REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2016/03267

In the matter between:

ANABEB CONSERVANCY COMMITTEE	**PLAINTIFF**

and

UAPAHA MUHARUKUA	**1ST DEFENDANT**
TJAKAMUONGENJA NGOMBE	**2ND DEFENDANT**
KOKUVI TJARAMBI	**3RD DEFENDANT**
UKAKANDA NGOMBE	**4TH DEFENDANT**
UNJENGISA MBINGE	**5TH DEFENDANT**
KATUZUU KAPIKA	**6TH DEFENDANT**
KAKEKE MBINGE	**7TH DEFENDANT**
UVARURAIRU TJAMBIRU	**8TH DEFENDANT**
TJISIUI TJIVINDA	**9TH DEFENDANT**
MUNIONGANDA NGOMBE	**10TH DEFENDANT**
MUTAAMBANDA KAPIKA	**11TH DEFENDANT**
UESEIKA HARIRE	**12TH DEFENDANT**
TUNGAPI MBIMBA	**13TH DEFENDANT**
MEEZEKAMBA TJINGEE	**14TH DEFENDANT**
VIRIMAUVI TJAMBIRU	**15TH DEFENDANT**
KATOMBERA TJIRAMBI	**16TH DEFENDANT**

JAAPO TJIUMBUA	**17TH DEFENDANT**
KATIRA NGORERA	**18TH DEFENDANT**
TJOKEINGA (SURNAME UNKNOWN)	**19TH DEFENDANT**
TJIMAKA TJAVARA	**20TH DEFENDANT**
BOESMAN KAVARI	**21ST DEFENDANT**
UVARURA TJAMBIRU	**22ND DEFENDANT**
UEZEHINGA KAPIMBUA	**23RD DEFENDANT**
UORUJEZU (SURNAME UNKNOWN)	**24TH DEFENDANT**
KAVITOPI TJIHANGE	**25TH DEFENDANT**
KARAMBI TJAVARA	**26TH DEFENDANT**
KERAMBU TJIUMBUA	**27TH DEFENDANT**
UATOORUA HAPUKA	**28TH DEFENDANT**
KAHINI HARIRE	**29TH DEFENDANT**
HINIMUE (SURNAME UNKNOWN)	**30TH DEFENDANT**
KATUNAMUTI (SURNAME UNKNOWN)	**31ST DEFENDANT**
MUHARUKUA (ALSO KNOWN AS "PASTOR") (SURNAME UNKNOWN)	**32ND DEFENDANT**
MAKAHUPAPI (SURNAME UNKNOWN)	**33RD DEFENDANT**
UTUIKE (SURNAME UNKNOWN)	**34TH DEFENDANT**
VEONGEKA (SURNAME UNKNOWN)	**35TH DEFENDANT**
KARIKITA (SURNAME UNKNOWN)	**36TH DEFENDANT**
UAUMBUYE (SURNAME UNKNOWN)	**37TH DEFENDANT**
KAUZEMINE (SURNAME UNKNOWN)	**38TH DEFENDANT**
COMMUNAL LAND BOARD FOR THE KUNENE REGION	**39TH DEFENDANT**
VITA TRADITIONAL AUTHORITY	**40TH DEFENDANT**

Neutral Citation: *Anabeb Conservancy Committee v Muharukua & 39 Others* (HC-MD-CIV-ACT-OTH-2016/03267) [2021] NAHCMD 24 (01 February 2022)

Coram:	**Ueitele J**
Heard:	**16-20, 22 - 24 November 2020, 11 February & 19 March 2021**
Order released:	**07 December 2021**
Reasons released:	**01 February 2022**

Flynote: *Practice* – Absolution from the instance at close of plaintiff's case-Court applying well known – Whether reasonable Court satisfied that plaintiff's establishing prima facie case.

Voluntary association - Power to sue and be sued - Right of unincorporated body to sue or be sued in own name depending upon nature and purpose of body, as well as constitution - Association can sue in own name if proved that it possesses characteristics of legal *persona* or *universitas* - To be *universitas* association to have perpetual succession and capacity to acquire rights apart from members.

Communal Land Reform Act, 2002 - Any allocation of a customary land right made by a Chief or a Traditional Authority under s 22 has no legal effect unless the allocation is ratified by the relevant communal land board in accordance with s 22.

Summary: The plaintiff, alleging that the defendants, in violation of s 29(1)(a)(ii) of the Communal Land Reform Act, 2002, are residing in and grazing their livestock on the commonages of the communal area zoned as areas exclusively for core wildlife and tourism (a Communal Conservancy) and that the defendants, without the written permission or authorisation of the Vita Traditional Authority, and in violation of ss 29(4)(a) and (c) of the Communal Land Reform Act, 2002, erected, and are occupying structures on the commonage and took up abode and occupy portions of the commonage of the communal area, instituted action against the defendants for the defendant's to be evicted from those areas..

The defendants entered notice to defendant the plaintiff's action and pleaded that some of them have been residing at their villages (in the commonage) before the promulgation of the Communal Land Reform Act, 2002 and therefore their rights vested before the establishment of the Anabeb Conservancy and thus disputed the plaintiff's right to eject them from the areas in dispute.

At trial of this matter, the defendants at the close of the plaintiff's case applied to be absolved from the instance.

Held that the evidence led on behalf of the plaintiff is of such a nature that it is evidence which a Court a court reasonably applying its mind might find that the defendants settled in the disputed areas without complying with the requirements of

the Communal Land Reform Act, 2002.

Held further that a communal conservancy is a group of persons who reside in a defined area on communal land and who have constituted themselves into a management body with the aim and purpose of managing the sustainable use of wildlife and other natural resources of the area they inhabit and developing the residents of the area they inhabit and who have applied to the Minister responsible for the Environment to be declared a conservancy and who have been so declared.

Held further that the Anabeb Conservancy Committee possess the characteristics of a corporation or a *universitas* and has therefore proven that it has the power to bring this application to court and sue in its own name.

Held further that the defendants were not merely content with a mere denial that their occupation of the disputed areas was unlawful; they set up a special defence that their occupation of the disputed areas was sanctioned by the Otjikaoko Traditional Authority.

Held furthermore that the defendants failed to rebut the allegations made by the plaintiff and I am satisfied that the defendants' occupation of the disputed areas is unlawful. I am furthermore satisfied that plaintiff has demonstrated that it has a direct and substantial interest in the outcome of the legal proceedings in this matter, thus entitling it to the relief it seeks.

ORDER

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1. The first to thirty - eight defendants must vacate the commonage at the areas known as the Quarantine Camp, Okaturua, Omauwa, Otjomenje, Otjorute, Otjizeka, Ombaikiha, Otjondunda, Okaruikovita, Warmquelle, Omisema, Otjondunda, Ongonga, Okandjou, Okomimunu, Okairanda, Okaturua and Okondjou in the communal area in the Kunene Region, Namibia.

2. The first, fourth, sixth, seventh, eight, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, twentieth, twenty-first, twenty-third, twenty-

fourth, twenty-sixth, twenty-seventh, twenty-eight, twenty-ninth, thirty-first, thirty-second, thirty-third and thirty fourth defendants must jointly and severally the one paying the other to be absolved pay the plaintiff's costs of suit.

3. The matter is finalised and is removed from the roll.

JUDGMENT

UEITELE J

Introduction

[1] In the main, this matter asks a simple but important question, namely whether a Conservancy Committee, established under s 24A of the Nature Conservation Ordinance, 1975[1] (I will in this judgement refer to the Nature Conservation Ordinance, 1975 as the "Ordinance") as amended, may seek an order to evict persons who, without the consent of the relevant Traditional Authority and Conservancy Committee, occupy and erect structures within an area situated within the geographical area, of communal land which has been declared a conservancy.

[2] The plaintiff in this matter is a Committee of a body known as the Anabeb Communal Conservancy, a voluntary association registered as a conservancy in terms of s 24A of the Nature Conservation Ordinance, 1975, read with Regulation 155B of the Regulations of the Nature Conservation Ordinance, 1975 which is situated in the communal area of the Kunene Region. I will later in this judgement briefly deal with the origin and purpose of communal conservancies in Namibia.

[3] There are 40 defendants cited in this matter the 1st to the 38th defendants are all natural persons who are adult communal farmers. During the trial, it became apparent that the person, Uvarura Tjambiru who is cited as the 8th defendant and also as the 22nd defendant is one and the same person. There are accordingly only 37 natural persons cited as defendants.

[4] The 39th and 40th defendants are the Communal Land Board for the Kunene

1 Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975).

Region and the Vita Traditional Authority respectively and they were cited for purposes of any interest they may have in this matter only, and no relief is sought against them. The Communal Land Board for the Kunene Region and the Vita Traditional Authority did not participate in these proceedings and any reference to defendants thus excludes them.

[5] The plaintiff alleging that, the 37 natural persons who are cited as defendants, in violation of s 29(1)(a)(ii) of the Communal Land Reform Act, 2002 and thus acting unlawfully, reside in, graze their livestock and have erected structures and taken up occupation in the commonage of the communal area zoned as areas exclusively for core wildlife and tourism, on 05 October 2016 caused summons to be issued out of this Court in terms of which it sought an order ejecting the 1st to 38th defendants from the commonages at the areas known as the Quarantine Camp, Okaturua, Omauwa, Otjomenje, Otjorute, Otjizeka, Ombaikiha, Otjondunda, Okaruikovita, Warmquelle, Omisema, Otjondunda, Ongongo, Okandjou, Okomimunu, Okairanda, Okaturua and Okandjou which are all within the communal area in the Kunene Region.

[6] The defendants entered notice to defend the action instituted against them by the plaintiff. Most, if not all the defendants, admit that they are currently residing in the areas described as the commonage, except for the 2nd, 3rd, 5th, 10th, 11th, 19th, 28th, 34th, and 35th defendants who all either pleaded that they live somewhere else and not in the commonage or that they have vacated the commonage areas mentioned in paragraph [5].

[7] I am of the view that in order to appreciate the dispute in this matter, one must have an understanding of what a communal conservancy is, the origin and purposes of communal conservancies in Namibia. I will accordingly, before I deal with the pleadings of the parties, digress and briefly deal with the concept of communal conservancies in Namibia and how they came into being.

Conservancies

[8] At independence in 1990, the Government of the Republic of Namibia inherited two agricultural sub sectors comprising of communal and commercial land, which divided Namibia in terms of land utilization. Of the 82.4 million hectares of the surface area in Namibia, approximately 38% of the land surface is described as

communal land. Much of the remaining land surface is allocated for freehold farm land (44%), national parks (17%) and declared urban areas (1%).[2] Approximately 52% of Namibia's population lived in communal areas at independence (that is as at 21 March 1990). This is just over half the total population; whilst approximately 900 000 (or 42% of the people) lived in urban areas and approximately 132 000 (or 6% of the people) lived on freehold farms.[3]

[9] The skewed land development which was pursued by the then South African administration manifested itself in all aspects of life and the utilisation and exploitation of Namibia's natural resources. The then South African Administration had granted commercial farmers some rights to utilise Namibia's natural resources such as its wildlife/game, flora and fauna, but these rights did not extend to persons living in communal areas. Residents on communal land who hunted wildlife/game were regarded as poachers and were liable to criminal punishment.

[10] In addition to the skewed development patterns pursued by the then South African administration, during the period over which the war for liberation of Namibia was waged, many animals were hunted almost to extinction, and communal farmers were often in conflict with wild animals such as hippos and elephants which damaged their crops, and therefore adversely affected their livelihoods.

[11] At independence, the system under which commercial land was regulated was well organized. In the commercial field, land is properly surveyed and is held under title deeds kept in the central deeds registry for commercial land in Windhoek and in a separate deeds registry for property in respect of the *Rehoboth Gebiet*. When a farm or an erf is sold or leased, the transaction is recorded on the title deed of the particular piece of land. Holders of title deeds are free to sell or lease their land subject to the conditions of the title deed. The situation with regards to communal land was much less clear. The uncertainties stemmed from the fact that the extent and role that traditional authorities played over the allocation and utilization of land over communal lands lacked a legal basis.

[12] Apart from the challenges that the Namibian Government faced with respect to the inequitable distribution of land, it also faced the tasks of improving the

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2 Namibia Statistics Agency. (2018) *Namibia Land Statistics Booklet*. September 2018. p. 15.

3 *Ibid*

management of wildlife resources, which as I have indicated above, were severely decimated due to poor management and the armed conflict that raged in Namibia.

[13] Article 98 (1) of the Namibian Constitution provides that the economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. In order to give meaning to Article 98(1) of the Namibian Constitution with respect to its natural resources, the Government of Namibia in 1996 introduced legislation[4] to allow for the formation of Communal Conservancies 'so as to provide for an economically based system of sustainable management and utilization of game in communal areas'.[5]

[14] Section 24A of the Ordinance[6] provides that any group of persons residing on

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4 The Nature Conservation Amendment Act, 1996 (Act NO. 5 of 1996).

5 See the long title of the Nature Conservation Amendment Act, 1996

6 Section 24A of the Ordinance reads as follows:

"24A. (1) Any group of persons residing on communal land and which desires to have the area which they inhabit, or any part thereof, to be declared a conservancy, shall apply therefor to the Minister in the prescribed manner, and such application shall be accompanied by –

(a) a list of the names of the persons who are members of a committee established for the purpose of being recognised by the Minister under subsection (2)(ii) as the conservancy committee for the conservancy applied for;

(b) the constitution of such committee;

(c) a statement setting out the boundaries of the geographic area in respect of which the application is made; and

(d) such other documents or information as the Minister may require.

(2) If the Minister is satisfied in respect of an application made in terms of subsection (1) that –

(a) the relevant committee is representative of the community residing in the area to which the application relates;

(b) the constitution of such committee provides for the sustainable management and utilization of game in such area;

(c) such committee has the ability to manage funds and has an appropriate method for the equitable distribution, to members of the community, of benefits derived from the consumptive and non-consumptive use of game in such area;

(d) the geographic area to which the application relates has been sufficiently identified, taking into account also the views of the Regional Council of that area

(e) the area concerned is not subject to any lease or is not a proclaimed game park or nature reserve; and

communal land and which desires to have the area which they inhabit, or any part of the area they inhabit, to be declared a conservancy, may apply to the Minister in the prescribed manner, to declare the area a conservancy. The section furthermore provides that the application must be accompanied by:

(a) a list of the names of the persons who are members of a committee established for the purpose of being recognised by the Minister under subsection (2)(ii) as the conservancy committee for the conservancy applied for;

(b) the constitution of such committee;

(c) a statement setting out the boundaries of the geographic area in respect of which the application is made; and

(d) such other documents or information as the Minister may require.

[15] In addition, the Ministry of Environment and Tourism requires a verifiable list of community members and a Constitution outlining governance rules agreed to by the community. The governance rules must include a benefit distribution plan, game management plan and rules regarding community meetings, committee elections and financial management.

[16] In the Namibian context, a communal conservancy is thus a group of persons who reside in a defined area on communal land and who have constituted themselves into a management body with the aim and purpose of managing the sustainable use of wildlife and other natural resources of the area they inhabit and developing the residents of the area they inhabit and who have applied to the Minister responsible for the Environment to be declared a conservancy and who have been so declared.

(f) any other prescribed requirements have been complied with, the Minister shall –

(i) in writing to the committee in question and on such conditions as he or she may determine in addition to any prescribed condition or restriction, recognize that committee as the conservancy committee for the conservancy concerned; and

(ii) by notice in the *Gazette* declare the area to which the application relates as a conservancy, and such notice shall set out the geographic boundaries of the area in respect of which the conservancy is being declared.'

[17] Although conservancies are recognised by the Ministry of Environment, Forestry and Tourism, they are not governed by that Ministry, which, however, does have the power to deregister a conservancy if it fails to comply with conservation regulations.[7]

[18] As I indicated earlier, communal conservancies are obliged to have game management plans, to conduct annual general meetings, and to prepare financial reports. They are managed under committees elected by their members. The two main income streams for communal conservancies are photographic and hunting tourism. Sales of indigenous plant products and handicrafts also provide some income for harvesters and crafts producers working in conservancies. Conservancies ordinarily sign joint-venture agreements with private lodges or hunting operators or both private lodges and hunting operators after negotiations regarding revenue sharing, employment creation and other details.[8]

[19] Hunting on conservancy land is governed by quotas, set by the Ministry of Environment, Forestry and Tourism, on the basis of annual game counts carried out by the Ministry and conservancies, with assistance from NACSO.[9] Natural Resource Management Working Group hunting falls into two areas: trophy hunting, which brings income to pay for game guards and anti-poaching activities, and meat harvesting, which provides a valuable dietary supplement.[10]

[20] Having briefly outlined what communal conservancies in Namibia are, how they came into being and how they operate, I now return and briefly look at the parties' pleadings.

The pleadings.

The plaintiff's particulars of claim

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7 Ministry of Environment, Forestry and Tourism; *Conservancies in Namibia.*

8 *Ibid,.*

9 The abbreviation NACSO means Namibian Association of Community Based Natural Resource Management Support Organisations.

10 Ministry of Environment, Forestry and Tourism; *Conservancies in Namibia*

[21] As I indicated earlier on in this judgment, the plaintiff caused summons to be issued during October 2016. In the particulars of claim, the plaintiff alleges that:

(a) the areas known as the Quarantine Camp, Okaturua, Omauwa, Otjomenje, Otjorute, Otjizeka, Ombaikiha, Otjondunda, Okaruikovita, Warmquelle, Omisema, Otjondunda, Ongongo, Okandjou, Okomimunu, Okairanda, Okaturua and Okandjou are commonages situated in the communal land and is a communal area inhabited by the traditional community resident in the communal area of Kaokoland in the Kunene Region of Namibia (I will, in this judgement, refer to these villages as the areas in dispute);

(b) the Anabeb Conservancy Committee was formed and registered under the Ordinance with the consent of the Vita Traditional Authority and that it manages the wildlife and other natural resources in and on parts of the communal areas that I have mentioned in sub-paragraph (a) of this paragraph;

(c) with the consent and acquiesce of the Kunene Communal Land Board and the Vita Traditional Community, Anabeb Conservancy Committee, as contemplated in s 29(1)(a)(ii) of the Communal Land Reform Act, 2002, zoned sections of the commonage of the communal area into areas over which it has rights of the utilisation and management of the wildlife and other natural resources;

(d) the defendants, in violation of s 29(1)(a)(ii) of the Communal Land Reform Act, 2002, are residing in and grazing their livestock on the commonages of the communal area zoned as areas exclusively for core wildlife and tourism;

(e) the defendants, without the written permission or authorisation of the Vita Traditional Authority, and in violation of ss 29(4)(a) and (c) of the Communal Land Reform Act, 2002, erected, and are occupying structures on the commonage and took up abode and occupy portions of the commonage of the communal area.

The defendants' pleas.

[22] The defendants pleaded to the plaintiffs particulars of claim. The second and third defendants denied that they reside at Quarantine Camp and Okaturua

respectively. They pleaded that they vacated those areas (that is Quarantine Camp and Okaturua) during the year 2013. The fifth defendant denied that he resides at Otjomenje and pleaded that he resides with authority at the Omauwa area in the Anabeb Conservancy.

[23] The tenth and the eleventh defendants deny that they are residing at Otjondunda. They pleaded that they vacated the Anabeb Conservancy area in the year 2014. The nineteenth defendant also denied that he resides at Otjondunda and pleaded that he vacated the Anabeb Conversancy area during the year 2008. So does the twenty-ninth defendant deny that he resides at Ongongo and pleads that he resides at Otjiwarongo, Anabeb Conservancy.

[24] The thirty-fourth defendant denies that he resides at Ongongo and pleads that he resides at Mongongo. The thirty-fifth defendant denies that he resides at Otjomenje, Anabeb Conservancy and pleaded that he vacated the Anabeb Conservancy during the year 2015.

[25] The defendants furthermore pleaded that the Vita Traditional Authority does not have exclusive jurisdiction over the communal areas which are in dispute in this matter. They pleaded that the Vita Traditional Authority enjoys concurrent jurisdiction with Otjikaoko Traditional Authority.

[26] The defendants accordingly plead that some of them have been residing at their villages (in the commonage) before the promulgation of the Communal Land Reform Act, 2002 and therefore their rights vested before the establishment of the Anabeb Conservancy and thus dispute the plaintiff's right to eject them from the areas in dispute.

[27] In the pre-trial report dated 29 May 2019, the parties agreed that it needs to be established at the trial whether the defendants must vacate the areas in dispute or live somewhere else. The parties furthermore agreed that some of the issues that the Court has to resolve include the questions of:

(a) whether or not the plaintiff has instituted this action with ulterior motives and dirty hands;

(b) whether or not the Plaintiff refuses or neglects to assist the defendants to become members of the Anabeb Conservancy;

(c) whether or not the Plaintiff is acting in contravention of article 6(1) of the Anabeb Conservancy Constitution and article 10(2) of the Namibian Constitution;

(d) whether or not the Plaintiff is in law, entitled to eject the defendants.

The evidence led at the trial.

The evidence on behalf of the plaintiff.

[28] At the trial, the plaintiff called four witnesses, namely Kenatjipo Uatokuja, Engiso Musaso, Raimo Muniongumbi, and Mbaandeka Kangombe to testify on its behalf whilst only six of the thirty-seven defendants testified. All the four persons who testified on behalf of the plaintiff testified that they are founding members of the plaintiff, are communal farmers who reside in the areas in dispute and are community leaders.

[29] Kenatjipo Uatokuja, Engiso Musaso, Raimo Muniongumbi, and Mbaandeka Kangombe (the witnesses) all testified that the plaintiff was formed and registered as a conservancy with the consent of the Vita Traditional Authority and manages the wildlife and other natural resources in parts of the communal areas, mentioned in paragraph [5] of this judgement, which commonages fall under the jurisdiction of the Vita Traditional Authority and supervised by the Kunene Communal Land Board.

[30] The witnesses further testified that the areas in dispute are all situated within the communal land area of Kaokoland in the Kunene Region and fall within the ambit of s 15(1) of the Communal Land Reform Act, 2002 and that the defendants are not lawful residents of the areas in question. The witnesses testified as to the periods over which the defendants arrived in the disputed areas. Raimo Muniongumbi testified that:

(a) The first defendant, *Uapaha Muharukua* without authority from the Vita Traditional Authority during the year 2007, entered the disputed areas, settled and resided at or near the Quarantine Camp area;

(b) The fourth defendant, *Ukakanda Ngombe,* without authority from the Vita Traditional Authority during the year 2010, entered the disputed areas, settled and resided at or near Omauwa area;

(c) The fifth defendant, *Unjengisa Mbinge,* without authority from the Vita Traditional Authority during the year 2008, entered the disputed areas, settled and resided at or near Otjomenje area. Muniongumbi furthermore testified that in his plea, Unjengisa Mbinge pleaded that he resides in the Omauwa area, which is in fact the same place. Muniongumbi furthermore testified that after the summons were served on the fifth defendant, the fifth defendant during the year 2017 move to a village known as the Orotjitombo village;

(d) The sixth defendant, *Katuzuu Kapika,* without authority from the Vita Traditional Authority during the year 2008, entered the disputed areas, settled and resided at or near Otjorute area; Muniongumbi further testified that he knows that during the year 2017 the sixth defendant moved to a village known as Kekoto Village;

(e) The seventh defendant, *Kakeke Mbinge,* without authority from the Vita Traditional Authority during the year 2013, entered the disputed areas, settled and resided at or near Otjomenje area where he is still residing area;

(f) The eight defendant, *Uvarura Tjambiru,* without authority from the Vita Traditional Authority during the year 2013, entered the disputed areas, settled and resided at or near Otjizeka and Warmquelle areas he erected structures in both the commonages of these areas.

(g) The ninth defendant, *Tjisiui Tjivanda,* without authority from the Vita Traditional Authority during the year 2010, entered the disputed areas, settled and resided at or near Otjorute area; Muniongumbi further testified that he knows that during the year 2017, the sixth defendant moved to a village near Etanga;

(h) The tenth defendant, *Munionganda Ngombe*, without authority from the Vita Traditional Authority during the year 2008, entered the disputed areas, settled and resided at or near Otjondunda area, Muniongumbi further testified that he knows that during the year 2017 the tenth defendant moved to a village known as

Otjisoko Tjamuhanguze village near Epupa Falls;

(i) The eleventh defendant, *Mutaambanda Kapika,* without authority from the Vita Traditional Authority during the year 2009, entered the disputed areas, settled and resided at or near Otjondunda area, Muniongumbi further testified that he knows that during the year 2017 the tenth defendant moved to a village near Epupa Falls;

(j) The twelfth defendant, *Uezeika Harire,* without authority from the Vita Traditional Authority during the year 2008, entered the disputed areas, settled and resided at or near Otjondunda area;

(k) The thirteenth defendant, *Tungapi Mbimba,,* without authority from the Vita Traditional Authority during the year 2008, entered the disputed areas, settled and resided at or near Okarui Kovita village;

(l) The fourteenth defendant, *Meezekamba Tjingee,* without authority from the Vita Traditional Authority during the year 2015, entered the disputed areas, settled and resided at or near Warmquelle area;

(m) The fifteenth defendant *Virimauvi Tjambiru* without authority from the Vita Traditional Authority during the year 2015, entered the disputed areas, settled and resided at or near Omisema area;

(n) The sixteenth defendant *Katombera Tjirambi,* passed away during the year 2018;

(o) The seventeenth defendant *Jaapo Tjiumbua* without authority from the Vita Traditional Authority, during the year 2015, entered the disputed areas, settled and resided at or near Omisema and Otjondunda area;

(p) The eighteenth defendant *Katira Ngorera* without authority from the Vita Traditional Authority, during the year 2009, entered the disputed areas, settled and resided at or near Otjondunda area;

(q) The nineteenth defendant *Tjokeinga,* without authority from the Vita Traditional Authority, during the year 2010, entered the disputed areas, settled and resided at or near Otjondunda area, but moved out of the area during the year

2017;

(r) The twentieth defendant, *Tjimaka Tjavara,* without authority from the Vita Traditional Authority during the year 2012, entered the disputed areas, settled and resided at or near Otjondunda area;

(s) The twenty first defendant, *Boesman Kavari,* without authority from the Vita Traditional Authority during the year 2006, entered the disputed areas, settled and resided at or near Otjondunda area;

(t) The twenty third defendant, *Uezehinga Kapimbua* without authority from the Vita Traditional Authority during the year 2006, entered the disputed areas, settled and resided at or near Warmquelle area;

(u) The twenty fourth defendant, *Uorujezu Rutjindo,* without authority from the Vita Traditional Authority during the year 2014, entered the disputed areas, settled and resided at or near Ongongo area. Muniongumbi further testified that the twenty fourth defendant in his plea pleaded that he resides at Mongongo, which is the same as Ongongo,

(v) The twenty fifth defendant, *Kavitopi Tjihange,* without authority from the Vita Traditional Authority during the year 2016, entered the disputed areas, settled and resided at or near Warmquelle area but has during the year 2017 moved out to an area near Opuwo;

(w) The twenty sixth defendant, *Karambi Tjavara,* without authority from the Vita Traditional Authority during the year 2016, entered the disputed areas, settled and resided at or near Otjondunda area;

(x) The twenty seventh defendant, *Kerambu Tjiumbua,* without authority from the Vita Traditional Authority during the year 2014, entered the disputed areas, settled and resided at or near Quarantine Camp area;

(y) The twenty eighth defendant, *Uatoruaa Hapuka,* without authority from the Vita Traditional Authority during the year 2006, entered the disputed areas, settled and resided at or near Ongongo area;

(z) The twenty ninth defendant, *Kahini Harire,* without authority from the Vita Traditional Authority during the year 2009, entered the disputed areas, settled and resided at or near Otjondunda area;

(aa) The thirty first defendant, *Katunamuti Kapimbua,* without authority from the Vita Traditional Authority during the year 2006, entered the disputed areas, settled and resided at or near Okairanda area;

(bb) The thirty second defendant, *Muharukua Riseuapo (*also known as *Pastor),* without authority from the Vita Traditional Authority during the year 2014, entered the disputed areas, settled and resided at or near Warmquelle area;

(cc) The thirty third defendant, *Makahupapi Tjiumbua,* without authority from the Vita Traditional Authority during the year 2006, entered the disputed areas, settled and resided at or near Okomimunu area;

(dd) The thirty fourth defendant, *Utuike,* without authority from the Vita Traditional Authority during the year 2014, entered the disputed areas, settled and resided at or near Ongongo area;

(ee) The thirty fifth defendant, *Veongeka,* without authority from the Vita Traditional Authority during the year 2016, entered the disputed areas but moved out at the end of the same year that is 2016;

(ff) The thirty sixth defendant, *Karikita Tjiposa*, without authority from the Vita Traditional Authority during the year 2007, entered the disputed areas, settled and resided at or near Otjondunda area;

(gg) The thirty seventh defendant, *Uaumbuye Zakuhu,* without authority from the Vita Traditional Authority during the year 2016, entered the disputed areas but moved out at the end of the same year 2016; and

(hh) The thirty eighth defendant, *Kauzemine Mbetjiha*, moved out of the disputed areas at the end of the year 2016.

[31] The witnesses accordingly contended that the residence and occupation by

the defendants in the disputed areas is unlawful, because the defendants never sought permission to settle or reside in the disputed areas as required under the Communal Land Reform Act, 2002. The witnesses proceeded and testified that in so far as the defendants plead or allege that they occupy those areas with the permission from the Otjikaoko Traditional Authority, the Otjikaoko Traditional Authority has no jurisdiction over the areas in question.

[32] Muniongumbi further testified (this version was corroborated by the other three witnesses who testified on behalf of the plaintiff) that during the course of this litigation, some of the defendants sought to obtain written authorizations or permission from the Vita Traditional Authority (and the Otjikaoko Traditional Authority) in order to reside in the areas, and furnished the plaintiffs' legal practitioners with copies of the purported authorizations.

[33] He further testified that after the plaintiff had sight of the purported written authorizations, the plaintiff, together with other Conservancies and individual lawful residents of the areas that are in dispute, launched an application in this Court to review the decision to issue the purported authorization permits and to have the purported permits set aside. That review application was heard on 7 February 2018, and the Court ordered that the decision of Chief Paulus Tjavara and Chief Tjimbuare Thom to issue the purported written residential permits be set aside, and that the permits be declared unlawful, illegal and therefore invalid and of no force or effect.

[34] At the close of the plaintiff's case, the defendants applied for absolution from the instance, after I heard arguments from the parties' legal practitioners, I dismissed that application and indicated that I will give reasons for my decision at the close of the defendant's case. For the purpose of the flow of this judgement, I will now proceed to deal with defendants' testimonies and deal with my reasons for dismissing the application for absolution from the instance when I discuss the evidence presented at the trial of this matter.

The defendants' evidence:

[35] As I indicated earlier, only six of the thirty seven defendants testified at the trial of this matter, namely Katuzuu Kapika (the 6th defendant), Jaapo Tjiumbua

(the 17th defendant), Boesman Kavari (the 21st defendant), Uorujezu Rutjindo (the 24th defendant), Ujeuetu Tjihange (the 25th defendant he is cited as Kavitopi Tjihange) and Kahini Harire (the 29th defendant).

[36] Katuzuu Kapika testified that he is a communal farmer residing at Otjorute in the Sesfontein Constituency. He further testified that he has been residing at a village known as Okamazema for the past eleven years in terms of the customary law of the Ovahimba people. He testified that during the year 2008, his great grandfather, the late Jeremia Kaisuma, became weak and as a younger person, he was called upon to be his caretaker. This is a common practice in terms of the customary law and customs of the Ovahimba people, the testimony went.

[37] He continued and testified that that before he moved to Okamazema, he complied with the procedural requirements which were in place by then. He testified that he informed the elders of Okamazema and they responded positively to his request to settle there and he resided there with Jeremia Kaisuma until his death during the year 2012. The Otjikaoko Traditional Authority which gave him permission to reside at Okamazema and the Vita Traditional Authority enjoys concurrent jurisdiction over the area of Okamazema and all other surrounding places, so the testimony went.

[38] In conclusion, Mr Kapika testified that the basis of this case is aimed at frustrating him, and the plaintiff succeeded in that regard as he sold all his animals to pay legal fees. He continued and stated that his animals died, because he was restricted from taking his animals to other places where he could get better grazing land. He says he is discriminated against by the plaintiff merely because he is a Himba.

[39] Jaapo Tjiumbua and Boesman Kavari's testimonies were in all respects identical to that of Katuzuu Kapika, except that Tjiumbua testified that he has been residing at Otjondunda, Omisema village 'for the past 13 years' while Boesman Kavari testified that he is a communal farmer who has been residing at Otjondunda village since 2005.

[40] Ujeuetu Tjihange (the 25th defendant, who is also known as Kavitopi Tjihange) testified that he is a communal farmer who resides at Otjomitjira, Sesfontein Constituency. He further testified that he is a senior traditional councillor in the Otjikaoko Authority under the chieftaincy of Chief Paulus Tjavara. He further testified that the Otjikaoko Traditional Authority has jurisdiction over vast areas of Kaokoland which includes the Quarantine Camp, Omauwa, Otjomenje, Otjorute, Otjizeka, Ombaikiha, Okaruikovita, Warmquelle, Omisema, Otjondunda, Ongongo, Okandjou, Okomimunu, Okairanda, and Okaturua. He further testified that the jurisdiction of the Otjikaoko Traditional Authority over the disputed areas is concurrent with that of the Vita Traditional Authority. He furthermore testified that he is not aware of any conditions imposed by the Vita Traditional Authority in respect of the grazing of livestock in the commonages of the areas in dispute.

[41] Kahini Harire testified that he is a communal farmer and has, with authority from the elders of the Otjondunda Village been residing at Otjondunda since 2006. He furthermore testified that during the year 2018, he was advised that in terms of the laws of Namibia, he was required to apply for customary land rights. He continued that in accordance with the advice that he received, he proceeded and applied for customary land rights and those rights were granted to him by Chief Paulus Tjavara of the Otjikaoko Traditional Authority. He tendered the purported documents granting him the customary rights into evidence.

[42] He furthermore testified that the Otjikaoko Traditional Authority enjoys concurrent jurisdiction over the disputed areas with the Vita Traditional Authority. He also testified that the basis of this case is aimed at frustrating him, and the plaintiff succeeded in that regard as he sold all his animals to pay legal fees. He continued and stated that his animals died, because he was restricted from taking his animals to other places where he could get better grazing land. He says he is discriminated against by the plaintiff merely because he is a Himba.

Discussion

[43] I indicated above that at the end of the plaintiff's case, the defendants applied to be absolved from the instance which as I also indicated I dismissed. I

now provide the reasons why I dismissed the application for absolution from the instance.

[44] I do not find it necessary to deal in much detail with the law applicable to applications for absolution from the instance, for the reason that the position of the law in this regard is well settled. To the extent necessary, the Supreme Court stated the following in *Stier v Henke*[11] at para 4:

'At 92F-G Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied for at the end of an appellant's case as appears in *Claude Neon Lights (SA) v Daniel* 1976 (4) SA 403(A) at 409G-H:

> "When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be established, but whether there is any evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff." '

[45] The learned judge of Appeal, Harms JA proceeded to state the following at para 92H-93A of the judgment:

'This implies that a plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff. As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one. The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury … .Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.'

[46] There is not much controversy among the parties regarding the standard to be met at this stage of the proceedings. This is so because the law in this regard is

11 *Stier and Another v Henke 2012 (1) NR 370 (SC) at para [4]..*

very much settled. It is, however, in the application of the law to the facts that does raise some controversy, the defendants claiming that there is no better case than the present, to grant the application for absolution from the instance. The plaintiff, on the other hand, claims that this is not a proper case in which to grant the application.

[47] I, however, find it necessary for purposes of this judgment, to mention the following additional points regarding the application for absolution from the instance. First, the plaintiff must make out a *prima facie* case, in the sense that all the elements of the claim must be established. If such evidence is not marshalled, the court cannot find for the plaintiff,[12] but if there is evidence upon which this court properly applying its mind may find for the plaintiff, then absolution must be refused.[13]

[48] Another principle that must be borne in mind is that it must be assumed that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true.[14] Except where a witness has clearly broken down and where it is clear that their evidence is not the truth, questions of credibility should normally not be investigated at the stage of proceedings when absolution from the instance is considered at the close of the plaintiff's case. The Court should also refrain from unnecessary discussion of the evidence to avoid the appearance that it is taking a view of its quality and effect that should only be reached at the end of the whole case.[15]

[49] I will proceed to consider the various positions taken by the parties in this regard. To the extent necessary, I will have regard to the evidence led and then I will apply the law to the facts and come to a conclusion as to why I refused to absolve the defendants from the instance.

[50] Mr Tjiteere, who appeared on behalf of the defendants and who applied for the defendants to be absolved from the instance, grounded the application on two

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12 *Factcrown Ltd v Namibia Broadcasting Corporation* 2012 (2) NR 447 (SC), para 72.

13 *Barker v Bentley* 1978 (4) SA 204 (N) (at 206C), which was approved by this Court in the matter of *Labuschagne v Namib Allied Meat Company (Pty) Ltd* (I 1-2009) [2014] NAHCMD 369 (1 December 2014).

14 (*Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C-D).

15 *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D-E).

grounds. The first basis on which Mr Tjiteere relied is the contention that the plaintiff which is before the Court (that is the Anabeb Conservancy Committee) is not entitled to obtain an eviction order against the defendants because it did not place evidence before the Court to demonstrate that it had the requisite authority to seek such an order.

[51] The second basis on which Mr Tjiteere relied is his contention that the plaintiff failed to call a member of the Vita Traditional Authority to prove that the defendants did not have the required authority to reside or occupy the disputed areas and also that the plaintiff failed to lead evidence to proof that the Vita Traditional Authority has exclusive jurisdiction over the disputed areas.

The plaintiff's alleged lack of authority to institute eviction proceedings

[52] Mr Tjiteere who appeared for the defendants argued that the plaintiff before Court is the Anabeb Conservancy Committee, which is seeking to evict the defendants from the Anabeb Conservancy. He thus argued that the Anabeb Conservancy Committee has not placed evidence before this Court to demonstrate that it has been authorised to institute action on behalf of the Anabeb Conservancy.

[53] In my view Mr Tjiteree's argument is based on a misconception of the nature of the plaintiff. Our law recognizes two classes of persons, namely natural persons and juristic/artificial persons. A natural person acquires his or her legal personality (rights, duties and capacity) at birth, while a juristic person acquires its legal personality from its constituent instrument or by the operation of the law. Our law recognizes the following entities as juristic persons:

(a) Associations incorporated in terms of general enabling legislation;[16]

(b) Associations especially created and recognized as juristic persons in separate legislation;[17]

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[16] Examples of these are companies, banks, close corporations and co-operatives.

[17] Examples of these are universities, state owned enterprises and public corporations like, Nampower and the Namibia Broadcasting Corporation.

(c) Associations which comply with the common law requirements for the recognition of legal personality of a juristic person. At common law, such juristic persons are known as *universitas.*

[54] I will briefly deal with the third category of juristic person. *Herbstein & Van Winsen*[18] argues as follows with regard to a *universitas*:

'A *universitas* is a legal fiction, an aggregation of individuals forming a *persona* or entity having the capacity of acquiring rights and incurring obligations to as great an extent as a human being. The main characteristics of a *universitas* are the capacity to acquire certain rights as apart from the rights of individuals forming it, and perpetual succession.'

[55] In the matter of *Morrison v Standard Building Society,*[19] Wessels JA said the following:

'In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution and if these shows that it possess the characteristics of a corporation or a *universitas* then it can sue in its own name.'

[56] I have in the part dealing with the nature of Communal Conservancies in Namibia indicated that the Ordinance in s 24A empowers a group of persons who reside on communal land and who desire to have the area which they inhabit, or any part of the area they inhabit, to be declared a conservancy, to apply to the Minister responsible for Environment and Tourism in the prescribed manner, to declare the area a conservancy. The section furthermore provides that the application must be accompanied by a list of the names of the persons who are members of a committee established for the purpose of being recognised by the Minister under subsec (2)(ii) as the conservancy committee for the conservancy applied for and the Constitution of such committee;

[57] I further indicated that the primary objective of the conservancy is to enable the inhabitants of the Conservancy to derive benefits from the sustainable management of the consumptive and non-consumptive utilization of the natural resources in the Conservancy. The Constitution of the Anabeb Conservancy was tendered into evidence during Mr Kenatjipo Uatokuja's testimony. That Constitution

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18 *Supra* at p 175.

19 *Morrison v Standard Building Society* 1932 AD 229.

does in, article 3 of chapter 1, set out the primary objectives of the Conservancy. In article 4 the Constitution provides that the Conservancy shall be managed by a Conservancy Committee (the plaintiff). The Constitution confers on the Conservancy the power to, amongst other things:

(a) acquire, hold and manage property, for the benefit and on behalf of its members[20];

(b) establish, monitor and enforce rules and sanctions for the sustainable management of the natural resources in the Conservancy[21];

(c) promote the economic and social well-being of the members of the conservancy by equitably distributing the benefits generated through the consumptive and non-consumptive of wildlife and forest resources.[22]

[58] Article 20 of the Constitution of the Anabeb Conservancy sets out the general and specific powers of the Conservancy Committee. The general and specific powers include the power to:

(a) institute or defend any legal arbitration proceedings, and to settle any claims made by or against the conservancy[23]; and

(b) distribute to the members of the Conservancy, invest or reinvest in any financial institution or otherwise use, the proceeds of any assets or any monies of the Conservancy as approved by the district meetings or general meetings.

[59] From what I have discussed in the preceding paragraphs, it is clear that the Anabeb Conservancy is a geographic area which is managed by a Conservancy Committee, the Anabeb Conservancy Committee and that from the Constitution of the Anabeb Conservancy, it is clear that a member of the Committee or the Conservancy is not an agent of the others and his or her individual acts cannot bind his or her fellow members. Nor can a member of the Conservancy Committee be held liable for the debts of the Committee.

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20 See article 5 of the Constitution of the Anabeb Conservancy.

21 See article 14 of the Constitution of the Anabeb Conservancy.

22 See article 20 of the Constitution of the Anabeb Conservancy.

23 See article 20 (d) of the Constitution of the Anabeb Conservancy

[60] The Conservancy Committee is furthermore endowed with the capacity to acquire rights and to incur obligations to as great an extent as a human being and separately from the persons who make up its membership, it is further empowered to institute and defend legal proceedings on behalf of the conservancy. In my view, the objects of the Conservancy shows that it possesses the characteristics of a corporation or a *universitas.* I therefore conclude that the plaintiff has proven that it has the power to in its name institute this action.

Has the plaintiff placed sufficient evidence before the Court for the Court to find for it?

[61] I start off by considering the issue of evidentiary burden and ancillary matters. The incidence of the *onus* tells us who must satisfy the Court. With regards to the incidence of the burden of proof, the following can be said. It is a well-established principle of our law that 'he who alleges must prove'. This approach was stated in *Pillay v Krishna.*[24]

[62] The first rule is that the person who claims something from another has to satisfy the court that he is entitled to it. Secondly, where the person against whom the claim is made is not content, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld, he must satisfy the court that he is entitled to succeed on it.

[63] It will be remembered that I indicated that the test to be applied is not whether the evidence led by the plaintiff established would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The phrase 'applying its mind reasonably' requires the Court not to consider the evidence in *vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.

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[24] *Pillay v Krishna* 1946 AD 946 at 951 -2;

[64] The evidence placed before me in this matter was that the areas in dispute were declared a conservancy, that much was admitted by the defendants. The evidence by the witnesses who testified on behalf of the plaintiff is that the defendant's started settling in the disputed areas after the coming into operation of the Communal Land Reform, 2002. The defendants started settling in the disputed areas as from the year 2005 and they so settled in those areas without the permission of the Vita Traditional Authority.

[65] In my view, the evidence led on behalf of the plaintiff is of such a nature that it is evidence which a Court reasonably applying its mind might find that the defendants settled in the disputed areas without complying with the requirements of the Communal Land Reform Act, 2002. It is more so if one has regard to the defendants plea where they set up a special defence that they were granted permission by the Otjikaoko Traditional Authority to reside in the disputed areas. In this regard, the defendants are regarded *quoad* that defence, as being the claimants. For their defence to be upheld, they must satisfy the court that they are entitled to succeed on it. It is for those reasons that I refused to absolve the defendants from the instance.

[66] As I have indicated, the defendants were not merely content with a mere denial that their occupation of the disputed areas was unlawful. They set up a special defence that their occupation of the disputed areas was sanctioned by the Otjikaoko Traditional Authority. That contention by the defendants was not backed by any admissible evidence that the Otjikaoko Traditional did grant the defendants authority to occupy the disputed areas.

[67] The provisions of the Communal Land Reform Act, 2002, must furthermore not be lost sight of. Section 24(1) of the Act stipulates that any allocation of a customary land right made by a Chief or a Traditional Authority under s 22 has no legal effect unless the allocation is ratified by the relevant communal land board in accordance with s 24. None of the respondents attached any document to evidence his or her application for customary land rights or grazing rights nor did they attach any document to evidence that the Kunene Communal Land Board ratified the alleged allocated customary land rights or the grazing rights.

[68] It therefore follows that all the defendants have failed to rebut the allegations made by the plaintiff and I am satisfied that the defendants' occupation of the disputed areas is unlawful. I am furthermore satisfied that plaintiff has demonstrated that it has a direct and substantial interest in the outcome of the legal proceedings in this matter, thus entitling it to the relief it seeks.

[69] Finally regarding the question of costs. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general a rule. For the reasons that I have set out in this judgement I make the following Order:

1. The first to thirty - eight defendants must vacate the commonage at the areas known as the Quarantine Camp, Okaturua, Omauwa, Otjomenje, Otjorute, Otjizeka, Ombaikiha, Otjondunda, Okaruikovita, Warmquelle, Omisema, Otjondunda, Ongonga, Okandjou, Okomimunu, Okairanda, Okaturua and Okondjou in the communal area in the Kunene Region, Namibia.

2. The first, fourth, sixth, seventh, eight, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, twentieth, twenty-first, twenty-third, twenty-fourth, twenty-sixth, twenty-seventh, twenty-eight, twenty-ninth, thirty-first, thirty-second, thirty-third and thirty fourth defendants must jointly and severally the one paying the other to be absolved pay the plaintiff's costs of suit.

3. The matter is finalised and is removed from the roll.

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Ueitele SFI

Judge

APPEARANCES

PLAINTIFF: Norman Tjombe
Tjombe–Elago Inc, Windhoek,

FOR, THE 5TH, 6TH, 7TH, 8TH,
17TH, 18TH, 21ST, 22ND,26TH and 29TH
DEFENDANTS: Mekumbu Tjiteree
Dr Weder, Kauta & Hoveka Inc, Windhoek.

FOR, THE 1st , 2nd, 3rd, 4th, 9th, 10th
11TH, 12TH, 13th, 14th, 15th 16th, 19th, 20th
23rd, 24th, 25th , 27th, 28th, 30th, 31st, 32nd,
33rd, 34th, 35th, 36th, 37th and 38th, DEFENDANTS: No appearance.