CASE NO. SA 4/95

IN THE SUPREME COURT OF NAMIBIA

In the matter, between

OHLTHAVER & LIST FINANCE AND	FIRST APPELLANT
TRADING CORPORATION LTD	SECOND APPELLANT
WERNHILL PARK (PTY) LTD LIST	THIRD APPELLANT
TRUST COMPANY (PTY)"LTD	

versus

THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING THE PERMANENT SECRETARY OF THE MINISTRY OF REGIONAL AND LOCAL GOVERNMENT AND	HOUSING CHAIRPERSON OF THE NAMIBIA BOARD CHAIRPERSON OF THE	SECOND RESPONDENT THIRD RESPONDENT FOURTH RESPONDENT FIFTH RESPONDENT
OF THE MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK RPP DEVELOPMENTS (NAMIBIA) (PTY) LTD FIRST RESPONDENT		

CORAM: MAHOMED, C.J ., DAM

BUTSHSNA, A.J.A, et STRYDOM, A.J.A.

Heard on: 1995.12.13 & 14

Delivered on: 1996.04.30

JUDGMENT

STRYDOM, A.J.A. ; This is an appeal against the whole of the judgment and order made by the Full Bench of the High Court of Namibia on 28th April, 1995. Appellants, who were the applicants in the Court a quo, took on review various decisions taken by the First to Fourth Respondents. The application to review was rejected in its entirety and hence this appeal. Mr Hodes, assisted'by Mr Maritz, appeared for the Appellants, whereas Mr Blignaut, assisted by Mr Mouton, appeared for the First, Second and Third Respondents and Mr Gauntlett, assisted by Mr Smuts, appeared for the Fourth Respondent. The Fifth Respondent was unrepresented.

The history of the matter goes back to 1984. At this time the Fourth Respondent commissioned a consortium of experts in the field of urban planning, to prepare a master plan for the central business area of Windhoek. This plan was approved by the Fourth Respondent on or about 27th May, 1987. Further approval, at the time by the Administrator-General, was obtained on 4th October, 1989. The latter caused the plan to be promulgated in terms of the provisions of Proclamation A.G. 28 of 1988.

According to the Appellants the most important features of the master plan were -

3. the closure of Post Street and the conversion thereof as a pedestrian shopping mall;

4. the development of "the area opposite Post Street and

along the western side of Tal Street. This included the development of erf no. 6874 as a retail shopping ....centre which would also serve as.an anchor for future development in this area; and

(c) the linking of the said shopping centre with the existing business area along Kaiser Street by **a** bridge across Tal and Post.Street pedestrian shopping mall.

The master plan furthermore indicated that the area, now known as erven 7033 and 7034 and situated immediately to the north of the proposed Tal Valley development along Tal Street, was earmarked for future development of offices, an office park and open air parking space. As such this development would therefore not have been in direct competition with the activities of Appellants and its tenants' businesses on Erf no. 6874.

After the master plan was in place Third Appellant tendered and acquired erf no. 6874 which was then developed as a shopping centre by the Second Appellant who succeeded to the rights of the Third Appellant. The shopping complex was eventually developed at a cost in excess of R50 million and was inaugurated during September, 1990.

Thereafter, and during April 1991, Appellants became aware of a resolution passed by the Management Committee of the Fourth Respondent whereby instruction was given to heads of departments of the Fourth Respondent to investigate the possibility to develop a "shopping centre and office space

on

erf no. 7033, Tal Street. Appellants, through their attorneys, objected to this development of the erf contrary to its intended purpose as contemplated and spelled out in the master plan. Other interested parties also raised objection to the development of this area as a shopping centre.

.By resolution dated 23rd September, 1991 the Management Committee resolved to recommend to the Council to rezone erf 7034 to "business" with a bulk of 2,0 and to advertise for comments for or against the proposed rezoning. This was done. Appellants, again through their attorneys, placed on record their opposition to the said rezoning.

On 10th February, 1992 the Council resolved to defer any decision in relation to the intended rezoning of erf 7034 until a temporary bus terminal had been removed from the said property and the economic climate would become more favourable for development of the area.

The matter was left there until about a year later. The Fourth Respondent on 24th February 1993, and after further investigations were made, by inter alia the City Engineer, took a resolution to set in motion the rezoning of erven 7033 and 7034. I will later herein refer more fully to this resolution.

This resolution taken by the Fourth Respondent was given effect to when advertisements were placed in various local newspapers. On 13th April, 1993 objection was lodged by the

Appellants against Fourth Respondent's intention to rezone erven 7033 and 7034 to allow a consent use for the development of a business complex comprising inter alia, retail facilities. At the same time Appellants also objected to the fact that the time allowed for the filing of objections was, as a result of public holidays, too short. This led to the re-advertising of the notices during June, 1993. Appellants thereupon filed a further objection through their attorneys on 23rd June, 1993.

Subsequently on the 3 0th June, 1993 the matter concerning the rezoning of the erven came before the Fourth Respondent who resolved as follows:

> "(a) That erf 7033 and erf 7034, Windhoek be rezoned to 'business' with a bulk of 2,0.
>
> (b) .....
>
> (c) That prior to the promulgation of the rezoning, consent be given for the land to be used for purposes falling within the definition of 'business', with a bulk zoning of 2,0 in the Town Planning Scheme."

On 19th July, 1993 Appellants were informed that their objections against the intended rezoning of the erven were rejected. In the notice written by the City Engineer, Appellants were told that their objeccions "were considered by the Management Committee and it was resolved that the objections received are not convincing enough to compel Council to set aside the business proposals for the two sites concerned. Consequently it was resolved to reject the objections for a variety of reasons."

On 11th August, 1993 the Appellants lodged an appeal in terms of section 35 of the Windhoek Town Planning Scheme against the rejection of their objections by the Fourth" Respondent. One of the grounds of appeal was that the Counsel of the Fourth Respondent did not take cognisance of the objections filed by the Appellants in that the objections were considered by the Management Committee only and not the Council itself.

Whilst this appeal was pending the Town Clerk of the Fourth Respondent continued to implement the previous resolution taken by the Fourth Respondent by calling for tenders in relation to the purchase and development of the two erven. This was suspended after objection thereto was raised by the Appellants.

Then on 30th September, 1993 Appellants' attorneys were advised by the Fourth Respondent that -

> "Council, at its meeting of 29 September 1993, considered the objections by your clients, as well as the appeal grounds, and resolved to reject same."

Appellants were further also informed that the tenders received in regard to erven 7033 and 7034 would be subject to the outcome of the pending appeal and they were further advised of their further right of appeal. The action taken by the Fourth Respondent on 29th September, 1993, led to some confusion on the part of the attorneys of the Appellants and this resul.ted in a spate of correspondence to and fro. By telefax, dated 1st November, 1993, the

attorneys for the Fourth Respondent conceded, by way of explanation, that their client did not consider the objections raised by the Appellants prior to its resolution to reject them on 30th June, 1993. This failure, so it was said, was then rectified by the Fourth Respondent when, at its meeting of 29th September, 1993, it considered Appellants' objections and resolved to reject them. In the meantime Appellants were- notified that their appeal would be heard on 11th November, 1993 before a Sub-Committee of the Third Respondent.

At the hearing of the appeal on the 11th the legal representative of the Appellants and a Mr Stubenrauch, a Planning Consultant, and the General Manager of the Appellants' group of companies, were called before the Sub-Committee and were given the opportunity to put submissions and express opinions to the Sub-Committee. Thereafter they were required to leave the hearing and representatives of the Fourth Respondent were called in and given a similar opportunity. The Appellants still endeavoured to lodge an appeal against the decision of the Fourth Respondent taken on 29th September, 1993. Their application, addressed to the Second Respondent, for an extension of the time within which to lodge the appeal, was refused by the Second Respondent.

Subsequently the Appellants received notice on 10th January, 1994 that their appeal against the decision of the Fourth Respondent to rezone erven 7033 and 7034 had been rejected by the First Respondent."

A reading of the Appellants' application shows that, at least at the stage when the documents were drafted, a lot was made by Appellants of the master plan and the effect thereof on the decisions made by Appellants to invest some R50 million in the development of the premises in Tal Street. Fourth Respondent throughout denied that the master plan constituted more than guidelines for future development and furthermore denied that any representations were made which could be interpreted as restricting the options available in regard to any future development in the area, known as Tal Valley. It was conceded however, that there was an undertaking that the site, which is to the southern side and adjacent to the Wernhill complex, and which was zoned "municipal", would not be changed for a period of five years after implementation of the master plan. Notwithstanding the great reliance placed on the master plan by Appellants in their papers it seems that the very fact that they have come to Court on review proceedings is an indication that they themselves did not believe that the master plan could be elevated into a binding contract which would have enabled them to insist on the enforcement of a contractual right. It seems that the relevance of the master plan is therefore limited to the background history and the consideration of issues such as reasonableness and bias on the part of the Respondents.

The attack of the Appellants on the various decisions taken by the Respondents was waged over a wide front. However some of the issues raised before the Court a quo were not again argued by Mr Hodes and to that extent the field of

attack was somewhat narrowed on appeal. During argument it soon became clear that the appeal hinged upon two basic issues, namely whether the decision, taken by the Fourth Respondent in the first instance, suffered from any reviewable defects, and if so, whether the subsequent appeal could, and did indeed, cure the failures which may have affected the proceedings in first instance. Leaving aside for the moment questions such as whether the Fourth Respondent acted unreasonably or not, the attack of the Appellants on the proceedings in first instance was twofold, namely:

1. That the Fourth Respondent was biased in the sense that it predetermined the issue; and

2 . That the Fourth Respondent did not itself consider the objections filed but left it to its Management Committee to do so and, in regard to objections lodged after the second advertisement was published, did not consider such objections at all (except perhaps on its meeting of 29 September, 1994 when it was already functus officio.)

Because of the conclusion to which I have come on the above two issues I find it unnecessary to deal with the Appellants' allegations in regard to unreasonableness etc. and I will immediately proceed to address the above two grounds.

In regard to the issue of bias it was accepted by Counsel on

both sides that section 20 of the Windhoek Town Scheme renders the Fourth Respondent judge in its own cause in that the Fourth Respondent, in the implementation of the provisions of the section where it concerns its own property, may initiate the steps whereby it will eventually be required to decide whether to grant consent use and to bring about the rezoning of such property. It was therefore accepted by Counsel that the Appellants, in order to succeed on this point, would have to prove more than institutional bias on the part of the Fourth Respondent when it decided to continue with the rezoning of erven 7033 and 7034 notwithstanding the objections they received thereto.

Although Counsel were agreed on this score they differed vigorously as to the test which the Court should apply to establish the presence or absence of bias. On behalf of the Appellants it was submitted that a mere likelihood of bias would suffice to set aside the decisions taken by the Fourth Respondent. On behalf of the Respondents it was submitted that nothing less than proof of a predetermination of the issue amounting to actual bias must be shown, before the Court could interfere with the said decisions.

There is no doubt that where an administrative body is by statute empowered to ace in its own cause, it is entitled to do so, provided that it acts fairly and keeps an open mind. Its decision cannot be assailed on the grounds that it acted in its own cause, a circumstance which, according to the rules of natural justice, would in any other

instance have disqualified such body. Thus it was stated in R v Sevenoaks

District Council, ex parte Terrv . 1985(3) All ER 226 (QBD) at 255 J - 256 A, as follows:

> ".... there must be many cases in which planning committees have to make decisions which affect the interests of the local authority and many instances where the local authority itself is the owner of the site the subject of a planning application and thus likely to derive substantial benefits from a favourable decision in respect of that site."

In R v Amber Valley District Council ex parte Jackson. 1984(3) All ER 501 at 509 C - E similar sentiments were expressed as follows:

> "The rules of fairness and natural justice cannot be regarded as being rigid. They must alter in accordance with the context. Thus in the case of highways the department can be both the promoting authority and the determining authority. When this happens of course, any reasonable man would regard the department as being predisposed towards the outcome of the enquiry. The department is under an obligation to be fair and to carefully consider the evidence given before the inquiry but the fact that it has a policy in the matter does not entitle a court to intervene. So in this case I do not consider the fact that there is a declaration of policy by the majority group can disqualify the district council from adjudicating on a planning application. It may mean that the outcome of the planning application is likely to be favourable to an applicant and therefore unfavourable to objectors. However, Parliament has seen fit to lay down that it is the local authority which have the power to make the decision and an applicant for planning permission in the normal way are entitled to have the decision from a local authority if the Secretary of State decides not to intervene."

As previously pointed out Counsel were not agreed as to the test applicable to determine reviewable bias. In Anderton & Others v Auckland Citv Council and James Walace (Ptv) Ltd. 1 NZLR 657, Mahon J., discussed the approach of Courts of

Law in various jurisdictions in regard to this issue. The test postulated by the learned Judge in cases such as the present is "actual predetermination of ■ the adjudicated question." (p. 696). It was pointed out that a test such as "real likelihood" of bias would be too easily satisfied because

> " (it) will be inherent in and apparent from the statutory power of a local authority as adjudicator in its own cause." (p. 696).

(See further Lower Hutt City Council v Bank, 1974 1 NZLR 545 at 550; R v Sevenoaks District Council ex parte Terrv. supra, at 226 G - H and R v St Edmundsburv Borouah Council ex parte Investors in Industry Commercial Properties Limited, 1985(3) All ER 234 (QBD)).

On behalf of the Appellants reliance was placed on inter alia the case of Steeples v Derbyshire Country Council. 1984(3) All ER 468 as well as various South African cases such as Monnina & Others v Council of Review & Others. 1989(4) SA 866 (C) at 879 G 0 880 A and Smith v Ring van Keetmanshooo van die Nederduitse Gereformeerde Kerk, Suidwes-Afrika en Andere, 1971(3) SA 353 (SWA) at 631 D -632 F which applied the oft repeated test of a real likelihood of bias. As was pointed out by Mr Gauntlett the approach in Steeples v Derbyshire Country Council, supra. was expressly disapproved in R v Sevenoaks District Council, supra, and R v St Edmundsburv Borough Council, supra. See further R v Amber Vallev District Council, supra.

For reasons which will become apparent I need not decide whether the test to be applied by the Court should be a real likelihood of bias or actual bias. Although it was submitted by Mr Hodes that the Appellants need only demonstrate a real likelihood of bias he submitted that they in fact had succeeded in proving actual bias, in the sense of a pre-adjudication of the issue demonstrating a closed mind to persuasion by the Appellants.

In order to decide this question the Court must look at all the actions of the Fourth Respondent and the surrounding circumstances in order to determine whether the Fourth Respondent, when it took its decision on 30th June, 1994, did so with a closed mind. The facts on which the Appellants rely for their submission are either common cause or undisputed. What is disputed is the inferences which the Appellants submit the Court should draw from these actions.

To substantiate his submissions, Counsel for the Appellants, as a starting point, referred to the Fourth Respondent's resolution of 10th February, 1992 whereby it was decided to defer any decision in relation to the rezoning of the erven until a bus terminus on the property had been removed and until the economic climate warranted further development of the area. This was then followed by a letter from the Second Respondent, dated 6th September, 1992, whereby strong support was expressed, on behalf of the Government, for the development of a shopping centre on the said erven.

I must agree with the Court a quo that this letter is no

more than a statement of policy reflecting the viewpoint, at that time, held by the Ministry of Local Government and Housing. At best for Appellants this letter can perhaps be seen as pointing the approach of the Fourth Respondent in a particular direction. On the papers it seemed that Fourth Respondent decided to reconsider the situation because of the application submitted to them by the Fifth Respondent.

A much more serious complaint raised by Mr Hodes is the resolution taken by the Fourth Respondent on 24th February, 1993. This is the resolution taken by Fourth Respondent which set in motion the whole process of the rezoning of erven 7033 and 7034. This resolution reads as follows:

> " (a) The city Council support the development of 'undetermined zoned Erven 7033 and 7034, Courtney Clarke Street, and the "industrial" zoned erf no. 6941, Windhoek for business purposes, including retail',-
>
> 5. Seeing that the proposed business centre will be approved as a consent use the Council's intention of allowing business development on the land concerned be advertised immediately;
>
> 6. suitable conditions of tender be formulated after the advertisement procedures have been concluded successfully;
>
> 7. Council delegate to the Management Committee authority to finalise tender documents and to specify precisely the area and conditions under which the land is to be sold and to put the area out to tender as soon as possible;
>
> 8. the applicants be informed of Council's intention of allowing business development and that any interested developer, including his client, will be granted an opportunity to tender for the land."

Various submissions were .made by Counsel for the Appellants in regard to the above resolution. Bearing in mind the

language used in framing the resolution there is little doubt in my mind that the resolution can only be seen as an expression of intent, on the part of Fourth Respondents to implement their decision, namely to rezone the said erven. What other meaning can be ascribed to the words "Seeing that the proposed business centre will be approved as a consent

use ....". The meaning of the words is plain and clear. Bearing in mind that it was the Fourth Respondent which would eventually approve the consent use the words used cannot be understood as the expression of an expectation only.

That the words referred to mean what they say is in my opinion supported by the wording used in other paragraphs of the resolution. In paragraph (d) the Management Committee is given authority to finalise tender documents and to specify precisely the area and conditions under which the land was to be sold. The words used refute any inference that the sale of the properties was only a possibility. Furthermore in paragraph (e) applicants were to be informed, it seems there and then, of the Committee's intention of allowing business development. An opportunity was further to be given to interested parties to tender for the land. (It is clear that the land here in question is erven 7033 and 7034.)

I find it impossible to give to the resolution any other meaning than that set out herein before. Even if the Court would be disposed, for some or other reason, not to give to paragraph (b) its literal and grammatical meaning then one

searches in vain for any indication in the rest of the resolution which will support a meaning different from the one set out, to be given to paragraph (b). In fact, as I have tried to show, the opposite is true, namely the rest of the resolution supports the literal meaning of paragraph (b) . What is more, the Fourth Respondent, being confronted with this resolution on the documents, did in no way try to explain that the resolution had a different meaning from what was contended for by the Appellants.

However, that is not the end of the matter because there is always the possibility that, notwithstanding the resolution taken by the Fourth Respondent at the time, they might, subsequently, have reconsidered the matter and decided not to be bound by the decision taken on 24th February, 1994. It is therefore of importance to look at the further actions of the Fourth Respondent and its Management Committee, and to see whether such actions give any indication that the Fourth Respondent, notwithstanding its resolution of 24th February, 1994, showed that they approached the issue with an open mind.

The first such relevant act relied upon by the Appellants is the decision by the Management Committee of the Fourth Respondent taken on 14th June, 1993 whereby "in order to save time" the Director: Properties and Protective Services, was authorised "to proceed with the invitation for tenders immediately after the consideration of objections." This resolution again in my opinion did not in the least take cognisance of a possibility that, due to the objections

received, a contrary decision, one which would not support the re zoning of the erven, may be forthcoming. What is particularly disturbing is that the instruction was given at a stage when the Management Committee had not yet considered the objections for the purposes of deciding whether they were of any substance or not. I must agree with Mr Hodes that as far as the Management Committee was concerned it was a foregone conclusion that tenders for the purchase and the development of the erven would be invited.

This inference is in my opinion further supported by what had happened on 21st June, 1993. On this date the Management Committee decided to proceed with the invitation to obtain tenders for the erven after they now had regard to objections which they received in response to the first advertisement only. This happened at a stage when the Fourth Respondent had not as yet considered the objections or resolved to reject or uphold them. At that stage the Fourth Respondent had not even received the recommendations of the Management Committee. What is more, when the Management Committee gave such instruction to call for tenders they knew that the closing date for the submission of objections was still two days off, namely 23rd June, 1993. If it were true that the Fourth Respondent was dealing with the issue in a piecemeal fashion then its instruction to go ahead and to call for tenders is unintelligible. In such an instance it would have at least considered the possibility that further objections may still be submitted which may conceivably change the situation. By giving the said instruction the Management Committee

demonstrated in my opinion its predetermination of the issue.

The full Council of the Fourth Respondent only came into the picture on 30th June, 1993 when they considered the recommendations made by the Management Committee on 21st June, 1993. Other than what was required by section 20 of the Town Planning Scheme they did not themselves consider the objections. Although objections which were received pursuant to the second advertisement were not put before it and were also not considered by the Management Committee at that stage, the Fourth Respondent rejected the objections. That this resolution was a final one, and not meant to be part of a piecemeal dealing with objections as they were submitted, is in my opinion borne out by the following facts:

(i) After taking its resolution consent use was then granted. How this could have been done when the Fourth Respondent knew that it had not considered all the objections is in my opinion not only proof of the finality of the decision taken on 3 0th June but further demonstrates that the Fourth Respondent still stood by its resolution taken on 24th February, 1993 and was merely going through the motions, if I may say, in a rather inept and blatant way;

(ii) The words of the resolution taken, leave little room for any other meaning but that it was final in form. It stated:

"That erf no. 7033 and erf 7034, Windhoek be rezoned to business' with a bulk of 2,0;

That prior to the promulgation of the rezoning, consent be given for the land to be used for purposes falling within the definition of 'business' with a bulk zoning of 2,0 in the Town Planning Scheme."

Apart from the language in which the resolution is couched why would Fourth Respondent's members take any resolution in the form it did if it was not meant to be final?

(iii)Following upon the decision, objectors were informed of their right to appeal and Fourth Respondent, in terms of section 20(c) of the Town Planning Scheme, also caused a letter to be sent to objectors informing them of the decision.

(iv) At no stage did the Fourth Respondent in any of the affidavits filed on its behalf maintain that the decision of 30th June was not what it purported to be, namely a final decision or that it considered objections piecemeal.

I have therefore come to the conclusion that the way in which the matter was treated by the Fourth Respondent when it rejected the objections on 30th June, 1993, (at a time when it knew that it was not in possession of all the objections) , justifies the inescapable inference that the Fourth Respondent had determined previously not to allow any objections and that, also on 30th June, 1993, it still firmly stood by its resolution of 24th February, 1993. This conclusion is further supported by the way in which the

Management Committee of the Fourth Respondent dealt with the additional objections when they resolved to disregard these objections on the basis that they were "not convincing enough to compel Council to set aside the business proposals for the two sites." These additional objections were for the first time considered by Fourth Respondent on 29th September, 1993 when it rejected them in the following terms, namely:

> "that the objections considered by the Management Committee on 12 July, 1993 as well as the appeal grounds be rejected."

It is now history that the resolution taken by Fourth Respondent on 29th September, 1993 was only taken after Counsel's opinion was obtained and it was pointed out to Fourth Respondent that in terms of section 20(c) of the Town Planning Scheme it was the duty of the Fourth Respondent to consider and decide the objections submitted to it and that it committed a grave irregularity to leave it to its Management Committee to consider the objections. As such this decision was not at all motivated by any genuine demonstration on the part of the Fourth Respondent to reconsider what was previously decided by itself or its Management Committee, and the outcome, namely rejection of all the objections, was more or less a foregone conclusion. The raison de etre for the meeting and the decision there taken was to regularise an otherwise irregular and invalid decision. By itself it cannot dispel the strong indications to which I have referred herein before and which in my opinion demonstrated the predetermination of the Fourth Respondent on the issue of the rezoning of the two erven.

Another aspect which supports the above finding is the undue haste with which steps, which followed naturally one upon the other, were skipped. It frequently happened that instructions were given to prepare some step, which was dependent on a decision to be taken, prior to it being taken by the Fourth Respondent or its Management Committee. One example is for instance the instruction given to the Director to prepare documents for the calling of tenders when there was as yet no decision by the Fourth Respondent concerning the objections. In face this was done at a time when those who gave the instruction knew that the time for the submission of objections had not even expired.

A reading of the authorities shows, in my opinion, that the Fourth Respondent is, in deciding to reject or allow the objections, acting in a cuasi judicial capacity and is therefore obliged to follow the dictates of natural justice. In Lower Hutt Citv Council v Bank. 1974 1 NZLR 545 the following was stated in this regard on 547 to 548:

> "Mr Barton's basic submission is that when a council is inquiring into and disposing of objections in the course of taking the successive steps required by the sixth schedule, it is acting in a purely administrative capacity, being obliged to do no more than investigate the facts relating to the objections in order to assemble all the relevant information to be sent either to the Town and Country Planning Appeal Board or to the Magistrate's Court. He likened the situation to that which arose in Farnell v Mhanaarei Hiah Schools Board, 1973(2) (NZLR) 705; 1973 (ACO 660, where the Privy Council saw the particular action there under examination as preliminary and administrative. We do not agree. It seems plain to us that the statutory delegation on a council to enquire into and dispose of objections imports at least substantial elements of the judicial function. It requires a consideration of the objections, and a decision whether they are to be

upheld or rejected.

> Furthermore, we believe that the clear-cut distinction, once favoured by the Courts, between administration functions, on the one hand, and judicial functions, on the other, as a result of which it was proper to require the observance of the rules of natural justice in the latter but not in the former, is not in these days to be accepted as supplying the answer in a case such as we have before us. Former clear-cut distinctions have been blurred of recent years by directions from highest authority to apply the requirement of fairness in administrative - actions as well, if the interests of justice make it apparent that the quality of fairness is required in those actions."
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> (See further R v Amber Valley District Council. supra, 506 - 507.)

In any event, whether the Fourth Respondent was required to discharge its functions in a quasi-judicial capacity or on "administrative" capacity, it was under a duty, in the circumstances to act fairly. (See Article 18 of the Constitution and Ridge v Baldwin, 1964 AC 40) . In the present case the parties were agreed that the principles of natural justice apply. This must of course, as previously pointed out, be qualified to the extent to which the repository of the power is, by statutory enactment, empowered to act. Although it is accepted that in such circumstances the same standard of impartiality cannot be required, as would be required from courts of law, the deciding authority must keep an open mind and be open to persuasion. What is required in such circumstances was aptly stated by McCarthy P. in the Lower Hutt Citv Council case, supra, at p. 550 as follows:

> "We think that the state of impartiality which is required is the capacity in a council to preserve a freedom notwithstanding earlier investigations and decisions, to approach this duty of enquiring into and disposing of the objections without a

> closed mind, so that if considerations advanced by the objectors bring them to a different frame of mind they can, and will go back on their proposals. As to the necessary appearance of impartiality, we think it must, follow that if a public authority exhibits that it has undertaken in advance to exercise the power and duty expressly entrusted to it by the legislator in a specific way which appears to obstruct the fair consideration and disposal of public rights, prohibition should normally issue."

In the Lower Hutt case, supra, the council entered into a lucrative lease agreement with a company which required of the council to stop or close certain streets. The council called for objections to the stopping of the streets and rejected the same in the end. The contract between the council and the company provided that the contract would be null and void if the council would be unable to stop the streets by virtue of a contrary decision of the Magistrate's Court. The Court, McCarthy P., concluded that this implied that only the Magistrate's Court stood between the possible stopping of the streets and that the council, by entering into such a contract, could not fulfil its public duty.

Mr Gauntlett was quick to point out that in the present instance the Fourth Respondent did not labour under the same disqualification and that it was neither alleged nor shown that any of the members of the Fourth Respondent stood to gain personally from the rezoning of the erven. In regard to the resolution taken by the Fourth Respondent on 24th February, 1994, Counsel submitted that the wording of the resolution sets out what would be envisaged by them, namely that the proposed business centre "will be approved as a consent use" and that it was plainly made subject to the provisions of the scheme, to which reference was

indirectly

made in paragraph (c) of the resolution, namely, "after advertisement procedures have been concluded successfully."

A reading of the resolution shows in my opinion differently. A reading of the whole resolution shows that what was uppermost in the minds of the Fourth Respondent was to rezone the properties and to sell the land. Here again firm resolutions were taken to set 'in motion the sale of the properties. The Management Committee was given authority to finalise tender documents and to specify precisely the area -and the conditions under which the land "is to be sold." (paragraph (d)) . Furthermore the Applicants, presumably Fifth Respondents, were to be informed of "Council's intention of allowing business development" and that all interested parties would be granted an opportunity to tender for the land. Whilst the resolution swarms with expressions of the intent of the Fourth Respondent to sell the land one looks in vain for any expression on their part which would show that they were alive to their duties in terms of the Town Planning Scheme to consider objections fairly and to be open to persuasion notwithstanding their support for the rezoning. The rather obscure reference to advertisement procedures set out in paragraph (c) of the resolution, and relied upon by Mr Gauntlett, is prefixed by a decision that suitable conditions of tender be formulated, which again only have relevance to the possible sale of the erven which in turn was only relevant after consideration of objections and their rejection by the Fourth Respondent. Again authority was given to undertake and to prepare a further step in the process of the rezoning of the erven which could

only be followed once a decision to rezone was taken by the Fourth Respondent. Furthermore almost all the steps taken after 24th February and the resolutions thereafter taken supported the inference of a Council which predetermined that the re zoning would go through. In my opinion Appellants were able to prove actual bias on the part of Fourth Respondent in the sense that they predetermined the actual point which they had to adjudicate, namely whether to rezone erven 7033 and 7034.

Furthermore I am of the opinion that the Fourth Respondents in the process also committed other irregularities. Firstly, in terms of section 20 of the Town Planning Scheme, they were enjoined by the section to decide on the objections submitted after considering them. It is clear from the evidence that this did not happen on 3 0th June, 1993. The Management Committee of the Fourth Respondent in fact considered those of the objections already submitted by the 14th June, 1993 and that the full Council thereafter only considered the recommendation of the Management Committee and, without themselves considering the objections, decided to reject them. (See in this regard: Baxter: Administrative Law, p. 444 - 445 and 459; Shidiack v Union Government. 1912 AD 642 at 648 and S A Airwavs Pilots Association & Others v Minister of Transport Affairs & Another, 1988(1) SA 362 at 370 - 371).

The second irregularity committed by the Fourth Respondent was that at the time when they took their decision to reject the objections they knew"that either they themselves or the

Management Committee/ on whose recommendations they acted, did not consider all the objections that were submitted or were still to be submitted within the time allowed by their own advertisements to submit them. The history how this came about was fully set out herein previously and it is not necessary to repeat it.

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An attempt to regularise the position was made by the Management Committee when it considered those objections which were submitted after 14th June, 1993 and they resolved to disregard them for not being "convincing enough to compel Council to set aside the business proposals for the two sites." This happened on 12th July, 1993. This however did not solve the problem.

In this regard the resolution of the Fourth Respondent taken on 29th September, 1993 is of importance. On this occasion the Fourth Respondent purported to do what they should have done in the first place namely to consider all the objections themselves. The rejection of these objections was a foregone conclusion. I say so for the reason that they had already taken a final decision on 30th June, 1993 and, but for the appeal of the Appellants, had started to implement such decision. The resolution taken on 29th September was again an attempt to regularise prior irregularities and was only taken on the'advice of Counsel. As such they were just attempting to go through the motions. In the circumstances the question whether Fourth Respondent was functus officio at the time when they took the decision on 29th September, 1993 "does not seem to me

to be of great

relevance. However it was submitted by Counsel for the Respondents that the Fourth Respondent was not functus officio when it decided to reject all the objections on 29 September. It was argued that on this date the Fourth Respondent itself had not yet considered any of the objections and therefore did not itself finally fulfilled its functions pursuant to the Scheme. Whether the Fourth Respondent had considered the objections or not is in my opinion not material to the question whether they were functus officio. What is in my view material is the fact that on 30 June, 1993 it took a final decision in regard to the very issue that the Scheme required them to do, namely to reject or approve of the objections. By rejecting the objections Fourth Respondent fulfilled its functions, albeit in an irregular way. (See Baxter, OD cit, p. 373 - 376.)

By the time that this resolution was taken all the objections had already been rejected in part by the Fourth Respondent itself or by its Management Committee. Any decision taken by the Fourth Respondent was therefore only an attempt to comply with their duties rather than a genuine and fair reconsideration of the issues involved.

What is the effect of the Fourth Respondent's failure to consider all the objections submitted to it on its own invitation and as required by the Town Planning Scheme? In my opinion this also amounts to a failure of justice. I have set out herein before that the Fourth Respondent was not merely the collector of objections but that it was required to behave fairly and observe the rules of natural

justice. (See Lower Hutt case, supra, at 546 - 548) . In my opinion a failure to consider all the objections submitted is tantamount to a failure of its duty to act fairly which is at the root of natural justice.

However the matter does not end there. An appeal was launched by the Appellants to the First Respondent in terms of the provisions of section 35 (a) of the Town Planning Scheme and it was submitted by Counsel on behalf of the Respondents that the subsequent appeal cured all shortcomings, if any, which existed during the "hearing" by the Fourth Respondent. Counsel for the Appellants denied this possibility.

This issue, so it seems to me, must be investigated in two phases. Firstly, whether a subsequent appeal can cure shortcomings and failures committed by the body entrusted by the statute to exercise the powers set out therein. If the answer to this question is in the affirmative then it becomes necessary to investigate whether the subsequent appeal was conducted in such a way as not only to have cured such shortcomings but whether the appeal body itself considered and applied all requirements and acted fairly.

It is at this juncture perhaps necessary to look at the role played by the principles of natural justice in our administrative law. Baxter, op cit, at p. 540 states the following:

> "The principles of natural justice are considered to be so important that they are enforced by the

> Courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration the enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignored. The policy of the Courts was crisply stated by Lord Wright in 1943:
>
> > xIf the principles of natural justice are violated, in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure•from the essential principles of justice. The decision must be declared to be no decision.'
>
> p. 541: The Courts have therefore nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter. The isolated decisions which have overlooked this have seldom received subsequent judicial endorsement."

Remarking on the above excerpt Friedman J. in the case of Yates v University of Boohuthatswana & Others, 1994(3) (SA) 815 stated at 836 A - C as follows:

> "I respectfully agree with what the learned author has stated. Inherent in the aforegoing is the principle of procedural justice and it is imperative that a distinction be drawn between the merits of a decision and the process of reaching it. Even if the merits are unassailable they cannot justify an infraction of the rules of procedure in which the principles of natural justice have been ignored or subverted. The merits and the procedure must not be blurred. Basically it is a quest for justice."

It seems therefore that once a failure of justice was found to have occurred the question of whether there was prejudice was not directly relevant.

As to whether a subsequent appeal can cure a failure of justice in a previous administrative hearing or tribunal the

Court must, in my opinion, start with the general principle laid down in Learv v National Union of Vehicle Builders. 1970(2) All ER 713 (Ch) at 720 that -

> "a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in"an appellate body."

In the same case, also at p. *.720, Megarry J. posed the question -

> "If the rules and the law combine to give a member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"

On the basis of this proposition Baxter, op cit. at p. 591, after discussing this issue submitted that -

> ".... even where an appellate tribunal is in a position to conduct a complete rehearing de novo the advantage of the double instance and the importance of fairness at all levels of administrative decision-making support a prima facie presumption against the appeal as being a sufficient cure for violations of natural justice."

In the following South African cases the principles laid down in the Learv case, supra., were applied with approval, namely: Turner v Jockev Club of South Africa. 1974(3) SA 633 (A) ; Monnina & Others v Council of Review & Others. 1989(4) SA 866 (C) ; which was confirmed on appeal, see 1992(3) SA 487 (A); Grundlinah v Van Rensburg & Others. 1984(4) SA 680 (WPD) ; Moleko v Bantu Affairs Administration Board (Vaal Triangle) & Others. 1975(4) SA 918 (T) ; Blacker v University of Caoe Town & Another. 1993(4) SA 402 (C) and Yates v University of Boohuthatswana

& Others, supra.

These cases show in my opinion a trend to regard a failure of justice, such as bias as "a vitiating failure of natural justice, the result of which is that what took place before, the adjudicator is not so much a defective hearing as no hearing at all", per Conradie J. in the Monnina case, supra, at p. 882 (G) . This trend was commented upon by the learned Judge to contrast cases such as Jockey Club & Others v Feldman, 1942 (AD) 340 and Smith v Ring van Keetmanshooo. 1971(3) (SA) 353 (SWA) where such a failure was regarded as an irregularity which could be overlooked if it was proved that the aggrieved party suffered no prejudice.

In two cases quoted to us by Counsel the Courts declined, in more or less similar circumstances as the present case, to let the matters go forward to be heard by domestic tribunals. In the Lower Hutt case, supra, at p. 551 the Court stated that the schedule "clearly contemplates two distinct independent and fair hearings, one by the council and a later one, if necessary, by an appeal board or a Magistrate's Court. Objectors are entitled to have the proposals rejected at the first hearing, if they can persuade the council that that is the proper course." See also the Anderton case, supra, at p. 698 - 700.

The above two cases must in my opinion be seen in their correct perspective. The Applicants in these two cases did not exhaust their statutory rights of appeal but approached the Courts directly after the first hearing where the failure of justice had occurred. It seems to me that once the failure was proven there was little else left but to

set

the proceedings aside. It further seems to me that the Appellants in the present matter could have done likewise and, on the findings by me, would equally have met with success. They however chose to exhaust the remedies provided by the Ordinance and took the matter on appeal to the Minister. The fact that the Appellants followed this avenue however did not preclude them from raising these ••. points in the ordinary courts of law also if they did not complain of such failure before the statutory body of appeal. (See Turner v Jockey Club of South Africa, supra. at 655 E - 656 A).

However, there is also another side to the matter and it seems impossible to categorically state that a failure of justice can never be cured by a fair and just appeal. In De Smith's: Judicial Review of Administrative Action, 4th Ed. by J M Evans the situation is summed up as follows at p. 242

> "Whether a decision initiated by a breach of the rules of natural justice can be made good by a subsequent hearing does not admit of a single answer applicable to all situations in which the issue may arise. Whilst it is difficult to reconcile all the relevant cases, recent case-law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in a particular context, the procedure as a whole gave the individual an opportunity for a fair hearing. Thus, when provision is made by statute or by the rules of a voluntary association for a full re-hearing of the case by the original body (constituted differently where possible) or by some other body vested with and exercising original jurisdiction, a court may readily conclude that a full and fair rehearing will cure any defect in the original hearing."

However where a rehearing is appellate in nature, regard

must be had t o various factors before it can be said that an original hearing, vitiated by a failure of justice, can be cured..by such an appeal. De Smith, OP cjjt, at p. 243 refers to the following factors:

> "of particular importance are the gravity of the errors committed in first instance, the likelihood that the prejudicial effects of the error may also have permeated the rehearing, the seriousness of the consequences for the individual, the width of the powers of the appellate body and whether it decided only on the basis of the material before the original tribunal or entertained the appeal by way of rehearing de novo."

In the Privy Council case of Calvin v Carr, 1979(2) All ER 440 the Council concluded that -

> "....on analysis, their Lordships recognised and indeed assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi judicial, can be cured through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so."

In the above case Lord Wilberforce pointed out that the general rule laid down by Megarry J. in the Learv case, supra, was too broadly stated. (p. 448) . This statement by Lord Wilberforce was approved and followed in the case of Llovd v Mcmahon, 1987(1) All ER 1118.

Bearing in mind the foregoing I find myself unable to conclude as an absolute rule that a failure of justice committed by the original administrative hearing can never be cured by a subsequent appeal and must of necessity be set aside. As was aptly demonstrated by Lord Wilberforce

in

Calvin v Carr . there are such a variety of situations that the application of an absolute rule cannot be said to fit all possibilities. In this regard it is perhaps necessary to refer to the three categories of cases dealt with by Lord Wilberforce:

> "First there are cases where the rules provide for rehearing by the original body, or some fuller or enlarged form of it. This situation may be found in relation to social clubs. It is not difficult in such cases to reach the conclusion that the first hearing is superseded by the second, or, putting it in contractual terms the parties are taken to have agreed to accept the decision of the hearing body whether original or adjourned .... At the other extreme there are cases, where, after examination the whole hearing structure, in the context of the particular entity to which it relates (trade union membership, planning, employment, etc) the conclusion is reached that a complainant has a right to nothing less than a fair hearing both at the original and at the appeal stage."

In regard to the third or intermediate category Lord Wilberforce stated as follows:

> "In them it is for the court, in the light of the agreements made, and in addition having regard to the course of the proceedings to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances where the defect is so flagrant, the consequences so severe, that the most perfect of appeals and rehearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect; it may be vitiated by the same defect as the original proceedings, or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full enquiry ....."

The Appellants' right of appeal is governed by section 35(1)

of the Windhoek Town Planning Scheme which provides that any person who is aggrieved by a decision of the Council in terms of an application made under this scheme, may appeal to the competent authority, in this case the Minister of Regional and Local Government and Housing, i.e. the First Respondent. Except that such appeal must be lodged in writing within 28 days, or any further extension granted by the First Respondent, the section is silent as to the procedures to be followed or the powers of the First Respondent. As the appeal lies to the competent authority, i.e. the Minister, I am of the opinion that this is, what is termed by the author Baxter, op cit, at p. 256 ff as a "wide" appeal. As was stated by the learned author a "wide" appeal "involves a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information."

(See also Computer Investors Group Inc. v Minister of Finance, 1979(1) SA 879 (T)) .

Further bearing in mind the classification made by Lord Wilberforce in Calvin v Carr. supra, it can be said that the present matter falls within the second category set out by the learned Judge. Furthermore, before dealing with the appeal as such, the following factors are in my opinion relevant and of importance in deciding whether the Appellants' appeal to the First Respondent can be said to have cured, or not cured, the defects that existed in the first decision, namely:

(i) The appeal came before the Minister who is a different person or body from the body that rejected the objections of the Appellants. Neither did she in any way form part or was involved in that decision making process.

(ii) No hearing in the sense of parties appearing and

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evidence being led and recorded took place in the first instance. The Appellants' objections were submitted in writing. These were to be considered by the Fourth Respondent and by resolution were to be accepted or rejected by them. Consequently there was no hearing where evidence was led and where a record was kept which, with all its defects, found its way to the First Respondent. It is therefore highly unlikely that in this way the proceedings before the First Respondent could be tainted with shortcomings or failures which existed in a record of the proceedings in first instance. It is however so that the proceedings were of an appellate nature. This is clear from the grounds of appeal, the heads of argument filed and the finding of First Respondent.

(iii) It cannot be denied that the errors committed in first instance were of a serious nature. The failure of justice in this instance lies at the root of a fair "hearing" in this instance and denied to Appellants their right to have their objection fairly considered with an open mind.

(iv) It is of importance to note that the failure which occurred did not result in **a** decision being taken which invaded personal rights of the Appellants. The question to be decided concerned the rezoning of certain erven. It had nothing to do with the liberty or rights of the Appellants and did not take away any of the rights of the Appellants. (See in this regard the cases referred" to by me hereinbefore and which applied the general rule laid down by McGarry J. in the Learv case, supra.)

This is not to mean that in cases, such as the present one, it will per se lead to a relaxation of the insistence on a fair hearing at all levels. The seriousness of the consequences of such a decision is however, in my opinion, a relevant factor to be considered and therefore requires that it be put in its correct perspective.

(v) There is no limit placed on the powers of the First Respondent to come to a proper decision on appeal. As such nothing stood in the way of the First Respondent to have considered, on the material put before her, the issue afresh and to have come to her own decision independent of what was decided by the Fourth Respondent.

The factors stated above and which the Court must consider, are in my opinion designed to test the sufficiency of a subsequent appeal to ensure that such hearing is indeed a

rehearing de novo free from the shortcomings and failures which ramshackled the original hearing. This notwithstanding, Lord Wilberforce made it clear that under this category insistence on a fair hearing at all levels may be the result after examination of the whole hearing structure set against the context of the particular activity to which it relates. (Calvin v Carr, supra, at p. 448).

The Appellants' appeal was heard on 11th November, 1993 by a Sub-Committee of the Third Respondent. In a letter dated 11th August, 1993, Appellants' attorneys set out their grounds of appeal and also requested an opportunity to appear and argue the matter at the hearing of the appeal. Five grounds of appeal were set out. These were -

"1. The City Council did not take cognisance of the objections filed by objectors, including that of our clients. These objections were considered only by the Management Committee and not by the Council. The Council had not as per Resolution 63/02/93, delegated this to the Management Committee. Accordingly the Council did not discharge its duty in a fair and reasonable manner nor on the basic principles of justice.

2. The Council (and/or the Management Committee) did not properly apply its mind to the matter on hand in that it did not, as it was previously done, obtained expert advice prior to taking a decision with such far-reaching consequences.

9. **The Council appears to have acted with an ulterior motive in that it has received an application for the development of the erven in question prior to the meeting it held on 24th February, 1993. This application appears to have prejudiced the Council in reaching its decision and has failed to publicise the fact that it had such application before it.**

10. The Council is legally bound by the representations it made under the Master plan when calling for the tender of Erf 6874 in that it held out that the erven in question, i.e. 7033 and 7034, would be utilised for the development of office facilities; this was one of the major factors which influenced our client's decision to tender for Erf 6874 and to invest this large amount of money.

11. Our clients (including its tenants) will be negatively and very seriously affected and prejudiced should the Council's decisions to allow a consent use of Erven 7033 and 7034 for retail purposes be allowed to come into force."

The grounds of appeal are not in all respects very clear. Ground no. 3 seems to raise the question of bias and ground 5 seems to contain a motivation rather than a ground of appeal. At the hearing of the appeal the following procedure was followed. The Sub-Committee called upon representatives of the firm Wecke and Voigts to make their submissions (Wecke and Voigts also took the matter on

appeal). Whilst representatives of Wecke and Voigts addressed the Sub-Committee neither the Appellants nor the Fourth Respondent were present. Thereafter the Appellants were called upon to present their case. The Appellants were represented by their attorney and a Mr Stubenrauch, a Town Planner. Both of them addressed the Sub-Committee in the absence of the Fourth Respondent. Thereafter the same procedure was followed in regard to Fourth Respondent, who then, in the absence of the other parties, addressed the Sub-Committee through their legal representative. From the record of proceedings it is clear that both legal representatives prepared written submissions which were also handed to the Sub-Committee.

Before continuing with the appeal it must be mentioned that recording equipment was set up to record the proceedings before the Sub-Committee. However when an attempt was made to transcribe the proceedings it was discovered that nothing was recorded. The operators then, from notes held by them during the hearing, compiled a summary of the proceedings. (See Vol. 7, p. 668 ff)

This summary with recommendations that the appeals be rejected, was then placed before the Third Respondent, who in turn drew up a memorandum (Vol. 7, p. 660 ff) containing the contentions of the parties and a further recommendation that the appeals be dismissed. To this memorandum was attached the summary of the proceedings before the Sub-Committee. These were then the documents which were placed before the First Respondent and on which she decided the

appeal.

Mr Hodes, on behalf of the Appellants, criticised, in various respects, the proceedings which took place before the Sub-Committee, the Third Respondent and the First Respondent. He submitted that the summary was not complete and that it was slanted to favour the Fourth Respondents. Furthermore he submitted that the facts and the law set out therein were incorrectly stated. Mr Hodes also criticised the procedure followed before the Sub-Committee on the basis that Appellants were not present when the Fourth Respondents put their submissions before the Sub-Committee and could consequently not reply or comment thereon.

.Mr Gauntlett, as well as Mr Blignaut, pointed out that many of the points of criticism now levelled at the proceedings by Mr Hodes were not raised in the application of the Appellants, or if raised, were not substantiated in any way. They consequently submitted that the Appellants noncompliance with Rule 53(2) and (4) should debar them from raising these points. In regard to the procedural aspects it was submitted that having regard to all the circumstances it cannot be said that the procedures followed before the Sub-Committee were unfair or amounted to a failure of natural justice.

I agree with Counsel that in the absence of any provisions determining the appeal procedure, First Respondent was at liberty to decide how and in what form the hearing would take place, provided of course that it complied with

whatever dictates are provided for in the Statute and further provided that it also complied with the requirements of natural justice. (See Davies v Chairman. Committee of the Johannesburg Stock Exchange. 1991(4) SA 43 (W) at 48 C) .

In this regard the fact that the matter was heard by a Sub-Committee can in my opinion also not be faulted. (See Wade, Administrative Law. 7th Ed., pp 351-351, and De Smith, OP cit. p 220).

The criticism which is levelled against the summary and documents which were placed before the First Respondent must be considered in order to determine the question whether the proceedings before the First to Third Respondents were such that it can be said to have cured the shortcomings of the proceedings before the Fourth Respondent. In this regard it must in my opinion be accepted that a summary can never be complete and to that extent it will always be open to criticism. What can, in my opinion, be expected is that the summary will contain a fair synopsis of all the points raised by the parties so that the repository of the power can consider them in order to come to a decision. This, so it seems to me, goes without saying. See De Smith, op cit, at p. 220 - 221.

Although some of the criticism expressed by Mr Hodes is in my opinion not substantiated or of much import the summary as well as the memorandum, in one instance, fell short and

did not inform the First Respondent of the case of the Appellants in that regard. That concerns the meeting and

decision taken by the Fourth Respondent on the 29th September, 1993. From a reading of the written heads of argument placed before the Sub-Committee it is clear that this issue was argued. Both representatives used these circumstances to substantiate their own cases. The legal representative for the Appellants pointed out that Fourth Respondent could not rely on the decision taken by it on the 29th to regularise its failure to consider all objections. This issue is pertinent to the first ground of appeal raised by the Appellants. Counsel for the Fourth Respondent, on the other hand, used the same circumstances to submit that thereby any irregularity which may have existed up to that stage was thereby "cured". Although there are various references to this issue in the Third Respondent's Memorandum to the First Respondent, depicting the attitude of the Fourth Respondent in this regard, I could find no reference therein to the submissions of the Appellants in this regard. (See Memorandum, par. 4.14 and 9.7) . In par. 9.7 the Fourth Respondent's submission that by this decision the "procedures were fulfilled after the mistake had been realised" may well have conveyed the impression that there was no counter-argument or answer thereto which in turn would have been a complete answer to Appellants' first, and in my opinion, only good ground of appeal.

A further issue which is in my opinion also of great importance in deciding whether the failure of natural justice by the Fourth Respondent was cured by the subsequent appeal is the procedure followed by the Sub-Committee.

Dealing with this issue and those discussed above I do not think that it would be correct to say, as was argued by Counsel for the Respondents, that the first warning that respondents had of these points was when they received the Appellants heads of argument. Attack on the procedure followed was set out in par. 17.10 of Appellants' founding affidavit and the point was specifically taken in paras. 19.5(a) and 19.6(a). See further Appellants' replying affidavit para. 11 and 15.

I have previously agreed with Counsel that in the absence of any provisions in the Statute the First Respondent could determine the form and procedure of the appeal subject to the provisions I have stated. Mr Blignaut submitted that the Appellants' opportunity to state their case was much more wider on appeal than at the first instance. This is correct. However this cannot be a reason not to comply with the dictates of natural justice. Discussing the content of the audi alteram partem rule De Smith, oo cit, at p. 215, stated as follows:

> "A tribunal may be entitled to base its decision on hearsay, written depositions or medical reports. In these circumstances a person aggrieved will normally be unable to insist on oral testimony by the original source of the information, provided that he has had a genuine opportunity to controvert that information."

Further in this regard the following was stated by the learned author on p. 202:

> "Take, for example, planning appeals of which nearly three-quarters are determined on the basis

> of written representations (coupled with an informal site inspection) instead of oral hearings. In the determination of such appeals no statutory procedural safeguards are provided. But it can be assumed with the general rules of natural justice, each party must be given the opportunity of commenting on written submissions made by the others."

In the present instance neither party had any insight in the written submissions of the other placed before the Sub-Committee. A request by Appellants' attorneys to that extent was refused. Of course, as set out before, Respondents' representatives would equally have been entitled to see the representations of the Appellants. This failure could in my opinion have been cured if the parties were present when each had put their representations before the Sub-Commit tee. This however did not happen and it is common cause that each party had put their representations before the Sub-Committee in the absence of each other. This seems to me to have put the Fourth Respondent at an advantage because their legal representative addressed the Sub-Committee after the representative of the Appellants had already done so. Obviously, Counsel for the Fourth Respondents was then available to deal with issues put to him by the members of the Sub-Committee, also issues arising

from the submissions made by Appellants' representative.

(See in this regard the replying affidavit of Barnie Peter Watson, par. 50, Vol. 3).

It has long been ac-cepted that all parties affected by an administrative body or tribunal have a right to see documents and information relied upon. See Baxter, oo

cit,

Paddock , (unreported 8th September, 1994, quoted in Fordham: Judicial Review Update at U 98. In Colpitts v Australian Telecommunications Commission & Others. 70 ALR 564 at 573 the following was stated:

> "In Kouda v Government of Malava, (1952) AC 322 at
> 337, after reiterating *whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other', Lord Dewing said: XThe Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so.' In the present case I have already indicated my view that there was actual prejudice in what occurred. But that the decision would the vitiated, even without proof of any actual prejudice is shown by Kouda' s case....."

This finding, namely that where a failure of justice occurred it is not necessary to prove actual prejudice, coincides with the position in our law as I have tried to demonstrate hereinbefore. The fact that Appellants were not present when Fourth Respondents addressed the Sub-Committee and were not given an opportunity to comment or controvert what was submitted to the Sub-Committee by Fourth Respondent's Counsel amounted, in these circumstances, in my opinion, to a failure of justice. Fourth Respondent's Counsel was, to a certain extent, at a similar disadvantage, but that does not save the situation and does not take away the fact that as far as Appellants were concerned, they were put at a disadvantage.

Looking now at the whole hearing structure, i.e. the original proceedings before the Fourth Respondent and the subsequent appeal, I am. satisfied that it cannot be said that the failures which occurred at the first instance were

cured by the appeal before the First Respondent. I have tried to point out the shortcomings which also occurred during the appeal stage which in my opinion also resulted in a less than fair hearing. In coming to this conclusion I am mindful of the factors which I have set out hereinbefore, such as that this was a rehearing before another body uncontaminated by the shortcomings of the first hearing. These factors go a long way to lay the foundation and to establish that the appeal body is free to come to its own conclusion on evidence or representations presented to it. Such factors therefore help to establish the credentials of the appeal body. However it is in my opinion also obvious that such factors cannot save the proceedings where a failure of justice occurred in the very proceedings themselves.

Having come to the above conclusion I wish to state that I am satisfied that the failures which occurred in the appeal proceedings were not purposely designed to prejudice or to disadvantage the Appellants. The Sub-Committee as well as the First, Second and Third Respondents consisted of lay persons who set out to give the Appellants a full and fair hearing but, for the reasons already stated, did not succeed. I therefore reject the Appellants' submissions that the appeal was also tainted with bias.

In the result the following orders are made:

1. The appeal succeeds and the decisions of the First and Fourth Respondents are hereby set aside with costs.

2. The order of the Court a quo awarding the costs of the application for review to Respondents is also set aside and substituted hereby with an order of costs for the Appellants.

3. All orders of costs shall include the costs consequent upon the engagement of two counsel.

4. As Fifth Respondent did not oppose the application and appeal Fifth Respondent is excluded from the above orders of costs.

STRYDOM, ACTING JUDGE OF APPEAL

I agree

MAHOMED, CHIEF JUSTICE

I agree

DAMBUTSHENA, ACTING JUDGE OF APPEAL

ON BEHALF OF THE APPELLANTS	MR P B, HODES, SC
Assisted by:	MR J D G MARITZ
Instructed by:	Engling, Stritter & Partners
ON BEHALF OF FIRST, SECOND AND THIRD RESPONDENT	MR A P BLIGNAULT, SC
Assisted by:	MR C J MOUTON
Instructed by:	Government Attorney
ON BEHALF OF FOURTH RESPONDENT	MR J J GAUNTLETT, SC
Assisted by:	MR D F SMUTS
Instructed by:	Lorentz & Bone