**REPUBLIC OF NAMIBIA** NOT REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: A 164/2015

In the matter between:

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| 1.1.1.1. | **GODFRIED NDJAMO TJIRIANGE** |
| | **APPLICANT** |
| And | |
| **CHIEF SAM KAMBAZEMBI** | **1st RESPONDENT** |
| **KAMBAZEMBI TRADITIONAL AUTHORITY** | **2nd RESPONDENT** |
| **COMMUNAL LAND BOARD OF THE OTJOZONDJUPA REGION** | **3rd RESPONDENT** |
| **THEODOR TJIRIANGE** | **4th RESPONDENT** |
| **AMBROSIUS TJIRIANGE** | **5th RESPONDENT** |
| **WILLEM TJIRIANGE** | **6th RESPONDENT** |
| **ABIUD TJIRIANGE** | **7th RESPONDENT** |
| **JOROKEE KATJIRUA TJIRIANGE** | **8th RESPONDENT** |

**Neutral citation:** *Tjiriange v Kambazembi (A 164-2015) [2015]* NAHCMD 185 (10 August 2015)

**Coram:** Schimming-Chase AJ

**Heard:** 10 July 2015, 21 July 2015, 30 July 2015

**Delivered:** 10 August 2015

**Flynote:** Practice – Applications and motions – Urgent applications – applicant is required to set out in detail the circumstances which he/she avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. Failure to set forth these facts explicitly is fatal to the urgent relief.

**Summary:** The applicant applied for urgent interim relief interdicting the respondents from preventing the applicant's livestock from grazing in the commonage of a communal area pending finalisation of a review application launched in the normal course. The applicant failed to adequately explain in his founding affidavit the circumstances which render the matter urgent and the reasons why he could not be afforded substantial redress in due course. Application struck from the Roll. Principles relating to urgent applications restated.

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**ORDER**

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**1.** The application is struck from the roll with costs.

**2.** Review application is postponed to 3 September 2015 at 08h30 before Parker AJ on the application roll for a case management conference.

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**JUDGMENT**

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SCHIMMING-CHASE, AJ

(b) This is an application launched on an urgent basis for interdictory relief pending the finalisation of a review application launched in Part B of the notice of motion.

(c) The urgent relief sought in Part A is for an interim interdict restraining and interdicting the respondents from preventing the applicant's livestock from grazing in the commonage of the communal area known as Camp A at Onjamo No 1 Village, Otjituuo, Namibia. It is common cause that the applicant and his cattle have been evicted from Camp A, and are grazing in Camp B. The camps are currently separated by a fence.

(d)

(e) The review application launched in the normal course, is for an order

(f)

> (g) "reviewing the proceedings, decision or judgment and/or order of the Chief Sam Kambazembi and/or the Kambazembi Traditional Authority, of which the decision is contained in the letter dated 24 April 2015 and setting aside and declaring such proceedings as unconstitutional, invalid and of no force and effect."

(h) This case in essence involves the unlawful limitation (according to the applicant) of his grazing rights on communal land in the Otjozondjupa region. There is a long and drawn out history between the parties (who are related) concerning these grazing rights.

(i) The certificate of urgency and notice of motion was signed on 3 July 2015 by Mr Tjombe, the applicant's legal practitioner of record. The application was set down for hearing on 10 July 2015 at 09h00 and was served on the first to third respondents via Deputy Sheriff on 8 July 2015 at 14h45. It appears from the returns of service that attempts were made to serve the fourth, sixth and eighth respondents who were either on leave or not at the given address. There were no returns of service in respect of the fifth and seventh respondents.

(j) The first to third respondents, represented by Mr Ncube from the Government Attorney, opposed the application and filed a notice in terms of rule

66(1)(c) on 9 July 2015, raising the point of urgency.

(k) At the hearing of the urgent application on 10 July 2015, Mr Rukoro, appearing for the fourth to eighth respondents, pointed out that as per their notice to oppose, the application had not yet been served on the respondents. Mr Rukoro was at that stage also not in possession of the founding papers, but he requested time to receive the application and prepare answering papers. Accordingly, this matter was postponed by agreement between the parties to 21 July 2015 at 09h00 in order to enable papers to be filed on behalf of the fourth to eighth respondents. The fourth to eighth respondents were ordered to file their answering affidavits on 15 July 2015 and the applicant his replying affidavit on or before 20 July 2015.

(l) The fourth to eighth respondents filed substantial answering affidavits on 15 July 2015 and also took the point *in limine* that the matter was not urgent. On 21 July 2015 the matter was again postponed by agreement to 30 July 2015 as the applicant was not able to file his replying affidavit in time. Counsel for the respondents did not oppose the request for additional time to file the replying affidavit.

(m) It is noted at this stage that the answering affidavits ran into some 160 pages, 132 of which comprised annexures which were not even properly referred to, either in terms of contents of the annexures, the references thereto or what portions exactly the court was to consider. The point *in limine* relating to urgency comprised about 2 pages only. Needless to say, this made consideration of the answering papers quite cumbersome. Some documentation was not even filed in the official language, and no translation was provided. It is necessary to remind, regard being had to the function of affidavits, that a deponent is required to identify the portion of the annexure on which he or she intends to rely on, so an opponent knows what case must be met[1]. It is not open to a party to merely annex documentation to an affidavit,

[1] Swissborough Diamond Mines (Pty) Ltd and Others v Government of South Africa 1999 (2) SA 279 (T) at 324F-G; Minister of Land Affairs and Agriculture v D & S Wevell Trust 2008 (2) SA 184 (SCA) at 200 par [43].

request the court to have regard to it and not at least point out to court which portions of the annexure are relied on. This is even more important when annexures are bulky or lengthy.

(n) Urgency having been raised in *limine* is considered at the outset. The submission of Mr Ncube, is in essence that the applicant failed to comply with the requirements of rule 73(4) and that the application is not urgent. It was further stated in the notice that the applicant has not shown cause why he cannot be afforded substantial redress at a hearing in due course, and that he has not satisfactorily placed before the court the circumstances which he avers renders the matter urgent.

(o)

(p) Mr Rukoro agreed with Mr Ncube's submissions and added that the urgency was entirely self created and an abuse of court process.

(q) In support of the urgent relief sought, the applicant alleged that the decision to restrict his grazing rights to Camp B of the commonage, as opposed to Camp A was purportedly taken either on 24 April 2015 or 28 May 2015. The applicant's case is that this decision was unlawful. It is not in issue that the decision was taken on 24 April 2015, or that the decision was only communicated to the applicant by the first respondent on 28 May 2015.

(r) In order to provide some context to my reasoning, I deal very shortly with some of the salient background facts. The first respondent made a decision in 2011 already that the applicant be evicted from Camp A. A warrant of eviction was ultimately issued against him and he was evicted on 26 March 2013. The applicant then challenged this decision via motion proceedings in this court, and this application was settled through a settlement agreement on 18 September 2014. Apart from the warrant of eviction not being enforced, the settlement agreement specified that the issue regarding the grazing rights in respect of Camp A be referred back to the second respondent and/or the third respondent for reconsideration.

(s) Subsequent to this agreement the applicant continued to reside and

graze his livestock in Camp A and Camp B at Ondjamo No 1 Village, Otjituuo.

(t) On 19 January 2015, the applicant was requested to attend a meeting at the offices of the first respondent, where his grazing rights were discussed. The applicant gave a history of his family's resettlement at the village, their grazing at Camps A and B and how the dispute between the family members came about. The third respondent was also at this meeting and gave his version of the dispute regarding the grazing rights. The meeting was adjourned to 13 February 2015 and then postponed to 19 February 2015. The applicant alleged that the final decision was read on 19 February 2015, namely that no person owns communal land and that all must reside on both Camps A and B. This is denied by fourth to eighth respondents, but the denial is not relevant in view of the order made below.

(u) On 28 May 2015 the applicant was visited by the first respondent, four police officers and the fourth to sixth respondents. The first respondent informed him that the dispute over the grazing rights had been reconsidered, and that the grazing rights would be divided between Camp A and Camp B. Henceforth, the applicant, together with the sixth and seventh respondents, would be allocated grazing rights at Camp B, while the fourth, fifth and eighth respondents would be allocated Camp A. The applicant was then informed that his livestock must be immediately removed from Camp A, after which the gate between Camp A and Camp B must be immediately closed. At this time, the applicant specifically averred that most of his cattle were already at Camp B at the troughs and there were "mostly calves" in Camp A. The applicant was then handed a letter dated 24 April 2015 (bearing a date stamp of 28 May 2015).

(v) The applicant stated that after his cattle were evicted from Camp A. He immediately contacted his legal practitioner for legal advice. He states that he only managed to secure an appointment with his legal practitioner on 17 June 2015.

(w) At the consultation of 17 June 2015 the applicant was advised that it would be prudent to obtain the necessary documentation before considering the

further conduct of the matter. As a result a letter was addressed to the second respondent on 19 June 2015. In the letter dated 19 June 2015, the second respondent was referred to a previous request for information pertaining to the dispute. The letter further stated the following with regard to the unlawful eviction of the applicant:

> "These actions and decisions are blatantly unlawful and in violation of the Communal Land Reform Act, and as a result, we demand that same be reversed immediately, failing which we are instructed to institute legal action, including an urgent application for appropriate orders."
> (emphasis supplied)

(x) No response was forthcoming. Accordingly a further letter was transmitted on behalf of the applicant on 22 June 2015. Again, no response was forthcoming. Yet another letter was sent on 29 June 2015, this time stating the following:

> "We refer to our previous correspondence herein, and inquire when we may receive the information i.e. a written report of the outcome of the meeting or proceedings where at the decision was taken to allocate Camp B to our client, and Camp A to be allocated to his brothers.
>
> We confirm that we are yet to receive any of the information, or acknowledgement of receipt of our correspondence.
>
> Your reply is urgently awaited, failing which we shall proceed to challenge the decision in the High Court of Namibia."

(y) On 2 July 2015 the applicant's legal practitioner received an email confirming that its Council would sit and reply to the letters, but no definite date had been set for the reply. According to the applicant, it became apparent that the documents would not be availed any time soon and because "the matter is urgent and is increasingly becoming a desperate matter" the applicant and his legal practitioner finalised the application on 3 July 2015.

(z) The applicant submitted that the delay from 28 May 2015 to date of

launching of application was not an unreasonable delay because the respondents caused the delay by not timeously providing the requested documents to enable the applicant to make a decision whether or not to challenge the matter. The applicant also averred that his legal practitioner had to thoroughly consult with him and make the necessary enquiries. In this regard Mr Tjombe expressed the wisdom of obtaining documentation evidencing the reasoning behind the decision sought to be set aside before a review application is launched.

(aa) The applicant further submitted that he would not be afforded substantial redress if the application is heard in the normal course. In this regard the applicant submitted that he will not be able to conduct his farming business without any loss to his livestock and that he has no alternative remedy but to obey the decision of the second respondent in the meantime.

(bb) Mr Tjombe submitted that the following facts advanced by the applicant need to be considered in support of his submission that the application is urgent:

(a) the applicant suffered and continues to suffer a debilitating drought, which is particularly acute in the communal area where he resides;

(b) his livestock is suffering with lack of adequate grazing, and will continue to suffer before the grazing improves;

(c) he received very little rain this rainy season, and that was not enough for proper grazing;

(d) the water pans are dry;

(e) that follows a drought of 2012 to 2013 where he lost 15 head of cattle (also because of similar conduct complained of in this application);

(f) 3 cows already died in June 2015 as a result of the lack of

adequate grazing;

(g) as a result of that a hearing in due course would not afford him substantial redress.

(cc) Numerous judgments of this court have set out the principles relating to what must be averred in order for a matter to be heard on an urgent basis. I mention only a few in this judgment.

(dd) An applicant is required to explicitly set forth in his founding affidavit the circumstances which he renders the matter urgent and the reasons why he claims that he cannot be afforded substantial redress in due course (emphasis supplied).[2] The essence of an urgent application is thus a request for a deviation from the forms that the Rules of Court prescribe. Thus that deviation must be fully justified.[3]

(ee) It is trite that in considering whether an applicant has complied with the above, each case is decided upon its own particular set of facts and circumstances. To my mind, this is why our law requires the applicant to provide full detail, so that there are sufficient facts to enable the court to make an informed decision whether on the relevant facts and circumstances presented in the founding papers, a matter is indeed urgent.

(ff) The court will exercise a discretion based on judicially accepted principles which include but are not necessarily limited to the following:

(a) In complying with the provisions of rule 73(3) and (4) the applicant must show good cause why the normal time limits provided for in the rules of court should be abridged and why he or she cannot be afforded substantial redress in due course. A failure to provide reasons can be

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[2]Rule 73(4), read with Rule 73(3)

[3]Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation 2006(4) SA 292 (SCA) at para 9, approved in Shetu Trading CC v Chair, Tender Board of Namibia 2012(1) NR 162 SC at 173J-174B.

fatal to the application, and it can be struck from the roll as a result.[4]

(b) When an application is brought on the basis of urgency, institution of the proceedings should take place as soon as reasonably possible[5].

(c) When an applicant believes that the matter is urgent, he or she must decide what times to allow affected parties for entering an appearance to defend and for the filing of answering affidavits[6]. In essence, the applicant forges his own rules, subject to the court's control. Unless it would defeat the object of the application or, due to the degree of urgency or other exigencies of the case, it is impractical or unreasonable, an applicant should effect service of an urgent application as soon as reasonably possible on a respondent and also afford him or her, within reason, time to oppose the application[7].

(d) For the purpose of determining urgency, the court's approach is that it must be accepted that the applicant's case is a good one and that the respondents are unlawfully infringing the applicant's rights[8].

(e) Commercial interests may justify the implementation of rule 73(3) and (4), no less than any other interest, but each case must depend on its own circumstances. Thus even in instances of commercial urgency, the court must still be satisfied that the matter is urgent and that the applicant will suffer prejudice if the application is not dealt with on an urgent basis[9].

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[4] Mweb Namibia (Pty) Ltd and Others 2012(1) NR 331 (HC) at par [19]-[21] and the authorities collected there.

[5] Bergmann v Commercial Bank of Namibia Ltd and Another 2001 NR 48 (HC) at 50H.

[6] Mweb *supra* at par [25].

[7] Bergmann *supra* at 51B.

[8] Mweb *supra* at par [22]; Nakanyala v Inspector-General Namibia 2012 (1) NR 200 at par [25].

[9] Mweb *supra* at par [22]; Wal-Mart Stores Inc v Chairperson of the Namibian Competition unreported (case A 61/2011) delivered on 28 April 2011 at par [26] and the authorities referred to; Petroneft International v The Minister of Mines and Energy unreported (case 24/2011) delivered on 28 April 2011 at par [27]-[28] and the authorities referred to.

(f) The convenience of the court is an important consideration[10]. Thus, when urgent applications are thrust upon an already extremely busy court roll, all the more reason for an applicant to provide full and satisfactory detail as to why his or her case is sufficiently urgent in the circumstances to warrant the roll being dislocated and the court coming to the assistance of the applicant, before other litigants who are patiently waiting their turn and going through the case management process in order for their matters to be heard.

(g) There are varying degrees of urgency, and the measure of an applicant's non-compliance with the rules must match the degree of urgency alleged to exist.[11]

(gg) I think it is accepted that an applicant cannot be faulted for taking time, where necessary, to consult and properly prepare papers before launching an application, but this must similarly be explicitly set out in the founding papers and in some way relate to the degree of urgency and complexity of the matter.

(hh) I have considered the above authorities as well as the applicant's averments in his founding papers and submissions made by Mr Tjombe on his behalf. I have similarly considered the arguments of counsel appearing on behalf of the respondents. Bearing in mind what should be set out in an urgent application the following is not present in the founding affidavit.

(ii) There is no proper explanation why, considering the dire and desperate circumstances alleged to be present by the applicant, a consultation could only be secured on 17 June 2015 and not earlier. Mr Tjombe submitted that the fact that the applicant could only secure an appointment with his legal practitioner on this date cannot be the cause of a complaint. This is true. But the cause of the complaint is that there is no explanation why, in view of the urgency contended

[10] Mweb *supra* at par [26] and the authorities referred to there.

[11] Luna Meubelvervaardigers (Edms) Bpk v Makin 1997(4) SA 135 (W); Sheehama v Inspector General Namibian Police 2006(1) NR 106 (HC) at 109 A-B.

for, a consultation could not be secured earlier or even with an alternative legal practitioner for that matter.

(jj) Mr Tjombe further submitted that the applicant has no readily available transport, and lives in a remote village some 100km from Coblenz village, which is the nearest settlement with some semblance of amenities, such as a mobile phone network or fax machine. In addition it was submitted that the applicant's village is about 600km from Windhoek, and it is also not as if his legal practitioner is on standby to attend to him immediately. That may be so, but these facts should have been set out in the founding papers, as part of setting out explicitly the reasons why the matter was urgent, and not contained in heads of argument or submissions before court. These 'facts' can thus simply not be considered.

(kk) There is also no explanation why, after no response was received to the letter dated 19 June 2015 (where it was specifically stated that urgent legal action will be instituted should the decision not be reversed) the application was not instituted then. Instead after 19 June 2015, another letter was written on 22 June 2015 and a further letter on 29 June 2015. In my opinion when no response was received from the letter dated 19 June 2015, even though it is important to get as much documentation as possible for review purposes, the applicant by this date (bearing in mind his desperate circumstances) should at the very least have known, and already had the jurisdictional facts available in order to launch an application for urgent interim interdictory relief pending review. A record would in any event have been filed at a later stage;

(ll) Also to be considered is the short time periods that the respondents were initially given to oppose the application and to file answering papers. The application was launched on 3 July 2015 and set down for 10 July 2015 literally 5 days from date of institution of the application. The applicant was evicted on 28 May 2015. The application was served on 8 July 2015, allowing the first to third respondents (the fourth to eighth respondents not having been served yet) a matter of 1 day to oppose the application. This application was heard on 30 July 2015 by agreement between the parties, and space had to be allocated for

the hearing in a busy court roll.

(mm) It is insufficient to allege that substantial redress will not be received in due course without explaining why this is so. It is true, there is a drought in Namibia, but this does not mean that the applicant could not take other steps to protect his cattle or his financial interests pending finalisation of a review application. The explanation to my mind is simply inadequate. Drought is a nationwide problem that all farmers are trying to cope with through seeking alternative measures to maintain their livestock.

(nn) In light of the foregoing I hold the view that the applicant has unfortunately failed to comply with the provisions in Rule 73(4), and the arguments made on behalf of the respondents are sound. As such I decline to condone his non-compliance with the rules of court or to hear this application as one of urgency. In the result the following order is made:

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

(b) Review application is postponed to 3 September 2015 at 08h30 before Parker AJ on the applications roll for a case management conference.

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SCHIMMING-CHASE

Acting Judge

APPEARANCES

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|---|---|
| FOR THE APPLICANT | Mr N Tjombe<br>Instructed by Tjombe-Elago Inc |
| FOR THE FIRST TO THIRD RESPONDENTS | Mr J Ncube<br>Instructed by Government Attorney |
| FOR FOURTH TO EIGHTH RESPONDENTS | Mr S Rukoro<br>Instructed by Dr. Weder, Kauta & Hoveka Inc. |