

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

“ANNEXURE 11”

Practice Directive 61

<b>Case Title:</b> ERNEST KAMBATUKU EPHRAIM NGURUNJOKA and LISIAS TJAVEONDJA MINISTER OF AGRICULTURE, WATER & LAND REFORM THE LAND ADVISORY COMMISSION THE DEPUTY SHERIFF: GOBABIS DISTRICT	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2021/00939
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE JUSTICE SIBEYA	<b>Date of hearing:</b> 20 April 2022
	<b>Order:</b> 12 May 2022 <b>Reasons:</b> 18 May 2022
<b>Neutral citation:</b> <i>Kambatuku v Tjaveondja and Others</i> (HC-MD-CIV-ACT-OTH-2021/00939) [2022] NAHCMD 246 (18 May 2022)	
<b>The order:</b> (a) The first defendant’s special plea of <i>locus standi</i> is dismissed. (b) There is no order as to the costs. (c) The matter is postponed to 09 June 2022 for a case management conference hearing. (d) Parties must file a revised joint case management report on or before 03 June 2022.	
<b>Reasons for the order:</b>	

SIBEYA, J

Introduction

[1] This matter revolves around an eviction claim sought by the plaintiffs against the first defendant from Camp K4 which forms an integral part of Unit B of Farm Goab. Farm Goab was previously allocated to the plaintiffs and camp K4 is occupied by the first defendant as per the allotment letter of 30 July 2019, annexed to the plaintiffs' particulars as Annexure "B" which approved the allocation of Unit B of portion 1 of Farm Goab to the plaintiffs.

Special plea of *locus standi*

[2] This court is seized with a special plea of *locus standi in judicio* raised by the first defendant against the plaintiffs. The special plea is premised on the assertion that the plaintiffs lack the necessary *locus standi* required to institute legal action for eviction of the first defendant from Camp K4 on Farm Goab.

[3] The basis of the plaintiffs' claim for eviction is the assertion that the plaintiffs were, on 30 July 2019, resettled by the second defendant (the Minister of Agriculture, Water & Land Reform, hereinafter referred to as "the Minister") on Unit B of Farm Goab which area incorporates Camp K4. The first defendant who is the occupant of Camp K4 is alleged to have refused to vacate Camp K4.

[4] The first defendant alleges that the plaintiffs failed to establish that they are the lawful owners or bona fide possessors of Camp No. K4 or that they have the right to institute the eviction claim against the first defendant.

[5] The plaintiffs oppose the special plea.

[6] Annexure "B" to the plaintiffs' particulars of claim provides that the Minister in consultation with the Land Reform Advisory Commission hereinafter referred to as "the Commission" decided that Unit B of portion 1 of Farm Goab No. 363 be allocated to the

plaintiffs.

[7] The first defendant sought to have the decision of the Minister to allocate farm unit B to the plaintiffs reviewed. This court heard the review application. On 2 October 2020, the court directed the Minister consider and respond to the objections made by the first defendant on 23 October 2015 in respect of the recognition and registration of farming units at farm Goab No. 362 within thirty (30) days from the date of the order.

[8] The first defendant alleges that the Minister did not fully comply with the aforesaid court order and therefore the rights claimed by the plaintiffs were reviewed and set aside, hence the special plea raised against the plaintiffs' particulars of claim.

#### Brief submissions

[9] Mr Tjiteere for the first defendant submitted that the plaintiffs relied on the decision of the Minister to institute eviction proceedings, but which decision was reviewed and set aside. This left the plaintiffs with no right to Camp K4. Mr Tjiteere submitted that the plaintiffs failed to establish that they have a direct and substantial interest in Camp K4.

[10] Mr Tjiteere further referred to a letter marked "TL3" annexed to the special plea wherein the plaintiffs are alleged to have written to the Minister stating that the first defendant is the rightful owner of Camp K4. This, Mr Tjiteere submitted, cements the ownership and rightful occupation of camp K4 by the first defendant.

[11] Mr Kauarivi for the plaintiffs submitted the contrary that the plaintiffs successfully applied for allotment of farm unit B for a lease period of 99 years in terms of s 42 of the Agricultural (Commercial) Land Reform Act (the Act).<sup>1</sup> Mr Kauarivi submitted that the plaintiffs have the legal capacity to sue and be sued and further that the plaintiffs have sufficient interest in the subject matter of the litigation. Mr Kauarivi wrapped up his submissions by stating that when consideration is had to the broader approach to ascertain whether a party has a direct and substantial interest in the subject matter then the plaintiffs cannot be said to lack *locus standi* to sue for eviction on a camp which forms part of the farm that was earlier allocated to them.

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<sup>1</sup> Land Reform Act 6 of 1995.

## Analysis

[12] There is no qualm between the parties that the plaintiffs have the required capacity to sue and be sued. What is in dispute, and which this court is called upon to decide, is whether the plaintiffs have a legal interest in the subject of the litigation. This is necessary to determine when raised early on in the proceedings as upholding the special plea would resolve the issues between the parties and bring the matter to finality without determining any other issues and the merits of the matter.

[13] Strydom JP in *Kerry Mcnamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*,<sup>2</sup> set the tone on what constitutes a direct and substantial interest in a subject matter under litigation when he remarked as follows:

‘The test for *locus standi* in our law is that stated in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415F-H as “an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation. ... It is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court.’

[14] The approach adopted in the *Kerry Mcnamara* matter to determine the legal interest is a narrow approach to the question under discussion. It provides that if a party is unable to establish a direct and substantial interest in the subject matter of the litigation, particularly where the interest is merely financial in a matter, such interest is insufficient to establish the necessary *locus standi* and therefore is a party will be non-suited.

[15] In *Trustco Insurance Ltd t/a Legal Shield Namibia & Another v Deeds Registries Regulation Board & Others*,<sup>3</sup> the Supreme court discussed and remarked that:

‘If the appellants are correct ... they will have successfully vindicated their rights. If they are incorrect, then they will have obtained clarity on their entitlements. The rules of standing should

<sup>2</sup> *Kerry Mcnamara Architects Inc. and Others v Minister of Works, Transport and Communication and Others* 2000 NR (1) (HC) at 7 – 8.

<sup>3</sup> *Trustco Insurance Ltd t/a Legal Shield Namibia & Another v Deeds Registries Regulation Board & Other* 2011 (2) NR 726 (SC) para 18.

not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.’

[16] In *Brink N O v Erongo All Sure Insurance CC*,<sup>4</sup> Shivute CJ discussed *locus standi in judicio* in relation to the principle that only the executor may sue on behalf of the estate and said the following at para 39-40:

‘[39] Access to justice is one of the rights guaranteed by our constitution as a means for people to protect and enforce their rights. To close the doors of justice to a widow with a legitimate interest in the subject matter of the litigation and who combines forces with the executrix would fly in the face of her constitutional right to be heard by an impartial and independent court, particularly in a dispute involving land which is of paramount importance to the citizens of Namibia.

[40] Therefore, I am of the considered view that where a sole legatee acts with the consent of the executrix to vindicate a specific asset of the estate because his/her right in the asset in question is infringed or threatened, the rule should be relaxed to allow the heir or legatee to institute proceedings jointly with the executor. In light of the above considerations, the ground of exception based on *locus standi* should have been dismissed. The court below erred in upholding the exception based on this ground.’

[17] I hold the view that direct and substantial interest required to be established by a party instituting action should be determined with due regard being had to the constitutional right of access to justice. Persons with legitimate interests should not be closed out of the courtrooms but should have their day in court for the determination of their legitimate disputes. After all, this is the spirit of the Constitution.

[18] The preamble to the Constitution provides, *inter alia*, that:

‘**Whereas** we the people of Namibia –

have finally emerged victorious in our struggle against colonialism, racism and apartheid;

are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the

<sup>4</sup> *Brink N O v Erongo All Sure Insurance CC* (SA 46-2016, 69-2016) [2018] NASC (22 June 2018).

Namibian nation among and in association with the nations of the world;

will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state;

committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity,

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.’

[19] It is not every Tom, Dick and Harry who should keep courts busy adjudicating actions where they lack direct and substantial interest. Court’s time should not be wasted on busybodies. It should be reserved for the resolution of legitimate disputes brought by persons with direct and substantial interest in the litigation and who have the right to enforce or to protect, and who may be prejudiced by the lack of such action.

[20] Mr Tjiteere in his quest to convince the court that the plaintiffs have no legitimate claim in this matter, laid great store on Annexure “TL3” to the first defendant’s plea. Annexure “TL3” is an undated letter alleged to have been written by the plaintiffs to the Minister to inform him that Camp K4 at farm Goab belongs to the first defendant. Confronted with the content of Annexure “TL3”, Mr Kauarivi, submitted that he holds no instructions with respect thereto. The plaintiff, in their reply to annexure “TL3”, in replication, just took note of the content thereof.

[21] I hold the view that the content, merit or demerit and effect of Annexure “TL3” is not ripe for determination. It is an issue that constitutes evidence and which should accordingly be decided upon during the trial. I, therefore, decline the invitation by Mr Tjiteere to find that the plaintiffs have no right to claim eviction on the basis of Annexure “TL3” and I find that such submission lacks merit.

[22] The main qualm that the first defendant has with the *locus standi* of the plaintiffs relates to the order of this court that directed the Minister to consider and respond to the objections made by the first defendant on 23 October 2015 regarding the recognition and

registration of farming units at Farm Goab No. 362 within thirty days of the order issued on 2 October 2020. The first defendant states that the said court order was not fully complied with by the Minister as the first defendant's objections were not considered by the Minister.

[23] The plaintiffs have no control over the Minister. They cannot instruct the Minister to comply with an order of the court. I find that the plaintiffs could have applied to court for a mandamus to compel the Minister to comply with the court order of 2 October 2020. In the same vein, the first defendant could have launched a similar application for a mandamus. Both parties did not do so.

[24] The first defendant opted to lie in wait for any application that challenges his occupation of Camp K4, upon which, he would flash the order of 2 October 2020 to such party. The option taken by the first defendant to enforce his rights in terms of the order of 2 October 2020 cannot go without criticism. While any reasonable person in the position of the first defendant would have raised the special plea of *locus standi* against the plaintiffs' particulars of claim based on the order of 2 October 2020, the plaintiffs cannot be blamed, in my view, for taking steps to protect and enforce their rights or to seek clarity to their legitimate rights.

[25] To close the doors of the court to the plaintiffs on the basis that the Minister did not fully comply with the court order will amount to diminishing the rights of the plaintiffs to the farm, which this court is not prepared to do. Considering that the claim for eviction that the plaintiffs seek emanates from the allotment of Farm Goab which incorporates Camp K4, I hold the view that the plaintiffs clearly have a direct and substantial interest in the subject matter of the litigation. I further find that the veracity of the claim, however, is a matter of evidence for determination at trial.

### Conclusion

[26] In view of the foregoing findings and conclusions, it follows that the special plea of *locus standi* falls to be dismissed and it shall be ordered accordingly.

### Costs

[27] I find that the first defendant had an arguable case and further that another party similarly placed could reasonably raise the same special plea. In the exercise of my discretion, I, therefore, find that the first defendant does not deserve to be mulched with costs. No adverse costs order will therefore be made against the first defendant.

### Order

[28] In the result, I make the following order:

- (a) The first defendant's special plea of *locus standi* is dismissed.
- (b) There is no order as to the costs.
- (c) The matter is postponed to 09 June 2022 for a case management conference hearing.
- (d) Parties must file a revised joint case management report on or before 03 June 2022.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
Sibeya Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiffs</b>	<b>Respondent</b>
T K Kaurivi for the plaintiffs T K Kaurivi Legal Practitioners 46 Church Street Windhoek	M Tjiteere for the 1 <sup>st</sup> defendant Dr Weder, Kauta & Hoveka WKH House, Ausspanplatz Windhoek