REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 21/2015

In the matter between:

KAMBAZEMBI GUEST FARM CC t/a WATERBERG WILDERNESS	**APPLICANT**

And

THE MINISTER OF LANDS AND RESETTLEMENT	**FIRST RESPONDENT**
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	**SECOND RESPONDENT**
THE MINISTER OF FINANCE	**THIRD RESPONDENT**
THE CHAIRPERSON OF THE LAND REFORM ADVISORY COMMISSION	**FOURTH RESPONDENT**
THE COMMISSIONER FOR INLAND REVENUE	**FIFTH RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**SIXTH RESPONDENT**

Neutral citation: *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement* (A 21/2015) [2016] NAHCMD 118 (21 April 2016)

Coram: PARKER AJ

Heard: **5 April 2016**

Delivered: **21 April 2016**

Flynote: Practice – Applications and motions – Interlocutory application – Court held that the relief sought by the applicant is an interlocutory order through and through – It matters tuppence whether the order concerns an application to review and set aside a decision of respondents and a constitutional challenge in the main application – Accordingly, court held that the instant application is an interlocutory application and therefore subject to the rule 32(9) and (10) of the rules of court – Court held further that whether rule 32(9) and (10) has been complied with is a question of fact – And court found that it has not been established factually that rule 32(9) and (10) has been complied with – Applying *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015) court held that non-compliance with rule 32(9) and (10) is fatal – Consequently, court upheld the point *in limine* and struck the application from the roll with costs – Principle of *publicum ius privatorum pacis mutari non potest* applied.

Summary: Practice – Applications and motions – Interlocutory application – Applicant launched an application to review and aside a decision of respondents and a constitutional challenge application – Meanwhile applicant brought application to compel respondents to deliver reasons for the decision, taken by respondents and to produce certain documents – Court found that the fact that 'the reasons and documentation' sought concern 'a case for constitutional review' matters tuppence – Court found application was for an interlocutory order through and through and therefore was an interlocutory application – Consequently, rule 32(9) and (10) applied – Court found that it has not been established factually that rule 32(9) and (10) was complied with – Consequently, court upheld point *in limine* and struck the application from the roll with costs.

ORDER

The application is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] There is filed with the court an application (main application) for the review and setting aside of 'the assessment issued to the applicant for the payment of land tax pursuant to Act 6 of 1995 and the regulations issued under Government Gazette (No.) 120 of 3 July 2007 payable on or before 28 February 2015'. The application in the instant proceeding, ie *an interlocutory application*, concerns an application to obtain a complete record and reasons for the decision sought to be reviewed and set aside in the main application. (Underlined and italicized for obvious emphasis)

[2] The respondents have moved to reject the main application and the instant interlocutory application. The latter application is the burden of this judgment.

[3] The respondents have raised a point *in limine*, and the long and short of it is that before launching the interlocutory application the applicant failed to comply with the peremptory provisions of rule 32(9) and (10); and such failure is fatal. It behoves me to determine this point *in limine* at the threshold because a decision upholding the point will dispose of the interlocutory application.

[4] In my view, the provisions of rule 32(9) and (10) are as clear as day and they are unambiguous; and so, I do not think one is entitled to add any words to them by implication to attain a purpose which is outwit the intention of the rule maker. It has been said:

'Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so as to give the paragraph sense and meaning in context.'

(*Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 (HC), para 7)

[5] The provisions of rule 32(9) and (10) are clear and unambiguous; and so no words should be added by implication to the language of rule 32(9) and (10) in order to give those provisions sense and meaning in context. The sense and meaning in context of those provisions are abundantly clear. And one can find the true extent and meaning of the rule from the rules of court only. See *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014 [2016] NAHCMD 80 (17 March 2016), para 12. Thus, considering the use of the word 'must' in rule 32(9) and (10), there is not one iota of doubt that rule 32(9) and (10) 'are peremptory, and non-compliance with them must be fatal'. (*Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (15 March 2015), para 6)

[6] The applicant seeks to compel the respondents to deliver to the applicant 'a complete record' and 'reasons' for the decision taken respecting the aforementioned assessment in order to pursue the main application. Rule 32(9) and (10) concern 'Interlocutory matters' and applications for directions, that is ***all*** matters, so long as they answer to the epithet 'interlocutory'. (Italicized and underlined for emphasis) The rules do not exempt any interlocutory matters. That being the case, with the greatest deference to Mr Tötemeyer SC, counsel for the applicant, it is a sheer idle argument to put forth, as Mr Tötemeyer appears to do, that rule 32(9) and (10) does not apply to the instant application.

[7] I have no difficulty – none at all – in holding that in the instant application the applicant seeks an interlocutory order through and through. I should have said so if I had not looked at the authorities. But when I look at *Hendrik Christian t/a Hope Financial Services and Others v LorentzAngula Inc and Others* Case No. A 244/2007 (Unreported), where the authorities are gathered, I feel no doubt in holding that this application is for an interlocutory order to compel respondents to produce documents and give reasons sought by the applicant which have a bearing on the main application; and so, this is an interlocutory application. And *Kambazembi Guest*

Farm CC v The Minister of Lands and Resettlement (A 295/2013) [2015] NAHCMD 128 (5 June 2015), para 12, tells us that 'the fact that the review relief is embodied in Article 18 of the (Namibian) Constitution, read with Article 25(1), cannot make it different from other interlocutory application'. Thus, the fact that the 'reasons and documentation' sought concern, according to the applicant's legal representatives, 'a case for constitutional review' matters tuppence: It is of no moment.

[8] Accordingly, it is with firm confidence that I reject Mr Tötemeyer's argument that rule 32(9) and (10) does not apply to this interlocutory matter. But that is not the end of the matter. Mr Tötemeyer has a second bow to his string. He says if rule 32(9) and (10) applies, then rule 32(9) and (10) has been complied with.

[9] Doubtless, whether rule 32(9) and (10) has been complied with, is a question of fact. There is nothing on the papers which establishes factually that rule 32(9) and (10) has been complied with. Indeed, it has all along been the position of the applicant and his legal representatives that rule 32 does not apply, apparently on the basis that it 'is a case for constitutional review' and it is to complete the (main) application, and the applicant seeks an order for the production of 'documentation in terms of the rule of law and/or rule 76(2)*(b)*'.

[10] The series of correspondence the applicant's legal representatives refer the court to (ie Annexures A-H to their letter dated 16 April 2015, p 87 of the Bundle) do not on any legal imagination constitute a rule 32(9) attempt to resolve any dispute as to the delivery to the applicant of the reasons and documents the applicant seeks. The legal representatives of applicant and the legal representatives of respondents were, if anything, only wrangling over the interpretation and application of rules 76(2) *(b)*, 76(2), 76*(b)*, 76(7), 76(8) and 76(9) and (10) and over the applicability of rule 32(9) and (10) to the interlocutory application.

[11] In sum, the exchanges between Mr Visser (for the applicant) and Mr Nekwaya (for the respondents) were nothing but a battle of wits between these two legal practitioners. It is not the case where it is clear on the papers that real steps were

taken in line with rule 32(9) of the rules to resolve some interlocutory matter amicably. See *Blaauw's Transport (Pty) Ltd v Auto Truck & Coach CC* (A 96/2015) [2015] NAHCMD 268 (12 November 2015), paras 7 and 8.

[12] One last point; it is trite that pacts entered into by parties in contravention of the public or general law of the country are not enforceable (*Schierhout v Ministry of Justice* 1925 AD 417): The principle is *publicum ius privatorum pacis mutari non potest*. It follows that any agreement reached by the parties that rule 32(9) and (10) do not apply to the bringing of the interlocutory application for an order to compel respondents to give the reasons and to produce the documents is of no force. The irrefragable fact that remains is that rule 32(9) and (10) have not been complied with. And the matter of law that stands is that rule 32(9) and (10) applies to the interlocutory application brought by the applicant for the interlocutory order.

[13] Based on these reasons the point *in limine* on the issue of rule 32(9) and (10) is upheld; whereupon, I make the following order:

> The application is struck from the roll with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT: R Tötemeyer SC

Instructed by ENSafrica (Incorporated as LorentzAngula Inc., Windhoek

RESPONDENTS: G Narib

Instructed by Government Attorney, Windhoek