REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 184/2016

In the matter between:

KAMBAZEMBI GUEST FARM CC t/a WATERBERG WILDERNESS	**APPLICANT**

And

THE MINISTER OF LAND REFORM	**FIRST RESPONDENT**
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	**SECOND RESPONDENT**
THE MINISTER OF FINANCE	**THIRD RESPONDENT**
THE LAND REFORM ADVISORY COMMISSION	**FOURTH RESPONDENT**
THE COMMISSIONER FOR INLAND REVENUE	**FIFTH RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**SIXTH RESPONDENT**
THE VALUATION COURT	**SEVENTH RESPONDENT**

Neutral citation: *Kambazembi Guest Farm CC ta Waterberg Wilderness v The Minister of Land Reform* (A 184-2016) [2016] NAHCMD 193 (7 July 2016)

Coram: PARKER AJ

Heard: **23 June 2016**

Delivered: **7 July 2016**

Flynote: Applications and motions – Urgency – Requirements for prescribed by rule 73(4) of the rules of court – Applicant must set out explicitly the circumstances relating to urgency and reasons why applicant claims he or she could not be afforded substantial redress in due course – And applicant must make out a case for urgency in founding affidavit – Respondents bears no onus, none at all, to establish the opposite, namely, lack of urgency – Respondents only need to answer to applicant's averments that the application be heard as a matter of urgency – Besides the court having found disingenuousness on the part of the applicant in the proceeding court should refuse to come to the aid of the applicant by granting him the indulgence he craves – Consequently, application is refused.

Summary: Applications and motions – Urgency – Requirements for prescribed by rule 73(4) of the rules of court – Applicant must set out explicitly the circumstances relating to urgency and reasons why applicant claims he or she could not be afforded substantial redress in due course – And applicant must make out a case for urgency in founding affidavit – Court found that the applicant failed to satisfy the requirements for urgency prescribed by rule 73(4) of the rules – Court concluded further that the applicant having been found to be disingenuous in the proceeding court should refuse to come to the aid of such applicant by granting him the indulgence he craves – The applicant urged the court to take it that in the present proceeding the Agricultural (Commercial) Land Reform Act 6 of 1995 and the regulations made thereunder are Constitution compliant and valid – Yet applicant has instituted at least three applications which are still pending in the court in which the constitutionality and validity of the very Act and the very regulations are challenged – Court held that either an Act and regulations made thereunder are valid or they are not and they cannot be valid on Monday or May and be invalid on Tuesday or June – Court found applicant's conduct to be disingenuous and calculated to delay conclusion of the numerous cases before the court on the same or similar issues and involving the same parties – Consequently, application is refused.

ORDER

The application is refused with costs, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] This application brought on urgency is not like any other urgent application. The applicant, an agricultural land owner, has not paid any tax on his land since 2007 as required by the Agricultural (Commercial) Land Reform Act 6 of 1995 ('the Act'), and has instituted not less than six applications in the court, not to speak of various interspersed interlocutory applications, in all manner of challenges to the land tax regime and the collection of land tax.

[2] As I understand Mr Cassim SC (with him Mr Narib), counsel for first to sixth respondents ('the GRN respondents'), the applicant has instituted these applications and interlocutory applications at every turn for no other reason but to thwart the Government's efforts at land reform, pursuant to the Act, aimed at redistribution of land fairly in order to redress past practices of racial discrimination and injustice in land distribution and which is aimed at concretizing art 23 of the Namibian Constitution.

[3] In this regard it ought to be remembered that the present situation which the Act aims at curing 'has its origins in the European colonization which alienated nearly all the arable and grazing land on the southern plateau and most of the productive land in the country to the minority whites'. (United Nations Institute for Namibia, *Namibia: Perspectives for National Reconstruction and Development* (1986), p 112)

[4] Mr Cassim reminded the court that the efforts of the Government at land reform is aimed at preventing land invasions by the landless majority that are commonplace in some jurisdictions in the Region. Counsel submitted that all these various applications and interlocutory applications are efforts aimed at refusing to pay land tax according to the law. Mr Cassim characterized these efforts as dishonest. I will epithetize the efforts as disingenuous, as I demonstrate.

[5] The numerous applications and interlocutory applications are to a very large extent on the same or similar cause of action and against almost the same respondents as shown in the next seven paragraphs.

[6] In Case No.: A 295/2013 the applicant seeks an order to have the provisions of sections 76 to 80 of the Act, declared inconsistent with the provisions of arts 63(2), 8, 10, 12(1)*(a)*, 18 and 22 of the Namibian Constitution. The applicant further seeks to have the regulations published in Government Gazette No. 2678 of 29 December 2001 declared invalid on the basis that such regulations are published under the impugned provisions and further challenges the regulations on various further grounds which are set out in the notice of motion in those proceedings. Under this application, two interlocutory applications were brought.

[7] In Case No.: A 21/2015 the applicant seeks to have the land tax assessment for the 2013/2014 financial year, and which was payable on 28 February 2015, reviewed and set aside; and in the alternative, to have the decision to assess such taxes to be declared null and void or to be declared unconstitutional and invalid. That application was struck from the roll (ie *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement* (A 21/2015) [2016] NAHCMD 118 (21 April 2016)).

[8] In Case No.: A 197/2015 the applicant challenges the 2014/2015 land tax assessment, which was due for payment on 30 August 2015 on the basis that the assessment was not made and served by the Minister of Land Reform as required

by regulations 21(1) and 21(3). The matter has been heard and judgement was to be delivered on 27 June 2016.

[9] In Case No.: A 234/2015 the applicant seeks to have the amendment to regulation 17(3) of the Land Valuation and Taxation Regulations made under the Act and published in terms of Government Notice No. 185 of 17 August 2015, declared null and void. This application was to be heard on 23 June 2016.

[10] In Case No.: A 158/2016 the applicant first seeks to have the amendment to regulation 17(3) of the Land Valuation and Taxation Regulations: Agricultural (Commercial) Land Reform Act, 1995 of 03 July 2007, published in terms of Government Notice No. 185 of 17 August 2015, declared null and void, and secondly seeks to have the 2015/2016 land tax assessment declared null and void. The notice to oppose was filed on 16 June 2016. The answering papers were to be filed within 21 days from that date.

[11] In Case No. 160/2016 applicant seeks various relief:

(a) An order prohibiting the Minister of Land Reform from imposing land tax pending the final determination of pending litigation in -

(i) Case No.: A 295/2013
(ii) Case No.: A 21/2015
(iii) Case No.: A 197/2015
(iv) Case No.: A 234/2015
(v) Case No.: A 158/2016

(b) An order prohibiting the Minister of Agriculture and the Minister of Finance and the land Advisory Commission from participating in the imposition and collection of the land tax. Lastly, declaring that the orders referred to above apply to all land owners who received assessment for the 2015/2016 tax year. This application was equally opposed on 16

June 2016. Opposing papers were to be filed with 21 days from that date.

[12] In the instant application, ie Case No. A 184/2016, the applicant prays the court to hear the matter on the basis of urgency. The respondents have moved to reject the application being heard on the basis of urgency.

[13] The applicant, through his counsel, Mr Tötemeyer SC, tells the court that for the purposes of the instant application the court should assume that the Act and the regulations made thereunder are Constitution compliant and valid. And yet, in Case No. A 295/2013 the applicant seeks to challenge the constitutionality of certain provisions of the selfsame Act. And yet, again, in Case No. A 21/2015 the applicant seeks to challenge the validity of the amendment of regulation 17(3) of the Land Valuation and Taxation Regulation made under the Act.

[14] This is significant: It defies all logic and is inexplicable in law for a litigant to urge a court to take it that in proceeding X the very law and regulations, which that party challenges as unconstitutional and invalid in other similar proceedings, are constitutional and valid in proceeding X. As I understand the law, either an enabling Act or regulations made thereunder are valid or they are not. They cannot be valid on Monday or in May and be invalid on Tuesday or in June or any other time. An enabling Act and regulations made thereunder are not facts whose existence may be assumed in proceedings.

[15] Without beating about the bush, I should say that applicant's attitude cannot be described appropriately in any other way than disingenuous. And I shall take this self-serving chicanery of applicant's into account, because it carries immense weight, in deciding whether I should grant the indulgence the applicant seeks, apart from the requirements of rule 73(4).

[16] As respects the prayer that an application should be heard on the basis of urgency; this court stated in *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (5 February 2015), para 2 thus:

'Urgent applications are now governed by rule 73 of the rules of court (ie rule 6(12) of the repealed rules of court), and subrule (4) provides that in every affidavit filed in support of an application under subrule (1) the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent (first requirement) and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course (second requirement). Indeed, subrule (4) rehearses para (b) of rule 6(12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis of urgency, the applicant must satisfy both requirements. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.'

[17] What has the applicant – not Mr Tötemeyer – placed before the court in his papers in his effort to satisfy the twin requirements in rule 73(4)? Only this. Applicant says that Hoff J stated in a case Hoff J was seized with, that is, *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement* (A 295/2013) [2013] NAHCMD 260 (18 September 2013) (another one of applicant's cases) that -

'In my view it is self-evident that the applicant in the particular circumstances of this case would not be afforded substantial redress in due course.'
(para 53)

and,

'furthermore it is self-evident that the balance of convenience favours the granting of the relief sought by the applicant since the applicant (as well as the other objectors) should not be subjected to an illegal court process.'
(para 54)

[18] It need hardly saying that Hoff J says himself that the conclusion he made then emerged from *'the particular circumstances of this case'*, ie the case he was seized with. (Underlined and italicized for obvious emphasis) How then can it be seriously argued that Hoff J was enunciating a principle of law applicable to all cases, including the instant application? I am surprised the applicant relies on Hoff J's judgment in support of his prayer that the instant matter be heard on urgent basis. I have no difficulty – not a modicum of difficulty – in holding that on the papers applicant has not satisfied the requirements of rule 73(4), apart from, as Mr Cassim submitted, complaining about 'illegalities and nullities' in the valuation process. The applicant bears the onus of establishing urgency; and it has failed to do so. In this regard, as I said in *Inter-Africa Security Services CC v Transnamib Holdings Limited* (A 236/2015) [2015] NAHCMD 276 (17 November 2015), para 5, a respondent bears no onus – none at all – to establish the opposite, that is, the lack of urgency.

[19] Apart from the fact that applicant has failed to satisfy the requirements of urgency, I hold that in the circumstances of this case where the court has found disingenuousness on the part of the applicant in this proceeding to exist, the court should not come to the aid of the applicant by granting him the indulgence he cravers, that is, hear the matter as one of urgency. On this aspect, I accept Mr Cassim's submission.

[20] Based on these reasons, the application is refused with costs, including costs of one instructing counsel and two instructed counsel.

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C Parker

Acting Judge

APPEARANCES

APPLICANT: R Tötemeyer SC
Instructed by ENSafrica (Incorporated as LorentzAngula Inc., Windhoek

RESPONDENTS: N Cassim SC (assisted by G Narib)
Instructed by Government Attorney, Windhoek