REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 295/2013

In the matter between:

KAMBAZEMBI GUEST FARM CC t/a WATERBERG WILDERNESS	**APPLICANT**
and	
THE MINISTER OF LANDS AND RESETTLEMENT	**1ST RESPONDENT**
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	**2ND RESPONDENT**
THE MINISTER OF FINANCE	**3RD RESPONDENT**
THE CHAIRPERSON OF THE LAND REFORM ADVISORY COMMISSION	**4TH RESPONDENT**
THE COMMISSIONER FOR INLAND REVENUE	**5TH RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**6TH RESPONDENT**
THE VALUATION COURT	**7TH RESPONDENT**

Neutral citation: *Kambazembi Guest Farm CC t/a Waterberg Wilderness v The Minister of Lands and Resettlement* (A 295/2013) [2013] NAHCMD 260 (18 September 2013)

Coram: HOFF J

Heard: **03 September 2013; 09 September 2013**

Delivered: **11 September 2013**

Reasons: **18 September 2013**

JUDGMENT

HOFF J:

[1] This court on 11 September 2013, subsequent to the hearing of argument in respect of an urgent application on 9 September 2013, gave the following ruling:

(a) The applicant's non-compliance with the forms and service provided for by the Rules of the above Honourable Court is hereby condoned and this application is heard as one of urgency as contemplated by Rule 6(12) of the Rules of this Honourable Court.

(b) The sitting of the valuation court established in terms of the provisions of Regulation 8 of Government Gazette No. 120 of 2007 (GG No. 3870) dated 3 July 2007 ('the valuation court') and scheduled for 30 August to 13 September 2013 is hereby declared null and void.

(c) The costs of this application shall be costs in the cause of the main application served and filed on 22 August 2013 under the above case number.

[2] This court indicated that reasons would be provided by 20 September 2013. These are the reasons.

[3] This is an interlocutory application brought as a matter of urgency in which the applicant seeks the following relief:

'Declaring that the sitting of the valuation court established in terms of the provisions of Regulation 8 of Government Notice No. 120 of 2007 (GG No. 3870) dated 3 July 2007 ("the valuation court") and ostensibly scheduled for '30 August to 2013 September 2013' to be null and void;

Alternatively, suspending the proceedings of the valuation court pending the final determination of applicant's application under case number A 295/2013 in the above Honourable Court.

Costs to be costs in the cause.'

[4] The applicant in the main application, attacks the constitutional validity of certain sections of the Agricultural (Commercial) Lands Reform Act, 6 of 1995 and some regulations promulgated in terms of that Act.

[5] This urgent application is opposed by the first sixth respondents. No notice of intention to oppose the application was filed by the 7th respondent. Mr Joachim Rust on behalf of the applicant in his founding affidavit in this application referred to a number of irregularities which apparently preceded the sitting of the valuation court.

[6] The applicant stated that a valuation court has been pronounced to commence a sitting on Friday 30 August 2013 at Windhoek to consider a provisional valuation roll dated 1 April 2012 and that in a Gazette dated 1 July 2013 the commencement of the sitting of the valuation court was announced as:

'from 30 August 2013 to September 2013' which renders this announcement unintelligible and vague and renders the notice invalid.

[7] Ms Lidwina Shapwa, the Permanent Secretary in the Ministry of Lands and Resettlement, deposing to an answering affidavit on behalf of respondents on this point, stated that it was a typing error and that there was proper publication of the period the valuation court would be sitting in two newspapers.

[8] The applicant in his founding affidavit further stated that in terms of the Gazette the provisional valuation roll would be for inspection during the period 1 July 2013 to 30 July 2013 which is one day short of the period of the 30 days period within which an objector may object against a valuation and renders the notice invalid. In addition the Gazette only became available to members of the public on 5 July 2013.

[9] The applicant refers to reg 3(3) which provides that the first respondent 'must by notice in the Gazette determine the date of valuation and the period during which any such general or interim valuation must be made'. This according to the applicant constitutes the commencement of the valuation process and is important since in determining the value of any agricultural land a valuer must have due regard to the carrying capacity of such land at the date of valuation. The applicant stated that purporting to act in terms of regulation 3 the first respondent issued a notice which was published in Gazette No. 4966 of 15 June 2012 and failed to determine the period during which the evaluation must be made.

[10] The applicant refers in his founding affidavit to reg 6(1) which requires the valuer, upon the completion of a provisional valuation roll to sign and date a declaration appended to such a roll and submit it to the Minister. The provisional valuation, applicant stated, came into existence when published on 1 July 2013 in the Government Gazette however in terms of Government Notice of 15 June 2013 for the purposes of Regulation 3(3) the date of valuation is 1 April 2012. It thus appears from the notice that the date of valuation was back-dated to 1 April 2012 'creating a fiction'.

[11] The applicant further deals with reg 6(6) which deals with procedure after objections have been received and which provides that every objector must be provided by the first respondent in writing 'of the date and time on which and the place at which the valuation court will be sitting'.

[12] The applicant stated that a simple calculation indicates on the basis of twelve days hearing time and allocating six hours per day, on the assumption of 1500 objectors, a hearing of some three minutes per objector will follow. It is common cause that there are 2760 objectors. This the applicant avers violates 'the uniquely caring and humanitarian quality of the Constitution', the rules of natural justice, Article 18 of the Constitution which demands administrative action to be fair and reasonable, Article 12(1)*(a)* of the Constitution which requires a hearing (which would include procedural aspects) to be fair, and the rule of law which requires rationality.

[13] Mr Henning SC who appeared on behalf of the applicant when the matter was heard on 3 September 2013 in essence submitted that no valid valuation court was in existence on 30 August 2013 when the valuation court was due to hear the objections. It is common cause that one of the four members of the valuation court (constituted in terms of reg 8(2)) a Mr Ipinge from the Ministry of Agriculture, Water & Forestry was absent. The whereabouts of this member was unknown at that stage. There was until now never any explanation for his absence.

[14] In terms of reg 8(2)*(a)* a magistrate designated at the request of the Minister (of Lands and Resettlement) by the Magistrates Commission established by s 2 of the Magistrates Act, 3 of 2003 presides over the valuation court.

[15] Regulation 8(5) provides that despite subregulation (4), (subregulation (4) deals with the casting vote of the magistrate in the event of equality of votes),

> 'if at any stage during the proceedings before a valuation court a member of that court dies or is otherwise incapable of acting, the proceedings must continue before the remaining members of the court, but –
>
> (a) only if such remaining members include the magistrate designated under subregulation (2)*(a);*
>
> (b) ....
>
> (c) if the magistrate is for any such reason unable to so act the proceedings must commence anew before a valuation court constituted anew in accordance with this regulation.'

[16] It is common cause that on 30 August 2013 there was an application for the recusal of the designated magistrate, Mrs Herunga, primarily based on the unilateral interactions which the valuer, Mr Protasius Thomas, had with the presiding officer in the days running up to the 30th of August 2013.

[17] It is further common cause that the designated officer postponed the proceedings to 2 September 2013 on which date she recused herself as presiding officer of the valuation court.

[18] The applicant in his founding affidavit stated that at approximately 12h15 on 2 September 2013 a new presiding officer by the name of Mr Sindano appeared in the valuation court and introduced a Mr Malima as an additional member of the valuation court and a replacement for Mr Ipinge. Counsel for the various objectors made certain submissions whereafter Mr Sindano adjourned the matter until 14h00. The applicant stated that at '14h00 Mr Sindano indicated that the "court" was not a properly constituted court; that it was a preliminary court and that it would only be possible by Monday 9 Monday 2013 to constitute a court'. According to the applicant certain 'rulings' were issued and that it 'was stressed that these "rulings" were not given by the valuation court, because formalities regarding appointments still have to be complied with'.

[19] This is not denied by the respondents. In the answering affidavit dealing with this aspect deponent Ms Lidwina Shapwa stated:

> 'I take note thereof. There is no prohibition in replacing a presiding officer if the sitting has not started.'

[20] I agree that in terms of the regulations that there is no prohibition in replacing a presiding officer but in such an instance and in terms of reg 8(5)*(c) 'proceedings must commence anew before a valuation court constituted anew'* in accordance with Government Gazette No. 120 of 2007 and specifically in terms of the provisions of reg 8(2)*(a) – (d)* which provides for the establishment and the composition of the valuation court.
(Emphasis provided).

[21] In fact in the answering affidavit respondents acknowledged that the 7th respondent was not in session on 30 August 2013 'due to various reasons which inter alia included that the members were not sworn in and that there was no *quorum*'.

[22] In terms of reg 9 'a member of the valuation other than the presiding officer may not perform any function as such a member, unless he or she has taken an oath or made an affirmation before a magistrate ...'

[23] Respondents thus stated that an incompetent relief is being sought by the applicant to declare the sitting of the 7th respondent null and void if the 7th respondent itself has not come into existence at all.

[24] Mr Tötemeyer who appeared on behalf of the applicant on 9 September 2013 submitted that even though the valuation court did not come into existence as provided for in the regulations the factual order had to be set aside since there was a dogged persistence to proceed with the illegal process of a valuation court.

[25] This is apparent in view of the fact that the designated magistrate, in spite of a lack of a quorum on 30 August 2013, postponed the sitting of the court until 2 September 2013. After the recusal of the designated magistrate the replacement magistrate postponed the proceeding further until 9 September 2013 in order to constitute a court. The respondents in their founding affidavit made no attempt to deal with the reconstitution of a new court in view of the fact that the designated magistrate had recused herself. It must also be accepted that Mr Ipinge who had been designated by the Minister of Agriculture, Water and Forestry was still a member of the valuation court established in terms of the Government Gazette dated 1 July 2013 since there is no confirmation that he died or is otherwise incapable of acting as a member of the valuation court.

[26] Constituting a court anew as provided for in reg 8(5)*(c*) by necessity includes the provisions of reg 6(4) which provides that the Minister (first respondent) 'must cause a notice to be published in the Gazette and in at least two newspapers widely circulating in Namibia on a date not earlier than 60 days before the date determined by the Minister for the commencement of the sitting of the valuation court -'

[27] Therefore in my view recusal of the designated magistrate was a pivotal moment in the determination of the legality of the valuation court. The Minister must in terms of the Government Notice not only reconstitute the court but must in terms of reg 6(4) cause a notice to be published not earlier than 60 days before the date to be determined for the sitting of the valuation court. It follows in my view that no replacement magistrate could have been appointed during the period 2 September 2013 until 13 September 2013 since to do so would violate the 'not

earlier than 60 days' requirement prescribed in reg 6(4). In my view the magistrate correctly recused herself in view of the perception of bias.

[28] This court has a discretion, which must be exercised judicially, in considering whether or not to grant a declaratory order. In *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 AD at 95B–C it was held that 'though it might be competent for a court to make a declaratory order in any particular case, the grant thereof is dependent upon the judicial exercise by that court of its discretion with due regard to the circumstances of the matter before it.

[29] A declaratory order will not be granted if the issue before is hypothetical, abstract and academicals. Considerations of public policy may also come into play when a court has to determine whether it should exercise its discretion in favour of a declaratory order or not. (See *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 TPD at 125D-E and 126B-C; *Mushwena v Government of the Republic of Namibia* (2) 2004 NR 94 at 102H-I).

[30] In my view the issue before court is not hypothetical, abstract or academic. It has practical implications ie an intention to continue with the sessions of the valuation court in spite of the fact that the valuation court was never constituted as prescribed in the regulations, and admitted as such by the respondents.

[31] Mr Boonzaier on behalf of the first six respondents submitted that a distinction should be drawn between the functions and duties of the Minister (first respondent) and that of the 7th respondent, the valuation court. It was submitted that if this court intervenes in the proceedings pending in the valuation court this Court would, in conflict with the doctrine separation of powers, restrain the Minister from exercising its powers and functions in terms of ss 76 and 77 of the Act which empower the Minister to impose land tax (to be paid by owners of agricultural land) and to make regulations in relation thereto.

[32] In support of this submission this court was referred to the matter *of Gool v Minister of Justice and Another* 1955 (2) SA 682 OPD. In this matter the applicant sought relief in the form of a rule *nisi* operating as an interim interdict restraining the first respondent (the Minister of Justice) from issuing, pending the determination of

the action commenced by applicant's summons, any notice against her pursuant to the provisions of s 5 of Act 44 of 1950 as amended (Suppression of Communism Act). This was in essence an application for an interdict restraining the possible future exercise of statutory powers by the Minister.

[33] The court held (at 689B) that the court should only grant an interdict such as sought by the applicant upon a strong case being made out for that relief.

[34] In the present application the relief sought is not intended to restrict the first respondent from exercising any statutory powers. On the contrary, the Minister had already exercised the prescribed statutory powers and in this regard this application is distinguishable from the relief sought in the *Gool* matter.

[35] In my view therefore the submission that this court, should it intervene in the pending proceedings in the valuation court, would interfere with the functions and duties of the executive branch of the State (ie the Minister/first respondent), is without substance.

[36] The indisputable fact is that the absence of a properly constituted valuation court was due to circumstances beyond the control of the Minister (first respondent) and beyond the control of any of the other respondents.

[37] The submission by Mr Boonzaier that although the valuation court was not properly constituted on 30 August 2013 such a court may still be constituted until 13 September 2013 loses sight of the provisions of reg 8(5)(*c)* and 6(4) referred to (supra). Any attempt to do so would be *ultra vires*.

[38] It was further submitted by Mr Boonzaier that should any objector be dissatisfied with the decision of the valuation court such objector has remedies in terms of the regulations (which provides for an appeal to this Court on a point of law). This certainly is true but only where a valid and properly constituted valuation court has considered the valuation of land contained in the provisional valuation roll. This is not the case in the present application.

[39] This Court was also with reference to the case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) reminded that the courts may not usurp the function of the executive branch of the State in order to frustrate the balance of power. In this matter the Constitutional Court in South Africa found that interdicts granted by the High Court had the effect of curtailing executive power to formulate and implement trade policy and had in this way encroached onto the domain of the executive branch, thus violating the constitutional doctrine of separation of powers.

[40] In my view, based on the particular facts and circumstances which prompted the applicant to launch this application seeking a declaratory order nullifying the sitting of a valuation court, it cannot be argued at all that to grant the relief prayed for would encroach onto the domain of the executive branch of government.

[41] Mr Boonzaier further submitted that should this Court be inclined to grant the relief sought by the applicant the order should be that the proceedings in the valuation court may not proceed against only the applicant's objection and that the valuation court should proceed to hear all the other objections before it. Since it is commonly accepted that the valuation court was a nullity from its inception and that no legal consequences or valid pronouncements can flow from such an entity, in my view the other objectors would be before an irregularly constituted court. It would be a futile exercise and this Court in the exercise of its discretion may in the circumstances prevent the perpetuation of an illegality.

Urgency

[42] The applicant in his founding affidavit stated that ss 76 and 77 of the Act and the regulations are invalid because they are inconsistent with the constitutional principle that taxation is reserved for the legislature, not the executive.

[43] The applicant stated that if it is assumed that the regulations are *intra vires* the Act and the Constitution, the statutory functionaries failed to apply statutory provisions, substantially deviated from prescriptions, acted unfairly and unreasonably, and failed to act rationally which resulted in illegality. The applicant further stated that the objectors faced a valuation court where they have to be

available for 11 or 15 days. This is unreasonable and a denial of the dignity enshrined in Article 8 of the Constitution which the public functionaries are obliged to respect and uphold.

[44] The applicant further stated that confronting the objectors at the hearing of the valuation court are regulations which are unconstitutional because they are unreasonable, unjust and offensive to Article 12(1)*(a)* of the Constitution, for example, reg 13(1) which prescribes an unpredictable procedure in the valuation court; reg 14(1) limiting the right of appeal (only on a point of law); reg 14(3) which requires that land tax be paid in spite of a pending appeal; reg 12(1)*(b)* limiting the jurisdiction of the valuation court severely; reg 12(1)*(e)* which is vague; and reg 8 creating a 'court' which lacks the appearance of independence. The applicant continued to state that a valuer appointed in terms of the regulations may appoint assistants who have important jurisdiction. This applicant stated, is *ultra vires* the Act, in conflict with the principle *delegatus delegare non potest* (derivative authority cannot be delegated), unjust and unreasonable, and all actions by assistants are nullities.

[45] The applicant then continued to narrate the events on 30 August 2013, the first day of the sitting of the valuation court, where one of the members of the valuation court Mr Ipinge simply failed to appear which result in the fact that the court was not properly constituted. On the same date legal representatives informed the designated magistrate, Mrs Herunga, that they would bring an application for her recusal on the basis of a perception of bias insofar that the valuer who is a witness in the proceedings before the valuation court had unilaterally access to her days prior to the scheduled sitting of the court. The designated magistrate initially refused to recuse herself postponing the case to Monday 2 September 2013 when she announced her recusal. Shortly afterward a replacement magistrate Mr Sindano appeared and introduced a Mr Malima as 'additional member' and the replacement for Mr Ipinge. Mr Sindano then postponed the proceedings to 9 September 2013 because the formalities regarding the appointments of members of the court still have to be complied with ie to reconstitute the valuation court.

[46] There had been exchange of correspondence between the legal representatives of objectors and the Permanent Secretary of the first respondent

which highlighted certain difficulties and alleged illegalities in connection with the sitting of the valuation court which evoked a reply from the Government Attorney as follows:

> 'It is our further instruction that your clients have ample substantial redress before the valuation court in due course, as such; any alleged procedural irregularity thereof should be raised before the presiding officer in the valuation court on the date of hearing.'

The applicant stated that this door has now been closed.

[47] In the answering affidavit deposed to on behalf of the respondents it is stated that the applicant is merely regurgitating the allegations he advances regarding the merits of the application as grounds for urgency and fails to show good cause as to why substantial redress cannot be afforded at a hearing in the normal time frame. The respondents further in the answering affidavit stated that the applicant had been aware that alleged unconstitutional and invalid regulations would be used during the proceedings before the valuation court and that objections by the applicant were advanced in his letter dated 21 August 2013 and annexed to his founding affidavit. It was further stated that there is no explanation advanced by the applicant what transpired from 21 August 2013 to 3 September 2013 to suddenly render the alleged infringements urgent.

[48] The submission by Mr Tötemeyer in this regard was that the applicant was coerced into an illegal process and is entitled to resist that on the basis of the illegality thereof. I agree with this submission.

[49] It is common cause that there was an exchange of correspondence between the parties regarding alleged irregularities resulting in the applicant *inter alia* being informed to raise those issues with the valuation court. It is further common cause that the valuation court never came into being therefore those matters intended to be raised with the valuation court could not be ventilated. However, and this is not disputed, there were attempts to resurrect this stillborn (figuratively) valuation court by way of postponements despite submissions (correctly made) to the presiding officers that the 'valuation court' could not make valid orders, for example postponements.

[50] It was this attempt of resurrection and to continue to hear objections which constituted the urgency and the subsequent urgent applicant to obtain a court order to declare valuation court null and void. That there was a ‘dogged persistence’ to get this nullity functional as a valuation court and to continue to hear the objections is underlined by the fact that even in this court it was submitted on behalf of the respondents that the non-existent valuation court may still be reconstituted before 13 September 2013. I have indicated that due to the time lines prescribed in the regulations this simply could not have been done.

[51] The matter for the afore-mentioned reason became urgent and the applicant was within his rights to approach the court on a urgent basis.

[52] Rule 6(12)*(b)* requires of an applicant to state explicitly the circumstances which render the matter urgent and the reasons why the applicant claims that he or she could not be afforded substantial redress at a hearing in due course.

[53] In my view it is self-evident that the applicant in the particular circumstances of this case would not be afforded substantial redress at a hearing in due course.

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

[55] A matter which was also raised as a ground for opposing the granting of the relief prayed for in this urgent application was that of non-joinder. It was stated in the answering affidavit that the 2759 other objectors have a direct and substantial interest in the subject matter as well as the outcome of these proceedings and ought to have been joined, the failure of which would result in the application being struck.

[56] It is not disputed that all the objectors have in common a challenge to the valuation roll which challenge was to be addressed at the valuation court which failed to commence and function as a court. Since it is common cause that the valuation court was a nullity it is a fallacious argument that the other objectors would have obtained justice before an extention of the ‘valuation court’.

[57] In my view it is certainly in the interest of the other objectors not to be exposed to or to participate in proceedings before a non-existent court. In these circumstances the non-joinder of the other objectors becomes irrelevant.

E P B HOFF

Judge

APPEARANCES

APPLICANT :	R Tötemeyer SC (with him J Schickerling) Instructed by Francois Erasmus & Partners, Windhoek
RESPONDENTS:	M G Boonzaier (with him E Nekwaya) of Government Attorney, Windhoek