

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00116

In the matter between:

**INGRID MARIANA NOLTE**

**APPLICANT**

and

**THE MINISTER OF ENVIRONMENT, FORESTRY  
AND TOURISM**

**FIRST RESPONDENT**

**THE ATTORNEY-GENERAL OF THE REPUBLIC  
OF NAMIBIA**

**SECOND RESPONDENT**

**Neutral citation:** *Nolte v The Minister of Environment, Forestry and Tourism*  
(HC-MD-CIV-MOT-GEN-2022/00116) [2023] NAHCMD 361 (28  
June 2023)

**Coram:** PARKER AJ

**Heard:** 16 May 2023

**Delivered:** 28 June 2023

**Flynote:** Administrative law – Administrative action – Review – What constitutes fair and reasonable administrative action in terms of article 18 of the Namibian Constitution – Applicant aggrieved by decision of the minister responsible for environment, forestry and tourism.

**Summary:** According to applicant, a person who later on turned out to be a Mr Bucks gave her two cheetah cubs in a box at the parking lot of Shoprite in Keetmanshoop. This was in April 2018. She applied to the minister on 16 July 2018 to keep the animals on her and her husband's farm. She had kept the cubs for almost three months before making the requisite application in terms of the Nature Conservation Ordinance 4 of 1975. In her application she did not name the person who had given her the animals. On 30 October 2020, she was charged with the offence of keeping two game or wild animals without a permit in terms of the Ordinance. She admitted guilt to the offence and paid an admission of guilt fine of N\$1 920. Subsequently, the applicant's application to the minister was declined. The minister gave two reasons for rejecting the application. The more weighty reason that goes to the root of the Ordinance was that the applicant was unable to give satisfactory account or prove that she acquired the cheetahs lawfully as demanded by s 51 of the Ordinance. The court found that the applicant was given an unrestrained hearing when she submitted a written application. The court found further that the minister was entitled to take into account in his decision making the fact that the applicant kept the cheetahs in contravention of s 51 of the Ordinance and she was unable to give a satisfactory account or prove that she acquired the cheetahs lawfully. In the result, the court concluded that the minister's decision was fair and reasonable in terms of article 18 of the Namibian Constitution. Consequently, the court dismissed the application with costs.

*Held*, administrative bodies and officials bear no burden to justify their acts and it is the applicant for judicial review who bears the burden of satisfying the court that good grounds, anchored in article 18 of the Namibian Constitution, exist to review the impugned administrative action.

*Held*, further that, the purpose of judicial review of administrative action is to ensure that the individual is given fair treatment in the decision-making process.

*Held*, further that, to satisfy the requirement of *audi alteram partem*, the public authority need not always give the applicant an oral hearing but may give the applicant an opportunity to put his or her case in writing.

*Held*, further that, in deciding whether an action was reasonable, the question is whether in the light of a careful analysis of the context of the conduct complained of, it is the conduct of reasonable decision-making.

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### ORDER

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1. The application is dismissed with costs.
2. The matter is finalised and removed from the roll.

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### JUDGMENT

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PARKER AJ:

[1] The instant matter concerns two cheetahs. It concerns the applicant's love for animals and her desire to ensure their protection. It concerns also the constitutional and statutory duty of the Government (represented by the minister, i.e. the respondent) on behalf of the State, to administer that which belongs to the State and which is 'not otherwise lawfully owned' in terms of article 100 of the Namibian Constitution, that is, 'lawfully owned' by a private person. I shall return to this provision of article 100 in due course.

[2] The applicant seeks an order in the following terms, as set out in the notice of motion:

1. Declaring that Section 51 of the Nature Conservation Ordinance, 4 of 1975 is unconstitutional and therefore null and void on the ground that it conflicts with Article 12(1)(d) of the Namibian Constitution;

2. Reviewing and setting aside the Minister's decision of 28 June 2022 to decline the application for registration of captive large carnivores in respect of the two female cheetahs,

names Nika and Zhandile, to the Farm Gariganus No. 157, Keetmanshoop, made on 8 June 2018, in terms of the Regulations for Large Carnivore in Captivity: Nature Conservation Ordinance, 1975, Government Gazette 4911, Government Notice 85 of 2012 (the “June 2022 Decision”);

3. Such further and/or alternative relief as the Honourable Court may deem appropriate; and
4. That the Minister be ordered to pay the costs of this application, including the costs of one instructing counsel and one instructed counsel.’

[3] In the course of the proceedings, the applicant abandoned the relief sought in para (1) of the notice of motion. The applicant persisted in para (2) only of the notice of motion, that is, the reviewing and setting aside of the minister’s decision of 28 June 2022 (‘the minister’s decision’). The respondents have moved to reject the application, and are represented by Mr Ncube. Ms Lewies represents the applicant.

[4] As to the determination by courts of challenges by judicial review of the lawfulness and validity of administrative acts of administrative bodies and officials, the applicable principles and approaches are well entrenched. The key principles and approaches *relevant to the instant proceedings* are discussed in the five preceding paragraphs. (Italicised for emphasis)

[5] Administrative bodies and officials bear no burden to justify their administrative acts.<sup>1</sup> The applicant instituting such judicial review application bears the burden of satisfying the court that good grounds exist to review the conduct complained of.<sup>2</sup> Good grounds are grounds anchored in the common law<sup>3</sup> and article 18 of the Namibian Constitution which embraces the common law principles<sup>4</sup> and whose object ‘is to ensure that acts and decisions of administrative bodies and officials are lawful, in the sense that they are fair and reasonable’.<sup>5</sup>

<sup>1</sup> *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687 (HC); and *New Era Investment (Pty) Ltd v Roads Authority and Others* 2014 (2) NR 596 (HC).

<sup>2</sup> *Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* 2008 (2) NR 753 (SC) para 15.

<sup>3</sup> *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS III, applied by the court in, for example, *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1991 NR 69 (HC); and *New Era Investment (Pty) Ltd v Roads Authority and Others* footnote 1.

<sup>4</sup> *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 265e-f.

<sup>5</sup> *Minister of Mines and Energy v Petroneft International* 2012 (2) NR 781 (SC) para 33.

[6] Thus, review of the exercise of judicial power is undertaken mainly on the basis of the principles of ultra vires and legality. These principles encompass fairness, reasonableness and natural justice (that is, disqualifying bias and *audi alteram partem*). The proposition has been explained thus:

‘It is important to remember in every case that the purpose [of review] ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.’<sup>6</sup>

[7] It has been held that fairness involves (a) the right to be heard; that is the *audi alteram partem* rule of natural justice (*‘audi’* for short) and (b) being given reasons for the act.<sup>7</sup> And it should be remembered, natural justice is a flexible doctrine: Its content may vary according to the nature of the power or discretion exercised and the circumstances of the case at hand.<sup>8</sup> What a hearing entails and how a hearing may be afforded to an interested person depends, barring statutory prescriptions, largely on the facts and circumstances of the particular matter. Thus, an applicant need not always be given an oral hearing, but may be given an opportunity to deal with the matter in writing.<sup>9</sup>

[8] Furthermore -

‘[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for

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<sup>6</sup> *Chief Constable of North Wales Police v Evans* [1982] /WLR 1155 at 1160 (per Lord Hailsham LC).

<sup>7</sup> *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC); and Lawrence Baxter *Administrative Law* (1991) at 569.

<sup>8</sup> *New Era Investment v Roads Authority and Others* footnote 3.

<sup>9</sup> *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 174H (per Strydom CJ).

judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.<sup>10</sup>

[9] The last principle relevant to the instant proceedings is legitimate expectation, which is the offshoot of *audi*. The doctrine has been recognized by the courts in Namibia, starting with *Westair Aviation (Pty) Ltd v Namibia Airports Co Ltd* at the High Court<sup>11</sup> and *Minister of Health and Social Services v Lisse at the Supreme Court*.<sup>12</sup> It is interesting to note that the Namibian courts relied on the landmark South African case of *Administrator, Transvaal and Others v Traub and Others*.<sup>13</sup>

[10] As respects the application of the principle, I said the following in *Rehoboth Town Council v Labour Commissioner*:

[20] In *Minister of Health and Social Services v Lisse*, referred to the court by Mr Esau, O'Linn AJA stated that 'Legitimate expectations are capable of including expectations which go beyond enforceable legal right rights: *provided they have some reasonable basis.*' (Italicised for emphasis) The qualification, which for good reason I have italicised, is neither insignificant nor aleatory. The qualification is crucial in any consideration based on the legitimate expectation doctrine.

[21] Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which *the claimant can reasonably expect to continue.* (Italicised for emphasis)<sup>14</sup>

[11] My response to Ms Lewies's submission that 'this matter is not a dispassionate review of administrative action' because it 'concerns the welfare of animals and how human beings treat wild animals in distress and/or domesticated wild animals' is this. Doubtless, what the applicant has approached the court for is to challenge by judicial review the minister's decision. Plainly the court can only determine the application by falling upon the principles and approaches known to the law. Those principles and approaches cannot change in the instant proceedings just

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<sup>10</sup> *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

<sup>11</sup> *Westair Aviation (Pty) Ltd v Namibia Airports Co Ltd* 2001 NR 256 (HC).

<sup>12</sup> *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC).

<sup>13</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A).

<sup>14</sup> *Rehoboth Town Council v Labour Commissioner* [2022] NALCMD 75 (7 December 2022).

because the welfare of animals and how human beings treat them are involved. In words of one syllable, the court can only do that which the law allows the court to do.

[12] Having applied the foregoing principles to the facts of the instant case, I come to the following conclusions.

[13] I am satisfied that the decision taker, i.e. the minister, gave sufficient and satisfactory reason for his decision. And the applicant was given sufficient and acceptable *audi* when – unrestrained – she put her case before the minister in writing.<sup>15</sup>

[14] Furthermore, in my view, the minister was entitled to take into account the applicant's admission of guilt that she kept the cheetahs in question without a permit. It matters not that the charge she faced was in respect of s 40(1)(a)(iii), and not s 51, of the Nature Conservation Ordinance ('the Ordinance'). Consequently, I hold that the minister did not offend the common law rule that when the repository of discretionary power is deciding, he or she or it should not take into account extraneous considerations.<sup>16</sup>

[15] On the facts, I cannot see how one can, as Ms Lewies does, seriously argue that s 40 of the Ordinance, which deals with the catching, capturing and killing of game and wild animals, is unconnected with s 51 of the Ordinance, which deals with one's inability to give satisfactory account of one's possession of game and wild animals. In our law, a cardinal principle of interpretation of statutes is that provisions of a statute ought to be read globally and contextually and intertextually with the other provisions and the long title of the statute in question to get the meaning of the provisions under consideration.<sup>17</sup>

[16] On the papers the conclusion is inescapable that the two cheetahs in question could only have been 'acquired', within the meaning of s 51 of the Ordinance, through being caught or captured. That is why the applicant admitted to her

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<sup>15</sup> See *New Era Investment v Roads Authority* footnote 3; and *Chairperson of the Immigration Selection Board v Frank and Another* footnote 9.

<sup>16</sup> *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA); and *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1991 NR 69 (HC).

<sup>17</sup> G E Devenish *Interpretation of Statutes* (1996) at 116-117.

contravention of s 40(1)(a)(iii) of the Ordinance. The minister cannot be faulted in deciding that the applicant was unable to prove that she 'acquired' the two cheetahs 'lawfully in accordance with the provisions of this Ordinance', within the meaning of s 51 of the Ordinance.

[17] On the papers, I find that no sufficient or satisfactory evidence was placed before the minister as to how the applicant came in possession of the two cheetahs. When the applicant was making the application, she never informed the minister about Mr Bucks, who, according to the applicant, gave her the cheetahs. I do not see why Mr Bucks could not have settled a sworn declaration to support the applicant's contention. Such declaration could have been attached to the applicant's application for the minister's consideration. Or the applicant could have explained in her application that she knew the name of the supplier of the cheetahs but that all reasonable efforts to locate him had failed. These are reasonable and simple actions which the applicant should have pursued in support of her application to the minister. But she did not pursue them. The court cannot come to her aid.

[18] In the absence of such reasonable and simple actions by the applicant, I do not find it unreasonable and unfair the minister's conclusion that the applicant was unable to give satisfactory account or prove that she had acquired the cheetahs lawfully in terms of the Ordinance.

[19] For the foregoing reasons, I find that the minister's act satisfied the requirements of fairness (including *audi*) and reasonableness for he gave sufficient and acceptable reason for his decision. This finding debunks the applicant's fallacious and self-serving assertion that the minister failed to give reasons for his decision. The paper containing the reasons forms part of the papers placed before the court, and the applicant is aware of it.

[20] Furthermore, I find that the minister did apply his mind to the question before him<sup>18</sup> as evidenced by the reasons he gave for rejecting the application. But that is not the end of the matter, as far as, it would seem, common law grounds of review are concerned.<sup>19</sup> The applicant alleges that the minister's reliance on a report by his

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<sup>18</sup> See Etienne Muneirik (1986) 'Administrative Law in South Africa'. *SALJ*, Vol 103 at 615 – 645.

<sup>19</sup> See *Federal Convention of Namibia v Speaker, National Assembly* footnote 3.



officials conducted in July 2018 that the yard where the cheetahs (then cubs) were kept was misplaced. For that reason, counsel submitted, the decision of the minister was wrong and for that reason alone the decision stood to be reviewed and set aside.

[21] I respectfully disagree. Counsel selectively and unjustifiably airbrushes the weighty and primary reason that goes to the root of the objects of the Ordinance that the applicant was unable to give satisfactory account or prove that she acquired the cheetahs lawfully. It should be remembered, 'It is up to a decision maker who knows what he or she desires to achieve to decide what information or facts to collect and what weight of importance and relevance to put on each information or facts placed before him or her when deciding.'<sup>20</sup>

[22] The fact that the minister failed to appreciate that the size of the yard was sufficient to keep the cheetahs when they were cubs but now (in 2020) they have been moved to a bigger yard cannot take away the irrefragable fact that the applicant has kept and continues to keep the cheetahs in flagrant contravention of s 51 of the Ordinance. Additionally, the applicant did not do any of the lawful acts that the law provides in the circumstances the applicant found herself in, as provided in regulation 4 of the Regulations made under the Ordinance.

[23] There is nowhere in the reasons given by the minister that it is indicated that his decision was based solely on the issue of the size of the yard only. Indeed, to review and set aside the minister's decision would amount to the court perpetuating an illegality, as Mr Ncube correctly submitted. For that in itself is against all that the rule of law stands for; and mind you, the rule of law is one of the core pillars upon which the Namibian Constitution stands.

[24] I do not see in what manner, as the applicant alleges, the minister failed to comply with the requirement imposed by the Nature Conservation Ordinance. On the contrary, I find that the minister complied with the Ordinance when he rejected the application with good reasons. In that regard the minister carried out also duties imposed on him by article 95(1) and article 100, read with article 101, of the Namibian Constitution.

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<sup>20</sup> *New Era Investment (Pty) Ltd v Roads Authority and Others* footnote 3.

[25] The applicant says as a ground of review in para 80 of her founding affidavit, that the minister failed to have regard to the objectives (objects) and provisions of the Animals Protection Act 71 of 1962. I do not see how that assists the applicant. The applicant's application to the minister of 16 July 2018 was in terms of the Ordinance. Nowhere in that application was it mentioned that she made the application in terms of the Animals Protection Act too. In any case, it cannot serve the ends of justice if one was allowed, without more, to protect a game and wild animal when one is unable to prove that one acquired the said game or wild animal lawfully. It could not have been the intention of the maker of the Ordinance to bring about such absurd and illegal result. In any case, there is no exemption to that effect in the Animal Protection Act which was passed after the Ordinance had been made.

[26] Consequently, I hold that there is not one iota of merit in the ground of review under para 80 of the founding affidavit, too. With respect, I should say, the applicant has no constitutional right to possess game or wild animals, as defined in the Ordinance, unlawfully. Rather, the applicant has a duty in a constitutional State like Namibia to obey the law, as Mr Ncube submitted. How can the applicant proclaim that the cheetahs are 'my property', when she has admitted she was holding them unlawfully, that is, without a permit.

[27] The competing interests involved are the interests of the applicant who possesses the cheetahs unlawfully and the interests of the minister who has the constitutional and statutory duty to ensure that such unlawful act does not occur. This consideration is important in examining the conduct of the minister.<sup>21</sup>

[28] As intimated previously, the minister representing the Government, which is the executive organ of the State, has the constitutional duty to administer that which concerns the cheetahs which belong to the State. *Pace Ms Lewies*, I do not read *Rostock CC and Another v AJ van Biljon*<sup>22</sup> as authority for the proposition that just because the State administers the natural resources on behalf of the people, the applicant (being part of the people) can just keep part of the natural resources in

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<sup>21</sup> *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* footnote 10 loc. cit.

<sup>22</sup> *Rostock CC and Another v AJ van Biljon* Case No. I 884/2010.

contravention of the law, as if we are in the proverbial 'Wild, Wild West' or in Thomas Hobbes's state of nature where life is 'solitary, poor, nasty, brutish and short'.<sup>23</sup>

[29] Upon a careful analysis of the facts and the application of the relevant statutory provisions and the relevant principles, I conclude that the minister's conduct is the conduct of a fair and reasonable decision maker.<sup>24</sup> I cannot, therefore, fault the minister's conduct at common law or in terms of article 18 of the Namibian Constitution.

[30] Based on these reasons, I conclude that the minister's decision has crossed the bar of fair and reasonable administrative act set by the authorities.<sup>25</sup> *A priori*, I find that the applicant has failed to place before the court good grounds sufficient to review and set aside the minister's decision. Accordingly, the application to review the minister's decision stands to be rejected.

[31] The preponderance of the analysis and conclusions reached thereon are unaffected by the applicant's reliance on legitimate expectation. Yes, the applicant has a legitimate expectation that the minister's decision will be fair and reasonable. The respondents do not deny that fact. Indeed, she has more than legitimate expectation: She is entitled to be given a fair and reasonable decision, and that is what the minister did. The court has found that the minister's decision is fair and reasonable in terms of the Namibian Constitution. The minister's decision has been adjudged to be fair and reasonable.

[32] It remains the matter of costs. The principle that costs follow the event should apply. That being the case, it would be unfair and unjust to mulct the applicant in additional costs for the late filing of the applicant's legal practitioner's heads of argument. I do not see any prejudice that occasioned the respondents for the late filing of the heads of argument when heads of argument are primarily for the benefit

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<sup>23</sup> Thomas Hobbes *Leviathan* (1668) at XIII.9 by Edwin Curley (1994).

<sup>24</sup> *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Board and Others* footnote 10.

<sup>25</sup> See, eg, *Federal Convention of Namibia v Speaker of National Assembly of Namibia and Others* footnote 3; *New Era Investment (Pty) Ltd v Roads Authority and Others* footnote 1; *Frank and Another v Chairperson of the Immigration Selection Board* footnote 4; *Chairperson of the Immigration Section Board v Frank and Another* footnote 9; *Chief Constable of North Wales Police v Evans* footnote 6; *Kaulinge v Minister of Health and Social Services* footnote 7; *New Era Investment (Pty) Ltd v Roads Authority* footnote 3 and *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* footnote 20.

of the judge. Costs relating to the applicant abandoning part of her claim would have been considered if the applicant was the successful party.

[33] In the result, I order as follows:

1. The application is dismissed with costs.
2. The matter is finalised and removed from the roll.

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C PARKER  
Acting Judge

## APPEARANCES

APPLICANT:

R LEWIES

Instructed by Cronjé Inc., Windhoek

RESPONDENTS:

J NCUBE

Of Office of the Government Attorney, Windhoek