

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
EX-TEMPORE RULING

Case no: HC-MD-CIV-MOT-GEN-2017/00289

In the matter between:

OVAMBANDERU TRADITIONAL AUTHORITY

APPLICANT

and

ALETHA NGUVAUVA

1ST RESPONDENT

UETUJETA TJOZONGORO

2ND RESPONDENT

HERLINDE SABOTHLE BOTHITILE

3RD RESPONDENT

JANNIE LEFF

4TH RESPONDENT

**NAMIBIAN POLICE FORCE FOR THE
DISTRICT OF OMAHEKE**

5TH RESPONDENT

Neutral citation: *Ovambanderu Traditional Authority v Nguvauva* (HC-MD-CIV-MOT-GEN-2017/00289) [2017] NAHCMD 243 (18 August 2017)

Coram: USIKU, J

Heard on: 18 August 2017

Delivered: 18 August 2017

Flynote: Practice – Applications and motions – Urgent application – Requirements of Rule 73 (4).

Summary: Applicant brought an urgent application for an order interdicting and restraining the 1st Respondent from holding commemorations at Okeseta on 18th to 20th August 2017 or on any other day thereafter, without prior written permission of the Applicant – Court finding that the Applicant has failed to meet the requirements of Rule 73(4) and strikes the application from the roll, for lack of urgency.

ORDER

1. The application is struck from the roll, for lack of urgency.
2. The applicant is ordered to pay the costs of the Respondent and such costs are to include costs of one instructing and one instructed counsel.

RULING

USIKU, J:

Introduction

[1] In this matter the Applicant asked this court to hear on urgent basis an application in which the Applicant prayed for orders in the following terms:

- ‘1. That the applicant’s non-compliance with the forms and service are provided for in the Rules of this Honourable Court be condoned and that the matter be heard on an urgent basis as contemplated in rule 73(4).
2. That a rule nisi be issued calling upon the respondents to show cause , if any, on a date to be determined by this Honourable Court, why an order in the following terms should not be granted:

- 2.1 interdicting and restraining the first respondent and any member or supporter of the Concerned Group from proceeding with the commemorations at Okeseta on 18 and 20 august 2017 or any other day thereafter without prior written permission from the Applicant at any other sacred site of the applicant.
- 2.2 interdicting and restraining the first and second respondent from entering Okeseta sacred and holy cemetery situated at the premises of Okeseta at Farm Groot Kunichas No. 947, in Gobabis.
3. Ordering that paragraphs 2.1 to 2.2 shall operate as an interim order with immediate effect pending the return date of the rule nisi.
4. That the applicant's legal representative, Tashiya Iifo, be authorized to cause a copy of this order to be served on the first respondent in the following manner:
 - 4.1. by service through the Deputy Sheriff and/or by way of radio announcement on the Otjiherero radio station and by causing a copy of the order to be affixed to the cemetery at Okeseta on Farm Groot Kunichas, in Gobabis.
5. The application is to be served in accordance with the Rules of Court, as soon as possible.
6. Ordering the respondent, who opposes this application to pay the cost of one instructing and one instructed counsel.
7. Further and/or alternative relief.'

Substance of the application

[2] From the above quoted relief sought and in the light of the evidence adduced, I understand the substance of the application to boil down to the following construct:

(a) the Applicant seeks to interdict on urgent basis, the First Respondent and any member of the 'Concerned Group' from proceeding with the commemorations at

Okeseta or other sacred sites, on the 18 to 20 August 2017, or any other day thereafter, without written permission of the Applicant;

(b) what is sought to be interdicted appears to me to be the planned “commemorations”. The verb “commemorate” means “to honour or to keep alive the memory of”¹;

(c) the envisaged commemorations are programmed to be conducted at Okeseta, situated on Farm Groot Kunichas No. 947, Omaheke Region, which is private property, and which is not owned by, nor under the control of, the Applicant;

(d) the commemorations are regarded as a customary/traditional/cultural event, and the interdict sought is based on the notion that the Applicant, as the custodian of the customs, culture and tradition of its traditional community, is entitled and empowered to regulate events of such nature.

[3] In essence, what would ultimately have to be determined in an application of this nature are:

(a) the proprietary nature of customs, culture or tradition, and

(b) the ownership of such customs, culture or tradition, if the same is capable to be termed as “property”.

Opposition by Respondent

[4] The First Respondent opposed the application. There was no opposition on the part of the other Respondents. I shall, therefore, make reference to the First Respondent as “the Respondent” herein, except where the context otherwise indicates.

[5] The Respondent raised two points in *limine*, namely, that:

(a) the application lacked urgency, and

¹ Collins Dictionary of the English Language, 2nd Edition, 1986.

(b) that the Applicant has no authority to seek the relief it seeks, in that, such relief would infringe upon her constitutional rights to practice and profess her culture and tradition, as guaranteed by *Article 19 of the Namibian Constitution*.

Whether the matter warrants to be heard on urgent basis

[6] In matters brought on the basis of urgency, the first point of departure is to establish whether urgency has been set out. In the event that urgency is not established, the matter, insofar as urgency is concerned, is disposed of and the Applicant if so inclined, proceeds in the normal course. If the Applicant passes the test of urgency, and other points raised in *limine*, if any, the court shall then consider the merits of the matter.

Applicant's argument

[7] The Applicant argued that it is the Traditional Authority, duly recognized under the provisions of the *Traditional Authorities Act No. 25 of 2000*, and as such, it is the custodian of the customs, tradition and culture of its traditional community.

[8] The August commemorations are traditionally held annually around the 18th August, that date being the day on which the late Chief Nicodemus Nguvauva was buried. The commemorations are held in preservation and furtherance of the Ovambanderu traditional community's customs, culture and tradition, and such commemorations have been so held since time immemorial.

[9] The Applicant had on 12 August 2017 placed a moratorium on holding commemorations for the year 2017. The First and Second Respondents were informed of that decision on 16 August 2017 and were requested to desist from continuing with their intended commemorations. The Respondent has responded to that request by making it clear that she shall proceed with her commemorations as planned.

[10] The Applicant argues that its application in this matter, is urgent because:

(a) Applicant has no other choice but to bring this application on urgent basis;

(b) Applicant will not be afforded substantial redress at a hearing in due course;

(c) if the relief sought is not granted on an urgent basis, the Respondent will proceed with the commemorations, and any legal proceedings brought thereafter will be academic and the damage done to the significance of the annual commemorations will be irreparable;

(d) if the relief sought is not granted, the Applicant and its community will suffer irreparable harm and prejudice, because custom and tradition will be "extinguished."

Respondent's argument

[11] The Respondent, on the other hand, argued that the Applicant is aware of the factious stance presented by the Respondent and the latter's position on commemorations.

[12] The Respondent further contended that she and her followers had conducted similar commemorations on 6-8 November 2015 and during August 2016. The Applicant could have launched an application for interdictory relief in the normal course to get the relief it wants. She further submitted that in the light of the previous commemorations she had conducted without the authority from the Applicant, the urgency claimed by the Applicant is self-created.

[13] Furthermore, the Respondent argued that Applicant did not allege that the Respondent will bring tradition and custom into disrepute by holding the planned commemorations, nor did it allege that Respondent would desecrate the holy site. In addition, it is not alleged by the Applicant that there would be a clash of commemorations between more than one factions of the traditional community. Besides, the commemorations shall take place on private property, not owned and not under the control of the Applicant.

Whether the requirements of urgency have been met

[14] *Rule 73(4)* requires that for an application to be heard on an urgent basis, an applicant must explicitly set out the:

(a) circumstances which he/she avers render the matter urgent, and

(b) the reasons why he/she claims could not be afforded substantial redress at a hearing in due course.

[15] The Applicant is required to set out the “circumstances” and the “reasons” referred to above, clearly and in detail, leaving no room for confusion or doubt.² Failure to comply with either of the two requirements set out above, may result in the application for the matter to be heard on urgent basis being refused.

[16] In determining whether a matter is urgent or not, each case is decided on its own facts.³

[17] In this matter, the Applicant contends that since the Respondent intends to hold her commemorations as from the 18th to 20th August 2017, and today is already the 18th August 2017, its application is urgent. It has no other choice but to bring this application on urgent basis.

[18] This application was brought on the 17 August 2017 for hearing today. Applicant states that it came to know of Respondent’s intentions only on the 8th August 2017 when it heard a radio broadcast by the First and Second Respondents announcing the commemorations to be held during the 18th to 20th August 2017. The Applicant held a meeting and its lawyers could only be instructed on the 15 August 2017.

[19] The above facts and action by the Applicant are not disputed. However, the Applicant has not explicitly set out the circumstances that makes interdicting the planned commemorations urgent, which circumstances did not exist when the Respondent held similar commemorations in year 2015 and 2016. Put differently, if

² *Nghimbwasha v Minister of Justice and others* (Unreported) A38/2015 [2015] NACHCMD 67 (20 March 2015).

³ *Tjipangandjara v Namibia Water Corporation (Pty) Ltd* (LC 60/2015) [2015] NALCMM 11 (11 May 2015).

the Respondent and her followers had held similar commemorations not sanctioned by the Applicant, why didn't the Applicant launch necessary legal proceedings, in due course, seeking to interdict the Respondent (and any other person) from holding similar commemorations, without prior permission of the Applicant. To wait for the Respondent to make an announcement of her intention to hold further commemorations, in the circumstances of this case, and then rush to court, on urgent basis, does not render the matter urgent.

[20] As to whether the Applicant has explicitly stated reasons why it alleges that it cannot be granted substantial redress at a hearing in due course, the Applicant contents itself with stating bare conclusions without setting out the premises upon which such conclusions are based. For example, the Applicant states that if the relief sought is not granted on urgent basis:

(a) the damage to the significance of the annual commemorations will be irreparable, and;

(b) the Applicant and its traditional community will suffer irreparable harm and prejudice, because custom and tradition would be extinguished.

[21] The Applicant has not explicitly set out how and to what extent the planned commemorations by the Respondent would cause damage to the significance of annual commemorations. The Applicant, further, did not set out the nature of such damage and why it would be irreparable. It further did not inform the court whether or not past commemorations held by the Respondent resulted in damage to the significance of annual commemorations and, if so, how such damage was managed.

[22] If the Applicant does not explicitly state the nature of the damage it may suffer, then the Applicant would not be in a position to argue that, if the relief it seeks is not granted and the commemorations proceed and Applicant later obtains the redress it seeks at a hearing in due course, the Applicant would not be put in the position it would have been had the commemorations been interdicted. Put differently, if the Applicant cannot show the nature of the damage it would suffer,

then the Applicant cannot argue that it would suffer irreparable damage, if the relief it seeks is not granted.

[23] In the same vein, the Applicant did not set out any factual basis for its allegation that if the relief sought is not granted, custom and tradition will be extinguished.

[24] For the foregoing reasons, I am not persuaded that the Applicant has explicitly set out reasons why it alleges that it will not be afforded substantial redress at a hearing in due course. The application therefore falls to be struck from the roll, for lack of urgency.

[25] As regards the question of costs, the costs must follow cause and I am satisfied that the matter warrants costs of one instructing and one instructed counsel.

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

1. the application is struck from the roll, for lack of urgency.
2. the Applicant is ordered to pay the costs of the Respondent, and such costs are to include costs of one instructing and one instructed counsel.

B Usiku
Judge

APPEARANCES

APPLICANT:

A Boesak

Instructed by AngulaCo Inc.

Windhoek

1st and 2nd RESPONDENTS:

JP Jones

Instructed by Ueitele and Hans Inc.

Windhoek