

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2018/00394

In the matter between:

**INNODEV CLOSE CORPORATION**

**APPLICANT**

and

**THE MINISTER OF LAND REFORM**

**1<sup>ST</sup> RESPONDENT**

**CHAIRPERSON OF THE LAND REFORM**

**ADVISORY COMMISSION**

**2<sup>ND</sup> RESPONDENT**

**CHAIRPERSON OF THE EVALUATION COMMITTEE**

**3<sup>RD</sup> RESPONDENT**

**PASSIONS CULINARY AND HOSPITALITY**

**INSTITUTE CLOSE CORPORATION**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Innodev Close Corporation v The Minister of Land Reform* (HC-MD-CIV-MOT-REV-2018/00394) [2021] NAHCMD 61 (22 February 2021)

Coram: **GEIER, J**

Reserved: **26 May 2020**

Delivered: **22 February 2021**

**Flynote:** Administrative law – Administrative action – Review of – Administrative body

a) Administrative law – Administrative bodies – Fair administrative justice in terms of art 18 of Namibian Constitution – Applicant had applied for the allotment of two farms in terms of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995 – farms initially to be allotted to another applicant as per the recommendation of the Land Reform Advisory Committee to the Land Reform Advisory Commission – Chair of the commission unilaterally and without resolution of the Commission referred the matter back to the committee with unauthorised further instruction – in such circumstances the fourth respondent – who had not even filed an application was allowed to participate in the allotment process and further representations to the committee – who then recommended that the farms in question be allotted to the fourth respondent – which recommendation was then endorsed by the Land Reform Advisory Commission who recommended the allotment further to the Minister, who endorsed the recommendation. This process was taken on review. The court upheld the review and set aside the relevant decisions as the process was materially defective as the fourth respondent, who did not make an application for allotment was allowed ex post facto to participate in the process and where the Evaluation Committee in any event improperly considered the fourth respondent for allotment. The process was also materially tainted through the participation of a conflicted member who continued to participate in the nomination process at the material times and the wrongful taking into account of the affirmative action criteria of the fourth respondent, which were only rectified ex post facto. Application for review thus granted with costs.

**Summary:** The facts appear from the judgment.

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## ORDER

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(a) The decision of the Minister of Land Reform to allot Farms Felseneck No. 26 and Okanatjikumu No. 25, in the Otjozondjupa region, Namibia, to the Passions Culinary and Hospitality Institute CC, is hereby reviewed and set aside;

- (b) The related decision of the Land Reform Advisory Commission, recommending to the Minister of Land Reform to allot Farms Felseneck No. 26 and Okanatjikumu No. 25 in the Otjozondjupa region, Namibia, to the Passions Culinary and Hospitality Institute CC, is also hereby reviewed and set aside, in so far as this may be necessary;
- (c) The related decision of the Land Reform Advisory Committee, recommending to the Land Reform Advisory Commission that Farms Felseneck No. 26 and Okanatjikumu No. 25, in the Otjozondjupa region, Namibia, be allotted to the Passions Culinary and Hospitality Institute CC, is also hereby reviewed and set aside, in so far as this may be necessary;
- (d) The Minister of Land Reform, the Land Reform Advisory Commission and the Land Reform Advisory Committee are hereby directed to consider the matter afresh.
- (e) The Minister of Land Reform, the Land Reform Advisory Commission and the Land Reform Advisory Committee are also hereby directed to provide written reasons for their respective decisions made on reconsideration to the Applicant, within 40 days of the decision in question;
- (f) The first, second and third respondents are to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

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## JUDGMENT

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GEIER, J

[1] This case entails the review and requested setting aside of the Minister of Land Reform's decision to allot Farms *Felseneck No 26* and *Okanatchikumu No 25* in the *Otjozondjupa* Region, Namibia, to the *Passions Culinary and Hospitality Institute CC*, which allotment was made on the recommendation of the Land Reform

Advisory Commission and which recommendation is thus also the subject of this review.

[2] In terms of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995 the process for the allotment was set in motion through an advertisement to which invitation the applicant and others responded during December 2016.

[3] Following the submission of applications by members of the public, an Evaluation Committee considered the applications, evaluated and scored them. At the meetings held on 16 May 2017 and 6 June 2017 it was resolved that the three highest applicants, who had scored more than the shortlisting benchmark of 60 points, be invited to conduct a PowerPoint presentation before the Committee. The three applicants who were shortlisted by the Committee were, Felseneck Game Ranch CC (65 points), Binvis Investment 189 (Pty) Ltd (73 points) and the applicant in this matter, with 64 points.

[4] On 3 July 2017 the requested presentations were made by only two of the short-listed candidates; Binvis Investment 189 (Pty) Ltd failed to attend. A recommendation was then made by the Evaluation Committee to the Land Reform Advisory Commission that the farms be allotted to Felseneck Game Ranch CC.

[5] The Commission was then apparently unable to consider the recommendations serving before it at the meetings of 27 and 28 July 2017. The reason advanced for not considering the applications was that there were inconsistencies detected in the bench marks set by the Evaluation Committee. The Committee had set a bench mark for a certain *Portion 1 of farm Irene*) and the remaining Portion of farm *Holstein* No.249, at 70 points and had invited all applicants, scoring above 70 points, for interviews whilst the bench mark for Farms *Felseneck* and *Okanatchikumu* had been set at 60 points.

[6] The Chairperson of the Commission then referred the recommendation for farms *Felseneck* and *Okanatchikumu* back to the Evaluation Committee in order for the Committee to now also interview those applicants who had scored 50 points and above.

[7] In such circumstances the initial recommendation made in respect of these two farms by the Committee was never considered by the Commission but by the Chairperson of the Commission alone who then decided to simply refer the recommendation back to the Committee with his personal instructions.

[8] As a result two more applicants - the fourth respondent and one other - both had also scored 50 points and above - were invited to make further representations on 17 October 2017. The Evaluation Committee now recommended that the fourth respondent be allotted farms *Felseneck* and *Okanatchikumu*.

[9] The Commission, in turn, consequent to its meetings of 30 November 2017 and 1 December 2017, considered the second recommendation from the Committee positively as a result of which it recommended that the responsible Minister allot the farms to the fourth respondent.

[10] The Minister then made the relevant decision on 12 December 2017 and approved the recommendation to allot the farms to the *Passions Culinary and Hospitality Institute CC*, the said fourth respondent.

[11] Consequent to that decision, and on 28 March 2018, the Ministry of Land Reform also published a notice in the media informing the public that Farms *Felseneck* and *Okanatjikumu* had been allotted to the fourth respondent.

[12] This sequence of events then triggered this review, which was opposed by the Minister of Land Reform, the Chairperson of the Land Reform Advisory Commission and the Chairperson of the Evaluation Committee, the first, second and third respondents respectively, whilst the fourth respondent did not oppose the application.

[13] Although one would in such circumstances think that the application would have to be dealt with as an opposed one, it emerged subsequently, that this would actually not have to be so, in the true sense, as a number of further grounds of review, raised by the applicant in its supplementary affidavits, filed in terms of Rule

76(9), were left unanswered. It thus remains to be seen – as a logical point of departure - whether these further grounds of review merit the granting of the sought relief in their own right or not, thus possibly obviating the need to deal with the remainder of the grounds raised in the application.

[14] It should in this regard be mentioned that counsel for the respondents, Mr Ncube, nevertheless raised certain arguments in respect of the supplementary/further grounds of review in his heads of argument, which arguments will obviously have to be considered.

[15] It so becomes incumbent to first turn to these further/supplementary grounds of review. They were:

- b) The fourth respondent<sup>1</sup> did not make an application for allotment;
- c) The Evaluation Committee improperly considered the fourth respondent for allotment;
- d) The Evaluation Committee was improperly constituted.

#### The first supplementary ground of review

[16] Mr Tjombe, counsel for the applicant's submissions, in support of the first supplementary ground of review, where brief and to the point:

'The fourth respondent did not make an application for allotment

Under Item 19 of the applicant's notice in terms of Rule 76(6), the applicant specifically sought the discovery of "A copy of the application for allotment by Passions Culinary and Hospitality Institute CC". Further, in a letter dated 18 November 2019<sup>2</sup> by the acting Executive Director of the Ministry of Land Reform, Esther N. Kaapanda and addressed to the Government Attorney (obviously in response to the applicant's notice in terms of Rule 76(6)), where under Item 2.19 thereof, reference to the fourth respondent's application for allotment is indicated other documents – and not the application form.

<sup>1</sup> i.e. Passions Culinary and Hospitality Institute CC.

<sup>2</sup> Annexure "N" to the applicant's supplementary affidavit.

As the fourth respondent never made an application for allotment, it could not have been considered for the allotment in the first place, and the allocation of the farm to the fourth respondent is therefore invalid, and falls to be set aside on that ground alone.’

[17] On behalf of the respondents this ground was not addressed at all.

[18] It would thus seem that it will have to be accepted that, for inexplicable reasons, the fourth respondent was allowed to ‘gate crash’ the allotment process and usurp it, without having formally lodged an application in the first place, as prescribed.<sup>3</sup> This ground of review is thus upheld.

#### The second supplementary ground of review

[19] The argument in support of this ground ran as follows:

‘The Evaluation Committee improperly considered the fourth respondent for allotment.

a) The minutes of the Evaluation Committee of 16 May 2017 and 6 June 2017<sup>4</sup> reveal that only applicants that scored more than 60 points were shortlisted by the Evaluation Committee. The applicant, together with Felseneck Game Ranch CC (that was also an applicant for allotment) made the further presentations to the Evaluation Committee as apparent from the minutes of a subsequent meeting of the Evaluation Committee of 3 July 2017. A third applicant (Binvis Investment 198 (Pty) Ltd) appeared not have attended to the presentations and was thus not considered any further.

b) It should be noted that the fourth respondent did not score more than 60 points, and was not invited for further representations.

c) After the presentations, the applicant scored 64 points, whilst Felseneck Game Ranch CC scored 69 points. As a result, Felseneck Game Ranch CC was recommended to

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<sup>3</sup> Section 41 prescribes this as follows : ‘1) Every application for the allotment of a farming unit offered for allotment under this Part shall be made in writing to the Minister in the manner stated in the relevant notice of offer. (2) Every application in terms of subsection (1) shall be accompanied by a written declaration by the applicant or, in the case of a joint application, by each applicant in the following form: ..’.

<sup>4</sup> Annexure “O” to the applicant’s supplementary affidavit.

the Land Reform Advisory Commission for allotment of Farming Unit C of Farm *Felseneck* No. 26 and *Okanatjikumua* No. 25.<sup>5</sup>

d) After this, something noteworthy and strange happened: At a subsequent meeting of the Evaluation Committee on 17 October 2017, the Chairperson thereof, Commissioner Nghituwamata informed the meeting that the submission of the Evaluation Committee to the Land Reform Advisory Commission was referred back to the Evaluation Committee in order for the Evaluation Committee to also interview applicants who scored 50 points and above. The following is recorded in the minutes of 17 October 2017:

“Further, the chairperson informed the meeting that the submission of the Evaluation Committee for Resettlement Game Farm (ECRGF) on the two game farms that are pending allocation namely, farming unit C of Farm Felseneck No. 26 and Okanatjikuma No. 25 in Otjozondjupa Region and the single unit of Portion 1 (Ilene) and Remaining Portion of Farm Holstein No. 249 in Kunene Region was submitted to the Land Reform Advisory Commission (LRAC) for deliberation during its 6<sup>th</sup> LRAC held on the 27<sup>th</sup> – 28<sup>th</sup> July 2017.

However, the ECRGF Submission was referred back due to some inconsistencies detected e.g. for Portion 1 (Ilene) and Remaining Portion of Farm Holstein No. 249, the Committee shortlisted and interviewed applicants who scored 70 points and above, while for farming unit C of Farm Felseneck No. 26 and Okanatjikuma No. 25, the Committee shortlisted and interviewed candidates who scored 60 points and above.

The LRAC thus referred back the submission to the ECRGF in order to for the Committee to also interview applicants of both game farms who scored 50 points and above.”

e) However, as the minutes of the Land Reform Advisory Commission reveals, this is far from the truth: The Land Reform Advisory Commission never considered the submissions of the Evaluation Committee: What actually happened at the meeting of the Land Reform Advisory Commission of 27-28 July 2017 is recorded in the submission of the Land Reform Advisory Commission to the Minister of Land Reform in the following terms:

“Applications received for game resettlement farming Unit C of Farm Felseneck No. 26 and Okanatjikuma No. 25 in Otjozondjupa Region as well as those for the single

<sup>5</sup> See page 9 of annexure “P” to the applicant’s supplementary affidavit.



unit of Portion 1 (Ilene) and Remaining Portion of Farm Holstein No. 249 in Kunene Region could not be discussed as the Chairperson informed the Commission that he referred the submission back to the ECRGF due to some inconsistencies detected E.g. for farm Portion 1 (Ilene and Remaining Portion of Farm Holstein No. 249, the Committee recommended those who got 50 points and above for interview whilst for Unit C of Farm Felseneck and Okanatjikuma No. 26 & 25 in Otjozondjupa Region, the Committee recommended and interviewed those who scored 70 points and above.

The LRAC Chairperson thus referred this submission back to the Committee in order to for them to also interview those who scored 50 points and above.”<sup>6</sup>  
(underlining added)

f) It is apparent from this minute that it was not the Land Reform Advisory Commission that referred the submission back to the Evaluation Committee, but it was the Chairperson who referred it back. In respect of that item on the agenda, the Land Reform Advisory Commission made only two recommendations, which were approved by the Minister, which are:

“Resolution No. 16 July 2017: Applications received: The Commission resolved as per below;

✓ That when advertising Game farms in future, the advert should clearly state that only applicants scoring 50 points and above will be called in for interview presentations.

✓ That only one (1) member of the Secretariat will be used to record the proceedings of the Commission relating to discussions of farm allocations as well as to facilitate the submission for approval by the Hon. Minister in order to maintain the confidentiality of the Commission’s discussions.”

g) The first resolution is only applicable to future advertisements – not the current applications being considered at that time. It is thus not true that the Land Reform Advisory

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<sup>6</sup> See pages 28 and 29 of the submission of the Land Advisory Commission to the Minister of Land Reform, marked “Q” to the applicant’s supplementary affidavit.

Commission resolved to invite the applicants who scored 50 points or above for further presentations.

h) As it turned out, the fourth respondent, who only scored 56 points at the initial evaluation by the Evaluation Committee, was invited for further representations in the form of a PowerPoint presentation, and was scored 72 points – the highest of all the shortlisted applicants.

i) The Evaluation Committee thus recommended to the Land Reform Advisory Commission the fourth respondent for allotment, and in turn the Land Reform Advisory Commission on 12 December 2017 recommended to the Minister of Land Reform, who promptly on the same day approved the recommendation.<sup>7</sup> I attach hereto a copy of the relevant pages (pages 18 – 21) of the submission by the Land Reform Advisory Commission to the Minister of Land Reform, marked “R”.

j) Had it not been for the *ultra vires* decision of the Chairperson of the Land Reform Advisory Commission to refer the submission of the Evaluation Committee back to the said Evaluation Committee with an equally *ultra vires* instruction that applicants who scored 50 points or more should also be invited, the fourth respondent would not have been allotted the farming unit.

k) It should be noted that the decision was not that of the Land Reform Advisory Commission (which is a collection of people who must form a *quorum* to pass valid decisions in terms of section 8(3) of the Agricultural (Commercial) Land Reform Act, 7 members are required to form a *quorum*), but this was the decision of a lone person. This tainted the entire process. Accordingly, the decision to allot to the Fourth Respondent is invalid for that reason and thus falls to be reviewed and set aside as a result.’

[20] Also this ground was not canvassed at all by the respondents except that it is to be noted that the respondents’ summary of facts also – and to some extent - reflects the material inconsistencies/inaccuracies exposed by Mr Tjombe, as mentioned above.<sup>8</sup>

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<sup>7</sup> See pages 18 – 21 of the submission by the Land Reform Advisory Commission to the Minister of Land Reform, marked “R” to the applicant’s supplementary affidavit.

<sup>8</sup> Compare para 7 of the respondents’ summary : “This recommendation was referred back to the Evaluation Committee by the second respondent due to inconsistencies that were detected pertaining to affirmative action. It was agreed that all applicants who scored 50 points and above should be invited for further presentations ...’.

[21] It so emerges that it is actually common cause that *Mr Nghituwamata*, the Chair of the Commission, unilaterally referred the first recommendation, that the farms in question be allotted to *Felseneck Game Ranch CC*, back for re-evaluation, in the absence of a valid resolution, by the Commission, to that effect.

[22] As far as the instruction, that those applicants, who had scored 50 points and above, should also now be invited to make representations to the evaluation committee, is concerned, it appears that there is similarly no resolution to that effect on record although the respondents' summary thus erroneously reflects that this was apparently agreed upon. It must in the premises be concluded that also this step was taken without the appropriate resolution from the competent body, the Land Reform Advisory Commission.<sup>9</sup> These acts were thus *ultra vires*.

[23] The ultimate effect of these *ultra vires* acts or omissions is clear. They '*shifted the goalposts*' so-to-speak. A situation was thereby created through which an applicant, the fourth respondent, who had never submitted a prescribed application for allotment in the first place, was now actually allowed to participate in the process in more favourable circumstances, as the threshold, to participate therein, had also been lowered.

[24] Incidentally these 'goalposts' were also shifted in another important respect, which favoured the fourth respondent. This aspect emerges from the arguments advanced in respect of the composition of the fourth respondent, which composition – regarding its male and female membership - became important when it came to the scoring of the submissions of the various applicants and where, in order to advance the affirmative action objectives underlying land reform, greater scores are afforded to applicants who meet the underlying affirmative action criteria.

[25] In this regard the founding documentation submitted by the fourth respondent – a close corporation - initially reflected that its only member was a certain *Mr Jona*

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<sup>9</sup> The mode for arriving at any decision is prescribed in section 8(6) 'A decision of the Commission on any question shall be by a majority of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.'

*Levi*, holding a 100% member interest in the corporation. In its business proposal the fourth respondent however indicated that it had four management representatives, two of which were women, namely *Ms Valeliana Valerie Aron* and *Ms Veripurua Katjatenja*. It so appears that the fourth respondent was initially not owned by ‘... a group of Namibians comprising of two male and two female ...’, an aspect apparently taken into account if one has regard, as was submitted, to the attempted justification of the Minister’s allotment advanced in a letter of the Permanent Secretary of the Ministry of Land Reform to the Ombudsman where it was stated :

*‘Passions Culinary and Hospitality Institute CC together with other companies met the criteria and where interviewed accordingly. Passions Culinary and Hospitality Institute CC is not owned by an individual, but is owned by a group of four Namibians comprising of two male and two female.’*

[26] Furthermore the Minister admitted, as was pointed out, that, at the material time of the consideration of the applications, the fourth respondent was not owned by a group of Namibians, an aspect that was only rectified at a later stage through the submission of an amended founding statement.

[27] In this regard the further argument was then made :

‘Therefore, the misrepresentation was significant. The policies of the Ministry of Land Reform, as set out in the Resettlement Criteria<sup>10</sup> and the Resettlement Criteria for Game Farming<sup>11</sup> are underpinned by section 14 of the Land Reform Act and Article 23 of the Namibian Constitution. Therefore, it cannot be said that the impugned decisions are in compliance with the statutory and constitutional purposes under which it operated.

Related to the scoring of the fourth respondent, the Minister also confirmed that he took into consideration that social standing of the individuals in the applications. In this respect, reference is made to paragraph 26 of his answering affidavit, which reads:

“26. In addition to, I consulted the Second Respondent prior to allotting the Games farming Unit to the Fourth Respondent and this decision was arrived at

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<sup>10</sup> Annexure “D” to the founding affidavit.

<sup>11</sup> Annexure “E” to the founding affidavit.

having regard to the circumstances of each of the applicants which were interviewed, more specifically their gender, social standing and other special considerations as alluded under clause 6.2 of the Resettlement Criteria for Game Farming.”<sup>12</sup>

This is repeated by the Minister at paragraph 49 of his answering affidavit:

“49. I respectfully submit that I applied my mind and considered whether there were any special criteria among the applicants taking into consideration their gender, citizenship, social standing, their educational background and their financial hardship in the society, to mention a few.”<sup>13</sup>

Social standing of the individuals was not a factor to be considered, and would in any event be offensive to article 10(1) of the Namibia Constitution, which prohibits the discrimination on the basis of social status.<sup>14</sup>

The applicant’s members are ordinary hardworking folk. The fourth respondent has a former Mayor and prominent ruling party figure as a member – although belatedly made a member so as to influence a favorable scoring (which seem to have worked).

That alone is sufficient reason to set aside the decision to allocate the allotment to the fourth respondent.

The decisions fall to be reviewed and set aside as a result.’

[28] The argument raised in defence of this aspect ran as follows :

‘It is important to note that at the time of the submission of the application, the Founding Statement of the fourth respondent indicated Mr. Jona Levi as the sole member with 100% interest. However, its business proposal indicated that the members under the

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<sup>12</sup> Underlining added.

<sup>13</sup> Underlining added.

<sup>14</sup> Article 10(2) of the Namibian Constitution:

“(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

business or management had four representatives of which two are women namely, Ms Valeria Aron and Veripurua Katjatenja. This was important in upholding the affirmative action laws and ensuring that previously disadvantaged communities and women are preferred. This ties up with the overall objectives of the Act.

The fourth respondent then provided an amended founding statement indicating that it comprises of four members; two male and two females. This was part of the tender specifications.

Annexure "F" to the answering affidavit.

The fourth respondent therefore met the requirements and criteria as per Clause 4 and 6.2 of the Resettlement Criteria for Game Farming as read with the tender specifications. This was more so in that it provided sufficient details of its farm development and usage, business and empowerment plans. The resettlement criteria are regulations made by the 1<sup>st</sup> respondent as guidelines for resettlement purposes.

The decision was made after considering all the applicants documents inclusive of the recommendations made by the Second and Third Respondents.

The Applicant did not meet the special considerations applied to the other applicants, as one of the prominent criteria applied was gender balance in line with the objectives of the Ministry of Land reform. This is to ensure that there is gender balance when allocating game farms.

Clause 6.2 of the Resettlement Criteria for Game Farming states that:

*"It has been a policy of the Government of the Republic of Namibia to mainstream gender issues as well as to empower women and to increase their ability to access land Therefore preferential consideration will be afforded to companies or institutions that are gender sensitive in their composition during selection of resettlement beneficiaries."*

As per the recommendations of the second respondent approved by the 1<sup>st</sup> respondent, the fourth respondent was scored and recommended based on the reasons listed under Table 8 of the minutes of the meeting dated 08<sup>th</sup> December 2017.

## Annexure D to the answering affidavit

The first respondent found that the experience of the fourth respondent will make a meaningful contribution to the socioeconomic development of the country. This was clearly apparent in it being the highest scorer with 72 points on the overall evaluation of the presentation.'

[29] Upon a closer consideration of these submissions it will have been noted how the argument raised on behalf of the respondent glossed over the essential requirement set by the quoted clause 6.2 of the Resettlement Criteria that '*.. preferential treatment will be afforded to companies or institutions that are gender sensitive in their composition ..*' and from which it thus appears that it is the 'composition' of the entity in question that had to be 'gender sensitive' in order to qualify for 'preferential treatment' : i.e. and in terms of which the membership interest in the fourth respondent, in this instance, and not its staff component had to be considered in order to determine whether the fourth respondent would meet this criterion. It so appears that contrary to the submission that '*... the fourth respondent therefore met the requirements and criteria as per Clause 4 and 6.2 of the Resettlement Criteria for Game Farming as read with the tender specifications ...*' this was initially not the case. This shortcoming was obviously realized and thus was and had to be rectified - *ex post facto* - through the making available of an amended founding statement through which, incidentally, a former Mayor and prominent ruling party figure was, belatedly, made a member of the fourth respondent, so as to, obviously, influence a favorable scoring, which seems to have worked, as was submitted by Mr Tjombe.

[30] All this was then not fair to the other applicants. Administrative action has to be fair.<sup>15</sup> If it is not, such action becomes liable to be set aside on review, so much becomes clear at this stage already.

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<sup>15</sup> See for instance : Article 18 of the Constitution or *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC* 2017 (1) NR 1 (SC) at [35].

[31] But there is more. Even if I am wrong in having come to the aforementioned conclusions I believe that the third supplementary ground of review proves beyond doubt that the process leading to the second recommendation and ultimate decision based thereon by the Minister was fundamentally flawed.

The third supplementary ground of review

[32] The submissions in support of this ground of review were formulated by Mr Tjombe as follows:

‘The Evaluation Committee was improperly constituted.

a) The Evaluation Committee is a committee of the Land Reform Advisory Commission, so established in terms of section 9(3)(a) of the Agricultural (Commercial) Land Reform Act. Section 10 of the Agricultural (Commercial) Land Reform Act is therefore applicable to the Evaluation Committee. Section 10(1) reads:

10. (1) A member of the Commission shall not participate in the deliberations or vote on any matter which is the subject of consideration at a meeting of the Commission if, in relation to such matter, such member has any interest, whether direct or indirect, which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner.

b) Mr Julius B Erckie was a member of the Evaluation Committee.

c) At its meeting of 16 May 2017 and 6 June 2017, it was recorded under Item 1.4 of the agenda that no member of the Evaluation Committee declared any conflict of interest. At that meeting, the Evaluation Committee evaluated the applicants for the allotment of Farm *Felseneck* No. 26 and *Okanatjikuma* No. 25.

d) At its subsequent meeting on 3 July 2017, it was recorded that Mr Julius B. Erckie declared his conflict of interest and recused himself from the proceedings of the meeting during the discussion and recommendation of Farm *Felseneck* No. 26 and *Okanatjikuma* No. 25 (under Item 1.4 of the agenda).



e) Yet, at a further meeting of the Evaluation Committee on 17 October 2017, Mr Julius B. Erckie was present (as the roll call is recorded) and it was further recorded no one declared a conflict of interest (under Item 1.4 of the agenda).

f) However, it is apparent from the minutes of that meeting that there was indeed a discussion of Farm *Felseneck* No. 26 and *Okanatjikuma* No. 25 (under Item 1.2 of the agenda). This is where further presentations by shortlisted applicants – including the fourth Respondent – were made. The members of the Evaluation Committee then scored the applicants, and then ultimately recommended the fourth respondent as the successful applicant.

g) As if the conflict of interest dissipated, Mr Julius B. Erckie was present during this meeting, as apparent from the minutes of that meeting. The minutes also record that there were no disclosures of conflict of interest.

h) ... in terms of section 10(1) of the Agricultural (Commercial) Land Reform Act, a member of the Commission shall not participate in the deliberations or vote on any matter which is the subject of consideration at a meeting of the Commission if, in relation to such matter, such member has any interest, whether direct or indirect, which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner. A violation of section 10(1) invites a fine of N\$20,000.00 or imprisonment of not exceeding 5 years or both, if convicted.

i) Despite the seriousness of not disclosing the conflict of interest and recuse himself from such deliberations, Mr Julius B. Erckie participated in the meeting and no doubt scored the various applicants, including Felseneck Game Farm Ranch CC for which he moonlights as a manager.

j) That his conflict of interest did not dissipate is apparent from the business proposal that was submitted on behalf of Felseneck Game Farm Ranch CC: he is in the executive summary of business proposal and at page 8 under Item 2.3 listed as being in charge of management.<sup>16</sup>

k) As a result of the inappropriate participation of Mr Julius B Erckie in the proceedings and decisions, the proceedings and decisions fall to be set aside for that reason. It should be noted that a violation of the conflict of interest rules under section 10(1) of the Agricultural (Commercial) Land Reform Act invites a fine of N\$20,000.00 or imprisonment of not exceeding 5 years or both, if convicted.'

[33] Counsel on behalf of the respondents', Mr Ncube, countered by submitting:

<sup>16</sup> See annexure "P" to the applicant's supplementary affidavit.

'Furthermore, the Evaluation Committee was properly constituted during the evaluation and recommendation process as envisaged in Section 9 (3) (a) of the Act and was constituted by six members including the secretary, namely:

Ms Ndiyakupi Nghituwamata, being the chairperson from Ministry of Land Reform

Mr Johannes Mbango , from the Development Bank of Namibia)

Mr. Ricardo D Jansen, from Namibia Tourism Board

Mr. Shall Shindume, from Agricultural Bank of Namibia

Mr. Julius B. Erckie, from Ministry of Environment and Tourism and lastly, - (*my underlining*)

Mr. Peter Ndeilenga who serves as a secretary to the committee from the Ministry of Land Reform

As per the Code of Conduct, the quorum of the committee meetings was made up by one more than half of its members. Three plus one constitutes a quorum.

Annexure G to the answering affidavit.

On 03<sup>rd</sup> of July 2017, the Committee interviewed the shortlisted candidates for two game Farms namely a Single Unit of Portion1 (Ileni) and Remaining Portion of the farm Holstein No. 249 in Kunene Region and the game farms which are the subject of this dispute.

Furthermore, a member from the Ministry of Environment and Tourism was part of the Committee and he recused himself from the proceedings as he was also an applicant of the game farms. The members never evaluated any candidate for this farming unit. However he attended the first interview for the Single Unit of Portion1 (Ileni) and remaining portion of the farm Holstein No. 249.

The committee therefore had met a quorum to decide despite the recusal of one of its members as mentioned. The remaining four members continued to evaluate the applicants.

During the second round of presentations on 17<sup>th</sup> October 2017, the Evaluation Committee met the quorum and was made up of four members, namely, the chairlady Ms Ndiyakupi Nghituwamata, Mr Johannes Mbango, Mr. Shali Shindume and Mr. Julius B. Erckie. (*my underlining*) Thus a quorum was formed and proper recommendations were made to the second respondent.

Annexure "H" to the 1<sup>st</sup> respondent's answering affidavit being the minutes of the meeting dated 17 October 2017.'

[34] If one considers the respective submissions it becomes immediately apparent that the argument made on behalf of the respondents is misplaced, as what was placed in issue, was the conflict of interest of *Mr Erckie*, and not the quorum of the interviewing committee. It emerges further that it is also not in dispute that *Mr Erckie*, despite his self-declared interest in one of the applicants, namely *Felseneck Game Farm Ranch CC*, where he is apparently in charge of management, continued to participate in the nomination process as was meticulously revealed by counsel for the applicant in his submissions. The record of the relevant meetings speak for themselves. They underscore the correctness of the argument made on behalf of the applicant.

[35] It is also clear that once *Mr Erckie* had declared his conflict, he should immediately have withdrawn from all relevant and related proceedings altogether. The minutes of 17 October 2017 however record no such withdrawal or any further disclosure of his conflict, despite the fact that the allotment of the farms *Felseneck* and *Okanatjikumu* featured on the agenda. This was also the occasion on which representations by the shortlisted applicants were heard, which included the fourth respondent, and where after - all the present members of the Evaluation Committee – inclusive of *Mr Erckie* – whose presence is reflected in the relevant minutes - then scored the applicants and eventually made their recommendation for allotment.

[36] There can be no question that the continued participation of *Mr Julius B Erckie* in the process was totally inappropriate and thus – in addition to other irregularities dealt with above - materially tainted the fairness of the entire second nomination process of the Evaluation Committee on which the Land Reform Advisory Commission then based its recommendation to the Minister of Land Reform, who in turn based his ultimate decision also thereon.

[37] This further finding - and the serious nature and vitiating effect of such corrupt participation in the administrative process in question – is - in my view - also underscored by the penal provisions contained in section 10(4) of the Agricultural

(Commercial) Land Reform Act 13 of 1995 which indicate that also Parliament views the type of transgression in question in a most serious light.<sup>17</sup>

[38] The ultimate conclusion that has to be reached in the premises is inescapable. The exposed irregularities materially undermine the entire allotment process bringing about its implosion. The findings on all the supplementary grounds of review consequently also obviate the need to determine any of the other grounds of review raised in the papers. The application for review must – and will thus succeed on the supplementary grounds alone.

[39] In the result the following orders are granted :

- (a) The decision of the Minister of Land Reform to allot Farms Felseneck No. 26 and Okanatjikumu No. 25, in the Otjozondjupa region, Namibia, to the Passions Culinary and Hospitality Institute CC, is hereby reviewed and set aside;
- (b) The related decision of the Land Reform Advisory Commission, recommending to the Minister of Land Reform to allot Farms Felseneck No. 26 and Okanatjikumu No. 25 in the Otjozondjupa region, Namibia, to the Passions Culinary and Hospitality Institute CC, is also hereby reviewed and set aside, in so far as this may be necessary;
- (c) The related decision of the Land Reform Advisory Committee, recommending to the Land Reform Advisory Commission that Farms Felseneck No. 26 and Okanatjikumu No. 25, in the Otjozondjupa region, Namibia, be allotted to the

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<sup>17</sup> Compare Section 10 : (1) A member of the Commission shall not participate in the deliberations or vote on any matter which is the subject of consideration at a meeting of the Commission if, in relation to such matter, such member has any interest, whether direct or indirect, which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner.' and ...

(4) Any member of the Commission who contravenes subsection (1) or fails to comply with the provisions of subsection (2) shall be guilty of an offence and be liable upon conviction to a fine not exceeding N\$20 000 or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

Passions Culinary and Hospitality Institute CC, is also hereby reviewed and set aside, in so far as this may be necessary;

- (d) The Minister of Land Reform, the Land Reform Advisory Commission and the Land Reform Advisory Committee are hereby directed to consider the matter afresh.
- (e) The Minister of Land Reform, the Land Reform Advisory Commission and the Land Reform Advisory Committee are also hereby directed to provide written reasons for their respective decisions made on reconsideration to the Applicant, within 40 days of the decision in question;
- (f) The first, second and third respondents are to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

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H GEIER  
JUDGE

APPEARANCES:

APPLICANT:

N TJOMBE

Tjombe-Elago Inc., Windhoek.

1<sup>st</sup> – 3<sup>rd</sup> RESPONDENTS:

J NCUBE

Government Attorney, Windhoek