

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON REFERRAL TO ORAL EVIDENCE

Case No.: HC-MD-CIV-MOT-REV-2018/00457

In the matter between:

POPULAR DEMOCRATIC MOVEMENT (PDM)

APPLICANT

and

MINISTER OF LAND REFORM

FIRST RESPONDENT

COMSAR PROPERTIES SA

SECOND RESPONDENT

THE MINISTER OF FINANCE

THIRD RESPONDENT

PRIME MINISTER OF NAMIBIA

FOURTH

RESPONDENT

THE PRESIDENT OF NAMIBIA

FIFTH

RESPONDENT

ATTORNEY-GENERAL OF NAMIBIA

SIXTH RESPONDENT

REGISTRAR OF DEEDS

SEVENTH

RESPONDENT

CHAIR OF CENTRAL PROCUREMENT

EIGHTH RESPONDENT

GOVERNMENT OF NAMIBIA

NINTH RESPONDENT

RAINHOFF FARMING COMPANY (PTY) LTD

TENTH RESPONDENT

WOLFFSGRUND FARMING CC

ELEVENTH RESPONDENT

Neutral citation: *Popular Democratic Movement (PDM) v Minister of Land Reform* (HC-MD-CIV-MOT-REV-2018/00457) [2023] NAHCMD 560 (8 September 2023)

Coram: SIBEYA J

Heard: 14 August 2023

Delivered: 8 September 2023

Flynote: Application – Reviews – Rule 67 – Application to refer issues to oral evidence – Referral to oral evidence where there are disputes of fact – Referral to oral evidence compared to referral to trial – Requirements of referring matters to oral evidence set out – Referral to oral evidence must be on specified issues and not be overbroad – Variation of a court order in terms of rule 103 – The status of parties that have been dissolved or deregistered after being joined to proceedings.

Summary: This is a review application where the applicant seeks to review and set aside certain decisions relating to the lease of farms on the basis that the lease agreement concluded where the second respondent leased the farms was unlawful. The court was also seized with a determination of the standing of the tenth and eleventh respondents.

The applicant contended that the inherent jurisdiction that this court is clothed with in terms of Article 78(4) of the Constitution and together with rule 67 allow for parties to be referred to oral evidence by the court where there is a dispute of fact.

The applicant's claim is that the Minister and the Government, in order to overcome the decision of Cabinet not to permit foreigners to own acquire agricultural land, invented a plan to circumvent the provisions of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act). The applicant contended further that the Minister conspired to allow for the transfer of the farms directly to the Government without the Government having paid the purchase price and to ensure that the second respondent obtains the right to lease the farms.

In opposition to the applicant's application, the first respondent contended that the issues sought to be referred to oral evidence by the applicant are overbroad, and may result in a referral to a fully-fledged trial which is contrary to a referral to oral evidence.

The second respondent contended that even if it is concluded that there are conceivably genuine disputes of fact which cannot be resolved on the papers because the disputes of fact contended for were clearly or reasonably foreseeable, the applicant cannot seek opportunistically to refer them to oral evidence more than four years after the institution of its application. The second respondent further contended that the applicant did not provide specified issues to be referred to oral evidence and on that basis, the application should fail.

Held: that the issues that the applicant seeks to refer to oral evidence constitute its whole claim without specified issues as required by rule 67. In the court's view, the application sought by the applicant is literally a referral of the matter for trial, which is distinctive from an application for referral to oral evidence. The applicant was further found to have failed to identify the witnesses required for oral evidence.

Held that: referral to oral evidence on wide issues and not specified facts should not be allowed and it poses difficulties to identify the witnesses to be called to testify; the scope of the discovery to be made; the scope of witness statements to be recorded, etc.

Held further that: the application by the applicant will not be in keeping with the overriding objectives of the rules which are to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively. This matter was registered in 2018 and referral to oral evidence on the whole of the applicant's claim is likely to delay the finalisation of the matter.

Held: it is not the suspicion that some of the laws may have been contravened that should determine the referral to oral evidence, but the existence of factual disputes that cannot be resolved on the papers.

Held further: even if it can be accepted that there can be disputes of facts, it is only specified issues that can be referred to oral evidence, and the applicant failed to list specified issues and for the reason the applicant ought to fail.

The application is dismissed.

ORDER

1. The applicant's application to refer the matter to oral evidence is dismissed.
 2. Costs of this interlocutory shall be determined at a later stage, together with the merits of the application.
 3. The order of 17 October 2022 is varied in terms of rule 103, to read 'that the joinder application of Rainhoff Farming Company (Pty) Ltd and Wolffsgrund Farming CC is refused'.
 4. The matter is postponed to 28 September 2023 at 08:30 for a status hearing.
 5. The parties must file a joint status report on or before 25 September 2023.
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JUDGMENT

SIBEYA J:

Introduction

[1] This is a protracted review application where the applicant seeks to review and set aside certain decisions relating to the lease of some farms on the basis that the lease agreement concluded where the second respondent leased the said farms was unlawful. The review application is opposed.

[2] To say that this review application is protracted is an understatement. The review application was launched on 14 December 2018, and was served on the respondents in January 2019. On 17 May 2019, the applicant addressed a letter to the Registrar of this court for a managing judge to be assigned to the matter. On 16 August 2019, the applicant requested the Registrar for a case planning conference. On 10 September 2019, the applicant requested for directions in terms of rule 76(6). On 11 September 2019, the managing judge, Geier J, issued a notice of a status hearing in terms of rule 27(1). There were condonation applications which were heard for non-compliance with court orders. The applicant's condonation application was struck from the roll on 20 August 2020.

[3] The managing judge issued a rule 132 notice to inquire into the inactivity of the matter. After going back and forth in respect of the rule 132 proceedings, the court (as it was then constituted) on 19 August 2021, declined to strike the matter from the roll in terms of rule 132(10), and made an adverse order of costs against the applicant. Several postponements ensued, after which the matter was postponed to 9 March 2022 for a case management conference hearing. It was then assigned to me in order to manage it further.

The parties and representation

[4] The applicant is the Popular Democratic Movement (PDM), a political party, duly registered in terms of the electoral laws of the Republic of Namibia (the Republic), and presently the official opposition party in parliament, with its official address situated at 123 John Meinert Street, Windhoek-West, Windhoek. The applicant shall be referred to as such.

[5] The first respondent is the Minister of Land Reform, duly appointed as such in terms of the laws of the Republic. The Minister is also responsible for the administration of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act). The first respondent shall be referred to as 'the Minister'.

[6] The second respondent is Comsar Properties SA, a company incorporated under the laws of Switzerland, a foreign national, as defined in s 1 of the Act, whose chosen *domicilium citandi et executandi* is c/o Sisa Namandje & Company, situated in Windhoek. The second respondent shall be referred to as 'Comsar'.

[7] The third respondent is the Minister of Finance, duly appointed as such in terms of the laws of the Republic and cited herein in his capacity as the Minister responsible for Treasury in terms of s 19(1) of the State Finance Act 13 of 1991 (State Finance Act).

[8] The fourth respondent is the Prime Minister of the Republic of Namibia duly appointed as such in terms of the laws of the Republic and cited herein for the interest that she may have in the matter.

[9] The fifth respondent is the President of the Republic of Namibia duly elected in terms of the laws of the Republic and cited herein in his capacity as the chairperson of Cabinet and for any interest that he may have in the matter.

[10] The sixth respondent is the Attorney-General of Namibia (AG), duly appointed in terms of the laws of the Republic, and cited herein for the interest that he may have in the matter.

[11] The seventh respondent is the Registrar of Deeds (Registrar), duly appointed in terms of the s 2 of the Deeds Registries Act 47 of 1937.

[12] The eighth respondent is the Chairperson of the Central Procurement Board of Namibia (CPBN), a statutory body established in terms of s 8 of the Public Procurement Act 15 of 2015 (the PPA).

[13] The ninth respondent is the Government of the Republic of Namibia (the Government), the registered owner of and lessor of the farms in question in this matter.

[14] The address of service of the third to the ninth respondents is c/o the Office of the Government Attorney situated at Sanlam Building, Independence Avenue, Windhoek.

[15] The tenth and eleventh respondents are cited as Rainhoff Farming Company (Pty) Ltd and Wolffsgrund Farming CC respectively. They shall be referred to as such.

[16] No relief is sought against the Minister of Finance, the Prime Minister, the President, the AG, the Registrar, the Chairperson of the CPBN, and tenth and eleventh respondents, who are cited for any interest that they may have in the matter.

[17] The applicant is represented by Ms Campbell, while the Minister and the Government are represented by Mr Narib, and Comsar by Mr Maleka SC.

Relief sought

[18] In the main application the applicant seeks, *inter alia*, the following relief:

5.1 Reviewing and setting aside first respondent's written permission in terms of section 58(1)(b)(i) of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act) to second respondent to enter into a 99 year lease with the Government of Namibia in the respect of the farms referred to in the founding affidavit (the farms).

5.2 Reviewing and setting aside the decision by first respondent, or the Government of Namibia, or both, to lease the farms to second respondent for 99 years and setting aside the lease agreement annexed marked HV7 (the lease agreement) to the founding affidavit herein.

5.3 In the alternative to paragraphs 5.1 & 5.2 above:

5.3.1 Declaring that the scheme devised by first and second respondents through which the Government of Namibia became the registered- owner of the farms

by donation in order to lease it to second respondent for 99 year(s) is unlawful; and

5.3.2 Consequently, setting aside the lease agreement entered into by second respondent with the Government of Namibia in respect of the farms.

6 Evicting second respondent and everyone under its employ or authority from the farms.

7 First respondent be directed to allot the farms in terms of section 60 and in accordance with the provision of Part IV for the purposes of section 14(1).

8 Further and/or alternative relief.

9 Costs of suit.'

Background

[19] Subsequent to what appeared to be an interminable dispute among the parties, and after filing of pleadings, the applicant applied for referral of the matter to oral evidence. The application is opposed. The parties, thereafter, filed a joint case management report where they set out the issues among them.

[20] It is common cause among the parties that Comsar is a foreign national as defined in s 1 of the Act. Comsar acquired the entire membership interest in three farms: Farm Coas 501 (11,591,5576 hectares); Farm Otjimukona 352 (11,515,0861 hectares); and Portion A of Farm Hillside 115 (5765,0770 hectares) prior to the transactions relevant to this matter. The three farms were later consolidated into a single game farm referred to as Marula Game Ranch.

[21] During 2017, the tenth and eleventh respondents were the owners of Farm Rainhoff 123 measuring 5027,8594 hectares; Farm Kameelboom 119 measuring 5917,3812 hectares; Portion C of Farm Smaldeel 124 measuring 457,7248 hectares; and Farm Wolfsgrund measuring 5982,1345 hectares (the farms), all of which constituted agricultural land.

[22] During 2017, the tenth and eleventh respondents approached the Minister with an offer to purchase the farms at a rate of N\$12 000 per hectare. The Minister declined.

[23] On 28 November 2017, the tenth and eleventh respondents applied for waivers in terms of s 16 of the Act for Comsar to purchase and acquire ownership of the farms. The applications for waiver were submitted together with Comsar's proposal to donate N\$24 million to the Government to be expended as follows:

- a) N\$12 million to be paid to the Minister in order to purchase two farms for resettlement purposes;
- b) N\$1 million to be utilised by the Government to train the resettled in order to become productive farmers;
- c) N\$10 million to be contribution to the Namibian Premier Soccer League;
- d) N\$1 million to be utilised for the refurbishment or renovation of two primary schools, one in Kunene and the other in Kavango West Regions.

[24] On 17 April 2018, the Minister informed Comsar that its application was refused and advised Comsar to rather lease the farms from the tenth and eleventh respondents.

[25] On 27 April 2018, Comsar offered to purchase the farms and donate them to the Government, subject to a 99 year lease at a rate equivalent to the land taxes payable annually applicable to the said farms. This offer was accepted by Cabinet as it was found to be beneficial to Namibia. On 12 September 2018, the Minister indicated the Government's approval of the proposed sale, donation and lease agreement.

[26] The Minister did not apply the provisions of the PPA, according to him, the PPA found no application to the matter. The PPA was therefore not applied in approving and concluding the transactions.

[27] On 17 September 2018, the Deeds of sale, donation and the lease agreements (the transactions) were concluded between the concerned parties and these resulted in the notarial lease agreement.

[28] Comsar paid an amount of N\$43 million and N\$118 million directly to the tenth and eleventh respondents in terms of the Deeds of payments which required the payments to be made on transfer of title to the Government.

[29] On 18 September 2018, the purchase price and compensation were paid; the transfer of the title was effected in favour of the Government; the notarial lease agreement was registered and Comsar took occupation of the farms.

[30] At the time of the transactions, there was a moratorium on the issuing of investment certificates as contemplated in the Foreign Investments Act 27 of 1990, and therefore, no investment certificates were issued at the time of the transactions.

[31] After occupying the farms, Comsar made substantial improvements, investments and development on the farms, including on construction and infrastructure, purchase of game and establishment of an eco-friendly hotel and additional game lodges. It also employed several employees.

The claim and defences

[32] The applicant's claim, in the main, is for the notarial lease agreement to be set aside on the basis that it contravened relevant legislation, constituted a simulation, an attempt to avoid the applicable legislation, was unlawful and was concluded to achieve an unlawful purpose.

[33] The respondents oppose the application on the basis that its institution and prosecution were unduly delayed without a case made out for condonation. The respondents contend, on the merits, that the agreement was authorised, justified, lawful, and further that it complied with all the statutory requirements for its enforceability. The respondents contend further that even if the agreement is found

to be wanting, the court should not exercise its discretion in favour of the applicant due to impossibility, delay or prejudice and further due to the applicant's failure to join the tenth and eleventh respondents.

Facts in dispute in the main application

[34] The parties listed the following as constituting facts in dispute for determination:

1. Whether the farms were acquired from the proceeds of the acquisition of Land and Development Fund (the Fund) or paid by Comsar on behalf of the Government.
2. Whether the farms were acquired for purposes of land reform or for purposes of investment as contemplated in the legislation.
3. Whether, in consenting to the lease agreement or the transactions, the Minister was authorised to do so in terms of Section 58(1)(b)(i) of the Act.
4. Whether the nature and extent of beneficial effects or benefits to the Namibian people (if any) arising from the transactions, in any manner, justified the transactions.
5. Whether the transaction or any of its components was unlawfully agreed upon, implemented deliberately to circumvent the law, without proper authority, in conflict with the legislation, with an unlawful purpose and/or unreasonably and without rational connection to the purpose of the Act or the public purpose.
6. Whether the Minister conspired with all concerned to allow the transfer of the farms from the previous owners directly to the Government of Namibia, without the Government actually having paid the purchase price for the farms and so as to enable Comsar to acquire the rights of an owner (via a 99-year lease).

7. Whether, in effect, the Minister acquired the farms on behalf of Comsar, in contravention with s 59 of the Act.
8. Whether the transaction was *bona fide* approved by Treasury.
9. Whether, in any event, the lease (including the lease period and rent payable) is disturbingly inappropriate or not justified by any compelling reasons and/or did not arise from a discretion reasonably or fairly exercised by the Minister.
10. Whether the transactions were concluded as a result of undue influence, corruption or in circumstances which compromised public interest, public policy and sound governance.
11. Whether, having regard to all circumstances surrounding the transactions, the powers relied upon by the relevant Minister were, in any event, used to achieve an unlawful or unauthorised purpose.
12. Whether the tripartite agreement was motivated by good faith on the part of the parties, so as to ensure compliance (as opposed to avoidance) of the Act.
13. Whether the donation made to the Government in the amount of N\$24 million to fund the development of football and buy farms for settlement purposes was lawful and whether the fourth respondent (the Prime Minister) duly gave approval therefor in terms of the State Finance Act.
14. Whether the purchase price for the farms in fact amounted to N\$43 462 749,75 paid for by Comsar.
15. Whether the applicant knew about the transaction sought to be impugned by reason of the advertisement 'JCK8'.
16. The date and circumstances under which the applicant must first have become aware of the transactions sought to be impugned.

17. Whether, by 23 October 2018, the applicant had sufficient information to launch this application.
18. Whether the relief sought or the setting aside of the transactions would be seriously prejudicial to Comsar and other stakeholders, in the respects specified in paragraph 149 of Comsar's answering affidavit and whether, in any event, the setting aside of the lease or any other components to the tripartite agreement, would result in no public benefit, in circumstances which would justify the court exercising a discretion not to set them aside, on the basis that it would give rise to an unjust and inequitable result.
19. Whether the application could only be launched following the relevant Minister's media statement on 23 November 2018 and whether it would have been premature to have done so before then.
20. Whether the applicant unduly delayed pursuing the prosecution of this application with the necessary expedition, in circumstances which preclude the court from setting aside the agreements and/or justify a declaratory order to the effect that such order would not affect the rights of third parties not joined to these proceedings.
21. Whether the conduct of the tenth and eleventh respondents (as reflected herein) constituted a negligent misrepresentation regarding the true state of their affairs, which resulted in the applicant acting to its prejudice by not earlier seeking re-registration or joinder of these entities.
22. Whether Comsar commenced or continued with the development and associated costs, infrastructure and investments fully aware of the nature of this application and the risks and consequences of the relief being granted, with the result that Comsar cannot seek to rely upon those events to invite the Court to refuse the relief sought.

[35] On 12 May 2023, and in *tandem* with the parties' joint case management report referred to above, the court adjourned the proceedings to 14 August 2023 for an interlocutory hearing on the following issues:

- (a) the standing of the tenth and eleventh respondents; and
- (b) whether or not the matter must be referred for oral evidence to be led.

[36] The tenth and eleventh respondents were the sellers of the farms to the Government. The tenth and eleventh respondents were joined to these proceedings but it later turned out, and unbeknown to the court, that by the time that they were so joined, they had long been deregistered. It, therefore, became pivotal that the standing of the said respondents be revisited, hence the court invited the parties to address the standing of the said respondents. I shall revert to this aspect as the judgment unfolds.

Referral to oral evidence

The applicant

[37] The applicant pondered on the inherent jurisdiction that this court is clothed with in terms of Article 78(4) of the Constitution and further that rule 67 allows for cases to be referred to oral evidence by the court.

[38] The applicant submitted that the following issues require determination by oral evidence:

- (a) whether the transaction or any of its components were unlawfully agreed upon, implemented deliberately to circumvent the law, without proper authority, in conflict with s 58(1)(b)(i) of the Act, s 59 of the Act, upon bona fide approval by the Treasury, for land reform or for the purpose of investment, with an unlawful purpose and/or unreasonably and without rational connection to the purpose of the Act or the public purpose;

- (b) whether the Minister conspired with all concerned to allow the transfer of the farms from the previous owners directly to the Government of Namibia, without the Government actually having paid the purchase price for the farms, on the basis that such purchase price was in fact paid for by Comsar in the amount of N\$43 462 749,75, and so as to enable Comsar to acquire the rights of an owner (via a 99-year lease);
- (c) whether the transactions were concluded as a result of undue influence, corruption or in circumstances which compromised public interest, public policy and sound governance;
- (d) whether having regard to all the circumstances surrounding the transactions, the powers relied upon by the relevant Minister were, in any event, used to achieve an unlawful or unauthorised purpose.

[39] Stripped to the bare bones, the applicant's claim is that the Minister and the Government, in order to overcome the decision of Cabinet not to permit foreigners to acquire agricultural land, invented a plan to circumvent the provisions of the Act. The applicant contends further that the Minister conspired to allow for the transfer of the farms directly to the Government without the Government having paid the purchase price, and to ensure that Comsar obtains the right to lease the farms. Thus, contends the applicant, the Minister acted contrary to his public duty to act in the best interest of the public to make available agricultural land to Namibian citizens as provided for by the Act.

[40] Ms Campbell argued that the respondents achieved indirectly what could not be achieved directly as the Act prohibited the acquisition of agricultural land by a foreign national, making the lease agreement unlawful. She argued further that the transactions that led to Comsar obtaining the right to lease the farms smells of a rat and she invited the court to refer the matter to oral evidence. She argued further that the applicant only came to the realisation of the disputes of fact after the answering affidavits were filed. This matter, she argued further, raises an exception to the general rule applicable to referral for oral evidence.

[41] It was further argued by Ms Campbell that there is a dispute between the parties as to whether some of the facts were indeed disputed or not. She further argued that some of the facts are strictly within the knowledge of the respondents and could therefore not be directly contradicted by the applicant. Reference was made to *Oertel NO v Pieterse & Others*.¹

[42] The applicant contends further, in the written arguments, that the court should adopt the approach by Hugo J in *Fax Directories (Pty) Ltd v SA Fax Listings CC*² where it was found that even if a party fails to succeed in an application for referral for oral evidence, referral to oral evidence may still be made on crisp issues even in the absence of success.

The first respondent

[43] The Minister contends that rule 67, which regulates referral of matters to oral evidence pertains to specified issues of fact which are in dispute and which must be resolved through oral evidence. The Minister further contend that the applicant has not identified any specified issues of fact to be referred for oral evidence as required by the rule.

[44] The Minister further states that the rule requires that the application should be incapable of resolution on affidavit, a case which is not made out by the applicant.

[45] Mr Narib argued that rule 67 requires that the court must consider the order of referral to oral evidence to be a suitable order, with the view to ensure a just and expeditious decision. A case which is also not made out by the applicant, so he argued. He argued further that there is no sufficient cause to have any issue referred to oral evidence. Mr Narib argued further that not only are the issues to be referred to oral evidence not specified but the witnesses sought to be called are also not mentioned. Mr Narib further argued that referral to oral evidence must not be conflated with referral to trial, which is a completely different procedure, where the founding affidavit stands as particulars of claim, the answering affidavit as the plea

¹ *Oertel NO v Pieterse & Others* 1954 (3) SA 364 OPD.

² *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 D.

and the replying affidavit as a replication and the matter is then referred to a fully-fledged trial. He called for the dismissal of the application with costs.

Second respondent

[46] Comsar contends that the applicant initiated the review application when it was clearly or reasonably foreseeable that the allegations upon which it relies were likely to elicit disputes of fact. It is thus not surprising that, at present, the applicant contends that there are several factual disputes on the papers that require referral to oral evidence for determination.

[47] Mr Maleka argued that even if it is concluded that there are conceivably genuine disputes of fact which cannot be resolved on the papers because the disputes of fact now contended for were clearly or reasonably foreseeable, and the applicant cannot presently seek opportunistically to refer them to oral evidence more than four years after the institution of its application. He relied on passages by the Supreme Court in *Mahe Construction (Pty) Ltd v Seasonaire*³, and this court in *Nantinda and Another v Minister of Safety and Security and Others*⁴.

[48] Mr Maleka argued that the *Fax Directions* matter does not come to the aid of the applicant as that matter was concluded on the law and not facts. Mr Maleka argued further that the applicant does not set out the specified issues to be referred to oral evidence. To the contrary, the applicant is engaged in a fishing expedition when it had an option to institute the proceedings through action, so it was argued. When the court posed a question on the presence or otherwise of the public interest in this matter, Mr Maleka submitted that what is present is self-interest by the applicant, but even if public interest is said to exist, that does not assist the applicant. He concluded that the issues set out by the applicant, which it seeks referral to oral evidence, constitute legal conclusions to be interrogated through the trial not by referral to oral evidence.

Analysis

³ *Mahe Construction (Pty) Ltd v Seasonaire* 2002 (1) NR 398 (SC) at 408A-B.

⁴ *Nantinda and Another v Minister of Safety and Security and Others* 2022 (3) NR 883 (HC) paras 44 to 47.

[49] Rule 67, which regulates referral to oral evidence, provides that:

‘(1) Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may –

(a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or

(b) refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter.

(2) After hearing an application the court may make no order, except an order for costs, if any, but may grant leave to the applicant to renew the application on the same papers, supplemented by such further affidavits as the case may require or allow.’ (Emphasis added)

[50] The Supreme Court in *Konrad v Ndapanda*⁵ at paras 14, 16-17 and, remarked as follows regarding referral to trial and the consideration of rule 67:

‘[14] While it is within the discretion of the court a quo to have dismissed the application since it could not be decided on affidavit, it does not follow that the application will always be dismissed with costs in such a case. There may be circumstances that will persuade a court not to dismiss the application but to order the parties to trial together with a suitable order as to costs. Also, in a proper case and where the dispute between the parties can be determined speedily it might even be proper to invoke the provisions of the rules of court as to the hearing of oral evidence.

...

[16] The exercise of the court's discretion in rule 67 should be read with the overriding objective of the court rules to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable...

⁵ *Konrad v Ndapanda* 2019 (2) NR 301 (SC) paras 14 and 16-17.

[17] The appellant urges that the matter be remitted to the High Court with the direction for that court to refer the matter to oral evidence as contemplated under rule 67(1)(a) of the Rules of the High Court. I note, however, that rule 67 is couched in discretionary terms and avails wide discretion for the court to: dismiss an application, or make any other order the court considers suitable, or direct that oral evidence be heard on specified issues, or refer the matter to trial with appropriate direction as to pleadings, definition of the issues or any other relevant matter.'

[51] The parties were *ad idem* on the law.

[52] The applicant, in its written arguments, stated the following in paragraph 59:

'If the disputed facts fall within a narrow compass, the issues may be referred to oral evidence. In this instance the court must be satisfied that there is a reasonable prospect that the oral evidence will disturb the probabilities as they appear from the papers.⁶ The court specifies the issues to be dealt with and the parties are limited to such issues.'

[53] I accept the above passage as indicative of our legal position. I further accept that the passage cited from *Secfin Bank Ltd v Merchantile Bank Ltd & Others*,⁷ where it was stated that:

'In application proceedings oral evidence ... should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned. Further, in reaching a decision in this regard, facts peculiarly within the knowledge of a party which for that reason cannot be directly contradicted or refuted by the other party must be carefully scrutinized.'

[54] The difficulty with the applicant's application for referral to oral evidence is that it seeks to refer the following issues to oral evidence:

'1 whether the transaction or any of its components were unlawfully agreed upon, implemented deliberately to circumvent the law, without proper authority, in conflict with Section 58(1)(b)(i) of the Act, Section 59 of the Act, upon bona fide approval by the Treasury, for land reform or for purpose for investment, with an unlawful purpose and/or

⁶ Harms Superior Court Practice, para B6.50.

⁷ *Secfin Bank Ltd v Merchantile Bank Ltd & Others* 1993 (2) SA 34 (WLD) at 37E-F. *Gumede and Others v Minister of Law and Order* 1987 (3) SA 155 (D).

unreasonably and without rational connection to the purpose of the Act or the public purpose;

2 whether the Minister conspired with all concerned to allow the direct transfer of the farms from the previous owners directly to the Government of Namibia, without the Government actually having paid the purchase price for the farms, on the basis that such purchase price was in fact paid for by Comsar in the amount of N\$43 462 749.75, and so as to enable Comsar to acquire the rights of an owner (via a 99-year lease);

3 whether the transactions were concluded as a result of undue influence, corruption 39 or in circumstances which compromised public interest, public policy and sound governance;

4 whether having regard to all circumstances surrounding the transactions, the powers relied upon by the relevant Minister were, in any event, used to achieve an unlawful or unauthorised purpose.'

[55] I find that a closer look at the above issues sought to be referred to oral evidence reveal that the said issues are not specified as required by rule 67. To the contrary, they are overbroad to the extent that if granted, the hearing will be unlimited and be tantamount to a full blown trial.

[56] Vally J in the Gauteng Local Division of South Africa in *Moropa v Chemical Industries National Provident Fund*,⁸ while discussing an application to refer a matter to oral evidence, remarked as follows at para 13:

'An application to refer a matter to oral evidence must be timeously brought – an opponent should not be ambushed at the hearing as has occurred here. The application must be clear in its intent and focused on a real dispute of fact. Put differently, a matter should not be referred to oral evidence if no facts are to be elicited. The evidence to be presented must be clearly, concisely and unambiguously identified. To avoid entering the realms of trial, it should not be open-ended or overly wide. A referral to oral evidence is very different from a referral to trial. While the NBC motion asks for the former it is actually seeking more than that, something closer to a referral to trial. This is manifest in the marked difference between what the motion says and what the draft order contains.'

⁸ *Moropa v Chemical Industries National Provident Fund* [2020] 4 All SA 197 (GJ); 2021 (1) SA 499 (GJ) 31 July 2020 para 13.

[57] The issues sought to be referred to oral evidence, in my view, capture the applicant's claim, in whole. I find that the issue sought to be referred is that, the transactions were not carried out according to law as they were unlawfully carried out in order for Comsar, a foreign entity, to acquire agricultural commercial land. I, therefore, further find that the referral sought constitutes a referral for trial which is not what the applicant applies for.

[58] I find that the issues that the applicant seeks to refer to oral evidence constitute its whole claim without specified issues as required by rule 67. In my view, the application sought by the applicant is literally a referral of the matter for trial, which is distinct from an application for referral to oral evidence. In *casu*, not only did the applicant fail to identify specified issues for referral to oral evidence, but further failed to identify the witnesses required for referral to oral evidence.

[59] Faced with this dilemma, Ms Campbell, during arguments and only in reply, attempted to identify the witnesses sought to be required for referral to oral evidence. I am unable to attach weight to such a submission that only surfaced during arguments in reply when the other parties no longer had an opportunity to gainsay the said argument. I find that the status quo remains as it appears in the papers filed of record that the applicant failed to identify the witnesses sought to be called. Paragraph 80 of the applicant's heads of argument cited below, cements the broadness of the applicant's application as it provides that:

'In view of the foregoing, we submit that an Order should be made for the abovementioned issues to be referred to oral evidence and for the various deponents to affidavits filed of record, to be available to be cross-examined.'

[60] I further find that referral to oral evidence on such wide issues and not specified facts should not be allowed. Thus, there exists a difficulty to identify the witnesses to be called to testify; the scope of the discovery to be made; the scope of witness statements to be recorded, etc. I further find that this application by the applicant will not be in keeping with the overriding objectives of the rules, which are to facilitate the resolution of the real issues in dispute justly and speedily, efficiently

and cost effectively.⁹ This matter was registered in 2018 as alluded to above, and referral to oral evidence on the whole of the applicant's claim is likely to delay the finalisation of the matter.

[61] The *Fax Directories (supra)* matter offers no assistance to the applicant. IN that matter, Hugo J remarked as follows at p 167I-168A:

'There are, it seems to me, cases where the legal issues are so crisp and so far removed from the conflict of fact that it would be fair to both parties to allow argument thereon *in initio*. If the applicant loses the legal battle he should not then be penalised for having tried to save the costs involved in hearing *viva voce* evidence. (Provided of course that his actions were *bona fide* and well considered and not merely frivolous.)

In my view this is a case in which counsel was justified in arguing the legal point *in initio* and making his application for reference to evidence dependent upon my not finding in his favour.'

[62] The nature of the applicant's case and the above decision of *Fax Directories* are poles apart. In *casu*, the applicant seeks a referral of issues of fact to oral evidence that are overbroad, and not crisp legal issues as was laid down in *Fax Directories*.

[63] As I draw the issue of referral to oral evidence to the finishing line, it should be apparent that it is not the suspicion that some of the laws may have been contravened that should determine the referral to oral evidence. It is the existence of factual disputes that cannot be resolved on the papers. In *casu*, even if it can be accepted that there can be such disputes of fact, it is only specified issues that can be referred to oral evidence as opposed to *carte blanche* overbroad issues. The applicant failed to list specified issues and for the reason the application ought to fail.

Tenth and eleventh respondents

[64] It is common cause between the parties that by the time that the main application was launched on 14 December 2018, and when service was effected on

⁹ Rule 1(3) of the rules of court.

the other respondents in January 2019, the tenth and eleventh respondents (the sellers) were not cited in the application. The tenth and eleventh respondents were deregistered on 16 March 2020 and 2 October 2020 respectively.

[65] Comsar, in its answering affidavit filed on 30 September 2020, raised a point *in limine* of non-joinder of the sellers. The members of the tenth and eleventh respondents filed affidavits to confirm the sale of the farms and to support Comsar's opposition to the relief sought. The applicant, on 22 September 2022, applied for the joinder of the tenth and eleventh respondents.

[66] The tenth and eleventh respondents, who were represented by legal practitioners, Mr Kavendjii, Mr Heathcote SC and Mr Diedericks, raised no objection to the joinder sought. The joinder order, which remains in force, was granted on 17 October 2022. It was, however, explained by the previous members of the tenth and eleventh respondents that the said legal representatives were unaware of the fact that the concerned respondents were deregistered at the time of the joinder application and they tendered apologies for inconveniences caused.

[67] It is not explained why the member of the tenth respondent withheld the deregistration of the tenth respondent from the court when they deposed to the affidavits on 30 September 2020, as by then the tenth respondent was long deregistered on 16 March 2020. It is further astounding that during September and October 2022, the members of the tenth and the eleventh respondents, despite been deregistered two years prior, failed to alert the court of such deregistration but opted rather to just not oppose the joinder application. This created an impression that the tenth and eleventh respondents, were still legal persons duly registered and thus capable of suing and being sued.

[68] The applicant argued that the interest of the tenth and eleventh respondents would not be affected by the relief sought in the review application.

[69] The applicant further contends that the non-joinder was raised by the Comsar which led to the applicant joining the said respondents.

[70] The applicant further contends the indisputable facts reveal that the tenth respondent and the members of the eleventh respondent were fully aware of the review application by 30 September 2020 (when they made supporting affidavits in answer to the application) and that, despite such knowledge they failed to inform the applicant that by 10 July 2019, they had applied for the entities to be deregistered. They further failed to inform the applicant that from 10 July 2019 onwards, they continued to submit documents to BIPA in support of such deregistration. They further failed to inform the applicant that the tenth respondent was deregistered on 16 March 2020.

[71] The applicant submitted that if it is found that it is not necessary to join the tenth and eleventh respondents, then the main application should be heard on the remaining issues. Ms Campbell argued that if it is found that it is necessary for the tenth and the eleventh respondents to be joined, then the applicant should be granted leave of 30 days of the order to apply for the re-registration of the tenth and eleventh respondents.

[72] Comsar maintains that the tenth and eleventh respondents should initially have been joined to the proceedings, as they undoubtedly had a direct and substantial interest in the relief sought. Mr Maleka, however, argued that since the tenth and eleventh respondents were no longer registered entities at the time of their joinder, it follows that the said joinder is invalid and is of no effect, and their citation should be regarded as *pro-non scripto*. Mr Maleka argued further that the court needs to determine, at the hearing of the review application, the effect of the applicant's failure to join the tenth and eleventh respondents at the time of launching the main application.

[73] It is apparent to the parties that the issue of non-joinder of the tenth and the eleventh respondents at the institution of the review application is far from being resolved. This, I make with particular reference to the applicant's contention that the said respondents have no sufficient interest in the outcome of the proceedings, and will not be prejudicially affected by the judgment of the court. It is the applicant's contention that two transactions occurred: firstly, the farms were acquired and secondly, the farms were leased to Comsar. The applicant contends that they are

only concerned with the lease of the farms to Comsar which they state that once the lease is set aside, then the Minister must allot the farms in terms of s 60 of the Act. Comsar's view is a different kettle of fish.

[74] In a passage cited by the applicant, the Supreme Court in *Council of the Itireleng Village Community and Another v Madi and Others*¹⁰ at para 30 laid bare the principle applicable to legal standing where it remarked as follows:

'As has been made clear by the South African Supreme Court of Appeal, the question of legal standing is in a sense procedural, but it also bears on substance. It concerns the sufficiency and directness of interest in the proceedings which warrants a party's title to prosecute a claim. The onus is upon a party instituting proceedings to establish legal standing. This not only concerns the establishing sufficiency and directness of interest but also that it is the rights-bearing entity or acting on the authority of that entity or has acquired rights.'

[75] I find, however, that despite the tempting invitation to enter the amphitheater in order to determine whether it was necessary to join the tenth and eleventh respondents in the main application and the consequences thereof, I decline the invitation as I consider it premature. This issue, in my view, is not ripe for determination at this stage of the proceedings. I, therefore, refrain from pronouncing myself on the contention and effect of non-joinder of the tenth and eleventh respondents at this stage.

[76] What then remains of the status of the tenth and eleventh respondents? It is a fact that the said respondents are non-existent. They are, therefore, not persons capable of suing and being sued.

[77] When the court granted the joinder of the tenth and eleventh respondents on 17 October 2022, the order was made against the backdrop of the consent of the said respondents. It was, therefore, ordered under the mistaken view that the tenth and eleventh respondents were duly registered entities and thus properly juristic

¹⁰ *Council of the Itireleng Village Community and Another v Madi and Others* 2017 (4) NR 1127 (SC) para 30. See also: *Trustco Ltd and Another v Deeds Registries Regulation Board & Others* 2011 (2) NR 726 (SC) para 16; *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC).

persons at that time. As it has become apparent, this is a mistake that is common to all the parties.

[78] Rule 103 of the rules of this court provides that:

‘(1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

- (a) erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) in respect of interest or costs granted without being argued;
- (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or
- (d) an order granted as a result of a mistake common to the parties.

(2) A party who intends to apply for relief under this rule may make application therefor on notice to all parties whose interests may be affected by the rescission or variation sought and rule 65 does, with necessary modifications required by the context, apply to an application brought under this rule.

(3) The court may not make an order rescinding or varying an order or judgment unless it is satisfied that all parties whose interests may be affected have notice of the proposed order. ‘

[79] The joint case management report filed by the parties proposes that if the court finds that the tenth and eleventh respondents should have been joined, then the applicant be granted leave to apply for re-registration of the said respondents and the respondents be granted leave to apply to set aside the joinder in terms of rule 103. It follows that, not only is it known to the parties that the joinder order was granted as a result of a mistake common to them, but the parties are also aware of a proposal to vary the joinder order in terms of rule 103.

[80] Considering that the joinder order of 17 October 2022, was made out of a mistake common to the parties as aforesaid, the said order will be varied *mero motu* and in terms of rule 103, to read that the joinder application of Rainhoff Farming Company (Pty) Ltd and Wolffsgrund Farming CC is refused and they are thus not joined to the application.

[81] The only other issue on the joinder that I deem necessary to comment on is the request by the applicant to grant it 30 days leave to apply for the re-registration of the tenth and eleventh respondents. I find that it is not the business of the court to determine how a party is to prosecute its case in our adversarial system. I further find that whether or not the applicant finds it fit to apply for the re-registration of the tenth and eleventh respondents, is a call that it must make, probably upon being duly advised by counsel. Therefore, save to state that in line with my refusal to determine the necessity or otherwise of joining the tenth and eleventh respondents, I grant no leave to either party for re-registration of the said respondents on the papers as they presently stand. If any of the parties require re-registration of the said respondents, such party will know what to do. I say no further on this subject.

Conclusion

[82] In view of the findings and conclusions reached above, I find that the applicant's application for referral to oral evidence is overbroad, unspecified and, resultantly, it is destined to fail. In the same vein I hold that the said application will be dismissed.

Costs

[83] Ordinarily costs follow the result. In the present matter, however, the applicant contends that it acts in the public interest to ensure that public officials act according to law for the benefit of the Namibian people. Amongst the relief sought by the applicant is for the court to review and set aside the lease agreement and for the Minister to be directed to allot the farms in terms of s 60 of the Act and Part IV of the Act.

[84] I hold a *prima facie* view that this matter attracted public interest. This finding is supported by the notorious fact that time and again, the Minister issued press releases explaining the relevant transactions to the Namibian people and

furthermore this matter has enjoyed wide media coverage. I thus hold the view that in deciding whether or not to mulct the applicant with a costs order should not be limited to what transpired in this interlocutory application as the determination of the merits of the main application may also have an effect on the costs. In the premises and in the exercise of my discretion, I opine that it will meet the justice of this case to stay the determination of costs to a later stage when the merits of the main application will be canvassed, which I hereby do.

Order

[85] For the above reasons, it is ordered that:

- 1 The applicant's application to refer the matter to oral evidence is dismissed.
- 2 Costs of this interlocutory shall be determined at a later stage, together with the merits of the application.
- 3 The order of 17 October 2022 is varied in terms of rule 103, to read 'that the joinder application of Rainhoff Farming Company (Pty) Ltd and Wolffsgrund Farming CC is refused'.
- 4 The matter is postponed to 28 September 2023 at 08:30 for a status hearing.
- 5 The parties must file a joint status report on or before 25 September 2023.

OS SIBEYA
Judge

APPEARANCES

APPLICANT:

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Instructed by Angula Co,
Windhoek

FIRST AND NINTH RESPONDENTS:

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Assisted by E Shifotoka
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SECOND RESPONDENT:

V Maleka, SC
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