REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-CIV-MOT-GEN-2020/00340

DIMBULUKENI NAUYOMA **APPLICANT**

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **1ST RESPONDENT**
ATTORNEY GENERAL OF NAMIBIA **2ND RESPONDENT**

Neutral citation: *Nauyoma v Government of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00340) [2023] NAHCMD 51 (15 February 2023)

Coram: USIKU J, COLEMAN J and PARKER, AJ
Heard: **6 December 2022**
Delivered: **15 February 2023**

Flynote: Constitutional law – Legislation – The Squatters Proclamation AG 21 of 1985 – Constitutionality of – The applicant complaining that a human right guaranteed to him or her by Chapter 3 of the Namibian Constitution has been breached must prove such breach – Applicant has approached the court to have the

Proclamation in its entirety declared unconstitutional – Court holding that the applicant has failed to prove that the entire Proclamation with all its provisions have breached applicant's rights guaranteed to him by the Constitution.

Summary: The applicant sought an order declaring the Squatters Proclamation AG 21 of 1985 unconstitutional – Not court's burden, particularly where the applicant was legally represented to trawl through all 70 basic human rights the Constitution has guaranteed to see which rights the applicant has approached the court to vindicate – In the relief sought the applicant has approached the court to declare the Proclamation in its entirety with all its provisions, including the long title and the definition clauses unconstitutional – Court found that the applicant has failed to prove that all the provisions of the Proclamation have breached his rights guaranteed by the Constitution in relation to him and in what manner – Court holding that it would be unlawful or inequitable to grant the declaratory order sought – Consequently, application dismissed.

Held, where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the court must not concern itself with what the public authority concerned did or did not do to implement the statutory provision. The enquiry should be directed only at the words used in formulating the legislative provision that is sought to be impugned to see whether or not the legislative provision is Constitution compliant.

Held, *further*, I do not know of any rule of law in a democratic constitutional State like Namibia that holds that where a word used in a statute is not defined that ipso facto renders the section containing the word vague and overbroad and therefore unconstitutional. The American law doctrines of vague and overbroad explained.

ORDER

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1. The application is dismissed.

2. There is no order as to costs.

3. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ (USIKU J and COLEMAN J concurring):

[1] The instant application concerns the Squatters Proclamation AG 21 of 1985 ('the Proclamation'). This is the verbatim order prayed by the applicant, represented by Mr Amoomo, in the notice of motion:

> '2. Declaring the Squatters Proclamation AG 21 of 1985 (as) unconstitutional;
>
> 3. Costs of suit jointly and severally in respect of the respondents that are opposing the relief.
>
> 4. Further and/or alternative relief.'

[2] The respondents, represented by Mr Khama, have moved to reject the application.

[3] Apart from the short title, the Proclamation contains 16 substantive sections. Section 4 of the Proclamation was considered by the Supreme Court in *Shaanika and Others v The Windhoek City Police and Others*.[1] There are about 15 substantive sections remaining. In *Shaanika* the Supreme Court declared unconstitutional and invalid and of no force subsections (1) and (3) of s 4 with effect from 15 July 2013, which is the date on which judgment in the matter was delivered.

[4] Before the High Court in *Shaanika*, the applicants (the appellants in the Supreme Court case) had sought an order interdicting the respondents from demolishing 'structures' which they had erected on a plot of land owned by the respondents. In addition, the applicants had sought an order declaring s 4(1) and (3) of the Proclamation unconstitutional. Aggrieved by the High Court's decision

[1] *Shaanika and Others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC).

dismissing the application, the applicants instituted an appeal therefrom to the Supreme Court where they were successful.

[5] The *ratio decidendi* of the Supreme Court's decision in *Shaanika* is mainly this: The impugned provisions denied the applicants and those similarly situated their right to approach the court for redress, yet the right of access to the courts is of great importance in a constitutional democracy like Namibia, because it is an aspect of the rule of law 'on which our constitutional democracy has been established'.[2]

[6] I have looked at *Shaanika* not simply because it concerns the very Proclamation which is under constitutional attack in the instant proceeding, but because of these commendable attributes thereof. The notice of motion filed of record is a model of good and concise pleading to challenge the constitutionality of specified and clearly identifiable provisions of the Proclamation, not the entire Proclamation.

[7] The applicants in *Shaanika* did not – and wisely so – approach the court to declare unconstitutional the Proclamation in its entirety. The reason is plainly this; and it bears common sense, it is highly inconceivable that all the provisions, including the long title and the provisions enacting the jurisdiction of magistrates' courts, for example, are unconstitutional on the basis that they offend all the 70 basic human rights guaranteed to individuals by Chapter 3 of the Namibian Constitution ('the Constitution'). I shall return to the issue of inconceivability in due course.

[8] The applicants in *Shaanika* were clear in their minds as to which specific provisions of the Proclamation they claimed violated or threatened to violate specific basic human right guaranteed to them by the Constitution. And they targeted those specific provisions of the Proclamation – no more, no less.

[9] By the same token, in *Julius v Commanding Officer, Windhoek Prison and Others*; *Nel v Commanding Officer, Windhoek Prison and Others*,[3] a full bench of the court upheld the applicants' claim that s 65 of the Magistrates' Courts Act 32 of 1944 was unconstitutional on the ground that it provided the imprisonment of debtors. The

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[2] *Shaanika and Others v the Windhoek City Police and Others*, footnote 1 para 48.
[3] 1996 NR 390 (HC).

applicants in *Julius* targeted a specific section of Act 32 of 1944 which they claimed violated art 12 (1) of the Namibian Constitution in relation to them. As it was the case in *Shaanika*, in *Julius*, too, the applicants did not claim that Act 32 of 1944 in its entirety violated all 70 basic human rights guaranteed by the Constitution in relation to them.

[10] I should say this in parentheses in response to the applicant's assertion that the Proclamation ought to be declared unconstitutional because it was enacted before Namibia regained its independence in March 1990. In any event, Mr Amoomo, counsel for the applicant, underlined in his submission, that the applicant does not challenge the constitutionality of the Proclamation on the basis that it was promulgated before Namibia regained its independence in March 1990, that is, during the apartheid era.

Principles and requirements

[11] The foregoing crucial remarks lead me to consider the legal principles and requirements which courts have applied when determining the constitutionality or otherwise of statutory provisions. In *Kennedy and Another v Minister of Safety and Security and Others*,[4] I set out the principles and requirements which courts have applied when determining applications challenging the validity of statutory provisions. They are set out in the following passages:

'[13] The foundational point to underline at the threshold is what the court stated in *Disciplinary Committee for Legal Practitioners v Slysken Makando and The Law Society, Slysken Makando v Disciplinary Committee for Legal Practitioners and Others* Case No. A216/2008 (Judgment on 8 October 2011):

> "[9] In considering the first respondent's constitutional challenge based on art 12(1) and art 18, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC)) (as Mr Khupe submitted). And before it

[4] *Kennedy and Another v Minister of Safety and Security and Others* 2020 (3) NR 731 (HC).

> can be held that an infringement has, indeed, taken place, it is necessary for the applicant to define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition (*S v Van der Berg* 1995 NR 23). Under item (2), the enquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the correct interpretation thereof to see whether the legislative provision – in the instant case, art 12 (1) and art 18 of the Namibia Constitution – has in truth been violated in relation to the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC) (unreported)."

[14] In that regard, where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the court must concern itself with only that statutory provision; the court must not concern itself with what the public authority concerned did or did not do to implement that statutory provision. (See *Slysken Makando* para 13 above.)'

[12] I note that the applicant prays for a declaratory order. The power of the court to grant declaratory orders is found in s16 of the High Court Act 16 of 1990, and it provides that the court has the power –

'(d) ... in its *discretion*, and at the instance of any interested person, to enquire into and determine any *existing*, *future* or *contingent* right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'
[My emphasis]

[13] Thus, s16 of Act 16 of 1990 contains the power by which the court may grant a declaratory order and the requirements which the applicant must satisfy to succeed. 'The important element in this section is that the power of the court is limited to a question concerning a right.'[5] The crucial element in s 16 of Act 16 of 1990 is, therefore, that the exercise of the court's power is limited to the question concerning a right – existing, future or contingent – which the applicant claims.

[14] Additionally, it is trite that a declaration is a discretionary order that ought to be granted with care, caution and judicially, having regard to all the circumstances of

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[5] *Government of the self-Governing Territory of Kwazulu v Mahlangu* 1994 (I) SA 626 (T) at 634B, per Eloff JP; applied in *Kennedy and Another*, footnote 4 para 18.

the case at hand. It will not be granted, for instance, where the relief claimed would be unlawful or inequitable for the court to grant.[6]

The points in limine

[15] I recall the following principle from para 11 above for a purpose that will become apparent shortly. Where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the court must concern itself with only that statutory provision to see whether or not that statutory provision is constitutional. The court must not concern itself with what the public authority concerned did or did not do to implement that statutory provision. The purpose is to reject respondents' preliminary objection of non-joinder of the Prosecutor General and the Municipal Council of Windhoek ('the Council'). The applicant has not approached the court to challenge an act of any State functionary or public authority, eg the Prosecutor General and the Municipal Council of Windhoek, for any act of theirs in implementing the Proclamation.

[16] The notice of motion is abundantly clear as to the purpose of the application. The applicant has approached the seat of judgment of the court to declare the Proclamation unconstitutional. Therefore, any order that the court grants will not be *brutum fulmen* with regard to the Prosecutor General and the Municipal Council of Windhoek, even if they have not been joined in the proceeding.

[17] The aforementioned State functionary and the public authority may, as Mr Khama submitted, have an interest in the outcome of the matter. That turns on nothing; for so do all the local authority councils in Namibia, yet the respondents have not suggested that all the local authority councils should be joined as parties, as Amoomo submitted. The point *in limine* is not well taken.

[18] It follows inevitably therefore that the argument put forth by Mr Khama, counsel for the respondents, concerning non-service of the originating process on aforementioned State functionary and the public authority is of no moment.

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[6] See *Halsbury's Laws of England*, 3rd ed. Vol. 22, para 1611, p 749-750; applied in *Amupanda and Others v Swapo Party of Namibia and Others* (A 215/2015) (2016) NAHCMD 126 (22 April 2016) para 59).

[19] The 17 August 2022 order, which granted the applicant leave to join the aforesaid parties, was made on the wrong understanding that the applicant has approached the court to challenge an act of the aforementioned State functionary and the public authority. But it turns out that that notice of motion indubitably belies any such impression, as I have demonstrated. The applicant has instituted an application to challenge the constitutionality of a Proclamation. In the result, the preliminary objection on non-joinder is roundly rejected.

[20] The second and third points *in limine* are not in truth points *in limine* properly so called. They go to the heart of the merits of the matter. They will therefore be dealt with as such in due course.

[21] I now direct the enquiry to the consideration of para 2 of the notice of motion, that is, the merits of the matter. Paragraph 1 is a chapeau of para 2; and para 3 concerns costs.

Application of the principles and requirements to the facts

[22] Keeping what I have said in paras 3-14 above in my mental spectacle, I proceed to consider the declaratory order sought by the applicant, being the substantive relief. The important point to make is what Mr Khama reminded the court about. Article 140 of the Namibian Constitution provides:

> '(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.'

[23] Thus, in terms of article 140, the court may declare a pre-Independence statutory provision unconstitutional only if good grounds exist to do so. And in an application to declare such statutory provision unconstitutional, the good grounds can only be placed before the court via the applicant's founding affidavit in terms of rule 65(1) of the rules of court.

[24] Therefore, in considering the instant application, I shall focus my attention on the founding papers; for, the applicant stands or falls by his founding affidavit;[7] and remembering also that submission by counsel is not evidence.[8] Thus, the manner in which I determine the application is to consider the facts in the affidavit relied on by the applicant for the relief he seeks as required by rule 65(1) of the rules of court. I accept the submission by Mr Khama on the point.

[25] Accordingly, I shall consider what right of his the applicant has approached the court to protect by a declaratory order. The reason is that, as I have said previously, the crucial element in s 16 of the High Court Act 16 of 1990, as I have said previously is that the exercise of the court's power is limited to the question concerning a right – existing, future or contingent – which the applicant claims.[9]

[26] For the foregoing reasons, in relation to the rule 65 (1) requirements, I shall trawl through the applicant's founding affidavit serially to consider what facts he relies on for relief. It, therefore, becomes required, where necessary, to set out word for word or paraphrase the facts in the founding affidavit on which the applicant relies for relief, as required by rule 65 (1) of the rules of court, as I have said more than once.

Article 8 and Proclamation 21 of 1985

[27] The applicant avers that to 'refer to someone as a "squatter" in an independent Namibia is to violate their right to dignity".' Applicant avers further, 'The Squatters Proclamation Act is unconstitutional because it violates Article 8 of the Namibian Constitution as far as the dignity of human beings are concerned'.

[28] Article 8 guarantees one foundational basic human right and five constituent basic human rights. On the applicant's founding papers, the court is at a loss as to which right or which rights the applicant claims the Proclamation has violated in relation to him. As the court in *Kennedy and Another* held, it is never the burden of the court – particularly when the applicant is legally represented – to trawl through all

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[7] *Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (SWA) Ltd and Another Intervening* 1994 NR 10 at 15J-16E.
[8] *Kennedy and Another v Minister of Safety and Security*, footnote 4 para 20.
[9] Ibid para 18.

the basic human rights which article 8 guarantees to see which one or which ones the applicant has approached the court to vindicate.[10]

[29] It should be underlined that it is just not enough for the applicant to approach the court and allege simply in general terms – without more – that his right guaranteed to him by article 8 of the Constitution has been infringed. The applicant bears the burden of establishing to the satisfaction of the court as to what particular basic human right or rights under article 8 have, according to applicant, been violated in relation to him, and in what manner that right or those rights have been violated or threatened to be violated. The applicant has failed to establish those crucial aspects in the founding affidavit.

[30] Consequently, I find that the applicant has failed to aver with satisfactory and reasonable particularity in his founding affidavit and to prove what particular basic human right or rights under article 8 have been allegedly violated and by which section or sections of Proclamation 21 of 1985 and in what manner in relation to him.[11] The inevitable result is that applicant is out of court as respects his reliance for a declaratory order on an alleged violation of article 8 of the Constitution by the Proclamation in relation to him. The applicant has failed to prove what he alleges. What the applicant avers is not established; it becomes a mere irrelevance.[12]

Article 10 and Proclamation 21 of 1985

[31] The applicant avers that: 'The Squatters Proclamation also violates Article 10 of the Namibian Constitution in that all persons, whether or not they are poor or rich, should be treated equally in Namibia.'

[32] Article 10 guarantees two basic human rights. One is an equality right and the other an anti-discrimination right. The applicant does not fare any better under the present head. Under the present head, too, the applicant has failed to establish the two crucial requirements, namely, (a) which provision or provisions of Proclamation 21 of 1985 have violated article 10 (1) of the Constitution (ie the equality right) and in what manner in relation to him. This is so, bearing in mind, as I

[10] See ibid para 47.
[11] See ibid paras 47-48.
[12] *Klein v Caremed Pharmaceuticals (Pty) Ltd* 2015 NR 1016 (HC) para 13.

have said previously, that 'where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the court must concern itself with only that provision'.[13] On this ground alone, I conclude that the applicant has failed to prove that a right guaranteed to him by art 10 (1) of the Constitution has been breached by the Proclamation in relation to him and in what manner. I proceed to consider article 10 (2), ie the anti-discrimination provision.

[33] By a parity of reasoning, I find that the applicant has failed to establish which provision or provisions of which section or sections of the Proclamation have allegedly violated the anti-discrimination provision of the Constitution in relation to him. That being the case, the applicant's challenge under this subhead, too, has no legal basis; and so, it must be rejected, and it is rejected.

[34] Additionally, the challenge based on article 10 (2) of the Constitution is rejected for this reason, too. The applicant has failed to prove any breach of article 10 (2) by any provision of Proclamation 21 of 1985 on the ground that such provision introduces a 'differentiation based on the enumerated grounds' and they 'unfairly or unjustly discriminate against the complainant' (ie the applicant).[14]

Article 16 and Proclamation 21 of 1985

[35] Under this head, the applicant contends that the 'Squatters Proclamation is also unconstitutional in that it violates Article 16 of the Namibian Constitution.'

[36] By a parity of reasoning, this challenge, too, is rejected on this ground: The applicant does not say which section or sections of the Proclamation breach article 16 of the Namibian Constitution in relation to him and in what manner. Furthermore, it is rejected on the following ground: The person complaining that a human right guaranteed to him or her has been violated must prove such violation.[15] The applicant has failed to prove the violation complained of and in what manner a provision or provisions of the Proclamation have caused the alleged violation in relation to him. The irrefragable result is that the applicant cannot succeed in his claim under the present head. The claim fails; and it is rejected.

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[13] Ibid paras 13-14.

[14] *Müller v President of the Republic of Namibia and Another* 1999 NR 190 (SC) at 203E.

[15] See *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC).

Section 2 of Proclamation 21 of 1985 and the Constitution

[37] The applicant avers that section 2 of the Proclamation is unconstitutional just because, according to the applicant, 'the concept of "enter" in the context of entering land, building or structure is not defined'. This challenge is rejected on two grounds.

[38] First, the applicant does not aver which of the 70 basic human rights guaranteed to the applicant by the Constitution has been violated by s 2 of the Proclamation in relation to him. The result is that the court is unable to determine the challenge. I have said previously that it is never the burden of the court to trawl through the 70 basic human rights to determine which right or rights might have been violated by s 2 of the Proclamation in relation to the applicant.

[39] Second, as respects Namibia's statute law, I said the following about the definition of words in the definition sections of statutes:

'[7] … It has been said that in legislation the principal function of a definition section is to shear away some of the vagueness and ambiguities which would otherwise surround the terms defined. (Thornton, *Legislative Drafting* 3 ed (1987) 56). And according to Devenish in his *Interpretation of Statutes* (1992) 242, the purpose of a definition section in a statute is to demarcate and define certain seminal terms or phrases in the legislation. And in his work *The Interpretation of Statutes* at 112, Du Plessis writes:

> "In a statute where such a definition clause occurs, the words and phrases it contains acquire, for purposes of that particular statute, a technical meaning which often deviates from their ordinary meaning in colloquial speech. It therefore follows that such words and phrases are as a rule not to be understood in their ordinary sense, but in accordance with the meaning ascribed to them by the definition clause".

[8] Thus, it follows inexorably from the textual authorities that if in a statute a word or phrase has not been defined, such word or phrase should as a rule be understood in its ordinary sense.'[16]

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[16] *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 paras 7-8.

[40] I do not know of any rule of law in a democratic constitutional State like Namibia – and none was referred to the court – that holds that where a word in a statute is not defined that ipso facto renders the section containing the word vague and overbroad and, therefore, unconstitutional. In my view, s 2 of the Proclamation describes concisely, adequately and satisfactorily the intended *corpus delicti* intended by the law maker. As I say, the provisions of s 2 are clear, adequate and concise enough to enable a person to order his affairs or conduct in relation to those provisions.[17]

[41] The birthplace of the vagueness doctrine and the overbroad doctrine in statute law is the United States of America (USA). In American (ie USA) law, these doctrines are usefully distinguished. The vagueness doctrine, which is based on due process, requires that a criminal statute states explicitly and definitely what acts are prohibited to preclude the lack of fair warning and arbitrary enforcement. The overbroad doctrine, by contrast, concerns the First Amendment in the American Constitution and relates to criminal and civil matters. The First Amendment protects freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances. I should say that similar rights are protected by Chapter 3 of the Namibian Constitution. The right to petition the Government for a redress of grievances, for instance, is comparable to the right to administrative justice under art 18 of the Constitution.

[42] A statutory provision is overbroad if it prohibits not only acts that it may legitimately forbid but also acts protected by the First Amendment freedoms.[18]

[43] In the instant proceeding, the applicant has failed to establish that the provisions of s 2 of the Proclamation are vague. On the contrary, I have held previously that those provisions are clear, adequate and concise to preclude the lack of warning and arbitrary enforcement. Additionally, the applicant has failed to establish the particular basic human right or basic human rights he alleges are protected by the Constitution but have been prohibited by s 2 of the Proclamation.

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[17] See para 41 below.

[18] Bryan A Garner *A Dictionary of Modern Legal Usage* 2ed (1995).

[44] The doctrines of vague and overbroad cannot mean anything different from what they mean in American law, the source of the doctrines, as I have explained them previously. The conclusion is inevitable that the applicant has failed to establish which articles of the Constitution s 2 of the Proclamation has violated in relation to him and in what manner.

Section 9 of the Proclamation and the Constitution

[45] The applicant avers that s 9 of the Proclamation is unconstitutional based on the same grounds as the grounds relied on with regard to s 2 of the Proclamation. Under s 9, the words complained of are 'hinders', 'obstructs' and 'delay'. The reasons for rejecting the applicant's challenge in relation to s 2 applies with equal force to the challenge respecting s 9 of the Proclamation. It, therefore, serves no purpose to rehearse the discussion on s 2 here under the treatment of s 9.

[46] Accordingly, by a parity of reasoning, I conclude that the applicant has failed to establish which particular basic human right or basic human rights guaranteed by the Constitution have been violated in relation to him and in what manner by s 9 of the Proclamation. Consequently, the applicant's challenge under the present head is rejected.

Paras 10, 11, and 12 of the founding affidavit

[47] The applicant does not allege and prove which of the aforementioned 15 sections of the Proclamation have violated which of the 70 basic human rights guaranteed to him by the Constitution in relation to him and in what manner.[19] His failure do what he must do to succeed leads to the inexorable conclusion that the challenge under these paragraphs has no merit. It must, therefore, fail; and it fails.

Paras 12.1, 12.2, 12.3, 12.4, 12.5, 13, 14, 15, and 16 of the founding affidavit

[48] The challenge supported by the facts in these subparagraphs of the founding affidavit stand in the same boat as the challenge supported by the facts in the paragraphs dealt with in para 47 above. Accordingly, the conclusions reached there

[19] See *Kennedy and Another*, footnote 4 paras 13-16.

apply with equal force to the challenge under the present head. The fate that befell the challenge discussed in para 47 above should befall the challenge under the present head, too, must also be rejected. I conclude that the challenge under the present head has not a tincture of merit; and so, it is rejected.

Section 16 of the High Court Act 16 of 1990

[49] I have held previously upon authority that the important element in s 16 of the High Court Act 16 of 1990 is that the power of the court to grant a declaratory order is limited to the question concerning a right. In the present proceeding, for all the foregoing discussions and conclusions thereanent, I hold that the applicant has not established a right, within the meaning of s 16 of the High Court Act, which the court is entitled to protect by a declaratory order, prayed by the applicant. It follows inevitably that the application must fail; and it fails. It would be unlawful or inequitable to grant the declaratory order sought.[20]

[50] For completeness, I should say that *Likuwa and Others v Council of the Municipality of Windhoek and Another*[21] is of no assistance on the points under consideration; so is any reliance on 'Comparison of Namibia and South Africa's Squatters and Alternatives.' Namibia, as counsel obliquely reminded the court in his submission, is a sovereign State with its own Constitution and laws. We cannot – and we say it in capitalities – take any respectable look at that country's Prevention of Illegal Squatting Act 52 of 1951. There is no comparable statute in Namibia. That country's Prevention of Illegal Eviction from and Unlawful Occupation of Land Act and the South African Constitution stand in the same boat. *A priori*, the authorities relied on by counsel based on the South African Constitution and aforementioned South African statutes are of no assistance on the points under consideration in the instant matter.

Costs

[51] There remains the matter costs. The applicant, a private individual, has dragged the Government to court to vindicate what he considered his constitutional

[20] See para 14 above.

[21] *Likuwa and Others v Council of the Municipality of Windhoek and Another* NAHCMD 113 (12 April 2017).

right. In a constitutional State, such conduct ought to be encouraged so that even if such private person is unsuccessful in his or her application, he or she may not be mulcted in costs, as happened in *Naholo v The Government of the Republic of Namibia*.[22] But the court should not be slow to mulct such applicant in costs if, for instance, the application is frivolous or vexatious or the applicant has no *locus standi* to institute the application, as it happened in *Namrights Inc v Government of the Republic of Namibia and Others*.[23] The applicant might have been misguided, but I cannot say that the present application is frivolous or vexatious. I cannot also say that the applicant has no *locus standi* in bringing the application. Consequently, I hold that it would be fair and just to make no order as to costs.

Conclusion

[52] Based on these reasons, I hold that the applicant has not made out a case for the relief sought. In the result, I make the following order:

1. The application is dismissed.

2. There is no order as to costs.

3. The matter is finalised and removed from the roll.

C PARKER

Acting Judge

B USIKU

Judge

[22] *Naholo v Government of the Republic of Namibia* [2020] NAHCMD 553 (2 December 2020) para 10.

[23] *Namrights Inc v Government of the Republic of Namibia and Others* 2020 (1) NR 36 (HC).

G COLEMAN
Judge

APPEARANCES

APPLICANT:	K Amoomo Of Kadhila Amoomo Legal Practitioners, Windhoek
RESPONDENTS:	D Khama (with him W Amukoto) Instructed by Office of the Government Attorney, Windhoek