CASE NO.: A 245/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ONGOMBE FARMERS ASSOCIATION **APPLICANT**

and

SEBRONI TJIURO **1ST RESPONDENT**
KAMBAZEMBI ROYAL HOUSE **2ND RESPONDENT**
INSPECTOR-GENERAL: NAMIBIAN POLICE **3RD RESPONDENT**

CORAM: **HEATHCOTE, A.J**

Heard on: **27 JUNE 2011**

Delivered on: **06 JULY 2011**

JUDGMENT

HEATHCOTE, A.J:

[1] The applicant, a voluntary association, lodged an urgent ex-parte application for interdictory relief prohibiting the respondents from breaking the locks of, or entering, the auction pens leased by the applicant from the Government of Namibia. Due to the urgency, no affidavits were filed, but oral evidence was led in support of the relief sought.

[2] As to be expected, no written resolution was available at the time the application was lodged. As it was entitled to do, a written resolution was obtained by the applicant after the court granted the interim interdict. In Christian v Metropolitan Life Namibia Retirement Annuity Fund 2008 (2) NR 753 SC, Maritz, J.A held that; when a respondent receives an urgent application on very short notice, and where there is no time for an artificial person to obtain the necessary formal resolutions, but the respondent nevertheless wants to oppose the matter, its legal representatives may do so as ***"it would be manifestly unjust if an applicant is allowed to effectively exclude any opposition at the hearing of an urgent application by giving such short notice that it is impossible for the respondents to attend timeously to the formalities regarding the authority of its legal representatives"*** (at page 768 D-G). In such circumstances the authority can be proven at a later stage.

[3] In my view, and in similar vein, where an artificial person has to approach the court on such an urgent basis that the **"resolution-formalities"** cannot be taken care of timeously, the court should allow the applicant to provide proof of

authority at a later stage. This is exactly what happened in this case. Even if it is assumed that the person who decided to approach the court on behalf of applicant, lacked the required authority, he did so on the basis that, if subsequent ratification was refused, he would be liable for the costs. Moreover, in such circumstances (i.e. where ratification by the artificial person was refused) the application could not have been persisted with. As a result, so it appears to me, no vested rights were effected by such ratification in this case, and because the respondent would have succeeded if the applicant's deponent did not subsequently obtain the necessary ratification, the respondent was not prejudiced by such a procedure. Hence the rule that;

> *"where proceeding are instituted on behalf of a company by an unauthorized person, the defect may be cured by subsequent ratification"* See LAWSA Volume 4(1) First Reissue, Companies Part 1, par 38).

[4] By the time affidavits were exchanged, the interdictory relief obtained by applicant had served its purpose. As there was no more need to determine all the issues in dispute, the parties agreed that only costs had to be determined.

[5] At the hearing (i.e. to determine the costs) Mr. Chanda, who appeared for the second and third respondents, submitted that the applicant was not entitled to costs against second and third respondents because the subsequent resolution

taken by he applicant did not authorize costs to be sought against second and third respondents (but only against first respondent). What appears to have happened is this; ***(a)*** the court originally granted a rule *nisi*, calling upon all the respondents to show cause, on the return date, why they should not be held jointly and severally liable for applicant's costs; ***(b)*** in the main written resolution, applicant's representative "Tjihero" was authorized to instruct its lawyers to claim, on the return date, for the rule to be confirmed. In other words, to seek costs against all three respondents. ***(c)*** Both the resolution and the power of attorney granted by Mr. Tjihero to applicant's legal practitioners, referred to an Annexure "A" (which is the same document). In Annexure "A", reference to costs against second and third respondents was omitted. Annexure "A" only referred to costs against first respondent. In the written resolution, Annexure "A" was described as the document setting out the relief which was claimed in urgent application. But, the relief which was claimed in the urgent application included costs against all three respondents. It appears to me that, seen in context, it was also intended to include reference to second and third respondents in Annexure "A" ("the omission").

[6] It is upon this omission which Mr. Chanda for the second and third respondent seized. Absent specific reference to second and third respondent in paragraph 2.2 of Annexure "A", so he submitted, applicant was never entitled to any costs against those respondents.

[7] In normal circumstances a person who is authorized to obtain certain relief in a court of law, may only obtain the relief covered by the resolution itself. That much was stated in South West Africa National Union v Tjozongoro and others 1985(1) SA 376 SWA at 381, where Strydom, J. held that; where the resolution authorizing the person who brings the application on behalf of the artificial person is attached to the affidavits, and the court must deal with the scope of that person's authority, the resolution must be interpreted as ***"it is the very foundation"*** on which the allegation of authority is based. In turn, so Strydom, J. held, the resolution must be strictly interpreted.

[8] The issue raised by Mr. Chanda would have been fatal to the applicant's claim for costs if Annexure "A" was the only document setting out Tjihero's authority. However, in the main resolution, applicant's representative was authorized to sign the necessary documents on behalf of the applicant, and that authorization included the power ***"to confirm the rule nisi"***. As I have already indicated, the rule nisi which was issued, called upon all the respondents to show cause why they should not pay the costs jointly and severally. Mr. Tjihero's authority included the right to seek cost against all three respondents. Once the resolution included the right to seek costs against all three respondents, the fact that it was not mentioned in the power of attorney, matters not. An application may validly include a claim for costs even though the power of attorney does not mention costs. (See Middel- Vrystaatse Suiwelkorporasie v Bondesio 1971 (3) SA 110 (O). Accordingly I cannot uphold the point of lack of authority.

[9] But Mr. Chanda raised a further issue. He submitted that the third respondent should not be ordered to pay applicant's costs because the interim interdict originally obtained by the applicant, was granted contrary to the provisions of section 39(1) of the Police Act, No. 19 of 1990 "the Act". According to Mr. Chanda, the third respondent did not receive the necessary month notice period as required by the Act. Section 39 reads as follows:

> *"Any civil proceedings against the State or any person in respect of anything done in pursuance of this Act shall be instituted within 12 months after the cause of action arose, and notice in writing of any such proceedings and of the cause thereof shall be given to the defendant not less than 1 month before it is instituted: Provided that the Minister may at any time waive compliance with the provisions of this subsection."*

[10] To strengthen his argument, Mr. Chanda submitted that the very same section 39 was held to be constitutional in Minister of Home Affairs v Majiedt 2007(2) NR 477 SC. At paragraph 38 of that judgment, the Supreme Court, per Chomba A.J.A, remarked that; ***"time is of no essence in the case of moving the Minister for waiver"***. With respect, this obiter statement shows that, *prima facie* at least, the Supreme Court did not understand the word ***"civil proceedings"*** in section 39 of the Act, to include urgent interdictory relief obtained through a rule nisi process. I return to this aspect later.

[11] I cannot agree with the submission that an urgent interim interdict can only be obtained against a member of the Police Force, after the police officer had received a months notice, particularly if such an officer, (under the guise of acting as a member of the Police), but still under the command of the Inspector General (section 3 of the Police Act) threatens to act unlawfully.

[12] In terms of section 13 of the Act, the functions of the Police Force shall be; the preservation of the internal security of Namibia; the maintenance of law and order; the investigation of any offence or alleged offence, the prevention of crime; and the protection of life and property. These functions emphasize the duty to maintain the law; not to breach it.

[13] The police officer involved in this case knew that the applicant had lawful possession of auction pens in terms of a valid lease agreement with the Government of Namibia. It must follow that, *prima facie* at least, the applicant was acting within its rights when it refused to give access to the auction pens to the second respondent. In such circumstances, a police officer is not allowed to state that he will break the applicant's locks in order to give access to the second respondent.

[14] Although the police officer denies that he uttered such words (i.e. that he would have broken the locks), he does say in the answering affidavits that he

would have seen to it that he second respondent be allowed to hold an auction at the auction pens. It is clear to me, for purposes of determining the costs issue at least, that the denial is indeed a lame one. As Mr. Corbett for the applicant pointed out; if the applicant did not provide the keys to the police officer to unlock the auction pens, he would have had to break the locks to allow the second respondent access.

[15] It is exactly this unlawful threat (i.e. of breaking the locks) which caused applicant to lodge the urgent application. In my view, the police officer who threatened such conduct did not do ***"anything in pursuance"*** of the Police Act, and does not deserve the intended protection afforded by section 39 of the Act. I hold this view for a number of reasons; firstly, because the law distinguishes between the concepts ***"in the course and scope"*** and ***"acting in pursuance"***, and therefore, also the manner in which these concepts must be interpreted. In Masuku and Another v Mdlalose and Others 1998(1) SA 1 (SCA), the following was stated at page 10;

> *"The concepts 'in the course and scope of his employment' (or any of its equivalents) and 'in pursuance of' the Act are notionally distinct from each other. They derive from different sources and deal with different incidents of liability. The former is primarily concerned with the common-law principles of vicarious liability; the latter is of statutory origin and its meaning and ambit stem from the provisions of the Act. Different policy*

considerations are at stake when dealing with the two concepts. The former favours a plaintiff by making a master liable for the wrongs of his servant, thereby extending and establishing liability where otherwise it would not exist. It is thus expansive in both its purpose and effect. The latter enures for the benefit of a defendant. A finding that a policeman acted in pursuance of the Act could result in the barring of a plaintiff's action for want of notice or the effluxion of the relatively short period of time within which action is to be instituted. It is therefore restrictive in its effect and can assist a defendant to escape liability. As such it needs to be strictly construed (Benning v Union Government (Minister of Finance) 1914 AD 180 at 185). These inherent differences justify the conclusion that the two concepts legally do not entirely correspond. If the Legislature had in mind to apply the notice requirement and the limitation provision of s 32(1) to all actions against the State arising out of unlawful acts by a policeman acting qua policeman, it failed to state so in clear and unequivocal terms in s 32(1) as one might have expected bearing in mind that earlier cases like Thorne and E Rosenberg (Pty) Ltd (supra), which preceded the current Act, had alerted it to a distinction between the two concepts. Instead it deliberately chose to retain the wording 'in pursuance of'. To the extent that the wording of s 32(1) lends itself to a restrictive interpretation, and impliedly recognises that there may be instances where the conduct of a policeman can give rise to State liability beyond the provisions of the Act, it should be interpreted accordingly. (See in general

the comments by the late P Q R Boberg in 1964 Annual Survey of South African Law at 154--6, and 1965 Annual Survey of South African Law at 175--8.)"

[16] Secondly, the meaning Mr. Chanda gives to section 39 of the Act, would lead to glaring absurdities. It would indeed be a sad day if police officers can threaten unlawful action, and then, when the court is approached on an urgent basis, the police officers can be heard to say that the applicant is only permitted to approach the court in a month's time. Many other examples may highlight this absurdity, eg. *habeas corpus* applications. It follows that, while a police officer who acted like the one under consideration, may have acted within the course and scope of his employment with the third respondent, he nevertheless did not do so in pursuance of the provisions of the Act. In such circumstances, section 39 is no assistance to the third respondent.

[17] Lastly, it appears to me that the purpose of section 39 of the Act is to prevent litigants from dragging their feet before instituting litigation against the State. Section 39 was found by the Supreme Court to pass constitutional muster. But, as I have already indicated, the obiter remark made by Chomba A.J.A, to the effect that **"time is of no essence in moving the Minister to waiver"** indicates that the learned justices did not include under the concept **"civil proceedings"**, relief claimed on urgent basis, (where *rule* nisi proceedings, incorporating interim interdictory relief is employed). If they did, the obiter statement would not have

been made. The purpose of a clause such as section 39 is, as I have said, to prevent litigants from dragging their feet in ordinary litigation. The interpretation Mr. Chanda gives to section 39, is to force a litigant to drag his/her feet for at least one month before the court may be approached. If that is the meaning of the notice period referred to in section 39 (in other words, if urgent interdictory relief is included in the concept of civil proceedings), I have great difficulties in appreciating its constitutionality, even in circumstances where the litigant's adversary (the Minister) can be approached for condonation. I accordingly conclude that the concept **"civil proceedings"** as envisaged in section 39, should be read to exclude from its meaning urgent interdictory relief obtained through a process where a *rule nisi* is issued, pending a return date. If the concept **"civil proceedings"** is not read in this way, the one month notice period (in the circumstances such as in this case) would be patently unconstitutional as it would simply deny immediate access to a court as of right.

[18] Where all the factual and legal issues have not been determined, but the parties nevertheless want the court to determine the issue of costs, the court does so by exercising discretion. It will suffice to refer to Channel Lite Namibia Limited v Finance in Education (Pty) Ltd 2004 NR 125 HC where, Damaseb J, (as he then was) discussed the relevant case law where a court must determine costs without the merits having been decided. In essence, he made two pertinent points; firstly, there can be no hard and fast rule that a court must never determine the merits to decide the costs. Sometimes it may be necessary to do

so, and on other occasions, not; secondly, a factor which should be taken into consideration is that all parties should, as soon as possible, take steps to curtail costs.

[19] In all the circumstance I am satisfied that the correct exercise of my discretion would be to order the respondents to pay the costs. Amongst others, for the following reasons;

[19.1] the police officers involved acted within the cause and scope of their employment, but not in pursuance of the Act;

[19.2] the resolution taken by applicant does authorize costs to be claimed against all the respondents;

[19.3] the two legal issues just mentioned, were raised at a very late stage of the proceedings and, indeed, increased the costs;

[19.4] the applicant was entitled to protect its interest; and

[19.5] the third respondent was informed of the factual issues before the proceedings were lodged, but did not intervene.

[20] I accordingly make the following order.

[20.1] The respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved, including the costs of one instructing and one instructed counsel.

[20.2] The costs as aforesaid shall include all costs incurred from inception of the proceeding, until the 27th of June 2011.

Dated at WINDHOEK on this 05th day of JULY 2011.

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HEATHCOTE, A.J

ON BEHALF OF THE APPLICANT:

WEDER, KAUTA & HOVEKA

ON BEHALF OF THE RESPONDENTS:

GOVERNMENT ATTORNEY