'Reportable'

SUMMARY

CASE NO.: A 189/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHIEF JOEL STEPHANUS *v* DANIEL APOLLUS AND 19 OTHERS

PARKER J

2012 May 10

Practice - Applications and motions – Notice of motion indicating the relief sought is interim interdict – Court finding, however, that although the relief is couched in the frame of rule *nisi*, in reality applicant seeks a final order in the form of *mandament van spolie*.

Spoliation - *Mandament van spolie* – Court confirming earlier authorities as to what applicant must establish in order to succeed – Court finding that in instant case applicant has not been deprived (let alone illicitly deprived) of his peaceful and undisturbed possession of the chieftainship of the Vaalgras traditional community and so the Court cannot as a matter of law and rudimentary logic order the respondents to restore the applicant to the peaceful and undisturbed possession of the chieftainship of the Vaalgras traditional community – Consequently, Court finding that applicant has not made out a case for the relief sought and accordingly Court dismissing the application with costs.

Statute - Traditional Authorities Act (Act No. 25 of 2000) – Court finding that s. 8 of the Act provides for the removal of a chief or head of a traditional community where sufficient reason exists – Consequently, Court holding that in instant case the peaceable process initiated by the respondents aimed at removing the applicant for what they see as bad governance and maladministration on the part of the applicant is not illegal or unconstitutional.

Held, that if the Court made an order prohibiting the respondents from taking any peaceable action aimed at removing the applicant in pursuance of the enjoyment of their statutory right under s. 8 of the Act, this Court would be acting outwit its powers, and such order would be offensive of the Act.

Held, further that bad governance or maladministration on the part of a chief or head of a traditional community is sufficient reason within the meaning of s.8 of Act No. 25 of 2000.

CASE NO.: A 189/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHIEF JOEL STEPHANUS	**Applicant**

and

DANIEL APOLLUS	**First Respondent**
JACOB APOLLUS	**Second Respondent**
AARON LUKAS STEPHANUS	**Third Respondent**
LUKAS APOLLUS	**Fourth Respondent**
GABRIEL BIWA	**Fifth Respondent**
BENEDICTUS BASSON	**Sixth Respondent**
ERIC BIWA	**Seventh Respondent**
ERICK STEPHANUS	**Eighth Respondent**
ANDREAS BIWA	**Ninth Respondent**
JESAJA STEPHANUS	**Tenth Respondent**
OTTO HINDA	**Eleventh Respondent**
IRMGARD EISEB	**Twelfth Respondent**
KOSMAS DAMIANUS APOLLUS	**Thirteenth Respondent**
CHRISTIAAN APRIL	**Fourteenth Respondent**
JAN STEPHANUS	**Fifteenth Respondent**
THOMAS APOLLUS	**Sixteenth Respondent**
WILLEM APOLLUS	**Seventeenth Respondent**
IMMANUEL HINDA	**Eighteenth Respondent**
JOSEF P STEPHANUS	**Nineteenth Respondent**
THE CONCERNED GROUP	**Twentieth Respondent**

***CORAM*:**	**PARKER J**
Heard on:	2012 April 18
Delivered on:	2012 May 10

JUDGMENT

PARKER J: [1] This is an application brought on notice of motion in which the applicant, represented by Ms Schulz, seeks the relief set out in the notice of motion. The respondents, represented by Mr Hinda, have moved to reject the application. Although the relief sought is couched in the frame of a rule *nisi*, it seems to me clear that the relief that the applicant seeks is in reality a final order, and I did not hear Mr Hinda or Ms Schulz argue contrariwise. And I accept Mr Hinda's submission that in essence the relief sought is *mandament van spolie*. That appears to be the submission of Ms Schulz, too, albeit Ms Schulz does not use the term *mandament van spolie* (or spoliation); nevertheless, counsel – unwittingly – submits, 'The matter before court is to grant a relief in which it is prayed for that the respondents should restore (to) the applicant the peaceful and undisturbed leadership, being the traditional chief of Vaalgras Traditional Authority and to refrain from interfering in the leadership by Chief Joël Stephanus (the applicant) and misleading the Traditional Authority'.

[2] Thus, the burden of this Court in the present proceeding is, therefore, to decide whether the applicant has placed before the Court sufficient evidence entitling the applicant to the relief of *mandament van spolie*. In this regard, the authorities converge on the principle that in order to succeed the applicant who seeks a spoliation order bears the burden of establishing that he or she was in peaceful and undisturbed possession of the thing in question and that he or she has been illicitly deprived of such possession. (*Constancia Muruko and Another v Godfriedine Kambatuku and Others* Case No. (P) A 282/206 (Unreported); *Kuiiri and Another v Kandjoze* and Others 2009 (2) NR 447 (SC)) It follows indubitably and reasonably that the only questions I must answer are these: (1) was the applicant in peaceful and undisturbed possession of the chieftainship of the Vaalgras traditional

community, and (2) has the applicant been illicitly deprived of such possession by the respondents?

[3] I accept the evidence on the papers and Ms Schulz's submission that the applicant is the traditional leader (that is, chief or head) of the Vaalgras Community ('the Community') and is accordingly the leader of the Vaalgras Traditional Authority ('the VTA') in terms of the Traditional Authorities Act, 2000 (Act No. 25 of 2000) ('the Act'). Mr Hinda does not dispute that fact. It follows that there is no dispute as to (1) in my representation above; that is, the applicant is in peaceful and undisturbed possession of the chieftainship of the Vaalgras traditional community. I proceed to consider (2) in my representation above; that is, has the applicant been *illicitly* deprived of such possession by the respondents? And in this regard the key word is 'illicitly', which I have italicized for emphasis.

[4] There is not one jot or tittle of evidence placed before this Court that establishes that the respondents have illicitly deprived the applicant of his possession of the chieftainship of the Vaalgras traditional community. Indeed, when I asked Ms Schulz whether the applicant is still the chief of the Vaalgras traditional community and therefore the leader of the Traditional Authority of the Community, she answered in the positive. And I accept Mr Hinda's submission that 'the relief for restoration of the applicant's "VTA's (i.e. the Vaalgras Traditional Authority's) Chieftainship" must as a matter of fact be founded on evidence that the applicant was unlawfully deprived of his Chieftainship of (the) VTA.' Thus, it follows irrefragably that since the applicant has not been deprived – let alone illicitly deprived – of his peaceful and undisturbed possession of the chieftainship of the Vaalgras traditional community (that is, the leadership of the Vaalgras Traditional Authority), this Court cannot as a matter of law order 'the Respondents to restore the Applicant to the peaceful and undisturbed leadership being the Traditional Chief of Vaalgras

Traditional Authority (VTA)'. Accordingly, I find that the relief sought has no merit at all in law, or, indeed, in rudimentary logic; for, X cannot restore Y's possession of a thing when X has not deprived Y of Y's possession of the thing.

[5] But that is not the end of the matter; and so it behoves me to signalize the point that what the applicant has put forth as evidence in support of the relief sought has no basis at all. The following actions on the part of the respondents relied on by the applicant are not illegal: they are not offensive of any provision of the Namibian Constitution or the Act. The applicant relies particularly on the following: (1) the print media and other campaign (initiated by a 'Concerned Group') 'to lift Chief Joël Stephanus (the applicant) from his leadership', (2) the letter inviting the applicant to a meeting of the Community (not the VTA, I must stress), (3) the letter written by the 'Concerned Group' to the then Ministry of Regional and Local Government, Housing and Rural Development, and (4) the Concerned Group's campaign among the Community members 'to believe that I am not competent to be the Traditional Chief (Leader)'.

[6] Ms Schulz did not refer to me any law – and I do not find any – which prohibits a section of a traditional community from campaigning peaceably for the removal of their chief or head from his or her office for bad governance or maladministration, for example. On the contrary; the Act provides for the removal of a chief or head of a traditional community where sufficient reason exists. And in my view bad governance or maladministration on the part of a chief or head of a traditional community is sufficient reason. Section 8 provides:

> '(1) If there is sufficient reason to warrant the removal of a chief or head of a traditional community from office, such chief or head may be removed from office by the members of his or her traditional community in accordance with the customary law of that community.'

[7] The logical question that, with the greatest deference to Ms Schulz, eludes Ms Schulz is this. If the law permits the removal of a chief or head of a traditional community like the applicant where sufficient reason is thought to exist, how can this statutory right be enjoyed if a section of the community does not initiate the process of removal where in their view sufficient reason exists to remove the chief or head of their traditional community? In my opinion, what the Act prohibits – I must signalize in this regard – is a process that is criminal and violent, that is, a process that is not peaceable. And I do not see in what manner any of the four actions adumbrated previously can answer to the epithet of violent or criminal, from which the applicant needs the protection of the Court. On the contrary; if the Court made an order prohibiting the respondents from taking any peaceable action aimed at removing the applicant in pursuance of the enjoyment of their statutory right under s. 8 of the Act, this Court would be acting outwit its powers, and such order would be offensive of the Act.

[8] For all the aforegoing ratiocination and conclusions, it is with firm confidence that I reject the applicant's application – though argued with great verve by the applicant's counsel. I hold that the applicant has failed to make out a case for the relief sought; whereupon I make the following order:

> The application is dismissed with costs; such costs to include costs of one instructing counsel and one instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Ms F E Schulz

Instructed by: PD Theron & Associates

COUNSEL ON BEHALF OF THE RESPONDENTS:

Adv. G S Hinda

Instructed by: Dr Weder, Kauta & Hoveka Inc.