

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2022/00200

In the matter between:

**GOCHAS LEWENDEHAWE AGENTE CC**

**APPLICANT**

and

**MINISTER OF MINES AND ENERGY**

**RESPONDENT**

**Neutral citation:** *Gochas Lewendehawe Agente CC v Minister of Mines and Energy* (HC-MD-CIV-MOT-REV-2022/00200) [2024] NAHCMD 111 (14 March 2024)

**Coram:** RAKOW J

**Heard:** 7 November 2023

**Delivered:** 14 March 2024

**Flynote:** Applications and motions – Review application – Administrative action – Article 18 of the Namibian Constitution Act 1 of 1990 – Fuel retail licence of the applicant cancelled in terms of regulation 30 of the Petroleum Products Regulations 2000 – The Minister is an official and as such his powers are limited by statute and he can only do what he has authority to do according to the statute – Minister further elected to cancel the retail licence in terms of regulation 30 which regulation does not

provide for the cancellation of fuel retail licences – The Minister's decision to cancel the retail licence was tainted by previous irregularities and no reasons for the decision was provided.

**Summary:** The applicant is the current licence holder of a retail licence issued by the Minister of Mines and Energy in terms of regulation 5(4) of the Petroleum Products Regulations made under s 2A of the Petroleum Products and Energy Act 13 of 1990.

The review application is brought in terms of rule 76(1) of the Rules of the High Court of Namibia and in essence seeks to review and set aside the decision taken by the respondent on or about 15 March 2022 to the effect that the respondent cancelled the fuel retail licence of the applicant in terms of regulation 30 of the Petroleum Products Regulations 2000. This happened after the applicant applied and was granted an amendment to their original 2008 retail licence.

*Held that:* the Minister is an official and as such his powers are limited by statute and he can only do what he has authority to do according to the statute. He therefore cannot exercise power and perform functions beyond that conferred upon him by law and can only do what he is legally empowered to do. I find that the initial notice forwarded by the Minister is vague and does not indicate the cause of complaint and therefore contrary to the law.

*Held that:* no particulars was contained in the notice as required in terms of regulation 31(3)(a)(i) of the Petroleum Regulations. The Minister further elected to cancel the retail licence in terms of regulation 30 which regulation does not provide for the cancellation of fuel retail licences but only for their amendment. The Minister's decision to cancel the retail licence was therefore tainted by previous irregularities and no reasons for the decision was provided contrary to compliance with Article 18 of the Namibian Constitution.

*Further held that:* the biggest issue however is that the fuel licence is still on the same premises, erf 466 Eerste Laan Gochas. This was the address on the fuel licence from before the time that it was owned by the applicant and in effect no

change of address took place. The Minister failed to take this specific issue into account.

---

### **ORDER**

---

- (1) The Notice of Intent to cancel, dated 22 June 2021, the Fuel Retail Licence R/150/2020 of the applicant is set aside and the decision is declared contrary to the provisions of Article 18 of the Namibian Constitution.
  - (2) The Notice to cancel, dated 15 March 2022, cancelling the Fuel Retail Licence R/150/2020 of the applicant, is set aside and declared that the decision was taken without taking the facts of the matter into consideration and therefore contrary to the provisions of Article 18 of the Namibian Constitution.
  - (3) Cost of the application is awarded to the applicant and to include the costs of one instructed and one instructing counsel.
- 

### **JUDGMENT**

---

RAKOW J:

#### Introduction

[1] This is a review application brought by Mrs Wiesner on behalf of Gochas Lewendehawe Agente CC, a close corporation duly registered in terms of the laws of Namibia. She is the sole member of the closed corporation. The respondent is the Minister of Mines and Energy, a Minister of State duly appointed in terms of the Namibian Constitution.

[2] The applicant is the current licence holder of a retail licence issued by the Minister of Mines and Energy in terms of regulation 5(4) of the Petroleum Products Regulations made under s 2A of the Petroleum Products and Energy Act 13 of 1990.

[3] The review application is brought in terms of rule 76(1) of the Rules of the High Court of Namibia and in essence seeks to review and set aside the decision taken by the respondent on or about 15 March 2022 to the effect that the respondent cancelled the fuel retail licence of the applicant in terms of regulation 30 of the Petroleum Products Regulations 2000. This happened after the applicant applied and was granted an amendment to their original 2008 retail licence.

#### Background

[4] Before 2008, the retail licence belonged to a certain Huibrecht A J Smit. The premises according to the retail licence to which the licence No R/150/2001 relates was Eerste Laan, erf 446 Gochas. This licence was issued on 5 May 2001 by the then Minister of Mines and Energy. On 11 December 2007 she completed an application for the amendment of Licence/Certificate form indicating that the nature of the amendment of the retail licence was that a new owner took over the business. On the same day the applicant applied for a retail licence on plot 446, 1<sup>st</sup> Ave, Gochas. A retail licence with the number R/150/2008 and for the premises at Eerste Laan, erf 466, Gochas was issued to the plaintiff on 4 June 2008 by the then Minister of Mines and Energy.

[5] During 2012, the executor in the estate of the late Huibrecht Aletta Johanna Smith sold to V.S.V Enterprises Number Fifty Seven Close Corporation, portion 2 of the farm Matty no 446 in the village of Gochas. The plaintiff was at that stage renting the filling station that was situated on these premises. During 2018, Mrs Wiesner the sole member of the plaintiff, purchased portion 1 of the farm Matty no 446 and the title of this property was transferred to her name on 6 September 2018. She was therefore renting portion 2 of erf 446 with the filling station and owning portion 1 of erf 446.

[6] During September 2020, Mr Carl Frederik Willem Boltman became the only member of V.S.V. Enterprises Number Fifty Seven Close Corporation and therefore the owner of the CC in which portion 2 of erf 446 was registered in. He was keen to take over the filling station and was under the impression that he also became the owner of the licence. During the same year, on 1 October 2020 the plaintiff applied for the amendment of the licence for the change of supplying wholesaler and for the

tanks and pumps to be moved to an adjacent location and the upgrading of the site. It however indicated on the application that the physical address remains the same, which in fact it did, it was still for the premises situated at First Avenue, erf 446, Gochas. This was so completed on form PP/9 of the Ministry of Mines and Energy titled Application for amendment of Licence/Certificate. This change of licence conditions was approved and a retail licence dated 26 October 2020 was issued by the minister.

[7] Mrs Wiesner seems to have had some discussions about this move with the Ministry of Mines and Energy employees and also submitted an environmental impact study and plans for the proposed changes which included the installation of new tanks, a new forecourt and new pumps. She also sought a change of service provider to Vivo Energy. A letter from the Gochas Village Council, dated 2 April 2020 and headed application to relocate Engine Service Station, approving Mrs Wiesner's request to relocate the Engine Service Station to the corner of plot 446, 1<sup>st</sup> Lane Gochas. The environmental impact study also carried a plan under figure 4-1 on page 3 indicating the site layout.

[8] It seems that Northern Fuel Distributors CC handed in the application of the applicant to the Ministry of Mines and Energy on 14 September 2020 and their cover letter indicated that a number of documents were attached to this application including the approval for relocation and the plans. This also included a letter from Northern Fuel Distributors CC indicating that the project for the applicant was now completed and that a new site has been erected next to the old site with the goal of replacing it.

#### Mr Boltman's intervention

[9] After Mr Boltman became the owner of V.S.V. Enterprises during September 2020, it seems that he approached the Ministry of Mines and Energy with an application for a Fuel Retail Licence and an amendment of a licence. The record provided by the Ministry of Mines and Energy does not contain a signed application form for the amendment of a licence application but contains a signed application form for the application for a Fuel Retail licence for V.S.V Enterprises number 57 CC for portion 2 of farm Matty no 446. This application is dated 5 July 2021.

[10] It seems if Mr Boltman bought V.S.V. Enterprises with the purpose of utilizing the filling station on that portion for his own use. He was further under the impression that he was entitled to demand the retail licence from the plaintiff. When that did not succeed, it seems that he applied for a new retail licence on portion 2 of erf 446.

### The investigation

[11] After receiving the complaints regarding the different portions on which the retail fuel licence was attached to, the Ministry of Mines and Energy sent an investigation team consisting out of Ms Louise Hangero, who is a Petroleum Inspector and Mr Imanuel Gaigob, an Admin Officer responsible for licensing to investigate the matter in response of a call from Mr Boltman, for the Ministry to intervene at Gochas. This investigation was undertaken on 27 - 28 April 2021.

[12] They met separately with all the parties involved. During the meeting with Mr Boltman and Ms Boltman he reported that he bought V.S.V. Enterprises CC with the intention of operating the service station and shop situated on the erf that V.S.V. Enterprises owns. Initially the plaintiff rented the filling station from V.S.V. Enterprises but when V.S.V. Enterprises wanted to evict them at the end of the lease agreement they counter-acted through their lawyers and the lease agreement was extended. During this time they constructed a new filling station at the adjacent plot and moved to their new site in December 2020. Mr Boltman further attempted to get the retail licence from Mrs Wiesner, but without any success.

[13] The team also met with Mrs Wiesner and two other employees of the plaintiff. The plaintiff is the holder of the only fuel retail licence ever issued in Gochas. Upon a question regarding the whereabouts of the retail licence for the Engine site, Mrs Wiesner mentioned the amended of the licence from Engen to Petrosol and that was the licence they were currently using. She also explained that it was done like that because they are still situated on the same erf, erf 446. She also informed them that she had a meeting with Mr Sheehama and Mr Geingob of the Ministry of Mines and Energy and informed them that she intended upgrading the site and moving the fuel tanks to a different location on the same erf. She got the go-ahead from the Ministry

but Engen withdrew their plan to upgrade the erf due to a lack of funds and this led her to approach Petrosol. This is when the Ministry was approached for an amendment to the licence.

[14] The team also met with Mr Beukes, the CEO of Gochas Village Council the next day to understand the demarcation protocols in Gochas. He was also asked whether the Village Council authorised the construction of a second service station and he responded that they only authorised a relocation of the Engen service station from portion 1 of erf 466 to portion 2 of erf 466.

[15] On 5 May 2021, the investigation team, some members of the Downstream Licensing Committee and Mr Vermaak from Engen had a meeting. He informed them that the contract with Engen was cancelled in November 2020 by Mrs Wiesner after she entered into a contract with Northern Fuel Distributors.

[16] The Downstream Licencing Committee met to discuss the matter and after the matter was introduced by Ms Hangero, had a long discussion of the matter. The meeting concluded that the plaintiff had in fact never applied for a new retail site and therefore misled the government by providing wrong information. They then decided that the licence should be canceled and a letter was written to Mrs Wiesner to inform her of the decision of the Minister to cancel the plaintiff's licence. The meeting also decided to advise Mr Boltman to apply for a fuel retailer's licence provided that Engen commits officially to upgrading the site to meet SANS standards.

#### Suspension of the licence

[17] On 22 June 2021, the Minister of Mines and Energy, Hon Tom Alweendo writes to Mrs Wiesner and informs her that in line with regulation 56 of the Petroleum Products Regulations of 2000, the Ministry has found that she has provided misleading information with regards to the application for the amendment of her retail licence with number R/150/2008. He further informed her that operations under R/150/2020 are found to be in contravention of the law and he therefore decided to cancel her licence as per regulation 31 of the Petroleum Products Regulations of 2000. He also explained that the letter serves to notify her of his intention to cancel

the licence and gave her 30 days from the date of the notice to make representations to him as to why the licence should not be canceled.

#### Submissions on behalf of the applicant

[18] The submissions on behalf of the applicant were prepared by Francois Erasmus and Partners. They pointed out that the requirements of regulations 31(3)(a)(i) and 31(3)(a)(ii) are prescriptive and that the Minister breached these as he failed to set out the particulars of the alleged failure or contravention as he only referred to misleading information without specifying what that is. They then addressed an email to Ms Hangero for her to explain what the misleading information is and she responded that the application which was submitted, was for an amendment and not for a new retail site. She further explained that the plaintiff applied for a relocation but instead a new retail site was constructed and no approval for such a new retail site was granted.

[19] On the plaintiff's behalf, they submitted that no change of the licenced premises has taken place as both the 2008 retail licence and the 2020 retail licence describes the premises as Eerste Laan erf no 446 Gochas. The application further indicates that not only will the supplier be changed but the tanks and pumps are to be moved to an adjacent location and that the site is being upgraded to meet the minimum safety requirements, but that the physical address remains the same. The Ministry was at all times informed of the relocation of the tanks and the upgrading of the premises. The plaintiff also provided the Ministry of Mines and Energy with drawings of the proposed layout of the new relocated stationn. These drawings were approved and stamped by Mr Andreas Sheehama of the Ministry of Mines and Energy on 16 November 2020. It was submitted that the plaintiff was clear and transparent with the Ministry at all times during the amendment of the 2008 retail licence.

#### Outcome of meeting with the Deputy Minister of Mines and Energy – 30 March 2022

[20] The plaintiff sought a meeting with the Minister of Mines and Energy and on 30 March 2022, a meeting took place where Ms Hilunga, the Deputy Minister, Mr



Nghishoongele, Ms Hangero, Ms Kavari, Ms Wiesner, Mr Wiesner, Mr Botes and Mr Dukeleni were present.

[21] The applicant's case was explained to the Deputy Minister by Ms Wiesner. She explained that V.S.V Enerprises sold to the new owners who requested the fuel licence from her. She informed them that she will relocate the fueling station to the premises adjacent to the site they initially occupied and applied to the Ministry of Mines and Energy for an amendment to the applicant's licence. She explained that the new premises were still on the same erf although on a different portion of the erf but that she was never asked to submit the title deed for the property.

[22] Ms Hangero explained the Ministry's case. She explained that the previous operator Mr Smith applied for an amendment of the old licence in January 2008 and surrendered the old licence. Mrs Wiesner completed a new application form and was issued with an amended licence with the same licence number. She further explained that the licence can only be used for the site for which it was issued which is portion 2 of Erf 446, Matty Farm. She therefore concluded that Mrs Wiesner used the licence on a different site.

[23] The Deputy Minister was of the opinion that cancelling the licence will have major financial implications on both the operator and the supplier as they had invested. She believed that the Ministry should stick to the Minister's decision to cancel, however allow the applicant to reapply again. Regarding Mr Boltman whose site is already licenced, the Ministry should licence both putting the competition implications to them.

#### Cancellation of fuel retail licence – Gochas Lewende Hawe.

[24] On 25 April 2022, the Minister of Mines and Energy wrote to the plaintiff that their representation is unsatisfactory and that the decision to cancel the plaintiff's retail licence remains. The plaintiff was instructed to halt operations immediately and to surrender the retail licence in their possession to the Ministry immediately.

#### Arguments by the parties

[25] For the applicant, it was argued that the Minister's affidavit was filled with vague allegations, generalities and conclusions without dealing specifically with the content of all the paragraphs of the applicant's affidavits and refers to the affidavit of Ms Hangero, stating that regard should be had to her affidavit for the full explanation and circumstances behind his cancellation of the applicant's retail licence. The consequence of the Minister and Ms Hangero's failing to admit or deny, or confess and avoid all the allegations in the applicant's affidavits is that the court should for the purpose of this application accept all those allegations not addressed by the Minister and Ms Hangero as correct.

[26] It was further argued that the notice forwarded by the Minister to inform the licence holder of the Minister's intention to cancel or suspend the licence did not sufficiently set out the particulars of the alleged failure or contravention as required in the regulations, being regulation 31(3)(a)(i) as the letter only vaguely alleged that the applicant provided misleading information without specifying any particulars of what the misleading information was. The applicant was therefore constrained to make any meaningful representations to the Minister. Ms Hangero answered their query and explained that it was an application to amend the retail licence not an application for a new retail site. This email did not originate from the Minister and can therefore not state what misleading information was received by him.

[27] It is further submitted that no change of the licensed premises as defined in the Regulations, has taken place as both on the 2008 retail licence and the 2020 retail licence the premises are described as Eerste Laan erf 446 Gochas. The application specifically also point out that the tanks and pumps are moved to an adjacent location. The site was upgraded and new tanks relocated to meet the specifications of the Ministry of Mines and Energy. The plaintiff further emailed letters and documents from Petrosol, a corrected application form and a confirmation of Gochas Town council in respect of the address of the licensed premises. They also provided the Ministry of Mines and Energy with drawings of the proposed layout of the new relocated STN, which drawings were duly approved and stamped by Mr Sheehama of the Ministry of Mines and Energy on 16 November 2020. The plaintiff has therefore been clear and transparent with the Ministry of Mines and Energy throughout the whole process of the application of the amendment of the 2008 retail licence. No construction work was started until the approvals were granted by the

Ministry of Mines and Energy – being the issuing of the 2020 retail licence and the approval of the drawings.

[28] The heads filed on behalf of the respondents were very brief. The respondents submit that the applicant has not made out a proper case for the relief it seeks in its Notice of Motion and will seek the court's dismissal of the application with costs. The decision by the respondents to cancel the applicant's fuel retail licence was lawful and did not violate the applicant's right to administrative justice as protected by Article 18 of the Namibian Constitution.

[29] It was however conceded by the legal counsel of the respondent that the biggest problem that cropped up was the erf number on the licence, as it appears to be the same erf number which appeared on the 2008 retail licence and then again on the 2020 retail licence.

#### Legal considerations

[30] Article 18 of the Namibian Constitution provides as follows:

'Administrative Justice:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[31] In *Kavendjaa v Kaunozondunge NO and Others*<sup>1</sup> the following was said by Mr Justice Damaseb:

'As Baxter<sup>2</sup> comments:

In addition to the powers which are expressly conferred on public authorities, a proper construction of the empowering legislation might reveal that further powers have also been impliedly conferred. Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly

<sup>1</sup> *Kavendjaa v Kaunozondunge NO and Others* 2005 NR 450 (HC).

<sup>2</sup> Baxter, *Lawrence Administrative Law: Legal Regulation of Administrative Action in South Africa* 1994 at 404-5.

conferred, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred.

What the learned Judge probably had in mind by referring to 'by necessary implication' is that magistrates think that because the law does not prevent them from exercising the power, they are at liberty to do so. That clearly is untenable in a constitutional State. The principles quite succinctly set out in characteristic eloquence (and I am in respectful agreement therewith) by Baxter (op cit) at 384 when he says:

'(P)ower, in legal parlance, means lawfully authorised power. Public authorities (this concept includes public officials) possess only so much power as is lawfully authorised, and every administrative act must be justified by reference to some lawful authority for that act. Moreover, on account of the institutional nature of the public authority itself exists as an office or body created by law. A valid exercise of administrative power requires both a lawful authorisation for the act concerned and the exercise of that power by the proper or lawful authority<sup>3</sup>.'

[32] In *Kessl v Ministry of Lands Resettlement and Others and two similar cases*<sup>4</sup> 2008 (1) NR 167 (HC) Muller J, made the following remarks and quoted with approval, the following authorities:

'[66] Article 18 of the Constitution requires that the administrative action must also be fair and reasonable. The legality of the exercise of the minister's powers will later on be judged against the provisions of the Act. This is a constitutional concept and it was held in *Pharmaceutical Manufacturers of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para 20 at 687 (SA) that the exercise of all public power must comply with the Constitution, which is supreme law, and the doctrine of legality, which is part of that law. This doctrine of legality was further described in the case of *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) para 49 at 272 (SA), as follows:

The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this

<sup>3</sup> (See *Malherbe v South African Medical and Dental Council* 1962 (1) SA 825 (N) at 829G-830A; *De Villiers v The Pretoria Municipality* 1912 TPD 626 at 645-6; and *Rose-Innes Judicial Review of Administrative Tribunals in South Africa* 1963 at 91.)

<sup>4</sup> *Kessl v Ministry of Lands Resettlement and Others and two similar cases* 2008 (1) NR 167 (HC).

sense, the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'

[33] In this regard, Mr De Bourbon also referred us to what was stated by Rose-Innes in his work *Judicial Review of Administrative Tribunals in South Africa* at p 91:

'Administration is thus the exercise of power which is conferred upon specifically designated authorities by statute, and which, however great the power which is conferred may be, and however wide the discretion which may be exercised, is a power limited by statute. The Administration can only do what it has statutory authority to do, and it must justify all its acts by pointing to a statute. If a public authority exceeds these powers, it acts unlawfully.'

[34] Moreover, the decision of the minister must be reasonable. This court held in the case of *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181 (HC) that a court of law will examine the discretionary power of the decision-maker to determine whether his decision was fair and reasonable. At 191J - 192B, the court stated (per Mainga J, with Hoff J concurring):

'The traditional common-law approach regarding unreasonableness as a reasonable ground for review, was that the Courts will not interfere with the exercise of a discretion on the mere ground of its unreasonableness; art 18 constitutes a departure from the traditional common-law grounds of review. A Court of law will examine the discretionary power to determine whether it is fair and reasonable. If it does not meet those requirements the Court will strike down the discretionary power as repugnant to the Constitution.'

[35] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) O'Regan J stated in para 45 at 513:

'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.'

Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural

ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.’

[36] Parker J in *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*<sup>5</sup> (the High Court Matter)said the following:

‘As respects art 18, in order for the second applicant to succeed, the second applicant must show that he has been aggrieved by an act of an administrative body or an administrative official because of non-compliance by the administrative body or administrative official with any of the requirements expressed in art 18, ie (1), (2), (3a) and (3b) (as indicated in the above quotation for clarity). As I see it, (1), (2), (3a) and (3b) are the art 18 requirements which administrative bodies and administrative officials must comply with when they ‘act’ in order for such of their acts to be adjudged consistent with the Constitution. And I must add; the aforementioned list of the art 18 requirements is exhaustive. It is not just enough for a person to approach the court and allege simply and in general terms — without more — that his or her right guaranteed to him or her by art 18 of the Constitution has been infringed. Such a person bears the burden of establishing to the satisfaction of the court as to what particular requirement or requirements under art 18 has or have not been complied with by the ‘act’ of a named administrative body or administrative official and in which respect such act has infringed or threatened an infringement of that person’s art 18 right (see *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others supra* at 39). If the applicant fails to so establish the art 18 requirement or requirements that has or have not been complied with in relation to the applicant, the applicant shall be out of court. That is the manner in which I approach the second applicant’s constitutional attack on the making of the Regulations and the Schedules based on art 18 of the Namibian Constitution.’

[37] When the *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*<sup>6</sup> matter went on appeal, O’Reagen AJD said the following:

‘[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A

---

<sup>5</sup> *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2010 (2) NR 656 (HC) p 578.

<sup>6</sup> *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at 736.

court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

[38] Corbett JA (as he then was said, in the matter of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another*<sup>7</sup>:

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* B 1972 (3) SA 726 (A) at 735F - G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B - C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F - G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

[39] In *Kamuhanga N.O v Master of the High Court and Others*<sup>8</sup> Parker AJ said the following regarding the onus:

'The grounds for the review of the acts of administrative bodies and officials are those set out in Article 18 of the Namibian Constitution. I should say those grounds encompass the common law grounds of review; for, as Levy J stated in *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 265E-F, Article 18 embraces the

<sup>7</sup> *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA p152.

<sup>8</sup> *Kamuhanga NO v Master of High Court of Namibia and Others (1)* (70 of 2012) [2012] (A 381/2010) [2013] NAHCMD 144 (30 May 2013).

common law. It must also be signaled that 'there is no onus on the respondent whose conduct is the subject-matter of review to justify his or her conduct. On the contrary, the onus rests upon the applicant for review to satisfy the court that good grounds exist to review the conduct complained of'. (*Gideon Jacobus du Preez v Minister of Finance* Case No. A 74/2009 (Unreported) para 5).'

### Discussion

[40] The Minister is an official and as such his powers are limited by statute and he can only do what he has authority to do according to the statute. He therefore cannot exercise power and perform functions beyond that conferred upon him by law and can only do what he is legally empowered to do. I find that the initial notice forwarded by the Minister is vague and does not indicate the cause of complaint and therefore contrary to the law. No particulars was contained in the notice as required in terms of regulation 31(3)(a)(i) of the Petroleum Regulations. The Minister further elected to cancel the retail licence in terms of regulation 30, which regulation does not provide for the cancellation of fuel retail licences but only for their amendment. The Minister's decision to cancel the retail licence was therefore tainted by previous irregularities and no reasons for the decision was provided contrary to compliance with Article 18 of the Namibian Constitution.

[41] The Minister further failed to take into account that the applicant has been transparent with the Ministry of Mines and Energy from the start. On behalf of the applicant, it was indicated that Mrs Wiesner met with employees of the Ministry and discussed her plans with them before she started the process. She also indicated on the amendment application that she intends to relocate the fuel tanks and pumps to an adjacent premise, she handed over plans for the said erection of the new fuel station, including the permission from the Gochas Town Council. The environmental study that was conducted further shows the new site plan and discussed the environmental impact around that site. The court finds that at no stage did the plaintiff mislead the Ministry of Mines and Energy.

[42] The biggest issue however is that the fuel licence is still on the same premises, erf 466 Eerste Laan Gochas. This was the address on the fuel licence from before the time that it was owned by the applicant and in effect no change of address



took place. The Minister failed to take this specific issue into account. To curb similar problems in future, the Ministry of Mines and Energy is advised to also request the title deeds of the premises on which a fueling station will be situated and to ensure that the full and correct address is displayed on the licence.

[43] In the result, I make the following order:

(1) The Notice of Intent to cancel, dated 22 June 2021, the Fuel Retail Licence R/150/2020 of the applicant is set aside and the decision is declared contrary to the provisions of Article 18 of the Namibian Constitution.

(2) The Notice to cancel, dated 15 March 2022, cancelling the Fuel Retail Licence R/150/2020 of the applicant, is set aside and declared that the decision was taken without taking the facts of the matter into consideration and therefore contrary to the provisions of Article 18 of the Namibian Constitution.

(3) Cost of the application is awarded to the applicant and to include the costs of one instructed and one instructing counsel.

-----  
E RAKOW  
Judge

## APPEARANCES

Plaintiff: CJ Van Zyl (with him Francois Erasmus)  
Francois Erasmus & Partners, Windhoek

Defendant: M Khupe  
Office of the Government Attorney, Windhoek