

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2017/00099

In the matter between:

TRAUPE FARMING CC	1ST APPLICANT
MAPAN BOERDERY (PTY) LTD	2ND APPLICANT

and

THE PRESIDING OFFICER OF THE VALUATION COURT	1ST RESPONDENT
JOHANNES SHUUVENI	2ND RESPONDENT
FRANSISCUS WITBOOI	3RD RESPONDENT
DUDLEY HITE	4TH RESPONDENT
JOHN MALUMANI	5TH RESPONDENT
MINISTER OF LAND REFORM	6TH RESPONDENT
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	7TH RESPONDENT
THE MINISTER OF FINANCE	8TH RESPONDENT
THE COMMISSIONER OF INLAND REVENUE	9TH RESPONDENT

Neutral Citation: *Traupe Farming CC v The Presiding Officer of the Valuation Court* (HC-MD-CIV-MOT-REV-2017/00099) [2020] NAHCMD 47 (February 2020)

CORAM: MASUKU J

Heard: 16 July 2019

Delivered: 13 February 2020

Flynote: Administrative law – Review – When certain decisions of an administrative body have already been reviewed and set aside, bringing the same issues to this court for determination renders them moot and academic – issues for determination before a court must be existing and live for them to be justiciable.

Costs – Whether it is proper to grant costs against judicial officers and Tribunals where their decisions have been rendered reviewable.

Constitutional Law – The constitution must be the last resort and not the first in the resolution of disputes that come before it.

Civil Procedure: Applications for striking out – When granted.

Summary: Applicants approached this court seeking an order reviewing and setting aside the rulings of the Valuation Court. They challenged the methodology employed by the valuer and his team in compiling the iso-maps and the provisional valuation roll. On 7 February 2019, the Parties, by consent, settled the matter in so far as it related to prayer 1 of the notice of motion in that the rulings were reviewed and set aside. The only questions which remain live, and which this court was called upon to determine are the following:

Whether the rulings and/or orders and proceedings of the Valuation Court, which had been set aside by consent could still be determined by the court in reference to whether they are in conflict with Article 18 read with Article 12 of the Namibian Constitution and who amongst the parties, is liable to pay the costs of the proceedings.

Held: That the allegations by the Minister in his answering affidavit are to be regarded as *pro non scripto* for the reason that the Minister delved into issues which pertained to the offices of the other respondents and when they had not authorised him to file an answering affidavit of and concerning them.

Held that: There were certain allegations in the Minister's answering affidavit, which were scandalous and/or vexatious and thus liable to be struck out.

Held: that the applicants cannot validly claim that they may be considered as having an existing, future or contingent right in the matter because the invalidity complained of by the applicants has been conceded, and rightly so, by the respondents.

Held further that: As matters stand, the decisions and orders complained of, have been not only reviewed, but also set aside by order of this court.

Held: That this finding clearly militates against a finding that with the issues having been disposed of in this manner, and in favour of the applicants, there can be no justiciable claim by the applicants, to any further existing right, in the circumstances. Once the order reviewing and setting aside the orders and rulings was issued, the matter was placed at an end, thus not amenable to further declarations of constitutional invalidity, in the circumstances.

Held that: there is no dispute or live controversy among the parties regarding the validity of the orders and rulings of the Valuation Court.

Held further that: The constitutional compliance of the said orders and rulings with various Articles of the Constitution is clearly rendered moot, in the circumstances.

Held that: to prevent a chilling effect, an adverse costs order must not be issued against members of a court sitting when their decisions are successfully reviewed except where there are proven allegations of malice,

fraud or other despicable conduct on the part of the court which are not only mendacious but also inconsistent with their mandate.

Held further that: both parties had a measure of success in the proceedings, but that the applicants success was substantial and that they were entitled to recover 70% of their costs as a result. Costs were granted against the Minister.

The court accordingly allowing the striking out application and dismissed the review application with a cost order against the Minister of Land Reform.

ORDER

1. The application for striking out the offensive portions of the affidavit filed by the Minister of Land Reform is granted with costs.
2. The application for the granting of a declarator in terms of prayer 3 of the Notice of Motion, is refused.
3. The Applicants, in view of their substantial success, are ordered to recover 70%of their costs from the Minister for Land Reform, consequent upon the employment of one instructing legal practitioner and one instructed legal practitioner.
4. The application is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:Introduction

[1] Presented for determination before court is an opposed application for review of certain oral and written rulings and orders of the Presiding Officer of the Valuation Court, handed down on different dates. The applicants apply for same to be corrected and set aside and further declared inconsistent with Article 12 of the Namibian Constitution.

The parties

[2] The 1st applicant is a close corporation styled Traupe Farming CC, an entity incorporated in terms of the Close Corporations Act, as amended.¹ Its place of business is situate at Farm Okarundu, Nord-West No.118, District Omaruru in this Republic. The 2nd applicant, on the other hand, is Mapan Boedery (Pty) Ltd, a company duly incorporated in terms of the Companies Act of this Republic.² Its place of business is situate at Farm Gemsbokpan, Gobabis in this Republic.

[3] The 1st respondent is the Presiding Officer of the Valuation Court and is cited in that capacity in these proceedings. His court is established in terms of the provisions of Regulation 8 (1) of the Land Evaluation and Taxation Regulations: Agricultural (Commercial) Land Reform Act, 1995. The 2nd to 4th respondents are male Namibian adults who have been cited in their official capacities as President and members of the Valuation Court.

[4] The 6th, 8th and 9th respondents are Ministers in the Government of the Republic of Namibia, respectively responsible for the Ministries of Land Reform, Agriculture, Water and Forestry and Finance. They are represented by the Office of the Government Attorney. The 7th respondent Mr. Protasius

¹ Act No. 26 of 1988.

² Act No. 28 of 2004.

Thomas, is cited in his official capacity as the Valuer, appointed in terms of the Regulations mentioned in para 3 above.

Factual background

[5] It is common cause that both applicants are owners of commercial agricultural land situate in this Republic. The bone of contention in this matter, arises from the publication by the 7th respondent of the Provisional Valuation Roll of 2012. The applicants, and other landowners, objected to the said roll. The basis of the objection by the applicants was that the information provided and lying for inspection in terms of the Notice issued, was inadequate.

[6] In this regard, detailed information and where applicable, documentation, was required by the applicants. This was done in order to enable the applicants; so they say, to fully exercise their rights to object to the valuation and to present their objections to the Valuation Court. The applicants allege that the information and/or documentation requested was never provided by the Valuer.

[7] When a new provisional roll was presented, the applicants further allege, a letter was drafted by Messrs. Engling Stritter and Partners on behalf of the objectors. In this letter, addressed to the 6th respondent, information, documentation concerning the methodology and source documentation forming the basis of the 2013 valuation roll was requested to enable the objectors to fully exercise their rights provided in the Constitution of Namibia.

[8] On 22 July 2013, the 6th respondent replied to the letter in question and adopted the view that all that was required by law was for the Minister to provide an iso-map for examination by the public. He stated that the further information requested would thus not be provided to the applicants and/or their legal practitioners as there was no legal obligation on his office to provide the required information.

[9] In the same month of July 2013, the applicants, together with other land-owners filed objections to the 2013 Provisional Valuation Roll. An urgent application was, however, launched by some of the objectors, seeking to review and set aside the proceedings before the Valuation Court. Hoff J granted that order resulting in the court not sitting in 2013.

[10] On 1 June 2016, the Minister of Land Reform, in terms of Regulation 6(4) issued a notice³ that the provisional valuation roll and iso-map, would lie open for inspection. He further notified the public that the provisional Valuation Court would commence its sittings on 1 August 2016. Potential objectors were called upon to lodge their objections.

[11] The following day, the aforesaid Minister issued a document styled 'Public Notice' in which the public was informed of the period for the inspection of the provisional valuation roll, the lodgement of objections and the sittings of the Valuation Court. The notice further advised objectors who had previously filed objections that their objections remained valid and effectual.

[12] The valuation court sittings commenced in earnest on 1 August 2016, as stated. The initial sitting was in Grootfontein and the Court proceeded to sit in other areas, such as Gobabis, Keetmanshoop, Outjo, Otjiwarongo, Omaruru and Windhoek. The objectors decided to challenge the methodology employed by the valuer and his team in compiling the iso-map and the provisional valuation roll.

[13] The bases for the objections included *inter alia*:

- (a) that the incorrect methodology had been applied by the Valuer;
- (b) that inaccurate and incomplete data had been used in arriving at the figures represented on the iso-value map and in the provisional valuation roll;

³ Government Gazette 6023 No. 102 dated 1 June 2016.

(c) there was a wrong application of the available data in respect of the iso-values; and

(d) through experts, the objectors further suggested that an alternative methodology be employed that would result in scientifically fair and pragmatic approach or methodology to the valuation for purposes of dealing with the objections and the Valuation Court making a ruling on the iso-map and the values contained in the provisional valuation roll.

[14] Oral argument was presented to the Valuation Court on 21 September 2016, on the objectors' behalf, including the question of the powers of the court to interpret and rule on the application of the regulations, considered in tandem with the court's discretion imbued by Regulation 12. The court delivered its *ex tempore* judgment on even date. It promised to deliver a written judgment in due course, as the one delivered was alleged to have been confusing.

[15] True to form, the court, on 10 October 2016, issued its written judgment in which it upheld 'each of the objectors objections in terms of Regulation 12(3) but we decline to decrease the values without affording the parties an opportunity to lead evidence with regard to decreased values.' In this regard, notwithstanding the upholding of the objectors' objections, the Court still required the Valuer to arrange the objections as per the assigned zones on the iso-map in the chronological farms numbers'. It was also indicated that the court would proceed to hear evidence led on the values to be decreased.

[16] The objectors in Windhoek, declined to lead any evidence, reasoning that they had previously led evidence through their experts mentioned above. The objectors, in the light of the evidence previously led, called upon the Court to determine the values of the property based on the evidence and material already adduced.

[17] Sensing a gulf in understanding of its position by the objectors, the Court took the stance that the objectors had misunderstood and thus

misinterpreted its judgment issued on 10 October 2016. It accordingly decided that it would provide reasons for the position it assumed and would also give reasons for the Court's continuation in Mariental. On 14 November 2016, the objectors refused to budge from refusing to lead any evidence required, for the reasons stated. The matters were thus postponed to 23 November 2016 on which date the Court made the decision in which it handed down a list containing reduced values, which were in manuscript, dated 14 November 2016.

[18] It must be pertinently mentioned that the respondents, particularly did not file any affidavits placing in issue any of the contentions by the applicants and thus stating their version, whether different from or consistent, even if in part with that stated by the applicants on oath. For that reason, and considering that the respondents, by and large, did not oppose the application, the factual contentions advanced by the applicants on oath stand uncontroverted and must, for that reason, be accepted as true and accurate.

[19] I have deliberately used the words 'by and large' in the preceding paragraph. I did so for the reason that the Minister for Land Reform, and who will henceforth be referred to as 'the Minister', did file an answering affidavit, in which he took issue with certain portions of the founding affidavits and unfortunately, partook in contesting matters that have nothing to do with the Minister's office or Ministry, and which required explanations or accounts by the other offices or individuals cited in these proceedings.

[20] There is no indication that any of the respondents, who were cited as competent persons or officials in their own respective rights, were unable to deal with relevant factual allegations made by the applicants. More importantly, these respondents, do not appear, anywhere on the papers, to have authorised the Minister to respond to or join issue in any matters that pertain to those offices and/or individuals. I say this particularly noting that there is no specific relief that the applicants seek against the Minister in their application. For all intents and purposes, the application and particularly the relief sought, are directed at the Valuation Court.

[21] In this regard, the Minister, in what can be regarded as a diatribe, accuses the applicants of being obstructive by raising before the Valuation Court matters that that court has no 'competency to resolve'. He continues, 'This is obstructionism, the sole purpose of which is to cause confusion with the view to arrest the certification of the valuation roll. I shall herein, in answering to some of the allegations of the applicants, point to this abuse which I submit this Honourable Court should not countenance.'

[22] It should be mentioned that the applicants have, in their papers applied for the striking out of these portions of the Minister's affidavit, as scandalous and/or irrelevant. This application is dealt with later in the latter parts of this judgment.

[23] To the extent that the Minister has dealt with matters that can competently and fully be dealt with by the correct respondents, I fully agree with the applicants' argument that his contentions, unauthorised as they are, should be rejected out of hand and I accordingly do so. There is no allegation neither is it apparent in any event, that any of the respondents suffer from any legal impediment, including minority, that may serve to render any of them unable or ill-equipped to deal with the allegations by the applicants, concerning and touching upon them or their actions, pound for pound.

[24] If it is correct, as the Minister alleges, that the applicants are bringing matters before the Valuation Court, which the latter has no competence to deal with, then it is the responsibility of the Court to say so. We are often faced with matters which applicants genuinely bring to the courts for adjudication and in some, the courts decline to deal with the cases on the basis that the court has no jurisdiction to deal with them.

[25] This is done in the course of the proceedings and in my considered view, it does not lie with the Minister to speak in this regard for the Valuation Court, which can speak, deal with and decline to deal with issues that in its view fall outside its jurisdiction or legislative mandate. In this regard, if the

parties are dissatisfied with the ruling, that issue can be brought to the appropriate court for determination.

[26] The allegations by the Minister, in this regard, have to be treated as *pro non-scripto*. He was certainly ill-advised to get on the band wagon with an instrument ill-suited for the music played and thus deal with matters his office has no business dealing with.

[27] There is, all said and done, a positive remark that the Minister makes in his affidavit and that is a concession made by the Minister in para 33, where he states the following:

‘I accordingly concede that the whole Valuation Court proceedings constitute a nullity and must be set aside. However, I do not agree that the members of the Valuation Court be mulcted in costs. I accordingly ask that the applicants’ prayers as set out in 1.1, 1.2, 1.3, 1.4, 1.5, and 1.6 be granted. I do not believe that a case is made out for the declarator order sought in prayer 2. It should not be granted.’

[28] I hasten to mention that the concession by the Minister appears to coincide with the position adopted by the relevant respondents. I say this for the reason that although the said respondents did not positively support the granting of the orders prayed by the applicants, or some of them, as the Minister has done, these respondents did not oppose the application, despite having been served with the papers. The only interpretation to be accorded to their actions and inactions, is that they do not have any objection to the granting of the application as prayed.

[29] In further amplification of the above conclusion, the parties, by consent, on 7 February 2019, settled the matter in so far as it relates to prayer 1 of the notice of motion. In the result, subject to what is stated above, the following order was made by Claasen AJ:

1. The oral rulings and/or orders of the First to Fifth Respondents handed down on 23 September 2016;

2. The written rulings and/or orders of the First to Fifth Respondents handed down on 10 October 2016;
3. The written rulings and /or orders of the First to Fifth Respondents, dated 18 October 2016, referred to, as 'Reasons for Ruling why the Court proceeded on 18 October 2016 and hearing of evidence";
4. The written rulings and/or orders, purportedly of the First to Fifth Respondents, dated 14 November 2016, but handed down on 23 November 2016; and
5. The proceedings of the Valuation Court in terms of whereof such rulings and/or orders were handed down:

are herewith reviewed and set aside.'

[30] It will accordingly be clear that the only questions which remain live, and which this court is called upon to determine, in view of the consent order recorded above, relate to prayers 2, 3 and 4 of the notice of motion. For ease of reference, the said prayers are the following:

1. Declaring the rulings and/or orders and proceedings referred to in paragraphs 1.1 to 1.5 *supra* to be in conflict with Article 18 read with Article 12 of the Namibian Constitution.
2. Ordering the First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents, and any other such respondents who might oppose the relief sought in this application, to pay the applicants' costs jointly and severally, the one paying and the other being absolved, with such costs to include the costs of four instructing and three instructed Counsel.

[31] I interpose to mention that the third prayer referred to above, as being prayer 4, is one generic in nature and scope, namely, further and/or alternative relief. I am of the view that the inclusion of prayer 4 in the order settling the first part of the notice of motion, dated 7 February 2019, is accordingly a misnomer and will not be considered in the next stage of the proceedings.

[32] It therefor becomes clear that two questions remain outstanding for the court's determination, namely, whether the court should, notwithstanding the consent *inter partes*, to review and set aside the prayers mentioned in para 28 still make a declaration whether the said orders and/or rulings stand in conflict with certain provisions of the Constitution. The last issue outstanding, relates to the question of costs. I deal with the outstanding issues presently.

Declarator

[33] As foreshadowed above, the question is whether in the light of the concession by the respondents that the orders and rulings referred to above have been reviewed and set aside, it is nevertheless appropriate for this court, notwithstanding the review, to still consider whether the said orders and rulings violate certain provisions of the Constitution.

[34] Mr. Narib, for the respondents, argued that the issue of whether the said orders and rulings violate certain provisions of the Constitution, has been rendered moot or academic as a result of the parties, especially the respondents, consenting to an order reviewing and setting aside the said orders and rulings.

[35] As would be expected, Mr. Corbett, for the applicants, adopted a contrary posture. He argued, and strenuously too, that notwithstanding the order reviewing the said orders and setting them aside, having been granted by consent, the Valuation Court is one which hardly has any judgments of the courts granting them guidance and where appropriate, illumination on what may be key requirements of the Constitution and the law that they have to comply with as they undertake their important function in this Republic. He accordingly argued that because an opportunity has presented itself, the court should not shy away from making the declarations for purposes of future guidance. Is he correct in this submission?

[36] In dealing with the propriety or otherwise of dealing with the declarator, as moved by the applicants, the court should not, in the process, close its eyes to the guiding remarks of this court in *Mushwena v Government of the Republic of Namibia and Another*⁴ where the court remarked as follows, referring in the process, to other cases:

‘It is settled law that a declaratory order is a discretionary remedy and will not be granted where the issue before the Court is academic, abstract or hypothetical.’

[37] In *Mahe Construction (Pty) Ltd v Seasonaire*,⁵ the Supreme Court, in considering such a matter, reasoned that in deciding whether or not a declarator should be made, the court should approach the process of examining the propriety thereof, in two different stages. First, the court should be satisfied that the applicant is a person interested in an existing, future or contingent right. Once so satisfied, the second stage then kicks in, namely, whether the case in issue, is a proper one, for the court, to exercise its discretion conferred on it by law.

[38] I am of the considered view, having regard to the present matter, that the applicants cannot validly claim that they may be considered as having an existing, future or contingent right in the matter. This is so, in my considered view, because the invalidity complained of by the applicants has been conceded, and rightly so, by the respondents. As matters stand, the decisions and orders complained of, have been not only reviewed, but also set aside by order of this court.

[39] This finding, in my considered view, clearly militates against a finding that with the issue having been disposed of in this manner, and in favour of the applicants, I may as well add, there can be no justifiable claim by the applicants, to any further existing right, in the circumstances. Once the order reviewing and setting aside the orders and rulings was issued, the matter was

⁴ 2004 NR 94 (HC), para 20.

⁵ 2002 NR 398 (SC) p410-411.

placed at an end, thus not amenable to further declarations of invalidity, in the circumstances.

[40] In this regard, it would seem that the questions, on which the applicants still seek a declarator, notwithstanding the review and setting aside of the acts complained of, have become academic or moot. The law is clear as to the fate of such questions, which appears, from most indications, to be inevitable.

[41] In *National Coalition for Gays and Lesbian Equality And Others v Minister of Home Affairs*,⁶ the Constitutional Court of South Africa propounded the applicable law in the following terms:

‘A case is moot and therefore not justiciable if it no longer presents an existing and live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’

[42] If any further authority is needed for the above proposition, the South African Supreme Court of Appeal⁷ cited with approval the lapidary remarks that fell from the lips of Lord Bridge of Harwich in *Ainsbury v Millington*,⁸ to the following effect:

‘It has always been a fundamental feature of our judicial system that the Courts decide disputes between parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.’

[43] It immediately becomes as clear as noonday that as matters presently stand, there is no dispute or live controversy among the parties herein regarding the validity of the orders and rulings of the Valuation Court. The issue of the validity or otherwise of those was settled once and for all by the concession made by the respondents and which was endorsed by the court,

⁶ 2000 (2) SA 1 (CC).

⁷ *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA) para 9.

⁸ [1987] 1 All ER 929 (HL) 930 (g).

being importuned to do so, by the parties. The constitutional compliance of the said orders and rulings with various Articles of the Constitution, is clearly rendered moot, in the circumstances.

[44] Mr. Narib had another arrow in his quiver. He referred the court to the judgment of the Supreme Court in *Road Fund Administration v Skorpion Mining Company*⁹ where the Supreme Court said:

‘The Constitution must be the last resort and not the first in the resolution of disputes that come before the courts. In the present case, the exact opposite happened. The High Court preferred to have recourse to the Constitution instead of first considering if the claim and the competing allegations could be resolved applying the common law . . . We have warned in the past that the court must first try and resolve a dispute by the application of the ordinary principles before resorting to the Constitution.’

[45] The judgment quoted immediately above, is binding on this court and its effect, on the present case is quite clear: the court has, in applying the dictates of the common law of administrative review, found that the orders and rulings of the Valuation Court are invalid and accordingly attract an order to have them set aside, and which order was granted by consent.

[46] In the circumstances, there is no need for the court, to then resort to the engaging the constitutional gear, so to speak to try and resolve the dispute, since whatever dispute may have existed, has been resolved by application of the ordinary gear, so to speak, of administrative law remedy of review. I accordingly hold that the declarator further sought by the applicants in addition to the setting aside of the orders, is academic and is thus not justiciable in the circumstances. The relief sought in terms of prayer 2 is thus rendered superfluous in the circumstances and is liable, in the premises, to be dismissed as I hereby do.

Costs

⁹ 2018 (3) NR 829 (SC), para 45.

[47] The only outstanding issue for determination at this juncture is limited to the question of costs. I should, at the outset, mention the obvious fact that none of the respondents have for all intents and purposes, opposed the application, save the Minister. It thus stands to reason that it would be harsh in the extreme, in the circumstances, to order the members of the Valuation Court and the other respondents, save the Minister, to pay the costs, when although their conduct may have instigated the proceedings, they appear to have readily thrown their hands in surrender and raised the white mast so to speak.

[48] I should in addition, mention that it would also invoke a chilling effect for the court, in the absence of very special and demanding circumstances, to issue a costs order against members of the Court sitting and dispensing their legislative mandate. Where there are proven allegations of malice, fraud or other despicable conduct on the part of the court, and which are not only mendacious, but inconsistent with their mandate, a competent court may, in those circumstances, be at large to issue a costs order to not only arrest, the decline, but to also bring the members of the court back to rails of judicial propriety and fair-minded exercise of their legal and judicial obligations.

[49] There are no such allegations in the present instance. If this court were to give in to the entreaties of the applicants, we may well have a serious scarcity of members willing to avail themselves for public service, for the reason that if they wrongly but *bona fide* make orders or rulings in the course of duty, that may attract personal reprisals. This would surely have a negative effect on persons sitting in judgment. Persons who sit and exercise any judicial power, should not sit on the bench with trembling hands, fearing that any lapse in judgment, even if *bona fide*, may attract a stinging sanction, more than just a verbal rebuke and correction by a competent court.

[50] Mr. Corbett, in his able address, referred the court to *Kliprivier Licensing Board Chairman v Ebrahim*,¹⁰ where the following was held, namely, 'Where, however, the proceedings of a body or officer are

¹⁰ 1911 AD 458.

successfully reviewed by reason of their irregularity, costs should be awarded.'

[51] Whilst I have no reason to quibble with the correctness of this statement of the law, one needs to consider whether it was meant to apply to a litigant in the position of a Valuation Court. When one has regard to the cases cited by the applicants in support of the submission, including *Parag v Ladysmith City Council And Another*,¹¹ it appears that none of the parties stood in the position of a court but administrative bodies of one class or the other.

[52] I need not answer the question but only need to point out that where a Magistrate's Court's decision is reviewed, it is very unusual for this court on review, to order costs against the presiding Magistrate. It would be quite strange and anomalous if the court did so. I need to point out that according to Regulation 14(2)¹², the Valuation Court's decision is deemed to be a civil judgment of a Magistrate's Court. To that extent, the Valuation Court stands on an even keel, so to speak, with the Magistrate's Court, thus rendering it anomalous for this court to mulct that Court with a costs order upon reviewing its decision or order.

[53] It should be pointed out that the first five respondents did not oppose the relief sought and no affidavits were filed by or on their behalf. This should ordinarily count in their favour – that is, in addition, to the remarks made immediately above.

[54] I accordingly find that this is a case where an adverse costs order against the other respondents, is, in the peculiar circumstances of this case, uncalled for and inappropriate. As mentioned earlier, these respondents did not oppose the relief sought by the applicants and in fact conceded the relief in para 1 of the notice of motion.

¹¹ 1961 (3) SA 714 (NPD); *SAR v Chairman Bophuthatswana Central Road Transportation Board* 1982 (3) SA 629.

¹² Land Valuation and Taxation Regulations: Agricultural (Commercial) Land Reform Act, 1995.

[55] The only question to now consider, is whether an adverse costs order is to be issued against the Minister. If so, the question, should further go, what about the fact that the applicants have not succeeded in obtaining a favourable order regarding the issue of the declarator – in fact, the position is that the Minister has been successful in that regard? Is an order that each party should bear its own costs, not fair and appropriate in the circumstances?

[56] There are two issues that must, in my considered view, be taken into account in this case. Although this was not dealt with head on, the applicants made an application for certain portions of the Minister's affidavit, to be struck out for being vexatious and/or scandalous. These have been identified earlier in the judgment. I am satisfied that the said portions fit hand in glove with the classification that they are scandalous and/or irrelevant. Costs, in that regard, should follow the event and I so order.

[57] Regarding the main costs, it was urged on behalf of the applicant that in appropriate cases, the courts would, where the matter is settled by the parties and the only issue becomes one of costs, that the court would have regard to the merits, based on the material at its disposal.¹³ This case, is however, on slightly different footing for the reason that although the issue of review was settled, the applicants persisted in the court having to decide the propriety of issuing the declarator, which as it is evident, was settled in favour of the Minister. To that extent, it would seem to me that the authority cited above, is not, properly considered, on all fours with the facts of the instant case and is thus not applicable.

[58] The view I come to, having regard to all the attendant facts to the matter, is that each of the parties, namely the applicants on the one hand, and the Minister, on the other, have had a fair measure of success in the matter. The applicants, for their part, succeeded in having the application for review settled in their favour, by consent. The Minister, on the other hand, succeeded in effectively parrying the applicants' relief for the declarator.

¹³ Channel Life Namibia Limited v Finance in Education (Pty) Ltd 2004 NR HC) 126.

[59] Having regard to the particular degree of success, however, and the overall effect of the success of each party, it would appear to me that the applicants' success, in having the review order granted almost without demur, has been comparatively been substantial. I accordingly order that the applicants be granted 70% of their costs in the circumstances.

Order

[60] In view of the foregoing, the following order appears to be condign:

1. The application for striking out the offensive portions of the affidavit filed by the Minister of Land Reform is granted with costs.
2. The application for the granting of a declarator in terms of prayer 3 of the Notice of Motion, is refused.
3. The Applicants, in view of their substantial success, are ordered to recover 70% of their costs from the Minister for Land Reform, consequent upon the employment of one instructing legal practitioners and one instructed legal practitioner.
4. The application is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: A. Corbett SC
Instructed by Engling, Stritter and Partners

RESPONDENTS: G. Narib
Instructed by the Office of the Government Attorney