



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 21/2016

In the matter between:

**ANHUI FOREIGN ECONOMIC CONSTRUCTION
(GROUP) CORP LTD**

APPLICANT

AND

**MINISTER OF WORKS AND TRANSPORT
PRESIDENT OF THE REPUBLIC OF NAMIBIA
NAMIBIA AIRPORTS COMPANY
MINISTER OF FINANCE
PERMANENT SECRETARY
MINISTRY OF WORKS AND TRANSPORT**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT**

Neutral citation: *Anhui Foreign Economic Construction v Minister of Works and Transport* (A21-2016)[2016] NAHCMD265 (9 September 2016)

Coram: UEITELE J

Heard: 10 February 2016, & 21 April 2016

Delivered: 09 September 2016

Flynote: *Statute* - Airports Company Act, 1998 - What constitutes jurisdictional facts - Jurisdictional fact – Constitutes a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite for the Minister to exercise the

statutory power conferred upon him - The power itself is a discretionary one - Even though the jurisdictional fact exists the Minister is not bound to exercise it - If the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid – Jurisdictional facts contemplated in s 9(1) and (5) of the Airports Company act were non-existent – Exercise of power by Minister therefore unlawful.

Administrative Law – Failure of Minister to exercise discretion – Minister failing to exercise discretion pertaining to conditions of intervening in decisions of Namibia Airports Company and abdicating decision to the President – A discretionary power vested in one official or body - may not be usurped by another-whether the former is subordinate to the latter or not – Minister thus having acted unlawfully.

Summary: The applicant in this matter approached this court seeking the following relief: (a) An order reviewing and setting aside the decisions and actions of the Minister of Works and Transport and the President of the Republic of Namibia to cancel all the activities relating to the upgrade and expansion of the Hosea Kutako International Airport; (b) an order declaring the Minister of Works and Transport's action taken in terms of s 9(1)(b) of the Airports Company Act, 1998 unlawful and invalid; and (c) An order declaring the award, on 3 December 2015, by the Namibia Airports Company to the applicant for the contract to upgrade or expand the Hosea Kutako International Airport as valid.

The first, second and fourth respondents opposed the application. Simultaneously with the filing of their answering affidavit, the respondents filed a notice of motion for a counter application in terms of which they seek an order declaring the purported award on, 3 December 2016, by the fifth respondent to the applicant of the contract for the upgrade and expansion of Hosea Kutako International Airport as unlawful and null and void and setting the same aside.

Held that the services that were required were the upgrade and expansion of the Hosea Kutako International Airport and that it was within the mandate of the Namibia

Airports Company to establish, develop, provide, maintain, manage, control or operate, in accordance with sound and generally accepted business principles, any aerodrome, in Namibia. The court found that the services for the upgrade and expansion of the Hosea Kutako International Airport had to be sourced or procured by the Namibia Airports Company in accordance with the Airports Company Act, 1998 and the Namibia Airports Company's Procurement Procedures.

Held that it was the Minister of Works and Transport who instructed the Namibia Airports Company to discontinue the process relating to the upgrade and expansion of the Hosea Kutako International Airport.

Held further that before the Minister could exercise his power to issue a directive to the Namibia Airports Company he must be satisfied that one or more of the conditions set forth in section 9(1) obtain, and that the procedural step prescribed in s 9(5) have been executed. The court found that the jurisdictional facts set out in s 9 of the Airports Company Act, 1998 were non-existent and that the Minister could not exercise the power conferred on him by that section. The exercise of the power was therefore unlawful.

Held furthermore that it is an accepted principle of our public law that a discretionary power vested in one official may not be usurped by another, whether the former is a subordinate to the latter or not. If a person in whom the power is vested, does not exercise the power vested in him or her the failure to exercise the power constitutes unlawful abdication.

Held furthermore that the Minister was guided by the views of the President and that this was a clear case of a failure to exercise one's own discretion which is what the Minister of Works and Transport was by law called upon to do. The failure by the Minister of Works and Transport to act in accordance with the law is a contravention of the principle of legality.

ORDER

- 1 The instructions, by the Minister of Works and Transport to the Namibia Airports Company to discontinue all activities relating to the upgrading and expansion of the Hosea Kutako International Airport, during December 2015 and communicated to the applicant on 5 January 2016, purportedly given under section 9(1)(b) of the Airports Company, Act 1998 are declared invalid and are set aside.
- 2 The counter application is dismissed.
- 3 The first, second and fourth respondents, the one paying the others to be absolved are ordered to pay the applicant's costs such costs to include the costs of one instructing and one instructed Counsel.

JUDGMENT

UEITELE, J:

Introduction and background.

-

[1] This matter started its life as an urgent application for an interim relief in terms of Part A of the initial notice of motion, pending the finalization of a review application contained in Part B of that notice of motion. The urgent application was filed on 01st February 2016 and was set down for hearing on 10th February 2016. After hearing arguments in respect of part A of the application I postponed the matter to the 2nd day of March 2016 for judgment.

[2] On the 2nd day of March 2016 judgment was not ready and I again postponed the matter to 21st April 2016. In the period between 2nd March 2016 and 21st April

2016 the parties exchanged pleadings in respect of the main review application (i.e. Part B of the Notice of Motion) and informed me that the matter was ready for hearing before I could deliver judgment in respect of the interim relief (i.e. Part A of the Notice of Motion). I accordingly set down the main application (i.e. Part B of the Notice of Motion) for hearing on and 21 April 2016.

[3] In part B of the application the applicant sought the following relief:

- (a) An order reviewing and setting aside the decisions and actions of the Minister of Works and Transport and the President of the Republic of Namibia to cancel the tender for the upgrading or expansion of the Hosea Kutako International Airport.
- (b) An order declaring the Minister of Works and Transport's action taken in terms of s 9(1)(b) of the Airports Company Act, 1998 unlawful and invalid;
- (c) An order declaring the award, on 3 December 2015, by the Namibia Airports Company to the applicant for the tender to upgrade or expand the Hosea Kutako International Airport as valid.

[4] The first, second and fourth respondents (I will in this judgment refer to them collectively as the respondents, except where the context requires of me to refer to a specific respondent as such) opposed the application. Simultaneously with the filing of their answering affidavit, which was deposed to by the Minister of Finance, the respondents filed a notice of motion for a counter application in terms of which they seek an order "*declaring the purported award of 3 December 2016 by the fifth respondent to the applicant of the tender for the upgrading and expansion of Hosea Kutako International Airport as unlawful and null and void and setting the same aside.*"

[5] I find it appropriate to, before I deal with the application and counter application, briefly give a background of the events that led to the application and the

counter application. The background facts (these facts are what I have discerned from the affidavits and the review record filed in this matter) are these, on 10 June 2014 the third respondent (I will, in this judgment, refer to third respondent as the “Namibia Airports Company”) placed an advertisement in the local printed media calling for interested parties or bidders to express their interest relating to a project for the upgrade and expansion of the Hosea Kutako International Airport in Windhoek. (I will, in this judgment, except where the context requires me to do otherwise, refer to the project for the upgrade and expansion of the Hosea Kutako International Airport in Windhoek simply as “the project”).

[6] On 27 June 2014 (which was the closing date set for the submission of the expression of interest) the applicant and nineteen other interested parties submitted their expressions of interest to the Namibia Airports Company. During August 2014 officials of Namibia Airports Company inspected some of the work performed by the applicant at the Maputo International Airport in Mozambique. After that inspection the Namibia Airports Company shortlisted bidders who would proceed to the next stage of the evaluation. One of the bidders who was so shortlisted was the applicant.

[7] On 6 October 2014 the Chief Executive Officer of the Namibia Airports Company addressed a letter to the applicant in which letter he (the Chief Executive Officer) informed the applicant that the applicant was shortlisted for the design, construction and financing of the upgrade and expansion of the Hosea Kutako International Airport. The applicant was therefore invited to make a presentation to the Namibia Airports Company on 17 October 2014.

[8] On 21 November 2014 the Chief Executive Officer of the Namibia Airports Company addressed a letter to the applicant in which letter he (the Chief Executive Officer) informed the applicant that the applicant was shortlisted to submit (by 22 December 2014) a detailed response to a ‘Request for Proposal’ in respect of the project. In the request of 21 November 2014 the applicant was also notified of a site visit that was scheduled to take place at the Hosea Kutako International Airport on 4 December 2014.

[9] On 22 December 2014 the applicant submitted a full project proposal which included the design and technical elements, costs and financial recommendations. The applicant's final proposal and that of the other remaining bidder were then evaluated by the Namibia Airports Company's Board's Tender & Technical Committee.

[10] On 12 March 2015 the Board of Directors of the Namibia Airports Company (I will in this judgment refer to this body as the "Board") endorsed a recommendation by the Board's Tender & Technical Committee to award the contract for the project to the applicant. After the Board endorsed the applicant as its preferred bidder the Chairperson of the Board, on 16 June 2015, addressed a letter to the first respondent ("the Minister") in which letter she amongst other things:

- (a) Confirmed to the Minister that the evaluation of bids for the project was completed;
- (b) Informed the Minister that the Namibia Airports Company was desirous of issuing an award letter to the successful tenderer;
- (c) Informed the Minister that the Namibia Airports Company was desirous to commence with the project, she required clarity from the Minister pertaining to the funding of the project and also sought to enlist the assistance of the Minister to engage the Minister of Finance, the National Planning Commission and the Chinese Embassy with a view to ascertain the concrete commitments by the Namibian and Chinese Governments to finance the project.

[11] The Minister of Works and Transport responded to the Namibia Airports Company's letter of 16 June 2015 on 30 July 2015 suggesting a separation between the design and construction aspects and the financing aspects of the project. The Minister further suggested that the financing aspects of the project be handled by the Minister of Finance. The Chairperson of the Namibia Airports Company replied to the

Minster and confirmed that the project will not be awarded in a manner such that the design, construction and financing aspects of the project are combined.

[12] On 25 November 2015 the Minister of Finance addressed a letter to Chinese Ambassador of the People's Republic of China in Namibia in which he amongst other things requested a concessional loan from the China Exim Bank to finance the project. The China Exim Bank on 27 November 2015 responded directly to the Minister of Finance in which letter the Bank confirmed its interest to finance the project and transmitted the loan application documents for completion by the Minister of Finance.

[13] On 3 December 2015 the Permanent Secretary in the Ministry of Works and Transport addressed a letter to the Chief Executive Officer of the applicant in which letter he informed the applicant that the expression of interest as submitted by the applicant for the upgrade and expansion of the Hosea Kutako International Airport in Windhoek has been accepted. In the letter the applicant was required to not later than five days from the date it received that letter, in writing, indicate whether it accepted or declined the award.

[14] On the same day (i.e. 3 December 2015) the Chief Executive Officer of the applicant addressed a letter to the Permanent Secretary in the Ministry of Works and Transport indicating that it (the applicant) accepted the award. After that, the parties (that is the applicant on the one hand and the Namibia Airports Company and the Ministry of Works and Transport on the other hand) started to negotiate the terms and specifications of the written contract culminating in a draft agreement.

[15] While the negotiations regarding the specifics of the project were proceeding between the parties some media reports emerged. The media reports amongst other things alleged that:

- (a) The Namibia Airports Company did not comply with some statutory prescripts in the process of calling for expression of interest in respect of the project.

- (b) The agreement between the applicant and the Namibia Airports Company was not approved by the Attorney General.
- (c) The applicant may have been involved in bribery and corruption in the process of evaluating the expressions of interest in respect of the project; and
- (d) Some of the most cost effective bidders were allegedly side-lined and ignored.

[16] On 22 December 2015 the office of the President issued a media statement in which the office of the President, amongst other things stated that:

‘The President has ...resolved to instruct the Minister of Works and Transport to act in terms of section 9(1)(b) of the Airports Company Act, 1998 to direct that the NAC discontinues all activities relating to the upgrading of the HKIA, so that the process commences *de novo* under the auspices of the Ministry of Works and Transport in line with the State Finance Act, 1991 and the Treasury instructions thereunder.’

[17] On 28 December 2015 the applicant’s Chief Executive Officer addressed a letter to the Permanent Secretary in the Ministry of Works and Transport seeking clarification of the media statement/release. The Permanent Secretary in the Ministry of Works respondent on 5 January 2016 and its response was crisp it, amongst other things, stated that “*the project no longer exists*”. The applicant is aggrieved by the termination of the project relating to the upgrade and expansion of the Hosea Kutako International Airport and thus approached the court and seek the relief that is set out in Part B of the Notice of Motion.

The basis on which the applicant seeks to impugn the decision by the Minister.

[18] The applicant basis its challenge of the decision by the Minister to instruct the Namibia Airports Company to discontinue all activities relating to the upgrading and expansion of the Hose Kutako International Airport on the basis, that the Namibia

Airports Company has the power to negotiate and enter into contracts independent from external influence or interference by or at the hands of the Minister and indeed the Government of the Republic of Namibia more broadly, including the President. Ordinarily it is the Chief Executive Officer or the board of the Namibia Airports Company or both the Board and the Chief Executive who make decisions regarding its affairs.

[19] The applicant contends that there are narrow circumstances in which directions can be given by the Minister to the Namibia Airports Company. The applicant accordingly contend that the instructions, by the Minister to the Namibia Airports Company to discontinue all activities relating to the upgrading and expansion of the Hose Kutako International Airport, were *ultra vires* the powers of the Minister given to him by s 9(1)(b) of the Airports Company Act, 1998 because the jurisdictional facts required by that section for the exercise of the statutory power, were absent.

The basis on which the respondents oppose the application and the basis of their counter application.

[20] The respondents oppose the application on the basis that the Namibia Airports Company has no power to procure goods and services on behalf of the Government of the Republic of Namibia. Such responsibility lies with the Tender Board in terms of section 7 of the Tender Board Act of Namibia, 1996. The respondents accordingly contend that the award of the project to the applicant by the Permanent Secretary of the Ministry of Works and Transport was unlawful and thus invalid.

[21] The respondents furthermore contend that, if the court were to find that the award was unlawful then it will follow that whether or not the applicant makes out a case in respect of the orders it seeks against the respondents, this court, in the exercise of its discretion, will be entitled to refuse such orders as there would not be

any underlying legitimate interest or right on the part of the applicant to be protected through such other relief.

[22] The respondents further oppose the application on the ground that the omission or failure, by the applicant to challenge the Namibia Airports Company's decision to discontinue the project, was fatal.

[23] Having set out the basis on which the applicant and the respondents rely for their claim and counter claim I will, before I consider the reliefs sought by the parties briefly set out the statutory framework under which the Namibia Airports Company operate and the statutory framework for the acquisition of goods and services on behalf of the Government.

The statutory framework relating to the Namibia Airports Company.

[24] The Namibia Airports Company is a public company, established in terms of s 2 of the Airports Company Act, 1998 and whose sole shareholder is the State¹. The objects and functions of the Namibia Airports Company are set out in ss 4 and 5 of the Act. Sections 4 (1) and 5(2) (a) of the Act read as follows:

'4 Objects of Company

(1) The object of the Company is the acquisition, establishment, development, provision, maintenance, management, control or operation, in accordance with sound and generally accepted business principles, of any aerodrome, any part of any aerodrome or any facility or service, including a relevant activity at any aerodrome normally related to the functioning of an aerodrome.

(2) ...

5 Functions of Company and appointment of chief executive officer

(2) The Company may-

¹ See section 3 of the Airports Company Act, 1998.

(a) enter into an agreement with any person, organisation or authority to perform a particular act or render a particular service on behalf of or in favour of the Company, and may let or subcontract any facility or service it is required or entitled to provide or render, but any such contract shall be consistent with the objects of the Company;'

[25] Section 9 of the Act empowers the Minister to give directions to the Namibia Airports Company. Section 9(1) & (5) of the Act reads as follows:

'9 Power of Minister to give directions to Company

(1) The Minister may, if he or she considers it necessary for, or expedient to, the national security or for the discharge of an international obligation of the State, after consultation with the Company, by notice in writing to the Company, issue a direction to the Company to-

- (a) perform any function conferred or imposed on the Company by or under this Act, or perform such function subject to such limitations or conditions, as the case may be; or
- (b) discontinue any relevant activity, specified in the notice.

(2) ...

(5) Before any direction issued under subsection (1), excluding a direction contemplated in subsection (4), comes into operation, the Minister shall publish a notice in the *Gazette*, which notice shall-

- '(a) confirm that such a direction has been issued;
- (b) summarise the main provisions of such direction;
- (c) specify the place, date and time where and when the text of such direction will be available for inspection by any member of the public; and
- (d) state the date when such direction shall come into operation.'

The statutory framework for the acquisition of goods and services on behalf of the Government.

[26] The procurement of goods and services for, the letting or hiring of anything or the acquisition or granting of rights for or on behalf of, and the disposal of property of, the Government is regulated by the Tender Board of Namibia Act, 1996. Section 2 of that Act establishes a Tender Board which is *'responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, and for the disposal of Government property.'*²

[27] Section 7(1) further permits the Tender Board to:

- (a) conclude an agreement with any person for the furnishing of goods or services to the Government on its behalf;
- (b) invite tenders and determine the manner in which they should be submitted;
- (c) inspect and test or cause to be inspected and tested the goods or services offered; and
- (d) accept or reject any tender and take steps to enforce or resile from any agreement concluded.

[28] Having set out the statutory framework which regulates the activities that may be performed by the Namibia Airports Company and the statutory framework for the acquisition of services or goods on behalf of the Government of Namibia, I am of the view that in order to determine the dispute in this matter, it is appropriate to first establish as to what services were required in respect of this matter and on whose behalf those services were to be performed.

² See section 7(1) of the Tender Board Act of Namibia.

[29] I find it appropriate to state here that, at the hearing, on 10 February 2016, in respect of the relief that was sought in Part A of this application, the respondents raised a point *in limine* with respect to the applicant's authority to institute this application. In reply the applicant attached a power of attorney to its replying affidavit which indicated the applicant's authority to launch the application. The respondents thereafter did not pursue the issue of the applicant's authority to launch this application. I therefore proceeded on the basis that the applicant's authority launch this application was no longer in issue.

What are the services that were required and on whose behalf were those services to be performed?

[30] Mr Schlettwein who deposed to the answering affidavit on behalf of the respondents appears to suggest that the contract for the project was for the procurement of goods and services on behalf of the Government of the Republic of Namibia and he accordingly argued that the process for the procurement of the services for the project had to be managed by Government under the Tender Board of Namibia Act, 1996³.

[31] I have indicated in the introductory part of this judgment that during June 2014 the Namibia Airports Company invited interested parties to express their interest relating to a project for the upgrade and expansion of the Hosea Kutako International Airport in Windhoek to an aerodrome classification of category 4F of the International Civil Aviation Organization. It is thus clear that the services that were required were the upgrade and expansion of the Hosea Kutako International Airport which fits into the definition of "*aerodrome*" in section 1 of the Airports Company Act, 1998.

[32] I therefore have no doubt in my mind that the invitations solicited by the Namibia Airports Company was within its mandate to establish, develop, provide, maintain, manage, control or operate, in accordance with sound and generally

³ Act No. 16 of 1996.

accepted business principles, any aerodrome, in Namibia. It therefore follows that the Namibia Airports Company was entitled to invite expressions of interests, evaluate the expressions of interests it has received and in accordance with its procurement policy award the contract for the rendering of the services for the upgrade and expansion of the Hosea Kutako International Airport to any party who complied with its procurement requirements. The fact that the Government would be called upon to provide financing or to guarantee the financing of the services to be rendered does not detract from the fact that the services are being rendered on behalf of the Namibia Airports Company.

[33] If the financing of the services to be rendered to the Namibia Airports Company was to be done by the Government of the Republic of Namibia or to be sourced or guaranteed by the Government of the Republic of Namibia that fact will in my view still not turn the services that are to be rendered into services rendered on behalf of the Government of Namibia. It thus follows that the services for the project had to be sourced or procured by the Namibia Airports Company in accordance with the Airports Company Act, 1998 and the Namibia Airports Company's Procurement Procedures. I therefore reject the argument by Mr Schlettwein that the contract for the project was for the procurement of goods and services on behalf of the Government.

The decision to instruct the Namibia Airports Company to discontinue all activities relating to the upgrade of the Hosea Kutako International Airport.

[34] It is now axiomatic that the Republic of Namibia is a Constitutional State and in a Constitutional State the principle of legality reigns supreme. What this means is that all State institutions and public officials (there is no denial that the Minister is a public official) may act only in accordance with powers conferred on them by law. This principle was articulated as follows in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*⁴

⁴ 2010 (2) NR 487 (SC) I have omitted the references to authorities from the quotation.

[23] The rule of law is one of the foundational principles of our State. One of the incidents that follow logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its 'Supreme Law', it demands that the exercise of any public power should be authorised by law — either by the Constitution itself or by any other law recognized by or made under the Constitution. The exercise of public power is only legitimate where lawful. If public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp powers of State constitutionally entrusted to legislative authorities and other public functionaries. The doctrine, as a means to determine the legality of administrative conduct, is therefore fundamental in controlling — and where necessary, in constraining — the exercise of public powers and functions in our constitutional democracy.'

[35] This brings me to the main thrust of the attack on the decision by the Minister, namely the instructions to the Namibia Airports Company to discontinue the process relating to the project, which is that those instructions are *ultra vires* the powers of the Minister conferred on him by s 9(1)(a) of the Act. In today's Constitutional context the attack amounts to an assertion that the decision of the Minister lacks legality.

[36] It is common cause that on 5 January 2016 the Permanent Secretary in the Ministry of Works and Transport addressed a letter to the Chief Executive Officer of the applicant in which he amongst other things stated that:

'2 As already communicated to you verbally, the President of the Republic of Namibia, in whom the executive powers vests jointly with Cabinet, and after consultation with the Cabinet Committee on Trade and Economic Development (CCTED), on 22 December 2015 instructed the Minister of Works and Transport to act under section 9(1)(a) of the Airports Company Act, 1998 (Act No. 18 of 1998) and direct the Namibia Airports Company (NAC) to discontinue all activities related to the upgrading of the Hosea Kutako International Airport (HKIA).

3 I am informed that the relevant notice will be issued by the Minister to the Namibia Airports Company Ltd in terms of which the HKIA Upgrade and

Expansion Project will be taken over by the Government and the process will commence *de novo* under the auspices of the Ministry of Works and Transport, in line with the State Finance Act, 1991 (Act No. 31 of 1991) the Treasury Instructions issued thereunder and the Tender Board of Namibia Act, 1996 (Act 16 of 1991).

4 ...

5 In the light of the above, please take note that the project for the Upgrade and Expansion of HKIA in Windhoek, for which your company submitted an expression of interest to the Namibia Airports Company, will no longer be pursued by the NAC, and will not be continued to fruition in its current format by the Government of the Republic of Namibia, and therefore the project no longer exists.'

[37] From the above letter it is clear that the Minister concedes to the fact that he was instructed by the President to instruct the Namibia Airports Company to discontinue all activities related to the upgrading of the Hosea Kutako International Airport. The applicant argued that the Namibia Airports Company, like all other companies, has the power to negotiate and conclude contracts, and that this fact is not only made explicit in the Act but also recognised by the internal Procurement Policy and Procedures of the Namibia Airports Company. The applicant thus submitted that the Namibia Airports Company must act independent from external influence or interference or both external influence and interference by or at the hands of the Minister.

[38] The applicant, however, recognises the fact that the Minister has some limited powers of intervention in the management of the affairs of the Company but argued that the Minister can only intervene or interfere where he (the Minister) considers it necessary for, or expedient to, the national security or for the discharge of an international obligation of the State to do so. But before the Minister issues his instructions, he is required to first consult with the Minister of Public Enterprises and the Namibia Airports Company.

[39] The respondents on the other hand argue that there was nothing unlawful about the actions of the first and second respondents. This is so because, (so the argument went) firstly, the applicant does not allege a contractual or public law relationship or both contractual and public law relationship with the first or second respondents but with the third respondent. Secondly, both the first and second respondents carried out their executive powers as contemplated in terms of Articles 27(2) and 40 of the Namibian Constitution. In terms of Article 40(a) and (k) the first and second respondents have the right to direct, coordinate and supervise the activities of Government Departments and Parastatal Enterprises to issue notices, instructions and directives to facilitate the implementation and administration of laws.

[40] In order to determine the scope of the Minister's powers to, in terms of Article 40(a) and (k) of the Namibian Constitution, direct, coordinate and supervise the activities of Parastatal Enterprises or to issue notices, instructions and directives to facilitate the implementation and administration of laws the logical starting point is an interpretation of the Constitution itself.

[41] Article 40 (a) and (k) reads as follows:

'Article 40 Duties and Functions

The members of the Cabinet shall have the following functions:

- (a) To direct, co-ordinate and supervise the activities of Ministries and Government departments including parastatal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such parastatal enterprises, regard being had to the public interest;
- (b) ...

- (k) to issue notices, instructions and directives to facilitate the implementation and administration of laws administered by the Executive, subject to the terms of this Constitution or any other law;

[42] It is crystal clear that the Minister's power to supervise parastatals or to issue directives to parastatal enterprises must be done subject to the terms of the Constitution and any other law governing the parastatal enterprise. One of the terms of the Constitution is Article 18 which enjoins administrative bodies and administrative officials to act fairly and reasonably and to comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation. The relevant legislation in this case is the Airports Company Act, 1998.

[43] It is clear that in this matter the President never issued any directive or instructions to the Namibia Airports Company. It is the Minister who instructed the Namibia Airports Company to discontinue the process relating to the project. Before the Minister is entitled to exercise his power (as conferred upon him by s 9 of the Act) to issue a directive to the Namibia Airports Company he must be satisfied that one or more of the conditions set forth in section 9 (1) obtain, and that the procedural step prescribed in s 9(5) have been executed. It thus follows that one of the possible grounds upon which the exercise of the power granted by s. 9(1) may be assailed in a Court of law is the absence of one or more of the conditions listed in subsection (1) of section 9.

[44] The content of this kind of condition (i.e. the condition listed in subsection (1) of section 9 of the Act) is often referred to as a '*jurisdictional fact*'⁵; in the sense that it is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite for the Minister to exercise the statutory power conferred upon him. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, if

⁵ See *Minister of the Interior v Bechler and Others*, 1948 (3) SA 409 (AD) at p. 442.

the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid.⁶

[45] Corbett J⁷ argued that upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power.

[46] The learned judge continued and said that on the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. The judge continued to say:

‘In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter.’

[47] In the present matter the jurisdictional facts set out in s 9 (1) and (5) consists of both justiciable and non-justiciable facts. In the present matter what is clear is that the Minister does not tell the Court that he considered it necessary for, or expedient to, the national security or for the discharge of an international obligation of the

⁶ See *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C).

⁷ *Supra*.

State, to give directives and instructions to the Namibia Airports Company to discontinue the project. The only reasonable inference to be drawn is that the jurisdictional facts (whatever form they take i.e. whether they are justiciable or not) were non-existent. It thus follows that the power conferred by s 9 of the Act on the Minister could not be exercised and any purported exercise of the power is invalid.

[48] The argument by Mr Namandje that the Minister was exercising executive powers under Article 40 of the Constitution is misplaced because the exercise of such power can only take place in terms of the law. It therefore follows that the instructions purportedly given under section 9(1)(a) or (b), by the Minister of Works and Transport to the Namibia Airports Company to discontinue all activities relating to the upgrading and expansion of the Hosea Kutako International Airport, during December 2015 and communicated to the applicant on 5 January 2016, are unlawful and therefore invalid.

[49] The instructions by the Minister to the Namibia Airports Company may be set aside on another ground. It is an accepted principle of our public law that a discretionary power vested in one official may not be usurped by another, whether the former is a subordinate to the latter or not.⁸ If a person in whom the power is vested, does not exercise the power vested in him or her the failure to exercise the power constitutes unlawful abdication. In the matter of *Mabi and Others v Venterspost Town Council and Another*⁹ a superintendent cancelled a residential permit on the instructions of another official (who did not possess the power to do so himself), the court held that the superintendent had failed to comply with his statutory duty. Clayden J said:

‘For the superintendent so to give effect to the instructions of a person not charged with the duty of considering cancellation under the Regulation was not, I consider, a proper discharge of his function under the Regulation. He allowed another to usurp his function, and gave the matter no consideration himself.’

⁸ L Baxter *Administrative Law*: 1984 Juta at 442.

⁹ 1950 (2) SA 793 (W).

[50] In the matter of *Leach v Secretary for Justice, Transkeian Government*¹⁰ the applicant, was granted a new on site-consumption liquor licence. After this licence had been granted the Chief Minister of the Transkeian Government commented publicly thereon and the respondent, in his capacity as Secretary for Justice, was instructed by the Minister of Justice to place the question of liquor licences for non-Transkeian citizens at seaside resorts before the Transkeian Cabinet for its consideration. On 11th October, 1964, such a memorandum was prepared. On 11th November, 1964, the date advertised for the licensing meeting, no Cabinet resolution had been taken. The respondent postponed consideration of all applications for liquor licences at seaside resorts in the Transkei. At some stage between 11th November and 27th November the Cabinet took a resolution resolving that it was the policy of the Transkeian Government that liquor licences, whether restricted or not, be not granted to seaside resorts which are the property of persons other than Transkeian citizens. At the adjourned meeting of 27th November the respondent informed the applicants for licences of the Transkeian declared policy and that he had to take the policy of the Government into consideration when considering applications affecting licensing. Although the respondent heard all the applicants he refused their applications. The applicant brought this decision refusing his application for renewal on review, averring, *inter alia*, that the respondent had failed to exercise a proper or any discretion in his decision. The court, Munnik J said:

'In the instant case, however, what the respondent has said in effect is: 'A factor which I take into account in deciding whether or not you should have a licence is not the fact that I think it undesirable that you should have it but that the Cabinet regards it as undesirable that you should have it although personally I have no objection'. By doing this the respondent has in fact not exercised his discretion at all in excluding this class of applicant. He has been guided by the views of somebody else. I cannot imagine a clearer case of a failure to exercise one's own discretion which is what the respondent was by law called upon to do.'

¹⁰ 1965 (3) SA 1 (E).

[51] What was said by Munnik J in the *Leach* case is what exactly happened in this matter. What the Minister has said in effect is this: 'A factor which I take into account in deciding whether or not to instruct you to discontinue a relevant activity is not the fact that I consider it necessary for, or expedient to, the national security or for the discharge of an international obligation of the State to do so but that the President has said I must do so'. The Minister has been guided by the views of somebody else. I cannot imagine a clearer case of a failure to exercise one's own discretion which is what the respondent was by law called upon to do. His failure to act in accordance with the law is clearly a contravention of the principle of legality.

[52] Mr Namandje, for the applicant, argued that even if the Court found that the Minister's instruction to the Namibia Airports Company were invalid the applicant must fail in its claim to have the instructions of the Minister set aside because the prejudice which the applicant alleges it suffered did not arise from the act of the Minister instructing the Namibia Airports Company to discontinue all the activities relating to the project, but arose from the Namibia Airports Company discontinuing or cancelling the activities relating to the project and therefore the failure to impugn the decision to discontinue or to cancel the activities relating to the project is fatal.

[53] I do not agree with Mr Namandje's argument for the simple reason that the foundation on which the decision, to cancel or discontinue the activities relating to the project, is based, is the instructions by the Minister. It thus follows that if the foundation is removed the superstructure which is built on a foundation which is no longer in place automatically collapses so there is no need to also demolish the superstructure. Once the instructions by the Minister are declared invalid any act or decision which is based on those instructions loses its legal basis and there is, in my view, no need to also assail that act or decision.

[54] This brings me to the respondents' argument that even if I find that the instructions were invalid, I do not need to consider the applicant's review application because the award to the applicant, by the fifth respondent (the Permanent

Secretary of the Ministry of Works and Transport) to applicant was unlawful, and if the court finds that to be the case the review application will be academic. The question I therefore turn to is to consider whether there was an award made by the fifth respondent to the applicant.

Did the fifth respondent make an award to the applicant?

[55] It is now well established in our law that in motion proceedings affidavits serve a dual purpose they are both pleadings and evidence.¹¹ In this matter the respondents in the counter application alleges that the award of the project to the applicant by the fifth respondent was unlawful and thus invalid. It is now also accepted that he or she who asserts must prove that assertion.¹² The issue of whether the fifth respondent awarded the project to the applicant is essentially a matter of fact and, ordinarily, some evidence would have to be adduced to support the contention. In this matter the respondents did not place any evidence before this court to indicate that the fifth respondent awarded the project to the applicant.

[56] What I gather from Mr Schlettwein's affidavit is that he relies on the assertion by the applicant that, on 3 December 2015, it was awarded the project by the fifth respondent who was then acting as the agent for the Namibia Airports Company. The applicant in turn relied on the letter of 3 December 2015 by the fifth respondent to it (applicant) that it was awarded the project by the fifth respondent acting as an agent for the Namibia Airports Company. The letter of 3 December 2015 amongst other things reads as follows:

'The Ministry would hereby like to inform you that the expression of interest as submitted by your company for the Upgrade and Expansion of the Hosea Kutako International Airport in Windhoek has been accepted and that the above-mentioned contract with a total project value of U\$ 477 854 350.00 (Four hundred and seventy

¹¹*Patrick Inkono v The Council of the Municipality of Windhoek* (A 55/2013) [2013] NAHCMD 140 (28 May 2013).

¹²*Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others* 1993 (4) SA 239 (ZS).

seven million eight hundred and fifty four thousand three hundred and fifty UD dollar) VAT included, is herewith officially awarded to your company.

Kindly, accept or decline the award in writing within five (5) working days from receipt hereof.'

[57] In this letter the Permanent Secretary nowhere mentions that he was acting as an agent for the Namibia Airports Company, the statement by the applicant that the fifth respondent acted as the agent for the Namibia Airports Company is purely speculative. The letter (of 3 December 2015) also does not state that the Permanent Secretary awarded or accepted the expression of interest as submitted by the applicant. The letter does not tell the reader of that letter as to who accepted the expression of interest which was submitted by the applicant. All we know for a fact is that the applicant submitted its expression of interest to the Namibia Airports Company and not to the Ministry of Works and Transport. The conclusion that the Permanent Secretary awarded the project to the applicant is conjectures. The respondents needed to put evidence before the Court to prove that the Permanent Secretary awarded the project to the applicant and they have failed to do so. In the absence of evidence I cannot come to the conclusion that the fifth respondent awarded the project to the applicant and for that reason the respondents' counter application must fail.

[58] While I am on the question of the alleged award of 3 December 2015 to the applicant, the applicant has implored me to uphold the award of 3 December 2015 by the third respondent to it (i.e. the applicant) of the project for the upgrading and expansion of the Hosea Kutako International Airport Windhoek. For the same reason that I have declined to hold that the fifth respondent awarded the project to the applicant, I cannot hold that the Namibia Airports Company, on 3 December 2015, awarded the project to the applicant. As I have indicated above the letter of 3 December 2015 does not tell me who awarded the project to the applicant. The only evidence on record is that the Namibia Airports Company, on 12 March 2015,

endorsed the recommendation by its Board's Tender and Technical Committee to accept the expression of interest submitted by the applicant.

[59] In view of the conclusion I have arrived at I find it unnecessary to consider the other basis on which the applicant impugns the decision by the second respondent to direct the Minister to act in terms of s 9(1)(b) of the Act.

[60] Finally regarding the question of costs. The applicant has substantially succeeded in its application. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general rule. I am further more satisfied that the complexity of this matter justifies the employment of two instructed counsel.

[61] In the result I make the following order:

- 1 The instructions, by the Minister of Works and Transport to the Namibia Airports Company to discontinue all activities relating to the upgrading and expansion of the Hosea Kutako International Airport, during December 2015 and communicated to the applicant on 5 January 2016, purportedly given under section 9(1)(b) of the Airports Company, Act 1998 are declared invalid and are set aside.
- 2 The counter application is dismissed.
- 3 The first, second and fourth respondents, the one paying the others to be absolved are ordered to pay the applicant's costs such costs to include the costs of one instructing and one instructed Counsel.

SFI Ueitele

27
27
27
27
27

Judge

APPEARANCES

APPLICANT: Mr N Cassim SC

Instructed by Tjombe-Elago Incorporated,
Windhoek

FIRST, SECOND & FOURTH

RESPONDENTS:

Mr. S Namandje, assisted by Mr. Boonzaaier
Instructed by the Government Attorney,
Windhoek