BK HOUSING COOPERATIVE SOCIETY LIMITED
and
CITY OF HARARE (1)
and
HEBERT CHITEPO HOUSING COOPERATIVE SOCIETY LIMITED (2)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE, 10 April & 2 May 2025

Court Application for Review

F Chinwawadzimba, with *G Makina,* for the applicant
S R Pasvani, for the 1st respondent
F Malinga, for the 2nd respondent

DEMBURE J:

INTRODUCTION

[1] On 10 April 2025, after hearing oral arguments from the parties' legal practitioners, the court reserved judgment *sine die*. The applicant approached the court seeking a review of the first respondent's decision made on 29 August 2024 on the grounds that the decision was irrational, unfair and motivated by malice and bias. The applicant seeks an order that the resolution by the first respondent to look for alternative land that is not depicted on layout plan TPX/WR/11/15 and TPX/WR/11/15/1 for applicant's members be set aside; that the first respondent be ordered to finalise its processes in the allocation of residential stands on layout plan TPX/WR/11/15 and TPX/WR/11/15/1 to the applicant's members forthwith and that the respondents pay the costs of suit on a legal practitioner and client scale.

[2] The application was opposed by both the first and the second respondents.

FACTUAL BACKGROUND

[3] The applicant is BK Housing Cooperative Society Limited, a registered housing cooperative. The first respondent is the City of Harare, a local authority responsible for allocating municipal land among other responsibilities and whose decision is subject to this application. The second respondent is Herbert Chitepo Housing Cooperative Limited, a registered housing cooperative.

[4] The dispute is centred on a piece of land which was subdivided into residential stands in Kuwadzana Extension, Harare, as morefully depicted on the layout plan number TPX/WR/11/15 and TPX/WR/11/15/1.

[5] On 29 August 2024, the first respondent made a resolution to look for alternative land that is not depicted on the layout plan TPX/WR/11/15 and TPX/WR/11/15/1 to accommodate the applicant's members while reserving the said land for the second respondent's members. In terms of the same decision, the first respondent resolved that ZW$500.00 paid by the applicant's members as administration fees for the same stands be forwarded to stands that will be availed to the applicant in the future. This is the first respondent's administrative decision subject to this application for review.

[6] It is common cause that before the decision of 29 August 2024, there was another decision made by the first respondent on 20 December 2022 to allocate the same stands to the second respondent's members while setting aside the intention to allocate the same to the applicant's members. That decision was set aside by the court on 14 May 2024 following an application for review filed by the applicant. The matter was heard before MUNANGATI-MANONGWA J. The court further remitted the matter to the first respondent for fresh investigations.

[7] In respect of this application, the applicant averred that it was registered by its members as a cooperative in terms of the law in 2012. It first applied for a piece of land to the first respondent in 2017 after identifying a vacant piece of land in Kuwadzana Extension. Its members were advised to pay the land's intrinsic value to the first respondent, which later advised that the land in question belonged to Old Mutual. They were later advised that they would be allocated land at Kuwadzana roundabout. That land was then allocated to FBC

Bank as the first respondent indicated that the area is the face of Harare, and the bank had a project to build eight hundred housing units.

[8] It was further stated that the first respondent undertook to allocate residential stands to the applicant's members from the unserviced stands depicted on the layout plan number TPX/WR/11/15 in Kuwadzana Extension Township. On 16 July 2018, a resolution was made by the first respondent's committee to allocate the said stands to deserving applicants on its waiting list. The resolution also stated that the first respondent should open a bank account, and the beneficiaries were to deposit administration fees into that account. The first respondent opened that bank account, and the applicant's members were instructed to pay administration fees into that bank account.

[9] It is not in dispute that in 2019, the applicant's members paid ZW$500.00 each as administration fees as instructed into the said bank account for the stands in question.

[10] On 3 February 2019, the first respondent instructed private land surveyors, A Derembwe Land Surveyors, to survey the piece of land in question for title registration purposes. In that letter, it was further stated that the applicant's pay scheme would be liable to pay the survey fees and any incidental fees payable as the beneficiaries. On 23 June 2023, the applicant entered into a contract with the said surveyors for the survey services. It further averred that it paid US$30,420.00 as the survey fees for the services rendered by the land surveyors in terms of the agreement.

[11] In its letter dated 18 January 2021, the applicant informed the first respondent of the completion of the survey and the pegging of the stands and for the first respondent to act as the land was being invaded by illegal settlers. It was also pleaded that the first respondent proceeded to publish a notice in a daily newspaper on the proposed sale of municipal land, including the stands in question.

[12] The first respondent's committee, however, later resolved that the land in question should be allocated to the second respondent's members who had illegally taken occupation of the stands. This first decision made in December 2022 was later set aside by this court before

MUNANGATI-MANONGWA J, resulting in the new decision of 29 August 2024, which is subject to this application.

[13] The first respondent opposed the application, contending that there was no gross irregularity in its decision. It argued that the decision to allocate alternative land was fairly reached without malice or any bias. The applicant was given the opportunity to be heard following new investigations. The first respondent also stood by its findings and recommendations as contained in the Audit Committee minutes of 24 June 2024, which are part of the record. It maintained that its decision was rational.

[14] In its opposing affidavit, the second respondent also argued that the first respondent correctly and appropriately allocated the land in question to it after a comprehensive audit had been carried out. It contended that the second respondent's members were already in occupation of the stands, and it was reasonable and justifiable for the applicant's members to be allocated alternative land elsewhere. The second respondent also confirmed that the layout plan number TPX/WR/11/15/1, which the first respondent had contended was fake in its opposing papers, had been approved by the first respondent as per its letter dated 11 September 2023. It further stated that the first respondent's committee at its meeting held on 29 May 2023 had confirmed the approval of the said layout plan. It also admitted that it had been allocated some stands before but argued that it was entitled to further stands as all its members had not been allocated stands.

SUBMISSIONS MADE BEFORE THIS COURT

APPLICANT'S SUBMISSIONS

[15] Ms *Chinwawadzimba*, for the applicant, submitted that by and large she abides by the heads of argument filed of record. This is an application for review of the decision made on 29 August 2024, which followed the Audit Committee's decision. The first respondent is an administrative authority which must act in terms of s 3 of the Administrative Justice Act [*Chapter 7:01*] (*the "AJA"*) and s 68 of the Constitution. The first respondent did not act in a lawful, fair and reasonable manner. The decision must be set aside.

[16] It was further argued that the decision was unreasonable and unfair. The applicant was allocated the piece of land and was called upon to make some payments. Surveys were carried out and approved. They went through all the necessary processes. The second respondent did not pay for all these. They did not take any action when the developments were being carried out. It is unfair to give the land to the second respondent. The unreasonableness also arises from the fact that they were in unlawful occupation of the land. There were notices to evict illegal settlers. Still, the second respondent did not approach the first respondent to say that they had the papers. The value of ZW$500.00 paid had been lost and cannot be compensated.

[17] Counsel also submitted that the second respondent invaded the land and did not have the authority to occupy it. The decision allowed them to act in an unlawful manner. The first respondent cannot sanction an illegality. The decision allowed a party that did not develop the land to occupy it, and that is unfair. It is unlawful for the first respondent to allow illegal settlers to occupy the land. It is unreasonable that after they had paid for the land to allow it to be occupied by the second respondent.

[18] Ms *Chinwawadzimba* further argued that by allowing the applicants to pay and follow through with all the processes, they created a legitimate expectation. The expectation was not met. They had acted contrary to the AJA and the Constitution. The representations made by the second respondent were not placed on record and were never served on the applicant.

FIRST RESPONDENT'S SUBMISSIONS

[19] On the other hand, Mr *Pasvani*, for the first respondent, argued that the decision made was reached lawfully, reasonably and in a fair manner. The land in question belongs to the first respondent. It has the right to choose who to allocate the land. He further argued that we have two parties claiming rights to the land in issue. The first respondent made a resolution that the second respondent is the one who is supposed to be on the land in issue.

[20] He further submitted that the applicant did not follow due process to pay the administration fees. The correct procedure is that the applicant identifies the land and applies for it. The

first respondent issues an offer letter. This was not done. The applicant was not given an offer letter. The first respondent resolved to offer alternative land because the second respondent had already occupied the land. The first respondent made a decision to let the second respondent, who is already on the land to stay there and offer alternative land to the applicant.

[21] Counsel also submitted that s 155 of the Urban Councils Act [*Chapter 29:15*] talks about *ex facto* regularisation. The first respondent has the power to regularise any person who would have occupied land illegally. The offer that was made to the applicant does not have any financial burden on the applicant. The decision it took was reasonable and fair as well. The layout plan that was being relied upon by the applicant was not recognised by the first respondent. The manner the layout plan TPX/WR/11/15/1 was drawn was irregular, and the applicant cannot rely on it. The decision was procedurally fair because the applicant was called to the first respondent's offices. The decision was made after consideration of all the applicant's submissions. The Audit Committee made investigations, and the second respondent made some representations.

[22] Mr *Pasvani* further argued that in para 2 of the relief sought, the applicant seeks to twist the hands of the court to make a decision on behalf of the administrative body, and this issue was canvassed in the heads of argument. This paragraph cannot be granted by this court. There are no such circumstances to resort to the exceptions in the case of *Affretair (Pvt) Ltd & Anor* v *M.K. Airlines Ltd* 1996 (2) ZLR 15 (S). The first respondent has already finalised the process in terms of the resolution, and the applicant offered alternative land. He argued that para 2 is incompetent.

SECOND RESPONDENT'S SUBMISSIONS

[23] Mr *Malinga*, for the second respondent, submitted that he would abide by the documents filed of record, that is, the notice of opposition at p 178 of the record. He argued that it was the applicant who had issues regarding the allocation of the land, considering the anomalies which had been discovered by the Audit Committee. The applicant had initially complained that they had not been heard. The invitation was extended to the applicant, and they are the ones who made the representations. The Audit Committee then proceeded to make a

resolution to award the land to the second respondent, who had been awarded the land initially.

[24] He further argued that taking into consideration the whole story of what had transpired, it cannot be said that the final decision of the Audit Committee was biased, unreasonable or unlawful. The Committee took into account that the respondent had constructed structures and the irregularity of the plan relied upon by the applicant. It was only fair, reasonable and just under the circumstances instead of evicting and demolishing, but to say those not on the ground can be allocated elsewhere. The resolution addresses that complaint in a fair, reasonable and regular manner. The second respondent is a client of the first respondent in the same way that the applicant is a client of the first respondent. The second respondent should not be penalised for the alleged misdeeds or acts of the first respondent. They are independent third parties. Given that the first respondent has offered alternative land and to absorb the costs, the issue would have been resolved. There is an undertaking to find alternative land.

APPLICANT'S SUBMISSIONS IN REPLY

[25] Ms *Makina*, for the applicant, in her reply, submitted that the applicant did not approve the amendment of the alleged irregular layout plan, as that is the power of the first respondent. A perusal of the layout plan shows that the amendment was approved by officials of the first respondent. A perusal of the minutes shows that there is no mention of the survey fees. The applicant paid about US$30,000.00 for the survey fees, and these were not considered. The Audit Committee also did not consider that the applicant's members paid the intrinsic value for the land, and they were not told that it would be transferred to another land. This shows that the decision is unreasonable.

[26] She further argued that on two occasions, the applicant had been allocated land. Paragraphs 8, 9, 10 and 12 of the founding affidavit shows that the first respondent has failed to treat the applicant fairly. In respect of para 2 of the draft order, as held in the *Affretair* case, the court may make such orders in exceptional circumstances. This case falls within the exception on the basis of the bias and further prejudice to the applicant. Further delay would cause prejudice to the applicant's members who had waited since 2017.

[27] Ms *Chinwawadzimba* further submitted that s 155 of the Urban Councils Act gives the council power to exercise discretion in regularisation. The first respondent has not regularised these stands. No steps have been made to regularise. It is an exercise of discretion which has not been taken. The fact that they want to regularise is an admission that they are sanctioning an illegality. The regularisation has not been performed and does not arise in the circumstances.

THE APPLICABLE LAW

[28] The law on reviews is settled. In terms of s 26 of the High Court Act [*Chapter 7:06*], the High Court has "power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe". Further s 27 of the same Act read as follows:

> **"27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

[29] The above statutory position was confirmed in the case of *Secretary for Transport & Anor v Makwavarara* 1991(1) ZLR 18 (S), where the court held that an administrative action is subject to control by judicial review under three heads as follows:

(a) Illegality, that is, where the decision-making authority has been guilty of an error in law;

(b) Irrationality, where the decision-making authority has arrived at a decision "so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it";

(c) The duty to act fairly.

[30] The other law which provides the remedy of review of proceedings or decisions of administrative authorities, is s 4 of the AJA. Thus, in *Gwaradzimba N.O* v *Gurta* A.G. SC 10/15, the court held that reviews may be done in terms of another statute, for instance, the Administrative Justice Act and that is contemplated by the provisions of s 27(2) of the High Court Act. In *casu,* the applicant argued that the first respondent was required in terms of s 3(1) of the AJA to act reasonably, lawfully and in a fair manner and that it failed to do so.

APPLICATION OF THE LAW TO THE FACTS

[31] There is no dispute that the first respondent is an administrative authority whose administrative decision is being challenged. It is trite that in an application for review, the court "must confine itself to establishing whether or not the proceedings were afflicted with irregularities." See *Police Service Commission & Anor* v *Manyoni* SC 7/22.

[32] In *casu*, the applicant, firstly, raised a ground of review that the decision by the first respondent to look for alternative land that is not on the layout plan TPX/WR/11/15 and TPX/WR/11/15/1 to accommodate the applicant and allocate the said land to the second respondent was irrational. The law in relation to this ground of review was enunciated in the case of *Telecel Zimbabwe (Pvt) Ltd* v *Attorney-General of Zimbabwe* SC1/14. At pp 20-21, PATEL JA (as he then was) had this to say:

> "The *locus classicus* on judicial review in England is the decision of the House of Lords in *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL). Lord Diplock, at 950-951, described the grounds of review as follows:
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> > "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> > By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all." [My emphasis]

[33] I must first determine whether the decision of the first respondent was irrational or in other words, "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[34] It is not in dispute that the applicant contributed to the development of the stands in question. The applicant was made to pay for survey fees, and the survey and pegging of the stands were carried out at its expense by a surveyor appointed by the first respondent. See pp 49 to 50 of the record. The applicant's members were all authorised by the first respondent through its letters dated 3 July 2019 to pay the administration fees of ZW$500.00 for the same stands in line with the council resolution. See pp 33-48 of the record. They were also made to pay for the land intrinsic value following the valuation instructions made internally within the first respondent. The letter dated 18 January 2021 from the applicant even called upon the first respondent to act swiftly following the completion of the survey and pegging of the stands to have the stands allocated to the applicant's members, as the second respondent's members were now unlawfully taking

occupation thereof. Given these facts, I agree that it was grossly unreasonable or irrational for the first respondent to make the resolution it did.

[35] From the totality of the representations it had made including calling upon the applicant to go through all the procedures required to develop the stands before occupation, it was outrageous in its defiance of logic that the first respondent would decide to let illegal occupiers occupy the land while those it had asked to follow due process were made to wait on the wings and eventually to be asked to wait for non-existent alternative land. There was no alternative land that was even available at the time the decision was made, and from the circumstances, the applicant had been waiting for the allocation and occupation of these stands since 2017. I accept that the first respondent did not properly apply its mind to the facts of the matter.

[36] In addition, there is no dispute that the applicant paid in excess of US$30,000.00 in survey fees for the said piece of land. The land is depicted in two layout plans. The revised layout plan number TPX/WR/11/15/1 was clearly approved through the first respondent's own officials. As confirmed by the second respondent's affidavit, the amendment was officially approved with Approval Reference 3089/HM, and the letter confirming this is attached thereto. It is dated 11 September 2023. See pp 187-188 of the record. For the first respondent to then turn around and claim that the layout plan was fake and blame the applicant for the manner it was drawn up would be disingenuous and mischievous to say the least.

[37] The first respondent's decision did not consider what would happen to the survey costs already covered by the applicant from its members. The decision to say ZW$500.00 would be forwarded to any future allocation, as the administration fees do not clearly define how that amount would be revalued. It is common cause that the currency in question was no longer in use at the time the decision was made. The amount had also been eroded by inflation to virtually nothing in value, and was no longer even worth talking about. How such an amount would be reflected in any account and what value it would take was also not clearly stated. The applicant had lost that value and could not be compensated at all by the vague proposal to transfer the amount to any future allocation. The decision in the

circumstances was, in my view, grossly unreasonable or irrational. The court has no option but to interfere with that decision.

[38] It is also common cause that the second respondent (and its members) unlawfully took occupation of the stands in question. They clearly took the law into their own hands. For the first respondent to allow such illegality by resolving to let them occupy the stands would be tantamount to sanctioning an illegality. It is a settled principle of the law that no one should benefit from their own wrong. This principle was remarkably outlined in *Mashamhanda* v *Bariade Investments (Pvt) Ltd & Anor* SC 17/24 at para 30, where BHUNU JA had this to say:

> "In my view, the proffered opinion is bad at law and goes against the grain of Zimbabwean public policy and established legal principles that one cannot be allowed to benefit from his own wrong or unlawful conduct. The applicant having admitted that he is unlawfully occupying the respondent's property in bad faith as determined by the Supreme Court, such type of conduct cannot be sanctioned by the courts. It is unconscionable and manifestly unjust for the courts to perpetuate unlawful or wrongful conduct."

[39] The first respondent's decision allowed the second respondent, who took occupation of the stands unlawfully, to benefit from its own wrong. That was irrational, utterly unconscionable and unfair. Such a decision cannot even be justified under the guise of purporting to prevent a war. Section 155 of the Urban Councils Act does not support the first respondent's decision. That provision did not even apply. I agree with Ms *Chinwawadzimba* that the first respondent had not yet exercised its power or discretion in terms of s 155 and, therefore, the application of that provision has not yet been triggered. The second respondent cannot be rewarded for illegal conduct or taking the law into its own hands. Given the circumstances, it was outrageous in its defiance of logic that no sensible authority could make the decision in the circumstances to purport to sanction an illegality and allow the second respondent to benefit from its own wrong. On this basis, I am satisfied that the decision of the first respondent ought to be reviewed and set aside.

[40] I also consider the decision of the first respondent to be unfair to the applicant. Administrative authorities are required to make decisions which are both procedurally and substantively fair. See s 3 of the AJA. The facts are clear that the applicant had been made

to go through all the processes to get the stands in question. They paid all the necessary costs, including surveys, intrinsic value and administration fees. On the other hand, the second respondent did not prove any payment of any such costs. The cooperative had also already been allocated several other stands before. The applicant had been made to wait since 2017, and the decision simply perpetuated that misery. They have to wait again for the so-called alternative land, which is, in any case, non-existent. Clearly, the applicant has been treated unfairly. The members of the second respondent would simply benefit from the efforts of the applicant's members who made substantial financial contributions towards the development of the said stands. The second respondent's members unlawfully invaded the land and took possession without following due process or seeking council authority. They are the ones who ought to have been penalised and not rewarded for their illegal actions. The decision cannot be allowed to stand.

[41] The court order issued on 14 May 2024 remitted the matter for fresh investigations. While the Audit Committee invited the applicant to make written submissions, which it did, placing all its documents on the matter before it, there is nothing from the minutes to show that the second respondent also submitted its documents on the matter. Instead, a perusal of the Audit Committee minutes it is clear that the Committee sided and argued a case for the second respondent. It then took it as if it was only the applicant that had to prove its claim or complaint, forgetting that it ought to have approached the matter from a position where all the parties had to present their respective cases backed by evidence and arguments before it could make a decision. It did not, therefore, objectively consider the merits of each party's case and the appropriate balance of equities, taking into account that what was before it was akin to a double sale or allocation. The decision was, therefore, given the facts and evidence, not only irrational but unfair too. The Committee did not treat the applicant fairly.

[42] Mr *Pasvani* argued that the first respondent has the power to allocate land to anyone it chooses or as it pleases. No one has denied that it is the allocating authority. However, it is subject to the law in the exercise of that power. It has no unbridled power. It is not above the law. This court can interfere with the exercise of such power by an administrative body

or with any administrative decision in appropriate cases. The court confirmed this position in *ZIMSEC* v *Makomeka & Anor* SC 10/20, where it was stated that:

> "The general principle is that the courts will not interfere with the actions or decisions of an administrative authority unless they are shown to be unlawful, grossly unreasonable or procedurally irregular or unfair. This fundamental canon of the common law, as embodied in the so-called Wednesbury principle, is now codified in s 3 (1) of the Administrative Justice Act [*Chapter 10:28*]. The corollary to this principle is that the courts will generally not substitute their own decisions for those of the administrative authority. As was aptly recognised by McNally JA in *Affretair (Pvt) Ltd & Anor* v *M.K. Airline (Pvt*) Ltd 1996 (2) ZLR 15 (S) at 21:
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> > "The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied that it has done that, we cannot interfere just because we do not approve of its conclusion." However, this latter principle is not immutable and may be departed from in exceptional circumstances. In particular, the court may substitute its own decision for that of the administrative functionary in the following instances:
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> > - where the end result is a foregone conclusion and it would be a waste of time to remit the matter;
> > - where further delay would prejudice the applicant;
> > - where the extent of bias or incompetence displayed is such that it would be unfair to force the applicant to submit to the same jurisdiction;
> > - where the court is in as good a position as the administrative body or functionary to make the appropriate decision.
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> See the *Affretair* case, *supra*, at 24–25: *Gurta AG* v *Gwaradzimba N.O*. HH 353-13, at pp. 9–10; C.J. *Petrow & Co (Pvt) Ltd* v *Gwaradzimba N.O*. HH 175–14, at pp. 8–9."

See also s 4(2) of the AJA.

[43] In *casu*, the court is not being asked to allocate any land nor is it being asked to usurp the first respondent's authority, but to remedy an unlawful situation it had created by its decision. The first respondent had already initiated the internal processes to allocate the land in question to the applicant, and in terms of para 2 of the draft order, the court can direct that it completes that process. In any case, I agree with Ms *Makina* that there exist exceptional circumstances warranting the court to grant the order as prayed for in the draft. I accept that any further delay would prejudice the applicant. Its members have waited for the stands in question since 2017, and there is no reason to perpetuate such an injustice any longer for an indefinite period as envisaged by the decision in question. The court can also properly grant the relief sought, given the evidence placed before it. The order is in sync

with the law. It ought to be granted as it is what is appropriate in the circumstances. I fully associate myself with the views expressed in the *Affretair (Pvt) Ltd* case, *supra*, where MCNALLY JA (as he then was), quoting from Baxter, *Administrative Law* at p 681, said:

> "The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator'. Thus it is said that: '[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness."

[44] The argument, therefore, that the order sought is incompetent is, in my view, erroneous and ill-advised. It would simply be a waste of time to remit the matter to the first respondent for the second time. The court previously remitted the same matter to the first respondent in its order of 14 May 2024. It is appropriate that the court decide this matter once and for all, as that is fair and proper in the circumstances.

[45] Mr *Malinga* argued that the second respondent is an independent third party and should not be affected. I do not agree. The second respondent's position is inseparable from the decision of the first respondent. The allocation of the stands to it stems from a reviewable decision of the Council. Once that decision is considered reviewable, the second respondent is equally affected. Nothing can stand or flow from an invalid decision. In the circumstances, given my findings above, the second respondent cannot escape the consequences of the invalidated decision. The allocation of the land to it automatically falls away with the impugned decision of the first respondent.

DISPOSITION

[46] The first respondent's decision of 29 August 2024 ought to be set aside. There is no reason to depart from the general rule that costs shall follow the cause. The costs ought to be borne by the first respondent in the circumstances of this case. However, no justification was set

out for such costs to be awarded on a legal practitioner and client scale as prayed for in the draft order.

[47] In the result, it is ordered that:

1. The resolution by the first respondent to look for alternative land that is not depicted on layout plan TPX/WR/11/15 and TPX/WR/11/15/1 for the applicant's members be and is hereby set aside.
2. The first respondent shall finalise its processes in the allocation of residential stands on layout plan TPX/WR/11/15 and TPX/WR/11/15/1 to the applicant's members forthwith.
3. The first respondent shall pay the costs of this application.

DEMBURE J: ……

Muvhami Attorneys, applicant's legal practitioners
Gambe Law Group, first respondent's legal practitioners
Malinga & Masango, second respondent's legal practitioners