

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Raphael Hijangungo Kapia and another v Minister of Urban and Rural Development and 4 others	Case No: HC-MD-CIV-MOT-REV-2019/00395 Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 24 January 2023 Date of order: 13 February 2023
Neutral citation: <i>Kapia v Minister of Urban and Rural Development</i> (HC-MD-CIV-MOT-REV- 2019/00395) [2022] NAHCMD 47 (13 February 2023)	
Results on merits: Merits not considered.	
The order: <ol style="list-style-type: none">1. The applicants are granted leave to supplement their founding papers by delivering further affidavits. The respondents have the right to deliver answering papers thereto, and the applicants will have the right to reply.2. The applicants are granted leave to amend their notice of motion by introducing the relief as set out in the notice of motion dated 12 September 2022.3. The applicants shall pay the costs of the first, second, third and fifth respondents in respect of the interlocutory application as limited in rule 32(11). In respect of the	

second and third respondents, such costs to include the costs of one instructed counsel.

Further conduct of the matter:

4. The case is postponed to 02/03/2023 at 15:00 for Status hearing (Reason: to determine further dates for the filing of papers).
5. The Parties must file a joint status report on or before 26 February 2023 setting out the dates for the further filing of papers.

Reasons for orders:

Introduction

[1] The matter came before me as a review application, and the parties had already exchanged their papers months ago. However, in the interim, the parties engaged in several interlocutory skirmishes, of which the current application is the latest.

[2] The applicants seek leave to deliver supplementary affidavits, which is a further affidavit as contemplated by rule 66(2)¹ of the Rules of Court. The applicants further seek to amend their notice of motion as set out in the applicants' Notice of Motion dated 12 September 2022.

The parties

[3] The first applicant is Raphael Hijangungo Kapia, an adult male and a member of the Zeraeua Royal Family. The first applicant's main contention is that he is the duly designated successor as Chief of the Zeraeua Traditional Community. The second applicant is Samuel Puriza, an adult male and member of the Chief's Counsel of the Zeraeua Traditional Community.

¹ (2) The applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in subrule (1)(b), deliver a replying affidavit and the court may in its discretion permit the filing of further affidavits.

[4] The respondents in this matter are as follows:

- a) The first respondent is the Minister of Urban and Rural Development, cited in his capacity as the functionary responsible for the administration of the Traditional Authorities Act, 25 of 2000 (the Act).
- b) The second respondent is the Zeraeua Traditional Authority, established in terms of s 2(1) of the Act for the Zeraeua Traditional Community, with its seat in Omatjete, Daures Constituency, Erongo region.
- c) The third respondent is Manase Meundju Christian Zeraeua, an adult male and the current Chief of the Zeraeua Traditional Community.
- d) The fourth respondent is Fabianus Uaseuapuni, an adult male and senior Traditional Councillor in the employ of the second respondent, residing in Omatjete, Daures Constituency, Erongo region.
- e) The fifth respondent is the President of the Republic of Namibia, cited in his capacity as functionary under s 6 of the Act.

[5] The application is opposed by the Government respondents only. The second and third respondents do not oppose the application by the applicants. The only element that these respondents take issue with is the cost implications of the current application.

The basis for the applicants' application

[6] The crux of the applicants' application is that pursuant to the exchange of affidavits by the parties, Masuku J delivered a judgment in the case of *Witbooi v Minister of Urban and Rural Development*² on 5 April 2022, which raises an important constitutional principle and which, according to the applicants, would be of great importance in the adjudication of the main application.

² *Witbooi v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00225) [2022] NAHCMD 172 (05 April 2022).

[7] The matter which the applicants seek to introduce by supplementary affidavit consists of three categories, i.e.

a) It appears from the respondents' answering papers that the first respondent based his decision on the fourth respondent's application for designation in March 2014. This application was purportedly made by the fourth respondent, Fabianus Uaseupani, in his capacity as acting chairperson of the Chief's Council and seemingly on behalf of the Chief's Council. This is ultra vires ss. 5 and 9 of the Act because no Chief Council existed.

b) It is the respondents' version that succession, in terms of the relevant customary law, is hereditary along the paternal line.

c) The first respondent assumed that succession should follow in accordance with the paternal line. However, based on the *Witbooi* judgment, the approach is unconstitutional.

[8] In respect of the applicants' application to amend, Mr Kapia states that the reformulation of his relief sought is necessary as the initial relief sought has become obsolete and to cater for what is sought to be introduced by supplementary affidavit and to deal with events, postdating the founding affidavit.

The opposition

[9] The respondents take the stance that the applicants' reliance on the *Witbooi* case is misplaced for the following reasons, i.e. firstly, whatever Masuku J said regarding constitutionality was said obiter and must be regarded as such. Secondly, there is an appeal pending against the judgment of Masuku J in the Supreme Court, and this court cannot grant leave to supplement affidavits based on an obiter dictum judgment, which is not persuasive.

[10] The respondents further oppose the application for the filing of further affidavits on the basis that the applicants failed to make out a case for exceptional circumstances, which would invite this court to use its discretion in favour of allowing the filing of supplementary affidavits.

[11] The respondents believe that the applicants attempt to introduce new matters under

the guise of filing supplementary affidavits.

Applicable legal principles

[12] It is trite that in motion proceedings, evidence must be led before court by way of affidavit. The affidavits are limited to three sets. These affidavits are supporting affidavits, answering affidavits and replying affidavits. If a party requires the filing of further affidavits, leave must be sought from the court to do so.

[13] The practice in respect of filing affidavits in application or motion proceedings has been developed by various decisions over time and was previously not formulated by the rules of court or statutes. That position was, however, remedied by rule 66(2) of the Rules of Court, which reads as follows:

‘(2) The applicant may, within 14 days of the service on him or her of the affidavit and documents referred to in subrule (1)(b), deliver a replying affidavit and the court may in its discretion permit the filing of further affidavits.’ (my emphasis)

[14] In *Fisher v Seelenbinder*³, Ueitele J discussed the filing of further affidavits as follows⁴:

‘[17] It is trite that in motion proceedings the ordinary rule is that three sets of affidavits are allowed, i.e. the supporting affidavits, the answering affidavits and the replying affidavit. In the matter of *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd*⁵, this Court stated that it may in its discretion permit the filing of further affidavit. Quoting from the South African case of *Juntgen T/A Paul Juntgen Real Estate v Nottbusch*⁶, it said:

‘Generally a Court has a discretion, which is inherent to the just performance of its decision reaching process, to grant that relief which is necessary to enable a party to make a full representation of his true case.’

³ *Fischer v Seelenbinder* (A 217/2015) [2017] NAHCMD 323 (10 November 2017).

⁴ Also see *Serve Investments Eight Four Pty Ltd v Agricultural Professional Services Pty Ltd & 6 Others* (HC-MD-CIV-MOT-GEN-2021/00096) [2021] NAHCMD 470 (08 October 2021).

⁵ *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd* 2007 (1) NR 222 (HC), Also see the matter of *Gabrielsen v Coertzen* Case No: (P) I 3062/2009 an unreported judgment of this Court delivered on 29 June 2011.

⁶ *Juntgen T/A Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W).

[18] In the matter of *Maritima Consulting Services CC v Northgate Distribution Services Ltd*⁷, the Court held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering affidavits will be permitted where, for instance, ‘there is a possibility of prejudice to the respondent if further information is not allowed’.’ (my underlining)

[15] In *The Namibian Competition Commission v Puma Energy (Pty) Ltd*⁸, Ueitele J expanded on the issue of ‘special circumstances’ and prejudice but, more importantly, the discretion of the court and discussed it as follows:

[11] In the South African case of *James Brown & Hamer (Pty) Ltd v Simmons N.O*⁹ the Court said:

‘It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable.’

[12] The above principle was endorsed by this Court when it held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. Thus, the filing of further answering affidavits will be permitted where, for instance, ‘there is a possibility of prejudice to the respondent if further information is not allowed.’¹⁰ The court will allow the filing of further affidavits only in exceptional circumstances and will expect an explanation as to

⁷ *Maritima Consulting Services CC v Northgate Distribution Services Ltd* (A 282-2014) [2015] NAHCMD 121 (29 May 2015).

⁸ *The Namibian Competition Commission v Puma Energy (Pty) Ltd* (HC-MD-CIV-MOT-EXP-2016/00275) [2018] NAHCMD 36 (16 February 2018).

⁹ *James Brown & Hamer (Pty) Ltd v Simmons N.O* 1963 (4) SA 656 (AD) at 660.

¹⁰ See the unreported judgment in the matter of *Maritima Consulting Services CC v Northgate Distribution Services Ltd* A 282-2014) [2015] NAHCMD 121 (delivered on 29 May 2015).

why the filing of further affidavits is necessary.¹¹

[13] The court exercises a judicial discretion when it considers whether or not to allow the filing of a further affidavit. In the exercising of the discretion, the Court essentially asks the question 'Do the circumstances of the case demand the filing of an additional affidavit?' The authorities that I have perused indicate that special circumstances have been held to exist and a departure from the general rule has been allowed where there was something unexpected in the applicant's replying affidavits¹² or where a new matter was raised therein and also where the Court desired to have fuller information on record.

[14] Where, however, there is a possibility of prejudice to the respondent if further information is not allowed the Court will, so the learned authors *Herbstein and van Winsen*¹³ say, admit the further affidavits. There must, however, be a proper and satisfactory explanation which negatives *mala fides* or culpable remissness as to the cause of the facts or information not being put before the Court at an earlier stage and what is more important is that the Court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs.' (my underlining)

[16] A party seeking to introduce further affidavits in proceedings is seeking the court's indulgence. In the matter of *Bangtoo Bros and Others v National Transport Commission and Others*¹⁴, the court held that where supplementary affidavits do not deal with new matters arising from the reply by an applicant or evidence which came to the attention of the parties subsequent to the filing of their affidavits, the party seeking the indulgence must provide an explanation which is sufficient to assuage any concern that the application is mala fide or that the failure to have introduced the evidence in question is not due to a culpable remissness of such party.

[17] Mr Ncube argued on behalf of the respondents that an appeal was filed in respect of the *Witbooi* judgment, which is currently pending before the Supreme Court, and the said case can thus not be regarded for purposes of the current matter. In addition, Mr Ncube

¹¹*James Brown & Hamer (Pty) Ltd v Simmons* N.O 1963 (4) SA 656 (AD).

¹²*Rens v Gutman* N.O 2002 4 All SA 30 (C).

¹³ In their book *The Civil Practice of the Supreme Court of South Africa*, 5 ed, p 433.

¹⁴ *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) at 680B.

argued that whatever Masuku J noted regarding the constitutionality and discriminatory practices regarding succession is obiter dictum and should be disregarded.

[18] I am of the view that the findings that this court needs to make in the current instance are three-fold, namely: a) whether the applicants made out a case for special circumstances which would allow the granting of the order sought by the applicants, b) whether a reasonable explanation was advanced as to why the facts or information not being put before the Court at an earlier stage, and lastly if the respondents would suffer prejudice if the court grants the application.

[19] The argument by Mr Ncube for this court to disregard the *Witbooi* judgment due to the pending appeal holds no merit. Appeal against a judgment stays the execution of the orders of a judgment¹⁵, but it does not mean that the legal questions decided on cannot be relied upon. I agree with Mr Tötemeyer's argument that the judgments of the High Court and the legal principles expressed therein remain valid case law until the Supreme Court overturns those principles. In terms of the stare decisis principles, this court is bound by its own decisions unless reasons can be advanced why it should depart therefrom. This is, however, neither the time nor the place to make any such findings.

[20] There is thus nothing that would preclude the applicants from relying on the *Witbooi*-matter for purposes of their application.

[21] In considering the application before me, I asked myself whether the circumstances of the case demanded the filing of an additional affidavit. If not for the *Witbooi* judgment, my response would have been negative. However, considering the findings made by Masuku J in *Witbooi*, it is relevant to the three central aspects that the applicants sought to introduce by supplementary affidavits (see para 7 above).

[22] I am satisfied that the applicants sufficiently explained the reasons for their belated application for filing further affidavits despite the respondents' criticism levelled against the

¹⁵ Rule 121(2) of the Rules of Court.

applicants that they could have raised a constitutional point from the onset but did not.

[23] Mr Ncube further argued that wrong legal advice is not a basis on which to apply for the filing of further affidavits. However, the application in casu does not find its origin in incorrect legal advice but as a result of this court pertinently pronouncing itself on issues which overlap with the current matter. There are no mala fides on the part of the applicants in filing this application, nor is there culpable remissness in filing the current application at this stage of the proceedings.

[24] The next issue to consider is the issue of prejudice. Apart from the complaint by the respondents that the granting of the application will result in the filing of further papers, I do not see any further grounds for prejudice and relief in this regard should be granted.

Amendment

[25] The last issue to address is the amendment of the relief sought. The application for amendment initially appears to be based on the *Witbooi* judgment. However, upon closer inspection, it is clear that it is not so. Some of the proposed amendments relate to the *Witbooi* judgment but also introduce new grounds that have nothing to do with *Witbooi*.

[26] The practical rule that has been adopted is that amendments should be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by an appropriate costs order. The primary purpose of an amendment is to set out the real issues between the parties so that justice may be done.

[27] I do not understand the respondents' case to be that the applicant's proposed amendments to the relief sought are mala fide or not designed to clarify the issues between the parties. In fact, in my opinion, the respondents did not put up much opposition in respect of the proposed amendment. They instead focused their attention on the opposition to the filing of further affidavits. The applicants are not barred from introducing further issues by

means of an amendment.

[28] The proposed amendment will accomplish what it sets out to do and that is to delineate the real issues between the parties. Application for leave to amend the relief sought is therefore granted as prayed for.

Costs

[29] Lastly, there is the issue of costs. In respect of the application as a whole, the applicants are craving the indulgence of this court. The amendment and filing of a further affidavit have substantial financial implications for the opposing parties, which should be mitigated at the cost of the applicants. The costs in respect of the amendment sought are regulated by rule 52(8) of the Rules of Court, and the applicants will be liable for the respondents' costs occasioned thereby by the operation of the rules unless the court orders differently. The applicants, to my understanding, tendered these costs and I see no reason to order otherwise.

[30] My order is as above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondents
R Töttemeyer SC assisted by C Kavijtjene Instructed by Kanguuehi & Kavendjii Inc., Windhoek	J Ncube Of Government - Office of the Government Attorney, Windhoek N Bassingthwaighte assisted by S Nambinga,

	Instructed by Palyeenime Incorporated, Windhoek
--	--