

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00060

In the matter between:

RYNAULT VAN WYK

APPLICANT

and

CYRIL PIENAAR

FIRST RESPONDENT

WESLEY HARCKER

SECOND RESPONDENT

THE ELECTION COMMITTEE FOR THE CAPTAINCY

OF THE REHOBOTH BASTER GEMEENTE

THIRD RESPONDENT

HERBERT GEORGE BRITZ

FOURTH RESPONDENT

REHOBOTH BASTER GEMEENTE

FIFTH RESPONDENT

Neutral citation: *Van Wyk v Pienaar* (HC-MD-CIV-MOT-GEN-2022/00060) [2023]
NAHCMD 255 (11 May 2023)

Coram: SIBEYA J

Heard: 1 March 2023

Delivered: 11 May 2023

Flynote: Administrative law – Election of the Kaptein of the Rehoboth Gemeente – Repealed law in terms of Schedule 8 of the Namibian Constitution – The applicability of repealed laws when reliance is put on such laws.

Summary: After the death of their Kaptein, the Rehoboth Gemeente, continued with election proceedings that were already in the pipeline. The election was held on 24 April 2021. The applicant, a candidate running for the position of Kaptein, brought this application to set aside the election held on 24 April 2021, and also to declare the election null and void. Part of the reasons provided by the applicant was that the election was not free and fair and that there were discrepancies around how the election process was conducted, including before, during and after the election. The applicant relied on the paternal laws of the Rehoboth Gebied.

Held – the paternal laws were repealed by Schedule 8 of the Namibian Constitution.

Held that – the election was conducted on the framework of the paternal laws that were repealed by the Namibian Constitution. The rules followed in conducting the election were made known to all candidates at the meetings and deliberations held of which the applicant attended only on some instances for reasons known to him only.

Held further that – the issue of the election not being free and fair is a non-issue for several reasons. The first being there is no set of legal and binding framework that the election was conducted on. The second reason is that some of the issues complained of on the day of the election, such as there being inadequate observers were due to the fault of the applicant.

The applicant's application is dismissed.

ORDER

1. The applicant's application, to declare the election held on 24 April 2021, null and void and to set the election aside, is dismissed.
2. The applicant must pay the costs of the respondents on a party-party scale, including the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

SIBEYA J:

Introduction

[1] Before the court for determination is an opposed application wherein the applicant prays for a declaratory order that the election for the Captaincy for the Rehoboth Baster Gemeente held on Saturday, 24 April 2021, at Rehoboth, Namibia, was irregular, and not free and fair, and accordingly set aside.

The parties and their representation

[2] The applicant is Mr Rynault van Wyk a major male person and farmer residing in Rehoboth, Namibia.

[3] The first respondent is Mr Cyril Pienaar, who served as the "Waarnemende-Kaptein" (Acting-Captain) of the Rehoboth Baster Gemeente in terms of the Constitution of January 1872 and the Paternal Laws, and with his official address situated at Volkstem Building 153, Church Street, Rehoboth, Namibia.

[4] The second respondent is Mr Wesley Harcker, the Chairperson of the Election Committee for the Captaincy of the Rehoboth Baster Gemeente, a body ostensibly constituted at a meeting of the community on 22 March 2021, and with his address situated at Volkstem Building 153, Church Street, Rehoboth, Namibia.

[5] The third respondent is the Election Committee for the Captaincy of the Rehoboth Baster Gemeente, a body ostensibly constituted at a meeting of the community on 22 March 2021, and with its address situated at Volkstem Building 153, Church Street, Rehoboth, Namibia.

[6] The fourth respondent is Mr Herbert George Britz, a major male person who was also duly nominated as a candidate for the Captaincy of the Rehoboth Baster Gemeente, and who was subsequently elected as Captain during the contested elections, and whose residential address is situated in Rehoboth, Namibia.

[7] The fifth respondent is the Rehoboth Baster Gemeente, an association of persons at public law constituted in terms of the Constitution of January 1872 and the Paternal Laws of the Rehoboth Baster Community, with its address at Volkstem Building 153, Church Street, Rehoboth, Namibia, and which body is merely cited for interest that it may have in relation to the relief that the applicant is seeking herein.

[8] The applicant was represented by Mr Boonzaier and the respondents by Mr Diedericks. The court notes its gratitude to both counsel for their assistance in this matter.

The background

[9] For more than 30 years the Late Kaptein found it very difficult to convince the community to take part in community affairs, however, after the death of the late Kaptein J. McNab, the office of the Provisional Kaptein (Late B. Buys) started a process to fulfil his mandate, according to Article 2 of 1872, "Paternal Laws", that is to immediately

choose a new Kaptein; which the first respondent, after the untimely death of the Kaptein, proceeded with.

[10] The election process which was already in the pipeline was proceeded with by the first respondent as the Acting Kaptein. A series of meetings were then called and deliberation were made pertaining to how the election was to be conducted. Included in the meetings and deliberations was the establishment of the Election Committee.

[11] The applicant, unhappy with the manner and hastiness in which the election was being conducted on 23 April 2021, launched an urgent application in this court under case number: HC-MD-CIV-MOT-GEN-2021/00153. The relief sought was to essentially interdict the respondents from proceeding with the election scheduled for the very next day, being 24 April 2021. The application was dismissed due to a lack of urgency, without the merits having been considered.

[12] The election took place as planned on 24 April 2021, and the applicant partook as a candidate running for the position as the Kaptein. He, however, launched this application after election was held. According to the applicant, the election was not free and fair and was tainted with several irregularities. The applicant went above and beyond to explain to the court the irregularities that he alleges took place.

[13] The respondents did not take the shots fired by the applicant lightly and fired shots of their own and painted a vivid picture to the court of the events as they happened. Both the applicant and respondents' cases will be dealt with in due course.

The applicant's case

The alleged irregularities

[14] The applicant in his founding affidavit contends that there were several irregularities pertaining to the said election. The irregularities range from the time before the election to after the election. The applicant relies on the paternal laws of the

Rehoboth Gemeente and states that it is recognised widely and in support thereof cited the Supreme Court case of *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others*.¹

[15] The applicant in his criticism of the election stated in his founding papers that the election was too sudden and that there were many complaints from the members of the community that they were not aware of the said election. He complained further that the meetings leading to the election were not announced in the mainstream media such as radio and television.

[16] The applicant contends further that there were concerns about the election not being free and fair from some of the members of the community, as community members were requested to pay N\$100 in order to be eligible to vote.

[17] The applicant further stated that the irregularities cited on the day of the election was, amongst others, that the voting boxes were not properly sealed and that there were inadequate observers at the polling stations. He further claims that the voting counts from outside Rehoboth were sent to the Election Committee via the short message system (SMS). He applicant contends that the irregularities raised reveals that the election was unfair and not credible and prayed for an order to set aside the said election.

The respondents' case

[18] The respondents, in the answering affidavit deposed to by the first respondent, stated that it is important to note that the majority of the people within the Rehoboth Baster community were aware that, after the death of the late Kaptein, a new Kaptein must immediately be elected. It is their case that in order to inform and also get participation from the community, several meetings and deliberations took place through all available media outlets. The first respondent further stated that the process to get

¹ *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others* 1996 NR 238 (SC).

people involved in the election was hampered by the Covid-19 pandemic, but notwithstanding, they tried their utmost best to act efficiently under abnormal circumstances.

[19] The first respondent further stated, in the answering affidavit, that the applicant only participated in selective meetings even though he was invited for meetings with the Election Committee. He contends further that the applicant also failed to attend the information meeting for aspiring candidates in the church hall during which all the rules and regulations for the election was announced to the possible candidates. He was the only one not in attendance.

[20] The first respondent deposed further that not all Basters are members of the Rehoboth Baster Gemeente, because the paternal laws stated clearly that one must be a registered and paid up member of the organisation. The registration sporadically took place and people were also requested to pay an amount of N\$100 (one hundred Namibia dollars) or N\$20 (twenty Namibia dollars) as an initial payment and then pay the rest in instalments in order to participate in the election.

The points in limine

[21] The respondents contend that the applicant failed to establish why this court has the jurisdiction to entertain this matter, and in their own words, this court lacks the necessary jurisdiction to adjudicate this matter, alternatively to adjudicate this matter as a court of first instance.

[22] The second point *in limine* is that the applicant's founding and supporting affidavits raise disputes of fact, meaning that the matter cannot be adjudicated on the papers alone. They further contend that the application should have been brought by way of action proceedings in view of the fact that the application is not brought as a review or appeal.

[23] The respondents brought a special plea of jurisdiction in this same matter and the court heard arguments on 5 August 2022, from the respondents as there was no appearance for the applicant. The court dismissed the special plea of jurisdiction raised by the respondents. I will, therefore, not dwell on the points of *limine* any further.

The arguments

[24] Mr Boonzaier submitted that the term ‘Paternal Laws’ might be ambiguous, because it does not have legislative effect and it is not a law strictly speaking. He further stated that the respondents make a big issue of this fact. He, however, submitted that these ‘Paternal Laws’ are a framework of rules as stated by the Supreme Court and that they are in fact customary laws.

[25] Mr Boonzaier further submitted that the group of people are aggrieved because they are not a recognised local authority in terms of the Traditional Authorities Act,² and do not have laws that govern them, however that does not retract anything from the rules that they set for themselves.

[26] It was argued by Mr Boonzaier that the applicant had questions on what the rules of the election was applicable and utilised, but such questions received no answers. When the court posed the question whether or not the ‘Paternal Laws’ had any legal effect, Mr Boonzaier submitted that the applicant therefore had questions about the legality of the election and how such election was to be conducted. He did not answer the question satisfactorily as the court is still in the dark as to whether the applicant relies on the ‘Paternal Laws’ as the source on which his application is based or not. He, however, argued that the members of the Rehoboth Baster Community are aggrieved as there was no free and fair process of the election prior to, during and after the election, hence this application was launched to set aside the said election.

² Traditional Authorities Act 25 of 2000.

[27] Mr Diedericks submitted the contrary. He submitted that the 'Paternal Laws' relied on by the applicant for the relief sought in this matter were repealed and, therefore, cannot be said to have been breached as such laws are an instrument that does not exist in the eyes of the law. He further submitted that when the applicant partook in the election and did so at own accord with the risks involved and cannot seek redress from this court based on repealed laws.

Analysis

[28] In the matter of *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others*,³ the Supreme Court set out the complete history of the Paternal Laws of the Baster Gemeente and how the laws evolved. It held the following:

'...Toward the end of the eighteenth and the beginning of the nineteenth century a number of Baster communities emerged in what was then known as the Cape Colony. One of these communities inhabiting the area known as de Tuin decided to emigrate north. It is this community that settled in Rehoboth and the vicinity around 1871. En route to Rehoboth they settled their own constitution which was eventually promulgated at Rehoboth during January 1872 and which constitution came to be known as the Paternal Laws. The Basters acquired land at and around Rehoboth pursuant to negotiations with the then existing Tribal Governments laying claim to this area principally the Nama tribe known as the Swartboois.

The Paternal Laws, although dealing also with matters one would not find in a modern day constitution such as civil and criminal matters, provided a framework of rules defining the organs of government of the Baster people and their rights and duties. Thus as Hannah, J. pointed out in his judgment where certain in limine objections were dealt with by the Full Bench:

"They provided for the appointment of an elected supreme ruler known as the Kaptein who was to hold such office for life. Also for a Raad (Council) consisting of two citizens to assist the Kaptein and a Volksraad (Parliament) consisting of a further two citizens. They provided that every Baster, or anyone married to a Baster, should be a citizen and that all tax-paying citizens

³ *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others* 1996 NR 238 (SC) paras 2-5.

should have the right to vote in the election of the Kaptein and members of Parliament. Provision was also made for non-Basters to become citizens. . . The Paternal Laws also provided for the appointment of judges by the Kaptein to hear criminal and civil matters and for the appointment of field-cornets, the equivalent of modern-day deputy-sheriffs. A number of offences were specified together with the penalties to be imposed. A system of taxation was created "in order to defray the necessary government expenditure." There were laws pertaining to marriage and restrictions were imposed on the sale of land. There was a call-up system in the event of attack by enemies."

After German annexation of the whole area presently known as Namibia (excluding the Walvis Bay enclave) a "Treaty of Protection and Friendship" was concluded between the German Imperial Government and the Basters. This Treaty recognised "the rights and freedom which have been acquired by the Basters at Rehoboth for themselves..." Despite this Treaty the German Imperial Government in true colonial tradition ignored it when it suited their purpose and made several laws which were applicable in Rehoboth, opened several Police stations in the area and even appointed a District Officer for the area. However, it is clear that the Kaptein and his Council continued to function throughout this period up to the time of the German defeat by South Africa in 1915.

After the defeat of the Germans the Basters continued basically to govern themselves according to the provisions of the Paternal Laws. The South Africans and the Kaptein and Council of the Basters came to an agreement which formed the basis of Proclamation 28 of 1923 wherein, inter alia, the right and title of the Rehoboth Community to the land then occupied by it was acknowledged as well as their right to local self-government in accordance with the Paternal Laws.

The boundaries of the Rehoboth Territory were also defined in this proclamation comprising an area of approximately 14 200 square kilometres. Political dissension in the Baster Community however followed upon the agreement which formed the basis of this proclamation and a further proclamation, No 31 of 1924, was enacted. In terms of this proclamation the powers of the Kaptein and certain other officials were transferred to the Magistrate and his Court. The Magistrate was an appointee of the South Africans. From this point onward there was a gradual restoration of the powers back to the community who also all along insisted on self-government.

This process was completed with the enactment of the Rehoboth Self-Government Act 56 of 1976 the long title whereof reads as follows:

“To grant self-government in accordance with the Paternal law, of 1872 to the citizens of the "Rehoboth Gebiet" within the territory of South West Africa; for that purpose to provide for the establishment of a Kaptein's Council and a Legislative Council for the said "Gebiet"; to determine the powers and functions of the said councils; and to provide for matters connected therewith.”

Elections were held under this Act, the structures were put in place and the Rehoboth area was governed in terms of this Act up until 1989. By Proc 32 of 1989 the powers granted by Act 56 of 1976 were transferred to the Administrator-General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. In terms of Schedule 8 of the Constitution of the Republic of Namibia, Act 56 of 1976 was repealed *in toto* and the form of self-government which the Basters enjoyed from their arrival at Rehoboth during 1871-1872 up to the independence of Namibia during 1990 had come to an end.’

[29] From the long passage cited above, the Supreme Court laid out the history of the ‘Paternal Laws’ and their enforceability. The long and short of it is that the ‘Paternal Laws’ were repealed by Schedule 8 of the Namibian Constitution and, therefore, ceased to exist.

[30] Paragraphs 12 – 14 of the applicant’s founding affidavit makes it plain that the applicant relies on the ‘Paternal Laws’ which ought to have been complied with in the conduct of the elections.

[31] A law that is repealed *in toto* has no legal consequence. Any action taken on the basis of such law is void with no effect. I find that, equally, an application to challenge the election based on the repealed law is void with no legal consequence as it constitutes a nullity.

[32] In a celebrated passage, Lord Denning remarked as follows in *Macfoy v United Africa Co Ltd*,⁴ at 1172:

⁴ *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172.

'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

[33] I find that the impugned election was conducted on the framework of the paternal laws that were repealed by the Namibian Constitution. For that reason and the findings made above, I find that the applicant cannot be granted the relief that he seeks from this court.

[34] In the event that I am wrong, I further find that the rules followed in conducting the election were made known to all candidates at the meetings and deliberations held. The applicant attended to some of these meetings but missed others for reasons known to him only. The bottom line, however, is that he participated in the election while being well aware of the applicable rules, and only after being unsuccessful did he turn around and question the same rules.

[35] What the applicant contends is that he did not know 'the rules of the game' as he termed them and that letters were sent to the Election Committee in order to establish as to how the election was to be conducted. What the applicant failed to respond to is that the respondents alleged that he was well aware of the meetings held wherein the Election Committee was established.

[36] It is clear from the affidavits filed of record that the election was to appoint a Kaptein and the framework that provided for the election of the Kaptein are the 'Paternal Laws', which as stated above, were repealed.

[37] What is intriguing is that the applicant on the eve of the election brought an urgent application for the court to interdict the election to be held on the very next day. The court however, dismissed the application. What is more intriguing is that the applicant after being chucked out by the court, still attended and took part in the election

as a candidate. This raises the question of whether the applicant would have brought this application had the election results turned out differently, or put bluntly, had the election gone his way.

[38] The issue of the election not being free and fair is a non-issue for several reasons. The first being that there is no set of legal and binding rules or framework that the election was conducted on. The election was conducted on the rules of the repealed framework with no binding effect due to have been repealed as alluded to above.

[39] The second reason is that some of the issues complained of on the day of the election, such as there being inadequate observers were also due to the fault of the applicant. The applicant in his own evidence stated that he received a letter from the Election Committee to provide a list of 18 observers who were to be trained and he stated that it was irregular and he approached his legal practitioner for advice,⁵ without stating that he indeed gave the list, which I presume was not done.

[40] The applicant for the reasons stated above, in my view, does not have a case. He criticised the whole election process from its inception and did not work along with the Election Committee. In fact, he worked very hard to try and stop or even sabotage the whole election and strangely enough when the election proceeded, he still partook therein, and launched this application, when he was unsuccessful. This is equivalent to one embracing the rules of the electoral process, but when the results turns out against such person, he or she, then turns around and claims that there were no rules. I find that the applicant saw advantage to take part in the election and, therefore, freely subscribed to the electoral process, but only regretted taking part in the election being unsuccessful. This, regret, in my view, falls outside the domain of this court.

Conclusion

⁵ Para 31 of the Founding affidavit.

[41] Considering the above conclusions reached, I find that the applicant failed to prove that he is entitled to relief sought from this court to declare the election for the Captaincy for the Rehoboth Bastergemeente held on 24 April 2021, irregular and not free and fair and to set such election aside. The applicant's application, therefore, falls to be dismissed.

Costs

[42] It is an established principle of law that costs follow the result. In this matter, the respondents were successful and thus are deserving of being awarded with the costs.

Order

[43] In the result, I order that:

1. The applicant's application, to declare the election held on 24 April 2021, null and void and to set the election aside, is dismissed.
2. The applicant must pay the costs of the respondents on a party-party scale, including the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded as finalised.

O S Sibeya
Judge

APPEARANCES

APPLICANT:

M Boonzaier

Instructed by Kangueehi & Kavendjii Inc,
Windhoek

RESPONDENTS:

J Diedericks

Instructed by Brockerhoff & Associates,
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