REPUBLIC OF NAMIBIA NOT-REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 44/2013

In the matter between:

ONDONGA TRADITIONAL AUTHORITY **APPLICANT**

And

OUKWANYAMA TRADITIONAL AUTHORITY **RESPONDENT**

Neutral citation: *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (A 44-2013) [2015] NAHCMD 170 (27 July 2015)

Coram: MILLER AJ
Heard: **18 November 2013**
Delivered: **27 July 2015**

Flynote: Practice – Parties – Joinder – Necessary parties – Application by a Traditional Authority established by the Traditional Authorities Act 25 of 2000 – Applicant

not citing all parties who are necessary parties to the proceeding – Court held that the non-joinder of those statutory bodies is fatal – Court struck the application with costs.

ORDER

The application is struck with costs.

JUDGMENT

MILLER AJ:

Background facts

[1] The Applicant in this matter seeks a declarator order to enforce an agreement that was signed by the applicant and the respondent's erstwhile chief. The parties to this application are both statutory bodies, ie Traditional Authorities, established in terms of the Traditional Authority Act 25 of 2000. Their objects include the promotion of peace and welfare amongst the community members, giving support to the communal land policies of the Government and its institutions as well as to supervise and ensure the observance of the customary law of that community by its members.

[2] The main dispute between the applicant and the respondent concerns the validity of the agreement entered into between the King of the applicant, King Immanuel

Kauluma Elifas and the respondent's erstwhile King the late Mwetupunga Shelungu. It is alleged that the applicant and the respondent, duly represented by authorized traditional leaders, entered into a written agreement on 14 March 2004 at Oshakati termed a 'BINDING AGREEMENT ENTERED INTO BY ONDONGA AND OUKWANYAMA TRADITIONAL AUTHORITIES CONCERNING THE BORDER DISPUTE BETWEEN THE TWO AUTHORITIES' in terms of which the parties agreed to regulate a border dispute between the two traditional authorities to the extent that geographical borders had been determined and each party had been allocated an area over which to exercise its jurisdiction. The agreement was concluded with the primary aim of resolving the ongoing dispute over communal border lines between the applicant and the respondent which was likely to cause instability within the communities.

[3] Applicant's version on the papers is that as a result of the threatening instability, the agreement was entered into on behalf of the communities by their authorized representatives after a careful discussion and negotiations and a consultative process. Both representatives voluntarily signed the agreement with the witnesses and no form of duress or intimidation was exerted on any of the signatories to the agreement. It is applicant's case that the respondent unlawfully repudiated its obligations under the said agreement in that in a letter dated 14 February 2008 and 3 November 2008, the respondent's Queen contest the validity of the agreement on the ground that it is invalid on the grounds that firstly, the representative on behalf of the respondent was critically ill an frail and was duped into signing the agreement. Accordingly, no prior negotiations or consultations were held with its subjects and as such, he had no authority to alienate land that belonged to the communities. A further bone of contention is that the areas over which the applicant exercises authority is inhabited by the respondent's subjects.

[4] It has become common cause between the parties that the respondent denies the validity and enforceability of the said agreement and it is on this basis that the applicant seeks an order for the agreement to be declared valid and enforceable by this court.

Preliminary points raised

Non-joinder

[5] As part of its opposition to the application, the respondent raises several points *in limine*. The first point *in limine* is that the applicant has failed to join all necessary parties with a direct and substantial interest in the outcome of the application. The point of non-joinder is premised on the ground that that the applicant is seeking an order to enforce the agreement which has the effect, if enforced, of transferring large tracks of communal land to the jurisdiction of the applicant. The respondent claims that the land in question falls within the areas defined as communal areas, and by virtue of section 17 of the Communal Land Reform Act 5 of 2002[1] the land in dispute is vested in the State. In support of this point the respondent further avers that, in terms of Article 100, read with Article 124 of the Namibian Constitution, the State is the owner of land otherwise lawfully owned. It is on this basis that the State has a direct and substantial interest in the outcome of the application, and accordingly, should have been joined to the application.

[1] Section 17 (1) of the Communal Land Reform Act, 5 of 2002 provide as follows: “Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.”

[6] Another necessary party that ought to have been joined is the Council of Traditional Leaders established in terms of the Traditional Leaders Act 13 of 1997 with the primary function of advising the President of the Republic of Namibia on the control and utilization of communal land. Thus, the said Council has an obvious direct and substantial interest in the application and its outcome and consequently, the Council should have been joined to the application. The respondent maintains the same basis for not joining the Communal Land Boards whose powers, duties and functions are to exercise statutory authority over communal land within the area for which each board is established in accordance of the Communal Land Reform Act. The relevant Communal Land Boards- in this instance, Communal Land Boards of the Oshikoto Region, Ohangwena Region, and of the Kavango Region - have all a direct and substantial interest in the outcome of this application. In respect to the Uukwangali Traditional Authority, the respondent asserts that the purported agreement sought to be enforced in terms of this application applies to large tracks of land which was donated to the Oukwanyama Traditional community by the Uukwangali Traditional Authority and due to this historical background, the Uukwangali Traditional Authority has a direct and substantial interest in the application and its outcome.

[7] The last leg of this point in *limine* is the non-joinder of the relevant residents and farmers within the area of dispute who are involved in various land-based activities, mainly livestock and crop farming. Their rights to residence and their farming activities will be affected by the enforcement of the purported agreement, and many of them are subjects of the respondent and their practices and observance of the Oukwanyama community's cultural practices, particularly those in relation to the land and land-based activities, would be drastically affected. Accordingly, the non-joinder of all these parties is fatal to the applicant's application and falls to be dismissed with costs.

[8] The applicant, in reply, states that the point in limine raised is spurious and bad in law since the agreement sought to be enforced only creates rights and obligations between the parties to the agreement. The applicant argues that the agreement has not created obligations on either party to transfer communal land, let alone large tracks of communal land. The applicant claims that, to the contrary, it is simply traditional jurisdiction over certain areas by the respective traditional authorities, not the transfer of any communal land of the areas. The applicant therefore submits that this contention is misplaced and unsustainable. The applicant further argues that Communal Land Boards are appointed to perform the functions conferred on a Board within an area for which each Board is established in accordance with subsection (2) of the Act, consequently the Communal Land Boards do not have a direct and substantial interest in the declaratory order sought.

[9] With regard to the interest of the several residents, the applicant argues that it does not understand who the faceless several residents are and what interest, if any, they may have in the relief sought by way of declarator. The applicant contends that the issue of non-joinder of the aforesaid parties, is without merit and should be dismissed with costs.

Pre-mature Application

[10] The respondent's second point raised in limine is the fact that the present application was launched prematurely in that the nature of the present dispute is one that should be referred to the Council of Traditional Leaders for investigation in terms of s 13 of the Council of Traditional Leaders Act and for the President of the Republic of Namibia to be advised on the further conduct of the dispute. Since the respondent has already requested that the matter be referred to the said Council, and is awaiting the

outcome of its request, the launching of this application pre-empts the President and the Council's constitutional and statutory powers in respect of the control and utilisation of communal land, and as such, this application should be stayed pending the outcome of that process. The applicant's stance is that bearing the type of relief sought, the Council does not have authority to issue a declarator. All in all, the applicant takes the stand that there is no bar in law that stops the parties from entering into agreements to regulate peaceful co-existence. Absent of such prohibition, therefore there is no basis in law for the respondent to contend that the agreement is invalid.

Issues that calls for determination by the court

[11] This application was subjected to judicial case management procedures in terms of the Rules of Court. As required by the Rules of Court, the parties filed their proposed pre-trial order filed on 17 September 2013 and invited the court to hear the points *in limine* together with the main application. The issues to be determined by this court are formulated as follows:

> '3.1 W*hether or not the Court should uphold the points in limine raised by the respondent in its answering affidavit.*
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> 3.2 *In the event that such points in limine are not upheld whether or not the agreement attached to the applicant's founding affidavit as annexure "A" is valid and enforceable.'*

[12] What manifests itself from the above is that the court is requested to determine the preliminary points before going into the merits of the application. It thus becomes incumbent on this court to firstly deal with the points *in limine* raised by the parties, because a decision upholding the points *in limine* would on its own be disposed the entire application.

The law on non-joinder

[13] It is trite law that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any judgment given in the action, it is essential that such person be joined either as an applicant or as a respondent. The objection of non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given notice of the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.[2] This test was applied in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*[3] where Damaseb JP at 447, para 32 said:

'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.'

[2]Daniels H. 2002.*Becks Theory and Principles of Pleading in Civil Actions*. Durban: LexisNexis, p 22.
[3] 2011 (2) NR 437.

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[14] The approach set out in *Amalgamated Engineering Union* and *Kleynhans* judgments, has been endorsed by this court in *Independence Catering (Pty) Ltd and Others v Minister of Defence and Others,*[4] where the court stated that:

'It is now our settled legal position that a direct and substantial interest is an interest in the right which is the subject matter by the litigant and not merely a pecuniary interest, . . . These courts have adopted a paradigm shift towards the strict application of this principle to an extent that where the need for joinder arises they will ensure that interested parties are afforded an opportunity to be heard. . . . '

[15] It is on the strength of these authorities above that it is incumbent upon any court to ensure that all persons, with the requisite interest in the subject matter of the dispute and whose rights may be affected, are before the Court since it is for all intents and purposes in line with the strict requirements of the rules of natural justice, the *audi alteram partem rule*. The substantial interest factor attracts a lot of judicial importance to an extent that the courts have assumed a right to raise it *mero motu* where justice so demands.[5] The usual procedure is that if a plea of non-joinder is successful, the court should stay the action until the necessary party has been joined and will make an appropriate order as to costs.

Does the State have a direct and substantial interest in the outcome of this application?

[16] The applicant seeks to validate the agreement which has the effect that territorial jurisdiction will be exercised by both the applicant and the respondent. It is not in dispute that the area in question is communal land which vests in the State in trust for

[4] 2014 (4) NR 1085 (HC) at 1093, para 24.

[5] Independence Catering (Pty) Ltd and Others v Minister of Defence and Others 2014 (4) NR 1085 (HC) at para (24) and (25).

the benefit of the traditional communities residing in those areas.[6] The president has the power to redefine any communal area affected by any change in declarations of communal areas in terms of s 16 of the Communal Land Reform Act. An order declaring that certain areas fall under the jurisdiction of another traditional authority might have been in conflict with the declarations made by the president. As the ultimate owner of all land, unless privately owned, the State has a direct and substantial interest in the outcome of this application. I therefore agree with the respondent that the State has a direct interest in the present matter. The line ministry is a necessary party to these proceedings and ought to have been joined.

Does the *Council of Traditional leaders have a direct and substantial interest in the outcome of this application?*

[17] In terms of s 3(f) of the Traditional Authorities Act 25 of 2000, the applicant as a Traditional Authority must advise the Council of Traditional Leaders in the performance of its functions as provided under Article 102(5) of the Namibian Constitution, the Council of Traditional Leaders Act 13 of 1997 or under any other law. Section 2 of the Council of Traditional Leaders Act 13 of 1997 vests the power in the Council to advice the President on the control and utilization of communal land and may for the purpose of performing its functions, and with the approval of the Minister, conduct an investigation regarding any matter pertaining to communal land.[7] The Council is further obliged to prepare a full report containing its recommendations in regard to any matter investigated by it and shall submit such report through the Minister to the President for consideration. How else would the council perform its functions if it is not privy to, firstly the agreement and the proceedings?

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[6] Article 100, read with Art 124 of the Namibian Constitution.
[7] Section 13 of the Council of Traditional Leaders Act.

[18] It is further evident that the dispute was supposed to be brought to the attention of the council for investigations and recommendations. This falls in favour of the respondent's second point in limine that the application was brought immaturely. It was therefore necessary to join the council for it has both constitutional and statutory obligations to fulfil with regard to communal land.

Does the *Communal Land Boards have a direct and substantial interest in the outcome of this application?*

[19] The respondent submits that the relevant boards that ought to be joined are the Kavango Communal Land Board; The Oshikoto Communal Land Board; The Ohangwena Communal Land Board. Section 20 of the Traditional Authorities Act 25 of 2000 states that the primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests firstly in the Chief of that traditional community; or where the Chief so determines, in the Traditional Authority of that traditional community. Section 24 of the same Act subjects such allocation or cancellation of a customary land right to the ratification by the relevant board that should then register the customary land rights and issue a certificate in terms of s 25 and s 27 of the Act. The effect of the agreement would then also be affected because no allocation of any customary land rights or cancellation thereof would be valid without the ratification of the relevant board over which it exercises jurisdiction. The Communal Land boards' functions would therefore be prejudicially affected by the judgment of this court.

Do the residents and the farmers in the area of dispute have a direct and substantial interest in the outcome of this application?

[20] It does not take a genius to understand and agree that the communal land rights holders, be it in the form of customary land rights or rights of leasehold as well as grazing rights will be affected by the outcome of this application. None of these persons are before court especially those that would have to fall under another traditional authority should the said agreement be enforced.

[21] As stated above, the duty to have all the necessary parties before court is enshrined in our constitution under the right to be heard and failure to observe such is fatal. It goes against one's right a fair hearing and most importantly access to justice. It will be an unjust should I hold the agreement to be valid without having an opportunity to hear all the necessary parties.

Order

[22] Based on the aforementioned reasons, I accordingly struck the application with costs.

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Miller, AJ

Acting

Appearance

Applicant	S Namandje
Of	Sisa Namandje & Partners, Windhoek.
Respondent	N Tjombe
Of	Tjombe-Elago Law Firm Inc, Windhoek.