**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING**

PRACTICE DIRECTION 61

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| **Case Title:**SALT ESSENTIAL INFORMATION TECHNOLOGY (PTY) LTD APPLICANTandRDW PROPERTIES CC FIRST RESPONDENTTHE CHIEF JUSTICE OF NAMIBIASECOND RESPONDENTTHEODORUS ADAM BARNARD THIRD RESPONDENT | **Case No:**HC-MD-CIV-ACT-CON-2021/02204 |
| **Division of Court:**HIGH COURT (MAIN DIVISION) |
| **Heard before:**HONOURABLE MR JUSTICE PARKER, ACTING | **Date of hearing:**20 JUNE 2024 |
| **Delivered on:**10 JULY 2024 |
| **Neutral citation:** *Salt Essential Information Technology (Pty) Ltd v RDW Properties CC* (HC-MD-CIV-ACT-CON-2021/02204) [2024] NAHCMD 375 (10 July 2024) |
| Based on these reasons, I hold that the applicant has made out a case for the relief sought and is entitled to judgment. In the result, I order as follows:1. The third respondent is joined as a party to these proceedings.

2. The decision by the Chief Justice to issue a certificate dated 16 August 2023 to Adv Theodorus Adam Barnard in terms of section 85 (2) of the Legal Practitioners Act 15 of 1995 to act in Namibia in relation to High Court case number HC-MD-CIV-ACT-CON-2021/02204 is hereby reviewed and set aside.3. Costs of suit are granted in favour of the applicant against the first and third respondents, the one paying the other to be absolved, and such costs shall include costs of one instructing counsel and two instructed counsel and the costs are not capped in terms of rule 32 (11) of the rules of court.4. The applicant shall pay costs in favour of the first and third respondents in respect of the proceedings of 27 March 2024 relating to the subpoena that was issued against the Executive Director of the Ministry of Home Affairs, Immigration and Safety and Security; except that, in respect of the third respondent, it shall be disbursements necessary and reasonably incurred. The costs and disbursements under this paragraph are capped in terms of rule 32 (11) of the rules of court. 5. The interlocutory application is finalised and removed from the roll.6. Counsel or the parties are called upon to attend a status hearing at 08H30 on 17 July 2024 for the court to consider the conduct of the action. |
| **Following below are the reasons for the above order:** |
| PARKER AJ:[1] The court is seized with an action proceeding. The trial of the action is pending. In the course of events, the applicant (plaintiff) has brought an application for the relief set out in the notice of motion. Mr Heathcote SC (with him Mr Dicks) represents the applicant. The first respondent (the defendant) and the third respondent have moved to reject the application, and are represented by Mr Barnard (the third respondent). The second respondent has not participated in these proceedings. I shall, therefore, refer to the opposers of the application as the respondents.[2] The application relates to the issuance of a certificate by the Honourable Chief Justice in terms of s 85 of the Legal Practitioners Act 15 of 1995 (‘the LPA’) (‘the s 85 certificate’). The issuance of the certificate is the impugned decision.[3] From the outset, I should say the following to put to bed any seeming dispute as to the nature of the application: First, the application is an interlocutory application upon the measurement of *Di Savino v Nedbank Namibia Ltd*.[[1]](#footnote-1) An order made will not be definitive of the rights of the parties in the action. It is interlocutory, that is, preliminary to, and connected with, the trial of the action. That it is an interlocutory application is also the understanding of the respondents as can be gathered from the papers. Second, being an interlocutory application, I do not think it was necessary or required to be brought in terms of rule 65 or rule 76 of the rules of court.[4] Consequently, I am satisfied that the application is properly before the court. The conclusion in para [3] above lead me to the determination of another preliminary point raised by the defendants concerning rule 32 (9) and (10) of the rules of court.[5] Granted, rule 32 (9) is helpful and it serves an effective purpose. It has served the court and parties well. However, we should not implement the provisions of rule 32 (9) mechanically as to lose its usefulness and purpose. The rule 32 (9) process is an essential part of the process of attempting to resolve matters amicably between the parties without the approval of the managing judge.[[2]](#footnote-2) The upshot is that where the matter in question cannot be resolved amicably by the parties without the approval of the managing judge, as the instant matter is, it is an inutility to pursue a rule 32 (9) engagement. The parties could not agree as to the interpretation and application of a statutory provision like s 85 (2) of the LPA. Only the court is entitled and competent to do that. Thus, any judicial insistence that such a matter, as the instant matter, be subjected to a rule 32 (9) process would be otiose and labour lost and, indeed counterproductive. Accordingly, I find that the authorities on rule 32 (9) and (10) referred to the court by Mr Barnard are distinguishable on the facts and are, in any way, of no assistance on the point under consideration.[6] Furthermore, the respondents have raised the point that there has been a delay in bringing the application. Mr Barnard submitted that the application for the s 85 certificate was made on 15 August 2023 and was granted on 16 August 2023, and yet the present application was brought on 11 April 2024. Therefore, according to Mr Barnard, there has been an unreasonable delay in the institution of the review application. [7] The approach in dealing with such point was last settled by the Supreme Court in *Keya v Chief of Defence Force and Others*.[[3]](#footnote-3) There, it was said that the question whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay.[8] An important consideration is this: ‘In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations’.[[4]](#footnote-4)[9] The applicant has put forth reasons for bringing the application some eight months after the issuing of the s 85 certificate. The reasons include the time it took to get hold of the immigration status of Mr Barnard and to seek the leave of the Honourable Deputy Chief Justice to cite the Honourable Chief Justice. The application to the Deputy Chief Justice was made on 22 March 2024 and leave was obtained on 3 April 2024.[10] I have considered the applicant’s explanation for the delay in bringing the application. I think the delay is unreasonable. Nevertheless, in the exercise of my discretion, I condone the unreasonable delay in bringing the application for reasons that follow in the succeeding paragraph [11].[11] The issue at play in the instant mater concerns ‘the rule of law and the principle of legality enshrined in Art 1 of the Constitution and upon which our constitutional democracy is based,[[5]](#footnote-5) as well as the *OUDEKRAAL* principle that ‘even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside’.[[6]](#footnote-6) The impugned decision is plainly unlawful, as I demonstrate below. To leave such clearly unlawful decision to remain intact without setting it aside would not conduce to rule of law and legality. It is, therefore, with firm confidence that I hold that ‘the public interest in the finality of administrative decisions’ is far outweighed in this case by the foregoing considerations. It is for those considerations that I condone the unreasonable delay in bringing the application.[12] I have rejected the respondents’ preliminary objections. I now proceed to consider the challenge to the lawfulness and validity of the impugned decision by the Honourable Chief Justice.[13] The first crucial determination I make is this. His Lordship the Chief Justice’s decision in issuing the s 85 certificate is an administrative act through and through, unconnected with the judicial functions of the Supreme Court under article 79 of the Constitution. It is an act done in the implementation of legislative provisions pursuant to administering the LPA. The Chief Justice’s power therein is traceable to that Act,[[7]](#footnote-7) and *a fortiori* Chief Justice (and in his or her absence, the Deputy Chief Justice) alone is the sole repository of the legislative power. The Supreme Court is not the repository of the said legislative power. In this jurisdiction, it must be said in capitalities, ‘Supreme Court’ is not synonymous with ‘Chief Justice’.[14] Therefore, *pace* Mr Barnard, the impugned decision cannot, on any pan of legal scales and upon any legal imagination be a decision of the Supreme Court. As Mr Heathcote submitted, the Supreme Court has no original jurisdiction, except in the limited situation where a matter is referred to it for decision by the Attorney General in terms of article 79 (2) of the Constitution and with regard to Presidential electoral challenges under s 172 of the Electoral Act 5 of 2014.[15] From the foregoing, the conclusion is inescapable that the granting of a s 85 certificate by the Chief Justice is an administrative act by the Chief Justice and not a decision of the Supreme Court, as contended by Mr Barnard.[16] It follows inevitably that the word ‘application’ in the grammatical clause ‘upon application made’ in s 85 of the LPA does not mean an application falling ‘within the ambit of s 17 of the Supreme Court Act 15 of 1990’, as Mr Barnard submitted. If it was the intention of the Legislature that an application for a s 85 certificate be made to the Supreme Court, it would have made such of its intention known by express provisions as it has done with regard to an application to be admitted as a legal practitioner in terms of s 4(1) of the LPA. [17] The Supreme Court Act 15 of 1990 provides:  ‘**Finality of decisions of Supreme Court**  17 (1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.’[18] Section 17 (1), which Mr Barnard is so much enamoured with, does not provide for the finality of the administrative decisions of the administrative acts of the Chief Justice but the finality of the decisions of the Supreme Court. Nor would such a provision be Constitution compliant. Ouster clauses making administrative decisions by public authorities final and unassailable by the courts is not part of our law. It would be offensive of article 18 of the Constitution. What is more, in Namibia, ‘Chief Justice’ is not synonymous with ‘Supreme Court’, as aforesaid.[19] The analysis and conclusions thereanent in paras [13]- [18] above give this court a clear way to consider whether His Lordship the Chief Justice’s decision stands to be reviewed and set aside without article 81 of the Constitution and s 17 (1) of the Supreme Court Act 15 of 1990 blocking my way.[20] The super talisman on which Mr Barnard hangs the fate of the respondents’ case in their attempt to resist the application is primarily this: The court ‘lacks jurisdiction to pronounce upon the propriety and regularity of the order of His Lordship Mr Justice Shivute (the Honourable Chief Justice)’ on the basis that the granting of a s 85 certificate ‘is an order or ruling of the Supreme Court within the ambit of s 17 (1) of the Supreme Court Act 15 of 1990’. According to Mr Barnard the respondents’ contention is reinforced by article 81 of the Constitution.[21] I have demonstrated in paras [13]-[18] above that like all talismans, the respondents’ talisman is an illusion. I now proceed to undertake the interpretation of s 85 of the LPA. Section 85 provides: ‘(2) Where the Chief Justice or, in his or her absence, the Judge President is satisfied that having regard to the complexity or special circumstances of a matter, it is fair and reasonable for a person to obtain the services of a lawyer who has special expertise relating the matter and that the lawyer is not resident in Namibia or a reciprocating country, he or she may, upon application made to him or her in that behalf, grant to such lawyer a certificate authorising him or her to act in Namibia in relation to that matter.’[22] The provisions of s 85 (2) of the LPA are clear and unambiguous. The approach to interpretation of legislation and other legal instruments propounded by the Supreme Court in the recent case of *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and Another* [[8]](#footnote-8)entails assessing the meaning of the words used within their statutory context and purpose. It is essentially one unitary exercise in which text and context are relevant in constructing provisions. I shall call them the *Shoprite Namibia (Pty) Ltd* approach.[23] Having applied the *Shoprite Namibia (Pty) Ltd* approach to the interpretation of s 85 (2) of the LPA, I conclude that the jurisdictional facts which must exist in relation to a matter for which a foreign lawyer is sought and in relation to such foreign lawyer are that – (1) the matter is complex or there are special circumstances appertaining to the matter (Fact 1);(2) the foreign lawyer has special expertise relating to the matter (Fact 2). (3) the foreign lawyer is not resident in Namibia (Fact 3).(4) the foreign lawyer is not resident in a reciprocating country referred to in s 85 (1) of the LPA (Fact 4).[24] It follows inevitably as night follows day that a foreign lawyer who fails to establish any one of the four facts set out in para [23] above cannot in law be issued with a s 85 certificate. Thus, if the application placed before him or her, any one of the four facts is not proved to exist, the Chief Justice has no power to grant a s 85 certificate. In that regard, in his or her exercise of discretion, the Chief Justice must not offend any ground known to the law for the review of administrative acts (action).[[9]](#footnote-9)[25] In the papers, the undisputed facts which are relevant for our present purposes are plainly these: Mr Barnard (the third respondent) has been issued with a permanent resident permit to enter and to be in Namibia for the purpose of permanent residence in Namibia in terms of s 26 of the Immigration Control Act 7 of 1993 and has taken up such residence to keep the validity of the permanent residence permit alive in terms of s 26 (5) of the said Act.[26] The fact that Mr Barnard has obtained a permanent residence permit and ‘has taken up such residence’, as aforesaid, is contained in the Declaration that accompanied the s 85 application submitted to the Chief Justice by the instructing legal practitioner in the matter concerned. From whatever prism one looks at these relevant facts and recalling the *Shoprite Namibia (Pty) Ltd* approach of interpretation, discussed in para [22] above, it is indisputable that Mr Barnard is resident in Namibia, within the meaning of s 85 (2) of the LPA. In failing to take into account those relevant facts when exercising his discretion regarding the jurisdictional facts, the Honourable Chief Justice’s decision, with respect and with the greatest deference to him, is unlawful and invalid for the reasons set out in the succeeding para [27].[27] There was an abuse or improper exercise of discretion, which is a ground of review of administrative action.[[10]](#footnote-10) His Lordship Chief Justice, with respect, failed or neglected to take into account a relevant matter which he ought to have taken into account,[[11]](#footnote-11) namely, the relevant fact that Mr Barnard is resident in Namibia. Mr Barnard’s own application for a s 85 certificate vindicates the relevant fact. The said application shows indubitably that a material jurisdictional fact (ie Fact 3 in para [24] above) was not shown to exist.[28] The decision to grant to Mr Barnard a s 85 certificate was, therefore, not in compliance with the section. A compliance with s 85 was required by the rule of law and legality.[[12]](#footnote-12)[29] Consequently, I find that and hold that His Lordship Chief Justice’s decision is unlawful and invalid. The question that arises is this: Should the invalid decision be set aside? On the facts and in circumstances of the case and in the interest of fairness to other lawyers who hold permanent resident permits and are resident in Namibia and who had to and have to be admitted as legal practitioners through the qualifications processes prescribed by the LPA. Moreover, it is not in the interest of the rule of law for the unlawful and invalid decision to remain intact without setting it aside. Accordingly, it is in the interest of the law and fairness to set aside the decision.[30] The foregoing analysis and conclusions thereanent are unaffected by the following points submitted to the court by Mr Barnard. It is about Mr Heathcote’s submissions to the court. I did not see that in his submissions, Mr Heathcote introduced for the first-time facts which are unknown to the papers filed of record. It was the respondents who raised the aforementioned preliminary objections. Therefore, it is safe and reasonable to say that the respondents know what facts they were relying on and the law applicable.[31] As to the facts on the merits that are relevant for the determination of the application, I did not see any relevant acts, particularly about the immigration status of Mr Barnard in Namibia and the fact that he has taken up residence in Namibia, that are not on the papers. As to the law on judicial review of administrative action, relied on by Mr Heathcote, I would say they are trite and rudimentary so much so that there is no way one can say that Mr Barnard is not familiar with them.[32] I have said those things in paras [30]-[31] above to conclude as follows: I cannot see in what manner Mr Barnard could have been short-changed by the content of Mr Heathcote’s submissions that are relevant for the task in hand. In any case, I hasten to add that it is trite that heads of arguments are for the benefit of the judge.[33] It remains the question of costs, that is, costs of this application and costs of the subpoena proceedings. As to the subpoena proceedings, I am prepared to grant costs.[34] As to costs of the application, the second respondent shall be exempted from the effects of any costs order; not least because the second respondent has not opposed the application. In any case, the applicant – correctly – has not sought a costs order against the second respondent. The interlocutory application was argued intensely by a silked senior counsel and a senior practitioner. Mr Heathcote’s written submission occupied nine pages and Mr Barnard’s written submission ran into 62 pages, not to count the pages and pages of a bevy of authorities that the court was treated to. It is not of the kind that at times are argued from the Bar without written heads or argued on up to10-page written heads of argument on some procedural matter. Indeed, the respondents sought costs that are uncapped by rule 32 (11) of the rules of court. Therefore, I think it is fair, just and reasonable to order costs that are uncapped by rule 32 (11) of the rules. |
| **Judge’s signature:** | **Note to the parties:** |
|  | Not applicable. |
| **Counsel:** |
| **APPLICANT** | **RESPONDENTS** |
| R Heathcote, SC (with him G Dicks)Instructed byMorwe & Associates Incorporated, Windhoek | T BarnardInstructed byDr Weder, Kauta & Hoveka Inc., Windhoek |

1. *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC). [↑](#footnote-ref-1)
2. Petrus Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* 1ed (2020) at 219-220. [↑](#footnote-ref-2)
3. *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC) para 21. [↑](#footnote-ref-3)
4. Para 22. [↑](#footnote-ref-4)
5. *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340 (SC). [↑](#footnote-ref-5)
6. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA); approved by the Supreme Court in several cases, eg *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation and Another* footnote 5. [↑](#footnote-ref-6)
7. *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another* footnote 5 para 49. [↑](#footnote-ref-7)
8. *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and Another* 2022 (2) NR 325 (SC) paras 37-40. [↑](#footnote-ref-8)
9. *Nolte v The Minister of Environment, Forestry and Tourism* [2023] NAHCMD 361 (28 June 2023). [↑](#footnote-ref-9)
10. Etienne Mureinik ‘Administrative Law in South Africa’. *SALJ* Vol 103 (1986) at 615-645, applied in *Nolte v Minister of Environment Forestry and Tourism* footnote 9; *Viljoen v Chairperson, Immigration Selection Board and Another* 2017 (1) NR 132 (HC) para 20. [↑](#footnote-ref-10)
11. *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1994 (1) SA 177 (NmH) at 197G. [↑](#footnote-ref-11)
12. See para [11] above. [↑](#footnote-ref-12)