

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING *I.T.O.* PRACTICE DIRECTIVE 61**

CASE NO. HC-MD-CIV-MOT-GEN-2019/00132

In the matter between:

**MIKA TJIZUNGO ANDREAS**

**APPLICANT**

and

**MARIA KAMBINDA**

**1st RESPONDENT**

**JOSE KAMBINDA**

**2nd RESPONDENT**

**JOSEFINA KAMBINDA**

**3rd RESPONDENT**

**ALBERTO CHIKUWA KAMBINDA**

**4th RESPONDENT**

**ROBEN KAMBINDA**

**5th RESPONDENT**

**RICARDO ZENDE KAMBINDA**

**6th RESPONDENT**

**FERNANDO LIDU KAMBINDA**

**7th RESPONDENT**

**DERK KAMBINDA KAMBINDA**

**8th RESPONDENT**

**Neutral Citation:** *Andreas v Kambinda* (HC-MD-CIV-MOT-GEN-2019/00132)

[2019] NAHCMD 133 (2 MAY 2019)

**Coram:** Masuku, J

**Heard on:** 26 April 2019

**Delivered on:** 02 May 2019

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## ORDER

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1. The application is dismissed with costs.
  2. The reasons for the order will be handed down on 2 May 2019 at 08h30.
  3. The matter is removed from the roll and is regarded as finalized.
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## REASONS FOR THE ORDER

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MASUKU J:

### Introduction

[1] The applicant approached this court on an urgent basis seeking an order in the following terms:

'1. Condoning the non-compliance with the form and service provided for by the Rules of the above Honourable Court and hearing this application as one of urgency in terms of Rule 73.

2. A Rule nisi be issued, calling upon the respondents to show cause on a day to be arranged with the Registrar, why an order should not be granted in the following terms: 2.1 Interdicting and restraining the Respondents from conducting a burial service and burying of the late Pius Kambinda at grave number 2073, Hendrik Witbooi Road, Pioneerspark Cemetery, Windhoek, Republic of Namibia.

3. That sub-paragraph 2.1 serve as a temporary interdict with immediate effect.

4. Ordering that the costs of this application be paid by the Respondents, jointly and severally, the one paying the other to be absolved.

5. Further and/or alternative relief.'

[2] The application was opposed and various points of law in *limine* were raised by the respondents inter alia; *locus standi* and non-joinder.

### Urgency

[3] The applicant filed a certificate of urgency that set the urgent application down for hearing at 14:30. Respondents argued that same was defective as it did not comply with Rule 73 (1) in that it did not set out why the matter could not be heard at 09:00 as provided for under the said rule. I upheld the point in law as good for the reason that the applicant did not state why the matter was so urgent as not to be set down at 09h00. The applicant's legal practitioner lay the blame at the door of ejustice, which cannot be. If the notice of motion generated by ejustice was in any way, shape or form incorrect, he had to ensure that the error is corrected accordingly.

### Locus standi in judicio

[4] The applicant's legal practitioner made submissions to the court about the nature of the relationship between the deceased and applicant. There was however, nothing in the papers suggesting in what capacity applicant had brought the application and the nature of his relationship with the deceased. Applicant conceded that it was not specifically stated in the founding papers and the respondent correctly argued that onus rests on an applicant to allege and prove *locus standi*. It was further argued that it must appear from the founding papers and there must exist, a legal *nexus*. It is trite that an applicant stands or falls on the allegations contained in the founding affidavit. Embellishment of the allegations from the bar is not allowed. The right of the applicant to bring the application was not disclosed in the papers and the application ought to fail therefor.

### Non-Joinder

[5] The applicant alleged that he was authorised by a number of family members of the deceased to bring this application but failed to provide this

court with any power of authority. There is no evidence provided why, these persons could not be joined as parties or why they could not bring the present application themselves. There was therefor non compliance with the principles set out in *Wood & Others v Ondangwa Tribal Authority and Another*.<sup>1</sup>

#### Non compliance with requisites for an interim interdict

[6] Applicant failed to comply with all the requirements of an interim interdict. These are (a) a right which is prima facie established, although open to some doubt; (b) a well grounded apprehension of fear; (c) that the balance of convenience favours the granting of the interim interdict and (d) that the applicant has no other satisfactory remedy.<sup>2</sup>

[7] In particular, the applicant failed to state reasons in his founding affidavit why he alleged that the balance of convenience favoured the application being granted; why there was a well-grounded apprehension of fear and also failed to allege and show that the applicant had no other suitable remedy open to him. In fact the applicant paid scant regard to these foundational requisites, without which an interim interdict may not be granted.

#### Other issues

[8] It was also alleged in the papers by the applicant and others who filed confirmatory affidavits that the deceased had informed them and other members of the family that he wished to be buried in Rundu upon his demise. Unfortunately, this is inadmissible hearsay and does not fall within the recognised exceptions to the hearsay rule. In this regard, the deceased cannot be called to confirm the assertion attributed to him.

[9] Lastly, the applicant argued that there was a customary practice or rite that required that the deceased be buried in Rundu. The applicant is not an expert in customary law and he cannot give testimony in this regard as customary

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<sup>1</sup> 1975 (2) SA 294.

<sup>2</sup> C. B. Prest, *Interlocutory Interdicts*, Juta & Co, 1993 at p.55

law must be proved as a fact for it to be applied, having satisfied the requirements in *Van Breda v Jacobs*<sup>3</sup>. There was no expert evidence tendered nor was it shown that the customary rituals for burying the deceased could not be performed in Windhoek, where the respondents wished that he be buried.

[10] It was for the foregoing reasons that the application was dismissed with costs.

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TS Masuku  
Judge

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<sup>3</sup> 1921 AD 330.

## APPEARANCES

APPLICANT: J. Muchali  
Of Jermaine Muchali Attorneys, Windhoek

RESPONDENTS: K. Haraseb  
Of ENSAfrica, Windhoek