REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 86/2016

In the matter between:

WILDLIFE RANCHING NAMIBIA	**FIRST APPLICANT**
JOHANNES MICHIEL BREDENKAMP	**SECOND APPLICANT**
ERINDI RANCH (PTY) LTD	**THIRD APPLICANT**
JOHANNES CHRISTIAAN KOTZE	**FOURTH APPLICANT**

and

MINISTER OF ENVIRONMENT AND TOURISM	**FIRST RESPONDENT**
THE PERMANENT SECRETARY OF THE MINISTRY OF WILDLIFE AND TOURISM	**SECOND RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND FORESTRY	**THIRD RESPONDENT**

Neutral citation: *Wildlife Ranching Namibia v Minister of Environment and Tourism* (A 86/2016) [2016] NAHCMD 110 (13 April 2016)

Coram: PARKER AJ

Heard: **1 April 2016**

Reasons: **13 April 2016**

Flynote: Nature conservation – Sale of game or game meat or the skins of any game which is obviously under the age of one year – Prohibition of – But exemption to prohibition of such sale in terms of s 47(1)*(a)* and *(b)* of the Nature Conservation

Ordinance 4 of 1975 – Exemption provided by proviso in s 47(1) – Proviso establishes dualism between 'a farm' and 'a piece of land' – Therefore requirements which the owner or lessee of 'a farm' must satisfy in order to qualify for the exemption are totally different from requirements the owner or lessee of 'a piece of land' must satisfy in order to qualify for the exemption – An interpretation which subjects the owner of 'a farm' to the requirements prescribed for 'a piece of land' is wrong – It does great violence to the English language and the rule of syntax – More important; it sets at naught the intention of the Legislature – Court found therefore that the last minute limitation placed on the permits issued on 29 March 2016, and without giving the third applicants *audi* was ultra vires and unlawful – Consequently, court held that third applicant was entitled to launch the urgent application and the court was justified in granting the relief sought by third applicant.

Summary: Nature conservation – Sale of game or game meat or the skins of any game which is obviously under the age of one year – Prohibition of – But exemption to prohibition of such sale in terms of s 47(1)*(a)* and *(b)* of the Nature Conservation Ordinance 4 of 1975 – Exemption provided by proviso in s 47(1) – Proviso establishes dualism between 'a farm' and 'a piece of land' – Therefore requirements which the owner or lessee of 'a farm' must satisfy in order to qualify for the exemption are totally different from requirements the owner or lessee of 'a piece of land' must satisfy in order to qualify for the exemption – An interpretation which subjects the owner of 'a farm' to the requirements prescribed for 'a piece of land' is wrong – It does great violence to the English language and the rule of syntax – More important; it sets at naught the intention of the Legislature – Court found therefore that the last minute limitation placed on the permits issued on 29 March 2016, and without giving the third applicants *audi* was ultra vires and unlawful – First and/or second respondents issued on Tuesday, 22 March 2016 permits to third applicant to enable third applicant to conduct auction of game on its 'farm' the following Saturday, 2 April 2016 – First or/and second respondents revoked the permits and replaced them with new ones on 29 March without giving third applicant *audi* which third applicant was entitled to – Court found that the limitation placed on the 29 March permits was ultra vires and unlawful apart from those respondents acting unfairly and unjustly when they denied the third applicant *audi* – Consequently, court held that

third applicant was entitled to launch the urgent application and the court was justified in granting the relief sought by third applicant.

JUDGMENT

PARKER AJ:

[1] By this application brought on urgent basis, concerning the sale of game in terms of the Nature Conservation Ordinance 4 of 1975 ('the Ordinance'), the third applicant prays for the relief sought in Part A of the notice of motion. Part B of the notice of motion concerns a pending review application, application for a declaration and a constitutional challenge. The respondents did move to reject the application. The instant proceeding concerns Part A of the notice of motion.

[2] After hearing Mr Heathcote SC (with him Ms Schneider), counsel for the applicants, and Mr Narib, counsel for the respondents, the court granted an order and noted there that reasons for the order (which now follow) would be handed down on or before 14 April 2016. The court ordered as follows:

1.1. The applicants' non-compliance with the Rules of this Court relating to service and time periods and enrolling this application as one of urgency as envisaged in rule 73(3) of the Rules of Court is condoned.

1.2. An interim interdict is granted against the first and second respondents, in the following terms:

1.2.1. That the first and/or second respondents and/or any of the first respondent's officers be interdicted from enforcing the words

"This permit does not apply to game kept in enclosures smaller than 1000 ha"

as contained in permit numbers 104815, 104812, 10409,10410 issued to the third applicant on 29 March 2016,

pending the outcome of the relief sought in Part B of the Notice of Motion.

1.3. That a rule *nisi* be issued calling upon the first, alternatively the second respondent or any of the first respondent's officers, to show cause on **19 April 2016** at **10h00** to the Court why the words

"This permit does not apply to game kept in enclosures smaller than 1000 ha" ,

as contained in fourth applicant's permit no 105243, and issued to the fourth applicant on 30 March 2016, (or any other permit still to be issued to any of first applicant's members) should not be enforced,

pending the outcome of the relief sought in Part B of the Notice of Motion.

1.4. That costs of the urgent relief shall stand over until the determination of the relief sought in Part B of the Notice of Motion.

[3] The determination of this application (in Part A of the notice of motion) turns squarely on the interpretation and application of s 47(1)*(a)* and *(b)*,read with the proviso in subpara (ii) thereto, of the Ordinance, which provides for 'Sale of game, game meat and the skins of game'.

[4] I accept Mr Narib's submission that s 47 provides for a prohibition of the sale of any game or game meat or the skins of any game which is obviously under the age of one year. The chapeau of s 47 says so. But there is a proviso, that is, an allowance respecting, or an opening in, the seemingly total prohibition.

[5] Thus, the phrase 'provided that' in s 47(1) 'performs the function of a conjunction meaning "but" or "except that" or "nevertheless".' (GC Thornton, *Legislative Drafting*, 3rd ed, p 70) There is therefore a prohibition on any person to sell game or game meat or the skins of any game which is obviously under the age of one year; except that -

(1) the owner or lessee of a farm which is enclosed with a game-proof fence may sell any game or game meat or any such skins originating from that farm; so long as the Minister (of Environment and Tourism) gives permission for it, and the Minister may attach conditions to any such permission; or

(2) the owner or lessee of a piece of land which is not a farm and which is at least one thousand hectares in extent and which is enclosed with a game-proof fence may sell any game or game meat or any skins originating from that piece of land; so long as the Minister gives his permission for it, and the Minister may attach conditions to any such permission.

The dualism of the legislative framework provided in the proviso in s 47 is contained also in s 40(2) of the Act, dealing with the catching, capturing and killing of game and wild animals and has some bearing on the present provision.

[6] That the 'except that' provision (ie the proviso) in s 47(1) of the Act applies to (1) a farm or (2) a piece of land is common sense. And common sense tells me that not every piece of land in Namibia is a farm; and the Legislature is alive to this truism; and so, in its wisdom, the Legislature made separate provisions for each one, ie 'a farm' and 'a piece of land', constituting the duality of the legislative framework. Apart from common sense, the width of the wording of the proviso impels such conclusion.

[7] It is trite that the intention of the Legislature can be gathered from the words of the particular legislation only. In the Ordinance there are two subordinate clauses

in para (i) of s 47(1) which appear in the first part of the sentence before the word 'may' which introduces the third subordinate clause; and they are as follows:

> (1) Provided that the owner or lessee of a farm which is enclosed with a game-proof fence, and
>
> (2) Provided that the owner or lessee of a piece of land which is at least one thousand hectares in extent and which is enclosed with a game-proof fence.

[8] And these two subordinate clauses are disjunctive because they are joined together in that sentence by the conjunction 'or', signifying that the second subordinate clause containing the noun phrase 'piece of land' is an alternative to the first subordinate clause containing the noun 'farm' (See *The Concise Oxford Dictionary of Current English*, 10th ed.)

[9] Furthermore, as a matter of syntax, the adjectival clause qualifying the noun 'farm' in para (i) of s 47(1) can only be this: 'which is enclosed with a game-proof fence'. And yet again, as a matter of syntax, two adjectival clauses qualify the noun phrase 'piece of land' and they are these: (1) which is at least one thousand hectares in extent and (2) which is enclosed with a game-proof fence.

[10] Put simply, the requirement that the owner or lessee of 'a farm' should satisfy in order to qualify for the exemption provided by the proviso in s 47 (1) of the Ordinance is totally different from the requirement the owner or lessee of 'a piece of land' must satisfy in order to qualify for such exemption. The ipsissima verba of the proviso say so in clearly and unambiguously.

[11] To argue, as Mr Narib does, that the first adjectival clause (1) containing the phrase 'which is at least one thousand hectares in extent' also qualifies the noun 'farm' in the first subordinate clause is to do great violence to the English language and rules of syntax. It is with firm confidence therefore that I reject Mr Narib's submission that 'the decision turns on whether the pieces of land within such farms

which are themselves enclosed with game proof fencing are pieces of land for purposes of the Ordinance'.

[12] *A priori*, I reject Mr Narib's submission that 'for one to qualify for the exemption provided in s 47(1) in terms of the except that provision, 'a piece of land enclosed with [within] a game-proof fence should be more than 10000 ha'. Section 47(1)*(i)* does not contain the phrase 'enclosed with (within)' but Mr Narib, with respect, intrepidly in effect amends the Act by inserting such phrase in the Act, and with that unlawful amendment, counsel arrives at an interpretation that suits his purposes, leading to a fallacious and self-serving conclusion, which is untenable on any pan of scale. I was surprised to hear such proposition put forward by Mr Narib. With respect, what Mr Narib appears to have done was 'to arrogate to himself a better knowledge of what Parliament actually had in mind when it expressed itself clearly as it did in' s 47(1)*(ii)* of the Ordinance, 'and put forward, without justification, the unexpressed intention of the Parliament'. (See *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793, para 9.)

[13] The first or/and second respondents – probably on advice, which I have demonstrated to be wrong – take the wrong view that the permits that were issued to the third applicant on 29 March 2016 should contain the words 'This permit does not apply to game kept in enclosures smaller than 1000 ha', thus equating the noun phrase 'piece of land' in s 47(1)*(ii)* with the noun 'enclosures', and by so doing unlawfully subjecting 'a farm' to the same requirement as the requirement governing a 'piece of land'.

[14] I have set out previously the intention of the Legislature as gathered from the words and wording of s 47(1) *(ii)* of the Ordinance. And it is this: the requirement of 'at least one thousand hectares in extent' does not and cannot apply to a 'farm' in terms of s 47(1) *(ii)* of the Act. As respects a farm, the only requirement to be satisfied in order to qualify for an exemption under that proviso is 'which is enclosed with a game-proof fence'. And it is not in dispute that the farm in question, Erindi, 'is enclosed with a game-proof fence'. And it is not disputed that game that were the subject of this application 'originate from that farm'. It follows inexorably that the

placing of the limitation on the 29 March 2016 permits was clearly ultra vires and unlawful.

[15] Furthermore, I hold the view that it was unfair and unjust and unreasonable for the permits issued on 22 March 2016 to be revoked – it matters tuppence who carried out the revocation – and replaced with new ones, on 29 March 2016, barely two days from the date of the action that had been planned to take place on Saturday, 2 April 2016, and this time carrying the aforementioned unlawful limitation, without the third applicant having been heard. The issue is not whether the person who revoked the permits had the power to do so. The issue is that it was unfair and unjust and unreasonable that the third applicant was denied *audi* when the original permits were not only revoked but revoked and new ones granted which then carried an unlawful limitation imposed at an extremely last minute, that is, when the final decision (see *MEC for Health, EC, and Another v Kirland Investments* 2014 (3) SA 219, *passim*) was changed at an extremely last minute – much to the prejudice of third applicant, and yet third applicant was not given *audi*. There was therefore want of justice and fairness reasonableness which the third applicant was entitled to at common law and in terms of art 18 of the Namibian Constitution. Doubtless, the third applicant's entitlement is basic to our system, and it transcends any view first or/and second respondents might have held as to why the 22 March 2016 permits were revoked and replaced by the 29 March 20176; and more important, why the third applicant was not given *audi*. See *Ridge v Baldwin* [1964] AC 40 (House of Lords) at 114.

[16] Accordingly, I accept the third applicant's contention that the prohibition (ie the aforementioned limitation placed on the 29 March 2016 permits) 'is ultra vires'.

[17] 'It is a common practice in this court', stated Damaseb JP in *Kleynhans v Chairperson of the Council for the Municipality* 2011 (2) NR 437, para 54, 'for a party, who feels aggrieved by administrative decision-making and desires immediate relief to protect its "immediate interest" while intending to have such decision-making reviewed and set aside, to seek an urgent interdict *pendente lite*'. In the instant case, in virtue of what I have said previously about the unlawful act and denial of *audi* and on the facts and in the circumstances of the case, the third applicant was entitled to

launch the urgent application, and the court was justified in granting the order appearing in para 2 of this judgment.

C Parker

Acting Judge

APPEARANCES

APPLICANTS:	R Heathcote SC (assisted by H Schneider) Instructed by Francois Erasmus & Partners, Windhoek
RESPONDENTS:	G Narib Instructed by Government Attorney, Windhoek