

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

Case Title:	Case No:
IMBERT NGAJOZIKWE TJIHERO FIRST APPLICANT	HC-MD-CIV-MOT-GEN-2024/00074
W.S TRADING & INVESTMENT CC SECOND APPLICANT	
ALEXIUS TUKOTORERA TJIHERO THIRD APPLICANT	Division of Court:
CECILIA VASTI GAYA FOURTH APPLICANT	HIGH COURT (MAIN DIVISION)
and	
MINISTER OF AGRICULTURE, WATER AND LAND REFORM FIRST RESPONDENT	
DEPUTY SHERIFF OF DISTRICT WINDHOEK SECOND RESPONDENT	
DEPUTY SHERIFF OF DISTRICT GOBABIS THIRD RESPONDENT	
DEPUTY SHERIFF OF DISTRICT OTJOZONDJUPA REGION FOURTH RESPONDENT	
DEPUTY SHERIFF OF DISTRICT OUTJO FIFTH RESPONDENT	
AGRIBANK OF NAMIBIA SIXTH RESPONDENT	
CAPX FINANCE NAMIBIA CC SEVENTH RESPONDENT	

MINISTER OF FINANCE REGISTRAR OF DEEDS	EIGHTH RESPONDENT NINTH RESPONDENT	
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING		Date of hearing: 11 MARCH 2024
		Delivered on: 3 APRIL 2024
Neutral citation: <i>Tjihero v Minister of Agriculture, Water and Land Reform</i> (HC-MD-CIV-MOT-GEN-2024/00074) [2024] NAHCMD 146 (3 April 2024)		
IT IS ORDERED THAT:		
<ol style="list-style-type: none"> 1. The application is dismissed. 2. The applicants shall, the one paying the other to be absolved, pay costs in favour of: <ol style="list-style-type: none"> (a) the first respondent; and (b) the sixth respondent, which costs shall include costs of one instructing counsel and one instructed counsel. 3. No costs order is made against the applicants in favour of the parties represented by Mr Jacobs, that is, the third, fourth, fifth and seventh respondents. 4. The matter is finalised and removed from the roll. 		
Following below are the reasons for the above order:		
<p>PARKER AJ:</p> <p><u>Preliminary issues</u></p> <p>[1] In this application, the applicants seek an interim interdict in terms set out in paras 1-5 of the notice of motion. They prayed that the matter be heard on the basis that it was urgent.</p>		

[2] The requirements of an interim interdict are well entrenched. The requirements are:

- (1) a prima facie right;
- (2) a well-grounded apprehension of irreparable harm if the relief is not granted;
- (3) that the balance of convenience favours the granting of an interim interdict; and
- (4) that the applicant has no other adequate remedy.¹

[3] I shall call the requirements set out in para [2] above the *Nakanyala* requirements. Furthermore, before a person can interdict another person from breaching a statute, the applicant for an interdict must show, among other things, that he himself or she herself suffers damage or a well-founded apprehension of damage to himself or herself, because the *actio popularis* is not part of our law.² I shall call this principle the *Beck* requisite. The *Nakanyala* requirements and the *Beck* requisite are the irreducible minima that the applicants must satisfy to succeed.

[4] The property involved are listed in the papers filed of record; and, *a fortiori*, each one of them was declared specially executable by the court as long ago as 2019 and 2020, as indicated hereunder:

- (1) Farm Dankbaar: 16 April 2019
- (2) Farm Renosterkom: 12 November 2019
- (3) Farm Cala Noord: 29 January 2020
- (4) Farm Omukaru: 12 June 2020

[5] There are four applicants in all. The first applicant appeared in person and he filed a founding affidavit. The second applicant, a close corporation, is represented by Mr Christian. As I understood it, and it was not challenged, Mr Christian is a member of the close corporation. The second applicant filed a confirmatory affidavit and I understood that the second applicant to be on common ground with the first applicant as respects the founding affidavit filed by the first applicant. Similarly, the third applicant appeared in person. He filed a confirmatory affidavit and I understood the third applicant to be on common ground with the first applicant respecting the founding affidavit. In the same fashion the fourth applicant appeared in person. She filed a

¹ See, eg, *Nakanyala v Inspector General Namibia and Others* 2012 (1) NR 200 (HC) para 36.

² I Isaacs *Beck's Theory and Principles of Pleading in Civil Actions* 5 ed (1982) para 103 (and the cases there cited); LTC Harms *Amler's Precedents of Pleadings* 4 ed (1995) at 49-50 (and the cases there cited).

confirmatory affidavit and I understood her to be on common ground with the first applicant respecting the founding affidavit.

[6] In like fashion, the first, third and fourth applicants made no oral submissions. They informed the court that they also rely on submissions by Mr Christian who made oral submissions for the second applicant.

[7] For these reasons, the singular 'applicant' and the plural 'applicants' are used interchangeably where the context permits.

[8] There are nine respondents in all. The first respondent (the Minister of Agriculture, Water and Land Reform) has moved to reject the application and has filed an answering affidavit. The third respondent has moved to reject the application and has filed an answering affidavit. The fourth respondent has moved to reject the application and has filed an answering affidavit. The sixth respondent has moved to reject the application and has filed an answering affidavit. The seventh respondent has moved to reject the application and has filed an answering affidavit. The first applicant filed a replying affidavit thereto.

[9] Ms Chinsembu of the Government Attorney's Office represents the first respondent. On the authority of *Maletzky v President of the Republic of Namibia*³, I have no good reason to reject counsel's appearance. Consequently, I roundly reject the applicants' objection to counsel's appearance.

[10] Mr Jacobs represents the third, fourth, fifth and seventh respondents and Mr Muhongo represents the sixth respondent.

[11] It was the applicants' submission that the respondents' counsel filed their heads of argument *sans* the time limit ordered by the court and so counsel and the parties they represent should not be allowed to participate in the instant proceedings. The said order of the court reads:

'2. Heads of argument shall be filed on or before 7 March 2024.'

³ *Maletzky v President of the Republic of Namibia* 2016 (2) NR 420 (HC).

[12] Rule 1 of the rules of court provides:

‘ “file” means file with the registrar.’

[13] Under the heading ‘File on’ on the ejustice system, it is clearly indicated that the first respondent filed his heads of argument on 7 March 2024 at 17h23 and the sixth respondent filed its heads on 7 March 2024 at 16h34. This means that the first respondent was two hours and 23 minutes late, and the sixth respondent was one hour and 34 minutes late. Their situation was different from that of Mr Jacobs who filed no heads of argument.

[14] Mr Christian referred the court to rules 53 and 54 of the rules of court to support his contention that counsel should not participate in the proceedings because they failed to obey a court order for the filing of heads of argument within the time limit set by the said order. I rejected Mr Christian’s submission made from the bar. My reasons therefore are in paras [15] – [21] below.

[15] It is trite that heads of argument in motion proceedings are for the convenience of the presiding judge.⁴ The filing of the heads by counsel, a miniscule of hours late and Mr Jacobs’s failure to file heads have not caused me any inconvenience at all. I shall return to Mr Jacob’s situation in due course.

[16] It should be stressed that submissions by counsel or by parties appearing in person is not a pleading, and, therefore, the capital consequence provided by rule 54(3) does not apply.

[17] The rule that applies to the issue in hand is rule 53. Subrule (2) provides sanctions open to a judge. Under rule 53(2), it should be remembered, the court bears no duty to order a sanction by hook or by crook under paras (a)-(d) thereof against an errant party. The court exercises a discretion.

[18] In that regard, it is important to reiterate the following relevant and decisive facts and circumstances: The lateness attributed to Ms Chinsembu and Mr Muhongo lasted momentarily. The lateness did not in any way inconvenience me in the hearing and determination of the application, as aforesaid. Furthermore, the applicants have not established that the lateness occasioned them prejudice.

⁴ *Kurtz v Kurtz* [2013] NAHCMD 178 (27 June 2013).

[19] Besides, I know of no binding authority – and none was referred to me – to support the proposition that where counsel falls late in filing heads of argument in motion proceedings then that counsel and the party he or she represents are without more ipso facto barred from participating in the proceedings.

[20] Based on the considerations in paras [15]-[19] and in the exercise of my discretion, I declined to exclude Ms Chinsembu and Mr Muhongo from participating in the proceedings on behalf of the parties they represented.

[21] By a parity of reasoning, I declined to exclude Mr Jacobs from participating in the proceedings on behalf of the parties he represented; except that different considerations and consequences should apply in respect of them. Therefore, in the application of rule 53(2)(d) of the rules, the parties represented by Mr Jacobs shall be denied their costs even if they were successful.

[22] It is appropriate to deal with the preliminary objection of non-joinder, raised by the sixth respondent, of persons who, as purchasers of the properties concerned, have acquired a right to the transfer to them of those properties. The applicants did not deal with the preliminary objection in their replying affidavit. Nevertheless, I have considered the objection. It might have been necessary to join such persons. However, having considered the relief sought, the target of the aim of the application and the view I take of the case, I find that no real prejudice has occasioned those the purchasers. The progress of the conclusion of the matter should not be derailed by such preliminary objections.

[23] I state from the outset this important point. The determination of this application turns on an extremely short and a very narrow compass. Additionally, the key to the determination of the application lies in the answering affidavit of the first respondent and the interpretation and application of the relevant provisions of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the ALRA), as amended by the Agricultural (Commercial) Land Reform Amendment Act 1 of 2014 (the ALRAA).

[24] Before I go to the *relevant* facts and the interpretation of the ALRA and the ALRAA, I should consider the issue of urgency. I use '*relevant*' advisedly. In both their founding papers and

submissions, the applicants said many things about the effect of German colonization on the body-politic and body-economic of Namibia, in particular as regards land, and the heroic protonationalist struggles against German colonial incursion into Namibia. No one can airbrush this evil system and the evil effects and consequences that were brought in its trail.

[25] But the court should not be seen to be giving judicial blessing to the bevy of *ad hominem* vitriolic attacks, cast in wicked vituperations and calumnies, against some persons who are parties in these proceedings and persons who are not. Doubtless, such vituperations in court papers are inimical to the rule of law and the very noble ideals and values that are enshrined in the Namibian Constitution and which make the Namibian Constitution stand out pulchritudinous on the international field of democratic national Constitutions.

[26] There are no more words to say about the aforesaid unprintable wicked vituperations and calumnies. The record will speak for itself. I now proceed to consider the *relevant* facts and the law. I use '*relevant*' advisedly.

[27] Regarding the question of urgency, the principles are well entrenched. On the papers, I think the applicants approached the court with speed and promptitude. They were under the impression that the first respondent would issue certificates of waiver on 16 February 2024 and they brought the application on 22 February 2024, thus, satisfying the requirement of urgency under rule 73(4)(a) of the rules of court. Whether their impression was valid or reasonable is neither here nor there and matters tuppence. Of the view I take of the application and of the facts the relief sought is tied up inextricably with the requirement under rule 73(4)(b).

[28] Additionally, I have considered the unprecedented and protracted proceedings in the instant matter and seemingly affiliated matters and what is more the fact that the orders of the court made as long ago as April 2019 and January and June 2020 remain unexecuted to this day. The applicants have 'frustrated the due process of law and thus undermined the rule of law upon which the Constitution is premised'.⁵ Therefore, in my view, it was reasonable to hear the matter, including the issue of urgency and the merits of the case, and dispose of it once and for all. To do otherwise would have amounted to assisting the applicants in their attempts to undermine the rule of law.

⁵ *Balzer v Vries* 2015 (2) NR 547 (SC) para 33.

[29] The applicants attempted once again to stop the train of justice from reaching the station of justice. The applicants submitted that there were matters on the court's roll that should be heard first as they had a bearing on the instant proceeding. The applicants' submission is, with respect, disingenuous and self-serving, to say the least. The applicants themselves brought the instant application, knowing that those matters were pending, and even prayed the court to hear their instant application on the basis that it was urgent. Consequently, I respectfully and firmly reject the applicants' submission. I do not see one iota of good reason for their entreaty. Indeed, I find and hold that those pending cases are irrelevant in the instant application: They are of no moment in the instant proceedings, as Mr Muhongo submitted.

The merits

[30] I accept the first respondent's contention that the ownership of the properties in question is no longer vested in the applicants. This piece of evidence was not contradicted. The replying affidavit did not make a phantom of an attempt to challenge that pivotal and superlatively weighty piece of evidence. Indeed, it is the key to determining the present application, for it is supported by the law, that is, s 17(1) and (2) of the ALRA, read with s 1 of the ALRAA. In words of one syllable, the first respondent's contention is valid and has legal force. It is the coup de grâce delivered by the first respondent to bury the applicants' case.

[31] It is, therefore, to the interpretation and application of the aforesaid statutory provisions that I now direct the enquiry. I underline the point that the said provisions must perforce be read intertextually and contextually because the ALRAA is an amending Act in relation to the ALRA, as aforesaid.

[32] The applicants are correct in their contention about the interpretation of s 17(1) and (2) of the ALRA that they give the State the right of first refusal, that is, preferential right to purchase agricultural land, where the owner of agricultural land wishes to sell his or her land. But, sadly, the applicants overlooked s 1 of the ALRAA.

[33] The definition of 'owner' in the ALRA was substituted by s 1 of the ALRAA whereby 'owner' was defined to include, inter alios, the deputy sheriff concerned, who is armed with a judicial execution order. Thus, such deputy sheriff, *qua* owner, has the power to do all that is necessary

and required to do to transfer ownership of the property in question to the purchaser because such deputy sheriff has become the 'owner' of such property by operation of law.⁶

[34] Thus, upon the correct interpretation of s 17(2) of ALRA, I hold that the ALRA does not prohibit owners of agricultural land, including a deputy sheriff, who by operation of law, as aforesaid, has become the owner of the attached property, from concluding a contract of sale of agricultural land even if the Minister's certificate of waiver has not been obtained. Only that the contract of sale shall come into force upon such waiver having been obtained. Thus, the deputy sheriff concerned could, therefore, enter into a contract of sale of agricultural land even if the minister's certificate of waiver has not been obtained; except that the contract is not enforceable until the land in question has been offered for sale to the State or the seller has been furnished with a certificate of waiver in respect of such land.⁷

[35] With respect, *Locke v Van der Merwe*⁸ debunks Mr Christian's spirited submission that the provisions of s 17(1) and (2) of the ALRA have not been interpreted, and so this court must interpret them. The Supreme Court interpreted those provisions as long ago as 2016.⁹ Need I say that the Supreme Court's decision binds all other courts of Namibia and all persons in Namibia, including all the applicants?

[36] I make the following crucial points in capitalities and underlined based on the foregoing analysis and conclusions thereanent: The preferential right given by s 17(1) and (2) of the ALRA is reposed in the State – and the State only. Therefore, it is only the State that is constitutionally and statutorily entitled to approach the seat of the judgment of the court to vindicate that right as an aggrieved person within the meaning of article 25(2) of the Namibian Constitution. None of the applicants is the State. Nor are the principles on *locus standi* enunciated by the Appellate Division in *Wood v Ondangwa Tribal Authority*¹⁰ and the constitutional State rule propounded by the Supreme Court in *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*¹¹ available to the applicants.¹²

⁶ *Grand Design Investment (Pty) Ltd v Deputy Sheriff Mariental (Andries Pretorius)* NAHCMD 677 (25 October 2023) para 15.

⁷ *Locke v Van der Merwe* 2016 (1) NR 1 (SC) at 18H-19F.

⁸ *Ibid.*

⁹ See *Locke* footnote 7.

¹⁰ *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

¹¹ *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation on Board and Others* 2011 (2) NR 726 (SC).

¹² *Namrights Inc v Government of Namibia* 2020 (1) NR 36 (HC) paras 7-14 where the principle in

[37] The inevitable conclusion is that the applicants have no ground in law or logic upon which they can claim they suffer damage or a well-founded apprehension of damage to themselves from an alleged breach of the aforesaid legislation, considering the *Beck* requisite discussed in para [3] above. I, therefore, find and hold that each of the applicants has failed to show that he himself or she herself suffers damage or a well-founded apprehension of damage to himself or herself. By a parity of reasoning, I find and hold that each of the applicants have failed to satisfy the requirements of interim interdict set out in para [2] above.

[38] In sum, I come to the following crucial and decisive conclusion: Each of the applicants have failed to satisfy the irreducible minima discussed in paras [2] and [3] above, and so they cannot succeed. Accordingly, the application stands to be dismissed.

[39] Based on these reasons, I hold that the applicants have failed to make out a case for the relief sought.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
APPLICANTS	RESPONDENTS
I N TJIHERO - In Person H CHRISTIAN – In person on behalf of the 2 nd Applicant A T TJIHERO – In Person C V GAYA – In Person	W CHINSEMBU – 1 st and 8 th Respondents of Office of the Government Attorney, Windhoek & J JACOBS – 3 rd , 4 th , 5 th and 7 th Respondents Instructed by Hohne & Co. and Schickerling Attorneys, Windhoek

Wood and Others and the constitutional State rule in *Trustco Ltd t/a Legal Shield Namibia and Another* are considered.

	<p style="text-align: center;">& T MUHONGO – 6th Respondent Instructed by LorentzAngula Inc., Windhoek</p>
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