REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 70/2012

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**
REGISTRAR OF DEEDS	**SIXTH RESPONDENT**
AGRICULTURAL BANK OF NAMIBIA	**SEVENTH RESPODNENT**

Neutral citation: *Kamuhanga v The Master of the High Court of Namibia* (A 70/2012) [2012] NAHCMD 6 (27 September 2012)

Coram: PARKER J
Heard: **30 July 2012**
Delivered: **27 September 2012**

Flynote: Practice – Applications and motions – Application for confirmation of interim order – Correct interpretation and application of the order establishes that the order remains valid and enforceable pending determination of the main application filed under a different case number, and should not be discharged or confirmed in present proceeding.

Practice – Applications and motions – Affidavit – Commissioner of Oaths declared he was satisfied deponent understood the contents of her affidavit – Court not entitled to fault such declaration in the absence of hearing the Commissioner.

Summary: Practice – Applications and motions – Although earlier order was characterised as 'rule nisi', a correct reading of the order establishes that that order must remain in force pending finalisation of the main application filed under a different case number – Accordingly, court in instant proceeding not entitled to discharge or confirm the 'interim' order – 'Interim' order will be discharged or confirmed upon final determination of the main application filed under a different case number.

Practice – Applications and motions – Affidavit – Commissioner of Oaths declared in a testimonium to the affidavit he was satisfied deponent understood contents of her affidavit – Court not entitled, upon submission by counsel, to fault the testimonium so declared – A party averring that there was no basis for the Commissioner's satisfaction may bring application to review the Commissioner's decision – If the court set aside the affidavit without hearing the Commissioner that would offend the *audi alteram partem* rule of natural justice and therefore unjust.

ORDER

(a) Paragraph 2.1 of the order made by the court (per Ueitele, AJ (as he then was)) on 10 April 2012 is valid and enforceable, and it shall be so valid and enforceable until the court determines the application under Case No. A 381/2010.

(b) The legal representatives of the parties should attend a status hearing on 25 October 2012 at 09h00 at which the managing judge will give directions as to the conduct of the application under Case No. A 381/2010.

(c) There is no order as to costs.

JUDGMENT

PARKER J:

[1] The court made the following order on 10 April 2012 ('the 10 April 2012 order'):

'1. That the Applicant's non-compliance with the forms and service as provided for in the Rules of Court and authorizing the Applicant to bring this Application on an urgent basis as contemplated in Rule 6(12) of the Rules of Court is hereby condoned.

2. That a Rule *nisi* is hereby issued, calling upon the Respondents (and/or any other interested party) to show cause, if any, on FRIDAY, 11 MAY 2012 at 10h00 why the following order should not be made:

2.1 Directing and ordering the Sixth Respondent not to transfer and register Farm Usagei No. 367 on 12 APRIL 2012, pending the resolution of the application under case number A 381/2010 as well as any relief in terms thereof.

2.2 Directing the Second, Third, Fourth and Fifth respondents to pay the costs of this application, in their own personal capacity, on an attorney/client scale (any any other Respondent opposing the application, to pay such costs jointly and severally, the one paying the other to be absolved).'

[2] The reason for launching the present application under Case No. 70/2012 ('the A 70/2012 application') was, according to the applicant, to 'restrain and/or interdict the respondents from transferring and/or in any way registering the immovable property which is the subject of legal proceedings in case number A

381/2010 on an urgent basis pending final determination of Case number A 381/2010 (“the Case A 381/2010 application”)’.

[3] As to the 10 April 2012 order; the opening words of the chapeau of para 2 thereof indicates it is a rule *nisi*, and so Ms Van der Merwe argues that ‘the court did not order that the rule *nisi* shall serve as an interim interdict with immediate effect pending the return date’. ‘As a result’, counsel submits, ‘there is currently no order interdicting 6th Respondent from transferring and registering the property’. I do not agree. With respect, counsel’s argument adds no weight. If the sixth respondent did that which the court has directed the sixth respondent to refrain from doing ‘*pending the resolution of the application under Case number A 381/2010*’, the sixth respondent will indubitably be violating a valid court order when *the resolution of the application under Case Number A 381/2010* has not occurred. (My emphasis)

[4] In its meaning and import, para 2.1 of the 10 April 2012 order is as clear as day: it directs the sixth respondent to refrain from transferring and registering Farm Usagei No. 367 on 12 April 2012, so long as the A 381/2010 application (‘the main application’) has not been resolved. That, in my opinion, is the true and correct interpretation and application of para 2.1 of the 10 April 2012 order. As matters stand the A 381/2010 application has not been determined: it is still pending. In this regard, as I say, it is my view that the correct reading of para 2.1 of the 10 April 2012 order establishes that that order must remain in force until determination of the main application that is filed under a different case number. In this regard, I do not think this court is entitled in the present proceeding to either discharge or confirm the rule. The rule will, in effect, be discharged if the court which hears the A 381/2010 application dismisses that application and will be confirmed if that court upholds the application and reviews and sets aside the decision of the first respondent. Thus, a ‘discharge’ or ‘confirmation’ of the 10 April 2010 order would follow as a matter of course and consequentially upon the decision of the court which hears the A 381/2010 application for the reason, as I have said previously, that the order remains in force pending the determination of the A 381/2010 application. It follows

reasonably and inevitably that the question of the applicant's standing to bring the A 70/2012 application, the issue of non-service and other suchlike issues should have been raised with the court that made the 10 April 2012 order. To ask this court in the present proceeding to determine those issues is, in my view, to arrogate to this court, without legal justification, the power to review the decision of the court that made the 10 April 2012 order or, indeed, to sit in an appeal from that decision.

[5] It follows that the 10 April 2012 order restraining and interdicting the sixth respondent from transferring and registering Farm Usagei No. 367 exists and is valid; for, the A 381/2010 application has not yet been determined. These conclusions dispose also of the respondent's second point *in limine*.

[6] For the sake of completeness, I think it behoves me to deal with the issue of the first applicant's founding affidavit which forms the basis of the respondent's first point *in limine*. Ms Van der Merwe argues in respect of the first point *in limine* in the present proceeding that the applicant cannot speak English and there is no allegation in the founding affidavit 'that can satisfy the court that she knows and understands the contents of the founding affidavit'. With the greatest deference to Ms Van der Merwe, this submission has not even a wraith of merit. In the testimonium which is an adjunct to the affidavit, the Commissioner of Oaths before whom the affidavit was sworn by the deponent has declared that he is satisfied that the applicant understands the contents of her affidavit. If it is the opinion of the respondents that there was no basis upon which the Commissioner could have been so satisfied, the correct and reasonable route open to the respondents to take is to bring the decision of the Commissioner under review. The simple reason is that what is before the court is not a naked, unsworn statement by the applicant. What is filed of record is rather an affidavit having a testimonium declared by the Commissioner. Without that testimonium there will be no affidavit properly filed with the court. For counsel to ask this court in the instant proceeding to rule that there is no basis upon which the Commissioner could have been so satisfied without affording the Commissioner the opportunity to be heard on his testimonium offends this court's sense of justice and fairness: it will be against the *audi alteram partem* rule of natural

justice; and, *a fortiori*, Ms Van der Merwe does not say that the affidavit, in form and content, offends the regulations governing the making of affidavits. For all what I have said, I reject the respondents' point *in limine*: it is, with respect, gravely baseless.

[7] Of the view I have taken of this matter, it serves no purpose to deal with any other interesting issues raised. The aforegoing reasoning and conclusions respecting the issues I have considered and determined are dispositive of the present application. As to the question of costs; it is my view that this is a proper case where the parties should pay their own costs. Even though the applicant appears to have registered some success, I think I should not award her costs. The papers were not paginated. Indeed, they were thrown into the court file haphazardly. Furthermore and more important, points were taken and argued on both sides of the suit without due regard to the essence and import of the 10 April 2012 order, which on any account is critical in the present proceeding.

[8] In the result, I make the following order:

(a) Paragraph 2.1 of the order made by the court (per Ueitele, AJ (as he then was)) on 10 April 2012 is valid and enforceable, and it shall be so valid and enforceable until the court determines the application under Case No. A 381/2010.

(b) The legal representatives of the parties should attend a status hearing on 25 October 2012 at 09h00 at which the managing judge will give directions as to the conduct of the application under Case No. A 381/2010.

(c) There is no order as to costs.

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C Parker

Judge

APPEARANCES

APPLICANT: T C Phatela

Instructed by Dr Weder, Kauta & Hoveka Inc.

SECOND, THIRD, FOURTH
and FIFTH RESPONDENTS: B Van der Merwe

Instructed by Du Pisani Legal Practitioners