REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no**:** HC-NLD-CIV-ACT-DEL-2021/00107

In the matter between:

ONGANDJERA TRADITIONAL AUTHORITY N.O	**1ST PLAINTIFF**
JOHANNES JAFET MUPIYA	**2ND PLAINTIFF**
OMUSATI COMMUNAL LAND BOARD	**3RD PLAINTIFF**
ESTATE LATE DANIEL UUTONI N.O	**4TH PLAINTIFF**
AILI NDAPANDAMEME IILENDE	**5TH PLAINTIFF**

and

ELIASER IIYAMBO	**1ST DEFENDANT**
SIMON IIYAMBO	**2ND DEFENDANT**

Neutral citation: *Ongandjera Traditional Authority v Iiyambo* (HC-NLD-CIV-ACT-DEL-2021/00107) [2022] NAHCNLD 57 (30 May 2022)

Coram: MUNSU, AJ

Heard on: **11 April 2022**

Delivered: **30 May 2022**

Flynote: Practice – Special Plea - Defective Service – Complete failure of service distinguished from irregular service which may be condoned – Court to consider whether

purpose of service has been achieved – Prejudice suffered – Overriding objectives of the Rules of Court.
Practice – Special Plea - Jurisdiction – Exclusion of High Court Jurisdiction - To be gleaned from legislation in the clearest terms.
Practice – Special Plea – Non-Joinder – Generic Prayer by Plaintiffs – Not meant to suggest existence of other Defendants – Defendants failed to identify parties to be joined.

Summary: The plaintiffs seek an eviction order against the defendants. The defendants raised three special pleas. The defendants' first contention is that the service of summons in the matter constitutes a nullity as the summons had been served on the defendant's legal practitioner. Secondly, the defendants argued that the court lacks jurisdiction to hear and determine the matter because there had been non-compliance with a statutory provision requiring ratification of the decision to allocate customary land rights. Such ratification lies with the relevant Communal Land Board and not this court. It is further alleged that there is an appeal noted with the Appeal Tribunal in respect of the land in question, thus a statutory body is seized with the matter which renders the action before this court premature. Lastly, the defendants' raised the issue of non-joinder of parties. This was gleaned from the plaintiffs' prayer seeking to evict the defendants and 'all those' in occupation of the units, which according to the defendants' suggests that there are other parties in occupation of the land and such parties have not been cited. The Court after having considered the arguments held as follows:

Held: that there is a distinction between cases in which there has been a complete failure of service, which cannot be condoned because service is a nullity, and cases in which there has been a less serious form of non-compliance (service that is not so irregular as to constitute a nullity), which may be condoned.
Held that: there was no complete failure of service in the matter. The purpose of service was achieved as the defendants were aware of the case they were required to meet.
Held that: there was no prejudice suffered by the defendants as a result of the manner in which service was effected.
Held further that: The parties had participated in all pre-trial stages of the matter. To order for the process to start afresh in the absence of prejudice and in circumstances where the

purpose of service had been achieved would not only be a waste of time and money but would go against the overriding objectives of the rules of court which is mainly to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively.

Held: that for this court not to exercise jurisdiction in respect of a specific matter, the court's jurisdiction must be excluded in unequivocal terms. Further, as stated in *Katjiuanjo and Others v Municipal Council of the Municipality of Windhoek* (I 2987/2013) [2014] NAHCMD 311 (21 October 2014), for the High Court not to entertain a matter, it must be clear that the original and unlimited jurisdiction it enjoys under article 80 of the Constitution and s 16 of the High Court Act has been excluded by the legislature in the clearest terms.

Held that: as was submitted by the plaintiffs, the prayer to have all other persons occupying the units evicted was a generic prayer, and the defendants had failed to identify any persons that ought to have been joined.

The Court in turn dismissed the special pleas altogether - with costs.

ORDER

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1. The defendants' special plea of defective service is dismissed.
2. The defendants' special plea of this court's lack of jurisdiction is dismissed.
3. The defendants' special plea of non-joinder is dismissed.
4. The defendants are ordered to pay the plaintiffs' costs occasioned by the special pleas, joint and severally the one paying the other to be absolved.
5. The matter is postponed to 27 June 2022 at 10h00 for a further pre-trial conference.
6. The parties are directed to file a joint pre-trial report on or before 22 June 2022.

RULING

MUNSU, AJ:

Introduction

[1] The plaintiffs instituted proceedings to evict the defendants from the residential and farming units situated at Olundjindja and Etunda Villages. The defendants raised three special pleas namely, defective service; lack of jurisdiction by this court and lastly, non-joinder. It is these special pleas that are subject to determination in this ruling.

Parties and representation

[2] The first plaintiff is the Ongandjera Traditional Authority, a traditional authority established in terms of section 2 of the Traditional Authorities Act, 2000 (Act 25 of 2000).

[3] The second plaintiff is Mr. Johannes Jafet Mupiya, an adult male and the Chief of the first plaintiff as contemplated in section 5 and 6 of the Traditional Authorities Act, 2000 (Act 25 of 2000).

[4] The third plaintiff is the Omusati Communal Land Board, a statutory body established in terms of section 2 of the Communal Land Reform Act, 2002 (Act 5 of 2002) hereinafter “the Act”.

[5] The fourth plaintiff is the Estate late Daniel Uutoni cited in its official capacity. It is administered and executed by his surviving spouse – the fifth plaintiff.

[6] The fifth plaintiff is Ms. Aili Ndapandameme Ilende, the surviving spouse of Mr. Daniel Uutoni and the executrix of his estate.

[7] The first defendant is Mr. Eliaser Megameno Iiyambo, an adult male, whose address for service is Slogan Matheus and Associates, Ongwediva.

[8] The second defendant is Mr. Simon Iiyambo, an adult male, whose address for service is Slogan Matheus and Associates, Ongwediva.

[9] The first to third plaintiffs are represented by Mr. Ncube, while the fourth and fifth plaintiffs are represented by Mr. Shapumba. The defendants are represented by Ms. Ambunda-Nashilundo on instructions of Slogan Matheus & Associates.

Background

[10] The plaintiffs allege in their particulars of claim that on 24 December 2014, the late Mr. Daniel Uutoni was allocated residential and farming units at Olundjindja and Etunda villages in the Ongandjera communal area by the third plaintiff under certificate number OMUCCB-CU 014703.

[11] It is alleged that on 02 March 2019, Mr. Daniel Uutoni passed away and was survived by his wife, the fifth plaintiff who is the executrix of his estate.

[12] It is further alleged that upon Mr. Uutoni's death, the defendants evicted the fifth plaintiff from her residential and farming units at Olundjindja and Etunda villages in one of the following ways:

a) They removed her movable properties and her other belongings from the residential and farming units.
b) They locked her out of and from the premises and rendered the premises inaccessible to her.
c) They illegally occupied the residential and farming units despite the land being allocated to her as the surviving spouse as provided for under section 26(2) of the Act.

[13] The plaintiffs further allege that on 30 October 2020, the first and second plaintiffs held a hearing in the presence of the defendants as well as the fifth plaintiff and their witnesses. It is alleged that at that hearing, the first and second plaintiffs ordered among others, that the rights over the land should devolve upon the fifth plaintiff as the surviving spouse. It was further ruled that the defendants had to restore to the fifth plaintiff her rights

and the peaceful and undisturbed possession of the residential and farming units within 30 days from the date of the hearing.

[14] Moreover, the plaintiffs allege that despite the legally binding decision, the defendants have refused to restore to the fifth plaintiff and afford her peaceful and undisturbed possession of the residential and farming units.

[15] It is alleged that the fifth plaintiff has a claim of *rei vindicatio* over the units in question as the surviving spouse for one or more of the following reasons:

a) She is the owner of the premises - at law;
b) She was in possession of the premises during and after the subsistence of her marriage to the late Mr. Daniel Uutoni.
c) The premises are still in existence and clearly identifiable.

[16] Lastly, it is alleged that at all material times, the aforementioned communal land is vested in the State in terms of section 17(1) of the Act read with article 100 of the Namibian Constitution.

[17] The plaintiffs seek relief in terms of which:

a) The fifth plaintiff's rights over the residential and farming units at Olundjindja and Etunda villages are restored.
b) An order directing the defendants to return the keys of the premises to the fifth plaintiff and providing her with vacant possession over the said units and allowing her peaceful and undisturbed possession of the said units within seven (7) days from the date of granting of the order;
c) Failing compliance with (b) above the deputy-sheriff of this Court is to be authorized to assist the fifth plaintiff to recover the keys of the premises and to remove the defendants from the units and to restore the fifth plaintiff to her premises;
d) An order in terms whereof the defendants and all those in occupation and claiming occupation of the units are evicted therefrom.

[18] Having set out the background, I now turn to deal with the special pleas raised.

Defective service

[19] The first special plea raised by the defendants is one of defective service of the combined summons. The combined summons was served by the deputy-sheriff on a certain Ms. Shimwoshili, the secretary, apparently over the age of 16 years and at the time in charge of the law firm Slogan Matheus & Associates. The return of service indicates that the service was effected in terms of rule 8(2)(b) which provides that where personal service is not reasonably possible, the deputy sheriff may leave a copy of the process at the place of residence or place of business of the person to be served.

[20] According to the defendants, they are cited in the combined summons as natural persons. In terms of rule 8(2)(a), they ought to have been served personally with the said summons. It was submitted that the plaintiffs are fully aware of where the defendants reside as they are seeking an eviction order against the defendants from a parcel of land on which the defendants are residing. However, there is no explanation as to how personal service was not possible in the circumstances. The defendants maintained that no attempt was made to serve the combined summons on their residential addresses.

[21] It was submitted that Ms. Shimwoshili, is not an employee of Slogan Matheus & Associates nor is she an agent of the defendants as she was not authorised in writing to accept service on behalf of the defendants as would have been required by rule 8(2)(e). At the time of service, Slogan Matheus & Associates had only assisted the defendants in the dispute before the first to third plaintiffs and in challenging the decision of the first plaintiff. This, according to the defendants is the only reason service was effected in the manner the plaintiffs did. However, the defendants submitted that at that stage Slogan Matheus & Associates had not yet come on record as legal representative for the defendants in this matter.

[22] According to the defendants, the court should be satisfied that the nature of the process had been conveyed to them in accordance with the rules. They emphasised that the onus is on the plaintiffs to show that service was effected in accordance with the rules and that if there was any deviation from the rules, they ought to have begged for leave from the court, which was not done. The defendants stressed that service is the all-important first step which sets a legal proceeding in train and concluded that the manner in which service was done in this matter is not in accordance with the rules of court and consequently, the service is defective as there was a failure of service.

[23] On the other hand, the plaintiffs deny that service on the legal representatives of the defendants constitutes defective service. They pointed out that the purpose of service is to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. Further, the plaintiffs submitted that if a party then proceeds to enter an appearance to defend through their legal representative, that fundamental purpose has been met.

[24] The plaintiffs submitted that the reason service was effected on the defendants' legal representative is because prior to the inception of these proceedings the defendants' legal representative had written letters to the first plaintiff raising issues concerning this matter. According to the plaintiffs, it was already common cause that the legal representative was acting on behalf of the defendants. Therefore, it was submitted that the defendants should not be heard to argue that service in this matter was no service at all, nor can they claim that it was irregular.

Determination

[25] From reading the authorities to which counsel referred me[1], there appears to be a distinction between cases in which there has been a complete failure of service, which cannot be condoned because service is a nullity, and cases in which there has been a less

[1] *Knowds NO v Josea and Another* 2007 (2) NR 792 (HC); *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* 2013 (1) NR 245 (HC); *Kapuire v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017-01508) [2017] NAHCMD 297 (18 October 2017); *Standard Bank v Maletzky* 2015 (3) NR 753 (SC); *Standic BV v Petroholland (Pty) Ltd* (I 2508/2012) [2019] NAHCMD 274 (02 August 2019).

serious form of non-compliance (service that is not so irregular as to constitute a nullity), which may be condoned. Thus, depending on the nature and degree of the irregularity, in instances where service is not so irregular as to constitute a nullity, such irregular service may be condoned. The rules of court and the circumstances of each case will have to be considered.

[26] In *Knouwds NO v Josea and Another,*[2] a matter that involved a sequestration of an estate, the court found that on the record before it, the respondent had not been served with a copy of the *rule nisi* and the founding papers and held that the proceedings were therefor null and void. The court held that:

'If short service is fatal, *a fortiori*, non-service cannot be otherwise. Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding that has taken place without service is a nullity and it is not competent for a court to condone it.'[3]

[27] In *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*[4] the issue was whether the application had been properly served on the Disciplinary Committee for Legal Practitioners. The Disciplinary Committee initially filed a notice to oppose the application, but then withdrew its opposition. As a point in *limine,* counsel for another respondent argued that service on the Disciplinary Committee had been defective because it had been effected on the Office of the Government Attorney, rather than the Chairperson of the Committee. The court held that the rule in the *Knouwds* case should be limited to the facts of that case which had concerned an application that affected status. The court went on to say that:

'The present circumstances are different and distinguishable. There was service on the Government Attorney in respect of a committee whose secretary is an employee of the Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the committee. The fundamental purpose of service is after all to bring the matter to

[2] *Knowds NO v Josea and Another* 2007 (2) NR 792 (HC).
[3] Para 23.
[4] *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* 2013 (1) NR 245 (HC).

the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, the fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import)'.[5]

[28] Mr. Ncube made a point that the *Knouwds* case was decided before the new rules on judicial case management were introduced when litigation was at the whim of the parties. However, I did not hear him to suggest that the *Knowuds* decision is not consonant with the new rules. Be that as it may, my understanding of the *ratio* in *Knouwds* is simply that, where there is a complete failure of service, it is not competent for a court to condone it.

[29] In *Kapuire v Minister of Safety and Security*[6] the plaintiffs, who were in-mates at a correctional facility sued the defendants for damages allegedly resulting from torture allegedly perpetrated on them by members of staff of the correctional facility. In serving the summons, the plaintiffs did not employ the services of the deputy-sheriff, but effected service on the Government Attorney instead of the defendants. The defendants claimed that the service was not in compliance with rule 8(1) which requires service of process initiating action proceedings to be served by the deputy sheriff. They raised a special plea for the court to set aside the service. The court found that it was obvious that the process was served at the correct address, although by a party who, on a strict reading of the relevant rule, should not have done so. The question that followed was whether such service was no service at all in which case the court would have had to require the plaintiffs to start the process afresh. The court held:

'[21] With everything said and done, can it be said that there was any damage or prejudice suffered by the defendants as a result of the service of the process at the proper office by the plaintiffs? I think not. I say so for the reason that the defendants filed their notice to defend and proceeded to file their special plea presently under consideration and further proceeded to file their respective pleas on the merits of the action. It cannot be said with a straight face and without any compunction, that the defendants have been prejudiced in this matter in a manner that has

[5] Para 17.
[6] *Kapuire v Minister of Safety and Security* (HC-MD-CIV-ACT-OTH-2017-01508) [2017] NAHCMD 297 (18October 2017).

seriously affected their right to fully and properly defend themselves in this matter as a result of the service of the process by the plaintiffs.

[30] Later on in the judgment, the court said the following:

'[24] In the instant case, it is clear that the process, albeit not served by the correct party, in terms of the rules, was actually served on the defendants' legal practitioners and they became aware of the case their clients had to meet. Furthermore, as indicated, the defendants entered their notice to defend the action and proceeded to file their special plea, together with their plea on the merits. In this regard, the inference is inescapable that the defendants were aware of the case they were being called upon to meet and they did not suffer any prejudice resultant from the non-service of the process by the deputy sheriff that would require the service to be regarded as if it never happened.

[30] The learned Judge went on to encapsulate the conclusions reached in *Standard Bank v Maletzky*[7] as follows:

'[26] The Supreme Court in *Maletzky* further held that a distinction should be made between irregular service and failure of service, although this may be question of degree. The court further stated that where the service is not in full compliance with the rules, the court may condone the service effected, albeit irregularly, in order to answer to the important principles of expeditious, cost-effective and fair administration of justice.[8] Lastly, the court also dealt with the issue of prejudice and held process served irregularly may be set aside if there has been demonstrable prejudice to the party served. If not, the court may condone the irregular service.'

[31] In the instant matter, the parties could not lay blame on each other for the belated hearing of the special pleas. However, the plaintiffs argued that if the defendants felt strongly about their special plea, they ought to have ensured that it was dealt with at inception. They forcefully submitted that it would be a manifest absurdity and contrary to the import of the rules if the court were to set aside the proceedings and order that service be reinstituted at this stage when the parties are preparing for trial.

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[7] Supra
[8] *Ibid* at para 23.

[32] The defendants entered appearance to defend and participated in the case plan of the matter; they filed pleadings which include the special pleas raised and a plea on the merits. Pleadings having been closed, they proceeded to file discovery affidavits; they participated in mediation; the case management conference; they filed witness statements and participated in a pre-trial conference.

[33] The defendants were represented from the inception of the proceedings up until this stage. They did not demonstrate or allege any prejudice suffered. On the question whether the purpose of service was achieved in this matter, I find the following submission by the defendants relevant:

> '…It is not our submission that we don't know what the case is all about, we know perfectly well what the case is. We also know what the rules require. If the process has to start over, let it be in accordance with the rules…'

[34] I find that there was no failure of service altogether in this matter. It is discernible from the foregoing that the purpose of service was achieved. As was similarly held in *Kapuire* case,[9] I find this to be a proper case where the court, without creating a precedent, can overlook the oversight of the plaintiffs and allow the service to stand, particularly as there was no prejudice suffered by the defendants as a result of the manner of service of the process.

[35] It is appropriate to repeat what was said by Schreiner JA in *Trans-Africa Insurance Co Ltd v Maluleka*[10]:

> 'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their real merits.'

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[9] Supra.

[10] *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 at 278.

[36] The matter is at an advanced case management stage, such that to order for the process to start afresh in circumstances where the purpose of service had been achieved and in the absence of prejudice will not only be a waste of time and money but will also go against the overriding objectives of the rules of court which is mainly to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively.[11] In the premises, I am of the considered view that the defendants' special plea cannot be allowed to stand and must fail.

Lack of jurisdiction

[37] The second special plea raised by the defendants' centres on section 24(1) of the Act which reads:

'24 (1) Any allocation of a customary land right made by a Chief or a Traditional Authority under section 22 has no legal effect unless the allocation is ratified by the relevant board in accordance with the provisions of this section.'

[38] The defendants contended that the plaintiffs' case is premised on the alleged binding nature of the allocation of the farming and residential units at Etunda and Olundjindja villages to the fifth plaintiff by the first and second plaintiffs. The defendants argued that there are no allegations of the statutory ratification having been done by the third plaintiff.[12]

[39] The parties agree that the allocation of the customary land rights by the first and second plaintiffs has not been ratified by the third plaintiff. It was submitted that such allocation or consent by the first and second plaintiff is of no legal force and effect unless the allocation has been ratified by the third plaintiff. Put differently, the defendants submitted that section 24(1) of the Act does not clothe the decision by the first and second plaintiffs with legal validity. The defendants made reference to *Joseph and Others v Joseph*[13] wherein the Supreme Court stated the following:

[11] See rule 1(3) of the rules of Court.
[12] The third plaintiff is cited, as I understand, due to the interest it has in the matter. It was submitted that its citation whether as plaintiff or defendant in neither here nor there.
[13] *Joseph and Others v Joseph* 2020 (3) NR 689 (SC)

'[28] The customary land rights recognized in the Act are the 'right to a farming unit' and the 'right to a residential unit' and those other rights that may be recognized by the minister by notice in the Gazette.[14]These rights are allocated by the relevant chief or the traditional authority.[15] The land board must ratify allocations of land and once this is done, they are registered in the prescribed register and the certificate to this effect is issued to the holder of the right.[16] On the death of the rights holder the land reverts to the chief or traditional authority for re-allocation. This re-allocation is however circumscribed so that, e.g. the surviving spouse will be entitled to such allocation if so desired.'[17]

[40] In view of the non-compliance with the ratification clause, the defendants' submitted that this court has no jurisdiction to hear and determine this matter.

[41] Furthermore, the defendants argued that if the court is to grant the main relief sought (eviction), the court will be endorsing the fifth plaintiff as the owner of the said units despite the fact that the authority to decide who the owner of the land vests with the third plaintiff and not this court. It was the defendants' contention that section 24(1) of the Act is a limitation on this court's jurisdiction. It was submitted that the decision by the first and second plaintiff is unenforceable as the matter is premature before this court.

[42] There is a second leg to the issue of lack of jurisdiction by the court. It rests on what is alleged are the common cause facts between the parties, being that the defendants have lodged a complaint and/or appeal against various decisions by the first and second plaintiffs, including the allocation of the rights in the parcels of land in question to the fifth plaintiff. The defendants submitted that it is trite between the parties that the responsible Minister of Agriculture, Water and Land Reform acknowledged that he is seized with the appeal for consideration by the Appeal Tribunal in terms of section 39 of the Act. This, according to the defendants, essentially means that the plaintiffs are seeking relief from this court based on a decision that is the subject of an appeal before a differently constituted statutory body. The defendants drew the court's attention to the words by

[14] Section 21 of the Act.
[15] Section 20 of the Act.
[16] Section 25 of the Act.
[17] Section 26 of the Act. See also *Mutrifa v Tjombe* (I 1384/2016) [2017] NAHCMD 162 (14 June 2017).

Parker AJ in *Ovambanderu Traditional Authority v Nguvauva*[18] wherein the learned Judge said the following:

> 'Where a statute has vested powers in a statutory body to carry out certain functions and perform certain duties, the court should not without lawful justification take any decision likely to thwart (frustrate) the statutory body in carrying out those functions and performing those duties.'

[43] In view of the above, it was submitted that this court has no jurisdiction to determine this matter which is a consequence of an unenforceable allocation the subject of an appeal now pending before the relevant statutory body. Suffice it to state that it is not quite clear as to which decision lies for appeal with the Appeal Tribunal. I got the impression that, in addition to the decisions made by the first and second plaintiffs, the third plaintiff equally had a say on the matter. The more the parties attempted to clarify the issue from the bar, is the more they seemed to be adducing evidence. This aspect is not clear on the pleadings and would be best dealt with in evidence.

[44] Furthermore, the defendants contended that the plaintiffs' pleaded case is that the fifth plaintiff is by virtue of the valid decision of allocation the owner of the units. Yet, in the submissions, the plaintiffs' case changed to one that the fifth plaintiff is the rightful possessor and that she has a better title over the units compared to the defendants, presupposing a shift from a claim based on *rei vindicatio* to one based on the *mandament van spolie.*

[45] On the other hand, the plaintiffs submitted that the fifth plaintiff was in occupation of the concerned land during the subsistence of her marriage to Mr. Daniel Uutoni. It was emphasised that upon Mr. Uutoni's death, the fifth plaintiff continued to be the rightful possessor of the land in question as the surviving spouse. On this score, the defendants submitted to the contrary that this interpretation is wrong to the extent that it suggests an automatic legal allocation of the customary land rights to the fifth plaintiff.

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[18] *Ovambanderu Traditional Authority v Nguvauva* (A 172-2016) [2016] NAHCMD 235 (18 August 2016), para 12.

[46] It was the plaintiffs' contention that the fifth plaintiff was subsequently granted consent to occupy the land by the first plaintiff in terms of section 26(2) of the Act. Moreover, it was argued that on 30 October 2020, the first plaintiff held a hearing on the issue and it found that the fifth plaintiff was the rightful occupier and possessor of the land.

[47] The plaintiffs maintained that the findings of the hearing of 30 October 2020 were not set aside by a competent tribunal or a court of law and they remain extant. Therefor, it was argued that the fifth plaintiff, who is already in occupation of the concerned units by virtue of marriage, has a better title to the land compared to the defendants whose occupation was found to be invalid.

[48] The plaintiffs stressed that the position would be the same even if the third plaintiff has not yet ratified the allocation. It was submitted that if ratification was to be an issue, it would be for the plaintiffs to deal with it in evidence. It was further argued that the defendants are raising the issue of ratification because they did not appeal or seek a review of the first and second plaintiffs' decision. The plaintiffs submitted that the decision by the first and second plaintiff does not hinge on ratification in order to have the force of law. It is for that reason, so it was argued, that in terms of section 39 of the Act, such decision can be appealed or reviewed before it is ratified. I agree that the decision remains in force until and unless set aside. This is in accordance with the well-established principle in *Oudekraal*[19] to the effect that the exercise of public power must be presumed to be valid and have legal consequences unless and until reviewed and set aside.[20]

[49] Moreover, it was argued that the fifth plaintiffs' rights in terms of section 26(2) of the Act and the findings by the first plaintiff are entirely protected by the presumption of regularity.[21] To this the defendants argued that it cannot be presumed that the decision of the first and second plaintiffs is valid as there is a clear procedure set out by the Act on what is supposed to be done in order for the decision to be valid, which was not done in this matter. Therefore, it was submitted that the presumption of regularity does not apply.

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[19] *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26.

[20] See *Musweu v The Chairperson of the Appeal Tribunal* (HC-MD-CIV-MOT-REV-2017-00400) [2022] NAHCMD 169 (05 April 2022).

[21] See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC). The presumption of regularity is a generally deferential principle that courts apply to presume executive branch officers and employees are lawfully and consistently discharging their duties.

[50] It was the plaintiffs' contention that the fifth plaintiff has an interest in the protection of her *possessory* claims/rights and for that reason has *locus standi* to institute eviction proceedings against the defendants and therefore, the court has jurisdiction to adjudicate the matter as it is justiciable.

[51] The plaintiffs further argued that in order for the court's jurisdiction to be ousted, there ought to be a specific statutory provision to that effect, which does not exist in this case. The plaintiffs pointed out that the fifth plaintiff is entitled to approach the court for redress regardless of the provision in the Act that allows the defendants to appeal to other statutory bodies.

Determination

[52] The defendants did not raise, nor did they suggest that the plaintiffs do not have *locus standi* in this matter. They however, argued that the mere fact that one has *locus standi* to bring proceedings does not necessarily clothe the court with jurisdiction.

[53] It is not in dispute that the fifth plaintiff was a spouse to the late Mr. Daniel Uutoni. A marriage certificate to that effect was attached. The plaintiffs allege that the late Mr. Daniel Uutoni was allocated customary land rights over farming and residential units which are the subject of this dispute. A certificate to that effect was attached to the particulars of claim. It is alleged that upon Mr. Uutoni's death, the fifth plaintiff continued to possess the said units as the surviving spouse. She was subsequently allocated or given consent over the said units by the first and second plaintiffs. It is alleged that the defendants evicted her from the said units. It is for that reason that the plaintiffs approached this court to vindicate the fifth plaintiff's rights over the units.

[54] It seems to me that, it is from the above factual matrix that the plaintiffs appear to have interchangeably used the concepts of ownership and possession. On the above highlighted facts, the plaintiffs' case appears to be straightforward and there ought reasonably to be no confusion or prejudice to follow from the use of the concepts of

ownership and possession. In any event the plaintiffs pleaded that the land in question vests in the State in terms of section 17(1) of the Act and article 100 of the Constitution.

[55] The onus of establishing a special plea rests on the defendants.[22] The plaintiffs identified the customary land rights claimed by the fifth plaintiff.[23] The defendants' pleaded case is that the farming and residential units they are in occupation of are not the same units from which the plaintiffs seek to evict them. This averment did not feature in their submissions. It follows that the court is faced with facts that are not common cause between the parties, which makes the resolution of the special plea on papers problematic.[24] The defendants elected not to lead evidence in support of the special plea.

[56] The plaintiffs' pleaded case is that the fifth plaintiff is being disinherited and disenfranchised of the farming and residential units by the defendants. On the contrary, the defendants disputed in their pleaded case that the farming and residential units in question are the ones they are in occupation of. Firstly, I found this issue to be a matter for evidence. Secondly, it is not alleged by either the plaintiffs or the defendants that after the demise of the fifth plaintiffs' husband, the fifth plaintiff went on to occupy units other than those which were allocated to her husband. The impression created from the plaintiffs' pleaded case is that fifth plaintiff remained in occupation of the units which were allocated to her late husband and subsequently to her until she was dispossessed by the defendants.

[57] The second issue raised by the defendant in their pleaded case relates to the alleged hearing of 30 October 2020. They admit that the hearing took place but aver that they were only invited to the meeting and informed of the orders without a fair hearing, and that the orders and decision taken by the plaintiffs at the meeting were based on wrong facts and law and as a result they are invalid. As pointed out earlier, the decision remains valid until set aside.

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[22] See *Mahamo v Lesotho National General Insurance Company* (C of A (CIV) 51/2017) [2021] LSCA 27 (14 May 2021).
[23] See *Maswahu v Katima Mulilo Town Council* (I 1575/2015) [2015] NAHCMD 284 (18 November 2015).
[24] See *Swanu of Namibia v Katjivirue* (HC-MD-CIV-ACT-OTH-2021/03315) [2022] NAHCMD 98 (09 March 2022).

[58] I do not understand the plaintiffs to have approached this court in order for the court to allocate customary land rights to the fifth plaintiff. In fact, it appears from the factual matrix of this matter that they are fully aware of the bodies established for that purpose. I understand the plaintiffs to have approached this court because the defendants have allegedly dispossessed the fifth plaintiff of the farming and residential units which she was in occupation of. The majority of the facts appear to be common cause except for what I highlighted above as facts placed in dispute.

[59] In *Joseph and Others v Joseph*[25] the Supreme Court held that:

'[26] In the normal course, a plaintiff who seeks the eviction or ejectment of someone from the property needs to prove only a possessory claim based on his or her right to possess and that the person he is seeking to evict does not have a better claim than him or her.[26] Obviously an owner can also vindicate his or her own property based on the ownership thereof by way of a *rei vindicatio*. Ownership is however not the only possessory right that can sustain a vindicatory claim as suggested in the *Ndevahoma* case. It is common cause that the ownership of communal land vests in the State…'

[60] The court went on to say the following in paragraph [40]:

'It thus follows that, s 43 of the Act does not prevent a person who has a right to communal land allocated to him or her from protecting such right through the use of a vindicatory action available to possessors under common law.'

[61] Mr. Ncube made reference to an authoritative decision of *Emil Sindere Mbuto v Ettiene Scholtz and 4 Others*[27] wherein counsel similarly argued that because the relevant Communal Land Board had not ratified the customary land right allocated to the plaintiff nor issued him with a certificate of registration, the plaintiff had no right and could therefore not seek the ejectment or eviction of the defendant from the farming unit. The court, after examining the provision on ratification made the following finding:

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[25] Supra.
[26] *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T) and *Steenkamp v Mienies & andere* 1987 (4) SA 186 (NC).
[27] *Emil Sindere Mbuto v Ettiene Scholtz and 4 others* (I 1/2018) [2021] NAHCMD 450 (01 October 2021).

'[43] In the present matter what cannot be disputed is the fact that Mr Mbuto has been in occupation of the farming unit since at least the year 2004. It follows that Mr Mbuto has *ius possessionis* of the farming unit entitling him to all powers and privileges flowing from the mere basis of him being in possession of that farming unit. It therefore follows that in the present matter where Mr Mbuto is seeking to enforce his possessory claim the question of whether or not his customary right has been ratified and he issued with a certificate of registration is irrelevant.'

[62] In *Gaoseb v Telecom*[28] the court held that in order for this court to decline to exercise jurisdiction in respect of a specific matter the court's jurisdiction must have been excluded in unequivocal terms. Similarly, in *Katjiuanjo and Others v Municipal Council of the Municipality of Windhoek*[29] the court stated that for the High Court not to entertain a matter, it must be clear that the original and unlimited jurisdiction it enjoys under article 80 of the Constitution and s 16 of the High Court Act has been excluded by the legislature in the clearest terms. The court went on to say the following in paragraph [14]:

'The issue in my view is not so much whether the Labour Court does have jurisdiction, but whether the legislature intended to exclude the High Court's jurisdiction in the kind of dispute now before court…'

[63] I was not referred to any provision in the Act that clearly ousts the court's jurisdiction in this matter. Having regard to the facts of the matter and the kind of relief sought by the plaintiffs in view of what was said in the authorities cited above, I find that this court has jurisdiction to hear and determine the matter. Similarly, the defendants' special plea of lack of jurisdiction must fail.

Non-joinder

[64] The third special plea raised by the defendants is one of non-joinder. It is premised on prayer 4 of the particulars of claim which reads as follows:

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[28] *Gaoseb v Telecom* (HC-MD-CIV-ACT-OTH-2019-01168) [2019] NAHCMD 407 (02 October 2019)
[29] *Katjiuanjo and others v Municipal Council of the Municipality of Windhoek* (I 2987/2013) [2014] NAHCMD 311 (21 October 2014).

‘An order in terms whereof the defendants and all those in occupation and claiming occupation are evicted from the residential unit in Olundjindja Village, Ongandjera and the farming Units at Etunda Village, Ongandjera.’

[65] It was submitted that in terms of the above prayer, the plaintiffs suggest that there are other people in occupation of the parcels of land in question. Despite this, the defendants submitted that the plaintiffs have not identified those occupants, neither did they make them parties to these proceedings, let alone serve them with court process in these proceedings. It was argued that the unidentified persons would have a direct and substantial interest in the outcome of these proceedings and therefore ought to have been joined.

[66] In replication, the plaintiffs aver that they are not aware of any other person in unlawful occupation of the units in question. The plaintiffs argued that in eviction proceedings, persons who are sought to be evicted and happen to be known to the parties are invariably identified in the particulars of claim. Any other unknown person who claims occupation through the identified party is included by the generic prayer and subsequent court order. According to the plaintiffs, they are not aware of the individuals, if any, who are in illegal occupation of the units through the defendants. The defendants did not identify any. Accordingly, nothing turns on this point in *limine* and it must likewise fail.

Costs

[67] The general rule is that costs follow the event. There is no reason why this rule should not apply in this matter. In my view, the special plea of lack of jurisdiction had the potential to finally dispose of the matter and is therefore not interlocutory. It is accordingly not subject to rule 32(11).

[68] In the result, it is ordered as follows:

1. The defendants’ special plea of defective service is dismissed.
2. The defendants’ special plea of this court’s lack of jurisdiction is dismissed.

3. The defendants' special plea of non-joinder is dismissed.
4. The defendants are ordered to pay the plaintiffs' costs occasioned by the special pleas, joint and severally the one paying the other to be absolved.
5. The matter is postponed to 27 June 2022 for a further pre-trial conference.
6. The parties are directed to file a joint pre-trial report on or before 22 June 2022.

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D C MUNSU

ACTING JUDGE

APPEARANCES

FOR THE 1ST – 3RD PLAINTIFFS:	Mr. J. Ncube Government Attorneys, Windhoek
FOR THE 4TH – 5TH PLAINTIFFS:	Mr. A. Shapumba Shapumba & Associates Inc., Ondangwa
FOR THE DEFENDANTS:	Ms. L. Ambunda-Nashilundo Instructed by Slogan Matheus & Associates, Ongwediva