REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 25/2016

In the matter between:

BONNY HAUFIKU **APPLICANT**

and

JOSUA SHINUNA KAUKUNGWA **FIRST RESPONDENT**
JOHANNES MOSHANA **SECOND RESPONDENT**
THE OHANGWENA COMMUNAL LAND BOARD **THIRD RESPONDENT**
THE OUKWANYAMA TRADITIONAL AUTHORITY **FOURTH RESPONDENT**

Neutral citation: *Haufiku v Kaukungwa* (A 25/2016) [2017] NAHCMD 64 (9 March 2017)

Coram: PARKER AJ
Heard: **14 – 15 February 2017**
Delivered: **9 March 2017**

Flynote: Practice – Applications and motions – Application for rescission of judgment by default – Requirements of application – Reasonable explanation for default, that application bona fide and there is bona fide defence – Applicant need not set out merits fully – Sufficient to make out a prima facie case – Principles in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC) applied.

Summary: Applications and motions – Application for rescission of judgment by default – Requirements of application – Reasonable explanation for default, that application bona fide and there is bona fide defence – Applicant need not set out merits fully – Sufficient to make out a prima facie case – Delay in instituting rescission application – Court satisfied with explanation for delay – Court found applicant made out prima facie case that applicant has prima facie defence – Applicant had by an appeal pursued internal statutory domestic remedies prescribed by the Communal Land Reform Act 5 of 2002, s 39 – Appeal pending when first respondent instituted eviction application – In the circumstances Permanent Secretary: Ministry of Land Reform should be afforded the opportunity to act in terms of s 39 of Act 5 of 2002 – Applicant had complied substantively with requirements prescribed by Regulations in terms of the Communal Land Reform Act (GN 120 of 16 June 2003), as amended – Court found on the papers applicant has made out a prima facie defence to make out a prima facie case – Consequently, rescission application granted – Court ordered Permanent Secretary to act on applicant's appeal in terms of Act 5 of 2002, s 39.

Flynote: Practice – Applications and motions – Interlocutory application – Compliance with rule 32(9) and (10) of the rules of court peremptory – Preliminary objection based on failure to comply with rule 32(9) and (10) – It is fair to raise such preliminary point in the answering affidavit in order to give the applicant an opportunity to reply to it in the replying affidavit or court's attention should be drawn to it when set down hearing date is sought and before it is granted – It is different when case plan or other judicial case management report indicates interlocutory application will be instituted and such application is instituted without compliance with rule 32(9) and (10) of the rules – Court held that rule 32(9) and (10) should not be used furtively by one party against the other in a manner that encourages ambushes in judicial proceedings – Court held further that the rule should not be prostituted in a manner that renders the rule an instrument of gaining unfair advantage, rather than an instrument of attaining justice, fairness and expedition in judicial proceedings.

Summary: Practice – Applications and motions – Interlocutory application – Compliance with rule 32(9) and (10) peremptory – Preliminary objection based on failure to comply with rule 32(9) and (10) – It is fair to raise such preliminary point in the answering affidavit in order to give the applicant an opportunity to reply to it in the replying affidavit or court's attention should be drawn to it when set down hearing date is sought and before it is granted – It is different when case plan or other judicial case management report indicates interlocutory application will be instituted and such application is instituted without compliance with rule 32(9) and (10) of the rules – Court held that rule 32(9) and (10) should not be used furtively by one party against the other in a manner that encourages ambushes in judicial proceedings – Court held further that the rule should not be prostituted in a manner that renders the rule an instrument of gaining unfair advantage, rather than an instrument of attaining justice, fairness and expedition in judicial proceedings – In instant case point *in limine* on rule 32(9) and (10) raised in first respondent's counsel's heads of argument – Court remarked that such approach ambushes not only the court but also the other party and it should not be encouraged – Court found that in the circumstances the preponderance of the reasoning and conclusions made leading to the court's decision on the application is affected by the rule 32(9) and (10) preliminary objection which court rejected.

ORDER

(a) The applicant's failure to institute the application within 20 days after he had knowledge of the judgment by default of 20 May 2016 is condoned.

(b) The said judgment by default is hereby rescinded and set aside.

(c) The Permanent Secretary of the Ministry of Land Reform is ordered to act in terms of s 39 of the Communal Land Reform Act 5 of 2002 not later than 23 March 2017 on the letter of Mr Bonny Haufiku, dated 4 February 2014.

(d) The legal representatives of the applicant Haufiku on record are authorized to serve this order on the Permanent Secretary of the Ministry of Land Reform and on the second, third and fourth respondents.

(e) There is no order as to costs; the parties are to pay their own costs.

JUDGMENT

PARKER AJ:

[1] This is an application to rescind judgment by default. The case started its life as an urgent application for interim relief pending the finalization of the present application for rescission of judgment by default which Kaukungwa (as applicant) obtained in the Motion Court on 20 May 2016. As is now commonplace in the practice of the court, the interim relief was set out in Part A of the notice of motion and the rescission application in Part B of the notice of motion. When the matter came up in the court on 23 September 2016, by agreement between the parties, Part A was not pursued on the understanding that the judgment by default would not then be executed; and so what is before the court now is the rescission application.

[2] 'The cause célebré, stated Chomba AJA in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC), para 19, 'which has been cited by both sides in this appeal and which encapsulates the three considerations set out in the preceeding paragraph is *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O). Chomba AJA continued:

> 'The following are the benchmarks which that case sets out, viz:
>
> "(1) He must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance.

(2) His application for rescission must be bona fide and not made with the intention of merely delaying the plaintiff's claim.

(3) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he make out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour." '

[3] I shall now proceed to consider the 'benchmarks' or requisites in the light of the facts of the instant case.

Reasonable explanation of default

[4] In considering Haufiku's explanation of the default I should have recourse to the following factual findings: they are crucial factors which I should not overlook in doing justice to the parties. First, Kaukungwa knew that Haufiku was serving in Namibia's foreign mission in Finland and yet court process was served on Haufiku's daughter in Windhoek. Kaukungwa does not explain why his legal representatives could not have served process on Haufiku in Finland which the rules of court allow.

[5] On 30 April 2014 Kaukungwa filed an eviction application under Case No. A 102/2014. On 3 February 2016, after a period of some two years, Kaukungwa filed a second – I use 'second' advisedly – eviction application under Case No. A 25/2016. Significantly, the first application and the second application are based on the same cause of action and he seeks the same relief in both applications.

[6] Kaukungwa withdrew the A 102/2014 application on 15 February 2016 after that application had been on the court's roll for almost two years, as aforesaid. Before withdrawing the A 102/2014 application, on 3 February 2016 Kaukungwa had already filed the A 25/2016 application, as I have mentioned. The upshot of this is that before filing the withdrawal notice in respect of the A 102/2014 application, there stood on the court's roll two applications by Kaukungwa on the same cause of action and for substantially the same, relief.

[7] These findings and conclusions should count as weighty factors in considering the present rescission application particularly with regard to Haufiku's averment in the present application that he understood that when his legal representatives informed him that Kaukungwa had withdrawn the application the legal representatives were referring to the second application. And who can fault him. X is overseas. Y files an eviction application against X with X as the respondent. Some two years later while that eviction application stood on the court's roll waiting for Y's replying affidavit, Y files a second eviction application on the same cause of action and seeking the same relief against X as the relief in the first application. X's legal practitioners inform X that the application has been withdrawn. It is possibly true that Haufiku believed it was the second application that had been withdrawn. Is the belief unreasonable in the circumstances? I do not think so. In this regard it must be remembered, as Ms Bassingthwaighte, counsel for Haufiku, reminded the court, while Haufiku was awaiting Kaukungwa's replying affidavit to allegations Haufiku had set up in answer to Kaukungwa's founding affidavit, Kaukungwa does not so reply but files the second application.

[8] But then Mr Tjombe, counsel for Kaukungwa, says since Haufiku received the second application he knew that A 25/2016 was a new case. Mr Tjombe overlooks this critical fact: Haufiku received process on A 25/2016 by e-mail from his daughter on 10 February 2016. But the first application A 102/2014 was withdrawn five days after 10 February; and so, it is reasonable to say that on 10 February 2016, Haufiku had two applications served on him on the same cause of action and seeking the same relief and when his legal representatives informed him that the application had been withdrawn. How would any reasonable person surmise that he knew that it was the first application which had been withdrawn?

[9] I accept Ms Bassingthwaighte's submission that Haufiku was confused. Kaukungwa's conduct would confuse any reasonable person who is not schooled in the law and is not familiar with the rules of court. Mr Tjombe says Haufiku could not have been confused. But that is not the issue. The question is this. Would a reasonable person conclude that on the facts and in the circumstances Haufiku's

understanding that it was the second application that Kaukungwa withdrew to be unreasonable? I do not think so.

[10] It was 'early June 2016' that Haufiku's brother informed him of the judgment by default. On the conspectus of the facts which I accept, I am satisfied that Haufiku did all that he could through his legal representatives to upset the judgment by default. In the comfortable atmosphere of court proceedings, it is always easy to say with hind sight: when Haufiku was in Namibia for official duties he should have done this and that; he should have applied for leave in order to attend to his private business; he should have contacted his legal representatives after the daily meetings. But Haufiku has explained that he was instructed by his principals not to make any private appointments; furthermore, that he had to attend to official duties, which, in the first place, brought him to Namibia, from morning until late at night.

[11] Furthermore Haufiku has explained how he made efforts between his erstwhile legal practitioners and his present legal practitioners and the efforts made by the new legal practitioners at the registrar's office to obtain the file. He has mentioned names of officials at the registrar's offices; not nameless officials. He gives 1st September 2016 as the date on which his new legal representatives obtained 'the court file'.

[12] In virtue of all this, I am not prepared to fault Mr Haufiku on that score. Can it be said that the default was wilful? I do not find Mr Haufiku's default to be wilful or due to gross negligence or to any degree of negligence.

Has Haufiku a bona fide defence

[13] Bona fide defence does not mean spotless defence, but a defence that is genuine not whimsical; a defence that is good in the sense that it would prove Haufiku's case if accepted by the court in due course. It must be remembered: all that Haufiku is required to do is to make out a prima facie defence. (*Minister of Home Affairs, Minister Ekandjo v Van der Berg*) Haufiku's defence is essentially this. Kaukungwa obtained the certificate of registration of recognition of existing customary land rights fraudulently and therefore he did not have an existing

customary land right in respect of that part of the land in respect of which the impugned certificate was granted.

[14] In fact these allegations were made in Haufiku's answering affidavit in the A 102/2014 application. And instead of replying to them in a replying affidavit, Kaukungwa decided to file the A 25/2016 application and thereafter withdraw the A 102/2014 application.

[15] In my opinion those allegations are good and they would establish Haufiku's case if a court accepted them in due course. Haufiku has made out a prima facie defence (see *Van der Berg*). This conclusion brings me to the next level of the enquiry. It is Kaukungwa's averment – articulated by Mr Tjombe in his submission – that the certificate issued to Kaukungwa constitutes a valid administrative action, and it remain valid unless set aside by a competent court. In this regard, it should be remembered; judicial review of administrative action is not the only remedy in law to attack an unlawful and invalid administrative action. In our law there are also statutory domestic remedies. See *Namibia Competition Commission v Wal-Mart Stores* 2012 (1) NR 69 (SC); Lawrence Baxter, *Administrative Law* (1984).

[16] In terms of s 39(1) of the Communal Land Reform Act 5 of 2002 ('the Act') 'a person aggrieved by a decision of a Chief or a Traditional Authority or any board (Communal Land Board) may appeal in the prescribed manner against that decision to an appeal tribunal'. Section 39 sets out an appeal procedure that in my opinion meets 'the *Wal-Mart Stores* requisites' and 'the *Baxter* requisites' (see *Four Three Five Development Company (Pty) Ltd v Namibia Airports Company* (HC-MD-CIV-MOT-REV-2016/00208) [2017] NAHCMD 23 (2 February 2017); and so, the law expected Haufiku to exhaust the internal statutory remedies provided by s 39 of the Act before approaching the court for relief. And that is what Haufiku did in his letter dated 4 April 2014 to the Permanent Secretary: Lands and Resettlement' (now Land Reform).

[17] Accordingly, I respectfully reject Mr Tjombe's submission that Haufiku was told in June 2014, or thereabouts, that if he challenged the validity of the decision by the relevant Communal Land Board to issue the certificate to Kaukungwa he should

institute judicial review proceedings and that Haufiku has done nothing of the sort for three years. That cannot be correct. Haufiku pursued internal statutory domestic remedies in April 2014. He challenged the decision of the Ohangwena Communal Land Board dated 05/06/2012 for awarding customary land rights to Mr Joshua Shimuna Kaukungwa Certificate No: OHLB-007781 and to Mr Gotlieb Immanuel Maxuilili Kaukungwa 65072210022 Certificate No: OHCLB 007782.

[18] But then Mr Tjombe says the letter cannot constitute an appeal within the meaning of s 39 of the Act. I disagree. As I said in *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC), para 8, 'if in a statute a word or a phrase has not been defined, such word or phrase should as a rule be understood in its ordinary sense'. In its ordinary sense 'appeal' is understood to mean make 'a formal request' (*the Concise Oxford Dictionary*, 10th ed).

[19] The only qualification under the Act is that the formal request, ie the appeal, should be made in the prescribed manner. The prescribed manner is contained in reg 25 of the Regulations in Terms of the Communal Land Reform Act GN 37 of 1 March 2003, as amended. I find that Haufiku's letter satisfies all the requirements under reg 25(3). The only requirement Haufiku did not satisfy is regulation 25(4) because it is not shown that the prescribed fee accompanied the letter. But that is something which the Permanent Secretary in exercise of her discretion and acting fairly and reasonably could have drawn Mr Haufiku's attention to when she received the letter. See *Viljoen v Chairperson of the Immigration Selection Board* (A 149/2015) [2017] NAHCMD 13 (26 January 2017). But, of course, because the Permanent Secretary unjustifiably misunderstood the nature and object of Haufiku's letter that it was an appeal and therefore s 39 applied, the Permanent Secretary did not do that which reg 25(2) enjoined her to do: she did not bring her mind to bear on the question at hand. She wrongly took the route laid down by s 37. If the Permanent Secretary had read s 37 intertextually with s 35, as she was obliged to do, when interpreting and applying provisions of the Act, it would have been clear to her that the letter was not talking about dispute over conflicting claims 'to existing rights'. Haufiku's appeal challenged the lawfulness and validity of the certificates granted by the Ohangwena Communal Land Board on the grounds contained in the letter.

[20] Be that as it may, the fact that the Permanent Secretary without justification misunderstood the nature and object of Haufiku's letter cannot detract from the finding I have made that Haufiku pursued internal statutory domestic remedies as he was entitled to do and was expected to do by the law in terms of s 39 of the Act. Haufiku's appeal is in writing and he set out particulars of the decision appealed from and the grounds of appeal, as required by reg 25(3) of the Regulations.

[21] In short, since April 2014 an appeal tribunal has not been given the opportunity to carry out its statutory functions; and in virtue of the grounds set out in the letter, I have good reason to hold that if the grounds are established an appeal tribunal may find for Haufiku and set aside the impugned certificates. Haufiku has therefore established a prima facie defence.

[22] It is with firm confidence that I say that the door to doing justice between the parties can only be unlocked if the Permanent Secretary is allowed to perform his or her statutory duty under s 39 of the Act in respect of Haufiku's letter. I find that any delay that has occurred will not result in failure of justice. (See *Van der Berg*, para 53.) I respectfully adopt for this case the dictum of Chomba AJA in *Van der Berg*, para 54:

> '[54] I do appreciate that courts have coercive power to penalise litigants who fail to comply with rules of procedure in litigation. Since, however, the ultimate, constitutional and fundamental duty of courts is to do justice, it is justice which must prevail. Indeed rules were made in order to be obeyed and to be disobeyed at a penalty. I, however, do not believe that justice must, per force, be sacrificed in the promotion of obedience to rules. Moreover, courts do nonetheless have what I will call compensatory power to assuage any inconvenience which may have been caused to a party who is a victim of certain breaches of procedural rules. Courts can condemn the guilty party in all costs arising from his or her breaches.'

[23] For the foregoing reasons, I think the applicant Haufiku has made out a case for the relief sought in this application.

[24] The prepondence of the foregoing reasoning and conclusions are unaffected by Mr Tjombe's argument on rule 32(9) and (10) of the rules, on the preliminary point he raised in his heads of argument. To start with the point *in limine* was raised in the heads of argument not in the pleadings and no foundation for it had been laid for it in the pleadings. The upshot is that Mr Tjombe ambushed not only the other side, but also the court. Such approach should never be encouraged by the court. It is always fair to raise such preliminary point in the founding affidavit in order to give the applicant an opportunity to reply to it in the replying affidavit. This is not a case where it is indicated in the Case Plan or other judicial case management report that an interlocutory application will be instituted and the applicant institutes the interlocutory application without complying with rule 32(9) and (10). (*Mukata v Appolus* 2015 (3) NR 695 (HC))

[25] The object of rule 32(9) and (10) should not be seen as a weapon to be used furtively by one party against the other in a manner that encourages ambushes in judicial proceedings. In short, the efficacy of the rule should not be prostituted in a manner that renders the rule an instrument of gaining unfair advantage, rather than an instrument of attaining justice, fairness and expedition in judicial proceedings. Accordingly, I accept Ms Bassingthwaighte's submission on the point.

[26] In the instant case, the preliminary objection was not set out or intimated in the papers; and what is more, the legal representatives of Kaukungwa did not draw the attention of the court to the fact that rule 32(9) and (10) had not been complied with when the hearing date was sought and obtained. I would not have set down the matter for hearing if first respondent Kaukungwa's legal representatives had brought the failure to my attention. They did not: they waited to pounce on Haufiku's legal representatives with the failure in their heads of argument.

[27] For these reasons, with respect, the point *in limine* has no merit; and it is rejected. But that is not the end of the matter. Haufiku has not explained why he did not follow up the appeal he had lodged with the Permanent Secretary in April 2014. If he had done so, probably this court might have been spared the burden of having to consider the application which was instituted after the April 2014 appeal. I have mentioned Haufiku's inaction to make the point that this is a good case where the

court ‘can condemn the guilty party in all costs arising from’ such unexplained inactivity. (See *Van der Berg*, para 54.) It follows that, although Haufiku has been successful, costs should not follow the event.

[28] In the result I make the following order:

(a) The applicant’s failure to institute the application within 20 days after he had knowledge of the judgment by default of 20 May 2016 is condoned.

(b) The said judgment by default is hereby rescinded and set aside.

(c) The Permanent Secretary of the Ministry of Land Reform is ordered to act in terms of s 39 of the Communal Land Reform Act 5 of 2002 not later than 23 March 2017 on the letter of Mr Bonny Haufiku, dated 4 February 2014.

(d) The legal representatives of the applicant Haufiku on record are authorized to serve this order on the Permanent Secretary of the Ministry of Land Reform and on the second, third and fourth respondents.

(e) There is no order as to costs; the parties are to pay their own costs.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	N Bassingthwaighte Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
FIRST RESPONDENT:	N Tjombe Of Tjombe-Elago Inc., Windhoek
THIRD AND FOURTH RESPONDENTS:	S T M Kahengombe Of Government Attorney, Windhoek