REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2022/00351

In the matter between:

COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND	**APPLICANT**

and

THE CHAIRPERSON OF THE MANAGEMENT COMMITTEE, COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND	**FIRST RESPONDENT**
NELSON ZAMBWE SIMASIKU	**SECOND RESPONDENT**
MPASI HAINGURA	**THIRD RESPONDENT**
THE NAMIBIA PUBLIC WORKERS UNION	**FOURTH RESPONDENT**

Neutral citation: *Council of the Municipality of Swakopmund v The Chairperson of the Management Committee, Council of the Municipality of Swakopmund* (HC-MD-CIV-MOT-REV-2022/00351) [2022] NAHCMD 665 (7 December 2022)

Coram: PARKER AJ
Heard: **16 November 2022**
Delivered: **7 December 2022**

Flynote: Administrative law – Review – Self review of decision of an administrative body – Court found the decision was ultra vires the relevant regulation

made by the applicant and approved and gazetted by the responsible minister as required by the Local Authorities Act 23 of 1992 – Consequently the decision was invalid.

Summary: Administrative law – Review – Self review of decision of an administrative body – The applicant is a local authority council and the taker of the impugned decision is the Management Committee of the applicant – The first respondent's Committee is the said Management Committee – The impugned decision is the decision by the Management Committee selecting the second respondent for appointment as General Manager of Corporate Service and Human Capital of the applicant – The applicant realized that the Management Committee had acted under the Committee's misinterpretation of its powers under the Regulations – The court found that no written contract of employment existed between the second respondent and the applicant as required by the Local Authorities Act 23 of 1992 – Consequently, court rejected second respondent's allegation that there was such a contract because of conversations he had with an official of the applicant regarding such matters as the official scheduling a medical examination of the second respondent and the official asking him when he could take up appointment and the official telling him that the applicant would incur the costs of the second respondent relocating to Swakopmund – Accordingly, court reviewed and set aside the impugned decision.

Held, the rule of law and the principle of legality require that administrative bodies and officials may only act in accordance with powers conferred on them by law – either by the Constitution or any other law.

Held, further, an ultra vires act of an administrative body or official is unlawful and invalid.

Held, further, the *Turquand* rule cannot apply to keep lawful an ultra vires act of an administrative body or official.

ORDER

1. The decision of the Management Committee of the applicant, made on 19 April 2022, whereby the second respondent was selected for appointment as General Manager of Corporate Services and Human Capital of the applicant is reviewed and set aside.

2. The matter is remitted to the Management Committee of the applicant for the Committee to act in proper accordance with the relevant provisions of the Regulations in the appointment of a General Manager: Corporate Services and Human Capital of the applicant.

3. There is no order as to costs.

4. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

[1] In the instant application, the applicant, a local authority council, seeks the review and setting aside of a decision taken by its Management Committee on 19 April 2022 ('the decision') and an order remitting the matter to the Management Committee for it to reconsider the impugned decision in the light of the recommendations of the applicant's Interview Panel respecting the appointment of General Manager: Corporate Services and Human Capital.

[2] The second respondent and the third respondent moved to reject the application. The second respondent, represented by Mr Kamwi, submitted that an employment relationship was formed between the second respondent and the applicant with effect from 1 June 2022.

[3] It is important to note that the third respondent opposes the application in respect of the relief sought in paragraph 1.2 of the notice of motion, but not paragraph 1.1. Indeed, as Dr Diedericks, counsel for the third respondent submitted, had it not been for para 1.2, the third respondent would not have opposed the application. He added that the third respondent forms common cause with the applicant as respects para 1.1 of the notice of motion. Counsel, therefore, supported the submission on para 1.1 made by Mr Barnard, counsel for the applicant.

[4] It behoves me to consider whether the parties cited are properly before the court. In our law the applicant is a universitas, and the Local Authorities Act 23 of 1992 vests in a local authority council the statutory power to sue and be sued. The taker of the impugned decision is the Management Committee of the applicant. The organizational and statutory relationship between the applicant and the Management Committee is this. The applicant is an administrative body, within the meaning of article 18 of the Namibian Constitution, and its Management Committee is the applicant's statutory administrative functionary. The decision sought to be reviewed is that of the Management Committee. And in compliance with rule 76(1), the chairperson of the Management Committee has been cited.[1] For the reason that the impugned decision is that of the Management Committee, it is required and necessary to cite the Committee as a respondent, otherwise an order made by the court, if the application were successful, might be *fulsum brutum*. In sum, the impugned decision was made vicariously by the applicant.

[5] In the result, I conclude that the parties so cited are properly before the court; and the application is properly before the court. I do not see the reason why Mr Kamwi is so much enamoured with *Desert Wear CC v The Chairperson of the Council of the Municipality of Swakopmund*.[2] Unlike in *Dalrymple v Colonial Treasurer*,[3] upon which the court in *Desert Wear CC* relied, the applicant in the instant proceeding is not 'some members' of the local authority council; neither is the applicant 'taxpayers', existing outside and independent of the local authority council, that is, the applicant.

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[1] See *Fire Tech Systems CC v Namibia Airports Co. Ltd and Others* 2016 (3) NR 802 (HC).
[2] *Desert Wear CC v The Chairperson of the Council of the Municipality of Swakopmund* [2020] NAHCMD 602 (18 March 2022).
[3] *Dalrymple v Colonial Treasurer* 1910 TS 372 at 379.

[6] The applicant seeks essentially self-review of the decision which it realized was unlawful because it was ultra vires the Retirement and Selection Regulations for Local Authority Councils[4] made under the enabling Act, that is, the Local Authorities Act 23 of 1992 ('the Regulations'). It is trite that such ultra vires act is unlawful and invalid. The rule of law and the principle of legality require that administrative bodies and administrative officials may only act in accordance with powers conferred on them by law – either by the Constitution itself of by any other law.[5]

[7] The second respondent's reliance on the *Turquand* rule[6] is, with respect, misplaced. As I have said previously, we are dealing here with a public authority and not with the issue of internal arrangements of the applicant. The issue at play is that the Management Committee acted ultra vires its statutory powers. No administrative body or administrative office (ie a public authority) has the discretion to do that which is not in accordance with the powers conferred upon them by law – either by the Constitution itself or by any other law. Indeed, estoppel, for instance, cannot be used in such a way as to give effect to what is not permitted by law. Invalidity must therefore follow uniformly as the consequence.[7] It matters tuppence that, as the second respondent stated in his answering affidavit, second respondent was not a party to the illegality. In sum, the *Turquand* rule cannot apply to keep lawful an ultra vires act of an administrative body or official.

[8] The second respondent relies also on a contract of employment. But he has failed to 'state whether the contract is written or oral and when, where and whom it was concluded', as is required peremptorily by rule 45(7) of the rules of court. The irrefragable conclusion is that there is no such contract in existence whose performance the court is entitled to order.

[9] Indeed, as Mr Barnard submitted, there was no written appointment of the second respondent to the post in question as required by regulation 30 of the Regulations. On the papers, it is abundantly clear that there must be a written appointment in existence to engender a valid and enforceable contract of

[4] GN No. 131 of 2019.
[5] *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC) para 49.
[6] *Royal British Bank v Turguand* (1855) 5 E & B 248 (QB) 119 ER 474; *Royal British Bank v Turguand* (1856) 6 E & B 327 (Exch) 119 ER 886.
[7] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 23.

employment with the applicant, and *a fortiori*, on the papers, the second respondent knew that.

[10] The second respondent has a second string to his bow. The second respondent relies on the principle of legitimate expectation. Mr Kamwi submitted that the second respondent acquired a legitimate expectation to be employed as General Manager: Corporate Service and Human Capital.

[11] It is not aleatory or insignificant that O'Linn AJA, upon authority of the English case of *O'Reilly v Mackman,*[8] held that 'reasonable expectation' and 'legitimate expectation' were to be equated.[9] The expectation that calls in aid the doctrine of legitimate expectation must, in the circumstances, be justifiable and reasonable. The second respondent's expectation could neither be justifiable nor reasonable for these reasons. As I have demonstrated, the second respondent knew or ought to have reasonably known that no written contract of employment existed between him and the applicant as is peremptorily required by regulation 30 of the Regulations. Secondly the second respondent's expectation could not be justifiable or reasonable where the decision maker has acted ultra vires the Regulations.

[12] It would be of no moment even if a contract of employment was entered into by and between the second respondent and the applicant. It has been held that a contract of employment involving a local authority council stands to be invalidated by a departure from regulations governing such contracts.[10]

[13] On the facts, I am satisfied that the applicant has placed before the court cogent and sufficient evidence tending to establish that the relevant decision of the Management Committee of the Council (the first respondent's Committee) was ultra vires the provisions of regulation 27 of the Regulations. It is incontrovertible and trite that such decision by a public authority is unlawful and invalid. The inevitable result, as a matter of law, is that no right, interest or obligation can lawfully be derived from the decision tainted by ultra vires and illegality. The maxim *ex nihilo nihil* fit applies, as Mr Barnard appeared to submit.

[8] [1982] 3 ALL ER 1124 (HL) at 1126j – 1127a.
[9] *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) para 24.2.
[10] RJF Gordon *Judicial Review: Law and Procedure* (1985) at 131, and the cases relied on.

[14] To allow the tainted decision to stand would be permitting illegality to trump legality and rendering the ultra vires doctrine nugatory. None of that would be in the interest of due administration of justice.[11] And it is competent for an administrative body or administrative official to approach the seat of the judgment of the court to seek self review of its administrative acts.[12]

[15] On the facts and the law, I conclude that the appellant has made out a case for the relief sought. Little wonder then that third respondent supports the application insofar as prayer 1.1 of the notice of motion is concerned. It stands to reason to consider prayer 1.2 of the notice of motion that drew the third respondent into the litigation.

[16] At first brush it would seem what prayer 1.2 seeks is a declaratory order, requiring the application of s 16 of the High Court Act 16 of 1990. On a closer look, what the applicant really seeks is an order, commanding the first respondent to act in proper accordance with the relevant provisions of the Regulations. In that regard, I do not see that the third respondent acted out of step or frivolously in opposing the application, particularly, with regard to the said prayer 1.2 of the notice of motion. The third respondent's concession regarding prayer 1.1 should be commended. For one thing, it shortened the proceedings.

[17] In the nature of the matter and the circumstances of the proceedings, I think this is one of the cases where it would be fair and just that the parties pay their own costs of suit.

[18] The applicant and the first respondent are public authorities; and the second respondent and the third respondent are private individuals. The applicant acted correctly and properly in approaching the court to self review a decision made vicariously by the applicant. Such conduct should be encouraged to avoid having to wait for an aggrieved person to approach the court to challenge the validity of an administrative action, particularly where such decision, though plainly unlawful, is enforceable unless and until it is declared unlawful and invalid by a competent court.

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[11] See(*City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* footnote 6 para 24.

[12] *China State Engineering Construction Corporation v Namibia Airports Co Limited* 2020 (2) NR 343 (SC).

[19] Based on these reasons, as I have found, the applicant has made out a case for the relief sought in prayer 1.1 of the notice of motion and in prayer 1.2 thereof, but only to the extent reflected in the order that follows:

[20] In the result, I make the following order:

1. The decision of the Management Committee of the applicant, made on 19 April 2022, whereby the second respondent was selected for appointment as General Manager of Corporate Services and Human Capital of the applicant is reviewed and set aside.

2. The matter is remitted to the Management Committee of the applicant for the Committee to act in proper accordance with the relevant provisions of the Regulations in the appointment of a General Manager: Corporate Services and Human Capital of the applicant.

3. There is no order as to costs.

4. The matter is finalised and removed from the roll.

C PARKER

Acting Judge

APPEARANCES:

APPLICANT: P C I BARNARD
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

2ND RESPONDENT: K KAMWI
K Kamwi Law Chambers, Windhoek

3RD RESPONDENT: J DIEDERICKS
Instructed by Tjitemisa & Associates, Windhoek