



REPORTABLE

CASE NO: SA 59/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PRESIDENT OF THE REPUBLIC OF NAMIBIA

First Appellant

MINISTER OF FINANCE

Second Appellant

MINISTER OF WORKS & TRANSPORT

Third Appellant

and

**ANHUI FOREIGN ECONOMIC CONSTRUCTION
GROUP CORPORATION LTD**

First Respondent

**PERMANENT SECRETARY OF WORKS &
TRANSPORT**

Second Respondent

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: 3 March 2017

Delivered: 28 March 2017

Summary:

On 3 December 2015 the Permanent Secretary in the Ministry of Works and Transport (the Ministry) sent a letter to the first respondent (Anhui) to inform the latter that it had been allocated a tender to upgrade and expand the Hosea Kutako International Airport (the airport) near Windhoek for a sum exceeding U\$ 447 million. Within approximately a week, a series of news reports appeared in the

print media alleging irregularities on the part of the Namibia Airports Company (NAC), as well as bribery and corrupt practices and alleging that more cost effective bids had been ignored and generally questioning the scale of expenditure. Following these reports, the President of Namibia issued a media release on 22 December 2015, referring to these allegations and stating that the award had been terminated and that he would instruct the Minister of Works and Transport (the Minister) to invoke s 9 of the Airports Company Act, 25 of 1998 (the Act) to direct the NAC to discontinue all activities relating to the project.

Anhui urgently sought the review of the Minister's decision to act under s 9 and certain declarators. The application was opposed and the government respondents (the President and the Ministers of Finance and Works and Transport) brought a counter application to set aside the award as encapsulated in the Permanent Secretary's letter of 3 December 2015.

The High Court set aside the Minister's decision to direct the discontinuation of all activities relating to the project but declined to grant the declarators sought by Anhui and also declined the Government's counter application to set aside the award.

The government respondents (the appellants) appealed against the judgment and orders of the High Court.

At issue in this appeal is whether the order setting aside the Minister's decision should have been granted and whether the High Court should have granted the counter application to set aside the award by the Permanent Secretary.

The Supreme Court found that the letter 3 December 2015 in its own terms amounted to an award of the project by the Permanent Secretary on behalf of the Ministry to Anhui. The letter was to be understood and viewed in the context of a letter by the Permanent Secretary on the same date to the NAC, stating that the Government of Namibia had approved the project. As implementer of capital construction projects financed by the Government, the Ministry had been mandated to award the contract to the successful tenderer Anhui.

The court found that it was thus established that an award had been made in the letter of 3 December 2015. It was common cause that the Tender Board Act, 1996 had not been followed which was required for valid procurement in capital projects involving the Government. Nor had Treasury approval been granted under the State Finance Act. The failure to follow the procedures in the Tender Board Act meant that the award was invalid and had to be set aside.

The High Court should have granted the counter application and set aside the award. That court's order was to be corrected to reflect that.

Counsel for the appellants conceded that the Minister's instruction to the NAC (to discontinue all activities in relation to an airport upgrade) made at the President's behest was invalid but argued that the court should not set it aside.

The court found that the Minister's instruction was invalid in several separate respects amounting to comprehensive non-compliance with the provisions of the Airports Company Act invoked by both the President and the Minister. The general powers of the President and Cabinet would not save the directive from invalidity.

The default position is to set aside an invalid act and refer the matter back to the functionary in question. The court found that no coherent reasons were raised as to why the defective directive should not be set aside. On the contrary, its public interest setting – relating to public procurement of a large scale - required that statutory provisions be scrupulously complied with. Good governance and transparency required this. The court also referred to the compelling public interest in vindicating the Constitution and the rule of law by setting aside invalid administrative action.

The court found that the High Court was correct in setting aside the Minister's directive.

It follows that the appeal succeeded in part (resulting in the setting aside of the award in the letter of 3 December 2015) and failed in part (with the appeal against setting aside the Minister's directive being dismissed).

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and MAINGA JA concurring):

[1] On 3 December 2015 the Permanent Secretary in the Ministry of Works and Transport (the Ministry) sent a letter to the first respondent (Anhui) to inform the latter that it had been allocated a tender to upgrade and expand the Hosea Kutako International Airport (the airport) near Windhoek for a sum exceeding U\$ 447 million. Within a week or so, a series of news reports appeared in the print media alleging irregularities on the part of the Namibia Airports Company (NAC), as well as bribery and corrupt practices and alleging that more cost effective bids had been ignored and generally questioning the scale of expenditure. Following these reports, the President of Namibia issued a media release on 22 December 2015, referring to these allegations and stating that the award had been terminated and

that he would instruct the Minister of Works and Transport (the Minister) to invoke s 9 of the Airports Company Act, 25 of 1998 (the Act) to direct the NAC to discontinue all activities relating to the project.

[2] Anhui urgently sought interlocutory relief, pending the review of the Minister's decision to act under s 9 and certain declarators. The application was opposed and the government respondents (the President and the Ministers of Finance and Works and Transport) brought a counter application to set aside the award.

[3] The High Court set aside the Minister's decision to direct the discontinuation of all activities relating to the project but declined to grant the declarators sought by Anhui and also declined the Government's counter application to set aside the award.

[4] The government respondents (the appellants) have appealed against the judgment and orders of the High Court.

[5] At issue in this appeal is whether the order setting aside the Minister's decision should have been granted and whether the High Court should have granted the counter application to set aside the award by the Permanent Secretary.

Background facts

[6] On 10 June 2014, the NAC placed advertisements in the media inviting expressions of interest from interested bidders for a project to upgrade and expand the airport (the project). Anhui was one of several entities which submitted a bid. In October 2014, the NAC informed Anhui that it was one of the bidders shortlisted for the project and was invited to make a presentation to NAC on 17 October 2014. After this Anhui was further shortlisted by the NAC to submit a detailed 'response to a request for proposal' by 22 December 2014. Anhui met that deadline and submitted a full project proposal including detailed design, technical and financial components. This proposal was examined by the NAC's Tender and Technical Committee which recommended to the NAC's board to award the contract to Anhui. The board in turn endorsed that recommendation at its meeting on 12 March 2015.

[7] The NAC's board chairperson subsequently addressed a letter to the Minister on 16 June 2015, advising him that the tender evaluation was completed and that the next step should be issuing a letter awarding the tender to the successful tenderer (Anhui). But it was made clear in this letter that the NAC would first need to have confirmation of the availability of funding by government before doing so. The Minister's response was to suggest splitting the project into two phases for financial reasons. The NAC board chairperson however reverted to point out that this would not be possible.

[8] Subsequently the Minister of Finance on 25 November 2014 requested a concessional loan from China's state-owned Export Import Bank to finance the

project. The latter made it clear that it would be interested in doing so and promptly transmitted the requisite loan application forms to that Minister.

[9] On 3 December 2015, the Permanent Secretary of the Ministry addressed a letter to Anhui advising that 'the expression of interest' it had submitted for the project 'had been accepted and that the abovementioned contract with a total project value of U\$ 477,854,350 . . . is herewith officially awarded to (Anhui)'.

[10] Anhui was requested to accept or decline the award within 5 days. It wrote a letter of acceptance on the same day.

[11] According to the documentation forming part of the record, the Minister of Finance prepared a submission dated 8 December 2015 for the Cabinet Committee on Treasury calling for support for the funding of the project in the project sum and making recommendations as to how this would be done. There is also reference to a meeting at State House on 18 December where the project was supported.

[12] In the meantime, the press reports negatively reflecting upon the award received wide coverage. These called into question the transparency of the process and the scale of the expenditure. The President then called a meeting of the Cabinet Committee on Trade and Economic Development to confer on the matter and report back to him. The President thereafter on 22 December 2015 issued a media release announcing that he had resolved to 'instruct the Minister of Works and Transport to act under s 9(b) of the Airports Company Act, 1998 to

direct that the NAC discontinues all activities relating to the upgrading of the Hosea Kutako International Airport, so that the process commences *de novo* under the auspices of the Ministry of Works and Transport in line with the State Finance Act, 1991 and Treasury Instructions thereunder’.

[13] Anhui was subsequently formally informed by the Acting Permanent Secretary in the Ministry on 5 January 2016 that the President had instructed the Minister to proceed in the terms set out in the media release to direct the NAC to discontinue all activities related to upgrading the airport. The letter further stated that the ‘project no longer exists’.

Proceedings in the High Court

[14] Anhui thereafter brought an urgent application to the High Court seeking to review the Minister’s decision ‘to discontinue all activities related to’ the airport upgrade as communicated in the letter of 5 January 2016. Two declaratory orders were sought to declare the President’s instruction to the Minister to be invalid as well as the Minister’s action under s 9 of the Act. Anhui also sought an order upholding the award of 3 December 2015. Anhui also applied for urgent interim relief pending the determination of these issues. Because of the timing of the hearing, the application for interim relief fell away.

[15] In support of the application, Anhui asserted that the NAC has the power to negotiate and enter into contracts independent from external influence or interference from government. Anhui further contended that the instruction by the Minister to the NAC to discontinue all activities relating to the upgrade was

unlawful as it exceeded the Minister's powers under the Act and also because the jurisdictional facts required by s 9 were absent. It was also contended that the President had sought to exercise the Minister's power by instructing the latter to issue a directive and that the Minister had not exercised his own discretion.

[16] Anhui also asserted that the award by the Permanent Secretary of 3 December 2015 was done on behalf of the NAC as its agent.

[17] The application was opposed by the President and the two Ministers. The NAC, cited as a respondent, elected to abide the decision of the High Court. The Permanent Secretary of the Ministry was subsequently joined as a further respondent.

[18] The Minister of Finance deposed to the answering affidavit for the government respondents which also served as the founding affidavit to the counter application which sought an order 'declaring the purported award of 3 December (2015) by the (Permanent Secretary of the Ministry) to (Anhui) of the tender for the upgrading and expansion of (the airport) as unlawful and null and void and setting same aside'.

[19] In support of the counter application, the Minister of Finance stated that the Permanent Secretary of the Ministry and his Minister had no power to deal with the procurement of goods and services for the government. This was to be done by the Tender Board in accordance with its empowering legislation.¹ The Minister of

¹ The Tender Board of Namibia Act, 16 of 1996.

Finance submitted that any award made by the Permanent Secretary would be unlawful and amount to an illegality, given that he had no power to award tenders.

[20] The Minister of Finance also disputed that the NAC had made the award. He pointed out that the funds required for the project would be provided by government, through either provision in the budget or as a loan. This would, he said, entail incurring expenditure as contemplated in s 17 of the State Finance Act, 1999. For that, Treasury authorisation was required. He said that there was no Treasury authorisation prior to the award which also rendered it unlawful.

The approach of the High Court

[21] The High Court referred to the statutory framework relating to the NAC, including its objects and functions in its empowering legislation, the Act, and found that soliciting invitations for the project and evaluating the subsequent submissions fell within its statutory mandate. The court also found that the evaluation of submissions within its procurement policies could result in a contract being awarded to a successful bidder. The fact that government would be called upon to provide financing or to guarantee loans for the project would not detract from the fact that the service would be rendered on behalf of the NAC. The court rejected the argument advanced by the government respondents that the contract for the project was for the procurement of goods and services for government.

[22] The High Court further found that the Minister's decision was unlawful and set it aside. The court found that the jurisdictional facts required by s 9 were not present. In their absence, a valid direction under that section could not be made.

[23] The High Court found that the Minister's directive would also be set aside for the further reason that his power to act under s 9 had been usurped by the President and that the Minister himself had not exercised his own discretion in exercising the power in s 9.

[24] The court accordingly reviewed and set aside the Minister's directive to the NAC. The court declined to grant the declarators and further order sought by Anhui as the latter had not established that the Permanent Secretary had acted as an agent for the NAC.

[25] As for the counter application, the High Court found that the government respondents had not discharged the onus to establish that the Permanent Secretary had made the award of the project to Anhui. The Permanent Secretary had not himself made an affidavit explaining his letter of 3 December 2015. Nor had his Minister. The court found that the Minister of Finance's assertion with reference to the letter of 3 December 2015 did not establish the proposition of the award having been made by the Permanent Secretary.

[26] The court found that Anhui had been substantially successful and awarded it costs. The appellants have appealed against the High Court's judgment and orders. There is no cross appeal by Anhui in respect of the dismissal of the declaratory and further orders sought by it.

Submissions on appeal

[27] Mr Namandje, who together with Mr Boonzaier appeared for the appellants (the President and the Ministers), conceded that the Minister had not validly acted under s 9. But counsel argued that, even if invalid, the Minister's direction should not be set aside. Counsel submitted that the High Court should have refused to exercise its discretion to set aside the directive because Anhui had failed to succeed with an order confirming the award of the project to it and also in view of the fact that the High Court should have granted the counter application to set aside that award. It was argued that in the absence of an award to it, there would be no practical and substantive benefit to Anhui to set that directive aside. When it was put to counsel that the terms of the instruction were extremely wide by directing that 'all activities relating to upgrade of the airport' and would negate certain functions of the NAC and its ownership of the airport, Mr Namandje invited the court to sever offending portions of the instruction and to tailor it to meet the requisites of the Act.

[28] Counsel further submitted that the High Court erred in dismissing the counter application directed at the award made by the Permanent Secretary. It was contended that the NAC could not delegate its power to make awards to the Permanent Secretary. Counsel also argued that the Permanent Secretary had no right or competence to make an award of such a tender on behalf of government. Only the Tender Board could do so. It was further contended that if the Government were to fund the project, this would amount to incurring expenditure as contemplated by s 17 of the State Finance Act and that prior Treasury authorisation was required which had not occurred.

[29] Mr Cassim, SC who along with Ms Freese and Mr Boesak appeared for Anhui, submitted that the High Court was correct in its decision to set aside the Minister's instructions to the NAC. He argued that the interference was bad in law for the reasons found by the High Court and could not stand. Counsel pointed out that the activities sought to be covered by the instruction fell within the statutory mandate of the NAC and that the Minister had acted outside his powers in making the instruction. This was, he said, compounded by the absence of any explanation by the Minister for his action.

[30] Mr Cassim also argued that the appellants had not made out a case for the counter application. He pointed out that neither the Permanent Secretary nor his Minister had made any affidavit to explain the award and their actions. Mr Cassim however conceded that Anhui could not rely on the award contained in the Permanent Secretary's letter. Anhui, he said, had believed that it had been awarded the project by the NAC. Mr Cassim also conceded that Anhui was unable to assert a contractual right on the strength of the Permanent Secretary's letter and could thus not rely on that 'award'.

[31] It follows that the issues to be determined in this appeal firstly concern whether the Minister's directive should be set aside, even if invalid, and secondly whether the award made in the letter of 3 December 2015 should be set aside. I understood that the appellants' contention that the High Court should have declined to set aside the Minister's directive is to an extent dependent upon their success in respect of the second question, the validity of the award of 3 December 2015 which is the first considered.

The award in the letter of 3 December 2015

[32] Even though it is contended in the founding and amplifying affidavit that the Permanent Secretary made the award in his letter of 3 December 2015 on behalf of the NAC, this position was no longer advanced in this court. That concession is in my view correctly made when considering the facts as a whole set out in the record of decision making. The NAC board had made it clear in its chairperson's letter of 16 June 2015 to the Minister that a letter (by the NAC) to award the tender could only be made after confirmation of government funding for the project. That was entirely understandable and is confirmed by what followed, with the Minister of Finance approaching the Chinese Export Import Bank for loan financing for the project.

[33] The Permanent Secretary's letter of 3 December 2015 in its own terms made it clear that it is directed on behalf of the Ministry. There is also no mention of the NAC. It is also to be understood and viewed in the context of the Permanent Secretary's letter of the same date addressed to the Chief Executive Officer of the NAC. It has the same heading ('Upgrade and expansion of the Hosea Kutako International Airport, Windhoek') and states:

'I would hereby like to confirm our discussion at 17h00 on Tuesday afternoon, 1 December 2015 in my office regarding the above-mentioned project. As conveyed to you during our conversation, the Government of Namibia has approved the project and the Ministry of Finance is currently in a process of finalising the loan agreement with the financier. As implementer of all capital construction projects financed by Government, the Ministry of Works and Transport has been mandated to award the contract to the successful tenderer.

Attached please find copy of award letter to Messrs. Anhui Foreign Economic Construction group) Corp. Ltd for your records. In similar manner the Ministry needs to inform all unsuccessful bidders of the outcome, once this information is received from your office.

Trust that you will find the above in order.

Yours sincerely'

[34] The letter makes it clear that the Government of Namibia had approved the project and that the Ministry as implementer of all capital construction projects had been mandated to 'award the project to the successful tenderer'.

[35] The Permanent Secretary's letter of 3 December 2015 to Anhui thus purported to award the tender to Anhui on behalf of the Ministry as its terms also convey. This correspondence viewed with the letter of the same date to the NAC clearly shows that the Permanent Secretary had purported to make the award on behalf of the Ministry as implementer of all capital construction projects (of government). There was thus no award by the NAC.

[36] Unfortunately and inexplicably, the Permanent Secretary has made no affidavit to explain his actions. I would have thought that he should have done so in support of the counter application to set this award aside.² Good and accountable governance called for an explanation from him. Albeit in a slightly different context, this court has held that the Constitution requires that administrative action is to be reasonable, but inherent in that requirement, fair

² As had been done in *Pharmaceutical Manufacturers Association of South Africa and another: In re: Ex parte President of the Republic of South Africa and others* 2000(2) SA 674 (CC) where an error, sought to be set aside on review, was fully explained.

procedures which are transparent.³ The court in *Frank* found that implicit in Art 18 of the Constitution is the obligation on the part of the administrative functionary to give reasons for a decision, stating:

‘There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret.’⁴

[37] The High Court found that the appellant had not discharged the onus to show that an award had in fact been made by the Permanent Secretary as the letter does not state who or which entity awarded the tender. The counter application was dismissed as a consequence. What no doubt understandably weighed heavily with the High Court was the absence of any explanation for the letter by the Permanent Secretary or the Minister which I have already stressed should have been provided to the court.

[38] But even in the absence of an explanation, can it be said that the making of an award was established on the papers? In my view it can.

[39] The letter of 3 December 2015 was clearly intended to convey the award of the tender to Anhui. Its purpose was to inform Anhui on behalf of the Ministry that the project had been ‘officially awarded’ to it and called for its written acceptance which occurred forthwith. When that letter is read with the Permanent Secretary’s letter to the NAC on the same date, it becomes apparent that he sought to convey an award of the tender to Anhui as administrative head of the Ministry as

³ *Immigration Selection Board v Frank and another* 2001 NR 107 (SC) per Strydom, CJ (*diss*) at 170I-J (Although a minority judgment, the majority concurred in this exposition of the law – at 109F – 110B). See also *Government of the Republic of Namibia v Cultura 2000 (Pty) Ltd* 1993 NR 32 (SC) at 340B-D.

⁴ *Frank* at 174I-J. See also *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC and another* Case No SA 87/2014, unreported Supreme Court 17 November 2016 at paras 30 – 32.

implementer of capital construction projects following the Government's approval of the project.

[40] It would follow, in my view, that it had been established that the award of the tender was conveyed by the Permanent Secretary on behalf of the Ministry as implementer of state capital construction projects.

[41] It is common cause that the provisions of the Tender Board Act had not been followed and would need to be followed for valid procurement in capital construction projects involving the Government. It is also clear from the affidavit by the Minister of Finance that Treasury approval had also not been granted under s 17 of the State Finance Act. The failure to follow the procedures set out in the Tender Board Act is fatal to the validity of an award made by the Ministry or its Permanent Secretary. For this reason alone, the award set out in the Permanent Secretary's letter of 3 December 2015, viewed in context with his letter of the same date to the NAC, is unlawful and invalid and should be set aside. The order of the High Court would need to be corrected to reflect that. The counter application was opposed. It should have been granted with costs.

[42] I agree with Mr Namandje that until it is set aside by a court in review proceedings, it may have consequences and that the appellants were entitled to seek its review and setting it aside as a counter application.⁵

⁵ See *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004(6) SA 222 (SCA) at para 26. *MEC for Health, Eastern Cape and another v Kirland Investments Ltd t/a Eye Laser Institute* 2014(3) SA 219 (SCA) at paras 20-21.

[43] There are compelling reasons to do so in the interests of certainty. As was lucidly explained in *Kirland Investments* with reference to *Oudekraal*:

[20] . . . In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* Howie P and Nugent JA set out the position thus:

'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[21] There is no suggestion in the above passage that the obviousness of the unlawfulness is a factor of any relevance. Indeed, Hoexter understands *Oudekraal* to mean — and she is, in my view, correct — that 'even an obvious illegality cannot simply be ignored'. One can easily understand why this is so. It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid, whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that

would be caused to the person in whose favour the initial decision had been granted is obvious. Baxter says the following:

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio*.'

[44] Neither the Permanent Secretary nor the Ministry had any authority to make the award. As long as the award as set out in his letter of 3 December 2015 has not been set aside on review it exists in fact and may have legal consequences. It should thus be set aside as a nullity.

The Minister's instruction

[45] Even though Mr Namandje concedes that the Minister's instruction to the NAC at the behest of the President was invalid, he nonetheless contends that the High Court should not have in its discretion set it aside for the reasons referred to by him. Although the illegality of the instruction is thus not in dispute, it remains an issue to be considered in view of Mr Namandje's submission that it should not have been set aside by the High Court.

[46] The power to make an order under s 9 invoked by the Minister (and the President in his instruction to him) is to be understood and considered within the context of the Act.

[47] The Act established the NAC as a public company with share capital under s 2 of the Act. The sole shareholder is the State. The NAC's objects, set out in s 4 of the Act, include the development and maintenance of the aerodromes listed in the schedule to the Act. These include the airport. The Act also confers upon the NAC the power to enter into contracts for the performance of any act or for the provision of any service on behalf of or in favour of the NAC, consistent with its objects. The Act also transferred the aerodromes in the schedule to the NAC.⁶ A contract to expand and upgrade the airport would thus fall squarely within the statutory mandate of the NAC.

[48] Quite apart from the wide powers the Government would be able to exercise in respect of the NAC by virtue of the State being its sole shareholder, the Act accords certain powers to the Minister to give directions to the NAC in s 9. The portions of that section relevant for present purposes are embodied in subsections (1), (2) and (5). They provide:

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

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

⁶ Section 14.

specified in the notice.

(2) The Company shall take all the necessary steps to give effect to a direction under subsection (1).

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

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

[49] As was made clear by the High Court, the starting point in any enquiry relating to the exercise of public power is that the rule of law and the principle of legality require that public officials and institutions may only act in accordance with powers conferred upon them by law.⁷ As was unequivocally stated by this court in the *Rally for Democracy and Progress* matter, the Constitution requires that the exercise of any public power is to be authorised by law – either by the Constitution itself or by any other law.⁸

[50] This fundamental principle thus requires that the Minister would need to act within the four corners of the powers conferred upon him under s 9 for the valid

⁷ *Rally for Democracy and Progress and others v Electoral Commission of Namibia and others* 2010(2) NR 487 (SC) at para 23, also cited by the High Court at para 34.

⁸ At para 23.

invocation and exercise of those powers. Articles 40 and 32 of the Constitution in respect of the powers of the Cabinet and the President respectively to direct and supervise parastatals and for the President to do all acts necessary, expedient, reasonable and incidental to the discharge of executive functions of government, referred to by Mr Namandje, would need to be exercised subject to the terms of the Constitution and the law - in this instance, s 9 of the Act because that section had been invoked.

[51] Section 9 delineates the circumstances in which directives are to be given by the Minister to the NAC under that section. The Minister would need to satisfy the jurisdictional facts posited by subsections (1) and (5) for a valid directive under s 9. Subsection (1) requires that before issuing a directive, the Minister would need to consider the directive necessary for or expedient to national security or for the discharge of an international obligation. The Minister made no affidavit to state that he considered the directive on this basis. Nor do these considerations remotely emerge from the sparse facts put up by the appellants. Nor is there any evidence of a consultation with the NAC.

[52] Equally fatal to the validity of the directive, it was common cause that there was non-compliance with the dictates of subsection (5), also required for the valid issuing of a directive. There was no notice in the Gazette setting out what is required by the sub-section.

[53] Not only was there thus comprehensive non-compliance with s 9, but there was furthermore no written notice by the Minister himself put before court. There

was only the instruction to make a notice set out in the President's media release and confirmation of those terms by the Permanent Secretary in correspondence to the NAC. There was no text of any notice in writing which the Minister himself was to have issued to the NAC. This is a yet further failure to comply with s 9.

[54] The directive was thus invalid by reason of not meeting the statutory requirements of s 9 in these manifold respects. It is not necessary for the purpose of this judgment to express a view concerning the further basis for invalidity expressed by the High Court with reference to the President's role. I expressly decline to do so as that aspect was not argued before us and is not necessary to determine, given the invalidity of the directive by reason of the comprehensive non-compliance with the requirements of s 9.

[55] Once the Minister has invoked the power to issue a directive under s 9, it is incumbent upon him to do so in compliance with the requirements of that section. That is what is required by the rule of law and the principle of legality enshrined in Art 1 of the Constitution and upon which our constitutional democracy is based. The general powers of supervision of parastatals vested in the Cabinet in Art 40(1) and the President's powers under Art 32 cannot save this invalid exercise of statutory powers. Once that statutory power is invoked, the repository of the power - in this instance the Minister - is required to act within the four corners of the statute, namely s 9, for the valid exercise of the powers in question. The same principle would for instance apply if government were to invoke its wide powers under the Companies Act, 2004 as the sole shareholder of the NAC.

[56] This is the context of the invalidity of the directive to be considered in the light of Mr Namandje's submission that this court should decline to set it aside once the award itself is set aside as, so he submits, it would have little practical effect. In advancing this argument, he relied heavily upon *Minister of Defence and Military Veterans v Motau and others*⁹ and *Masetlha v President of the Republic of South Africa and another*.¹⁰ Both of these cases are entirely distinguishable from the facts and legal considerations raised in this appeal. The former concerned a challenge by two directors of a parastatal (Amscor) to their removal by the Minister of Defence and Veterans Affairs in South Africa. That Minister had exercised a power to terminate the service of directors 'on good cause shown'. The court held that there was justification to single out the two directors for failures on the part of that parastatal to complete procurement projects timeously and for their failure to enter into service level agreements with the Department of Defence. The court also held that the Minister had acted rationally. But the Minister had not followed the Companies Act in procedurally terminating their services and thus had acted unlawfully. Given the exceptional circumstances, the court found that it would not be just and equitable to re-instate the two directors and that it was sufficient to declare that the Minister's conduct was unlawful and direct her attention to the proper procedure to be followed.

[57] The *Masetlha* case concerned a presidential decision to remove the head of the National Intelligence Agency. The court found that there was a rational basis for the President to remove the functionary but that it constituted a breach of

⁹ 2014(5) SA 69 (CC).

¹⁰ 2008(1) SA 566 (CC).

contract. In the light of the special relationship of trust presupposed by the position, the court however declined to order his re-instatement.

[58] Both of these cases concerned the termination of services of directors or a functionary by members of the executive branch of government and concerned exceptional circumstances where reinstatement would not be appropriate in the exercise of the court's discretion even though the exercise of the public power leading to the removal or termination was flawed or unlawful. That position is a far cry from the present circumstances.

[59] The Minister had purported to issue a directive to the NAC under s 9 to discontinue 'all activities relating to the upgrading' of the airport. As is already shown, there was a comprehensive failure on the part of the Minister to have acted within the required ambit of the section. Even though no notice in writing by the Minister was placed before court - the absence of which may give rise to invalidity – its proposed terms were as set out in the President's instruction. Apart from not meeting the requirements set by s 9 for the validity of the notice, its extremely wide terms – directed at the NAC discontinuing all activities relating to the upgrade of the airport – are in conflict with the NAC's statutory mandate set out in its objects embodied in s 4 of the Act read with its ownership of the airport as brought about by s 14 read with the Act's schedule.

[60] Not only is the directive defective in its manifold respects, but the failure to set it aside would frustrate the provisions of the Act with regard to the statutory functions accorded by the legislature to the NAC. If government would want to

take action to prevent an upgrade to the extent proposed and to the recipient recommended by the NAC, it would have other remedies at its disposal to prevent that and address unspecified irregularities - either in its capacity as sole shareholder of the NAC or to decline to fund the works in question.

[61] Under the common law, once invalid administrative action is established in review proceedings, the default remedy is to set aside the impugned act and remit it to the decision makers for a fresh decision. Only in exceptional circumstances will a court substitute its own decision for that of the decision maker, as was succinctly set out by the Chief Justice in *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism*.¹¹ This principle is reinforced by the separation of powers upon which our Constitution is based.¹² Furthermore as a matter of constitutional principle, the exercise of public power in conflict with the law and thus invalid should be corrected or reversed in accordance with the principles of legality and the rule of law,¹³ as had been argued by Mr Namandje in respect of the award of the project in the Permanent Secretary's letter.

[62] As was stated by Moseneke DCJ in *Steenkamp NO v Provisional Tender Board, Eastern Cape*:¹⁴

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to

¹¹ 2010(1) NR 1 (SC) at 31G-33C.

¹² See *Masamba v Chairperson, Western Cape Regional Committee, Immigration Selection Board and others* 2000(12) BCLR 1239 (c) at 1259D-E approved by the Chief Justice in *Waterberg* at p 31H. See also *Oudekraal* at paras 26-27.

¹³ *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency and others* 2014(4) SA 179 (CC) at para 42.

¹⁴ 2007(3) SA 121 (CC) at para 29.

appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.’

[63] This is not a case where the default position of setting aside an invalid act should be deviated from in the exercise of this court’s discretion as may occur where the public interest is better served by refusing a remedy. For instance, in *Chairperson, Standing Tender Committee v JFE Sapela Electronics*¹⁵ where unsuccessful tenderers established unlawfulness and procedural unfairness the court however declined to set aside the unlawful administrative act on the grounds of pragmatism and finality. This was because much of the work required by the tender had been completed when the matter came before court. This case was described in a subsequent decision of the same court as exceptional,¹⁶ given the near completion of the works and the impracticality of starting the tender process afresh for the remaining work.¹⁷

[64] The South African Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*¹⁸ overruled the refusal (of

¹⁵ 2008(2) SA 638 (SCA) at paras 25-29

¹⁶ *Eskom Holdings Ltd v New Reclamation Group* 2009(4) SA 628 (SCA) at para 16.

¹⁷ At para 26.

¹⁸ 2011(4) SA 113 (CC) at paras 84-87.

inferior courts) to set aside an unlawfully granted prospecting right. That court held that, in exercising a discretion, a court should 'emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful'.¹⁹ The court stressed that the 'circumstances of each case would be examined in order to determine whether factual certainty requires some amelioration of legality and if so, to what extent. The approach taken will depend on the kind of challenge presented - direct or collateral; the interests involved, and the extent or materiality of the breach of constitutional right to just administrative action in each particular case'.²⁰

[65] Even though these judicial pronouncements were made within the context of the remedies embodied in the South African Promotion of Administrative Justice Act,²¹ the approach and guidelines articulated accord with Namibian constitutional principles and the common law.²²

[66] Mr Namandje was unable to refer to considerations which would impel the court in its discretion to decline to set aside the invalid directive of the Minister. The setting aside of the award set out in the letter of 3 December 2015 does not in my view assist him. In the President's press release it is made clear that a process directed at upgrading the airport could go ahead afresh under the auspices of the Ministry. An invalid directive requiring that the NAC discontinue all activities relating to the airport upgrade would have considerable practical effect. It would mean that the NAC is invalidly prevented from performing its statutory mandate in

¹⁹ At para 84.

²⁰ At para 85.

²¹ Act 3 of 2000.

²² For a helpful article discussing these principles and cases, see Freund and Price. *On the legal effects of unlawful administrative action* (2017) Vol 134 Part 1 SALJ 184 et seq.

respect of an airport which vests in it. Quite how an upgrade can continue in the face of this directive – by requiring the NAC to discontinue all activities relating to the upgrade in the face of its ownership of the airport and its statutory mandate - is not explained.

[67] Mr Namandje had rightly contended with regard to the award that it should be set aside as it may have consequences if it were to stand. Similar considerations arise and apply with regard to the directive. The interests involved in the upgrade of the airport require that, as does the principle of legality and the rule of law. The breaches of the statutory requirements of s 9 are manifestly material. This is not a case where there is a minor technical imperfection causing invalidity. There is failure to comply with almost every jurisdictional fact and statutory requirement contained in s 9. These considerations are destructive of Mr Namandje's contention.

[68] The defective directive was furthermore made within the context of procurement by the State and a State owned enterprise involving a massive amount of public funds. The primacy of the public interest in procurement, by means of public funds particularly on the scale envisaged in the upgrade of the airport, requires that statutory provisions should be scrupulously and transparently complied with²³ and where there have been breaches, those blemishes should be corrected. If the NAC's procurement process has been mired in irregularity as would appear to be indicated in the President's media release and implied by the directive, then the Government would have powers as sole shareholder to address and remedy those issues.

²³ See *AllPay* at para 33.

[69] There is also the compelling public interest in vindicating the Constitution and the rule of law by setting aside invalid administrative action. No coherent reasons have been advanced for the amelioration of the rule of law in this case. On the contrary, considerations of factual certainty also impel the setting aside of the directive. Until the directive is set aside, the NAC is obliged under s 9(2) to adhere to it. Nor was it explained how severance could conceivably be applied in the face of the statutory breaches in question. Nor was it stated what parts of the directive should be severed, especially in the absence of any reasons or explanation by the Minister for the directive.

[70] It follows that the High Court was both correct in finding that the directive was invalid and in setting it aside. The appeal against that order must accordingly fail.

Costs

[71] It follows that the appellants should have succeeded with their counter application in the High Court. This measure of success in that court should be reflected in the cost order of that court. It would seem from the judgment that most of the argument was directed at the main application.

[72] The appeal has succeeded in part by setting aside the refusal of the counter application but failing in respect of the appeal against the setting aside of the Minister's directive. The costs of the appeal should reflect that.

Conclusion and order

[73] The appeal against the setting aside of the Minister's directive fails and succeeds in respect of the counter application which should have been granted.

[74] The following order is made:

1. The appeal against the setting aside of the Minister's directive is dismissed;
2. The appeal against the refusal of the counter application succeeds;
3. The order of the High Court is set aside and corrected to read:
 - '(a) The instruction by the Minister of Works and Transport to the Namibia Airports Company to discontinue all activities relating to the upgrading and expansion of the Hosea Kutako International Airport, during December 2015 and communicated to the applicant (Anhui) on 5 January 2016, purportedly given under section 9(1) (b) of the Airports Company, Act 1998 is declared invalid and set aside;
 - (b) The counter application is granted with costs;
 - (c) The award by the Permanent Secretary of the Ministry of Works and Transport set out in his letter of 3 December 2015 of the tender for the upgrading and expansion of the airport is declared unlawful and null and void and set aside;
 - (d) The first, second and fourth respondents are ordered to pay the applicant's (Anhui's) costs of the main application, jointly and severally;

- (e) The costs referred to above include the costs of one instructing and one instructed counsel;
 - (f) For the purpose of the taxing master, the time taken in the preparation and presentation of argument is allocated as three quarters of the time being spent in arguing the main application and one quarter in respect of the counter application.'
4. No order is made in respect of the costs of the appeal.

SMUTS JA

SHIVUTE CJ

MAINGA JA

APPEARANCES

APPELLANTS:

Mr S Namandje
(with him Mr M Boonzaier)

Instructed by Government Attorney

FIRST RESPONDENT:

Mr N A Cassim, SC
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Boesak)

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