

## REPUBLIC OF NAMIBIA



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## SPECIAL PLEAS

## RULING

Case No: HC-MD-CIV-ACT-OTH-2019/03033

In the matter between:

**SALAMBALA CONSERVANCY****PLAINTIFF**

and

**CALVIN MUKATA****1ST DEFENDANT****NANDU MARTIN MUTHWAMPO****2ND DEFENDANT****MARTIN MACHANA MUSHABATI****3RD DEFENDANT****MUSHABATI AUSTIN MUSHABATI****4TH DEFENDANT****VICTOR LISHOMWA MUSHABATI****5TH DEFENDANT****MUSHABATI LUBINDA****6TH DEFENDANT****MASIZIANI PATSEN LUBINDA****7TH DEFENDANT****MUNIHANGO SHADRECK MUTUA****8TH DEFENDANT****NDABENI BRIAN SIMWANZA****9TH DEFENDANT****NYAMBE RAYMOND MATENGU****10TH DEFENDANT****MUSHABATI LUBINDA****11TH DEFENDANT**

**Neutral citation:** *Salambala Conservancy v Mukata* (HC-MD-CIV-ACT-OTH-2019/03033) [2022] NAHCMD 340 (8 July 2022)

**CORAM:** NDAUENDAPO J

**Heard:** 17 May 2022

**Delivered:** 8 July 2022

**Flynote:** Civil practice – Interlocutory application – Special pleas – Defendants plead that plaintiff has no *locus standi* – Non-joinder of necessary parties – Pleas dismissed.

**Summary:** The plaintiff instituted action against the first to tenth defendants alleging that they are unlawfully occupying the area forming part of the plaintiff's core area which is designated for conservancy use only and that they do so without the plaintiff's permission and the defendant prays for their eviction from that area.

The defendants raised special pleas of lack of *locus standi* and non-joinder of parties who are necessary and who have a direct and substantial interest in the relief sought.

Counsel for the defendant submitted that the area occupied by the defendants is a conservancy and the plaintiff does not possess a title over the land which it seeks to evict the defendants from and therefore does not possess the necessary *locus standi* for the relief sought. Counsel contended that the land is communal land and in terms of section 43 (2) of the Communal Land Act 5 of 2002 'the Act', the powers of eviction vests with the Traditional Authority, the Chief or the Land Board or a possessor of communal land rights, counsel further submitted that the plaintiff is not a possessor of the land it seeks to evict the defendants from and therefore lacks standing to institute the action. Counsel contended that all communal land vests in the State and accordingly the President of the Republic of Namibia and/or the Government of the Republic of Namibia and/or the Minister of Land Resettlement and/or Minister of Land Reform are necessary and interested parties in this action and have a direct and substantial interest in respect of the relief sought.

Counsel further submitted that in terms of s 2 read with ss 3 and 43 of the Act, the Zambezi Communal Land Board as well as the Minister of Environment and Tourism are necessary parties and have a direct and substantial interest in the relief sought.

Counsel for the plaintiff submitted that the plaintiff is a *universitas* and in terms of its constitution, it has the right to institute action against the defendants for eviction in the area allocated to it. Relying on the *Joseph* matter, counsel argued that:

‘To grant a person a right which is registered and then to say that such person cannot personally protect that right seems to me an absurdity. The normal approach is *ubi rem ibi remedium*. To give a person a right but no remedy to protect it has long been held as an anomaly’.

Accordingly, counsel argued that it has the necessary *locus standi* to institute the action.

Counsel further argued that the parties alleged by the defendants that they must have been joined, are not necessary and do not have a direct and substantial interest in the relief sought.

*Held that*, the plaintiff has the necessary *locus standi* to institute the action against the defendants.

*Held further that*, the parties alleged by defendants to be necessary parties and should have been joined, do not have a direct and substantial interest in the relief sought.

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## ORDER

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Special pleas dismissed with costs.

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## JUDGMENT

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Ndauendapo, J

### Introduction

[1] Before me are two special pleas brought by the defendant against the particulars of claim brought by the plaintiff seeking the eviction of the defendants from the Salambala Conservancy ‘the Conservancy’.

### Special Pleas

[2] (a) The plaintiff lacks the necessary *locus standi* to institute the action to evict the defendants.

(b) Non joinder.

### Plaintiff's relief

[3] The plaintiff in its particulars of claim alleges that the first to tenth defendants unlawfully occupy the area forming part of the plaintiff's core area which is designated for conservancy use only and they do so without the plaintiff's permission and the defendant prays for their eviction from that area.

### Defendant's written submissions

[4] Counsel submitted that the plaintiff is neither endowed with the necessary capacity to sue nor does it have a legally recognised interest in the relevant action sought by it. Counsel submitted that conservancies only have some legal use rights over game, but not to the land, minerals, water and forests. A conservancy established in terms of s 24A of the Ordinance has rights and duties in respect of consumptive and non-consumptive use and sustainable management of game within such conservancy, to enable its members to derive benefits from such use and management. The efforts of conservancy are based on the need to conserve. The legislature has therefore only conferred conservancies with ownership rights over wildlife, but that does not extend to the land itself, nor to the minerals, fish and forests on that land. Land rights are not protected by the conservancy, but rather the rights to wildlife. The plaintiff therefore does not possess a title over the land which it seeks to evict the defendants from and therefore does not possess the necessary *locus standi* for the relief sought.

[5] Counsel contended that the land is communal land and in terms of s 43(2) of the Act, the powers of eviction vests with the Traditional Authority, the Chief or the Land Board or a possessor of communal land rights.

[6] Counsel further submitted that the plaintiff is not a possessor of the land it seeks to evict the defendants from. Counsel referred to *Kashidulika v Likeno* (HC-NLD-CIV-ACT-OTH-2018/00273) [2021] NAHCNLD 25 (15 March 2021) where the plaintiff was unable to provide the allocation certificate over the property in question to prove title to the land and where the court held that without allocation vests the land in the chief or the Traditional Authority and accordingly the plaintiff has no standing to bring the eviction proceedings. The reliance on that authority is misplaced as the plaintiff in this case attached the certificate of allocation to the amended particulars of claim.

[7] Counsel contended that by virtue of the provisions of s 17 of the Act, all communal land vests in the State and accordingly the President of the Republic of Namibia and/or the Government of the Republic of Namibia and/or the Minister of Land Resettlement and or Minister of Land Reform are necessary and interested parties in this action and has a direct and substantial interest in respect of the relief sought.

[8] Counsel further submitted that in terms of s 2 read with ss 3 and 43 of the Act, the Zambezi Communal Land Board as well as the Minister of Environment and Tourism are necessary parties and have a direct and substantial interest in the relief sought. The relief sought would have an impact on the interests of the aforesaid parties and in the circumstances the action stands to be stayed pending the joinder of the aforesaid parties.

#### Plaintiff's written submissions

[9] Counsel submitted that this court in the *Anabeb Conservancy Committee v Muharukua & 39 Others* (HC-MD-CIV-ACT-OTH-2016/03267) [2021] NAHCMD 24 (01 February 2022) quoted Wessels JA in the matter of *Morrison v Standard Building Society*<sup>1</sup>, on the test to be adopted when determining the *locus standi* of an association:

'In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution and if these shows that it possess the characteristics of a corporation or a *universitas* then it can sue in its own name.'

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<sup>1</sup> *Morrison v Standard Building Society* (1932 AD 229)

[10] Counsel argued that the Constitution of the Conservancy is attached to the particulars of claim and provides at Article 6.2 thereof that:

‘The Conservancy is and shall continue to be a distinct and separate legal entity from its members. It is a juristic person with perpetual succession, with the powers to acquire, hold and alienate property of every kind and with the capacity to acquire rights and obligations.’

Article 6.3 of the Constitution provides that:

‘All actions proceedings at law, including court and arbitration proceedings, shall be brought by and against the Conservancy in the name of the Conservancy.’

For these reasons the defendants’ challenge to the plaintiff’s standing must fail as they fail to have regard to the plaintiff’s nature and its constitution.

[11] Counsel further submitted that the defendants’ first special plea further continues to state that the plaintiff does not have a legally recognised interest in the action instituted by it.<sup>2</sup> The defendants rely on their interpretation of the Communal Land Reform Act 5 of 2002 (‘the Act’) for this assertion. This assertion, we submit, is unsustainable and does not paint the full picture of the true scheme of the Act.

[12] Counsel submitted that the defendants’ position that the plaintiff does not have any right to evict the defendants from its geographical area is absurd and does not accord with the purpose of the Act or the ordinance.

[13] To quote Damaseb AJA (as he then was) in *Joseph v Joseph*<sup>3</sup> (the Joseph matter)

‘To grant a person a right which is registered and then to say that such person cannot personally protect that right seems to me an absurdity. The normal approach is *ubi rem ibi remedium*. To give a person a right but no remedy to protect it has long been held as an anomaly.<sup>4</sup> To make the right dependent on the decision of a functionary is to water down the right to such extent that it goes against the grain of the Act which seeks to establish a register of right holders with the concomitant security of tenure this will bring about.’

<sup>2</sup> Para 8 of defendants’ heads of argument.

<sup>3</sup> *Joseph v Joseph* (SA 44-2019 and SA 18-2020) [2020] NASC (30 July 2020) (1) para 37.

<sup>4</sup> *Kashela v Katima Mulilo Town Council & others* 2018 (4) NR 1160 (SC) para 71.

[14] Counsel argued that the plaintiff is a possessor of the geographical area of the Conservancy and has the rights as conceded by the defendants<sup>5</sup> over the natural resources and wildlife in this area. The unlawful occupation of the core area by the defendants infringes this right. Consequently, the plaintiff has an interest in the order it seeks and is not precluded by s 43 (2) of the Act to approach this court.

[15] Counsel relying on *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) argued that it is trite that any person with a direct and substantial interest in any order which this Court may make in the litigation must be joined as a party. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party is a necessary party and should be joined to the proceedings, unless it consents to its exclusion.<sup>6</sup>

[16] Counsel argued that, the court must consider whether the parties would really have any interest in the orders by the defendant and whether the orders could be executed against those parties.

[17] The plaintiff seeks the following orders:

(a) An order in terms whereof the first to the tenth defendants are, within 60 calendar days of the Order herein, directed to vacate the area.

(b) An order in terms whereof the first to the tenth defendants are directed to pay the costs of this action.

[18] Section 20 of the Act provides that:

'Subject to the provisions of this Act, the primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests - (a) in the Chief of that traditional community; or (b) where the Chief so determines, in the Traditional Authority of that traditional community. The geographical area of the Salambala Conservancy falls under the Musubia Traditional Authority. The latter is cited as the eleventh

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<sup>5</sup> See para 9, 11 of defendants' heads of argument.

<sup>6</sup> *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC), para 32.

defendant, and it is specifically pleaded that the eleventh defendant takes common cause with the relief sought by the plaintiff in this action.’

[19] Counsel thus submitted that the other parties do not have any direct and substantial interest in the order sought and the defendants have failed to discharge the onus on them to prove the facts underlying the special plea.

## Discussion

### *Lack of standing*

[20] The plaintiff in this matter is a voluntary association registered as a Conservancy in terms of s 24A of the Nature Conservation Ordinance, 1975, read with Regulation 155B of the Regulations of the Nature Conservation Ordinance and at common law such associations are known as *universitas*. The plaintiff’s constitution, attached to the particulars of claim, provides in Art.6.2 that:

“The Conservancy is and shall continue to be a distinct and separate legal entity from its members. It is a juristic person with perpetual succession, with the powers to acquire, hold and alienate property of every kind and with the capacity to acquire rights and obligations.”

[21] The learned authors, Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa*, 4 ed, p 175 opine the following as regards *universitas*: ‘A *universitas* is a legal fiction, an aggregation of individuals forming a *persona* or entity having the capacity of acquiring rights and incurring obligations to as great extent as a human being. The main characteristics of a *universitas* are the capacity to acquire certain rights as apart from the rights of individuals forming it, and perpetual succession’.

[22] In *Morrison v Standard Building Society* (1932 AD 229) the court held that:

‘In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and object of the association as well as its constitution and if these show that it possess the characteristics of a corporation or a *universitas* then it can sue in its own name.’



The above dictum was cited with approval in this court in *Anabeb Conservancy Committee v Muharukua & 39 Others*<sup>7</sup>. I fully associate myself with that dictum as a correct exposition of the law on that aspect.

[23] Article 6.3 of the plaintiff's Constitution provides that:

'All actions proceedings at law, including court and arbitration proceedings, shall be brought by and against the Conservancy in the name of the Conservancy.'

[24] From the above exposition of the law and the plaintiff's constitution, it is clear that the plaintiff is a *universita* and it has the necessary *locus standi* to institute the action against the defendants.

[25] Defendants further aver that in terms of s 43 (2) of the Act, only three bodies are clothed with the powers of eviction on communal land, namely, the Traditional Authority, the Land Board and the Chief or anyone with a title over the land in dispute. In the absence of a title, the power to evict a person from communal land vests in the three bodies.

[26] That averment is simply wrong. In *Joseph v Joseph*<sup>8</sup> the Supreme Court in interpreting s 43 (2) of the Act, held that:

'[34] In view of the fact that the common law provides a vindicatory action to a possessor, the only way to interpret s 43 of the Act so as to do away with this common law right is to insert the word 'only' in front of s 43 (2) to make it read 'only a Chief or a Traditional Authority or the Land Board concerned' may evict a person who occupies land without it being allocated to such person. Whereas the Act vests the relevant Chief, Traditional Authority or Land Board with locus standi as the statutory appointed administrators of communal land to evict persons who occupy land not allocated to them, it does not mean that other possessors who have the right under common law to evict such persons are no longer vested with such a right as:'

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<sup>7</sup> *Anabeb Conservancy Committee v Muharukua & 39 Others* (HC-MD-CIV-ACT-OTH-2016/03267) [2021] NAHCMD 24(1 Feb 2022).

<sup>8</sup> *Joseph v Joseph* (SA44-2019 and SA 18-2020) [2020] NASC (30 July 2020)

*It is a sound rule to construe a statute in a conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law.*<sup>9</sup>

**The defendants do not hold better title to the core area than the plaintiff.**

*And further...*

*"To grant a person a right which is registered and then to say that such person cannot personally protect that right seems to me an absurdity. The normal approach is ubi rem ibi remedium. To give a person a right but not a remedy to protect it has long been held as an anomaly. To make the right dependent on the decision of a functionary is to water down the right to such extent that it goes against the grain of the Act which seeks to establish a register of right holders with concomitant security of tenure this will bring about,"*

[27] The plaintiff has been declared a Conservancy in terms of Government Notice 146 of 1998 and s 24 A (2) (ii) of the Ordinance and issued with a certificate declaring it a Conservancy and recognizing the Conservancy Committee and on the authority of *Joseph supra*, the plaintiff has the necessary *locus standi* to institute the action to protect its right. Accordingly the special plea of lack *locus standi* is meritless and stands to be dismissed.

#### Non-Joinder

[28] In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637(A) the court held 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 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 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'.

[29] The test applied to determine whether a party has a direct and substantial interest to be joined was set out by 'Herbstein and Van Winsen p 170-173' as follows:

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<sup>9</sup> *Johannesburg Municipality v Cohen's Trustees* 1908 TS 811 at 823 quoting from *R v Morris* (1867) LR 1 CCR 90 at 95.

'Would the third party have locus standi to claim relief concerning the same subject matter; and could a situation arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance'.

[30] The defendants submitted that the President of the Republic of Namibia and or the Minister of Land and Resettlement, because in terms of s 17 of the Act all communal land vests in the State, the Zambezi Communal land Reform and the Minister of Environment and Tourism are necessary and interested party in this action and have a direct and substantial interest in the relief sought by the plaintiff. Counsel for the defendants further argued that the relief sought would have an impact on the interests of the aforesaid parties.

[31] In order to determine whether those parties should be joined as necessary parties, the court must have regard to the relief sought by the plaintiff.

The plaintiff seeks the following orders:

- (a) An order in terms whereof the first to the tenth defendants are, within 60 calendar days of the order herein, directed to vacate the area.
- (b) An order in terms whereof the first to tenth defendants are directed to pay the costs of this action.

[32] In terms of s 20 of the Act, 'the primary power to allocate or cancel customary land right in respect of any portion of land in the communal area of traditional community vests (a) in the Chief of that traditional community; or (b) where the Chief so determines, in the Traditional Authority of that traditional community;.' Counsel for the plaintiff correctly submitted that the Conservancy falls under the Musubia Traditional Authority and the latter is cited as eleventh defendant and it is specifically pleaded that the eleventh defendant takes common cause with the relief sought by the plaintiff in this action. The other parties cited by the defendants to be joined do not have a direct and substantial interest in the relief sought by the plaintiff. In addition, the ownership of the communal land by the State

would not be affected by the relief sought in any way. Accordingly the special plea of non-joinder is without merit.

The order

The special pleas are dismissed with costs.

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G N NDAUENDAPO

Judge

## APPEARANCES

PLAINTIFF:

M Kuzeeko

Of Dr Weder Kauta &amp; Hoveka Inc, Windhoek

FIRST TO TENTH DEFENDENT:

M Kemp

Of Metcalfe Beukes Attorneys, Windhoek