

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Ruling on Exception

Case No: HC-MD-CIV-ACT-CON-2020/01666

In the matter between:

CASSIUS MUKENNAH

1ST PLAINTIFF

ANGELIKA THIRUDHI SAMATI

2ND PLAINTIFF

AND

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST DEFENDANT

HAMBUKUSHU TRADITIONAL AUTHORITY

2ND DEFENDANT

CHIEF/FUMU ERWIN MUNIKA MBAMBO

3RD DEFENDANT

Neutral citation: *Mukennah v Government of the Republic of Namibia* (HC-MD-CIV-ACT-OTH-2020/01666) [2020] NAHCMD 422 (4 September 2020)

CORAM: NDAUENDAPO

Heard: 12 August 2020

Delivered: 4 September 2020

Flynote: Civil procedure-Exception to particulars of claim- content of customary law not stated-No need to state content-Evidence can be led at trial-Particulars of claim not excipiable-Exception refused.

Summary: The plaintiffs issued an action demanding the removal of the chief of the Hambukushu community according to customary laws on the basis that he mismanages the affairs of the community. The content of customary laws have not been stated in the particulars of claim. The defendants raise an exception to the particulars of claim on the basis that the particulars do not disclose a cause of action. They also complain that the chief was not given a hearing when the decision to remove him was taken.

Held that there is no need to state the content of customary laws in the particulars of claim in this particular case.

Held further that evidence can be adduced at the trial to prove the content of customary law.

Held further that the exception is refused.

ORDER

1. The exception is dismissed.
 2. Costs shall be costs in the main action.
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JUDGMENT

NDAUENDAPO, J

Introduction

[1] Before me is an opposed exception to the particulars of claim of the plaintiff. The facts giving rise to the exception are as follows:

Background facts

[2] On 7 November 2018, the first and the second plaintiffs (“plaintiffs”), in their capacity as members of the second defendant’s community, pursuant to the second defendant community’s traditions, customary laws and practices (pleaded below) and section 8 (1) of the Act, established the Committee, to gage the second defendant’s community’s on the propriety of the removal of the third defendant as Chief of the second defendant’s community in terms of the latter’s customary law.

[3] The committee was established to enquire, by way of an election/referendum, whether the third defendant’s conduct of the second defendant’s affairs were contrary to the traditions, customs and practice (as set out below) of the second defendant’s community and broadly contrary to section 16 of the Act (as set out below), merited the third defendant’s removal as Chief of the second defendant.

[4] The plaintiff’s aforesaid election/referendum was conducted in view of the third defendant’s conduct (set out below) in relation to the affairs of the second defendant during the third defendant’s tenure as Chief of the second defendant (and particularly more recently):

ˆThe third defendant;

4.1 failed to promote peace and welfare amongst the members of the second defendant’s community in that;

4.1.1 the third defendant is dictatorial;

4.1.2 the third defendant abandoned the second defendant’s traditional, customary and cultural practices of consultation in relation to his management of

the affairs (e.g. appointment of head (women) men, the finances) of the second defendant.

4.2.3 the third defendant mismanages, does not manage the second defendant's resources (monies, contributions and land) for the benefit of the second defendant's community.

4.2 failed to develop the second defendant's customary laws by and through codification;

4.3 failed to administer and execute the customary law of the traditional community, more particularly in that;

4.3.1 the third defendant failed to establish a chief's Council as contemplated in terms of section 9 of the Act;

And

4.3.2 the third defendant failed to establish a Community Court as envisaged in terms of Section 3 and 4 of the Community Court's Act, Act 10 of 2003;

4.4 failed to uphold, promote, protect and preserve the culture, tradition and traditional values of that traditional community, for the reasons pleaded above.

4.5 failed to promote affirmative action amongst the members of the second defendant's community as contemplated in Article 23 of the Namibian Constitution, by promoting gender equality with regard to positions of leadership – all the second defendant's gazette Traditional Councilors are male.

4.6 failed to assist and cooperate with the Government, regional councils and local authority councils in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area, more particularly in that;

4.6.1 the third defendant on numerous occasions, has caused the alienation of land with the second defendant's area of jurisdiction and even land ("townland") not within the second defendant's area of jurisdiction.

4.6.2 the third defendant obstructs (by levying and soliciting payments) development within the second defendant's area of jurisdiction by amongst others obstructing and harassing tourist establishments.'

[5] It is trite and, an old age well established (in the year 1947 and the year 1990) traditional and customary practice of the second defendant's community (as further contemplated in terms of section 8(1) of the Act) that its Chief may be removed on one or more of the above basis consequent to a conduct of an election/referendum (which must return a majority vote), held amongst the second defendant's community within the second defendant's area of jurisdiction.

[6] Between 1 September 2018 and 8 November 2018, within the second defendant's area of jurisdiction (Mbukushu District), the first and the second plaintiff's ("Plaintiff"), in terms of the second defendant community's customary law (with the third defendant's knowledge and right to participate therein) presided over the conducted election/referendum by the committee, for the removal of the third defendant as the Chief of the second defendant.

[7] The outcome of the election/referendum conducted by the plaintiffs' committee, was to the effect that the overwhelming majority of the second defendant's community voted to remove the third defendant as the Chief of the second defendant.

[8] On 12 November 2018, the plaintiffs addressed a letter to the first defendant (the Minister of Urban the Rural Development), advising the latter of the election/referendum and the outcome thereof as well as the consequences thereof as contemplated in terms of section 8(4) of the Act.

[9] Despite the aforesaid, the first defendant has – despite numerous written demands and a lapse of a reasonable time – failed to cause the removal of the third defendant and the chief of the second defendant as provided by sections 8(3) and (4) of the Act in the following manner:

'10.1 the Minister of Urban and Rural Development (cited as a representative of the first defendant herein) has failed, alternatively, refuses to notify the President of the Republic of Namibia (cited as a representative of the first defendant herein) of the processes pleaded in paragraphs 10 and 11 hereof, for the latter's recognition (by way of proclamation in the Government Gazette) of the removals of the third defendant and Chief of the second defendant.'

Grounds of the intended Exception are as follows:

[10] '1. The plaintiff did not plead how the provisions as contemplated under section 8 of the Traditional Authorities Act, 25 of 2000 ("the act") were complied with. It is not clear how the Fact Finding and Dismissal Committee's (The committee) composition and decisions taken conform to the traditions and customs of the Hambukushu Traditional Community as defined under section 1 of the Act.

2. The plaintiffs did not demonstrate how the Committee as a constituted complied with the definition of a member under section 1 of the Act.

3. The committee does not demonstrate how the matrilineal lineage of the customary law of the Hambukushu Community in respect of the removal and succession of the 3rd defendant (hereinafter referred to as the Chief) was followed in that:-

3.1 there are no averments on who constituted the members of the Royal Family from the matrilineal lineage and the day the meeting was convened to endorse the removal and replacement of the Chief.

3.2 It does not show who gave them the mandate from the Royal House to remove the Chief and the nature of the customary law that was used to effect the decision.

3.3 No resolution is attached from the matrilineal part of the Royal Family that made such resolutions authorizing the committee to undertake the referendum to remove the Chief.

4. The plaintiffs do not disclose how the referendum complies with the customary laws of the Hambukushu Community in that:-

4.1 it does not constitute the majority of the Hambukushu Community inclusive of those members of the Traditional Community as defined under section 1 of the Act who do not reside within the confines and boundaries of the jurisdiction of Mukwe, Divundu which is the seat of the traditional authority and its community at large.

4.2 the referendum does not conform to Article 66 of the Constitution of the Republic of Namibia (The Constitution) as the Chief is not removed by way of a referendum under Hambukushu customs that are in accordance with the Constitution.

4.3 the chief is not elected and removed through universal suffrage as that does not arise under the customary law of the Hambukushu Community pre and post the Act.

5. The plaintiffs do not demonstrate how in terms of the customs of the Hambukushu Community the Article 18 rights as contained in the Constitution were complied with. The plaintiffs have not demonstrated the exercise of fair administrative justice permitting the chief to make representations prior to being informed of the decision of his removal. That is contrary to the Hambukushu customs which have the *audi alteram partem* as a foundation of the traditional authority before decisions are arrived at.

6. The first plaintiff does not demonstrate how he represents the Royal Family in its totality before arriving at those decisions to initiate the removal of the Chief through the Committee and how that Committee is a member of the Royal Family.

7. The plaintiffs do not show how the quorum was achieved by the committee and whether it followed fair administrative justice when conducting the referendum, which is the fulcrum of the Hambukushu customs.

8. The plaintiffs do not demonstrate how the various statutory breaches as pleaded as allegations in the particulars of claim amount to undisputed jurisdictional facts under Hambukushu customary law that necessitate the removal of the Chief'.

Submissions by the excipients/defendants

[11] Counsel argued that the attempt to oust the Hambukushu traditional authority chief by the Committee constitutes breach of section 8 of the Traditional authorities Act and the plaintiffs have not demonstrated how that impugned section has been complied with. Counsel further argues that the right to a fair hearing and administrative justice as enshrined in the Namibian Constitution have not been complied with. Counsel further argues that none of the aspects have been pleaded pertaining to how the plaintiffs arrived at the decision under section 8 of the Act.

[12] Those are the basic tenets of what constitutes the customary law that was used in the particulars of claim to enable the defendants to plead. There is no reference to the customary law and its tenets and how it complies with the Constitution. Counsel further submits that the main difficulty the plaintiffs face is the proof of customary law in question. If plaintiffs have not properly set out the customary law relied upon, then on what basis can the plaintiffs even prove same at the hearing.

Submissions by respondents

[13] Counsel argued that the particulars of claim do not lack averments necessary to sustain a cause of action. Counsel further argued that the particulars of claim disclosed a cause of action upon which evidence is capable of being led.

Discussion

[14] The main complaint of the defendants is that 'the main difficulty the plaintiffs face in this matter is the proof of the customary law in question'. The defendants allege that the customary law of the Hambukshu traditional community under which the plaintiffs want the chief to be removed has not been pleaded. Put differently, they say plaintiffs did not plead how the provisions as contemplated under section 8 of the Traditional Authorities Act, 25 of 2000 (the Act) were complied with. Section 8 provides that a chief can only be removed according to that traditional community's customary laws by members of that traditional community and for a valid reason.

[15] They argue that the plaintiffs have not demonstrated how that impugned provision has been complied with. I disagree. The plaintiffs who are members of the Hambukushu traditional community state that a committee was established to gauge the feelings of the members of the communities on how the chief conducts the affairs of the community and then the majority expressed an opinion and based on that and according to their customs and practices came to the conclusion that the chief must be removed. 'The material facts which are necessary for the plaintiff to prove, if traversed, in order to support his right to judgment are there'.

[16] What constitutes Hambukushu customary law can be proven by leading evidence at the trial. In *Van Straten N.O v NAMFISA*¹ the Supreme Court held that:

'Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the pleadings are taken as correct. In the second place it is incumbent upon excipient to persuade this court that upon every interpretation which the pleadings can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable. '

In *Oryx Development group v GRN*² the court held that:

¹ 2016 (3) NR 747 (SC), Paragraph 18.

² A1635/2011 NAHCMD 129 on 20 May 2013 per Ueitele, J.

'The first principle in dealing with an exception is whether evidence can be led which can disclose a cause of action alleged in the pleading. If the answer is in the affirmative then it is not expiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'(my emphasis)

[17] In this case, the plaintiffs can clearly lead evidence on what constitute customary law and customs of the Hambukushu community. In *Tjingaete v Lackay NO*³ Smuts J (as he was then) said:

'That the applicant who claims to have acted in terms of an aspect of customary law must prove what that customary law in question is. This should include the content of the customary law, its observance and its effects. Accordingly, a way in which that can be done is to tender the relevant evidence on the customary law and customs in question'.

[18] From the above mentioned authorities, it is clear that you don't need to plead the content of customary law and practices that can be done by tendering evidence at the trial. For all those reasons the exception is refused.

G N NDAUENDAPO
JUDGE

³ A34/2014 delivered on 11 June 2014.

APPEARANCES

FOR THE PLAINTIFFS

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FOR THE DEFENDANTS

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