



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

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2019/00243

In the matter between:

**NAMRIGHTS INC**

**APPLICANT**

and

**GOVERNMENT OF NAMIBIA**

**1st RESPONDENT**

**OMBALANTU TRADITIONAL AUTHORITY**

**2nd RESPONDENT**

**OMBADJA TRADITIONAL AUTHORITY**

**3rd RESPONDENT**

**SAM NUJOMA**

**4th RESPONDENT**

**NAMTRANSLATION SERVICES CC**

**5th RESPONDENT**

**ELIZABETH NYEUVO EKANDJO**

**6th RESPONDENT**

**OMBUDSMAN**

**7th RESPONDENT**

**EVANGELICAL LUTHERAN CHURCH IN NAMIBIA**

**8th RESPONDENT**

**NAMIBIAN CHAMBER OF COMMERCE AND INDUSTRY**

**9th RESPONDENT**

**NAMIBIA TOURISM BOARD**

**10th RESPONDENT**

**NAMIBIA NATIONAL FARMERS' UNION**

**11th RESPONDENT**

**NAMIBIA AGRONOMIC BOARD**

**12th RESPONDENT**

**NAMIBIA ARTS COUNCIL**

**13th RESPONDENT**

**WOMEN'S LEADERSHIP CENTRE**

**14th RESPONDENT**

**WOMEN'S SOLIDARITY OF NAMIBIA**

**15th RESPONDENT**

<b>RESPONDENT SISTER NAMIBIA</b>	<b>16th RESPONDENT</b>
<b>WOMEN'S ACTION FOR DEVELOPMENT</b>	<b>17th RESPONDENT</b>
<b>LEGAL ASSISTANCE CENTRE</b>	<b>18th RESPONDENT</b>
<b>LIFELINE-CHILDLINE NAMIBIA</b>	<b>19th RESPONDENT</b>

**Neutral citation:** *Namrights v Government of Namibia* (HC-MD-CIV-MOT-GEN-2019/00243) NAHCMD 538 (6 December 2019)

**Coram:** PARKER AJ  
**Heard:** 8, 30 October, and 1, 19 November 2019  
**Delivered:** 6 December 2019

**Flynote:** Practice — Parties — *Locus standi* — Applicant applying for declaratory orders, among other relief, on behalf of some nameless, phantom girl children — Applicant's rights have not been violated and applicant's entitlements have not been taken away — Court held that a person's *locus standi* to instate proceedings is a matter of law that there is no rule of law allowing a court to confer *locus standi* upon a party, who otherwise has none — Court held that *actio popularis* not part of Namibian law — Court finding that applicant has placed no evidence before the court to explain the nature of the relationship applicant has with the parents or guardians of the girl children and why those parents or guardians are unable to approach the court themselves for relief — Consequently, court held that applicant has failed totally to satisfy the *Wood v Ondangwa Traditional Authority* 1975 (2) SA 294 (A) requirements — Court held further that applicant cannot take advantage of the constitutional State rule in *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR726 (SC) — Court held further that the allowance granted by *Wood v Ondangwa Tribal Authority* meet the justice and exigency of a constitutional State in the protection of basic human rights of others who are unable to do so themselves — Court finding that since there are no people who have been wrongfully deprived of their liberty or other rights, the principle *non exsistentis nulla sunt iura* must apply — On the basis of applicant having no *locus standi* and on the principle *non exsistentis nulla sunt iura* there is simply no application before the court for the court to adjudicate upon — Accordingly, court dismissed application with costs without any further enquiry as to whether any persons' rights have been violated.

**Summary:** Practice — Parties — *Locus standi* — It was widely published in the electronic and print media that *Olufuko* was to be officially revived — On the papers court finding that *Olufuko* is a rite of passage for girl children once they have experienced their first menstrual period — *Olufuko* has been held in the area of Ombalantu in the Omusati Region since the late 18<sup>th</sup> and 19<sup>th</sup> Centuries — It is a traditional custom at the centre of preserving a girl child's sexual identity, self-respect and family honour — It is meant to promote proper sex education and discourages sexual escapades by girl children before they are mature and responsible — It would seem applicant holds a different view about the nature and purpose of

*Olufuko*, hence the instant application — Applicant says it has *locus standi* (ie standing) to institute the proceedings, but first to fourth respondents, who oppose the application, say applicant has no *locus standi* — Court concluding that applicant has no *locus standi* to bring the application, apart from the fact that there are no people who have been wrongfully deprived of their liberty or other rights — Court concluding that there is simply no application before the court for the court to adjudicate upon — Consequently, court dismissing the application with costs.

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### ORDER

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1. The application is dismissed.
2. The applicant is ordered to pay the costs of the first, second, third, and fourth respondents, including costs occasioned by the employment of one instructing counsel and one instructed counsel on the scale as between party and party.
3. The matter is finalized and is removed from the roll.

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### JUDGMENT

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PARKER AJ:

#### Introduction

[1] The instant matter started its life as a ‘semi-urgent’ matter; whatever that means in the rules of court. The matter was opposed and was set down for hearing on 5 August 2019. The court issued a hearing notice in pursuit of judicial case management wherein the court directed the parties or their legal representatives to attend a status hearing on 8 October 2019 for the court to determine the further

conduct of the matter. On 8 October 2019 the court made an order for hearing of the matter on 31 October 2019.

[2] In due course it became apparent that the 8 October 2019 order might not have been clear to Mr Khama, who appeared for first to fourth respondents, understood that the whole matter, that is, the main application and the ancillary relief respecting protective costs order, was to be argued on 30 October 2019, Mr Phil Ya Nangoloh, who describes himself as 'both founder and Executive Director of Applicant', represents applicant, understood the 8 October 2019 order that only the matter of annularity relief was to be argued on 30 October 2019.

[3] There are 19 respondents. Only first to fourth respondents are participating in the proceedings.

[4] In order to avoid a protracted approach to litigation and piecemeal adjudication of the dispute, the court set down for 19 November 2019 the hearing of the matter, ie the main application, the ancillary relief respecting a protective costs order, application to strike out certain matters in applicant's affidavit, preliminary objections and any suchlike matters, including wasted costs for 30 October 2019.

[5] In the papers filed of record, one finds the following. It was widely published in the electronic and print media that *Olufuko* was to be officially revived. *Olufuko* is a rite of passage for girl children once they have experienced their first menstrual period. *Olufuko* has been held in the area of Ombalantu in the Omusati Region since the late 18<sup>th</sup> and 19<sup>th</sup> Centuries. The practice was meant to transition girl children to adulthood after they were identified by their parents. Thus, *Olufuko*, like similar initiation rites of passage in certain parts of Africa, is a traditional custom at the centre of preserving a girl child's sexual identity, self-respect and family honour. *Olufuko* promotes proper sex education and discourages sexual encounters by girls before they are mature and responsible.

[6] It would seem applicant holds a different view about the nature and purpose of *Olufuko*, hence the instant application. Applicant says it has *locus standi* (ie

standing) to institute the proceedings. First to fourth respondents, who oppose the application, say applicant has no *locus standi*.

Has applicant established its *locus standi in judicio* (ie standing)?

[7] For good reason, I should perforce first and foremost consider the issue of *locus standi*, because *locus standi* has a critical bearing on the consideration of the ancillary relief respecting a protective costs order, and *a fortiori*, whether there is an application properly before the court for the court to adjudicate upon.

[8] The centremost principle is that a person's standing to institute a particular action or motion proceeding is a matter of law. (*East London Municipality v BKK Meats CC t/a Heinz Meats* 1993 (2) SA 67 (E)) Indeed, as Harms JA said in *Gross & Others v Penz* 1996 (4) SA 617 (A) at 575H-I,

'I am unaware of a rule of law that allows a court to confer *locus standi* upon a party, who otherwise has none, on the ground of expediency and to obviate impractical and undesirable procedures.'

[9] The following principles and doctrines are also trite respecting *locus standi*. An applicant in motion proceedings who approaches the court to vindicate his or her rights must establish that he or she has direct and substantial interest in the outcome of the proceedings ('the common law rule'). See *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR726 (SC). This is the common law rule on standing or *locus standi in judicio*.

[10] In a constitutional State, citizens are entitled to exercise *their* rights and are entitled to approach courts, where there is uncertainty as to the law, to determine *their* rights ... The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to *their* legal entitlements. (*Trustco Ltd t/a Legal Shield Namibia and Another* at para 18)

[11] I have italicized the word 'their', which qualifies 'rights' and also 'legal entitlements' for a purpose. It is to signalize this point: The Supreme Court tells us that only those who allege that '*their* legal rights' and '*their* legal entitlements' have been taken away have standing to approach the court for relief. In that event, in my view, they would be 'aggrieved persons' within the meaning of art 25 (2) of the Namibian Constitution. I shall refer to the holding of the Supreme Court holding henceforth as the 'Constitutional State rule'.

[12] There are exceptions to the common law rule of 'direct and substantial interest' to found standing in order to prevent the injustice that might arise where people who have been wrongfully deprived of their liberty are unable to approach a court for relief. That is a *ratio decidendi* of the nonpareil and classic authority enunciated in *Wood v Ondangwa Tribal Authority* 1975 (2) SA (A). I shall call it 'the *Wood and Ondangwa Traditional Authority* rule'.

[13] And it must be remembered that whether persons who have been wrongfully deprived of 'their' rights 'are unable to approach the court for relief' is a question of fact. Accordingly, it is in his or her founding affidavit that the applicant who has approached the court to vindicate the rights of others when the applicant himself or herself has not suffered any violation of his or her right must show –

- (a) the nature of the relationship he or she bears with the persons who are unable to approach the court themselves for relief; and
- (b) why such persons are unable to approach the court themselves.

[14] For the sake of clarity and convenience, I shall call the requirements in para 13 (a) and (b) above 'the *Wood v Ondangwa Tribal Authority* requirements'.

[15] Thus, above all, as I have intimated previously, an applicant must establish that he or she has standing to institute the motion proceedings in the founding affidavit. (*Swissborough Diamond Mines (Pty) v Govt of RSA* 1999 (2) SA 279 (T), applied in *Mostert v The Minister of Justice* 2003 NR 11 (SC)).

[16] In the instant proceedings, in the applicant's founding affidavit, applicant sets out under the title 'VI STANDING OF APPLICANT' what applicant considers to be sufficient to establish applicant's *locus standi* in instituting the instant proceeding. With respect, it is labour lost. All that applicant puts forth does not – singly or cumulatively – begin to get off the starting blocks in applicant's attempt to establish applicant's *locus standi*. Applicant admits, *quamquam non totidem verbis*, that applicant itself has not suffered any violation of its 'rights' or the taking away of its 'legal entitlements': It has come to court to ventilate the rights of some nameless, phantom girl children who are not over the age of 18.

[17] Indeed, applicant's attempt to establish *locus standi* atrophies in the face of this legal reality to which Mr Khama drew the court's attention. The girl children – if they exist at all, and there is not one jot of evidence that they exist – are minors; but applicant has not placed one iota of evidence before the court to explain the nature of the relationship applicant has with the parents or guardians of the girl children and why those parents or guardians are unable to approach the court themselves for relief. Consequently, I find that applicant has failed totally to satisfy the *Wood v Ondangwa Traditional Authority* requirements (see paras 12- 4 above).

[18] The recurrent refrain that is repeated like a broken record in Mr ya Nangoloh's submission is briefly this: Applicant is a human rights organization, committed to the promotion of human rights. Applicant is known nationally and internationally. *Ergo*, applicant is entitled 'mero motu' (whatever that means) to institute the instant proceedings in terms of art 25 (2)-(4), read with art 5, of the Namibia Constitution. 'Applicant, therefore, has *locus standi* mero motu' (whatever that means), submitted Mr ya Nangoloh.

[19] It is a well-known canon of interpretation that the provisions of a statute or other legal instrument sought to be interpreted should be read globally and intertextually with related provisions of the instrument in question. In interpreting art 25 of the Constitution, it is important to read sub-arts (1), (2), (3) and (4) intertextually in order to understand the true meaning of any of the sub-articles. Mr ya Nangoloh appears to assert that art 25 does not expressly require that only the persons wishing to vindicate their rights conferred on them are entitled to approach



the court for relief. The *ipsissima verba* of sub-art (3) pulverize any such argument. *Pace* Mr ya Nangoloh, art 25 (2) to (4) do expressly provide that it is only persons, alleging a violation of their rights conferred on them by the Constitution, who are aggrieved persons and, accordingly, have *locus standi* to vindicate their rights in the court. Article 25 says so. As I have said previously, all the provisions of art 25 must be read globally and intertextually in order to get the true meaning of those provisions.

[20] According to art 25, in a deserving case, the court is entitled 'to make all such orders as shall be necessary and appropriate to secure *such applicants* the enjoyment of the rights and freedoms conferred *on them* (that is, the applicants) under the provisions of this Constitution ...' (Italicized for emphasis).

[21] The foregoing analysis and the conclusions therefor debunk Mr ya Nangoloh's argument that applicant has '*locus standi mero motu*' on the basis of art 25 (2) to (4) of the Namibian Constitution to bring the application to protect some unknown, phantom girl children whose rights have allegedly been violated. As I have said more than once, applicant has not approached the seat of judgment of the court to secure applicant the enjoyment of the rights and freedoms conferred on it under the provisions of the Constitution (see art 25 (3) of the Constitution, and, on the facts, applicant cannot take advantage of the allowance granted by *Wood v Ondangwa Tribal Authority* to institute these proceedings (see paras 12 and 14 above).

[22] I should say, any purposive and liberal interpretation of art 25 (2)-(4) must perforce take into account the *Wood v Ondangwa Tribal Authority* requirements (see paras 12 and 13 above); otherwise, with the greatest deference to all, any busybody, meddling and misguided crusader would approach the court for relief when he or she has no *locus standi*. That would surely be a recipe for chaos and confusion in the business of the Court. And in that regard, it must be remembered, the court is not entitled to confer *locus standi* on an applicant, who otherwise has none. (*Gross & Others v Penz*) I signalize the point that the allowance granted by *Wood v Ondangwa Tribal Authority* (see paras 12-14 above) meet the justice and exigency of a constitutional State in the protection of basic human rights of others.

[23] Furthermore, in our law, an applicant's expertise – real or assumed – cannot on its own establish applicant's *locus standi*. Any argument that it can is, with respect, fallacious and self-serving.

[24] Mr ya Nangoloh sought to rely on the South African case of *Lawyers for Human Rights and Others v Minister of Home Affairs and Others* 2004 (4) SA 125 (CC) for support and succour. Mr Khama stopped Mr ya Nangoloh dead in his tracks, as it were. Mr Khama submitted that in South Africa, the South African Constitution, s 38, specifically confers *locus standi* on some named persons. There is no such provision or comparable provision in the Namibian Constitution, counsel submitted in peroration. Doubtless, there is great force in Mr Khama's submission, which I find to be entirely valid. Accordingly, I find that *Lawyers for Human Rights* is of no assistance on the point under consideration; and so, I pay no heed to it. Consequently, I hold that applicant cannot pray in aid *Lawyers for Human Rights*: It has no relevance whatsoever in these proceedings.

[25] 'It is not disputed that the Roman law concept of *actio popularis* is not part of our law. In our law no private person can proceed by *actio popularis*. What this means is that the general principle of our law is that –

“a private individual can only sue on his own behalf not on behalf of the public. The right which he seeks to enforce, or the injury in respect of which he claims damages, or against which he desires protection, will I depend upon the nature of the litigation. But the right must be available to him personally, and the injury must be sustained or apprehended by himself.”

[*Katjivene and Others v Minister of the Republic of Namibia and Others* 2016 (3) NR 903 (HC).]

[26] The only qualification to this principle is what I have discussed in paras 13-14 above. I need not rehash them here.

[27] Based on the foregoing analysis and conclusions thereanent, I hold as follows: applicant has not come to court in a constitutional State to determine its rights and legal entitlements or obtain legal clarity as to its entitlements in circumstances where there is uncertainty as to the law (see *Trustco Ltd t/a legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*); and so, applicant cannot take advantage of the constitutional State rule (see paras 9 – 11 above). Furthermore, applicant has not come to court to prevent injustice that might arise where the people who have allegedly been wrongfully deprived of their liberty are unable to approach the court for relief. It follows inevitably that applicant cannot take advantage of the *Wood and Ondangwa Traditional Authority* rule, too.

[28] In any case, on the facts, I find that there are no people who have been wrongfully deprived of their liberty or other rights; and in that event, the principle *non exsistentis nulla sunt iura* must apply. I hold that upon this principle alone the application stands to be dismissed. I need not cite any authority for my decision. It stands to reason and logic. If there are no people who have been wrongfully deprived of their liberty or other rights, how can there be an application to vindicate the rights of non-existent people. The rights contained in the Constitution are guaranteed to ‘persons’, that is, existing persons.

[29] Based on these reasons and having taken into account the principle that no rule of law allows a court to confer *locus standi* upon a party, who otherwise has none (see *Gross and Others v Penz*), it is with firm confidence that I hold that applicant has not proved that it has *locus standi* – as a matter of law – to institute the instant proceedings. Besides, there are no people who have been ‘wrongfully deprived’ of their liberty or other rights. Thus, on the basis of applicant having no *locus standi* and on the principle *non exsistentis nulla sunt iura*, there is simply no application before the court for the court to adjudicate upon. Accordingly, the application must be dismissed, and it is so dismissed without any further enquiry as to whether any persons’ rights have been violated.

[30] Since I have found that there is no application to adjudicate upon, I conclude that the occasion has not arisen to consider whether applicant could be thankful of rule 20 of the rules of court. By a parity of reasoning, it is not open to the court to

consider the striking out application and any other preliminary objections and connected matters. There can be no further enquiry, I reiterate.

[31] The upshot is that applicant, having no *locus standi*, has dragged the respondents to court unnecessarily, on behalf of non-existent persons, and at a cost. That being the case, it is fair and just for first to fourth respondents to have their costs. It follows resolutely that on the facts and in the circumstances of the case, applicant should be mulcted in costs.

[32] But that is not the end of the matter as regards costs. Applicant says that this court should follow a decision in the South African case of *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC). In short, applicant's argument (apparently relying on *Biowatch Trust*) is that since applicant (a private body) has instituted constitutional litigation against the State and the State has become successful, each party should pay their own costs. Mr Khama's argument contrariwise is simply that where an applicant lacks *locus standi* to institute the application, the *Biowatch Trust* approach cannot come to the aid of such applicant. I respectfully accept Mr Khama's submission. It has merit and force, and, therefore, valid. Not forgetting that there are no persons who have been 'wrongfully deprived' of their liberty or other rights. By the same token, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and *Tlhoru v Minister of Home Affairs* 20008 (1) NR 97 (HC) cannot assist applicant to parry a costs order and escape it.

[33] First to fourth respondents have asked for costs on the sale as between attorney (legal practitioner) and own client, ie punitive costs. In my opinion, applicant might have been misguided in instituting these proceedings when it has no *locus standi* to do so and when there are no persons who have been 'wrongfully deprived' of their liberty or other rights. It would seem applicant misread the law on *locus standi*. Applicant has put the said respondents to unnecessary trouble and expense (see *Namibia Breweries Limited v Serrao* 2007 (1) NR 49). Doubtless, the *Serrao* factors do exist in the present proceedings justifying the granting of a punitive costs order. But I did not hear Mr Khama argue for such scale of costs. That being the case, I think I should step away from making a punitive costs order against applicant.

[34] As respects the wasted costs for 30 October 2019, I think I should decline to order any such costs. I do not see Mr ya Nangoloh's apparent misunderstanding of the 8 October 2019 order to be wilful or unreasonable.

[35] In the result, the application is dismissed. The applicant is ordered to pay the costs of first, second, third, and fourth respondents, including costs occasioned by the employment of one instructing counsel and one instructed counsel on the scale as between party and party.

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C Parker  
Acting Judge

APPEARANCES:

APPLICANT:

P ya Nangoloh

In person

FIRST – FOURTH RESPONDENTS:

D Khama

Instructed by:

The Government Attorney, Windhoek