'Reportable'

SUMMARY

CASE NO.: A 287/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANDREAS VAATZ v THE MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK

PARKER J

2011 June 22

Practice - *Locus standi in judicio* – Relying on the rule in *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) 294 (AD), Court finding that applicant has not established his standing in seeking an order on behalf of all residents and businesses in all municipalities (bar Gloudina Street in the Windhoek Municipality) against all the Municipal Councils for those municipalities and also for all residents and businesses on Uhland Street, Windhoek.

Practice - The Court – Powers of – Declaration of rights – In terms of s. 16 of Act 16 of 1990 – Court accepting that declaratory order may be sought instead of reviewing the already completed act following the procedure set out in rule 53 of the Rules of Court – Court finding that *in casu* applicant has neither

brought review application in terms of rule 53 of the Rules nor does he seek a declaratory order in terms s. 16 of Act 16 of 1990 – Consequently, Court holding that the Court has no power to order the administrative body not to carry out its functions and perform its duties under an applicable statute – Additionally, Court holding that the Court has no power to prescribe to the administrative body (the Windhoek Municipal Council) the manner in which it should exercise a discretionary power given to it by Act No. 23 of 1992 – Consequently Court dismissing application with costs.

Costs - On a scale as between attorney (legal practitioner) and client – When appropriate – Court finding that in bringing the application applicant has acted frivolously and vexatiously and with malice – Consequently, Court exercising its discretion and granting costs on the scale as between attorney (legal practitioner) and client.

Held, that declaration is discretionary remedy; and the Court may refuse it if it thinks fit, for example, if persons who are directly interested in the proceedings and who are to carry out the order are not joined as parties.

Held, further that an applicant may seek a declaratory order instead of reviewing the already completed act following the procedure set out in rule 53 of the Rules of Court.

CASE NO.: A 287/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANDREAS VAATZ **Applicant**

and

THE MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK **Respondent**

CORAM: **PARKER, J**
Heard on: 2011 May 23
Delivered on: 2011 June 22

JUDGMENT

PARKER J

[1] The genesis of this matter lies in an urgent application brought by the applicant for relief set out in the notice of motion. It is common cause between the parties that the relief for an interim interdict contained in the chapeau of para 2 of the notice of motion has fallen away. It would seem also that the relief sought in prayer 1, too, has fallen away. The burden of this Court in these proceedings is, therefore, to determine the relief sought in paras 2.1, 2.2 and 2.3 in the notice of motion. Ms Bassingthwaighte represents the applicant, and Mr Marcus the respondent.

[2] I now proceed to consider prayer 2.2 of the notice of motion first in which the applicant says he seeks a declaratory order in terms formulated in that prayer. As I see it, the question that immediately arises for determination is the standing of the applicant, who lives at one location on one street, being 7 Gloudina Street in Windhoek, to seek a declaratory order against all the Municipal Councils in Namibia (bar the Windhoek Municipal Council (the respondent)) on behalf of the 'majority of residents residing or operating a business in a street 'in any municipality in Namibia.' There is nothing in the applicant's papers showing, even remotely, the basis of the standing of the applicant in these proceedings as far as prayer 2.2 is concerned in this regard. In my opinion, *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) 294 (AD) represents the *locus classicus* on the principle of *locus standi in judicio* in our law; but the applicant cannot be thankful of the rule in *Wood and Others v Ondangwa Tribal Authority and Another*. The applicant has not shown what right, apart from his misplaced zeal and empty officiousness, he has to make this application (as respects prayer 2.2 and barring the respondent) on behalf of the 'majority of residents residing or operating a business in a street in any municipality in Namibia' and why those persons cannot make the application themselves; neither has the applicant satisfied the Court that he has good reason for making the application on behalf of all those nameless and amorphous persons in all the other municipalities in Namibia.

[3] Additionally, I fail to see, with respect, by what legal imagination does the applicant intrepidly assume that this Court will grant an order against all the other Municipal Councils in Namibia in these proceedings when those Municipal Councils are not parties to these proceedings. Doubtless, it will not only be unjudicial but also it will go against all the tenets of rule of law and natural justice, which this Court must uphold,

for this Court to make an order – which is disobeyed at the pain of punitive measures – requesting a person to carry out an order when that person is not a party to the proceedings in which such order is made. I should have said so if I had not looked at authorities. But when I look at *London Passenger Transport Board v Mascrop* [1942] AC 322 (House of Lords) and *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) I feel no doubt that I should exercise my discretion and refuse what the applicant characterizes as declaration on the ground that interested persons have not been joined as parties (bar the respondent). Declaration is a discretionary remedy; and the Court may refuse it if it thinks fit, for example if persons who are directly interested in the proceedings and who are the ones (as in the instant matter) to carry out the order are not joined as parties. I shall return to this conclusion in due course.

[4] It follows that on the ground of lack of *locus standi in judicio* on the part of the applicant and on the basis that the persons who are directly interested in the proceedings are not joined as parties (bar the respondent); and in the exercise of my discretion, the so-called declaration prayed for in prayer 2.2 of the notice of motion is refused as respects all municipal councils in Namibia, save the respondent. I shall deal with the respondent in that behalf next.

[5] I now proceed to consider prayer 2.2 inasmuch as it relates to the respondent. The power of this Court to grant declaratory orders flow from s. 16 of the High Court Act, 1990 (Act No. 16 of 1990) which provides that the Court has 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)

[6] With the greatest deference to the applicant, prayer 2.2 of the notice of motion is so inelegantly drafted that I fail to see what declaration of what rights the applicant prays the Court to make in terms of s. 16 of Act No. 16 of 1990. As a matter of law, the formulation of prayer 2.2 is clumsy and meaningless in its intendment; for, as a matter of law and in terms of the language of the formulation, the only reasonable and correct construction that prayer 2.2 can carry is that the applicant prays the Court to prescribe to the respondent the manner in which the respondent should exercise its discretionary power reposed in it by the applicable statute, being the Local Government Act, 1992 (Act No. 23 of 1992). Doubtless, this Court has no power of any hue or shape, without justification in law, to issue such prescription to a statutory body in the Executive organ of State on account of the system of separation of powers that is entrenched in the Namibian Constitution. This constitutional fact is so elementary and so well known that I need not cite authority in support thereof.

[7] The fact that the applicant has ingeniously prefixed prayer 2.2 in the notice of motion with the clause ‘That the court makes a declaratory order’ does not and cannot by that fact alone metamorphose what is clearly a prayer to the Court *to prescribe* into a prayer *for declaration of rights* in terms of s. 16 of Act 16 of 1990. (Italicized for emphasis) The Village of Koes in terms of Act No. 23 of 1992 does not become the Municipality of Koes in terms of that Act just because X, a resident of Koes, always

refers in his writings to the Municipality of Koes because in X's view his village deserves to be a Municipality.

[8] Thus, as a matter of law, the applicant has in terms of prayer 2.2 of the notice of motion not prayed for declaration of rights: the applicant has prayed for rather an order directed to the respondent, prescribing to the respondent the manner in which the respondent should exercise a discretionary power that the Parliament in their wisdom have given to the respondent in terms of Act No. 23 of 1992. I have not a wraith of doubt in my mind that the application in that regard is misconceived. This Court is not competent on any legal plane to give such prescription in these proceedings. This conclusion disposes of prayer 2.2 inasmuch as it relates to the respondent. It would, with respect, be otiose and sheer waste of time for this Court to enquire into a declaration of rights as provided for in s. 16 of Act 16 of 1990; for there is simply no application for declaration in terms of prayer 2.2 inasmuch as it relates to the respondent. It follows that prayer 2.2 inasmuch as it relates to the respondent must fail.

[9] I have previously held that prayer 2.2 inasmuch as it relates to all municipal councils in Namibia must fail. Accordingly I hold that, that prayer 2.2 in its entirety must fail.

[10] I pass to consider prayer 2.1; and in doing so, it behoves me – as the reason will become apparent in a moment – to treat Gloudina Street and Uhland Street separately and differently. As respects Uhland Street; I fail to see the legal basis upon which the applicant has *locus standi in judicio* to bring his application on behalf of all the residents residing or doing business there. In this regard the reasoning and conclusions

respecting prayer 2.2 in relation to all the other municipal councils in Namibia discussed *supra* apply with equal force to Uhland Street. I do not, with respect, give any respectable look at the list, marked Annexure 'A' to the applicant's supplementary affidavit, containing names of persons who live on that street and who, according to the applicant, 'are totally opposed to the name change of the said streets'. The supplementary affidavit does not satisfy the requirements of the rule in *Wood and Others v Ondangwa Tribal Authority and Another* supra: the applicant does not show in his papers why those persons cannot make the application themselves; neither has the applicant satisfied the Court that he has good reason to make the application on behalf of those persons. The fact that the applicant has annexed confirmatory affidavits of his confederates cannot detract from the fact that the supplementary affidavit, together with the confirmatory affidavits and a list of their makers, does not satisfy the requirements of the rule in *Wood and Others v Ondangwa Tribal Authority and Another* supra, and so therefore the supplementary affidavit, together with the list of the names of the applicant's confederates and their confirmatory affidavits, have not one iota of probative value in these judicial proceedings: they are absolutely irrelevant. Such a list names may do and have relevance when a group of angry women, armed with a petition containing a list of names and signatures of like-minded women, present the petition to the local magistrate, calling on her not to admit to bail an accused facing a rape charge. In the result, the application fails as respects prayer 2.1 inasmuch as it relates to Uhland Street, which I am presently treating.

[11] I now direct my attention to prayer 2.1 in relation to Gloudina Street; and for the sake of clarity I set out hereunder prayer 2.1, leaving out any reference to Uhland Street:

> That the Respondent be directed and ordered not to rename or in any manner change the name of Gloudina Street ... in Ludwigsdorf ...'

[12] With respect I fail to see in terms of what power can this Court direct and order the respondent, an administrative body, not to perform its duties and carry out its functions under a valid and applicable statute, that is, Act No. 23 of 1992, as prayed for by the applicant in these proceedings. In our law an applicant seeking to challenge an act of an administrative body or administrative official may bring a proper application before the Court for adjudication. I use the word 'proper' advisedly. Such applicant may 'seek a declaratory order instead of reviewing the (already completed) act following the procedure set out in rule 53 of the Rules of Court' and this approach appears 'to be the preferred option in the context of local government ...' (JR de Ville, *Judicial Review of Administrative Action in South Africa* (2003): pp. 338-339 and the cases there cited; L Baxter, *Administrative Law* (1984): pp 698-704 and the cases there cited**)** But in the instant matter the applicant has in terms of prayer 2.1 not brought a review application following the procedure set out in rule 53 of the Rules, as Mr Marcus correctly submitted; neither does the applicant seek a declaratory order. In my judgement, therefore, there is no application before the Court for the Court to determine as respects prayer 2.1 inasmuch as it relates to Gloudina Street: there is no application in terms rule 53 of the Rules of Court or an application in terms of s. 16 of Act 16 of 1990. That being the case, I hold that this Court is not competent under the common law or statute, including the Namibian Constitution, to make the order prayed for in prayer 2.1 of the notice of motion. It follows that the application as respects prayer 2.1 inasmuch as it relates to Gloudina Street, too, fails.

[13] I have already refused the application in respect of prayer 2.1 inasmuch as it relates to Uhland Street. Thus, the relief sought in prayer 2.1 in its entirety is refused, too.

[14] There remains the issue of costs. Mr Marcus argued that this Court should grant costs on the scale as between attorney and client because of 'the disparaging remarks made by the applicant.' And Mr. Marcus refers the Court to two judgments of the Supreme Court in support of his submission, namely, *Namibia Grape Growers and Exporters Association and Others v Minister of Mines and Energy and Others* 2004 NR 194 (SC); *Vaatz v Klotsch and Others* Case No. SA 26/2001 (Unreported). Ms Bassingthwaighte argued contrariwise that the Court should not grant costs on the scale prayed for by Mr. Marcus on the basis of 'the disparaging remarks'. And what is Ms Bassingthwaighte's reason for so submitting. For her, Mr. Marcus should have applied to have the remarks struck off, Mr Marcus did not, and so Mr Marcus cannot rely on those remarks and ask the Court to grant costs on the scale as between attorney (legal practitioner) and client. I must now exercise my discretion and decide which route to take; and in so doing I must take into account the facts of this case as they appear on the papers filed of record.

[15] I find that the statements made by the applicant in the founding affidavit are not just disparaging as Mr. Marcus describes them; they are calumnious and vituperative and odious in the extreme, and they are directed at Hon. Ms Pendukeni Iivula Ithana and the memory of her late husband. What is more; the insults – and insults they are – are uncalled for and unjustified; and they can never be countenanced in any judicial proceedings in any civilized legal system like Namibia's. In the applicant's view, as I

see it, the sin Hon. Ithana has committed to deserve such vituperations and calumnies is because she dared apply to the respondent to honour her late husband's name by renaming a street after him in virtue of Mr. Ithana's contribution to the liberation of Namibia and to the building of Namibia's post-Independence Public Service; and he was at one point in time the Chairman of the Public Service Commission.

[16] Ms Bassingthwaighte misses the point with her submission, which cannot pull the applicant out of the dangerous abyss he has fallen into by filing papers in the Court, containing highly vituperative *ad hominem* attacks – attacks that are in the public domain and, *a fortiori*, against persons who are not parties to these proceedings and who have no way of defending themselves. And yet for all this; it is Ms Bassingthwaighte's submission – though not in so many words – that this Court should just airbrush those unjustified and unsolicited and otiose scurrilities just because counsel for the respondent has not applied to strike off those foul-spoken statements. This Court cannot do that. For an applicant who has approached the Court for redress because, in his opinion, his basic human right under Article 18 of the Namibian Constitution has been violated, it is diabolically cynical, to say the least, that the same applicant does not see that other individuals, too, have the selfsame basic human rights, also guaranteed to them by the Namibian Constitution (Article 8 (1) readily comes to mind as respects Hon Ithana) and that he (the applicant) has no colour of right or authority to violate that right in his zealous pursuit of enjoyment of his Article 18 basic right. Moreover, in pursuit of his reckless desire and malicious intent to annoy, insult and denigrate, the applicant has chosen to ignore the simple fact that Hon Ithana and Mr Ithana are not the administrative body that took the decision that has irked the applicant. They are not the respondent. And as far as Ms Bassingthwaighte is

concerned, if the statements are vituperative and calumnious or 'are disparaging' (in the words of Mr. Marcus); and so what? If Mr. Marcus thinks they are disparaging, so Ms Bassingwaithe says, why did Mr. Marcus not apply to have them struck off? Mr Marcus did not; and so, says Ms Bassingthwaighte, Mr Marcus cannot stand on the disparaging statements and ask for costs on the scale as between attorney (legal practitioner) and client. With the greatest deference to Ms Bassingthwaighte, counsel's argument along those lines is colourless and weightless.

[17] It must be remembered that basic human rights without commitment to responsible behaviour are made into purposeless absolutes. But I do not think the Namibian Constitution, with the noble ideals of basic human rights and rule of law embedded in its bosom, says that those basic human rights are absolutes – to be enjoyed by an individual without the individual looking to see if in pursuit of his or her enjoyment of his or her rights he or she is violating the basic human rights of other individuals. In the instant case, the applicant did not look to see. The applicant is only interested in his own enjoyment of his Article 18 basic human right. The applicant cares less if in so enjoying he rides rough-shod on and tramples over Hon Ithana's basic human right, as aforementioned, and Mr Ithana's memory.

[18] In my opinion, the vituperations and scurrilities contained in the applicant's founding affidavit are uncalled for and they serve no purpose in these judicial proceedings except to insult, annoy and denigrate. Consequently, a look at those statements in the applicant's founding affidavit which this Court cannot even demean itself to repeat in this judgment, impels me to the only reasonable conclusion that in bringing this application the applicant has acted in a frivolous and vexatious manner,

and the applicant was motivated by no other motive but malice – and malice writ large – in that the applicant is prepared to use the process of the Court to cast unjustified, uncalled for and irrelevant aspersions on persons who, as I have said *ad nauseam*, are not parties to these proceedings and, therefore, cannot defend themselves.

[19] I have not a shadow doubt in my mind that if there are cases in which the Court must – not may – mulct the errant party with costs on the scale as between attorney (legal practitioner) and client, the present case will indubitably take top honours, that is, gold. Consequently, the appropriate order that this Court should make in order to signalize the Court's total revulsion at the reprehensible and odious conduct of the applicant is to order costs on a scale as between attorney and client. And I am fortified in my conclusion and decision by the high authority of Strydom, CJ in *Namibia Grape Growers and Exporters v Ministry of Mines and Energy* 2004 NR 194 (SC).

[20] For all the aforegoing conclusions and reasoning, I make the following order:

> The application is dismissed with costs on a scale as between attorney (legal practitioner) and client.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:	Adv. N Bassingthwaighte
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