REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2016/00208

In the matter between:

FOUR THREE FIVE DEVELOPMENT COMPANIES (PTY) LTD	**APPLICANT**

and

NAMIBIA AIRPORTS COMPANY	**FIRST RESPONDENT**
CHAIRPERSON OF THE NAMIBIA AIRPORTS COMPANY TENDER COMMITTEE	**SECOND RESPONDENT**
MENZIES AVIATION NAMIBIA (PTY) LTD	**THIRD RESPONDENT**
OSHOTO LOUNGE SERVICES CC	**FOURTH RESPONDENT**
BIDVEST NAMIBIA (PTY) LTD	**FIFTH RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA LTD	**SIXTH RESPONDENT**

Neutral citation: *Four Three Five Development Companies (Pty) Ltd v Namibia Airports Company* (HC-MD-CIV-MOT-REV-2016/00208) [2017] NAHCMD 23 (2 February 2017)

Coram: PARKER AJ

Heard: **20 September 2016; 20 October 2016; 31 October 2016**

Delivered: **2 February 2017**

Flynote: Administrative law – Exhaustion of statutory domestic remedies before approaching court for relief – Airports Company Act 25 of 1998, s 12 providing comprehensive, practical, cheap, expeditious and effective remedies – Procedure of a Commission of Enquiry contemplated in s 12, involving the adducing of evidence that could be tested by cross-examination – Court found that the Minister and the Commission of Enquiry were in a better position at that stage to decide on review of first respondent's decision – Applicant still at liberty to approach court if not satisfied with Minister's decision – Court held therefore that jurisdiction of court not ousted by the Act – Court having applied considerations that ought to be taken into account when deciding whether statutory domestic remedies should be exhausted first before approaching court for relief found that applicant spurned the statutory domestic remedies without justification – Court held that the doctrine of exhaustion of domestic remedies is part of our law and effect must be given to it – Court held further that judicial review process should not be allowed to supplant the normal statutory domestic remedies where there are no exceptional circumstances – Exceptional circumstances will be found to exist where the statutory domestic remedies do not satisfy substantially the *Wal-Mart Stores* requisites and the *Baxter* requisites – Court found that it has not been established in the instant case that exceptional circumstances exist justifying supplanting the s 12 remedies with judicial review process – Consequently, court dismissed, with costs, the application as being premature. Principles in *Namibian Competition Commission and Another v Wal-Mart Stores* 2012 (1) NR 69 (SC); and in Lawrence Baxter, *Administrative Law* (1991) applied.

Summary: Administrative law – Exhaustion of statutory domestic remedies before approaching court for relief – Airports Company Act 25 of 1998, s 12 providing comprehensive, practical, cheap, expeditious and effective remedy – Procedure of Commission of Enquiry contemplated in s 12 involving the adducing of evidence that could be tested by cross-examination – Court found that the Minister and the Commission of Enquiry were in a better position at that stage to decide on review of first respondent's decision – Applicant still at liberty to approach court if not satisfied with Minister's decision – Court held therefore that jurisdiction of court not ousted by the Act – Court having applied considerations that ought to be taken into account when deciding whether statutory domestic remedies should be exhausted first before

approaching court for relief found that applicant spurned the statutory domestic remedies without justification – Applicant alleging that irregularities occurred in the award of a tender to third respondent in that, among others, first respondent failed to follow procedures in evaluating the tender bids and awarding of tenders which are part of first respondent's statement of intent – Court found that this is the kind of complaint which the procedure contemplated in s 12 of the Act could deal with cheaply, expeditiously and effectively – Applicant chose to spurn the s 12 domestic remedies without justification – Consequently, court found the bringing of the application to be premature, and accordingly dismissed the application with costs.

ORDER

(a) The application is dismissed.

(b) Applicant must pay –

(i) to the third respondent its costs of the application and the costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

(ii) to the first and second respondents their costs of the application.

JUDGMENT

PARKER AJ:

[1] Once again the stream of incessant flow of challenges to awards of tenders by administrative bodies has reached this court. As usual, it is our duty to consider whether the applicant has discharged the onus cast upon it to establish that good grounds exist to review the decision of the administrative body in question. In the

instant case the administrative body is the first respondent; and the second respondent is the chairperson of the first respondent's tender committee. They are represented by Mr Marcus. I should say; I can see no good reason why the second respondent is cited. As I see it, the tender committee is a depute to the first respondent.

[2] In judicial review, a good ground must be grounded in any common law and constitutional grounds of review of administrative action of an administrative body or official. See *Chico/Octagon Joint Venture Africa v Roads Authority* (HC-MD-CIV-MOT-GEN-2016/000210) [2016] NAHCMD 385 (8 December 2016), paras 9 and 10 where the authorities are gathered. It is for this reason that it does not assist the case of an applicant who embarks upon the conduct of heaping vituperations and calumnies on the taker of the decision complained of and placing allegations of moral turpitude at the door of the decision taker unless they are established as foundations upon which any of the common law grounds and constitutional law grounds are proved. Otherwise, such conduct is otiose; its labour lost. Indeed, in a case referred to the court by Mr Strydom, counsel for the third respondent, *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v CEO, South African Social Security Agency and Others* 2013 (4) SA 557 (SCA), the Court decried such conduct and observed that such conduct tended to be prejudicial to the judicial process.

[3] The third respondent whose tender was successful has moved to reject the application. The third respondent has raised a preliminary objection which I propose to consider at the threshold because if it was successful it would dispose of the application. The preliminary objection is based on the doctrine of exhaustion of statutory domestic remedies before an aggrieved person could launch proceedings in the court. Mr Namandje, counsel for the applicant characterizes the point *in limine* as 'spurious'. Why does counsel so contend? Only this, that para 21.7 of the invitation to tender (ITT) conditions provides that the High Court has jurisdiction to determine any proceedings instituted by way of notice of motion by any of the parties to the ITT' and further that the applicant 'has the right in terms of Article 18 (of the Namibian Constitution) to approach Court if it is prejudiced by any administrative decision of the first respondent and second respondent'.

[4] I accept Mr Strydom's submission that the applicant misses the point. First and foremost the doctrine of exhaustion of statutory domestic remedies before approaching the court for relief is part of our law (see *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated* 2012 (1) NR 69 (SC)). Second, the doctrine does not oust the jurisdiction of the court to review administrative actions of administrative bodies and officials. Third, the aforementioned clause 21.7 is an unnecessary pleonasm inasmuch as the clause provides that the court 'has jurisdiction to determine proceedings instituted by way of notice of motion by any party to the ITT against any other party in which interim relief or urgent final relief is claimed (howsoever) however arising out of or in connection with the ITT'.

[5] I now proceed to the next level of the enquiry which is the application of the doctrine. In that regard, I cannot do any better than to rehearse what I said about the application of the doctrine in *Gurirab v Minister of Home Affairs and Immigration* (A 323/2014) [2015] NAHCMD 262 (5 November 2015):

'[14] This finding leads me to the next level of the enquiry. It concerns the principle of exhausting domestic remedies. It is that the right to seek judicial review of the act of an administrative body or administrative official may be suspended or deferred until the complainant has exhausted domestic remedies which, as is in the present case, might have been created by statute expressly or by necessary implication. In the instant case, such remedy is created by s 9(2) of the Act.

[15] In *Namibia Competition Commission v Wal-Mart Stores* 2012 (1) NR 69 (SC) the Supreme Court proposed certain considerations that a court ought to take into account in determining the issue of exhausting domestic or internal remedies. (a) The first consideration is the wording of the relevant statutory provision; and (b) the second is whether the internal remedy would be sufficient to afford practical relief in the circumstances. I hasten to add the caveat that the list is exhaustive; neither was it meant to be exhaustive; and neither should the considerations be applied mechanically as if they were immutable prescriptions to be applied without due regard to the circumstances of the particular case.

[16] And Lawrence Baxter writes in his work *Administrative Law*, 3rd Imp (1991), p 721:

> "Two considerations appear to be paramount: first, are the domestic remedies capable of providing effective redress in respect of the complaint?; and, secondly, has the alleged unlawfulness undermined the domestic remedies themselves."

[17] To the *Wal-Mart* considerations and the *Baxter* considerations should be added this crucial qualification proposed by Mokgone J in *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC), para 35:

> "Internal remedies are designed to provide immediate and cost effective relief, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigant's access to justice (ie court justice), the importance of more readily available and cost effective internal remedies cannot be gainsaid." '

Paragraphs 14 and 17 contain what may be called the *Wal-Mart Stores* requisites, and para 16 the *Baxter* requisites.

[6] In the present proceeding the statutory domestic remedies are provided in s 12 of the Airports Company Act No 25 of 1998 ('the Act'). It is worth noting that s 12 is not some brief, unhelpful and ineffective provision. The section is deep, self-explanatory, comprehensive and practical; and, *a fortiori*, the procedure provided there is comparable to tribunal proceedings. It provides for the following practical and effective procedure:

(a) the lodging of a complaint with the Minister responsible for Civil Aviation;

(b) the requirement that the Minister must transmit a copy of the complaint to the Company (ie in these proceedings, the first respondent);

(c) the requirement that the Company must within 14 days of receiving a copy of the complaint lodged with the Minister submit a written reply to the complaint;

(d) the complainant pays nothing to the Company (first respondent) to pursue the s 12 remedies.

[7] That is not all; s 12 provides an effective, outside-the-decision-maker procedure of the kind the Supreme Court in *Wal-Mart Stores* and *Baxter* in his works A*dministrative Law* proposed (see para 5 of this judgment) in that -

(a) the Minister has the power to establish a commission of inquiry to investigate a complaint;

(b) the commission conducts tribunal-like proceedings in which evidence is adduced and tested in cross-examination;

(c) without conducting a hearing, the commission is entitled to call for books and other items of evidential value for the commission's examination and consideration;

(d) upon completion of an investigation, if he or she is satisfied that the Company has failed to comply with a provision in s 12(1), eg where the Company failed to comply with a statement of intent, which may contain 'the procedures to be followed by the Company in the evaluation and awarding of tenders to, and negotiations of agreements with, any person, organization or authority', the Minister 'shall direct the Company to comply with such provision within the period of time determined by the Minister and specified in such direction'.

[8] In peroration, these conclusions emerge inevitably:

(a) The s 12 remedies provide 'immediate and cost effective relief, rectifying irregularities' (see *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC)).

(b) The wording of s 12 indicates an intention of the Legislature to provide sufficient and practical relief (see *Wal-Mart*)).

(c) The s 12 remedies provide effective redress in respect of the complaint which the applicant has asked the court to deal with (see *Baxter*, *Administrative Law*, loc. cit.).

(d) The unlawfulness alleged by the applicant will not undermine the s 12 remedies at all since the implementers of the s 12 remedies stand apart of, and are independent from, the first and second respondents (see *Baxter*, *Administrative Law*, loc. cit.).

(e) It is no less the Government Minister responsible for the first respondent who is authorized by the Act to direct in a deserving case the administrative body involved to comply with s 7(2)*(g)* of Act which in the instant case is precisely the conspectus of the compliants of the applicant (see *Shekunyenge v Principal of St Joseph's Roman Catholic High School Dobra* (HC-MD-CIV-MOT-GEN-2016/00269) [2016] NAHCMD 308 (6 October 2016)).

[9] Take, for instance, the order which the applicant seeks in para 2 of the notice of motion. This is exactly what the Minister could, if satisfied that the applicant has acted in a manner that offends against s 7(2)*(g)* upon investigation by a commission of enquiry established by him or her, have granted to the applicant. But the applicant, without justification chose to spurn the s 12 domestic remedies and rush to court on urgent basis.

[10] In my judgment, for the foregoing reasons, due implementation of the s 12 remedies must be given effect to. The reason is that the remedies are in line with the doctrine of exhaustion of statutory domestic remedies and the doctrine is part of our law and it has not been found to offend against any constitutional provision. The applicant did not exhaust the statutory domestic remedies provided by the Act. And the only reason why the applicant did not do so is, according to the applicant, the application of clause 21.7 of the ITT mentioned previously. That cannot, as I have demonstrated, be a good reason not to exhaust the statutory domestic remedies provided by the Act which, as I have found, satisfy both the *Wal-Mart Stores* requisites and the *Baxter* requisites. It therefore behoves the court to give effect to

the s 12 remedies. In that regard, it has been held by the House of Lords (England) that '[j]udicial review process should not be allowed to supplant the normal statutory appeal procedure' unless there are exceptional circumstances. (*Preston v IRC* [1985] 2 All ER 327 (HL) at 337j-338a) In my view exceptional circumstances will be found to exist where the statutory domestic remedies do not satisfy substantially the *Wal-Mart Stores* requisites and the *Baxter* requisites, discussed in para 5 of this judgment. On the facts and in the circumstances of the instant case, it has not been established that the s 12 remedies do not satisfy substantially the *Baxter* requisites and the *Wal-Mart Stores* requisites, justifying supplanting the s 12 remedies with judicial review process. Indeed, I find that the s 12 domestic remedies satisfy substantially the *Baxter* requisites and the *Wal-Mart Stores* requisites

[11] Based on these reasons, I must uphold the point *in limine* raised by the third respondent and argued by Mr Strydom. I accept Mr Strydom's conclusion in his argument that the application is premature and can only be properly instituted and considered by the court after the statutory domestic remedies provided by the Act have been exhausted. It follows inevitably that the court should refuse the review application, as it does; whereupon, I make the following order:

(a) The application is dismissed.

(b) Applicant must pay -

(i) to the third respondent its costs of the application and the costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

(ii) to the first and second respondents their costs of the application.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	S Namandje (with him T Iileka) Of Sisa Namandje & Co. Inc., Windhoek
FIRST AND SECOND RESPONDENTS:	N Marcus Of Nixon Marcus Public Law Office, Windhoek
THIRD RESPONDENT:	J A N Strydom Instructed by MB de Klerk & Associates, Windhoek