1ST APPLICANT
2ND APPLICANT**

and

**MUNICIPAL COUNCIL FOR THE DISTRICT OF
WINDHOEK
THE PROSECUTOR-GENERAL
GUNTHER HENLE
RUN HENLE
SIGRUN HENLE
MINISTER FOR REGIONAL AND LOCAL
GOVERNMENT**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

Neutral Citation: *Hallie Investments Number Five Hundred and Eight Two (Pty) Ltd v Municipal Council for the District of Windhoek (HC-MD-CIV-MOT-REV-2020/00153) [2023] NAHCMD 179 (3 April 2023).*

Coram: MASUKU J
Heard: 20 July 2022
Delivered: 3 April 2023

Flynote: Administrative Law – the audit alteram partem rule and when applicable – Delegation or powers and duties in terms of section 31 of the Local Authorities Act 23 of 1992 – Civil Procedure – Section 16 of the High Court declaratory orders and considerations to be taken into account in deciding whether or not to issue declaratory relief.

Summary: The first applicant is a company with limited liability, registered in Namibia. It owns landed property just past Klein Windhoek Town and in which it operates a business called Droombos wherein it has a restaurant and accommodation facilities, including hosting events. It obtained a consent regarding the usage of the property from the respondent, the Municipal Council for the City of Windhoek. It would appear that following complaints from neighbours, the respondent eventually withdrew the consent and also caused notices to be issued to the second applicant, Ms van der Merwe for violation of certain regulations. The first applicant contends that a series of decisions taken by the respondent, which prejudicially affected the Consent issued to it and the use it could put the property to, should be reviewed and set aside. This is because the respondent did not afford the first applicant a hearing before the decisions, including recommendations, were taken. The applicant further took issue with the respondent's officials who took the decisions, contending that they were not properly delegated to do so in terms of the Local Authorities Act, 1992. Last, the first applicant applied for declaratory relief regarding certain provisions of the consent, as being unreasonable. It also sought an order declaring what activities it may carry out on the premises, including operating an accommodation facility, a conference facility, an events and functions facility and that it could serve alcoholic beverages every day, between 14h00 and 02h00. The respondent opposed the application pound for pound.

Held: That the decisions sought to be impugned by the first applicant, were administrative decisions and thus amenable to being reviewed.

Held that: A party, who may be prejudicially affected by a decision made, is entitled to rights enshrined in Art 8, including the right to be heard before that decision is made. In the instant case, the first applicant was denied audi.

Held further that: Preliminary decisions can have serious consequences in particular cases, where they lay a foundation for a possible decision which may have grave results – *Director: Mineral Development, Gauteng v Save The Vaal Environment* 1992 (2) SA 709 at 718D.

Held: That it is permissible in law for a repository of power to delegate the function to another. In the instant case, the delegation must be in terms of s 31 of the Local Authorities Act, 1992, which requires the delegation to be in writing and this was not observed in the instant case. Where it is purported to have been done, the issue of compliance therewith was not raised in the papers but in the heads of argument, which is not permissible because it denied the other party the opportunity to deal with that allegation in the course of the exchange of papers.

Held that: The granting of declaratory relief is governed by the provisions of s 16(d) of the High Court Act No. 16 of 1991 and the court is required to establish if the party seeking declaratory relief has an existing, future or contingent right in the matter and if that is established, the court exercises a discretion in deciding whether or not the case is a proper one in which to grant the declaratory relief sought.

Held further that: The declaratory relief sought by the first applicant, although it is an interested party and generally has a right in terms of the *Trustco Ltd/ ta Legal Shield v Deeds Registries Regulation Board* 2011 (2) NR 726 (SC) judgment, to approach the courts in order to establish what its rights are, the case is not an appropriate one in which the court should grant the declaratory

relief sought because some of the *declarators* sought fall within the realms of policy and would constitute a slippery slope for the court to intervene.

The court reviewed and set aside the decisions of the respondent and by and large refused the declaratory relief on the grounds that it was not a proper case for the court to exercise its discretion, as it required the court to venture into the realms of issues of policy.

ORDER

1. The decisions taken by the first respondent's officials dated 29 October 2019, 5 December 2019, 24 January 2020 and 14 February 2020 and a recommendation made on 5 November 2020, as well as a resolution passed by the first respondent's management committee on 12 November 2020, be and are hereby reviewed and set aside.
2. The several notices issued in terms of section 56 of the Criminal Procedure Act, 1977 by the first respondent's municipal police, be and are hereby set aside.
3. Paragraph 1.3 of the Consent contained in Resolution 275/08/2012 granted to the first applicant by the first respondent during 2012 is hereby declared to be unlawful or *ultra vires* and is set aside.
4. The declaratory relief regarding the Consent allowing the applicant to operate an accommodation facility; a conference facility establishment and to operate a facility which falls within the definition of a 'social hall' as defined in the Windhoek Town Planning Scheme promulgated under the Town Planning Scheme, is hereby refused.
5. The declaratory relief to the effect that the Consent read with the first applicant's liquor licence permits the first applicant to host conferences, events and functions from Mondays to Sundays and to sell liquor on those days, between 14h00 and 02h00, is refused.
6. The first respondent is ordered to pay the costs of the application.
7. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] At issue in this judgment, are certain decisions allegedly taken by the first respondent, the Municipal Council for the District of Windhoek which the applicants challenge and seek an order from this court reviewing and setting them aside on bases that will be adverted to as the judgment unfolds further. In addition, the applicants seek certain the issuance of *declarators* from the court.

[2] Needless to mention, the first respondent opposes the relief sought by the applicants and has moved this court to dismiss the application for review and the issuance of the *declarators* with costs. As the judgment unfolds, it will become apparent on whose side the court leans, having regard to the documents filed of record, the law applicable and the arguments presented.

The parties

[3] The first applicant is Hallie Investments Number Five Hundred and Eight Two (Pty) Ltd, a company duly incorporated and registered in terms of the company laws of this Republic. Its address is at an entity called 'Droombos', situated at Portion R/41, Klein Windhoek Town and Townlands, ('the premises'). The first applicant is represented by its director, Mr Karel Petrus van der Merwe, in this application and he deposed to the affidavit in support of the application.

[4] The second applicant is Ms Susan Margaret van der Merwe, a major female who is in the employ of the first respondent as the banqueting

manageress. Her address is the same as that of the first applicant. She is also cited in her capacity as a person who was issued with various notices issued in terms of s 56 of the Criminal Procedure Act of 1977, (‘the CPA).

[5] The first respondent is the Municipal Council for the District of Windhoek, a local municipality constituted in terms of s 2 read with s 4 of the Local Authorities Act 23 of 1992. Its principal place of business is situated at Municipal Buildings, Independence Avenue, Windhoek. The second respondent is the Prosecutor-General of Namibia, who is cited in her capacity as an appointee in terms of Art 88(2) of the Constitution. She is vested with prosecutorial powers to be exercised in the name of the Republic of Namibia. Her address of service is situated at 2nd Floor, Sanlam Building, Independence Avenue, Windhoek.

[6] The third respondent is Mr Gunther Henle, a male adult who resides at Portion R/41, Klein Windhoek Town and Townlands No 70, off the Gobabis trunk road. The fourth respondent is Ms Sigrun Henle, a major female adult, who jointly owns the property mentioned in relation to the third respondent. It is important to mention that the applicant seeks no relief against the third and fourth respondent, save if they oppose the relief sought. They, in the event, did not oppose the application.

[7] The fifth respondent is the Minister of Regional and Local Government, cited by virtue of being the minister responsible for Regional and local Government and Housing in the Republic. In this regard, the Minister exercises supervisory powers in respect of the Town Planning Ordinance 18 of 1954; the Windhoek Town Planning Scheme; the Local Authorities Act, 23 of 1992 and the Regulations to the Registration of a Business published in Government Gazette 3669 on 26 July 2006.

[8] It is perhaps important to mention that, properly considered, the relief sought in this application, is solely directed at the first respondent. There is thus no relief sought against all the other respondents, namely, the second to the fifth respondents. Indeed, none of the said respondents opposed the

application or put up any papers in opposition or support of the relief sought. As such, there is effectively one respondent being the Municipal Council of Windhoek.

[9] A bird's eye view of the case and the papers filed suggests inexorably that although both applicants have made common cause, the main beneficiary and proponent of this application, is the first applicant. For that reason, I will accordingly refer to the first applicant as 'the applicant'. Where the second applicant is to be separately identified, she will be identified as the second applicant. By the same token, the Municipality of the City of Windhoek, being the only respondent, will, for ease of reference, be referred to as 'the respondent'. Where reference is made to the applicants and the respondent in this judgment, they will jointly be referred to as 'the parties'.

Representation

[10] The applicants were represented by Mr Töttemeyer, whereas the respondent was represented by Mr Narib. The court expresses its gratitude to both counsel for the assistance rendered to the court in the determination of this matter. Whichever way the application is ultimately decided, is no reflection on the application of both counsel.

The relief sought

[11] Loosely identified, the applicants seek two types of relief. The first is the review and setting aside of certain decisions made by the respondent. These are:

- (a) a decision taken by the respondent's employee, Mr van Rensburg on 29 October 2019;
- (b) a further decision taken by the said Mr van Rensburg on 5 December 2019;
- (c) a decision by Ms Daleen Brand on 24 January 2020;
- (d) a decision taken by Mr van Rensburg on 14 February 2020;

- (e) the recommendation made by the respondent's Strategic Executive: Urban and Transport Planning dated 4 November 2020 as well as a resolution passed by the first respondent's managing committee on 12 November 2020; and
- (f) several notices issued in terms of s 56 of the CPA by the respondent's municipal police service.

[12] The second type of relief sought by the applicants is declaratory in nature. In that regard, the applicants seek an order declaring para 1.3 of the consent contained in resolution 275/08/2012 ('the Consent'), granted to the applicant by the respondent to be unlawful or *ultra vires* or irregular and for it to be set aside.

[13] The applicant further seeks a *declarator* that in terms of the Consent, the first applicant may operate an accommodation facility; operate a conference facility establishment; operate a facility where events and functions may be hosted and a facility which falls within the definition of a 'social hall' as defined by the respondent's Town Planning Scheme, promulgated under the Town Planning Ordinance.

[14] Last, but by no means least, the applicant seeks a *declarator* that the Consent, read with the first applicant's liquor licence, permits the first applicant to host conferences, events and functions from Mondays to Sundays and to sell liquor during those days between 14h00 and 02h00.

Background

[15] It would appear, having regard to the papers filed of record, that the bone of contention in this matter revolves around the continued eligibility of the first applicant to run a guest house with a restaurant and conference facility called Droombos. It would seem that pursuant to complaints lodged with the respondent, and certain allegations by the respondent's functionaries accusing the applicant of failing to meet some of the conditions of the Consent

granted to it, the respondent sought to withdraw the consent it had given to the applicant.

[16] The applicant thus cries foul, and approached this court for the relief set out earlier in this judgment. The question is whether the first applicant is entitled, regard had to the material before court, to the relief it seeks. Namely, the review of the decisions made and the *declarators*.

The applicant's submissions

[17] It was submitted on behalf of the applicant that as at the time of the March 2020 "lockdown", Droombos was operating for the most part, at full capacity and as such was operating from the morning to the evening, seven days a week and in accordance with its trading hours.

[18] It was pointed out that the applicant had, as at end February 2020, invested N\$55 309 871 in Droombos (comprising an investment in land and buildings of N\$50 129 447 and furniture and equipment of N\$5,180,425). In so doing it developed Droombos into a premier five-star conference and event location.

[19] The improvements constituting the above investments were erected in terms of building plans duly approved by the respondent's council. The land is zoned in terms of the Scheme as *undetermined*, and as such has no primary use, no prohibited uses and is able to be used for all 'consent uses'. This, therefore, means that the land can only be used in terms of a consent granted by the first respondent. Therefore, having regard to the Scheme, a withdrawal of consent will render the land useless. Such withdrawal is viewed as an absurdity and an infringement of the applicant's right to property protected by Article 16 of the Namibian Constitution.

[20] The applicant further submits that it was permitted by the respondent's council to conduct its business (which includes the hosting of functions and events) as described in the Certificate of Fitness / Registration (issued on

behalf of Council) read with the Consent, and also in terms of its liquor licence.

[21] The applicant contends its offerings at Droombos, fall within the definition of 'Social Hall' as defined in the Town Planning Scheme. Thus, properly construed and on the aforementioned basis - a legitimate expectation at all relevant times existed, that it is entitled to operate in terms of the Consent, read with the Certificate.

[22] The applicant points out that since 26 March 2019, the respondent's officials have been accusing it of either not meeting the conditions imposed in the Consent or not fulfilling additional conditions.

[23] With this said, the main thrust of the first respondent's opposition to the relief sought is seemingly that the Consent imposed the condition that the first applicant had the right to operate a guesthouse establishment in terms of the "Residential Occupational Policy" which, according to the first respondent, thereby confirms the "residential status" of the approval granted. The first applicant disagrees.

[24] The respondent also contends that the requirements of clause 2 of the Consent must have been met before the first applicant can claim the consent to operate a guesthouse. The first respondent is of the opinion that conditions 7 to 13 of the Consent remain unfulfilled, and as such the Consent is "conditional", and actually never came into existence. This contention is challenged by the first applicant in that:

1. From the respondent's own correspondence, the email string of 15 and 16 May 2019, between the first respondent's Mr van Rensburg, Mr Archer, Mr Rust, Mr Lisse and Mrs. van der Merwe it appears that, on first respondent's own version all conditions have been met.
2. It appears, according to the applicant, that the concerns raised, and actions by the respondent's functionaries, are being driven

by complaints made by the third and fourth respondents. Mr. Lisse, through correspondence, however conceded that the Roads Authority had waived their initial objections in regard to the intersection with the trunk road leading to the Hosea Kutako Airport. Importantly, Mr Lisse states that:

‘I believe Council would not have legal backing if challenged in court regarding above, if this would be the only reason for cancelling the consent?’

3. Then Mr van Rensburg responds, by adding as follows:

‘1. It is my understanding that all conditions of the consent has been met, apart from wastewater which has only recently been submitted and is still subject to approval. Can everyone please confirm or indicate otherwise? Immanuel with respect to our previous claims that structures were erected / being erected which is not covered under the current approved building permit.’

[25] The applicant contends that, the wastewater concerns raised by the respondent have been addressed and all the requirements (per the Consent) have been complied with in that, although the construction of an industrial and domestic wastewater treatment plant and related pipeline system was never a requirement by the first respondent, it was nonetheless undertaken by the applicant (far over and above what was required) and at a cost of approximately N\$850 000.

[26] The aforementioned was done in terms of the Environmental Clearance Certificate. The respondent’s reliance on (unspecified) 2011 environmental regulations which were apparently not complied with by the applicant is incorrect. Similarly, the allegations that condition 14 of the Consent had not been complied with is incorrect as the property was purchased with approved wastewater management plans in place.

[27] Regarding the complaints that the drawings for the effluent plant which were submitted, were not signed by a professional engineer, the applicant

submits that those drawings were done by a registered professional engineer. The respondent's functionaries, however, refused to accept them and failed to provide reasons for their refusal. All improvements effected on the Land have been done in terms of properly approved building plans, so the applicant argues.

[28] Regarding the allegations surrounding 'noise', the respondent, although relying on "the Noise Control Regulations, General Notice No 77 of 30 March 2006" has failed to attach this document to its papers (or to even refer to its Gazette publication). Another reliance placed on the General Health Regulations (GN 121 of 1969) which is a subordinate legislation and respondent, is enjoined to prove the alleged subordinate legislation. It has failed to do so. The court can therefore not take judicial notice of same. That notwithstanding, it is denied that the levels of noise generated by Droombos' operations are excessive or offensive or that they infringe the provisions and conditions contained in the Consent, as no measurable standard/level is included or provided for in the Consent.

[29] The respondent alleges that applicant's liquor license was obtained unlawfully and they should not be allowed to operate under such licence. To this, the applicant states that it has been properly and lawfully issued with a special liquor licence which is valid and not subject to any review by the respondents through the correct legal procedures.

[30] The respondent states that the six decisions it took were not administrative in nature, that they were 'never decisions' but were rather notices in terms of section 28(3) of the Town Planning Ordinance and/or the 'performance of a duty' in terms of section 28(2)(c) of the Town Planning Ordinance.

[31] As such, the respondent contends that acting in terms of section 28(2) (c) of the Town Planning Ordinance does not involve the exercise of discretion, or judgment or choice in the circumstances. At most, the respondent was only 'prohibiting' the applicant from using its property i.n a

manner which contravened the Scheme, and this power is sourced from section 28(2)(c) of the Town Planning Ordinance. The respondent alleges that the withdrawal and cancellation of the consent is thus authorized by section 28(2)(c) of the Town Planning Ordinance and therefore, the decisions complained of do not constitute decisions and are not of reviewable character, as they are not decisions of an administrative nature. The applicant strongly disagrees and contends that the decisions are all administrative in nature and character.

[32] The applicant further submits that the respondent never sought to invoke section 28 of the Ordinance and has purported to do so only after the fact. This unilateral and unauthorised cancellation was unlawful and violated the applicant's Art. 18 rights. The first respondent obtains its powers from various legal instruments such as the Local Authorities Act, 23 of 1992; the Town Planning Ordinance, 18 of 1954; the Windhoek Town Planning Scheme (originally approved by Proclamation 16 of 1 July 1976), ('the Scheme') etc. They are thus administrative bodies that took administrative decisions, which decisions are reviewable and must accordingly meet the requirements of Article 18 of the Constitution.

[33] The applicant argued further that the duty to hear affected parties before any decision is taken which is adverse to or negatively affects their rights or interests, is inherent in Article 18. In this connection, it was submitted that Art 18 of the Constitution requires administrative bodies and officials to act fairly and reasonably and further requires them to comply with common law and any relevant legislation. In considering what fairness entails in terms of Article 18 of the Namibian Constitution, the applicant referred this court to *Onesmus v Permanent Secretary: Finance and Others*,¹ which approvingly referred to the following requirements.²

¹ *Onesmus v Permanent Secretary: Finance and Others* 2010 (2) NR 460 (HC).

² At par 13 and 14 where court referred to *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) Lord Mustill stated the following in a speech concurred in by the remaining members of the court (at 106d-h).

'(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

(2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type.

(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspect.

(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

(5) Fairness will very often require that a person who may be adversely affected be allowed to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest, fairness will very often require that he is informed of the gist of the case which he has to answer.'

[34] On 29 October 2019, the respondent's Mr. van Rensburg, included a further suspensive condition to the Consent as follows:

'It was further brought to our attention that active advertisement for events outside of the scope of the consent approval is ongoing which affects operation and is a direct cause of complaints / objections from neighbouring property owners. Just to reiterate our previous correspondence of 10 July, the existing consent is limited to the operation of a 10 bedroom guesthouse and conference facility for daytime activities only. Accordingly we wish to draw your attention to paragraph 1.3 of the consent as granted under CR275/08/2012 stating that:

"The City reserves the right to revoke the consent, should there be a valid complaint as a result of the guesthouse and conference facility establishment."

[35] Mr van Rensburg in his letter goes on to note that:

'We therefore confirm our sole interest in the matter being the enforcement of conditions of approval of the complimentary activities (consent use) in a residential area.... despite extensive efforts by the City of Windhoek to correctly advise and assist the owners of Portion RE/41 Klein Windhoek Town and Townlands No 70 to operate a legal business on the premises, certain activities contrary to and exceeding the existing land use rights continues to take place (sic). We regret to inform you that this leaves us little choice but to install yet another suspensive condition on the current consent approval governing land use rights on the premises. You are herewith informed to cease all activities outside the existing approval including any functions and events outside of normal working hours with immediate effect. Failure to adhere to this instruction will ultimately result in an immediate cancellation of the consent use granted in terms of the Windhoek Town Planning Scheme under Council resolution 275/08/2012.' (Emphasis added).

[36] In the 29 October 2019 decision, the applicant was informed to cease all activities outside of the existing approval including any functions and events outside normal working hours, with immediate effect. In a letter dated 5 December 2019, Mr van Rensburg withdrew the first applicant's consent use for a 'guesthouse establishment and conference facility' with immediate effect. In the 5 December 2019 decision Mr van Rensburg's reason for cancelling the consent was 'due to the continued non adherence to the request to cease all functions and events', and not only those referred to in the 29 October decision.

[37] The applicant argues that, the Land is not zoned as a residential area but instead as an undetermined area. No conditions are imposed either in the Consent or in the Certificate of Fitness limiting the first applicant's hours of operation. Nowhere is the first applicant limited to daytime activities only. The Consent does not provide for the addition of suspensive conditions in addition to the conditions already contained therein.

[38] That said, Mr van Rensburg accordingly had no power to impose any of the aforesaid conditions and none were delegated to him. On this basis alone, Mr van Rensburg's decision should fail. By limiting the first applicant's operations to working hours, Mr van Rensburg acted unlawfully. The

applicant was not afforded a hearing nor an opportunity to make representations prior to the adverse condition being imposed upon it.

[39] In the letter authored by Ms Daleen Brand, dated 24 January 2020, she decided that the 'fitness certificate was also no longer valid due to the withdrawal of the consent' despite the first applicant's Certificate being valid until 9 April 2020. In addition, a new zoning was effectively imposed upon the first applicant's Land because the letter of 24 January 2020 effectively seeks to reduce and restrict the use of the Land to that of an 'administrative office', and seeks to remove all rights to conduct any of the activities granted in terms of the Consent.

[40] In turning to Ms. Brand's decision, the applicant submits that, Regulation 16 of the Regulations deals with the withdrawal or suspension of a certificate of fitness. In terms of section 16(2) of the Regulation, Council may not cancel or suspend a certificate of fitness or a certificate of registration unless the Council gives the holder of a certificate at least 21 days' notice in writing of its proposed action and the reason therefore, and invited written objections and upon a proper consideration of same. The decision to cancel the first applicant's certificate of fitness, it is argued, is thus *ultra vires* the Regulations and unlawful.

[41] Regarding the issue of delegation, applicant argues that the only delegated authority apparent from the record is that which was granted to the Strategic Executive: Urban and Transport Planning under section 31(1) of the Local Authorities Act, 23 of 1992. In terms of Resolution 257/10/2017, taken on 31 October 2017, the first respondent resolved that delegated authority to approve and not approve consent uses as provided in Table B of the Windhoek Town Planning Scheme be granted to the Strategic.

[42] Section 31(1) of the Local Authorities Act confers a power to sub delegate. The power to sub-delegate, must be strictly construed. In addition, the Act does not expressly authorise the delegation of powers to make 'regulations or rules'. It was submitted that the decision to withdraw or to

cancel a Consent Use falls within that category and if the Council had the power to make that decision (which is disputed) only the Council itself could have made that decision. This particularly applies to the Consent use *in casu*, given its special nature. Such delegation was not done, the applicant added.

[43] As regards the fines imposed, it would seem that they centre on s 48(a) of the Ordinance and other provisions of the Scheme, all dealing with alleged failures to comply with various provision of the Town Planning Scheme. In addition, a contravention of regulation 15 (read with other regulations) in failing to comply with requirements stipulated in a notice issued, is relied upon. Once the impugned decisions are reviewed and set aside (by virtue of their illegality), the basis upon which the ten fines were issued also falls away and the ten fines stand to be reviewed, set aside, and cancelled.

[44] Counsel for the applicant further argued that the concept of a legitimate expectation is premised on a 'practice or promise'. The respondent's conduct falls within that category. The law has also developed to the extent that a legitimate expectation not only gives rise to procedural rights (i.e. right to be heard) but may also give rise to substantive rights.³

[45] It was accordingly submitted that the applicants are entitled to the declaratory relief, in terms of which it should be declared that the Consent granted by the first respondent, entitles the first applicant to operate an accommodation establishment; a conference facility and establishment; host events and functions as defined and contemplated in the first applicant's certificate of fitness of 22 April 2019, and sell liquor on the premises from Mondays to Sundays between the hours of 14h00 and 02h00.

[46] The applicant concludes by submitting that first respondent's actions were unlawful and the decisions adverse to the first applicant, including the

³ *Duncan v Minister of Environmental Affairs* 2010 (6) SA 374 (SCA) at 380–382; *Pretorius v Transnet* 2016 (6) SA 77 (GP), para 33 and authorities therein referred to.

withdrawal of the first applicant's Consent and Certificate of Fitness / Registration together with the issuing of the tickets, stand to be reviewed and set aside.

The respondent's submissions

[47] The respondent submits that the key land use authorisation in terms of which the Droombos Estate conducts its business is the Council Resolution 275/08/2012 of 30 August 2012. The material authorisation which is granted is recorded in para 1 of the Council Resolution as:

'1. That consent to operate a guest house establishment with ten (10) leasable rooms on Portion R/41, Klein Windhoek Town and Townlands No 70, off the Gobabis Trunk Road, be granted in terms of the Resident Occupation Policy, subject to the following conditions:

2. That a maximum of ten (10) rooms with twenty (20) beds be used for the accommodation establishment.

3. That the City reserve the right to revoke the consent, should there be a valid complaint as a result of the guest house and conference facility establishment.

4. That consent be effective only, once a parking layout has been provided for on-site parking, to the satisfaction of the Strategic Executive: Transportation and the conditions as per paragraphs 3 to 15 have been fulfilled.

5. That surface stormwater run-off be accommodated according to clause 35 of the Town Planning Scheme (see Info 35 of the Town Planning Scheme) stating:

6. That no stormwater drainage pipe, canal, work or obstruction (except stormwater drain pipes, canal or work which have been authorised in writing by the local authority or which have been or may be built, laid or erected in terms of any law) be constructed on or over the property or located in such a way that:

7. The flow of stormwater from higher lying property to lower lying property is impeded or obstructed and through which any property is or may be endangered; or

8. That engineering drawings on how the stormwater would be accommodated to the satisfaction of the Strategic Executive: Transportation be submitted for approval simultaneously with the building plans.

9. That no building plans be approved until the stormwater conditions are met.'

[48] The Applicant was granted the right “to operate a guest house establishment” subject to clause 2 of the Resolution which states:

‘That consent be effective only, once a parking layout has been provided for on-site parking, to the satisfaction of the Strategic Executive: Transportation and the conditions as per paragraphs 3 to 15 have been fulfilled.’

[49] Section 45 of the Scheme, on ‘Council may impose conditions on granting consent reads:

‘(1) In giving its approval, authority, permission or consent under any clause in this Scheme, Council may impose such conditions as it deems necessary, including conditions relating to the management of the approved activity, such as an environmental management plan which outlines the processes and procedures for minimising or mitigating, or preventing the adverse effects of activities on the environment, inclusive of the possible pollution of groundwater recharge areas or groundwater or both.’

[50] Section 46 of the Scheme, on “Binding force of conditions imposed” provides the following:

‘(1) Where permission to erect any building, execute any works or to use any building or land for any particular purpose or to do any other act or thing, is granted under the Scheme, and conditions have been imposed, the conditions shall have the same force and effect as if they were part of the scheme.’

[51] In relation to certificates of fitness, the General Health Regulations makes a certificate of fitness subject to compliance with other laws. It specifically, in Regulation 2 provides that:

‘2. These regulations lay down minimum requirements and standards and shall be deemed to be in addition to, but not in substitution for, any regulation in force within the district of the local authority, except where such regulation is in conflict or inconsistent with these regulations, or lay down requirements and standards which

are lower than those required by these regulations, in which case the provisions of these regulations shall prevail.'

[52] Regulation 174(1) of the General Health Regulations also makes the land use rights a pre-condition to the validity of a certificate of fitness. The regulation 174(1) provides as follows:

'174. (1) No person shall carry on the business of a hotel or boarding house or lodging house in or on any premises, unless he has had such premises registered in advance with the local authority for this purpose. The local authority issue to the applicant the certificate of registration applied for only if such application is accompanied by a certificate of fitness in accordance with regulations 175 and 176.'

[53] The respondent submits that, as per Regulation 2 of the General Health Regulations, the 'hosting events and function', which is reflected in certificate of fitness, is not 'in substitution for, any regulation in force within the district of the local authority'. The Scheme's requirement for an appropriate land use right cannot be substituted or extended on the basis of what is contained in a certificate of fitness.

[54] The respondent further submitted that the applicant held a 'Special liquor licence', which it obtained in terms of section 7(1) of the Liquor Act and that such licence was improperly sought and obtained as the conditions for such a licence could not have been legally satisfied by the applicant.

[55] The respondent made the following submissions regarding the specific decisions attacked by the applicant. The letter dated 29 October 2019 conveyed to the applicant the continued unlawful use of the subject property, and the consequences. However, such letter does not constitute a decision; is not a reviewable decision of an administrative nature; and is the performance of a duty.

[56] The letter dated 5 December 2019, from the City's Mr. van Rensburg, addressed to the applicant, is equally the performance of a duty in terms of

section 28(2)(c) of the Town Planning Ordinance. The withdrawal of and the cancellation of the Consent is authorised by section 28(2)(c) of the Town Planning Ordinance, further contended the respondent.

[57] The respondent further submitted that s 28(2)(c) of the Town Planning Ordinance, Ordinance No. 18 of 1954, requires that where any building or land is being used in such a manner as to contravene any provision of the scheme, it should be prohibited from being used. Section 28(3) of the Town Planning Ordinance, then provides further that:

‘(3) Before taking any action under subsection (2) the responsible authority shall serve a notice on the owner and on the occupier of the building or land in respect of which the action is proposed to be taken and on any other person who, in its opinion, may be affected thereby, specifying the nature of, and the grounds upon which it proposes to take that action.’

[58] It was contended that the letter dated 24 January 2020, from the City’s Ms Daleen Brand, addressed to the applicant’s legal practitioners, and the Email dated 14 February 2020, from the City’s Mr van Rensburg addressed to the applicant, confirmed the continued unlawful use of the subject property, and the invalidity of the Fitness Certificate. These equally do not constitute decisions and are not reviewable decisions of an administrative nature.

[59] Regarding the notices in terms of the Criminal Procedure Act, the respondent submitted that the applicants have contravened the Scheme, by the illegal land uses before the satisfaction of the suspensive conditions, and extending the uses of the subject property beyond the contemplated consent use, the notices were therefor correctly given.

[60] The respondent argued that the consent use which was granted to the applicant did not legally come into existence due to the suspensive conditions not being satisfied. It is therefore not legally feasible to refer to the ‘revocation’ of a right, which did not come into existence. However, the power to ‘prohibit’ the applicant’s property from ‘being used in such a manner as to contravene

any provision of the scheme' and which is sourced from section 28(2)(c) of the Town Planning Ordinance, must be separated from the withdrawal of the land use consent granted in favour of the First Applicant, it was further submitted.

[61] The recommendation on 5 November 2020, to the City's Managing Committee, as well as the Resolution of the City's Managing Committee on the same date resolving to recommend to the City's Council to endorse the withdrawal of the land use consent granted in favour of the first applicant, submitted the respondent, are therefore distinct from the power which was granted in terms of section 28(2)(c) of the Town Planning Ordinance.

[62] The respondent further argued that section 9(3) of the Interpretation of Laws Proclamation further preserved the City's power of revocation, which is expressed in clause 1.3 of the Council Resolution. Section 9(3) reads as follows:

'(3) Where a law confers a power to make rules, regulations, or bye-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend, or vary the rules, regulations, or bye-laws.'

[63] As regards the declaratory order, counsel for the respondent argued that the applicant has always been at liberty to make a further land use application to the City for the amendment of the rights including extending the current rights to include the desired 'events and functions' and more. The 'legal interpretive exercise', which the applicant has presented in support of the declaratory orders in prayers 4 and 5, are therefore not legally competent.

[64] On the issue of delegation of authority, the respondent submitted that in terms of Council Resolution 275/08/2012, the City reserves, the right to revoke the consent, should there be a valid complaint as a result of the guest house and conference facility establishment. The respondent acts through its officials and authority to execute Council decisions vests in Council's officials, because such authority was delegated by way of Delegation of Power

Resolution 187/07/2011 of 27 July 2011. Resolution 10.4.1 in particular and pages 100 and 117 of the Annexure to the resolution, clearly confers 'the powers to act on behalf of Council to ensure operational implementation of statutory and regulatory powers' including the power to approve rezoning and land use rights.

[65] In view of the Resolution reserving the right to revoke the consent, both Ms Brand in her capacity as a staff member and Mr Van Rensburg in his capacity as Strategic Executive: Urban and Transport Planning, had the delegated authority to implement the right of the City to revoke the relevant consent use.

[66] The respondent, in this connection, referred this court to the case of *Chairperson, Council of the Municipality of Windhoek v Roland*,⁴ where the Supreme Court affirmed that the import of the Scheme is to protect the interest of the inhabitants of the area to which it applies and to impose both obligations and rights on such inhabitants, that is for them to comply with the Scheme. The Supreme Court went on to state that the purpose of the Scheme and the benefits of complying with it extends beyond financial interests of land owners and determines a wide range of matters that may not have ascertainable financial value including safety, health, amenities and convenience. Neighbours are accordingly entitled to know that the Scheme will be observed.

[67] The respondent concluded by stating that first applicants have not made a case for the relief sought as per the notice of motion. They have not complied with the conditions subject to which the consent use was granted in respect of the subject property. The applicant thus has no right to host events and to entertain patrons with liquor on the subject property up 2'o clock in the morning. The consent was only in respect of an establishment of a guesthouse and conference facilities. Furthermore, the applicant, it was contended, was afforded an opportunity to be heard before the decision to

⁴ *Chairperson, Council of the Municipality of Windhoek v Roland* 2014 (1) NR 247 at p 256 para 24 and p 261 para 40.

revoke the consent was taken. This was done through numerous correspondences and personal engagements, including meetings, which are apparent from the record.

Determination

[68] In the determination of the matter, I now proceed to deal with the various types of relief sought by the applicant in turn. In this regard, I will commence with the review and after making a determination in that regard, I will proceed to deal with the *declarators* sought.

Decision of 29 October 2019

[69] It is common cause that Mr van Rensburg, who is described as the Strategic Executive of the respondent, wrote a letter to the first applicant entitled, 'Subject: Consent for Guest House Establishment and Conference Facilities on Portion RE/41 Klein Windhoek Town and Townlands'.⁵ In this letter, the applicant was advised that the respondent had received complaints 'with regards to the operations in terms of the abovementioned consent which directly impacts on the conditions of maintaining the consent as follows: . . .'.⁶

[70] After dealing with the complaints lodged against the applicant and alleged non-compliances by the applicant, the letter ends on an ominous note, as follows:

'In conclusion, and despite extensive efforts by the City of Windhoek to correctly advise and assist the owners of portion re/41, Klein Windhoek Town and Townlands no 70 to operate a legal business on the premises, certain activities contrary to and exceeding the existing land use rights continues (*sic*) to take place. We regret to inform you that this leaves us with little choice but to install yet another suspensive condition on the current consent approval governing land use rights on the premises. You are herewith informed to cease all activities outside of the existing

⁵ Page 173 – 175 of the record of proceedings, annexure 'DB 10'.

⁶ Page 17 175 of the record of proceedings.

approval including any functions and events outside of normal working hours with immediate effect. Failure to adhere to this instruction will unfortunately result in an immediate cancellation of the consent use granted in terms of the Windhoek Town Planning Scheme under Council Resolution 275/08/2012.'

[71] This decision is impugned on two principal grounds. First, that the respondent was never afforded a hearing before the decision conveyed above and taken by Mr van Rensburg was implemented. Furthermore, the applicants contend that Mr van Rensburg was never delegated by the Council to act on its behalf and to issue the decision in question. As such, so contends the applicant, the decision of 29 October 2019, is liable to be set aside.

[72] The respondent, for its part, contends that the letter dated 29 October 2019 did not amount to a decision. Furthermore, it is contended that the said letter is not a decision of reviewable administrative nature. Lastly, that it was issued in pursuance of the performance of a duty in terms of s 28(2)(c) of the Town Planning Ordinance. It was also argued that the withdrawal of the Consent intimated in the said letter, is authorised by s 28(2)(c) of the Town Planning Ordinance.

[73] The first issue to be determined in this regard, is whether the respondent is correct in its assertion that the letter in question did not amount to a decision that can be said to be reviewable. In *Permanent Secretary of the Ministry of Health v Ward*,⁷ the Supreme Court, per Strydom AJA, remarked as follows regarding the question whether a decision made by an administrative official is reviewable:

'The basis on which this distinction is drawn depends on whether the functionary's decision amounts to administrative action or, as was alleged in this instance, he acted purely in terms of his contractual rights. To decide whether a decision by a functionary amounts to administrative action is not always easy and a reading of the cases on this issue bears out this difficulty. Certain guidelines have crystallised out of judgments of the courts in Namibia and also in South Africa, but it is clear that the courts are careful not to lay down hard and fast rules and each case

⁷ *Permanent Secretary of the Ministry of Health v Ward* 2009 (1) NR 314, at 320, para 22H-J.

must be judged on its own facts and circumstances. There is also no doubt that in deciding the issue courts must have regard to constitutional provisions which, in certain instances, have broadened the scope of reviewable action.'

[74] In yet another judgment, the Supreme Court stated the following regarding the inquiry into the nature of whether a decision amounts to administrative action:⁸

'The approach is articulated thus in the *SARFU* matter para 141-143:

[141] In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether the conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

[75] Pertinently, at para 143, the court proceeded as follows:

'Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily on the nature of the power. The source of the power though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of the power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose

⁸*Transworld Cargo (Pty) Ltd v Air Namibia (Pty) Ltd* 2014 (4) NR 932 (SC), para 34.

of an efficient, equitable and ethical administration. This can be done on a case by case basis.'

[76] It would appear, from the foregoing, that there are certain traits that one may have to have regard to, in determining whether certain action taken, constitutes administrative action or not. The source of the power exercised may be a relevant consideration in a certain case. Furthermore, the nature of the power exercised may be determinative, in the sense whether it involves the exercise of a public duty.

[77] In the instant case, I am of the considered view that the respondent, even in its answer, contends that it took the decision in the implementation of legislation, namely, the Town Planning Ordinance. This, in my view, points inexorably, in the direction that the decision was indeed administrative in nature and character. Furthermore, its source, was legislative as well. The nature of the power exercised, more importantly, had a prejudicial effect on the nature, extent and privileges contained in the Consent extended to the applicant.

[78] I accordingly come to the conclusion that I cannot agree with Mr Narib that the letter written by Mr van Rensburg did not fall within the realms of an administrative decision. It has all the hallmarks of one and I so hold. In my considered opinion, the letter, because of its content and import, particularly on the first applicant's rights conferred by the Consent, was a decision that is administrative in nature, character and effect.

[79] Having come to that conclusion, I need to determine whether the said letter, by virtue of its nature and effect, required that the first applicant be given a right to be heard before its terms could be implemented. The letter is clear, in the portion described as ominous above, that it would change the nature of the rights and privileges granted to the applicant by the Consent. What the letter did was to unilaterally impose a further suspensive condition without the first applicant having been afforded a hearing. There was a further threat added, namely, to cancel the consent if the first applicant did not

comply with the changed and added suspensive condition so unilaterally imposed.

[80] The right to be heard, i.e. the audi alteram partem rule, is an integral and indispensable part of the law of Namibia. It is implied in Art 18 of the Constitution, which requires administrative bodies and administrative officials to act fairly and reasonably and comply with the requirements imposed by the common law and any relevant legislation. The right to be heard is one such right imposed by the common law. To violate that right before a prejudicial decision is made against one, is inconsistent with the notions of fairness and reasonableness required by Art 18.

[81] In dealing with the principle of the right to be heard, Tebbutt JA, sitting with Kotze P and Browde JA in *Swaziland Federation of Trade Unions v The President of the Industrial Court and another*,⁹ had the following to say:

‘The audi alteram partem principle i.e. the other party must be heard before an order may be granted against him, is one of the oldest and universally recognised principles enshrined in our law. That no man is to be judged unheard was a precedent known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18 century English judge to be principle of divine justice and traced to the evens in the Garden of Eden, and has been applied from 1723 to the present time (see de Smith: Judicial Review of Administrative Action p. 156.’

[82] It is clear, in my considered opinion, that the respondent did not follow this hallowed principle when its official made the prejudicial decision to alter the Consent and add a further condition to it and which it is undeniable, became something of an Albatross around the applicant’s business’ operational neck. We should not, at this day and age, be writing about the need to afford an affected party audi, when its existence and application has been accepted for centuries.

⁹ *Swaziland Federation of Trade Unions v The President of the Industrial Court and another* [1998] SZSC 8 (01 January 1998).

[83] In the premises, I find that the letter written by the respondent's official, Mr van Rensburg, was an administrative decision. I also find that it is one, which was taken without having afforded the first applicant audi. It is thus an odious decision that must be reviewed and set aside, as I hereby do.

[84] As indicated earlier, there is another basis on which the applicant contends the decision conveyed by the letter dated 29 October 2019, should be reviewed and set aside. The applicant claims that the said decision was made by Mr van Rensburg without any delegation from the authority in whom the power to exercise that power is by law reposed.

[85] The court was referred to the provisions of s 31 of the Local Authorities Act, which deals with delegation of powers by local authorities. It provides the following:

'A municipal council or town council may delegate or assign in writing, and on such conditions as it may determine, to its management committee or its chief executive officer or any other staff member, any power conferred or any duty imposed upon it by or under this Act or any other law, except any power –

- (a) to make regulations or rules;
- (b) to approve its estimates or supplementary estimates of revenue and expenditure;
- (c) to determine rates, charges, fees or other moneys which may be levied under any provision of this Act;
- (d) to borrow money; or
- (e) A) to appoint, suspend or discharge the chief executive officer or a head of department referred to in section 28;
- (f) which the minister may determine by notice in the *Gazette*.'

[86] It was argued by Mr Töttemeyer that an official who alleges that he or she has been delegated to carry out any functions bears the onus to prove delegation from the person or body in whom that power is reposed.¹⁰ It was

¹⁰ *Waterberg Big Game Hunting Lodge v Minister of Environment* 2010 NR (1) SC, p 12H and 15H-I.

his contention that the powers related to the Town Planning Scheme reside solely in Council and not the official who purported to act in Council's stead.

[87] In the *Waterberg* case,¹¹ the Supreme Court relied on the following *dictum* in *Chairman, Board on Tariffs and Trade, and Others v Teltron (Pty) Ltd* 1997 (2) SA 25 at 31F-G, where the following is recorded:

‘The Board is, after all, a creature of statute, and where the statute gives it the right to delegate its duties, there is an *onus* on the Board to show that delegation has been properly made. It may well be that the *onus* has not been discharged by the mere allegation that there had been delegation. The terms of the delegation have not been disclosed. There is furthermore no proof that the formalities required for a resolution to that effect had been complied with, that the requisite *quorum* had been present and that the resolution had been properly recorded. None of this has been done.’

[88] One needs, in connection to this matter, to have regard to the relevant piece of legislation to determine the applicability of the issue of delegation in this matter. Section 31 quoted above, allows the council, to delegate some of its powers and functions to among others, officials in writing. The powers to change or vary the terms of the consent granted to the first applicant lay with the council.

[89] Mr Narib, for the respondent, argued that the contention by the applicant that there was no proper resolution enabling Mr van Rensburg and Ms Denise Brand, to make the decisions in question, has no merit. It is important, in dealing with this particular issue, to have regard to the contents of the answering affidavit, deposed to by Mr van Rensburg. He stated the following:

‘The delegation to the Strategic executive: Urban and Transport Planning, in terms of section 31(1) of the Local Authorities Act 23 of 1992, to approve or not approve consent use as per Table B of the Scheme extends to the duty imposed in clause 50(1) of the Scheme read with Section 28(2)(c) of the Town Planning Ordinance.’

¹¹ *Ibid* at p 13A-B.

[90] It is clear, from the foregoing, that the deponent, relied on s 31 of the Act and provisions of the Town Planning Scheme. What is plain from s 31 of the Act is that the delegation must be in writing. The deponent failed to provide that written authority in his affidavit and relied, for that purpose, on the extended meaning of s 31 of the Act, which does not, in my considered view, assist the respondent's case.

[91] In the heads of argument, Mr Narib, for the first time, referred to a Council Resolution, which the applicant was not able to deal with in the replying affidavit. In argument, it was submitted that Council acts through its officials and that the authority to execute Council's decisions vest in Council officials. I am of the considered view that this argument flies in the face of s 31 of the Act. Where employees and officials of the respondent take decisions that fall within the ambit of the powers and functions of Council, they require written authority, specifically delegating those powers and functions to the said officials, in writing, in terms of the s 31 of the Act.

[92] There is no evidence that the council at any duly constituted meeting, delegated these powers to Mr van Rensburg. He has thus failed to discharge the onus on him to prove delegation in this respect. For that reason, I am of the considered view that the point raised by the applicants regarding lack of delegation, is good and must be upheld. The decision made by Mr van Rensburg on 29 October 2019, must this be set aside, as invalid as it was not properly authorised in terms of the applicable law.

[93] I am of the considered view that the findings made in relation to the decision is 2.1, both in respect of the failure to grant the first applicant *audi* and the absence of delegation, applies with equal force to the rest of the decisions made by the respondent or its officials in relation to the relief sought in prayers 2.2, 2.3, 2.4, 2.6 of the notice of motion. To the extent that the respondent contends these were not administrative decisions, I am of the view that all these were administrative decisions, as articulated earlier in this judgment.

[94] In the decision of 5 December 2019, the respondent, through Mr van Rensburg, withdrew the first applicant's consent use for a guest house establishment and conference facility, with immediate effect. That, in my view is an administrative decision that the council itself had to take in terms of para 1.3 of the consent. Furthermore, there was no proper delegation as previously stated.

[95] The decisions of 24 January and 14 February 2020, were also decisions taken by Ms Daleen Brand and in terms of which she stated that the fitness certificate was no longer valid due to the withdrawal of the consent. It is noteworthy that the certificate of consent was valid until 9 April 2020. The first applicant had a new rezoning imposed on its land and reduced its operations to an administrative office. These are all decisions that the council had to itself make, and if not, an official who has been delegated those powers would carry out such powers and functions. Regulation 16 is clear in regard to who may withdraw, suspend a certificate of fitness or certificate of registration.¹² In this regard, audi is specifically included.

The recommendation and resolution of 5 and 12 November 2020

¹² '16 (1) The Council may cancel or, for such period of time as it may determine, suspend a certificate of fitness or certificate of registration if the holder of that certificate carries out or causes to carry out or permits to be carried out any unapproved alterations or does or causes anything to be done or permits anything to be done on such business premises which is in contravention of any provision of these regulations.

(2) The Council may not cancel or suspend a certificate of fitness or a certificate or registration unless the Council –

- (a) gives the holder of a certificate at least 21 days notice in writing of its proposed action and of the reasons thereof; and
- (b) in such notice, invites such person to lodge with the Council in writing any representation, which he or she wishes to make in connection with the Council's proposed action.

(3) The Council must, where a certificate of fitness or certificate of registration is cancelled or suspended, cause such cancellation or suspension to be indicated in the business register.”

[96] The applicant's complaint in this leg of the matter, is that the first respondent's management committee, on 5 November 2020, made a recommendation to the following effect:

1. That it be noted that following an application in this regard consent to operate a guesthouse establishment with ten (10) leasable rooms on Portion RE/41 of Klein Windhoek Town and Townlands No. 70 was granted in terms of Council Resolution 275/08/2012;
2. That it be noted that the consent granted in 1 was based on an application for "small scale", "low impact" and "quiet" development which explicitly excluded any "noisy" and "other activities";
3. That it be noted that following a change in ownership late in 2018 operations on the premises changed to include frequent late night into the early morning events and functions which land use was not included in the original application and consent granted;
4. That it be noted that following several written complaints a formal notice to align operations with the consent granted was issued to the ownership/operators on 29 October 2019;
5. That it be noted that following continued complaints, verified by a report from the Namibian Police, the consent granted was withdrawn in line with sub-resolution 1.3 of the Council Resolution 275/08/2012 after a grace period of 28 days was granted to the owner/operator to cancel operations;
6. That the Council endorse and confirm the withdrawal/cancellation of the consent to operate a guesthouse establishment with ten (10) leasable rooms on Portion RE/41 of Klein Windhoek Town and Townlands No. 70 as granted in terms of Council Resolution 275/08/2012;
7. That the resolution be implemented prior to confirmation of the minutes.'

[97] The applicant claims that in making the recommendations, the respondent acted irregularly and in violation of the applicant's constitutional rights under Art 18 in that it did not afford the applicant a right to be heard before making the aforesaid recommendation. It is the applicant's further case

that the recommendation was based on a memorandum prepared by Mr van Rensburg, and in respect of which the applicant was also not granted audi.

[98] The applicant further contends that the respondent relies for the making of the decision by Mr van Rensburg on a resolution taken on 31 October 2017, where the respondent resolved that, 'The delegated authority to approve and not approve consent uses as provided in Table B of the Windhoek Town Planning Scheme be granted to the Strategic Executive: Urban and Transport Planning, under section 31(1) of the Local Authorities Act, (Act 23 of 1992).'

[99] It is the applicant's case that the power regarding the approval of re-zoning of property, does not rest with the respondent but with the Minister. It was accordingly argued that the purported delegation of power by the respondent was ineffectual. It was further argued that in any event, the powers actually exercised by the delegated official did not consist of exercising power 'to approve or not approve' consent uses, but proceeded, impermissibly, to withdraw and change existing land uses.

[100] I am of the considered view that the applicant was entitled to be afforded audi before the recommendation was made. This is because of the serious consequences that flowed from the recommendation made to the management committee that the Consent be withdrawn or cancelled. Clearly, that decision would have drastic consequences to the applicant's use and enjoyment of the property in question.

[101] I am of the considered view that the recommendation, in the light of its gravity and decisive nature on the applicant's right, required that the applicant be afforded a hearing before the decision was made. In this connection, I align myself with the case of *Director: Mineral Development Gauteng v Save the Vaal Environment*¹³ where the court considered the effect of some preliminary decisions.

¹³*Director: Mineral Development Gauteng v Save the Vaal Environment* 1999 (2) SA 709 (SCA) at 718D-E.

[102] The court said, there are some preliminary decisions ‘that can have serious consequences in particular cases inter alia where it lays . . . the necessary foundation of a possible decision which may have grave results and which requires the application of the audi rule.’ I am of the view that the consequences of the committee adopting the recommendation in this case without affording the applicant, whose interests were seriously affected, vitiates the decision and renders it one not in conformity with Art 18. It qualifies to be set aside on that basis.

[103] In view of that finding, I do not consider it necessary to consider the question of delegation in this particular matter. All I can say is that the delegation referred to, allowed the official in question to approve or not approve consent uses. What the official did, was to recommend a course that was outside of the ambit of the powers delegated.

[104] I say so because the official in question, extended the delegation of power beyond approving and approving consent uses as recorded in the minutes. He made beyond the scope of the delegation and made recommendations for the withdrawal or cancellation of the consent use. I say this without necessarily holding that the delegation of authority was properly done. The recommendation and resolution of the management committee of 5 and 12 November 2020, thus fall to be reviewed and set aside for the reasons mentioned immediately above.

The notices issued in terms of s 56 of the CPA

[105] It will be recalled that the respondent caused certain notices in terms of s 56 of the CPA to be issued against both applicants. It is clear that those notices were issued pursuant to the decisions made by the respondent, which the court has found they are liable to be reviewed and set aside. As such the said notices cannot survive outside the existence of the impugned decisions. I hold that with the decisions set aside, the notices in terms of s 56 of the CPA should also fall away.

The *declarators* sought

[106] In their notice of motion, the applicants also seek the following *declarators*, namely, an order declaring para 1.3 of the consent issued in Resolution 275/08/2012, granted to the first applicant by the respondent during 2012 to be unlawful or *ultra vires* and to be set aside therefor. The second *declarator* relates to the consent, with the first applicant seeking a declaration that it may operate an accommodation facility; a conference facility and a facility wherein events and functions are hosted. Last, but by no means least, the first applicant seeks a *declarator*, that the consent issued, when read with the first applicant's liquor licence, permits the first applicant to host conferences, events and functions from Mondays to Sundays between the hours of 14h00 and 02h00 and to serve liquor thereat.

[107] It is important to mention that the granting of the *declarators* is strenuously resisted by the respondent. I will, in the following paragraphs deal with the question whether the *declarators* are or not competent in this case and whether or not they should be granted.

[108] It may be useful, before dealing with the above questions, to first quote the said consent verbatim. As recorded above, the consent is contained in Council Resolution 275/08/2012, dated 30 August 2012. It reads as follows:

'RESOLVED

That consent to operate a guesthouse establishment with ten (10) leasable rooms on Portion R/41, Klein Windhoek Town and Townlands No 70, off the Gobabis Trunk Road, be granted in terms of the Resident Occupation Policy, subject to the following conditions:

That the standard conditions for an accommodation facility be adhered to.

That a maximum of ten (10) rooms with twenty (20) beds be used for the accommodation establishment.

That the City reserves the right to revoke the consent, should there be a valid complaint as a result of the guesthouse and conference facility establishment.

That consent be effective only, once a parking layout has been provided for on-site parking, to the satisfaction of the Strategic Executive: Transportation and the conditions as per paragraphs 3 to 15 have been fulfilled.

That the surface stormwater run-off be accommodated according to clause 35 of the Town Planning Scheme (see Info of the Town Planning Scheme) stating:

That no stormwater drainage pipe, canal, work or obstruction (except stormwater drain pipes), canal or work which have been authorised in writing by the local authority or which have been or may be built, laid or located in such a way that:

The flow of stormwater from higher lying property is impeded or obstructed and through which any property is or may be endangered; or

The flow of natural watercourse (in which the local authority allow flood water to run-off, be discharged or to be canalised) is or can be changed, canalised or impeded.

That the maintenance of such waterstorm pipe, channel or work be the responsibility of the owner of the concerned property.

That prior approval be obtained from the Strategic Executive: Transportation in the accommodation of the stormwater on the erf is contemplated.

The engineering drawings on how the stormwater would be accommodated to the satisfaction of the Strategic Executive: Transportation be submitted for approval simultaneously with the building plans.

That all existing stormwater pipes, outlets and inlets or any other stormwater system be clearly indicated on all building plans submitted, prior to the approval thereof.

That no building plans be approved until the stormwater conditions are met.

That all extensions and additional service connections be to the cost of the applicant.

That on-site parking of 1.5 parking bays per leasable room be provided to the satisfaction of the Strategic Executive: Transportation together with the building plans.

That a proper structure for the crossing of the Klein Windhoek River with an alternative emergency entrance/exit over the Klein Windhoek River be provided, should the proposed river structure not be accommodative of the 50-year flood occurrence.

That access be to the satisfaction of the Strategic Executive: Transportation as a result of the extension of the Windhoek municipal boundaries.

That the access from Trunk Road 1/6 be upgraded by the developer to the satisfaction of the Roads Authority in lieu of the betterment fee payable.

That a combined access be provided by the developers together with the large lodge development further towards the south.

That it be proposed that a detailed design of the widening be approved by the Road Authority, before the applicant finalise the rezoning formally, while concern is expressed regarding the viability and costs.

That no building plans be approved unless the upgrading was finalised to the satisfaction of the Road Authority.

That proper right of ways be registered against Portion R/BKWT&TL or verified, ensuring access to Plots R/41, 40 and 109 from Trunk Road 1/6.

That access roads remain the responsibility of the owners and not be maintained by the City.

That the system for the management and containment of the waste water and sewerage effluent be designed by the professional Engineer and be submitted to the

Strategic Executive: Infrastructure, Water and Waste Management for approval, before the guest house become operational.

That the proponent advise the Strategic Executive: Infrastructure, Water and Waste Management on the source of potable water for the guest house and obtain the approved quota from the Strategic Executive: Infrastructure, Water and Waste Management, if sourced from municipal boreholes.

That the objectors be informed of Council's decision and be notified of the right to appeal to the Minister of Regional and Local Government. Housing and Rural Development against the City's decision within twenty eight (28) days from the date of notification thereof.

That the applicant accept this Council Resolution in writing and complete the Form of Acknowledgement of Liability and Undertaking to pay betterment fees (tax) within twenty eight (28) days from receipt of this Council Resolution.

RESOLUTION 275/08/2012'

[109] Before turning to decide whether the declaratory relief should be granted as prayed for by the applicant, I find it necessary to first take a short conducted tour of the law relating to *declarators* in this jurisdiction. The granting of such relief is governed by the provisions of s 16 of the High Court Act 16 of 1990. The relevant provision, in this regard, is s 16(d), which has the following rendering:

'The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon that determination.'

[110] What becomes clear from this provision is that declaratory relief is discretionary. What the court is required to do, is to first determine whether the party seeking the declaratory relief, is an 'interested' person, who has a

future, contingent right or obligation implicated in the matter where the declarator is sought. Once the court establishes and is satisfied that the person seeking a declaratory order, is an interested person who has an existing, future, or contingent right, the question that the court has to answer and in this regard use its discretion, is whether the case is a proper one in which to grant the *declarator*.

[111] It then follows that what the court is required to do, in the instant case, and in relation to all the *declarators* sought, is to decide firstly whether the applicant is an interested person in order to have the court pronounce on the *declarator* in question. The second question for determination, is for the court to decide whether the case in question is one, which in its discretion requires or demands it to enlist its discretion and issue the *declarator* sought.

[112] Mr Tötemeyer, in his able argument, reminded the court that in dealing with this issue, particularly the second leg of the enquiry, namely, whether the case presents itself as one where the court should exercise its discretionary powers in an applicant's favour, the court must be mindful of the guiding principle expressed by O'Regan AJA in the celebrated case of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*,¹⁴ where the learned judge made some lapidary remarks pertaining to approaching the courts in a constitutional state.

[113] She stated as following:

'In a constitutional State, citizens are entitled exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights.'

I am required, in deciding, particularly whether to exercise the court's discretion in the applicant's favour in this case, to embrace the remarks quoted above and to apply them appropriately.

¹⁴ *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 at 733, para 18.

[114] The respondent has taken issue in this matter. Whilst it does not question the applicant's interest, it argues that the court, if it decides to grant the declarator sought, it would, in effect, be usurping powers that do not ordinarily fall within its mandate. I proceed to deal with each of the declarators in turn below.

Declarator in prayer 3 of notice of motion

[115] I now turn to deal with the first *declarator* sought by the applicant, namely, that para 1.3 of the consent use be set aside. To recap, this condition records that, 'That the City reserves the right to revoke the consent, should there be a valid complaint as a result of the guesthouse and conference facility establishment.'

[116] The applicant contends that its enjoyment of the rights contained in the consent, is subject to a subjective criterion, namely, a 'valid' complaint submitted to the City. The applicant contends that this condition circumvents the statutory Scheme and safeguards laid down for the change of zoning, which are subject to ministerial discretion. It is thus contended that this condition is unreasonable and *ultra vires* the decision-making powers on the basis of a clause that is itself inherently unreasonable.

[117] It is the applicant's further contention that any withdrawal or change in the consent use can only be done in accordance with the provisions laid down for the change of a town planning scheme, requiring compliance with s 46 of the Ordinance. It was Mr Töttemeyer's submission that to allow the respondent to act in the manner contemplated by para 1.3 above, is to permit unreasonable and illegal decision-making, which is not only absurd, but which also serves to infringe the applicant's right to enjoyment of the rights to property protected in Art 16 of the Constitution.

[118] What is the respondent's take on this argument? Mr Narib, for his part, argued that the consent use granted to the applicant in terms of 1.3 of

the resolution, did not legally come into effect because the applicant failed to comply with some of the suspensive conditions imposed in the Consent. In this connection, the applicant cannot, so contended Mr Narib, speak of the revocation of a right, which did not lawfully come into existence in the event.

[119] I am of the considered view that the stance adopted by the respondent on this issue is indicative of a party that seems to approbate and reprobate at the same time. I say so for the reason that it is the respondent, which issued the decision complained of. It now, without more, seeks to say that the decision that it made never took effect because of certain suspensive conditions not being fulfilled.

[120] It is my view that the language employed in clause 1.3 is too wide, subjective, sweeping and far-reaching in its nature and possibly its effect. The power given to the respondent, to revoke the consent, is too wide and may be open to abuse. This is so because the validity of the complaint is not in any manner qualified and there are no steps or procedures put in place that would serve to ensure due process and protect the applicant's rights to enjoyment of the consent before it can be revoked.

[121] The Consent is the soul of the existence, use and enjoyment of the property by the applicant. Once the Consent is revoked, the land becomes a totally different animal, so to speak. In a sense, the power to revoke the consent is tantamount in effect, to a re-zoning of the property, which is the sole preserve of the Minister in terms of the applicable legal architecture. It is not correct that the applicant's right to use and enjoy the property should be at the whim of the respondent, after considering what it subjectively considers a 'valid' complaint, with no objective standards applicable.

[122] In view of my observations above, I come to the conclusion that the clause in question is too wide in its ambit and terms, as much as it is imprecise. In this regard, it allows the respondent to act in a manner that may be illegal at worst and unreasonable at best. It renders the applicant's right to

enjoy its property in terms of Art 16 tenuous and subject to unreasonable and at times unlawful infringements. I accordingly uphold this *declarator*.

[123] It must, however, be stated that the decision to declare para 1.3 of the consent unreasonable and illegal, does not, however, imperil the entire Consent. The doctrine of severance should apply so that the rest of the provisions of the Consent are not affected by the poison introduced to the tree and its fruits, by the provisions of clause 1.3 referred to above.

[124] There is no question that the applicant is not only an interested party in the *declarator* sought, but it is plain from what has been placed before court, that it is negatively affected by the clause in question. I have also found that this is a proper case in which the court ought to exercise its discretion imbued by s 16(d) of the High Court Act, referred to above, in the applicant's favour and grant the *declarator* sought.

Declarator in prayer 4

[125] In this part of the notice of motion, the applicant seeks a *declarator* regarding the use to which the property is being utilised. It is common cause that the Consent allows the applicant to use the property as 'a guest house', and a 'conference facilities establishment'. It appears common cause that neither the word 'guesthouse' nor 'conference facility' are defined in the Scheme.

[126] The applicant's case is to the effect that given the fact that the Scheme does not define a guesthouse and a conference facility, resort must therefor be had to the meaning attached to related facilities in terms of other pieces of legislation, including the Accommodation Establishment and Tourism Ordinance 20 of 1973, as well as the regulations made under the Liquor Act of 2000. This interpretation would, it is submitted, allow the applicant to serve food and beverages to its patrons.

[127] The respondent does not agree with the contentions put forth by the applicant. Mr Narib argued that if the court were to accede to the entreaties of the applicant in this particular regard, it would result in the court assuming or usurping the powers of the respondent regarding the use to which the property in question can be put.

[128] There does not appear to be any question regarding whether this is a case in which the applicant has an interest, as required by s 16(d) of the High Court Act. This is so because the issue of the land use rights clearly in issue directly affect the applicant's business operations and what it requires, probably in line with the *Trustco* case, is to seek clarity from the court regarding the land use rights it has in law in relation to the property in question.

[129] The question that looms large, and requires the court to answer, is whether it is appropriate for the court to exercise its discretion and to deal with the *declarator* sought. Mr Narib, for his part argued that this case is not one that is appropriate for the court to exercise its discretion in the applicant's favour. It was his contention that to do so, would result in the court usurping or assuming to itself, the powers of the respondent to grant land use rights for which the applicant has not made an application to the appropriate authorities.

[130] I am of the considered view that Mr Narib is correct in his submission. The question appears to be whether the applicant is entitled, in terms of the use rights, to allow gatherings and the supply of food and beverages to the patrons of the facility.

[131] It appears common cause that the Scheme does not, in its interpretation clause, define what a guest house and a conference facility establishment is. As mentioned earlier, Mr Töttemeyer, probably in pursuance of the *ratio* of the *Trustco* decision, argues that the court should intervene and cut the Gordian Knot, as it were. He submitted, as stated earlier, that the court would, in doing so, be guided by other pieces of legislation, such as the

Establishment and Tourism Ordinance 20 of 1973, which provides definitions of for instance accommodation establishment.

[132] I am of the considered view that the court would not be performing its duty of adjudication if it yielded to the entreaties of the applicant. To do so, the court would in effect be legislating and determining what land rights may be allowed on the property in question. That, in my considered opinion, falls beyond the remit of the court's powers. In so legislating, the court may find itself in a situation where its decision may collide with some policy considerations that may be critical in determining the whole question of land use rights.

[133] I accordingly agree with Mr Narib that this consideration renders the matter not one in which the court should exercise its discretion in terms of s 16(d) of the High Court Act. In this regard, I do not think that the court can legitimately pronounce on this issue under the guise that it is following the *Trustco* judgment referred to above. In this regard, I accordingly refuse to grant the *declarator* sought for the reason that this is not an appropriate case as envisaged in s 16(d) of the High Court Act quoted above.

Declarator regarding the applicant's right to host conferences and sell liquor

[134] For similar reasons, as I have stated immediately above, I am of the considered opinion that although the applicant clearly has an interest in the relief sought in this particular *declarator*, the matter does not, however, hold itself out as one which is proper for the court to exercise its discretion. It appears to me to be an exercise beyond this court's remit, to make a *declarator* regarding the nature and activities that the applicant is entitled to partake in, including the sale of alcohol by the applicant and the trading hours it is to observe.

[135] I am, for the reasons stated above, of the considered opinion that although this is a matter in which the applicant has a live interest in and has existing rights, it is however, not one in respect of which the court should exercise its discretion by making the *declarator* sought. The case is not one suited, having regard to its nature and policy considerations, which normally govern these issues, not one proper for the court to grant the relief sought.

[136] It is perhaps opportune, before drawing the curtain on the matter, to mention that the respondent has been vociferous in its condemnation of the operation of a liquor licence by the applicant. It has punched holes in the entire issue, contending that the applicant is not entitled to serve alcohol. As pertinently pointed out by Mr Töttemeyer, the respondent did not, as it is entitled to, file a counter application to deal with the granting of the liquor license. I shall therefor, say nothing more about this matter.

Conclusion

[137] It therefor seems to me that the applicant is entitled to the review relief it seeks. In this regard, it is also entitled to the first declaratory relief it seeks in prayer 3 of the notice of motion. It is, however not entitled to the rest of the declaratory relief it seeks for the reason that although it is an interested person, the case put up in support of the declaratory relief does not render the case an appropriate one in which the court should exercise its discretion and grant the *declarators* sought.

Costs

[138] The law applicable to costs is that costs will normally follow the event. Where a party has been successful in the relief it seeks, or a respondent successfully parries away a claim against it, it should be entitled to costs of the proceedings. In this case, the applicant has been both successful and unsuccessful. It has been successful in the review relief and one declaratory relief. It however failed in respect of prayers 4 and 5.

[139] I am of the considered opinion that the matter considered as a whole, the applicant has been substantially successful, having gained a large measure of the relief sought granted in its favour. It should, in the circumstances, recover its costs.

Order

[140] Having regard to what is stated above, I am of the considered opinion that the following relief should be granted:

1. The decisions taken by the first respondent's officials dated 29 October 2019, 5 December 2019, 24 January 2020 and 14 February 2020 and a recommendation made on 5 November 2020, as well as a resolution passed by the first respondent's management committee on 12 November 2020, be and are hereby reviewed and set aside.
2. The several notices issued in terms of section 56 of the Criminal Procedure Act, 1977 by the first respondent's municipal police, be and are hereby set aside.
3. Paragraph 1.3 of the Consent contained in Resolution 275/08/2012 granted to the first applicant by the first respondent during 2012 is hereby declared to be unlawful or *ultra vires* and is set aside.
4. The declaratory relief regarding the Consent allowing the applicant to operate an accommodation facility; a conference facility establishment and to operate a facility which falls within the definition of a 'social hall' as defined in the Windhoek Town Planning Scheme promulgated under the Town Planning Scheme, is hereby refused.
5. The declaratory relief to the effect that the Consent read with the first applicant's liquor licence permits the first applicant to host conferences, events and functions from Mondays to Sundays and to sell liquor on those days, between 14h00 and 02h00, is refused.
6. The first respondent is ordered to pay the costs of the application.
7. The matter is removed from the roll and is regarded as finalised.

T S MASUKU

Judge

APPEARANCES

APPLICANTS: R Töttemeyer SC, (with him JP Ravenscroft-Jones)
Instructed by Ellis Shilengundwa Inc. Windhoek

RESPONDENTS: G Narib, (with him V Kauta)
Instructed by Dr Weder, Kauta & Hoveka Inc. Windhoek