

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO. HC-MD-CIV-MOT-REV-2019/00219

In the matter between:

KONISA EINO KALENGA	1ST APPLICANT
SELMA GWANANDJOKWE SHEJAVALI	2ND APPLICANT
HILENI KANDALI AUALA	3RD APPLICANT
HILMA SISCO NAMBAHU	4TH APPLICANT
AILY KAZIMO PETRUS	5TH APPLICANT
ESTER GWASHAMBA NEPANDO	6TH APPLICANT
NAEMAN AMALWA	7TH APPLICANT
ONDONGA TRADITIONAL AUTHORITY	8TH APPLICANT
and	
MINISTER OF URBAN AND RURAL DEVELOPMENT	1ST RESPONDENT
THE GOVERNOR OSHANA REGION	2ND RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	3RD RESPONDENT
THE ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA	4TH RESPONDENT
COUNCIL OF TRADITIONAL LEADERS	5TH RESPONDENT
FILLEMOM SHUUMBWA NANGOLO	6TH RESPONDENT

**JOSEF SIMANEKA ASINO
SELMA KASAMANE**

**7TH RESPONDENT
8TH RESPONDENT**

MARIA MANNENE JOSEF

9TH RESPONDENT

Neutral Citation: *Kalenga v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00219) NAHCMD 217 (28 June 2019)

CORAM: MASUKU J

Heard: 26 June 2019

Delivered: 27 June 2019

Reasons delivered: 1 July 2019

Flynote: Rules of Court – Urgency – Rule 73(1) and (3) – requirements therefor – Public Administration - importance of public officials to deal timeously with correspondence addressed to them – Administrative Law – effect of decision by Minister of Rural and Urban Development to approve the designation of a designate in Chief in terms of the Traditional Authorities Act - Commissioner of Oaths Act – whether entering a wrong name where the affidavit is commissioned affects the validity of the affidavit of the commissioner of oaths records the true place where the affidavit was commissioned.

Summary: The applicants brought an urgent application for the review of a decision by the Minister of Urban and Rural Development to recognise the sixth respondent as a Chief designate of the Ondonga traditional community. In particular, they sought to distraint a coronation ceremony slated for 29 June 2018, pending the review of the Minister’s decision.

Held that: an applicant, in an urgent application is required to fulfil all the requirements of Rule 73. In particular, the applicant’s legal practitioner should, in terms of rule 73 (1), if the matter is proposed to be heard at a time other than 09h00 am on a working day, or on a day that is not a working day, state

in the certificate of urgency, the reasons why the matter cannot be heard at 09h00 on a working day.

Held further that: the 6th applicant, although he may have met the circumstances why the matter is rendered urgent in terms of rule 73(4)(a), failed to show that he does not have substantial redress at a hearing in due course. The application for review, it was held, constituted substantial relief in this regard.

Held that: public officials are required to respond timeously to any enquiries that members of the public may have. Not to do so is frowned upon by the court as inexcusable behaviour.

Held further that: on account of the urgency of the matter and the sheer weight of the issues raised, the failure by the respondents to meet the strict requirements of the abridged time for filing papers in terms of the rules, was excusable.

Held that: the fact that the affidavit was deposed to in Nkurenkuru and not Windhoek, as typed in the affidavit, does not affect the validity of the affidavit when one considers that the commissioner of oaths was duly qualified to administer the oath and that the requirements of the Commissioner of Oaths Act and the Regulations thereunder, were observed. The insertion of 'Windhoek' instead of Nkurenkuru, was a mere typographical error. Occasioned by the urgency of the matter and one that does not affect the validity and acceptability of the Minister's affidavit in opposition.

The application was struck from the roll with costs for non-compliance with Rule 73(1) and (4).

ORDER

1. The application is struck from roll for non-compliance with Rule 73(1) and (4) of the Rules of this Court.
2. The Applicants are ordered to pay the costs of the First to Fifth Respondents consequent upon the employment of one instructing and one instructed Counsel and also costs in respect of the other Respondents who opposed the application.
3. The reasons for the order will be delivered on Monday 1 July 2019 and will be uploaded on ejustice.
4. The matter is removed from the roll and is regarded as finalised.

RULING

MASUKU J:Introduction

[1] Uneasy the head that wears the crown – so goes an old English idiom. King Kauluma Elifas, the doyen of the Ondonga people in the Northern part of Namibia, who wore the proverbial crown of the Ondonga people, joined the procession of his ancestors who predeceased him, in March 2019. His translation to the celestial jurisdiction, has left in its wake a battle for succession of the head traditionally considered to be fit to wear the Ondonga crown. Standing in the contest for the appropriate head fit to wear the crown are two protagonists, namely, Mr. Konisa Eino Kalenga, the first applicant and Fillemon Shuumbwa Nangolo, the 6th respondent.

Background

[2] Following the demise of King Elifas, as stated above, it would appear that moves to appoint his successor ensued. They resulted, in part, in the designation of the sixth applicant. The First respondent, the Minister of Urban and Rural Development, ('the Minister'), in terms of the Traditional Authorities Act,¹ (the Act) approved the designation of the sixth respondent as the successor on 10 June 2019.

[3] The coronation of the sixth applicant, pursuant to the approval of the designation by the Minister, was slated for 29 June 2019. In view of the latter event, in particular, the applicants approached this court on urgency, seeking in essence an order interdicting the coronation and one seeking the urgent review of the Minister's decision approving the designation as stated earlier. The relief sought will be dealt with below.

The relief sought

[4] The first to the eighth applicants ('the applicants') instituted an urgent application, which application was set down for hearing on 27 June 2019 at 14h00pm. The urgent notice of motion, sought three separate types of relief, mentioned below:

- (a) Part A sought a rule-*nisi* (interim interdict), stopping the coronation on 27 June 2019;
- (b) Part B sought an urgent review of the Minister's decision to approve the sixth respondent's coronation; and
- (c) Part C sought a review of the Minister's decision in the normal course.

[5] In respect of Part A of the notice of motion, the timelines for the filing of affidavits were as follows:

¹ Act No. 25 of 2000.

The notice to oppose was due on 20 June 2019, the answering affidavit was due on 24 June 2019 and the replying affidavit was due on 26 June 2019.

[6] In respect of Part B of the notice of motion, the timelines for the filing of affidavits were as follows;

The notice to oppose was due on 20 June 2019, the complete review record was due on 21 June 2019, the supplementary affidavit was due on 24 June 2019, the answering affidavit was due on 25 June 2019 and the replying affidavit was due on 26 June 2019.

[7] The respondents vigorously opposed the urgent application. They raised various points of law in *limine* including urgency, incompleteness of the action sought to be reviewed and the illegality of the actions of the applicants for the alleged contravention of the Act, to mention but a few. The respondents further joined issue with the applicants and filed full sets of affidavits on the merits. At the hearing, the court directed that the points of law in *limine* be heard and determined first. As a result of the finding I make on the urgency, it has been rendered unnecessary for the court to make any determination on any of the points argued or the merits of this matter, which were in any event, not traversed.

Urgency

[8] I am constrained, at the commencement of the ruling, to rebuke the approach adopted by the first, second and fourth respondents. It is common cause that on 10 June 2019, the first respondent made a decision to approve the designation of the sixth respondent as the Chief of the Ondonga traditional community. He did so acting in terms of section 5 (2) of the Act. The said provision reads as follows;

‘(2) On receipt of an application complying with subsection (1), the Minister shall, subject to subsection (3), in writing approve the proposed designation set out in such application.’

[9] The first applicant by way of his founding affidavit, indicates that he became aware of the decision by the first respondent to approve the designation of the sixth respondent by way of social media. He stated that despite his pending application to the first respondent for approval of his designation as Chief of the Ondonga traditional community, he was not directly notified by the first respondent of the approval of the designation of his rival for the throne. As a result of the first respondent's letter dated 10 June 2019, a coronation of the sixth respondent as Chief designate of the Ondonga traditional community is planned to take place on 29 June 2019. It is this planned coronation that has triggered the urgent application instituted by the applicants seeking on an urgent basis the relief under Part A and B of the notice of motion.

[10] On 10 June 2019 the first applicant's legal practitioners dispatched a letter, for the attention of the first to the fifth respondents, to the Government Attorney stating that the decision to approve the designation was unlawful and invalid. On 11 June 2019, the Government Attorney, writing on behalf of the first to the fifth respondents requested the applicants to hold the matter in abeyance pending a response to the letter from the applicants' legal practitioners.

[11] On 13 June 2019, the applicants' legal representatives dispatched another letter to the Government Attorney. No response to this letter was forthcoming. The present application was thereafter launched on 19 June 2019.

[12] The first to the fifth respondents then raised urgency in response to the urgent application and argued that the correspondence should be ignored when considering urgency in the context of rule 73 (4) of the rules. I address the provisions of the rule later in this ruling but I am constrained to state that the above-mentioned respondents are public officials. It is trite that public officials have a duty to respond to legitimate enquiries by members of the public. If a public official requests an undertaking from a private person, such

as that requested by way of the letter of 11 June 2019, such a public official is not entitled to gloss over the undertaking and its import and effect.

[13] I now turn to consider the main issue for determination. The requirements for determining whether a matter can be heard on an urgent basis have been stated by this Court many a time. The relevant rule governing urgent applications is rule 73². Rule 73 (1) and (4) read as follows:

'(1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, *unless a legal practitioner certifies in a certificate of urgency* that the matter is so urgent that it should be heard at any time or on any other day.

(2) ...

(4) In an affidavit filed in support of an application under subrule (1), the applicant *must set out explicitly* –

(a) the circumstances which he or she avers render the matter urgent; and

(b) *the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.*' (Italicized for emphasis).

[14] I reiterate what was stated by this court in *Nghiimbwasha v Minister of Justice and Others*³ when addressing the nature of urgent applications and what an applicant seeking to invoke the urgency procedure must attest to. The court expressed itself as follows;

'It must also be remembered that an applicant who seeks to invoke the urgency procedure essentially asks the court to allow him or her to "jump the queue" as it were and have his or her case heard before others that were launched earlier. The reasons why the court is requested to allow the jumping of the queue must be

² Rules of the High Court of Namibia: High Court Act, 1990 promulgated by the Judge President in the Government Gazette No. No. 5392 of 17 January 2014 but which came into operation on 16 April 2014.

³ (A 38/2015) [2015] NAHCMD 67 (20 March 2015) at paragraph 28.

motivated and others whose cases have been overtaken by the applicant's case, must be able to attest that from the papers filed, the fast-tracking of the case was indeed called for. To do otherwise would bring the administration of justice into disrepute.'

Rule 73 (1)

[15] The first to the fifth respondents, by way of their answering affidavit, take the point that the applicants have brought the urgent application on a court date at a time other than that set out in terms of subrule (1). These respondents further assert that a case must be made out for this deviation from the time stipulated and aver that the applicants have not made out such case.

[16] The replying affidavit does not address this aspect of the case related to urgency made out by the aforementioned respondents. In oral argument, counsel for the respondents did not argue this point. The court, however, raised it with counsel for the applicants. This was to provide counsel with the opportunity to address the alleged non-compliance with rule 73 (1) which was raised by way of the first to the fifth respondent's answering affidavit.

[17] The certificate of urgency, dated 18 June 2019, filed on behalf of the applicants by Mrs. Sandra Miller, does not state the reasons why the urgent application cannot be heard at 09h00 am, as required by the said subrule. This issue was addressed in *Andreas v Kambinda*⁴ where the following findings were made at para 3:

'The applicant filed a certificate of urgency that set the urgent application down for hearing at 14:30. Respondents argued that same was defective as it did not comply with Rule 73 (1) in that it did not set out why the matter could not be heard at 09:00 as provided for under the said rule. I upheld the point in law as good for the reason that the applicant did not state why the matter was so urgent as not to be set down at 09h00.'

⁴ [2019] NAHCMD 133 (2 MAY 2019) at paragraph 3.

[18] It must be mentioned that many practitioners in this court, appear to pay no regard whatsoever, to the peremptory requirements of rule 73(1). The import of the said subrule, is that all urgent matters should be heard at 09h00 on a working day. If for any reason, a matter cannot be heard at 09h00 or during a working day, the applicant's legal practitioner should, in the certificate of urgency, certify that the matter is so urgent that it should be heard on some other time or day.

[19] This requirement, it must be stated, is additional to the other certification by the applicant's legal practitioner regarding the urgency of the matter. In this regard, it means that the applicant's legal practitioner should generally certify that the matter is urgent if it is to be heard at 09h00 on a court day. If it cannot be heard at 09h00 or on a working day, the said practitioner should certify further that the matter is of such urgency that the applicant could not wait for the matter to be heard at 09h00, or on a working day.

[20] As a result I find that the point related to non-compliance raised by way of the first to the fifth respondents answering affidavit is on the facts of this matter a good point and I uphold it. Legal practitioners of this court should adhere to this requirement. Merely paying lip-service to it, particularly in legal argument, will not do.

Rule 73 (4) (b)

[21] Both sets of respondents raise urgency on the basis that the applicants, in particular the first applicant, has substantial redress in due course. One of the authoritative cases emanating from this court, on the interpretation of the previous rule 6(12)(a) and (b) (now rule 73(4)(a) and (b)), is the matter of *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*⁵ where a Full Bench of this court said the following:

⁵ 2012 (1) NR 331 (HC).

[19] ... Rule 6(12)(b)⁶ makes it clear that the applicant must in his founding affidavit *explicitly* set out the circumstances upon which he or she relies that it is an urgent matter. Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course.

It has often been said in previous judgments of our courts that failure to provide reasons may be fatal to the application and that mere lip service is not enough. (*Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Salt and Another v Smith* 1990 NR 87 (HC) at 88 (1991 (2) SA 186 (Nm) at 187D – G.)

[20] The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent. (Underlined for emphasis)

[22] The applicants raise as one of their grounds of urgency, by way of the founding affidavit, protection of their constitutional rights. I have no difficulty in accepting as a general principle that an unlawful activity may create a basis for urgency. The applicants say that the circumstances which render the matter urgent are the alleged unlawful actions of the first and second respondents. That notwithstanding, the applicants must still make out a case that they will not obtain substantial redress in due course.

[23] The first applicant in his founding affidavit set out the reasons why he claims that he will not obtain substantial redress in due course. In summary I find his position to be the following-

- i. That coronation is highly revered in the Ondonga traditional community and goes to the root of the Ondonga traditional community;
- ii That coronation has high cultural value and creates a connection between the person coronated and the traditional community;

⁶ The equivalent of this rule is rule 73(4)(b).

- iii That allowing coronation to proceed prejudices his legitimacy and royal rights irreparably and affects his prospects to ascend the throne;
- iv That the coronation will violate his right to be recognised as a nominated candidate for the Ondonga throne;
- v That the coronation will affect the stability and homogenous nature of the Ondonga traditional community;
- vi That the coronation shall affect his dignity, which he enjoyed within the community as a nominated candidate for the Ondonga throne;
- vii That review relief as a result becomes water under the bridge because the process as a subsequent review will restore the customary value attached to coronation.

[24] This court, in *Kapia v Minister of Regional and Local Government Housing and Rural Development*⁷ held that a decision of the first respondent acting in terms of s 5 of the Act, to approve the designation of a Chief, amounts to administrative action. The coronation is also provided for in terms of s 5 (7) of the Act.

[25] I find as a result that a review is fully capable of setting aside the consequences of the coronation as it is part of an administrative decision-making process that reaches finality when the third respondent acts in terms of section 6 (2) of the Act and recognizes the designation by proclamation in the Gazette. This much is evident from a reading of s 6 (3) of the Act, which states that:

‘(3) Notwithstanding any other provision to the contrary in this Act contained, a chief or head of a traditional community shall be deemed not to have been designated under this Act, unless such designation has been recognized under this section.’

⁷ [2013] NAHCMD 13 (24 January 2014) at para 18.

[26] The sixth to the ninth respondents by way of their opposing affidavit indicate that on 14 April 2019 the sixth respondent was installed in terms of the customs and traditions of the Ondonga traditional community as Omukwaniilwa (Chief). Importantly an allegation is made that after the customary installation as Chief of the Ondonga traditional community, community members attended on the sixth respondent to pay their respects to him. An allegation was made under oath that the attendance register was well over 30 pages. The first applicant, by way of the replying affidavit, did not dispute these allegations of fact.

[27] The sixth to the ninth respondents made further allegations in their opposing affidavit. They stated that during 2012 the first applicant became aware of the nomination and appointment of the sixth respondent by the Late King of the Ondonga traditional community and further that this nomination was gazetted, meaning that it was officially published for all and sundry to know of that fact. These allegations of fact were again not addressed in the replying affidavits.

[28] These undisputed allegations of fact pour cold water on the averments relied upon by the first applicant in his quest to meet the mandatory requirements of rule 73 (4) (b). These uncontested facts demonstrate that various customary steps related to the sixth respondent's claim to the throne have come to the attention of the wider Ondonga traditional community.

[29] I therefore find that in the peculiar circumstances of this matter, the applicants, particularly the first applicant, who appears to bear the brunt more, can obtain substantial redress at a hearing in due course, by way of review proceedings. I note that a review application has already been instituted by the applicants. I accordingly refrain from making any findings of fact and leave that duty to the review court.

Objection to first respondent's affidavit

[30] In the replying affidavit, an objection was taken to the answering affidavit deposed to by the first respondent. The basis of the objection is that there is reference that the affidavit was signed at Windhoek, however the Commissioner of Oaths states his address as Nkurenkuru Police Station and the Commissioner of Oaths stamp reflects Nkurenkuru as well. The first applicant therefore infers as a result that the affidavit could not have been properly commissioned. I shall briefly address the legal basis for the commissioning of affidavits. The applicable law is the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 section 8 (2) as read with (3) read as follows;

'8(2) If any person referred to in sub-section (1) administers an oath or affirmation to or takes a solemn or attested declaration from any person, he shall authenticate the affidavit or declaration in question by affixing thereto the seal or impressing thereon the stamp used by him in connection with his office or, if he possesses no such seal or stamp, certifying thereon under his signature to that effect.

(3) Any affidavit, affirmation or solemn or attested declaration purporting to have been made before a person referred to in sub-section (1) and to be authenticated in accordance with the provisions of sub-section (2), may, on its mere production, be admitted in evidence in any court or received in any public office'

[31] There are Regulations established in terms of the Act and these are the Regulations Governing the Administering of an Oath or Affirmation. Those regulations then set out the manner in which an oath must be administered. Regulations 2 and 3 are relevant to the present enquiry and they read as follows:

'2. (1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation I he shall ask the deponent -

(a) whether he knows and understands the contents of the declaration;

(b) whether he has any objection to taking the prescribed oath; and

(c) whether he considers the prescribed oath to be binding on his conscience.

(2) If the deponent acknowledges that he knows and understands the contents of the declaration and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience the commissioner of oaths shall administer the oath prescribed by regulation 1(1).

(3) If the deponent acknowledges that he knows and understands the contents of the declaration but objects to taking the oath or informs the commissioner of oaths that he does not consider the oath to be binding on his conscience the commissioner of oaths shall administer the affirmation prescribed by regulation 1(2).

3. (1) The deponent shall sign the declaration in the presence of the commissioner of oaths. 4. (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.'

[32] This court in *S v Lameck*⁸ addressed the purpose underlying the Justices of the Peace and Commissioners of Oaths Act as well as the regulations made thereunder. The court held that:

[13] Section 6 of the Justices of the Peace and Commissioners of Oaths Act provides for the designation of the holder of any office as a commissioner of oaths by notice in the Gazette by the Minister of Justice, while the regulations merely govern the process of administering of an oath or affirmation.' (Emphasis added)

[33] The objection raised by the applicants does not allege non-compliance with the underlying purpose of the Act. The objection questions the presence of the typed word 'Windhoek' on the affidavit. I accept the explanation that it was a typographical error. In view of the lack of a challenge to the capacity of

⁸ [2018] NAHCMD 214 (16 July 2018) at paragraph 13.

the commissioner to administer the oath or any actual evidence that the oath was not properly administered, I accept the explanation that there was a typographical error considering that the matter was dealt with on an urgent basis. I therefore dismiss the objection raised related to the first respondent's answering affidavit. The affidavit, for what it is worth, accordingly stands.

[34] I also dismiss the objection related to the non-compliance with the truncated time periods specified in the notice of motion. I find that the affidavits filed by the applicants were extensive and the extensive response in roughly four working days was, in the circumstances, acceptable. More importantly, I have declined to condone non-compliance in the time periods prescribed in terms of the rules, leaving this matter of no practical importance in the circumstances.

Conclusion

[35] In the result, and for the reasons set out above, I am of the view that the applicants have failed to demonstrate that the matter is of such urgency that the provisions of the rules need to be abridged.

Costs

[36] I find no reason why the costs should not follow the result in this matter, I therefore order that the applicants pay the costs of the first to the fifth respondent on the basis of one instructed and one instructing counsel and that the applicants pay the costs of the sixth to the ninth respondents on the basis of one instructing and one instructed counsel.

Order

[37] In view of the considerations stated above, the following order is issued:

1. The application is struck from roll for non-compliance with Rule 73(1) and (4) of the Rules of this Court.

2. The Applicants are ordered to pay the costs of the First to Fifth Respondents consequent upon the employment of one instructing and one instructed Counsel and also costs in respect of the other Respondents who opposed the application.
3. The reasons for the order will be delivered on Monday 1 July 2019 and will be uploaded on ejustice.
4. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANTS: Mr. D Khama, (with him Mr. E. Shikongo and Mrs. S. Miller)

Instructed by: Shikongo Law Chamber, Windhoek.

1st TO 5th RESPONDENTS: Mr. Lecogele (with him Mr. J Ncube)

Instructed by: Government Attorney

6th TO 9th RESPONDENTS: Ms. E. N. Angula, (with her A. Kamanja)
Of and Instructed by AngulaCo Inc,
Windhoek.