CASE NO.: A284/10

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMUSHASHA COUNTRY LODGE (PTY) LTD	**FIRST APPLICANT**
GORDON VORSTER	**SECOND APPLICANT**

and

THE MAFWE TRADITIONAL AUTHORITY	**FIRST RESPONDENT**
MULYANI FUNGU AUSTIN	**SECOND RESPONDENT**
THE HEAD OF THE KADIMBA SUB-KHUTA	**THIRD RESPONDENT**
THE HEAD OF THE NGONGA SUB-KHUTA	**FOURTH RESPONDENT**
THE HEAD OF THE SACHONA SUB-KHUTA	**FIFTH RESPONDENT**
THE HEAD OF THE LUBUTA SUB-KHUTA	**SIXTH RESPONDENT**
THE HEAD OF THE MUNEMBWANA SUB-KHUTA	**SEVENTH RESPONDENT**
THE SECRETARY OF THE MAFWE CUSTOMARY COURT	**EIGHT RESPONDENT**
THE CHAIRPERSON OF THE MAFWE CUSTOMARY COURT	**NINTH RESPONDENT**
THE MASHI CONSERVANCY	**TENTH RESPONDENT**
THE INSPECTOR GENERAL OF THE NAMIBIAN POLICE	**ELEVENTH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**TWELFTH RESPONDENT**

CORAM: **NAMANDJE AJ**

Heard on: 21 September 2010

Delivered on: 27 September 2010

JUDGMENT: URGENT APPLICATION

NAMANDJE, AJ.: [1] In this application the applicants approached this court on an urgent basis without having served the application upon the respondents.

[2] The applicants seek the following orders:[1]

"*1. Condoning the applicants' non-compliance with the Rules of this Honourable Court and the time periods prescribed therein in so far as these have not been complied with and directing that this matter be heard as one of urgency.*

2. That leave be granted to the Applicants to proceed with this application by making use of facsimile of the confirmatory affidavits, subject thereto that the originals be filed with the registrar before 22 October 2010.

3. That a rule nisi be issued, calling upon the Respondents and/or any other interested party to show cause, if any, to this Honourable Court on Friday, 22 October 2010 at 10h00, why the following Order should not be made final:

3.1 interdicting and restraining the First to Seventh Respondents from making any threats to the life of any employee of the First Applicant and from making threats against and or interfere in the business operations of the First Applicant;

[1]The orders sought were slightly amended, on application, by applicants' counsel. The relief sought in terms of paragraph 3.2 was abandoned.

3.2 interdicting and restraining the First to Seventh Respondents and any person in their employ and or under their control, from damaging the property of the First Applicant and its employees;

3.3 that the decision of the Eighth and Ninth Respondents to subject the Second Applicant to a trial or hearing in the Customary Court of the First Respondent, should not be reviewed, corrected and or set aside, and declaring the aforesaid decision unconstitutional, and or null and void; and that the hearing be stayed pending the review application;

3.4 that the First to Ninth Respondents, jointly and severally, together with such further Respondents electing to oppose any order of this application, not be order to pay the costs of this application on the scale as between attorney and own client.

4. Ordering the relief sought in terms of paragraphs 3.1, 3.2 and 3.3 of the rule nisi to operate as interim orders with immediate effect, pending the return day of the rule.

5. Granting the Applicants such further and or alternative relief as this Honourable Court deem fit.

> 6. *That service of the Rule nisi be effected by telefax thereof to the Deputy Sheriff, Katima Mulilo, for service on the Respondents.*
>
> 7. *Further and/or alternative relief*."

[3] Mr Norman Tjombe is acting for the applicants.

[4] The first respondent is the Mafwe Traditional Authority while the second to the seventh respondents are said to be the Headmen of certain "*Sub-Khutas*"[2] of the first respondent.

[5] The first applicant operates an upmarket lodge in the Caprivi Region. The Lodge is situated in an area under the first respondent's jurisdiction. During 2007 the first applicant entered into a Joint Venture Agreement with the Mashi Conservancy. Community members of a number of Sub-Khutas, it appears, are members of the Mashi Conservancy. They therefore have interest in the operation of business of the first applicant by virtue of the Joint Venture Agreement between the first applicant and the Mashi Conservancy. The tenth respondent has allocated an exclusive no hunting area to the first applicant in terms of the Joint Venture Agreement. In terms of the Joint Venture Agreement the first applicant and the tenth respondent had to form a Joint Management Committee which amongst other responsibilities nominates or recommends candidates for employment at the Lodge and further facilitates the resolution of any disputes that may arise between the parties in relation to employment issues.

[2]Sub-Khutas are said to geographical sub-sections of the area under the jurisdiction of the first respondent.

[6] The first applicant's managing director alleges, in the founding affidavit, that since the first applicant commenced business in 1995[3] the relationship between the first applicant and members of the first respondent has been turbulent. He further alleged that the members of Sub-Khutas continuously interfere in the business operation of the first applicant, such as by demanding that its senior managers resign or be dismissed. Because of such interference a number of applicants' staff members have, over the years, resigned. He alleges that in the last fifteen years at least three general managers have left the employment of the first applicant on account of interference by members of the concerned Sub-Khutas. He alleges that during February and August 2010 the first applicant received some handwritten letters wherein demands were made that the second applicant be removed as the general manager of the lodge.[4] He alleges that the reasons for the demand for the second applicant to be dismissed could be because he allegedly refused to attend a funeral of a certain first applicant's deceased staff member. A further reason is alleged to be that he requested more time than he was given to appear in a Traditional Court. He referred to an incident when the second applicant found some employees[5] and an independent security guard involved in an illegal meeting during work time. The second applicant requested the employees and the security guard to return to work. The security guard fired a shot over the head of the second applicant. The security guard was arrested and, at a later stage, released. The security guard was later rearrested when he came at the Lodge, after his first arrest, to organize an illegal strike. He further referred to an incident where the second respondent was arrested by the police and uttered threatening statements towards the second applicant's wife while he was in a police van.

[3]It is clear that there is a history of disputes between the first applicant, its employees and members of the local communities.
[4]These letters' contents are summarized below.
[5]Employees of the first applicant.

[7] It would be helpful to set out, in brief, the alleged recent[6] incidents. They are:

(i) on 1 September 2010 several members of the Sub-Khutas and the second respondent arrived at the gates of the lodge and aggressively inquired why the second respondent was still on the Lodge premises;

(ii) the second respondent and another person were arrested by the police on the basis of a complaint lodged by the second applicant. At the time of his arrest the second respondent uttered threatening statements towards the second applicant's wife whilst in the police van;[7]

(iii) on 9 September 2010 the second applicant was telephonically contacted by Dorothy Kabula, the Regional Councillor for the Linyanti constituency and a meeting with various stakeholders was arranged to take place on 11th of September 2010. It is alleged that Dorothy Kabula then summonsed the second applicant to a tribal meeting for purposes of discussing labour related matters. The second applicant refused to discuss confidential labour matters with Dorothy Kabula. The meeting to discuss labour matters set for 11 September 2010 was postponed to 14 September 2010. The second applicant tendered his resignation on the 14th of September 2010[8] as he could no more tolerate the alleged intimidations. It is of note that the second respondent's resignation notice if it was in writing was not attached to the founding affidavit;

[6]These are incidents that alleged to have occurred during September 2010.

[7]It is not alleged that the second respondent has since been released from custody after his arrest. If he is in custody, there is therefore no justifiable fear that he would be a danger to the second applicant's wife.

[8]There are no allegations made as to whether it was a resignation with immediate effect or it was a resignation with effect from a date in future calculated from the 14th of September 2010. This begs a question as to what further interest he has in the matter given his resignation.

(iiii) on 13 September 2010 a certain female staff member of the first applicant allegedly informed the second applicant that another staff members who is employed by the first applicant as a Chef and who is supposedly a friend to the second respondent threatened to harm such a staff member and her family should they show sympathy and support towards the second applicant.

[8] The first applicant's Managing Director further vaguely, in an attempt to justify why this Court had to be approached on an urgent basis, stated the following under paragraphs 34, 35 and 36 respectively:

"*34. The interference into the business and management decisions and operations of the business have* ***now reached critical stages. In the past****, we managed to mitigate the tensions by talking to the Sub-Khutas, although the same issues would again resurface a few months later. However,* ***this last series of incidents are indicative that the tensions are now unmanageable****. Our senior staff members are called, on no notice or short notice, to attend to* ***community meetings*** *and* ***traditional court hearings****, to answer on matters which were raised and answered time and again in the past. Threats are being made against our staff members, and in at least one incident,* ***a gunshot was fired at the second applicant, narrowly missing him****. Tourists are being harassed. We have enlisted the services of the Police for protection, and when the Police made an attempt to arrest the culprits,* ***they were themselves subjected to violence and had to leave the scene****. This is obviously an unacceptable situation. The first applicant is risking violating the Labour Act and employments contract of its employees by acceding to the demands of the Sub-Khutas. The mood of almost all the employees is*

negative at this stage. They are ***at present basically on a 'go-slow' and management needs to address even the most basic and ordinary tasks of the employees****. The pressure is extremely high having regard to the* ***high occupancy rate*** *at this stage.*

35. *I submit that it is clear that* ***this application is urgent****. If this application is not heard on an urgent basis, the applicants would suffer irreparable harm, including the real possibility of staff members* ***being seriously harmed and the closure of the business operations****.*

36. *This is now high season for tourism in Namibia, and we expect to have very high occupancy and cannot afford to let our staff members, especially the senior staff members such as the second* ***applicant****,* ***attend meetings and hearings of the Traditional Court without advance notice, and for matters that do not concern the respondents***." (Own emphasis)

[9] The above allegations are a traversity of what a litigant approaching this Court on an urgent basis should set forth as required by Rule 6(12) of the rules of the High Court. A matter is not urgent simply because a litigant subjectively thinks the matter is urgent. A litigant can also not be heard on an urgent basis merely because he is inconvenienced or agitated by any nuisance. An applicant is required to explicitly state the reasons why he/she cannot be given a substantial redress at a hearing in due course. The mere fact that a litigant may suffer an irreparable change does not on its own alone prove urgency. Compare Beukes and Others v National Housing Enterprise, 2007 (1) NR 142 at 144 to 145. See further MWEB Namibia (Pty) Ltd v Telecom Namibia Ltd and 4 Others,

unreported, case number (P) A 91/2007, Judgment delivered on 31 July 2007 at pages 21 – 25.

[10] I sense that the applicants simply do not like community meetings or courts. While the applicants allege that the police has made some arrests, they *in cotra* under paragraph 34 of the founding affidavit allege that the police was subjected to violence when, it at times, intervened to make arrest. No source of such information was identified in the applicants' founding affidavit nor were details on the date and place of such incident given.

DID THE APPLICANTS MAKE OUT A CASE JUSTIFYING THE HEARING OF THIS APPLICATION ON AN URGENT BASIS AND WITHOUT NOTICE OF THE APPLICATION HAVING BEEN GIVEN TO THE RESPONDENTS?

[11] The applicants' allegations of interference and threats by the first to the ninth respondents are not only imprecise but vague too. In fact some of the allegations are made against the employees of the applicants while others are made against persons that are not cited as parties. Some allegations are labour related and one is left to wonder as to why the applicants did not approach the Labour Court in particular where threats are carried out by its employees. In fact, a number of respondents are not being accused of any conduct which harms or may harm the first applicant's interests. In support of the applicants' plea for indulgence by this Court to hear the matter on an urgent basis a number of correspondences from some respondents to the applicants were attached on the applicants' founding affidavit. I intend, in brief, to set out the respective contents of such correspondences.

[12] The letter of the 18th of February 2010 addressed to the Managing Director of the first applicant refers to a meeting held on 17 February 2010 between members of the local Sub-Khutas, the representatives of the first applicant and the members of the local Land Board. It is noted in the letter that a number of persons were not happy with the second applicant as the Manager of the Lodge. It is stated that there was a need for another Manager to be found to replace the second applicant. There were no threats made in the letter.

[13] The second letter is dated 10 August 2010. It lists a number of grievances by employees of the first applicant in particular, black employees who are said to be unhappy that the first applicant's business is run like a family business, workers being accused of being liars and criminals, work uniforms not given to black employees except to white members of the Management, black workers not being allowed to drive company cars. There were no threats made in that letter too.

[14] The third letter was a petition from the first applicant's employees in which they listed a number of complaints *inter alia*, relating to ration, transport and bad work relationship between employees and the Management. There were no threats made in that petition.

[15] The fourth letter is a community petition in which unhappiness was expressed concerning *inter alia* lack of support to the community by the second applicant, the first applicant's Manager refusing to attend Traditional Authorities' meetings, poor salaries for workers, lack of respect for workers and lack of representation of black staff members on the first applicant's management. Further unhappiness is expressed regarding the second applicant's management style.

[16] The last one is a letter dated 24 August 2010 addressed to the first applicant where unhappiness is expressed with the fact that the second applicant did not attend one of the first applicant's deceased staff member's funeral.

[17] There is nothing, in my opinion, that occurred during August and September 2010 that justify the hearing of this application on an urgent basis and without notice to the respondents. It appears the applicants simply got tired of the complaints by its employees and the local community. This application, it is clear, is an attempt aimed at muzzling voices of unhappiness by the first applicant's employees and the local traditional community without them being given notice.

[18] I am satisfied that the applicants did not satisfy the requirements of Rule 6(12) for this application to be heard as one of urgency. Even if I were to be wrong in that respect this application should be struck from the roll on the basis of the grounds of urgency having been created by the first applicant itself if regard is had to the allegations the applicants made concerning a series of incidents that occurred from the beginning of this year to August and September 2010.

[19] Another ground why this application should be struck from the roll of this Court is the fact while the applicants are admitting that the majority of the respondents have interest in the matter they did not give them notice. Not even a most attenuated notice was given. No allegations are explicitly set out as to why notice of the application nearer as much as possible to time periods provided for in the Rules of this Court could not be given to the respondents.

[20] Rule 6(5)(a) states that:

"*Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 2(b) of the First Schedule and true copies of the notice, and all annexures thereto**, shall be served upon every party to whom notice thereof is to be given***." (Own emphasis)

[21] In substance the applicants' application is not an *ex parte* application contemplated in terms of Rule 6(5)(a) and (b) as the majority of respondents do have substantial and direct interests in the relief sought. Should the applicants however have been of the opinion that notwithstanding substantial and direct interest in the application by the respondents the matter was urgent to such an extent that it would have been prejudicial to them (applicants) if they were to serve the application upon the respondents such should have been explicitly addressed in the founding affidavit. Having failed to make out a case in that respect this application is to be struck from the Court's roll. Accordingly in the results I make the following order:

(i) The application for condonation for non-compliance with the Rules of the High Court as contemplated under Rule 6(12) is refused.

(ii) The applicants' application is struck from the roll.

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NAMANDJE, AJ.

ON BEHALF OF THE APPLICANT:	MR. N. TJOMBE
INSTRUCTED BY:	STEPHEN F KENNY LEGAL PRACTITIONERS
ON BEHALF OF THE RESPONDENTS:	NO APPEARANCE