REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 295/2013

In the matter between:

KAMBAZEMBI GUEST FARM CC t/a WATERBERG WILDERNESS	**APPLICANT**
And	
THE MINISTER OF LANDS AND RESETTLEMENT	**1ST RESPONDENT**
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	**2ND RESPONDENT**
THE MINISTER OF FINANCE	**3RD RESPONDENT**
THE CHAIRPERSON OF THE LAND REFORM ADVISORY COMMISSION	**4TH RESPONDENT**
THE COMMISSIONER FOR INLAND REVENUE	**5TH RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**6TH RESPONDENT**
THE VALUATION COURT	**7TH RESPONDENT**

Neutral citation: *Kambazembi Guest Farm CC v The Minister of Lands and Resettlement* (A 295/2013) [2015] NAHCMD 128 (05 June 2015)

Coram: UNENGU AJ

Heard: **08 April 2015**

Delivered: **05 June 2015**

Flynote: Practice – Applications and motions – Interlocutory application – Applicant contending that application is *sui generis* therefore, rule 32 of the High Court Rules not applicable – Court held that not persuaded that rule 32(9) and (10) not applicable – Further, Court held that application is of interlocutory nature, therefore, must comply with the peremptory provisions of rule 32(9) and (10) of the Rules of Court – In the result, the point *in limine* upheld due to non-compliance with rule 32(9) and (10) – and application struck from the roll with costs.

Summary: Practice – Applications and motions – Interlocutory application – Applicant who launched review application against the respondents in the main application has launched another application to compel the respondents to furnish him with certain documents – Application was termed by the applicant *sui generis* excusing the applicant from complying with the provisions of rule 32(9) and (10) of the Rules of Court – However, the court held that the point *in limine* raised by the respondents be upheld due to non-compliance with rule 32(9) and (10) and struck the application from the roll with costs.

ORDER

(i) The point *in limine* raised by the respondents is upheld.

(ii) The application is struck from the roll with costs.

JUDGMENT

UNENGU AJ:

[1] In his notice of motion filed on 01 October 2014, the applicant gave notice to the respondents that an application will be made on his behalf for orders in the following terms:

> ‘(i) Directing the first, fourth and fifth respondents to furnish reasons, within 20 days, for the decisions challenged at paragraphs B26, C27, D28, E29, F30, G31, H32,K35.1 and K35.2 of the notice of motion in the main application.
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> (ii) Directing the first, fourth and fifth respondents to deliver, within 20 days, the original record of proceedings sought to be set aside and reviewed in terms of paragraphs B26 to H32 and K35.2 of the notice of motion in the main application, which record should include but is not limited to the original documents appearing in Annexure A attached to the notice of application.
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> (iii) Directing the first, fourth and fifth respondents to deliver, within 20 days, the complete record of proceedings sought to be set aside and reviewed in terms of paragraph s B26 to H32 and K35.1 and K35.2 of the notice of motion in the main application, which record should include but is not limited to the original documents and related particulars specified in Annexure B attached to the notice of application.
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> (iv) Costs of the application against those respondents opposing it, jointly and severally if more than one.
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> (v) Such further and or alternative relief as the court may deem appropriate.’

[2] The affidavit supporting the application was deposed to by Mr Rust, the sole member of the applicant and who together with his wife manage the day to day business of the applicant. In his affidavit, Mr Rust stated that the purpose of the application is to compel the respondents to furnish to the applicant reasons for the decisions challenged by the applicant in the main application, to serve on the

registrar the original record of the proceedings under review; and to serve on the applicant the complete record of the proceedings under review which relief, he said, is constitutional in nature, embodied in rule 76 of the rules of court.

[3] In his opening address, Mr Tötemeyer confirmed that the application arises from the main application concerning Constitutional Review relief and essentially an application to compel the first respondent to give reasons for decisions sought to be reviewed in the main application. The main application, as already indicated, is brought before court in terms of Rule 76 of the High Court Rules.[1]

[4] Mr Hinda, counsel for the respondents, as an introduction to his written heads of argument, pointed out that the respondents were in agreement with the general jurisprudence espoused in the applicant's heads of argument, but their concern is whether the applicant has complied with the provisions of Rule 76 and, if so, whether the records sought to be compelled are in existence and can be compelled in proceedings of this nature.

[5] That being the case, and as a result therefore, Mr Hinda raised a point *in limine* that the new rules of this Court do not provide for an application to compel the respondents to furnish to the applicant the reasons for the decisions challenged, the procedure which was available under Rule 35(7) of the previous Rules of Court. According to Mr Hinda, the application to compel procedure in the old Rules has been jettisoned in favour of the procedure controlled by the Managing Judge under Rule 76(8) for the discovery and disclosure of reasonable and identified additional documents which were not made available in terms of Rule 76(2).

[6] In paragraph 4 of his main heads of argument, Mr Hinda submits that the fact that the applicant designated the relief it seeks as constitutional does not elevate it to a level different from an ordinary review application in terms of Rule 76 of the Rules

[1]Rule 76 deals with review applications, in general. Subrule (1) provides that all proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or administrative official and to all other parties affected.

of Court. He further argues that all review applications are predicated on constitutional provisions and that there is no difference between this application and any other review application. According to him the application must comply, not only with rule 76 but also with rule 32(9) and (10).

[7] On his side, Mr Tötemeyer argues that judicial review of public law action is a *sui generis* remedy, vested in the judiciary by the Constitution dating back to at least 1855. He said that the reliance on rule 32(8) and (9) by the respondents cannot succeed because it is common cause that rule 32 does not apply to this matter, and also that when the hearing of this matter was determined by Hoff, J on 20 November 2014, the respondents did not raise objections. It is further his submission that this review relief is embodied in Article 18 of the Constitution and finally expressed in Article 25(1), that no rule of court can change or qualify the Constitution.

[8] Reference has been made to about what transpired before Hoff, J during the hearing and determination of the application on 20 November 2014. I was unfortunately unable to locate the proceedings of 20 November 2014 to acquaint myself with what transpired before Hoff, J on the said date. Counsel for the applicant is also not helpful in his heads of argument as he only say ‘when the hearing of this matter was determined by Hoff, J on 20 November 2014 the respondent did not raise objections. It is too late now to reverse the process’, without stating what was determined by Hoff, J which cannot now be reversed.

[9] A perusal of the correspondence exchanged between the legal practitioners of the applicant and the respondents shows that there is a disagreement between them as to whether the application is interlocutory in nature or not. The applicant is determined that the application is not interlocutory, therefore, the provisions of rule 32 are not applicable, while the respondents are of the opposite view.

[10] It was argued on behalf of the applicant during the hearing of the application that the application was brought to direct the first, fourth and fifth respondents to furnish reasons for the decisions challenged in the main application. This is also the

relief sought by the applicant in his notice of application filed on 01 October 2014 supported by an affidavit of Mr Joachim Rust; which, in paragraph 3 thereof states the purpose of the application as 'to compel the respondents to furnish to the applicant reasons for the decisions challenged by the applicant in the main application; to serve on the registrar the original record of the proceedings under review and to serve on the applicant the complete record of the proceedings under review.'

[11] It is therefore clear from the abovementioned statements that the present application is interlocutory as it is incidental to the main application which is still pending between the same parties, and of which the same legal practitioners are litigating on behalf of the parties. Also because of the fact that the ruling in this application will not terminate or dispose of the dispute of the parties in the main application. Therefore, the application, in my opinion, is pure interlocutory in nature, and rule 32 is applicable.

[12] The fact that the review relief is embodied in Article 18 of the Constitution read with Article 25(1), cannot make it different from other interlocutory applications. I agree with Mr Hinda that all review applications are constitutional in nature and embodied in Article 18 of the Constitution as, in most instances, these reviews are directed against the decisions of administrative bodies or against decisions of administrative officials.

[13] It is trite that the new rules of the court discourages interlocutory applications to court on matters which can amicably be resolved between the parties. The party who wishes to institute an interlocutory proceeding is enjoyed first, under Rule 32(9) to approach the other party in an attempt to try and resolve the issue, a procedure provided for in an attempt to avoid unnecessary interlocutory proceedings. This application is not an exception to the rule. The parties must comply with the peremptory terms of subrules (9) and (10) of rule 32 of the Rules of Court[2]. In

[2]South African Poultry Association v The Ministry of Trade and Industry (A 94/2014) [2014] NAHCMD 331 (07 November 2014).

Mukata v Appolus[3], Parker, AJ stated, in para [6] of the judgment that a non-compliance with the provisions of rule 32(9) and (10) is fatal. I agree. In this application, I am not persuaded by the applicant that, it is a *sui generis* application therefore, rule 32(9) and (10) should not apply. All interlocutory applications must follow the procedure provided for in the rule, a failure to comply with the rule, therefore, will have dire consequences to the applicant – in the sense that the application will be defective (See *Mukata v Appolus* supra).

[14] That being the case, and for reasons stated above, I came to the conclusion that the point *in limine* raised by the respondents must succeed.

[15] In the result the following orders are made:

(i) The point *in limine* raised by the respondents is upheld.

(ii) The application is struck from the roll with costs.

E P UNENGU AJ

Judge

[3](I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

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APPEARANCES

APPLICANT :	R Tötemeyer SC Instructed by LorentzAngula Inc., Windhoek
RESPONDENTS:	G Hinda SC of Government Attorney, Windhoek