REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 381/2010

In the matter between:

SELMA KAMUHANGA N.O.	**APPLICANT**

and

THE MASTER OF THE HIGH COURT OF NAMIBIA	**FIRST RESPONDENT**
BENGO INVESTMENT CC	**SECOND RESPONDENT**
EMMERENTIA COETZEE	**THIRD RESPONDENT**
ALEXANDER KAMUHANGA	**FOURTH RESPONDENT**
EMMERENTIA KAMUHANGA	**FIFTH RESPONDENT**

Neutral citation: *Kamuhanga v The Master of the High Court of Namibia* (A 381/2010) [2013] NAHCMD 144 (30 May 2013)

Coram: PARKER AJ
Heard: **3 April 2013**
Delivered: **30 May 2013**

Flynote: Administrative law – Judicial review – Judicial review of decision of an administrative official (the first respondent) – Conduct of the rest of the respondents is not subject to judicial sought to be reviewed in the present proceeding – Grounds of review are those set out in Article 18 of the Namibian Constitution which encompass common law grounds – Applicant failed to discharge the onus cast on her to satisfy the court that good grounds exist to review the decision of the first respondent – Consequently, application dismissed with costs.

Summary: Administrative law – Judicial review of decision of the first respondent being an administrative official within the meaning of Article 18 of the Namibian Constitution – Act sought to be reviewed is the exercise of discretion by the first respondent in terms of the Administration of Estates Act 66 of 1965 – Grounds for judicial review of acts of administrative bodies and administrative officials are those set out in Article 18 of the Namibian Constitution and they encompass common law grounds – *In casu* the conduct of the rest of the respondents is not sought to be reviewed – Court concluded that the applicant has failed to satisfy the court that good grounds exist to review the decision of the first respondent which is exercise of discretion under the Administration of Estates Act 66 of 1965 – Accordingly, the court dismissed the application.

ORDER

The application is dismissed with costs; and the costs include costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] In this application brought on notice of motion under Case No. A 381/2010 the applicant applies for an order in the following terms:

‘1. Review, correct and/or set aside the decision by the first respondent as set out in her letter dated 15 November 2010, annexed hereto marked “SK1”.

2. Directing the first respondent to have farm Usagei Gobabis District sold on public tender or auction to the highest bidder.

3. Directing that first respondent and such other respondents as may oppose the relief herein pay the costs of this application jointly and severally, the one paying the other(s) to be absolved.

4. Granting such further and/or alternative relief.'

The applicant is represented in the instant proceeding by Mr Phatela.

[2] The notice of motion was filed with the court on 15 December 2010. In accordance with rule 6(1) of the rules of court the applicant indicates in the notice of motion that the affidavits of the applicant, Hermanus van Aardt Dreyer, Tjakazenga Kamuhanga Kamuhanga and Nangosora Ashley Tjipitua 'annexed hereto will be used in support of this application'. A founding affidavit of the applicant (settled on 14 December 2010) enclosing certain papers were filed of record, and is accompanied by a confirmatory affidavit of Nangosora Ashley Tjipitua (which was also settled on 14 December 2010) and a confirmatory affidavit of Tjakazenga Kamuhanga Kamuhanga (also settled on 14 December 2010). There is no affidavit of Hermanus van Aardt.

[3] The second and third respondents did move to reject the application. The second, third and fourth respondents are represented by Ms De Jager. Ms De Jager submitted the point challenging the *locus standi* of the applicant. If the point is relevant in this matter, it ought to have been raised in the papers during the judicial case management process, during which the managing judge could have dealt with it in an interlocutory proceeding since a decision upholding the preliminary point would have disposed of the application. In any case, on the papers I am satisfied that the applicant has standing to bring the application. This conclusion disposes of the preliminary point on *locus standi*.

[4] The notice of opposition of the second and third respondents was filed on their behalf by their legal representatives, Du Pisani Legal Practitioners. I do not see any notice of opposition that has been filed of record by the first, fourth and fifth respondents. That being the case I shall consider the answering affidavits of the second and third respondents only. In this regard I find that contrary to submission by Ms De Jager, the first respondent was served with the application and she acknowledges receipt of it by the date stamp of her office (dated 15 December 2010).

[5] I have made the findings and reached the conclusions in paras 2, 3 and 4 for a purpose. It is to say that the burden of this court in the instant proceeding is to determine the application brought by the applicant on 15 December 2010 under Case No. A 381/2010 supported by the affidavits and other papers filed of record in respect of that application. The court takes no respectable look at any notices of motion that were apparently filed thereafter.

[6] The present application is basically an application to review and correct or review and set aside the decision of the first respondent who is an administrative official within the meaning of Article 18 of the Namibian Constitution. The rest of the respondents are not administrative officials or administrative bodies. As I see it, they have been joined because they have a direct and substantial interest in the outcome of the review application. In that regard; whatever the second respondent and the third respondent did or did not do in their capacity as executor and nominee has no bearing on the present application. The same goes for any conduct of the rest of the respondents. Their action or omission is not under review. I therefore, with respect, fail to see how Mr Phatela's invigorated submission on the duties of an executor advances the case of the applicant. As I say; the decision complained of was made by the first respondent in pursuance of the exercise of discretion in terms of the Administration of Estates Act 66 of 1965.

[7] The grounds for the review of the acts of administrative bodies and officials are those set out in Article 18 of the Namibian Constitution. I should say those grounds encompass the common law grounds of review; for, as Levy J stated in *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 265E-F, Article 18 embraces the common law. It must also be signalized that 'there is no onus on the respondent whose conduct is the subject-matter of review to justify his or her conduct. On the contrary, the onus rests upon the applicant for review to satisfy the court that good grounds exist to review the conduct complained of'. (*Gideon Jacobus du Preez v Minister of Finance* Case No. A 74/2009 (Unreported) para 5)

[8] In sum, in the present application the applicant must satisfy this court that good grounds exist to review the decision of the first respondent. That decision is contained in a letter dated 15 November 2010 and it is also in response to 'Objections to the Liquidation and Distribution Account' ('the Objections') submitted

to the first respondent by legal practitioners Dr Weder, Kauta & Hoveka Inc. who say in a covering letter of the Objections that (a) they 'act as the executors in the Estate of Late Simeon Kamuhanga'; and (b) they attach 'our objections to the first and final liquidator'. The legal representatives describe themselves 'as the executors in the Estate of Late Simeon Kamuhanga'. This is palpably false and deceiving. In the letters of executorship issued by the Master of the High Court of Namibia Selma Kamuhanga (the applicant) is the 'executrix'. The fact that a law firm XXX & Co represents the Prime Minister in a matter does not mean that the law firm XXX & Co acts 'as' the Prime Minister.

[9] Be that as it may, I now proceed to consider the grounds which the applicant say are good which exist to justify review of the decision of the first respondent. And for this I go to the founding affidavit. The first ground (in para 26 of the founding affidavit) is that the first respondent's decision 'is unlawful and prejudicial to myself and the minor beneficiaries in this estate'. The second ground (in para 27 of the founding affidavit) is that the 'first respondent acted contrary to' her duty 'to make decisions that will benefit the minors in any estate'. The third ground (in para 28 of the founding affidavit) is entitled 'unfair process'.

[10] I should say with respect that the formulation of para 28 is as unclear as it is clumsy, inelegant and untenable. To start with, the first respondent did not make 'a directive to the second and third respondents to sell any assets on the estate to the highest bidder'. Second, the first respondent did not make 'a decision to sell the immovable property by way of private treaty, for not less than N$1.3 million'. The last ground (in para 29 of the founding affidavit), entitled 'failure to apply mind', is equally untenable; and it reads:

'The first respondent has clearly failed to apply her mind on the 15th November 2010 when she instructs that Farm Usagei must now be sold to fourth respondent for the minimum amount of N$1.3 million, despite the fact that there is no proof from second and third respondent that they inquired bids from other beneficiaries apart from fourth respondent. More so, if regard is had to the affidavit of Mr McDonald filed herewith, and that it has always been in the mind of first respondent that the farm must be sold by public tender or auction if the beneficiaries are not in agreement.'

[11] The first respondent's letter dated 25 August 2010 must be read together with her letter dated 15 November 2010. It is clearly stated that she gave due consideration to the applicant's legal representatives' objections (they are the applicant's objections) and dealt systematically with the objections. Thus, I am satisfied that the applicant applied her mind to the information placed before her before she decided. In that regard, the first respondent approved the sale by private treaty of the immovable property in question, provided that the purchase price must not be less than N$1 300 000,00 and provided further that the beneficiaries are given first option to purchase. Thus, the first respondent gave her approval, attaching conditions. It has not been established that the conditions are unfair or unreasonable. It has also not been shown that the first respondent instructed the second and third respondents to sell the property to the fourth respondent only and also not to take bids from other beneficiaries apart from the fourth respondent.

[12] In *Gideon Jacobus du Preez v Minister of Finance* Case No. A 74/2009 (judgment delivered on 23 March 2011) (Unreported) para 4, relying on *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687 at 701H-J, the court stated of the purpose of judicial review thus:

'In this regard, on the purpose of judicial review, I cannot do any better than to respectfully adopt that which was explained by Damaseb JP in *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687 at 701H-J:

'Purpose of judicial review

[53] Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law (which includes the Constitution) are carried out. A functionary who fails to carry out a duty imposed by law can be compelled by the High Court to carry it out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i.e. that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of *ultra vires*. If the decision is one that the decision-maker was authorised to make, the only question which can arise is whether the decision is right or wrong. This involves a consideration of the merits of the decision.

With limited exceptions, namely an error of law on the face of the record and the still-evolving doctrine of proportionality, the Courts are in principle not prepared to review the

merits of the decision unless Parliament has created a statutory right of appeal. (See *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 46-48; *The Western Australia Law Reform Commission* (1986) at para 1.9.) It must be borne in mind that 'in the absence of irregularity or unlawfulness, considerations of equity do not provide any ground of review.'

[13] As I have signalized previously in this proceeding the court is not concerned with the conduct of the second and third respondents, which conduct the applicant appears to complain about in paras 28 and 29 of her founding affidavit. Their conduct cannot on any legal basis be attributed to the first respondent as I have shown in paras 10 and 11. This conclusion rejects allegation of 'unfair process'. I should also say again that the conduct of these two respondents and that of the fourth and fifth respondents are not sought to be reviewed in the present proceeding.

[14] The applicant has failed to establish that the first respondent acted in bad faith or from improper motives or on extraneous considerations or under a view of the facts or law which could not reasonably be entertained. (See *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).) Besides, the applicant has not shown that the first respondent acted *ultra vires* by acting outside the authority conferred on her by the Administration of Estates Act 66 of 1965. (See *Trustco Insurance v Deeds Registries Regulation Board* 2010 (2) NR 565 (HC) at 582E) I, accordingly, accept submissions by Ms De Jager on the point.

[15] As I have stated in para 11 the applicant has not shown that the conditions that the first respondent attached to her approval of the sale of the immovable property are unreasonable or unjust. Indeed, I find them to be reasonable in regard to the existing circumstances of which the first respondent knew or ought to have known. And it cannot be argued that the decision is entirely without foundation, or that the first respondent used her powers dishonesty or that the decision would lead to harsh, arbitrary, unjust or uncertain consequences. (See *Trustco Insurance v Deeds Registries Regulation Board*.) In this regard, it must be remembered that the affidavit of McDonald does not form part of the evidence placed before the court in the present application.

[16] For all these reasoning and conclusions, I come to the inevitable conclusion that the application has no merit; and it fails. In the result, I make the following order:

The application is dismissed with costs; and the costs include costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	T C Phatela Instructed by Dr Weder, Kauta & Hoveka Inc.
SECOND, THIRD, FOURTH and FIFTH RESPONDENTS:	B de Jager Instructed by Du Pisani Legal Practitioners