CASE NO.: A 165/2011
REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE ROAD FUND ADMINISTRATION	**APPLICANT**
vs	
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**1ST RESPONDENT**
THE CABINET OF THE GOVERNMENT OF NAMIBIA	**2ND RESPONDENT**
THE MINISTER OF FINANCE	**3RD RESPONDENT**
THE MINISTER OF WORKS AND TRANSPORT	**4TH RESPONDENT**
THE AUDITOR-GENERAL	**5TH RESPONDENT**
PENDA KIIYALA	**6TH RESPONDENT**
DESMOND BASSON	**7TH RESPONDENT**
TALASKA KATJIRURU	**8TH RESPONDENT**

CORAM: MILLER, AJ

Heard on: 08 July 2011

Delivered on: 12 July 2011

JUDGMENT:

MILLER, AJ: [1] In this matter the Applicant, which is the Road Fund Administration, instituted certain proceedings against eight Respondents by way of Notice of Motion. In part A of the Notice of Motion the Applicant seeks the review and setting aside of certain decisions taken by the 1st, 2nd and 3rd Respondents all related in some sense or the other to the suspension of certain officials of the Applicant being the sixth, seventh and eight respondents and the institution of disciplinary proceedings against them.

[2] As part B of the relief claimed the Applicant seeks relief on an urgent basis and in essence asks this Court to order that the relief sought in paragraph A of part 1 of the Notice of Motion shall operate as interim orders pending the final determination of the relief sought in part A of the Notice of Motion.

[3] Part B of the Notice of Motion was enrolled for hearing before me on Friday the 8th of July 2011 at 09:00 in the morning. Mr Corbett appeared for the Applicant before me and Mr Semenya SC assisted by Mr Akwenya represented the 1st, 2nd and 3rd Respondents.

[4] The remaining Respondents did not oppose the relief sought in part B of the Notice of Motion. I heard argument from counsel, where after I indicated that I will deliver a Judgment which I am now proceeding to do.

[5] The facts of this matter are in so far as they are relevant not in dispute. What is in dispute is in essence the authority of the 1st, 2nd and 3rd Respondents to have issued certain instructions to the Applicant pursuant to the Applicant's decision to suspend the officials, including the Chief Executive Officer, who is the 6th Respondent as well as the 7th and the 8th Respondents and to institute disciplinary proceedings against them.

[6] I wish to indicate at the outset that I am not called upon in these proceedings to make any final determination as to whether the decisions of the 1st , 2nd and 3rd Respondents should be reviewed and set aside or otherwise.

[7] The proceedings before me are confined to the granting or otherwise of interim relief and any relief I grant is temporary in its nature and will endure only until such time as a final determination has been made by this Court or a bench differently constitutes as to whether the decisions of the 1st, 2nd and 3rd Respondents should be reviewed and set aside. That in itself may require me to revisit the form of the relief sought in that part of the Urgent Application heard by me in the event that I am persuaded that I should grant relief in some form or another.

[8] The Applicant was established as a juristic entity by legislation being the Road Fund Act, Act 18 of 1999 which together with and subsequent to the promulgation of the State Owned Enterprises Governance Act 2 of 2006, governed the establishment and functioning of the Applicant. The legislation envisaged the establishment of a Board of Directors of the Applicant in Section 4 of the Road Fund Administration Act. Section 4(1) provides as follows:

> *"There shall be a Board of Directors of the administration which shall subject to this Act be responsible for the policy, control and management of the administration".*

[9] Section 2 of the Road Fund Administration Act provides that the Applicant once established will be a juristic person which implies that it is a body corporate in some sense or another of the word.

[10] The Act further provides for the appointment of a Chief Executive Officer and Section 7 of that Act provides for the vacation of the office of the directors appointed and in sub-section (2) thereof, the removal of a director in certain circumstances. These are the incapacitation of a director by virtue of physical or mental illness, or if the Minister after giving the director an opportunity to be heard is satisfied that such director for any good reason is unable or unfit to discharge the functions of a director.

[11] In so far as the State and Enterprises Governance Act, Act 2 of 2006 is concerned, it is relevant to have regard to the provisions of Sections 15 and 17 of that Act, as well as Section 18. Section 15 provides for the procedure for the

appointment of board members and alternate board members of State owned enterprises of which the Applicant is one. Section 17 makes provision for the conclusion of a governance agreement with the board and provides that the Council must within one month of being constituted, enter into a written governance agreement with the board of the State owned enterprises in relation to a number of factors, provided for in that particular section. Section 18 of the Act provides that the Minister must enter into a performance agreement with directors appointed in terms of that Act.

[12] I pause to indicate that the Respondents did not place before me, if it exists any governance agreement it had entered into with the board of the Applicant nor did it place before me if it exists any performance agreement it had entered into with individual board members of the Applicant.

[13] It follows from what I have indicated that the relationship between the 1st, 2nd and 3rd Respondents and the Applicant is governed to a large extent, not only by the Road Fund Administration Act but also by the State Owned Enterprises Governance Act. These regulate relationship between the board of State owned enterprises such as the Applicant and the Government.

[14] I have indicated that the facts are by and large common cause and they are the following: The board of the Applicant initiated an enquiry into certain perceived irregularities and malpractices, on the part of the Chief Executive Officer of the Applicant, the 6th Respondent Mr Penda Kiiyala. It required and

commissioned an independent enquiry and report by a firm of auditors Messrs Deloitte and Touche and were in due course provided with a provisional report. That report alerted the board to the possibility that certain irregularities had been committed, by the 6th, 7th and 8th Respondents in relation to a contract entered into between the Applicant and Iroko, relating to the collection of fees at the Noordoewer border post. It also alerted to the Board to the possibility that certain other irregularities are being committed. These concerned salary increases, transfers of funds, procurement of legal practitioners and the like all of which was not authorized.

[15] The board of the Applicant as a consequence resolved to suspend the 6th, 7th and 8th Respondents and thereafter proceeded to institute disciplinary proceedings against those Respondents. These proceedings have commenced in the sense that charges had been prepared and an initiator and a chairperson to chair the disciplinary hearing had already been appointed.

[16] The Applicants also advised the Respondents, 1st, 2nd and 3rd Respondents of these developments in the affairs of the Applicant. The Applicants' decisions when considered by 1st, 2nd and 3rd Respondents were questioned. The 1st, 2nd and 3rd Respondents concluded that a different course of action was called for. They were of the view that the perceived irregularities should be investigated by the Auditor-General and they were of the view that in order to save costs and expenditure no parallel investigation should be conducted by any other entity. It was also of the view that pending the findings of the Auditor-General the

suspension of the 6th, 7th and 8th Respondents should not be given effect to and should be suspended so to speak until the recommendations of the Auditor-General who is the 5th Respondent were made known. It was not contended that the applicant's decisions were irregular or not lawful in any sense. The first, second and third respondents were of the opinion simply that other alternatives were more expedient.

[17] The general view that the 1st, 2nd and 3rd Respondents took was articulated in certain decisions conveyed to the Applicant in the form of certain letters which were addressed to the Applicant. It also required the board of the Applicant to recuse itself from the activities of the Applicant pending the final determination or recommendations of the Auditor-General.

[18] Initially the Respondents took the point in their papers that the so called request for recusal to which the board of the Applicant consented rendered the board in operative to the extent that it is no longer functioned as a board. In argument before me Mr Semenya rightly conceded that such could not be the case and that the board of the Applicant continued to function as an existing board.

[19] Certain other points in *limine* were raised which I need to dispose of at the outset. It was stated by the 1st, 2nd and 3rd Respondents that no Certificate of Urgency had been attached to the papers as required by the Rules of this Court. The existence of a valid resolution to bring the Application was raised as

a point in *limine*. There was a point taken that the relief sought by the Applicant was not urgent and there was a point taken that the board members of the Applicant should have been cited in their individual capacities. All these were abandoned by Mr Simenya during the course of argument with the exception of the point in *limine* relating to the urgency of the matter which was argued before me.

[20] The issue before me which as I have indicated concerns the authority and power of the 1st, 2nd and 3rd Respondent to make the orders and directives that they did. In essence the stance adopted by the Applicant is the following: Firstly, the Applicant contends that the board of the Applicant is an independent body. That it is the board of the Applicant which has the power and the sole power to order the suspension of its employees and to institute disciplinary proceedings where appropriate. This point although opposed on the papers was conceded in argument by Mr Semenya. He in fact conceded that the decisions by the board of the Applicant to suspend the 6th, 7th and 8th Respondents and to institute disciplinary proceedings, against them did not require the prior consent or the subsequent approval of the 3rd Respondent who is the Minister of Finance. This concession which in my view was rightly made clearly impacts on the relief claimed by the Applicant both in so far as its entitlement thereto and the urgency of seeking the relief is concerned.

[21] In so far as the 1st, 2nd and 3rd Respondent contend, that the instructions issued to the Applicant fall within the powers of the 3rd Respondent as well as

the 1st and 2nd Respondent; reliance is placed on Articles 40 and 41 of the Constitution. It was within the power of the 1st, 2nd and 3rd Respondents to override as it were the decisions of the board of the Applicant and to issue different instructions which required compliance by the Applicant. To place this in context one needs to consider the type of instructions issued. These instructions will to a large extent, if given effect to substantially delay, the process instituted by the Applicant to suspend and discipline by way of disciplinary action, the 6th, 7th and 8th Respondent.

[22] Firstly, it was conveyed to the Applicant that the 1st and 2nd Respondents resolved that the Auditor-General conduct an audit into the Applicant in order to establish the accuracy of the allegations and conclusions made in respect of certain reports commissioned by the Applicant and to advise the 1st Respondent on the appropriate measures to address the identified problems and for the Auditor-General to advise the first Respondent on which employees would need to be suspended so that the Applicant to give way for an investigation to take place.

[23] It is apparent from these instructions that the validity of the decision by the board of the Applicant to suspend its employees was put in issue. This particular decision was extended by further decisions conveyed in a letter dated the 13th of June 2011 in which the board of the Applicant was directed to await the conclusion of the Auditor-General's audit before undertaking disciplinary proceedings against the 6th, 7th and 8th Respondents. A further direction to the

board was that any disciplinary action against the 6th, 7th and 8th Applicants be based on the Auditor-General's audit. The board was further directed to comply with the directive of the 2nd Respondent which is the Cabinet concerning the suspension of staff members and a further instruction that the board be directed to seek the opinion of the 3rd Respondent before taking any disciplinary action in respect of the 6th, 7th and 8th Respondent.

[24] I indicated earlier that Mr Semenya in argument before me conceded that the decision to suspend and take disciplinary action against the 6th, 7th and 8th Respondent was a decision solely within the powers of the Applicant and its Board. I also indicated, that such, concession resonates in relation to the decisions taken by the 1st, 2nd and 3rd Respondents concerning the institution of disciplinary proceedings and suspension of the 6th, 7th and 8th Respondents. That concession if correctly made has in its wake the fact that any decision taken by the 1st, 2nd and 3rd Respondents regarding the institution of disciplinary proceedings and the pre-requisites which must be met or otherwise before such action can be instituted, is ultra vires the powers of the 1st, 2nd and 3rd Respondents at least on a *prima facie* basis as I will indicate during the course of the Judgment.

[25] Despite the fact that the concession was made I am in any event of the view that the reliance by the Respondents on Sections 40 and 41 of the Constitution is misplaced. Article 41 of the Constitution deals only with the accountability of Ministers for the administration of their Ministries and does not

deal at all with the powers and functions of Ministers and duties of Ministers in relation to parastatal organisation like the Applicant. In so far as parastatals are concerned Article 40(a) of the Constitution provides:

> *The members of Cabinet shall have the following functions to direct, coordinate and supervise the activities of Ministries and local departments including parastatal enterprises and to review and advise the President and the National Assembly on the desirability and wisdom of the any prevailing subordinate legislation, regulations and orders pertaining to such parastatal enterprises regard being have to the public interest".*

[26] I do not interpret Section 40(a) of the Constitution as giving the Cabinet the power to make executive decisions in relation to the affairs of parastatals. Their duty is plainly to direct, supervise and control. The making of executive decisions where Parliament had enacted provisions for the establishment of an independent board is as far as the executive functions are concerned first and foremost and exclusively, the functions of the board.

[27] Some argument was placed before me by the Respondents relating to corporate governance and the functions of the 1st, 2nd and 3rd Respondents in relation to corporate governance. Admittedly the Applicant is not a corporate entity as created in terms of the Company's Act. It does not have articles of association. Instead, Section 15 of the State Owned Enterprises Act seems to provide some mechanism in terms of which the relationship between the Minister, Government and the board are governed.

[28] But given the fact that the Applicant is not a commercial enterprise it is nonetheless my view that the centre piece of corporate governance and corporate entities is the fact that a board must be independent and must not be subject to the dictates of shareholders or in this particular instance cabinet ministers. The remedies provided for the Minister and Government is to be found in those provisions relating to the removal and disqualification of board members in the event that it is considered that the board members and the board do not function in a manner suitable to the achievement of the objects of the enterprise thus created.

[29] I have indicated that I am not called upon finally to determine these issues. I need only to be satisfied that as one leg of the enquiry the Applicants have established on a *prima facie* basis that they have a right and entitlement to relief. What I have stated in relation to the duties and functions of the Board on the one hand and Government on the other are *prima facie* views and in my view there is much to be said for the argument at least *prima facie* that the decisions taken by the 1st, 2nd and 3rd Respondents were decisions that were not within their power to make. As I have indicated the final determination of these issues is best left for determination by the Court hearing the main Application seeking final declarations in that regard. I need also mention that in my view the relationship between Ministers and Cabinent on the one hand and State owned enterprises on the other, differ from the relationship between Ministers on the one hand and State departments and ministries on the other hand.

[30] It would seem to me that it is for that reason that the Constitution deals with these two matters separately and makes specific provision in Article 41 for ministerial accountability as far as ministries are concerned. As far as ministries are concerned the Minister is for all practical purposes the head of that particular Ministry and the Minister certainly has the power to issue executive orders and directions, in so far as that ministry is concerned and that is so in view of the fact that the Minister is finally accountable to Cabinet for the affairs of that particular Ministry.

[31] In the case of parastratals where legislation makes provisions for the establishment of a board different considerations apply. The board is established to make the executive decisions. It is not in my view within the powers of the Minister to assume the functions of the board and to make executive decisions which are reserved for decision and determination by the board.

[32] There is merit in the argument by Mr Corbett that in this particular instance the Minister in effect assumes the functions of the board and no longer exercised mere supervisory powers but sought to exercise executive powers. The decisions taken by the board were in effect nullified and substituted by the decisions taken by Government. *Prima facie* I therefore conclude that the Applicants have established a clear right.

[33] But there are further requirements. These were articulated in the Supreme Court of Appeal in South Africa in the decision of ***Hix Networking***

Technologies versus Systems Publishers (Pty) Limited 1997(1) SA 391 AD, which decision I may add was quoted with approval in this Court in several other decisions. On page 398 of that report the requisites stated are the following:

(a) *prima fa*cie right which I have indicated I find the Applicant has established in this particular case.
(b) a well grounded apprehension of irreparable harm if the relief is not granted.
(c) That the balance of convenience favours the granting of an interim order and
(d) that the Applicant has no other satisfactory remedy.

[34] To this I must add that whether or not to grant interim relief is a discretionary remedy which vests in this Court and that I have a wide discretion in this matter. In dealing with the further requirements it is clear that the Applicant has no other remedy than to seek the review of the decision. It follows that this particular requirement has been met.

[35] As far as the balance of convenience is concerned it is my view that the balance of convenience taking into account the totality of the facts and circumstances of this case equally favour the Applicant. If the relief is not granted the effect would be that the process of suspension and the taking of disciplinary action will grind to a halt until the final determination of these issues. Once more I emphasise the concession made that the decisions taken by the

1st, 2nd and 3rd Respondents regarding the suspension and the institution of disciplinary proceedings were *ulta vires* powers of the 1st, 2nd and 3rd Respondents and the balance of convenience will then indicate that the process invalidly challenged by the 1st, 2nd and 3rd Respondents should not be kept in abeyance pending the final determination of this issue. It is also in the interest of the 6th, 7th and 8th Respondents who are suspended *albeit* it with pay, that their disciplinary action should be concluded as speedily as possible. Depending on which way the disciplinary proceedings are determined the consequences for the 6th, 7th and 8th Respondents may be far reaching and devastating and in my view they should not be left in anticipation of the final determination of the disciplinary process pending the final determination of this Review Application.

[36] In so far as the issue of irreparable harm is concerned, much of the same considerations apply as apply to the determination of the balance of convenience. It follows that for these considerations and for the reasons I already gave that the Applicant is entitled to some interim relief.

[37] I indicated earlier in the Judgment that in deciding upon what interim relief I am to grant it may be necessary to have regard to the manner in which the prayers for interim relief was formulated. The relief claimed in part A the Applicant seeks a final order reviewing the decisions mentioned in paragraphs 1.1 to 1.3.5 of the Notice of Motion and declaring them null and void.

[38] In so far as the interim relief is concerned the Applicant requires and seeks relief that I issue interim orders reviewing and declaring null and void those decisions. It does not seem to me to be appropriate that I should even on an interim basis review temporarily and set aside temporarily the decisions which the Applicant seeks to have finally reviewed at a later stage. It follows that for those reasons I should grant interim relief which takes a different form.

[39] I may also indicate prior to making any orders that Mr Corbett conceded in argument before me that at last as far as prayer 1.1.1 is concerned that the Applicant is not entitled to that relief. Prayer 1.1.1 relates to the decision to appoint the Auditor-General to conduct an investigation into the Applicant and to advise the 1st Respondent on appropriate measures to address the identified problems. That concession was in my view correctly made.

[40] I also foresee no problem in so far as the Respondents require the Auditor-General to advise the 1st Respondent on which employees would need to be suspended. What the 1st, 2nd and 3rd Respondents are empowered to do once it receives that advice is another matter. But there can be no complaint if the 1st, 2nd and 3rd Respondents seek advice from the 5th Respondent as to what ought to be done.

[41] In so far as prayer 1.2 is concerned and that relates to the approval of the decision by the Applicant's board to suspend the 6th, 7th and 8th Respondents, I must add for the reasons I have given, that falls outside the power of the 3rd

Respondent and that in any event such approval is not a pre-requisite to the suspension.

[42] I am of the view that the decisions articulated in paragraphs 1.3 through to 1.3.5. should be the subject of some relief, in the manner in which I will formulate it.

[43] It follows in my view that the following orders are appropriate:

1. I dispense with the full and proper compliance with the Rules relating to service and time limits as set out on Rule 6.12 of the Rules of this Court by reason of the urgency of the matter.

2. I order that pending the final determination of the proceedings for the relief claimed in Part A of the Notice of Motion, the 1st, 2nd and 3rd Respondents are interdicted and restrained from implementing or requiring the Applicant to give effect to the following decisions taken by the 1st, 2nd and 3rd Respondents.

    2.1) The decision taken on 24th May 2011 not to approve the suspension of the 6th, 7th and 8th Respondents pending the advice to be furnished by the Auditor-General.

    2.2) The decision taken on 13th June 2011 by the 3rd Respondent to the effect that the board be directed to await the conclusion of the Auditor-General's report, audit before undertaking the disciplinary action against the 6th, 7th and 8th Respondent.

    2.3) The board be directed that disciplinary action against the 6th, 7th and 8th Respondents be based on the Auditor-General's audit.

2.4) The decision that the Board be directed to comply with directive of Cabinet, the 2nd Respondent, concerning the suspension of the stuff members and,

2.5) 1.3.5, the board be directed to seek the opinion of the 3rd Respondent before taking any disciplinary action in respect of the 6th, 7th and 8th Respondents.

[44] Finally the 1st, 2nd and 3rd Respondents are ordered to pay the costs of the proceedings before me jointly and severally the one paying the others to be absolved.

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MILLER, AJ

of one instructing and one instructed counsel of the proceedings

ON BEHALF OF THE APPLICANT **Mr. Corbett**

Instructed by: **Conradie & Damaseb**

ON BEHALF OF 1, 2 & 3 RESPONDENTS **Mr. Likwenya**

Assisted by: **Mr. Semenya**

Instructed by: **Government Attorney**