

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON POINT *IN LIMINE*

Case no: HC-MD-CIV-MOT-GEN-2016/00333

In the matter between:

ALEX MABUKU KAMWI KAMWI

APPLICANT

and

MINISTER OF LANDS AND RESETTLEMENT

1ST RESPONDENT

**COMMUNAL LAND BOARD OF ZAMBEZI:
REPRESENTED BY CHAIRPERSON**

2ND RESPONDENT

CHIEF KISKO MAIBA LISWANI III

3RD RESPONDENT

LUCKSON MAHOSHI CHIKA

4TH RESPONDENT

PHILLEMUN MUNICHEZE NASILELE

5TH RESPONDENT

SIMASIKU RAYMOND SILUZUNGILA NTOMWA

6TH RESPONDENT

CHARLES LISULO

7TH RESPONDENT

BENSON NTOMWA

8TH RESPONDENT

ALBERT SHAMUKUNI

9TH RESPONDENT

NCHINDO SIMASIKU

10TH RESPONDENT

SAMUEL BUCHANE MUKANGARA SIMATAA

11TH RESPONDENT

Neutral citation: *Kamwi v Minister of Lands and Resettlement* (HC-MD-CIV-MOT-GEN-2016/00333) [2022] NAHCMD 282 (8 June 2022)

Coram: ANGULA DJP

Heard: 10 May 2022

Delivered: 8 June 2022

Flynote: Applications and motions – Application – Point of law raised *in limine* – Non-joinder – Test for joinder restated – A person with a direct and substantial interest in the outcome of legal proceedings must be joined to such proceedings as a party.

Summary: The applicant sought an eviction order against the fourth to eleventh respondents and ‘all persons claiming [occupation] through them’ from communal land he alleges belongs to him – The respondents raised a point *in limine* of non-joinder, contending that the applicant’s failure to join the fourth to eleventh respondents’ family members, whose identities had been made known to the applicant, was fatal to the application.

Held that: The test for non-joinder is that the person to be joined should have a direct interest in the outcome of a suit. In other words the persons to be joined must have a direct and substantial interest not only in the subject matter of the litigation, but also the outcome of the litigation.

Held that: The respondents’ family members as occupiers of the land from which an order is sought to evict them have direct and substantial interest not only in the subject matter of the litigation but also in the outcome of the proceedings and therefore ought to have been joined.

Held that: The applicant’s failure to join the respondents’ family members whose names were made available to him makes the present application liable to be struck from the roll with costs.

Accordingly, the application was struck from the roll with costs.

ORDER

1. The fourth to eleventh respondents’ point *in limine* of non-joinder is upheld.

2. The application is struck from the roll.
3. The application is not to be re-enrolled until and unless the persons whose names have been furnished to the applicant by the legal practitioner for the fourth to eleventh respondents as occupiers of the land in respect of which the applicant seeks the eviction and interdict orders against the fourth to eleventh respondents, have been joined and served with the application papers.
4. The applicant is ordered to pay the fourth to eleventh respondents' costs of this application. Furthermore the matter is not to be re-enrolled until the applicant has paid the fourth to eleven respondents' costs of this application.

RULING

ANGULA DJP:

Introduction

[1] The applicant, an adult male lay-litigant, instituted these proceedings seeking an eviction order of the fourth to eleventh respondents and 'any person claiming [occupation] through them' from an area of land in the Zambezi Region which he alleges belongs to him.

Relief sought

[2] The orders sought, as they appear from the notice of motion, are the following:

- '1. Authorizing the Deputy Sheriff to evict the 4th – 11th respondents and their families and all persons claiming through them, the goods and possessions from and out of all occupation and possession whatsoever of my residential, grazing and ploughing area situated in Ngala, Mahundu district, Zambezi region to the

end that I may peaceably enter into and possess my residential, grazing and ploughing area without any form of harassment or attacks from the 4th – 11th respondents or any person claiming through them.

2. To interdict the 4th – 11th respondents and all persons claiming through them from ploughing, residing and grazing their cattle in my piece of land.
3. To interdict 4th – 11th respondents and all persons claiming through them from crossing the Shanshuma river or point at any direction which serves as the boundary between my residential, grazing and ploughing customary land rights in Ngala and the 4th – 11th respondents customary rights in Shanshuma.
4. Ordering the 4th – 11th respondents to pay the costs of this application, if they oppose the application.
5. Further and or alternative relief.'

[3] In opposition of the application, the fourth to eleventh respondents ('the respondents') not only challenged the merits of the application but also raised a point *in limine* of non-joinder.

[4] The first, second and third respondents have not filed notices to oppose the application.

Background

[5] This matter has a protracted history, the full details of which are not necessary for purposes of this ruling. I however find it apposite to set out the most recent events in these proceedings leading up to the hearing of this application on 10 May 2022. This will give context to the parties' respective arguments, as it will become evident later on in this ruling.

[6] At a hearing before this court on 4 August 2021 the respondents' legal practitioner, Mr Tjombe, advised the court of the respondents' intention to bring an application for joinder of further respondents. This resulted in a court order wherein the parties were directed on the procedure to be followed with regard to intended

interlocutory application. In terms of that order, the respondents were to file their joinder application by 20 August 2021.

[7] The respondents failed to file their joinder application as directed and were subsequently ordered to file a sanctions affidavit explaining their non-compliance with the court's order of 4 August 2021. The case was then postponed to 8 December 2021 for a sanctions hearing.

[8] Mr Tjombe filed his sanctions affidavit on 2 December 2021, wherein he set out the circumstances which resulted in the respondents' non-compliance. In the affidavit Mr Tjombe stated that he had identified 319 members of the respondents' respective families and that the names of those family members had been sent to the applicant as part of the respondents' rule 32(9) engagement towards an amicable solution to the intended joinder application.

[9] On 8 December 2021 both the applicant and Mr Tjombe, on behalf of the respondents, appeared in court for the sanctions hearing. During the hearing Mr Tjombe informed the court that the respondents had elected not to pursue the joinder application, having decided that the legal obligation to join the interested persons as parties to the proceedings, rested on the applicant. He further informed the court that should the application be set down for hearing, without those persons being joined, the point of non-joinder would be raised.

[10] When asked by the court on how he intended to proceed – in light of the respondents' change of stance – Mr Kamwi stated the following:

'How I want to proceed is that the application for non-joinder must be refused and then we proceed with the arguments of the matter'.

[11] It needs to be pointed out immediately with regards to Mr Kamwi's response that there was no application for joinder before court. The hearing concluded with an order as to the further exchange of affidavits and the filing of heads of argument. I now turn to deal with the respondents' contentions in respect of the point *in limine*.

Point *in limine* of non-joinder

[12] As already stated, the applicant seeks relief against the fourth to eleventh respondents and their respective family members and 'all persons claiming [occupation] through them'. The respondents take issue with the applicant's failure to cite the respondents' family members, despite it being apparent that the family members have a direct and substantial interest in the outcome of the proceedings. This failure to cite the family members, so it is argued, amounts to a non-joinder of interested and necessary parties in this application.

[13] The tenth respondent, Mr Hastings Nchindo Lyamine¹, deposed to the answering affidavit on behalf of the respondents. In the answering affidavit he referred to Mr Tjombe's affidavit dated 2 December 2021 and the delivery of the list of 319 names of the respondents' family members to the applicant. He further points out that the applicant was afforded sufficient opportunity to join the persons whose names were provided to him by Mr Tjombe who have direct and substantial interest in the outcome of the application, but he had been steadfast in his refusal to do so.

[14] In reply, the applicant referred to the court's proceedings of 8 December 2021 and contends that after hearing both parties the court made a ruling 'that the application for joinder was refused and the judge said the issue of joinder shall be between the parties if the order that shall be made shall affect them'.

[15] The applicant further submitted the following at sub-para 4.5 of his replying affidavit:

'In the premises and for the above point in limine for joinder, the applicant further submits, as it was decided upon on 8 December 2021, the same issue cannot be raised in these proceedings because the ruling stands and the court is functus-officio. Thus, the respondents estopped in that regard and point in limine on joinder that have been dealt with and finalised should be dismissed.'

Discussion

¹ Mr Lyamine was incorrectly cited as Nchindo Simasiku. In the answering affidavit he states that Simasiku is his father's name and not his surname. The applicant accepted this error in citation in his replying affidavit.

[16] The law on non-joinder is both well established and trite. In the oft quoted passage from the judgment in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*², Damaseb JP stated the following:

[32] 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.'

[17] The test for joinder is a direct interest in the outcome of a suit.³ The persons to be joined as parties to the proceedings, must have a direct and substantial interest not only in the subject matter of the litigation, but also the outcome of the proceedings.

[19] It is the applicant's case that the respondents and their families are currently occupying land from which he seeks an order for their eviction. If the applicant were to be granted such order, the respondents' identified but uncited family members would not only be evicted from their homes but would also be interdicted from grazing their cattle and ploughing the area of land in question. There is no doubt that such identified but uncited family members of the respondents as occupiers of the land in question in respect of whom eviction and interdicts orders are being sought against, have direct and substantial interest in these proceedings.

[20] This fact was previously abundantly and crystal clear made by this court to the applicant in *Alex Kamwi 'Mabuku' Kamwi v Simasiku Raymond Siluzunggila and Family and Another*.⁴

² *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011(2) NR 437.

³ *Maletzky v Zaaluka; Maletzkey v Hope Village* (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013) para 41.

⁴ *Alex Kamwi 'Mabuku' Kamwi v Simasiku Raymond Siluzunggila and Family and another* (A 347/2015) [2016] NAHCMD 273 (19 September 2016).

[21] This is therefore not the first time that the applicant has approached this court seeking similar relief relating to the same subject matter as in the current application. As correctly pointed out by the respondents during argument, the applicant applied to this court in 2015 seeking an almost identical list of orders, which application, coincidentally, served before this court as presently constituted.

[22] In the *Siluzungila* matter the applicant cited only two respondents, namely Simasiku Raymond Siluzungila and his family, and Zacharia Chika Simasiku and his family. The respondents raised two points *in limine*, one of non-joinder and the other of misjoinder of parties to the proceedings. Insofar as the point of non-joinder was concerned, the respondents took issue with the applicant's failure to join several persons, including the family members of the two respondents.

[23] In upholding the point *in limine* the court said *inter alia* the following:

[12] Furthermore, the applicant seeks an order against the respondents' family members without identifying who these family members are. The family members clearly have a substantial interest in the application and its outcome. The applicant is under a duty to establish the identities of the family members and join them to the proceedings.'

[24] For that reason the application was struck from the roll.

[25] The applicant's choice in pursuing the relief he seeks in a new application however does not obviate the need for joinder of the family members of the respondents and those he labelled as 'any person claiming through them'. The reason or need for joining those persons claiming under the cited respondents is that they are legal persons; they have the right to be sued in their own right. They cannot be treated in law as appendage respondents without being formally joined. They might be occupying the land in their own rights and not under the respondents' rights.

[26] The applicant's task in joining the family members to these proceedings was greatly alleviated in that he was provided with 319 names of the family members by

Mr Tjombe during August 2021. Yet still, he chose not to bring an application to join them to these proceedings. Applicant's stance is that the matter was referred to the High Court by the Supreme Court for case management and joinder was no part of the Supreme Court's judgment. Clearly the applicant misconstrued the legal position. The respondent's right to raise the point *in limine* of non-joinder is not depended on the order of the Supreme Court. The order by the Supreme Court simply struck the appeal from the roll. In any even the applicant was forewarned that the non-joinder point would be raised if the persons who ought to have been joined were not joined.

[27] I therefore hold that the family members of the respondents, whose names and particulars have been provided to the applicant, as occupiers of the land in respect of which the eviction and interdicts orders are sought, have direct and substantial interest in the current proceedings as well as its outcome. They must therefore be joined before the matter may proceed further.

[28] I turn to consider the applicant's argument for not bringing an application to join the persons who are alleged to be the occupiers of the land concerned.

[29] In this regard, the applicant states 'that the application for joinder was refused and the judge said the issue of joinder shall be between the parties if the order that shall be made shall affect them'. He further states at para 4.5 of his replying affidavit as follows:

'In the premises and for the above point in limine for joinder, the applicant further submits, as it was decided upon on 8 December 2021, the same issue cannot be raised in these proceedings because the ruling stands and the court is functus-officio. Thus, the respondents estopped in that regard and point in limine on joinder that have been dealt with and finalised should be dismissed.'

[30] As I understand, the applicant's stance is that the court has already made a ruling on the issue of non-joinder during the proceedings on 8 December 2021 when the court said:

'... if there are people who are going to be affected by the order, who have not been joined and would have been joined, that will be Mr Kamwi's problem.'

[31] Before dealing with the question whether or not the court previously made a ruling of non-joinder of necessary persons, it is necessary to briefly narrate what transpired on 8 December 2021 in order to provide context.

[32] On 15 September 2021 the matter was postponed to 8 December 2021 for sanctions hearing following the respondents' failure to comply with the court's previous order. Mr Tjombe deposed to the main affidavit. The respondents filed confirmatory affidavits. He explained the various reasons why the joinder application could not be filed. In court, he placed on record that the respondents would no longer persist with the joinder application as they considered that to be the applicant's obligation. He further reserved the respondents' right to raise the non-joinder point at an appropriate time. Thereupon, the court made an order for the exchange of pleadings and postponed the matter to 25 January 2022 for the allocation of a hearing date.

[33] It would appear that the applicant incorrectly interpreted the above statement by the court to be a ruling dismissing the respondents' alleged application for joinder. The applicant clearly misconstrued the statement. There was no application for joinder before court. Consequently, the court could not have made a ruling on the issue of non-joinder. The purpose of the statement was essentially to inform the applicant that in the event that the necessary persons were not joined as parties to the present proceedings he would have to suffer the consequences of such non-joinder. In any event, he was forewarned both in the sanctions affidavit and orally during the proceedings that the respondents would raise the point of non-joinder should the matter proceed without the necessary persons being joined to the proceedings as necessary parties.

[34] For all those reasons, it follows thus that the applicant's argument that the court is *functus officio* is therefore meritless and is rejected.

Conclusion

[35] Mr Tjombe argued that in the light of the applicant's conduct – namely his failure to join the 319 persons whose names were made available to the applicant

coupled with the applicant's knowledge from the previous application which was struck from the roll for non-joinder – this application should be dismissed with costs.

[36] In support of the above submission counsel referred to *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board*⁵. In that matter the applicants sought to set aside the first respondent's decision to award a tender to the third respondent. The applicants failed to join unsuccessful tenderers to the application although the identities of those tenderers were known to them. The court held that the unsuccessful tenderers had a direct and substantial interest not only in the subject matter of litigation but also in the outcome of it. The applicant's failure to join unsuccessful tenderers fatal to applicants' case and the application was dismissed.

[37] Ordinarily when the issue of non-joinder is successfully argued the courts afford the applicant or plaintiff an opportunity to join the necessary persons or persons to the proceedings as parties. *In casu*, the applicant had an opportunity to join the affected family members in the *Siluzungila* matter. Instead of the applicant joining those persons as parties to the proceedings, the applicant simply abandoned that application and institutes the present application.

[38] In bringing the current application, the applicant was given a further opportunity to join the said persons as parties to the proceedings when the respondents' informed him of their intended application for joinder and subsequently when it was raised as point in the respondents' answering affidavit. The applicant elected not to heed the court's direction in the *Siluzungila* matter nor to make use of the opportunity afforded to him by the respondents. In other words he could have apply for the stay of the present proceedings pending him bringing an application for joinder.

[39] There is force in Mr Tjombe's submission that the application stands to be dismissed and I have given serious consideration to the submission. However, on further reflection and given the fact that the applicant is a lay-litigant, I have decided not to accede to Mr Tjombe's plea to dismiss the application. I am of the view that an

⁵ *Namibia Construction (Pty) Ltd v The Chairperson of the Tender Board* (A 283/2007) [2014] NAHCMD 6 (21 January 2014).

appropriate order should drive the message to the applicant to comply with the legal principles applicable to his case such as joinder in the present matter.

Order

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

1. The fourth to eleventh respondents' point *in limine* of non-joinder is upheld.
2. The application is struck from the roll.
3. The application is not to be enrolled until and unless the persons whose names have been furnished to the applicant by the legal practitioner for the fourth to eleventh respondents as occupiers of the land in respect of which the applicant seeks the eviction and interdict orders against the fourth to eleventh respondents, have been joined and served with the application papers.
4. The applicant is ordered to pay the fourth to eleventh respondents' costs of this application. Furthermore, the matter is not to be re-enrolled until the applicant has paid the fourth to eleven respondents' costs of this application.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT: A M KAMWI
In person

FIRST RESPONDENT: No appearance
Office of the Government Attorney, Windhoek

FOURTH, FIFTH, SIXTH,
SEVENTH, EIGHTH, NINTH
and ELEVENTH RESPONDENTS: N TJOMBE
Of Tjombe-Elago Inc., Windhoek