HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO: HC-MD-CIV-ACT-OTH-2021/02075

In the matter between:

JOB SHIPULULO AMUPANDA	**PLAINTIFF**

and

MINISTER OF AGRICULTURE, WATER AND LAND REFORM	**1ST DEFENDANT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**2ND DEFENDANT**
ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA	**3RD DEFENDANT**
HANGO NAMBINGA N.O	**4TH DEFENDANT**
THE MEAT BOARD OF NAMIBIA	**5TH DEFENDANT**
DIETHELM METZGER	**6TH DEFENDANT**
ANDRE XAVIER COMPION	**7TH DEFENDANT**
NAMIBIAN AGRICULTURAL UNION	**8TH DEFENDANT**

Neutral Citation: *Amupanda v Minister of Agriculture, Water and Land Reform* (HC-MD-CIV-ACT-OTH-2021/02075) [2023] NAHCMD 547 (5 September 2023)

Coram: Ueitele J
Heard: **29 June 2023**
Delivered: **5 September 2023**

Flynote: Civil procedure **—** Rules of the High Court — Rule 20 — Protective costs orders — Purpose and requirements of rule 20.

Summary: On 26 May 2021, Mr Amupanda commenced action proceedings against the first to fourth defendants seeking an order; (a) declaring that the erection of the Veterinary Cordon Fence has not been carried out in terms of any law; (b) declaring that the erection of the Veterinary Cordon Fence is unconstitutional; and (c) reviewing and setting aside the decision of the first and second defendants to retain the Veterinary Cordon Fence. The first to fourth defendants defended the action and at a later stage, when the fifth to the eighth defendants gained knowledge of the matter, they intervened and were joined as defendants to the action.

On 4 March 2022, Mr Amupanda delivered a notice of intention to amend his particulars of claim. The defendants did not oppose the amendment and the amendment was effected in terms of rule 52, on 24 March 2022. Mr Amupanda, however, did not tender costs to the defendants and on 24 June 2022, the Meatboard signified its intention to follow up on its warning as contained in the case management report of 24 February 2022 to seek an order for wasted costs, which application was heard and disposed of.

On 29 August 2022, Mr Amupanda, in response to the Meatboard's indication that it will seek an order for wasted costs and in addition to opposing the application for wasted costs, filed an application for a protective costs order in terms of rule 20, which was heard on 29 June 2023.

Mr Amupanda contends that the issues in the main action are of public importance, underpinned by social justice and not for personal or political gain, that a protective costs order will ensure that the parties litigate on equal footing, and that he anticipates that the costs of this action will run into millions. Due to his limited financial resources he will not be able to pay the defendants' legal costs if his action is dismissed with costs. The defendants' oppose the application on the ground that the plaintiff failed to satisfy the requirements of rule 20 and consequently he has not made out a case for a protective costs order.

The court finds that Mr Amupanda has satisfied the first two requirements for a protective costs order, but in respect of the third requirement, he has not fully disclosed his financial position to this court and has not met the requirements set out in rule 20(1)*(c)*. Based on the financial situation presented by Mr Amupanda, the court is not in the position to arrive at a conclusion as to whether or not it is just and fair for the court to grant a protective costs order in his favour, and what conditions must be imposed if indeed the protective costs order is granted. The court, therefore, grants Mr Amupanda leave to supplement his papers in order to enable the court to properly asses his financial resources and the amount of costs that are likely to be involved in this matter.

Held that the effect or purpose of a protective costs order is to prospectively cap one or all parties' potential exposure to liability for their opponent's costs.

Held that rule 20(1) is formulated using the conjunctive adjective ‘and’ in a manner that appears to require the existence or satisfaction of all the requirements set out in the rule.

Held further that, an applicant for a protective costs order must satisfy the court that; first the issues raised in the case are of general public importance and it is a first impression case; second, that public interest requires that those issues be resolved, and thirdly having regard to the financial resources of the applicant and respondents the amount of costs that are likely to be involved it is fair and just to make a protective costs order, as long as the conduct of the applicant in the case is not frivolous or vexatious.

ORDER

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1. The plaintiff is granted leave to approach this court on the same papers, duly amplified, on the aspect of his financial resources and the amount of costs that are likely to be involved in this matter.

2. For the purposes of paragraph 1 of this order, the plaintiff must, if so advised, file his amplified papers by not later than 12 September 2023.

3. The defendants may, if so advised, reply to the plaintiff's amplified papers by not later than 23 September 2023.

4. The matter is postponed to 26 September 2023 at 08h30 for a status hearing to consider the way forward.

RULING

UEITELE J:

Introduction

[1] The plaintiff in this matter is Mr Job Shipululo Amupanda (Mr Amupanda). He is seeking an order in terms of rule 20 of the rules of this court insulating him from an adverse costs order. The background to the present application is this: Mr Amupanda was born and raised at a village known as Omaalala Village, in the northern part of Namibia. After completing his secondary school education, Mr Amupanda registered for tertiary education at the University of Namibia, which is situated in Windhoek. Upon completion of his studies, he secured employment in Windhoek. He thus asserts that he has, as from the year 2005, been a frequent traveller between his birth village namely, Omaalala and Windhoek.

[2] He alleges that on 17 May 2021, he was travelling in his private motor vehicle from his home village to Windhoek and at the Oshivelo Checkpoint[1], Mr Hango Nambinga who at the time was employed by the Government of the Republic of Namibia, in the Directorate of Veterinary Services of the Ministry of Agriculture, Water and Land Reform, confiscated his animal products 'red meat' and burned it.

[1]Oshivelo is a settlement located centrally between the town of Omuthiya and Tsumeb in the Oshikoto Region of Namibia. The historical connotations of the Oshivelo settlement, are that it was an animal disease control point. Its colonial aspect is that, during the pre - independence era (before 1990) it served as a checkpoint where people travelling from the northern part of Namibia to the central and southern parts of Namibia in pursuit of job opportunities and better living conditions would be screened and issued permits. Oshivelo also served as a military base for the apartheid regime.

[3] Alleging that Mr Nambinga's actions of confiscating and burning his red meat are unlawful and not in accordance with the Namibian Constitution. Mr Amupanda, on 26 May 2021, commenced proceedings in this court against the Minister of Agriculture, Water and Land Reform, as the first defendant, the Government of the Republic of Namibia, as the second defendant, the Attorney-General of the Republic of Namibia, as the third defendant and Mr Hango Nambinga, in his official capacity as an official of the Directorate of Veterinary Services as the fourth defendant, in terms of which action Mr Amupanda amongst other reliefs seeks an order;

(a) declaring that the erection of the Veterinary Cordon Fence, which has become known as the red line, has not been carried out in terms of any law;

(b) declaring that the erection of the Veterinary Cordon Fence is unconstitutional; and

(c) reviewing and setting aside the decision of the first and second defendants to retain the Veterinary Cordon Fence.

[4] In his particulars of claim, Mr Amupanda describes himself as an adult male person and the Activist-in-Chief of the Affirmative Reposition Movement. He also describes himself as the former mayor of the Municipal Council of Windhoek and is currently employed as a senior lecturer at the University of Namibia, Windhoek Campus.

[5] Mr Amupanda further states that since the year 2014, he and thousands of other young Namibians have engaged in intensive social activism, which is aimed at among many other objectives, to complete the alleged 'incomplete project of liberation' and bettering the social conditions of all poor, marginalised and disenfranchised persons. He further states that chief among this social activism is the restoration of the dignity of the Namibian people through serious, fearless and selfless social activism.

[6] Mr Amupanda furthermore states that as a political scientist and scholar he researches areas of interest including studying how coloniality, the successor of colonialism, manifests itself in a post-colonial state through the institutions of state, the education system and the imagination of self (of the oppressed in general and the natives in particular). He thus asserts that he is committed to social and political activities aimed at the restoration of dignity and equality of the Namibian people.

[7] The Minister responsible for Agriculture, Water and Land Reform, and the second to the fourth defendants defended Mr Amupanda's action. Mr Amupanda had initially not cited the fifth to the eight defendants as parties to the action nor did he serve the particulars of claim on them. Despite the fact that Mr Amupanda did not cite nor serve the fifth to the eighth defendants with the summons and particulars of claim, they gained knowledge of Mr Amupanda's action and successfully launched applications to intervene in the matter and were joined as defendants to the action during August 2021.

[8] I will therefore for ease of reference, in this ruling, refer to the first defendant as the Minister, the second defendant as the Government, the third defendant as the Attorney General, the fourth defendant as Mr Nambinga, the fifth defendant as the Meatboard, the sixth defendant as Mr Metzger, the seventh defendant as Mr Compion and the eighth defendant as the Agricultural Union. Where I refer to two or more of the defendants, I will simply refer to them as the defendants.

[9] After being joined as a defendant to this matter, the Meatboard, during September 2021, participated in the preparation of the case plan report. In the case planning report, the defendants recorded that they intended to raise exceptions to Mr Amupanda's particulars of claim. On 29 October 2021, the Meatboard filed its notice of exception and application to strike out certain allegations in Mr Amupanda's particulars of claim as it then stood. Pursuant to the notice of exception and application to strike out, Mr Amupanda on 15 November 2021 after engaging the defendants as contemplated in rule 32(9) & (10), filed a notice of intention to amend his particulars of claim.

[10] During the period of 15 November 2021 to 24 February 2022, some activities, such as exchange of correspondence, delivering of notices to amend, objections to the notices to amend, defective case management reports, one sided case management or status reports and at times holding of meetings to engage as required under rule 32(9), took place which culminated in the parties delivering a case management report on 24 February 2022, in terms of which Mr Amupanda indicated his desire to file a further notice of his intention to amend his particulars claim. In the case management report of 24 February 2022 the Meatboard recorded the following:

'...This is yet a further amendment sought by the plaintiff. The fifth defendants' rights in regard to costs incurred in respect of this matter and previous attendances, including the exceptions and notices of objection, are and remain reserved and will be addressed at a later stage before the Honourable Court...'

[11] After filing the case management report which I referred to in the preceding paragraph, Mr Amupanda on 4 March 2022 delivered his notice of intention to amend his particulars of claim to the defendants. After delivery of the notice of intention to amend Mr Amupanda and the defendants met and engaged in terms of rule 32(9). During that engagement, the Meatboard indicated that it does not intend to object to Mr Amupanda's intended amendment. The defendants accordingly did not oppose the proposed amendment and the amendment was, in terms of rule 52 of the Rules of Court effected on 24 March 2022.

[12] During the activities over the period 15 November 2021 to 24 March 2022 when Mr Amupanda ultimately effected the amendment of his particulars of claim, Mr Amupanda did not tender the costs of those activities to the defendants. On 24 June 2022, the Meatboard signified its intention to follow up on its warning contained in the case management report of 24 February 2022 to seek an order for wasted costs. The application for wasted costs was launched, heard and disposed of[2].

[2] See *Amupanda v Minister of Agriculture, Water and Land Reform* (HC-MD-CIV-ACT-OTH 2021/02075) [2022] NAHCMD 691 (22 December 2022).

[13] In response to the Meatboard's indication that it will seek an order for wasted costs, Mr Amupanda in addition to opposing the application for wasted costs, indicated that he will seek a protective costs order as contemplated in rule 20 and in fact did that by filing an application for protective costs order on 29 August 2022. I heard the application on 29 June 2023 and this ruling is in respect of that application.

The traditional approach to costs in private law litigation

[14] I find it convenient to structure this ruling by considering the relevant law first, and to set out the general purpose of a protective costs order before I consider Mr Amupanda's application.

[15] Our courts have historically treated costs as a matter of largely unfettered discretion[3]. Despite this 'free hand', a coherent set of principles on costs orders has emerged from the case law. In civil litigation, the ordinary approach was and still is that costs orders must indemnify a successful party against expenses that he or she incurred as a result of litigation that he or she should not have been required to initiate or to defend[4].

[16] The rationale behind the rule in civil litigation is that if a private person is brought to court to defend a claim with insufficient merit, then it could hardly be fair to expect him or her to pay legal costs to institute or defend an action that, objectively, ought not to have been brought in the first place. The courts therefore adopted a general rule that costs follow the event or put otherwise the 'loser must pay'[5].

[17] In 2014, the Judge President of this court introduced new rules[6] which contain a measure hitherto unknown in our civil practice namely protective costs

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[3] See A Cilliers: *The Law of Costs* (2006) at § 14.04, citing *Neugebauer & Co Ltd v Hermann* 1923 AD 564,at p 575; *Penny v Walker* 1936 AD 241,at p 260; *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963, 976 (a); and *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808, 815-816 (a).

[4] See *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC), 2002 (1) BCLR 1 (CC), [2001] ZACC 5 at para 15.

[5] *Hailulu v Director of the Anti-Corruption Commission and Others* 2014 (1) NR 62 (HC).

[6] Promulgated in Government *Gazette* -No. 5392 of 17 January 2014 under Government Notice No. 4 of 2014.

orders. The new measure contained in rule 20 reverses the common law principle of indemnity underpinning costs orders which holds that the successful party must, as far as possible, be placed in the position it would have been in but for the litigation[7]. Rule 20 provides as follows:

'20. (1) On an application by a party and served on any other party the court may, on such conditions as it thinks fit, make a protective costs order at any stage of the proceedings if the court is satisfied that—

(a) the issues raised in the case are of general public importance and it is a first impression case;

(b) the public interest requires that those issues be resolved; and

(c) having regard to the financial resources of the applicant or applicants and the respondent or respondents and to the amount of costs that are likely to be involved it is fair and just to make the order, as long as the conduct of the applicant in the case is not frivolous or vexatious.

(2) A protective costs order may-

(a) prescribe in advance that there will be no order as to costs in the substantive proceedings whatever the outcome of the case;

(b) prescribe in advance that there will be no adverse costs order against the party requesting the protective costs order in case that party is unsuccessful in the substantive proceedings; or

(c) cap the maximum liability for costs against the party requesting the protective costs order in the event that that party is unsuccessful in the substantive proceedings.

(3) If a litigant covered by a protective costs order refuses an offer of settlement and fails in the event to be awarded more than the offered amount or remedy, the protective costs order does apply only with respect to the proceedings up to the date of the offer of settlement.

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[7] Petrus T Damaseb: *Court-Managed Civil Procedure of the High Court Of Namibia Law, Procedure and Practice*. p 364.

(4) The court may make any award regarding costs that it considers fit in respect of an application for a protective costs order under this rule.'

[18] The ancestry of protective costs orders are cases decided in the United Kingdom and Canada and followed by Australian courts granting a protective costs order, pursuant to specific statutory powers, or potentially a broader statutory discretion as to costs.

[19] The effect or purpose of a protective costs order is to prospectively cap one or all parties' potential exposure to liability for their opponent's costs. Damaseb[8] argues that the purpose of the rule is that a person who has an arguable case that involves a matter of public interest must not, for fear of an adverse costs order, be deterred from pursuing a claim. The underlying premise is that the pursuit of such a claim is in the public interest and that the issue involved be authoritatively determined by the court, in the public interest. He opines that:

'…the rule is, not intended to insulate a person with substantial means or resources from the vagaries of the litigation process. That much seems apparent from paragraph (c) of Rule 20(1) which states that the court must have regard to the financial resources of both the applicant and the respondent and to the amount of costs that are likely to be involved, and make an order for protective costs only if it is fair and just to make the order. The order for protective costs may in any event be made only if the conduct of the applicant is not frivolous or vexatious.'

Protective Costs Orders: the governing principles

[20] In the English case of *Corner House Research, R (on the application of) v Secretary of State for Trade & Industry*[9] the England and Wales Court of Appeal stated that a protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

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[8] *Ibid.*

[9] *Corner House Research, R (on the application of) v Secretary of State for Trade & Industry* [2005] 1 WLR 2600, [2005] 4 All ER 1, para [74].

(a) The issues raised are of general public importance;

(b) The public interest requires that those issues should be resolved;

(c) The applicant has no private interest in the outcome of the case;

(d) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and

(e) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

[21] Rule 20(1) of the Rules of Court (quoted earlier in this ruling) appears to have followed the guidelines set in the Canadian, United Kingdom and Australian cases[10] as regards when a court may make a protective costs order. The guidelines that rule 20(1) identify are that the court may make a protective costs order at any stage of the proceedings if it is satisfied that:

(a) the issues raised in the case are of general public importance and it is a first impression case;

(b) the public interest requires that those issues be resolved; and

(c) having regard to the financial resources of the applicant or applicants and the respondent or respondents and to the amount of costs that are likely to be involved it is fair and just to make the order, as long as the conduct of the applicant in the case is not frivolous or vexatious.

[22] The common thread that runs through rule 20(1) and the decisions that I have referred to in the preceding paragraph is the requirement that the court must be satisfied that 'public interest' requires that the issues in contention must be resolved.

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[10] See the cases of *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, 313 N.R. 84, *Regina (Corner House Research) v Secretary for Trade and Industry* [2005] 1 W.L.R. 2600, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

The question that arises then is; ‘but what is public interest’. In *Asko Beleggings v Voorsitter van die Drankraad NO en Andere*[11] the court held that the term *'public interest'* was a wide and uncertain. In *Leicester Properties (Pty) Ltd v Farran*[12] the court argued that the phrase 'public interest' does not permit a clear, precise and comprehensive definition.

[23] Despite the above quoted pronouncements a good general understanding of the concept can be developed by considering the ways in which the courts have interpreted and applied the concept. At a general level, public interest has been interpreted as benefiting the public, promoting the general welfare of the public, or better serving the public[13]. In *Maharaj v Chairman Liquor Board*[14] Nicholson J said:

‘It is of course essential to determine what the phrase *'in the public interest'* means. Paraphrasing the dicta in a number of cases it may be said to be encapsulated in the following propositions:

(a) It does not mean that the public whose interest is to be served is necessarily to be widely representative of the general public.

(b) It means that the public would be better served if the applicant were granted the licence than that the existing state of affairs was to continue.

(c) It is not the national interest that is intended but that of the inhabitants in the areas for which the licence is sought or visitors to that area.’

[24] In *Argus Printing and Publishing Co. Ltd. v. Darbys Artware (Pty.) Ltd. and Others*[15]*,* Herbstein J, pointed out that:

‘…. "The public” is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even

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[11] *Asko Beleggings v Voorsitter van die Drankraad NO en Andere* 1997 (2) SA 57 (NC).

[12] *Leicester Properties (Pty) Ltd v Farran* 1976 (1) SA 492 (D).

[13] See *Transnet Ltd t/a Metrorail v Rail Commuter Action Group* 2003 (6) SA 349 (SCA) and *CJW Marketing CC v Limpopo Provincial Liquor Board* [2008] ZAGPHC 40

[14] *In Maharaj v Chairman Liquor Board* 1997 (1) SA 273 (N) at 281G.

[15] *Argus Printing and Publishing Co. Ltd. v. Darbys Artware (Pty.) Ltd. and Others,* 1952 (2) SA 1 (C) at 8 - 10.

the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in any particular matter professional, political, social, artistic or local. …

While the words 'the public' may not necessarily embrace every member of the community the context in which they are used here - 'the general interest of the public' suggests that they were intended to cover more than a group of persons with a particular interest. Furthermore it seems to me that the composition of 'the public' must vary according to the particular scheme under consideration. …

One faces the same difficulty in determining the 'general interest' of that nebulous 'public'. The interest must be a 'general' one; not a particular interest such as the possibility of larger dividends to the shareholders but one which is widespread though not necessarily common to the whole group of 'the public'. How is this 'general interest of the public' to be determined?

'We have to construe a statute which it is not easy to interpret; the subject matter is difficult and the words used are vague.'… Nevertheless one must attempt to give some reasonable meaning to the language of the legislature.

With diffidence I suggest that the approach of the Court must be to take a broad, common sense view of the position as a whole. It must take the evidence placed before it by the applicant and the respondents and bearing in mind that the *onus* is on the former decide whether it has been satisfied that the public would be better served if the applicant were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs. The Court will have, as best it can, to determine in the light of the special facts and circumstances of each case who 'the public' is; in doing so it would have regard to those individuals or classes of individuals who might be affected directly or indirectly by the scheme and the use to which the reconstructed premises will be put.'

[25] Having regard to the authorities generally and those that I have cited in this ruling, I suggest that *'public interest'* is a wide and diverse concept that cannot, and must not, be limited in its scope and application. The definition of what constitutes public interest must be assessed on the facts of every case or on a case-by-case basis. I therefore find that in its very basic formulation, public interest is the notion

that an action or process or outcome widely and generally benefits the public at large as opposed to a few or a single entity or person. Put otherwise, the question must be whether the action or process or outcome benefits the Namibian people as a collective or group of people in Namibia as a collective and that the action or process or outcome must be accepted or pursued in the spirit of the rule of law as envisaged by our Constitution.

[26] When is a matter then one of first impression? A matter of first impression is an issue where the parties disagree on what the applicable law is, and there is no prior binding authority (precedent) so that the matter has to be decided for the first time. A first impression case may be a first impression in only a particular jurisdiction[16]. Put otherwise a 'case of first impression' is a legal term that refers to a legal case where a judge must make a decision about a question of law that has not been previously addressed by any higher court. This means that the judge must determine the legal rule or principle that should be applied to the specific circumstances before him or her.

Has Mr Amupanda satisfied the requirements of rule 20?

[27] Rule 20(1) is formulated using the conjunctive adjective 'and' in a manner that appears to require the existence or satisfaction of all the requirements set out in the rule. In other words, an applicant for a protective costs order must satisfy the court that: first the issues raised in the case are of general public importance, and it is a first impression case; second, that public interest requires that those issues be resolved; and thirdly having regard to the financial resources of the applicant and respondents the amount of costs that are likely to be involved it is fair and just to make a protective costs order, as long as the conduct of the applicant in the case is not frivolous or vexatious.

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[16] Compare *Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd and Others* 2014 (1) NR 290 (HC) para 45 where Damaseb JP said *'No binding precedent has been cited for such far reaching a conclusion. In that sense, this is a case of first impression.'*

[28] In evaluating whether Mr Amupanda has satisfied the requirements of the rule, the court must consider the evidence that Mr Amupanda has placed before it and the evidence placed by the defendants before it, and bearing in mind that the *onus* is on Mr Amupanda in order to decide whether the court is satisfied that the public would be better served if the relief sought by Mr Amupanda, in the main action, were to be granted. The court must as best it can, in the light of the special facts and circumstances of this case determine who 'the public' is; in doing so the court will have regard to those individuals or classes of individuals, who might be affected directly or indirectly by the relief sought by Mr Amupanda in the main action.

[29] In the main action, Mr Amupanda seeks an order which *inter alia* declares that the erection of the Veterinary Cordon Fence has not been carried out in terms of any law, is unconstitutional and an order reviewing and setting aside the decision of the Government of the Republic of Namibia to retain the Veterinary Cordon Fence. The basis on which Mr Amupanda seeks those orders is his contention that the existence of the Veterinary Cordon Fence perpetuates a colonial practice that sustains the discrimination of the predominantly black persons, who reside north of the red line and their livestock.

[30] Mr Amupanda thus contends that the issues in the main action are of public importance, underpinned by social justice and not for personal or political gain. He further contends that a protective costs order will ensure that the parties litigate on equal footing. He furthermore contends that he anticipates that the costs of this action will run into millions and since he is a natural person with limited financial resources he will not be able to pay the defendants' legal costs, if his action is dismissed with costs.

[31] Mr Amupanda further asserts that he will not be able to confidently prosecute his claim by virtue of him running the risk of paying the costs of the defendants should he be unsuccessful in his case which will hinder the advancement of constitutional justice[17] ultimately depriving him from his right to a fair trial as guaranteed by Article 12 of the Namibian Constitution.

[17]This statement mirrors the plaintiff's allegation that the preservation order will also ensure that the matter is handled in a manner that gives effect to Article 12 of the constitution.

[32] The defendants' opposition to the grant of the protective costs order sought by Mr Amupanda can be summarised in one sentence namely that Mr Amupanda has failed to satisfy the requirements of rule 20, and has consequently not made out a case for the relief he seeks, namely a protective costs order.

Public importance and public interest.

[33] In his founding affidavit, Mr Amupanda makes reference to an interview by the President of this Republic given to the New Era newspaper on 10 July 2018, in which interview the President is reported to have stated that the Veterinary Cordon Fence must be removed. He also makes reference to a report by a committee which was established by the Government to report on the effects of the Veterinary Cordon Fence and by pronouncements by the King of the Aandonga community in which the King castigates the hypocrisy allegedly surrounding the Veterinary Cordon Fence. In view of these pronouncements Mr Amupanda contends that the debate around the existence and constitutionality of retaining the Veterinary Cordon Fence is of public importance.

[34] The Minister, in his answering affidavit denies that public interest require the issues (the retention or removal of the VCF) around the Veterinary Cordon Fence to be resolved. He contends that by contrast, the public interest demands that the area south of the Veterinary Cordon Fence, which is free of foot-and-mouth disease without practising vaccination, be extended gradually to the communal areas north of the Veterinary Cordon Fence, in a way that does not cause Namibia to lose its status with the World Organisation for Animal Health (WOAH) as a country having areas that are free of the foot and mouth disease. He contends that it is absolutely not in the public interest to abruptly remove the Veterinary Cordon Fence as the plaintiff asks the court to do.

[35] The Minister furthermore opposes the granting of the protective costs order on the basis that the question regarding the constitutionality or otherwise of the policy around the Veterinary Cordon Fence is not a first impression case within the

meaning of rule 20. He asserts that the jurisprudence of Namibia is replete with legal principles to be applied resolving the main issue in this case, namely, whether the executive or administrative conduct complained of by Mr Amupanda is limiting or interfering with Mr Amupanda's fundamental rights of dignity and equality to an extent not permitted by the Namibian Constitution.

[36] The Minister furthermore contends that Mr Amupanda's institution of the action in this case is frivolous and vexatious, because he staged this action. The Minister alleges that Mr Amupanda deliberately arrived at the Oshivelo control gate with raw meat and asked the veterinary officials to confiscate it in order to artificially create the facts to institute this action.

[37] The Minister furthermore reasoned that since the year 2005, the measures controlling the spread of animal disease from north to south across the Veterinary Cordon Fence never sufficiently bothered Mr Amupanda to institute this action. Now, out of the blue, 16 years later, Mr Amupanda institutes this action to embarrass the Government of the Republic of Namibia, and to abuse this court by purporting to achieve by litigation what he is unable to achieve in the political arena.

[38] The Minister further contends that if Mr Amupanda is granted immunity against any adverse costs order, it will, encourage him to litigate inefficiently, wastefully and unexpeditiously inimical to the overriding objective of the rules of this court, namely: to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable. The Minister furthermore contends that the complexity of the factual and legal issues in this matter is not of a high degree. The facts are simple and not seriously in dispute. The legal principles to be applied have been authoritatively established by the Courts of Namibia.

[39] The Meatboard opposes the granting of a protective costs order on the basis that Mr Amupanda is not seeking to set aside any statute, regulation or law but seeks to 'set aside' an inanimate object, the Veterinary Cordon Fence. The Meatboard further contends that the Veterinary Cordon Fence as it exists today, serves a

perfectly rational and constitutionally permitted object and denies that the Veterinary Cordon Fence itself violates Mr Amupanda's dignity or the dignity of others.

[40] The Meatboard further contends that Mr Amupanda failed to make out a case in his founding papers for the relief he is seeking, in that he:

(a) failed to allege the necessary or sufficient facts whereupon this court can determine whether the issues are of general public importance considering the consequence if the Veterinary Cordon Fence is removed;

(b) failed to make out a case that the public interest requires that the constitutionality and removal of the Veterinary Cordon Fence must be resolved;

(c) failed to provide any definitive amounts for what the costs could amount to; and

(d) failed to disclose his true and full financial position, in the absence whereof the Honourable Court cannot adjudicate the application in favour of the plaintiff.

[41] The Meatboard furthermore opposes the grant of a protective costs order in favour of Mr Amupanda on the basis of its contention that Mr Amupanda has substantial direct and private interests in the outcome of this action – such interests being duplicitous because he seeks to benefit his own political agenda by launching the action (the media knew about this action even before it was served on the defendants) and he is producing agricultural products north of the Veterinary Cordon Fence, and having the Veterinary Cordon Fence removed would benefit, according to himself - his farming operations.

[42] I have no hesitation to conclude that this case raises issues of general public importance. The first reason why I come to that conclusion is the fact that the issues raised relates to a perception (whether the perception is wrong or right matters not at this moment) that the Government's policy of restricting the movement of livestock from the areas north of the Veterinary Cordon Fence to areas south of the Veterinary

Cordon Fence is discriminatory. Discrimination is an evil which offends against the public policy of this country. It is thus of outmost public importance that legal certainty be obtained as to whether the Government's actions or policy is discriminatory and thus affronts the Constitution.

[43] Another reason why I have come to the conclusion that the issues in question in this matter raise questions of public importance that must be clarified in the public interest, (public interest here refers to the interests of both the commercial and communal farming community of Namibia) is the admission by both the Minister and the Meatboard that the farming sector in Namibia approximately contributes N$7,3 billion to the Namibian Gross Domestic Product. It follows that any decision, whether to retain or remove the Veterinary Cordon Fence, will impact either positively or negatively a broad section of the Namibian populace as a collective. The issues raised thus loudly cry out for legal certainty. It may be so that the issues raised may benefit Mr Amupanda as an individual, but the individual benefit will be outweighed by the public benefits of resolving the issues.

[44] I agree with the Minister that the legal principles which may be applied to resolve the issues in this matter have been authoritatively established by the Courts of Namibia and in that sense the case is not one of first impression. I, however, find that the fact that the legal principles, which may be applied to resolve the issues raised in this matter have been authoritatively established by our superior courts, does not detract from the fact that the issues that are raised in this matter call for them to be resolved by the courts, and will to that extent benefit the public at large as opposed to a few or a single entity or person. The issues must in the public interest be resolved by the courts.

[45] I pause here to note that the labels (namely that Mr Amupanda raises or brought the issues to court to gain or score political goals), which the Minister and the Meatboard uses to characterise the institution of this action by Mr Amupanda are irrelevant. I say they are irrelevant because Article 17 of our Constitution accords Mr Amupanda the right to participate in peaceful political activities intended to influence the composition and policies of the Government and to participate in the conduct of

public affairs, whether directly or through freely chosen representatives. The only relevant question is thus whether it is in the public interest that the competing contentions are resolved, and as I have found it surely is of public importance and in the public interest that the issues be resolved.

[46] I therefore do not agree that Mr Amupanda is abusing the court or its process when he brings the questions of whether or not the retention of the Veterinary Cordon Fence is discriminatory against a section of the Namibia populace for determination by the court. The question of whether or not Mr Amupanda will score a victory which he will otherwise not score in the political 'playing field' is of no moment because courts exists to resolve legal disputes and cannot shy away from that responsibility simply because one of the parties may score a political victory. The only question must be whether the dispute is a legal dispute which is justiciable.

Fairness and justice taking into consideration financial means.

[47] One of the contentions on which Mr Amupanda anchors his application for a protective costs order is his reliance on the principle which he identifies as the principle of 'equality of arms', and which he claims is rooted in Article 12 of the Namibian Constitution. Mr Amupanda argues that without a protective costs order he will not have a fair trial.

[48] The rules of court are there to ensure that parties who appear before it are treated equally and in accordance with the law and thus secure a fair trial. I have indicated earlier that rule 20(1) requires that all the three requirements set out in that rule must be satisfied before a court can exercise its discretion as to whether or not it will make protective costs order. This means that an application for a protective costs order is not a mere formality and a protective costs order is not just for the asking. An applicant for a protective costs order must discharge the *onus* of satisfying the court with proper, persuasive and admissible evidence that the prerequisites of rule 20(1) for the granting of a protective costs order exists. General, bold and vague allegations are not enough.

[49] In the present matter, Mr Amupanda simply states that he is a natural person without the necessary financial means to advance this case and as such further the interest of justice. He says that he does not have access to resources sufficient enough to achieve equality of forces (as opposed to the defendants). He furthermore simply states that the costs involved in this matter will be 'messy' and will definitely run into millions of Namibia Dollars. These are not facts but are unsubstantiated bold statements and conclusions, the basis on which they were arrived at not having been stated.

[50] I do, therefore, agree with the Minister and Meatboard's contention that because Mr Amupanda has not fully disclosed his financial position to this court, he has not met the requirements set out in rule 20(1)*(c)*. Looking at the financial situation presented by Mr Amupanda, I am not in the position to arrive at a conclusion as to whether or not it is just and fair that I grant a protective costs order in his favour and what conditions I must impose if I indeed grant the protective costs order.

[51] The conclusion that I have arrived at, namely that Mr Amupanda has not satisfied the requirements imposed by rule 20(1)*(c),* would ordinarily have one and only one result namely the refusal and dismissal of Mr Amupanda's application for a protective cost order.

[52] I earlier stated that the Deputy Chief Justice in his work *Court-Managed Civil Procedure of the High Court of Namibia Law, Procedure and Practice*[18] argued that the purpose of rule 20 is that a person who has an arguable case that involves a matter of public interest must not, for fear of an adverse costs order, be deterred from pursuing a claim.

[53] I am therefore inclined to assist Mr Amupanda in this regard. I will grant him leave to supplement his papers and to place more detailed information before the court for the court to properly assess his financial resources and the amount of costs that are likely to be involved in this matter.

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[18] *Supra* Footnote 6.

Order

[54] Having considered the arguments presented and the papers before me, as well as the applicable law, I make the following order:

1 The plaintiff is granted leave to approach this court on the same papers, duly amplified, on the aspect of his financial resources and the amount of costs that are likely to be involved in this matter.

2 For the purposes of paragraph 1 of this order, the plaintiff must, if so advised, file his amplified papers by not later than 12 September 2023.

3 The defendants may, if so advised, reply to the plaintiff's amplified papers by not later than 23 September 2023.

4 The matter is postponed to 26 September 2023 at 08h30 for a status hearing to consider the way forward.

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Judge

APPEARANCES

PLAINTIFF:	T Chibwana Instructed by Kadhila Amoomo Legal Practitioners, Windhoek
1ST – 4TH DEFENDANTS:	H Steyn (with him M Boonzaier) Instructed by Office of the Government Attorney, Windhoek
5TH DEFENDANT:	R Heathcote SC (with him A van Vuuren) Instructed by Theunissen, Louw & Partners, Windhoek