CASE NO.: A 72/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERINDI RANCH (PTY) LTD	**APPLICANT**
vs	
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**1ST RESPONDENT**
THE MINISTER OF ENVIRONMENT AND TOURISM	**2ND RESPONDENT**
THE PERMANENT SECRETARY OF THE MINISTRY OF ENVIRONMENT & TOURISM	**3RD RESPONDENT**
THE ATTORNEY-GENERAL	**4TH RESPONDENT**

CORAM: MILLER, AJ

Heard on: 28 October 2011

Delivered on: 11 November 2011

JUDGMENT:

MILLER, AJ: [1] The applicant is the owner of farms Erindi No. 58 and Constantia No. 60 in the district of Omaruru. The property owned by it constitutes a vast track of land measuring some 65 000.00 hectares in extent.

[2] The applicant utilizes the property as a private game reserve, its market being aimed at attracting both local and foreign tourists to visit the game reserve.

[3] The ultimate aim of the applicant to become, in its words, the first “big five” tourist destination in Namibia. By that I am given to understand that once the applicant’s vision becomes a reality, tourists visiting the applicants game reserve will be able to conveniently, view the five recognized big species of game, including the elephant, at one convenient location.

[4] The problem confronting the applicant though is that due to the vastness of its game reserve, and the small number of elephant it has, (some 12 in number) the prospects of a tourist being able to actually see an elephant in the wild is remote.

[5] To overcome this, the applicant is of the view that the introduction of 200 elephants within the boundaries of its game reserve will address this shortcoming in the fulfilment of its vision.

[6] It is the applicant's quest to introduce 200 more elephants to its game reserve that culminated in the present proceedings before me.

History:

[7] During the year 2009 the applicant decided to apply for a permit from the second respondent to import 200 elephants from the Sabi Sand game reserve in South Africa. An application was duly made in terms of Section 49(1) of Ordinance 4 of 1975. No response was forthcoming. The matter dragged on until 24 June 2009 upon which date the applicant delivered to the second respondent a new application supported by a detailed and comprehensive motivation for the application itself.

[8] The second respondent's response to the application is contained in a letter dated 29 July 2009 addressed to the applicant by the Permanent Secretary in the Ministry of Environment and Tourism who features in these proceedings as the third respondent. The letter reads as follows:

> "Your letter dated 18 June 2009 refers.
>
> I wish to bring to your attention that Government Gazette No. 4236 dated 1st April 2009, Notice No. 60 puts a moratorium on the issuing of permits for the import into Namibia of certain species. Some species indigenous to Namibia such as Lion, Leopard, Cheetah, Crocodile (captive bred), Duiker, Eland, Elephant, Giraffe, Wild dog, Hartbeest, Kudu, Oryx, Springbok and Steenbok are listed. In view thereof, the Ministry is therefore not in a position to issue you with an import permit for elephants"

[9] Pursuant to further negotiations and correspondence a meeting was held between the applicant and inter alia the third respondent. Following that meeting the third respondent addressed a letter to the Government Attorney, who also attended the meeting. The letter reads as follows:

> "During the meeting attended by you and representatives of Erindi Ranch, the Ministry agreed to sell 200 elephants to Erindi Ranch at N$20 000.00 per head. Kindly be informed that the Ministry will only sell the elephants at the agreed price and would not exchange them for other species."

[10] A draft agreement was forwarded to the applicant which was signed by it. The respondents never signed the agreement. Instead the matter remained in limbo until 15 September 2010 when the second respondent addressed the following letter to the applicant.

> "I believe it would not best serve the public and national interest to sell such a number of the elephant herd to a private entity. You must bear in mind that the elephants are a national asset. Further, I note that the price per head referred to in the Treasury Instructions does not cater for this particular situation. The particular Treasury Instruction relations (sic) to problems (sic) animals when being hunted. The number you require would not fall under the problem animal category as you require the elephant for specific purposes. Based on my views reflected above, I propose the following solutions which should be of benefit to all parties concerned. I propose that you lease the elephants from the

Government, this way the state need to have to sell off national assets and you also acquire the elephants you require which will achieve your purposes."

[11] It is common cause that, although the applicant was amendable to that proposal, no agreement of lease was entered into between the parties. Instead the matter was once more left to drag on with to end in sight.

[12] Ultimately the applicant instituted the present proceeding before this court on 31 March 2011.

The Relief claimed:

[13] Applicant's Notice of Motion contains the following prayers:

"

1. That the moratorium published in Government Gazette No. 4236, Notice 60, dated 1st April 2009 be declared *ultra vires* the Constitution of Namibia and consequently null and void.
2. That the moratorium published in Government Gazette No. 4236, Notice 60 dated 1st April 2009, be declared *ultra vires* the provisions of the Nature Conservation Ordinance No. 4 of 1975 and (sic) amended and consequently null and void.

3.1 To obtain an order in terms whereof the second respondent is ordered to issue a permit to the applicant in terms of Section 49(1) of the Nature Conservation Ordinance No. 4 of 1975 for the import by the applicant of 200 (two hundred) elephants into Namibia from South Africa, alternatively

3.2 That a mandamus be issued in terms whereof the second applicant (sic) is ordered to take a decision in respect of the applicant's application dated 18 June 2009 (Annexure **"PJ1"**) and lodged with the second respondent on 24 June 2009.

4. That it be declared that the agreement (Annexure **"PJ7"**) entered into and between the second respondent and the applicant on 14 January 2010, in terms of which the second respondent agreed to sell to the applicant 200 (two hundred) elephants for the amount of N$20 000.00 per head, was validly entered into.
5. Costs of this application, including the costs of one instructing and one instructed counsel.
6. Further and alternative relief"

The Response by the Respondents:

[14] The respondents duly filed a Notice of Opposition, but thereafter took no steps to file any answering papers within the time periods determined by the Rules of this Court. Instead what purported to the answering affidavits were filed well out of time without there being any application, as was required, for the condonation of the late filing of the answering affidavits.

[15] I pause to mention that the applicant erroneously sought and was granted a judgment by default on 15 April 2011, which judgment was subsequently rescinded at the instance of the applicant.

[16] On 8 August 2011 a Case Management Conference was held by me during the course of which I raised with Mr. Chibwana who appeared for the respondents, the fact that there is no application for condonation of the late filing of the answering affidavits. I was informed that such an application had been prepared and will be filed not later than 10 August 2011.

[17] I consequently made the orders I deemed appropriate for the filing of the condonation application and the filing of the further affidavits.

[18] That notwithstanding, no application for condonation was filed, although the applicant, perhaps in anticipation of a condonation application filed a replying affidavit.

[19] It follows that I had regard only to the founding affidavit filed by the applicants.

The issues to be determined:

[20] At the outset of the hearing before me on 28 October 2011, I was advised by Mr. Heathcote SC, who together with Ms. Scheider, appeared for the applicant that the respondents conceded the fact that the moratorium issued by the second respondent and published on 1 April 2009 in Government Gazette 4236, Notice 60, was *ultra vires* the provisions of the Ordinance 4 of 1975.

[21] Mr. Chibwana, who again appeared for the respondents confirmed that fact.

[22] In my view the concession was correctly made. In issuing the moratorium, the second respondent purported to act in terms of Section 78 (d) of Ordinance 4 of 1975. A proper reading of that section makes it clear that the powers it confers upon the second respondent do not include the power to place a blanket prohibition upon the imporation of wild animals into Namibia.

[23] As a result of the concession made, the applicant did not pursue the relief claimed in Prayer 1 and it became common cause that the applicant is entitled to at least the relief claimed in Prayers 2 and 3.2 of the Notice of Motion.

[24] Apart from the question of costs, the remaining issues are:

(a) Whether I should in the exercise of my discretion make an order directing the second respondents to issue the required permit to the applicant and
(b) Whether the applicant and the second respondent entered into a valid agreement in terms whereof the second respondent sold 200 elephants to the applicant.

[25] In deciding the first issue the following principles apply:

(a) The court has a discretion once it sets aside an administrative decision to take the decision itself, instead of referring the matter back.

(b) The discretion must be exercised judicially.

(c) Generally the matter will be referred back if there is no reason for not doing so.

(d) The Court will consider what is fair to both sides.

Erf One Six Seven Orchards CC vs Johannesburg Metropolitan Council (Johannesburg Administration) and Another 1991 (i) SA 104 (SCA).

Ministry of Health and Social Services v Lisse 2006 (2) NR 739 (SC)

Waterberg Big Game Hunting Lodge Otjihevita (Pty) Ltd v Minister of Environment and Tourism 2010 (1) NR 1 (SC).

[26] It must be borne in mind, firstly, that the second respondent has yet to decide upon the merits of the application to have a permit issued. This fact puts this case on a somewhat different footing. The question which arises is whether I, sitting as a judge of the High Court, should make the decision for the second respondent without affording the second respondent the opportunity to apply her mind to the matter. Whether or not to issue the required permit is a matter of fact within the domain of the second respondent and I am of the view that a court ought to be slow in usurping that function.

[27] Secondly, the applicant contends that the application for a permit contains compelling factual material in favour of a permit being granted.

That may well be so, and I am certain that once those facts are placed before the second respondent, she will afford the facts the weight they deserve. What is absent before me, is the possibility that there may well be other complimentary or competing considerations which should be considered as well. I simply do not know what they are.

[28] Thirdly, the applicant complains that once the matter is placed before the second respondent the application is certainly destined to be refused.

[29] This argument loses sight of the fact that the refusal of the application may ultimately prove to be correct. Whether or not that will be the case is a matter upon which I can only speculate.

[30] It is a question that in my view is best left for another day, should the applicant consider itself aggrieved by such a refusal.

[31] Fourtly, I raised with Mr. Heathcote during arguments that the issue of a permit would inevitably have to be subject to certain conditions which I am ill-equipped to determine. Mr. Heathcote submitted that I can order the second respondent to issue the permit subject to such conditions as the second respondent deems fit. That, to me, seems to be inappropriate. It is best left to a single decision maker.

[32] It follows that given the facts before me I am not prepared to grant the relief set out in paragraph 3.1 of the Notice of Motion.

[33] As far as the alleged agreement is concerned I find that on the totality of the facts no valid agreement was concluded. Whilst some aspects may have been discussed and agreed upon, it is plain that it was not intended by the parties that those would be the only conditions.

[34] In addition there is no merit in the submission that the second respondent had delegated her authority to conclude the agreement to the third respondent.

[35] Insofar as the relief claimed in paragraph 3.2 is concerned, a decision on the application must be taken without further delay.

[36] Mr. Chibwana indicated that a period of three weeks will be sufficient.

[37] Finally I conclude that the applicant is entitled to an order for costs I consequently make the following orders:

1. The moratorium published in Government Gazette 4236, Notice 60, dated 1 April 2009 is declared *ultra vires* the provisions of the Nature Conservation Ordinance, No. 4 of 1975 as amended and consequently null and void.

2. A mandamus is issued in terms whereof the second respondent is ordered to take a decision in respect of the applicants application dated 18 June 2009 and lodged with the second respondent on 24 June 2009 by not later than three weeks from the date of this order.

3.1 The respondents are ordered jointly and severally, to pay the applicants costs which shall include the costs of one instructing and two instructed counsel.

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MILLER AJ

ON BEHALF OF THE APPLICANT:	Mr. Heathcote assisted by Ms. Schneider-Waterberg
Instructed by:	Lorentz Angula Inc.
ON BEHALF OF DEFENDANTS:	Mr. Chibwana
Instructed by:	Government Attorney