REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: A 287/2011

In the matter between:

COUNCIL OF ITIRELENG VILLAGE COMMUNITY (COMPRISING THE MEMBERS LISTED PER ANNEXURE ABM3)	**APPLICANT**

and

FELIX MADI	**1ST RESPONDENT**
TSHABANG MAKGONE	**2ND RESPONDENT**
ANNA MOKALENG	**3RD RESPONDENT**
EUPHAROSINE MBUENDE	**4TH RESPONDENT**
BERHARD MOKALENG	**5TH RESPONDENT**
REINHARTH MORWE	**6TH RESPONDENT**
VICTUS EDWARD	**7TH RESPONDENT**
AUGUSTINUS MOKALENG	**8TH RESPONDENT**
GENEVEFA MOKALENG	**9TH RESPONDENT**
JASPER MADI	**10TH RESPONDENT**
MICHAEL KAPENG	**11TH RESPONDENT**
OSWALD TIBINYANE	**12TH RESPONDENT**
LAZARUS SEBETWANA	**13TH RESPONDENT**
ARNOLD MORWE	**14TH RESPONDENT**
ALEXIUS UDIGENG	**15TH RESPONDENT**
BERLINDIS UDIGENG	**16TH RESPONDENT**
RILEU KENE	**17TH RESPONDENT**

Neutral citation: *Council of Itireleng Village Community v Madi* (A 287/2011) [2013] NAHCMD 363 (29 November 2013)

Coram: PARKER AJ

Heard: **12 November 2013**

Delivered: **29 November 2013**

Flynote: Practice – Parties – Joinder – Necessary parties – Application by a traditional authority established by the Traditional Authorities Act 25 of 2000 – Applicant not citing all persons who are necessary parties to the proceeding – Court finding that non-joinder of all the members who were purportedly elected as council members of the applicant should have been cited as respondents as they are necessary parties – Court held that in the nature of the matter the non-joinder of those individual members is fatal – Consequently, court dismissed application with costs.

Summary: Practice – Parties – Joinder – Necessary parties – Applicant failed to cite five other persons as respondents who were elected members of the council of applicant – Applicant only served process on those persons – Court held that serving papers on persons who are not cited as parties in the proceeding is otiose – In that case there has been non-joinder of parties – In the nature of the matter which concerns interpretation and application of the Traditional Authorities Act 25 of 2000 the non-joinder of the necessary parties is fatal – Consequently the court dismissed the application with costs.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This is an application brought by the applicant on notice of motion for an order in terms set out in the notice of motion. The applicant seeks relief against some persons who were elected as members of the Itireleng Community Council at a meeting held on 4 July 2010. The minutes of the meeting are annexed to the answering affidavit and marked 'FM4'. In the answering affidavit the respondents drew the attention of the applicant to the fact that five new members of the Itireleng Village Council have not been cited. They are Bernhard Kaemo Langmann, Maria Seiphetlho Thekwane, Michael Kapeng, Hubertha Bontleeng Tibinyane and Cyprianus Matshabi Pogisho. But I see that Michael Kapeng is cited as the 11th respondent, and so he falls out of the non-joinder issue, bringing the number of the members not cited to four.

[2] The respondents have moved to reject the application, and they have also raised a preliminary point about non-joinder of certain persons as parties to the application. They are the four members. At the commencement of the hearing of the present application Mr Barnard, counsel for the respondents, urged the court to determine the preliminary point before going into the merits of the case. His reason for so urging is that a decision, upholding the point *in limine*, would on its own be dispositive of the application. I did not hear Mr Khama, counsel for the applicant, make a contrary argument.

[3] At the outset I should consider the so-called 'application' to condone the late filing of the applicant's legal practitioner's heads of argument and the respondents' opposition to it. The contents of the notice of motion and the notice of opposition are superlatively confusing as respects which party is applying for the condonation and which party is opposing it; so much so that I shall not waste my time considering the application and the opposition to it. Under normal circumstances, that is, if the application and the notice to oppose were not so ineptly and slovenly formulated as respects which party is which party, as aforesaid, I would have allowed the application and mulcted the erring party in costs. (See *Kurtz v Kurtz* (A 115/2012)

[2013] NAHCMD 178 (29 June 2013).) In sum, I do nothing about the so-called application to condone filed on 8 November 2013 and the notice of opposition to it; both of them are inelegant, and both parties have acted with careless abandon. I hasten to add that this conclusion does not in any way affect the following reasoning and conclusions on the instant application (the main application) filed on 11 November 2011 and the decision thereon.

[4] Mr Barnard's submission on the issue of non-joinder of parties is crisply this: In the nature of the instant matter there are some persons (ie the four members) who should be cited because they are necessary parties but they have not been cited. For counsel, this non-joinder is fatal to the applicant's case. Mr Barnard underlines the point that the applicant was aware, and accepted, that the four council members of the applicant should be cited as necessary parties to the application; and what is more, in its replying affidavit the applicant undertook to join those members but the applicant has done nothing of the sort. And so, Mr Barnard submitted, that should be the end of the application.

[5] What is the argument on the other side? Only this (as articulated by Mr Khama, counsel for the applicant); that those persons who should have been joined as parties have been served with process, and they should, Mr Khama submitted, have indicated they were interested in the matter. Thus, for Mr Khama service of process on those persons was enough. Mr Khama's argument does not appeal to me in the least. With the greatest deference to Mr Khama, the argument is simplistic and, indeed, fallacious.

[6] In *Namibia Grape Growers and Exporters v Minister of Mines & Energy* 2002 NR 328 at 332 G–H Manyarara AJ cited with approval the following passage by Milne J in *Khumalo v Wilkins and Another* 1972 (4) SA 470 (N) at 475A:

> 'In my view, once it is shown that a party "is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court" the Court will not deal with those issues without such joinder being effected, and no question of discretion nor of convenience arises.'

And in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 Damaseb JP stated at 447 E–G that –

> 'The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the ratio in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court has a direct and substantial interest in the matter and should be joined as a party.'

[7] In any event, this is not a case where there is a dispute between the applicant and respondents that a necessary party to the proceeding, who has not been cited, should or should not be joined, as was the case in, for example, *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay*. In the instant case the applicant admits – though not in so many words – that the persons who were not joined as parties have direct and substantial legal interest in any judgment or order in this proceeding and should, therefore, be joined, and it was going to join them. But they have not been joined, as I have found previously.

[8] I find that the applicant failed to cite as parties the four new council members Langman, Thekwane, Tibinyane and Pogisho.

[9] The determination of the preliminary point respecting non-joinder turns on extremely short and narrow compass; and it is this: Has the applicant joined the persons whose joining as parties is necessary, if those persons have been served with process? The essence of the question maybe fracturized practically into the following questions: (a) Can a person who has only been served with process in a cause or matter but is not cited as a party be said to have unquestioned *locus standi in judicio* in that cause or matter? (b) Can a judgment or an order in the cause or

matter be executed against the person who has been served with papers but has not been joined as a party? (c) As a related question to (b); can the court punish for contempt that person if that person disobeys the judgment or order? The answer to (a), (b) and (c) is an emphatic 'No'!

[10] Doubtless, what the applicant should have done was for the applicant to apply to join those persons as respondents, as the applicant itself said it was going to do. It was only after those persons have been joined as parties would it be expected of the applicant to serve papers on them, that is, after they have become parties to the suit. In my opinion service of papers on a non-existent party is otiose: it is labour lost. Indeed, the negative answers to questions (a), (b) and (c) clearly accounts for this conclusion. What is interesting and inexplicable is that the applicant does not tell the court why it failed to join those persons as parties which the applicant said it would do as the applicant itself realized that those persons were necessary parties, and thus, also admitting that, *a priori*, they would be prejudicially affected by the judgment or order of the court.

[11] For these reasons I uphold the respondents' point *in limine* about non-joinder. And I agree with the respondents that the non-joinder of the aforementioned persons as parties to the application is fatal. I, therefore, accept Mr Barnard's submission that that should be the end of the application. Accordingly, I hold that it is fair and reasonable to dismiss the present application, filed on 11 November 2013, with costs.

[12] As to costs; Mr Barnard submits that a costs order in the event of the application being dismissed with costs, as has happened, should be granted against the individual persons who are listed in annexure 'ABM3' to the founding affidavit and not 'the association'. The basis of Mr Barnard's argument is this. The costs order should be made against the individuals as listed in annexure "ABM3" to the founding affidavit because the application was unauthorized as those individual persons have no *locus standi*. That being the case these individuals should pay the costs jointly and severally. For counsel, if a costs order is not made against the individuals listed in annexure "ABM3" to the founding affidavit but made against the association, the

respondents and the association would in fact have defeated the application but be held liable for the costs of both the victory and the defeat. Counsel, accordingly submits that the costs of the defeat should be visited upon the individuals listed in annexure "ABM3". At first brush the argument appears to be attractive but, in my opinion, it is not cogent. This matter was subjected to judicial case management procedures in terms of the rules of court and at no stage was the point now raised by counsel raised and considered, namely, that the 'application was unauthorized as they have no *locus standi*'. In any event, in the founding affidavit the deponent of the affidavit states unambiguously that 'I am … equally authorized to bring this application on behalf of the applicant'. As I say, the authority to bring the application has never been challenged on the papers for the applicant to be given an opportunity to answer the challenge. It would be unfair and unreasonable, therefore, for the court to hold at this late hour that the application was unauthorized as they (ie the individual persons) have no *locus standi*, as Mr Barnard argues. Mr Barnard's submission on the point is, accordingly, rejected.

[13] For all the aforegoing, I make the following order:

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT: D Khama

Instructed by Government Attorney, Windhoek

RESPONDENTS: P C I Barnard

Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek