REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-MOT-GEN-2021/00492

In the matter between:

SHIPAPO WAMBAMBANGANDU INVESTMENT (PTY) LTD	**APPLICANT**

And

SHAMBYU TRADITIONAL AUTHORITY	**1ST RESPONDENT**
KAVANGO EAST COMMUNAL LAND BOARD	**2ND RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND LAND REFORM	**3RD RESPONDENT**
THE INSPECTOR GENERAL OF THE NAMIBIAN POLICE	**4TH RESPONDENT**
KAVANGO EAST REGIONAL GOVERNOR, BONIFATIUS WAKUDUMO	**5TH RESPONDENT**
COUNCIL OF TRADITIONAL LEADERS	**6TH RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**7TH RESPONDENT**

Neutral citation: *Shipapo Wambambangandu Investment (Pty) Ltd v Shambyu Traditional Authority* (HC-MD-CIV-MOT-GEN-2021/00492) [2022] NAHCMD 384 (29 July 2022)

Coram: SCHIMMING-CHASE J
Heard: **22 March 2022**
Delivered: **29 July 2022**

Flynote: Spoliation – *Mandament van spolie* – Effect – The *mandament van spolie* when granted is a final court order, to the extent that it provides for interim relief pending a final determination of that party's rights.

Practice – Parties – Misjoinder or non-joinder – Test of a direct and substantial interest in subject matter of litigation is the decisive criterion.

Practice – Parties – Joinder of parties – Order against offending respondents not identified by name (or perhaps by individualised description) in proceedings would have generalised effect of legislation – Failure to identify respondents destructive of notion that court order operates only *inter partes*.

Summary: The applicant launched urgent spoliatory and interdictory proceedings against a number of respondents, including the Shambyu Traditional Authority, the Kavango East Communal Land Board and the Minister of Agriculture. The applicant's complaint (initially brought by way of urgent application in this court) was that it was dispossessed by certain unidentified community members of the Shambyu Traditional Authority of its lawful possession of certain immovable property located in the Kavango East Region, in respect of which it holds a right of leasehold granted in terms of the Communal Land Reform Act 5 of 2002. By agreement between the parties, the spoliatory portion of the relief was granted as a final order, and interim interdictory relief was granted pending the return date of the rule *nisi*. On the return date, the respondents raised a number of points *in limine* relating to joinder of specified parties. On the merits, the respondents attempted to deny clear acts of interference with the applicant's operations on the property in question, and also argued that the interdictory relief could not be competent as the applicant had failed to meaningfully identify any or all of the members of the relevant traditional community, who unlawfully interfered in the applicant's operation. The respondents also argued that upon proper

consideration of the papers, the court order should not have been issued, despite the fact that the respondents agreed to the order granted.

Held, the final spoliatory relief sought was granted by agreement between the parties. The court was *functus officio* in this respect.

Held, the non-joinder points were dismissed because the persons that the respondents alleged should have been joined to the proceedings did not have an interest in the outcome of the proceedings.

The misjoinder points were dismissed as those respondents cited, on the papers, had a direct and substantial interest in the outcome of the proceedings and were properly joined.

Held, the applicant made out a case for the interdictory relief sought, however, the applicant was unable to identify the offending members of the traditional community in any meaningful way. Thus the court could not come to the applicant's assistance in making the interim order final on the facts presented.

ORDER

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1. The rule *nisi* granted on 14 December 2021 is discharged.

2. There shall be no order as to costs.

3. The applicant is granted leave to approach this court, on papers duly amplified, to seek interdictory relief against specified persons, if so advised.

4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] This application concerns certain communal land situated in the Kavango East Region of Namibia, in respect of which the applicant has a right of leasehold and seeks certain spoliatory and interdictory relief.

Parties

[2] The applicant is Shipapo Wambambangandu Investment (Pty) Ltd, a private company with limited liability, duly incorporated and registered in terms of the applicable company laws of Namibia.

[3] The first respondent is the Shambyu Traditional Authority, a traditional authority recognised under section 2 of the Traditional Authorities Act 25 of 2000 ("the Act").

[4] The second respondent is the Kavango East Communal Land Board established in terms of section 2 of the Communal Land Reform Act 5 of 2002 ("the CLR Act").

[5] The third respondent is the Minister of Agriculture, Water and Land Reform, cited in his official capacity as the Minister responsible for communal land matters and who is empowered to give approval for the granting of a right of leasehold in terms of section 30(3) of the CLR Act.

[6] The fourth respondent is the Inspector General of the Namibian Police, cited in these proceedings in his official capacity as the head of the Namibian Police Force.

[7] The fifth respondent is the Kavango East Regional Governor, Bonifatius Wakudumo.

[8] The sixth and seventh respondents are the Council of Traditional Leaders and the Government of the Republic of Namibia, respectively. No relief was sought against the sixth and seventh respondents, who were cited for any interest they may have in the outcome of these proceedings. They have not opposed this application.

[9] The first to fifth respondents oppose this application and are jointly represented by the Government Attorney. Where reference is made to 'the respondents' in this judgement, such reference is to the exclusion of the sixth and seventh respondents.

Background

[10] The brief background to this application – as per the account of the applicant – is as follows: the applicant is the holder of a right of leasehold in respect of certain communal property situated at the Muroro Village of the Mashare Constituency in the Kavango East Region ("the land"). The applicant was granted the right of leasehold for agricultural purposes in terms of the CLR Act on 17 March 2020.

[11] During July 2021, one of the applicant's members, Mr Shikongo Mavara, was approached by an investigation team led by the office of the Kavango East Regional Commander, who advised him that a dispute had been noted against the allocation to the applicant of the leasehold title to the land in question, and that an investigation into how the applicant was allocated the land was being conducted. At the time of instituting these proceedings the applicant had not received any report or feedback regarding the alleged investigation.

[12] The applicant took possession of the land on 10 September 2021, on which date its employees and contractors commenced with the process of debushing for the purpose of creating roads in the area. This process involved the use of heavy machinery, including that

of a bulldozer leased from one Mr Fourie de Villiers in Rundu. The rental agreement in respect of the bulldozer was facilitated by the Managing Director of Mashare Irrigation (Pty) Ltd, Mr Lourens Le Grange.

[13] The following day, namely 11 September 2021, the applicant's employees and contractors continued with the process of clearing the land. Whilst engaged in this activity, the applicant alleged that community members of the first respondent came on site and brought the operations to a halt.

[14] On 13 September 2021, the applicant's employees again attended at the site, and were once again met with members of the community, who yet again brought the applicant's operations to a standstill.

[15] On 14 September 2021, members of the fourth respondent, and in particular one Inspector Petrus Kasiki, together with approximately 15 community members attended to the office of Mr Le Grange and informed him that no further activities should take place on the land as it is subject to a dispute. Inspector Kasiki further informed Mr Le Grange that the Namibian Police could neither guarantee the safety of the bulldozer nor that of its operator, as some of the community members had threatened to burn the bulldozer.

[16] The applicant then resolved to halt its operations. On 15 September 2021, one of the applicant's members, Mr Festus Mbendeka, approached the Regional Commander for the Kavango East Region for some clarity on the alleged dispute. Mr Mbendeka was advised that the matter was under investigation and no further information would be divulged pending its outcome. Furthermore, the Regional Commander indicated that no further debushing would be permitted on the land in order to avoid further conflict between the community members and the applicant, which could result in loss of life.

[17] Upon further inquiry with the Namibian Police by the applicant, it was revealed that the reason for the interference was a dispute registered over the land by a close corporation named LHW and LVM Investments CC. The members of this close corporation were

competitors of the applicant in the initial application process for the right of leasehold, and also allegedly had family ties to the fifth respondent, the Kavango East Regional Governer, Mr Bonifatius Wakudumo.

[18] On 25 November 2021, the applicant transmitted a letter to the fourth respondent wherein it addressed the unlawfulness of the actions of the members of the police in assisting the community members, as opposed to protecting the applicant's rights to its undisturbed possession of the land.

[19] The applicant attempted to resume its operations on the land on 29 November 2021. Its employees were again denied access to the site by members of the community. According to the applicant, seeking assistance from members of the police proved futile as they did not attend to the site on the date in question. This last encounter appears to have been the straw that broke the camel's back, which according to the applicant necessitated the institution of urgent proceedings in this court 'as it became clear that the applicant was denied access to and possession of the land in terms of which it has a vested right'[1].

Urgent application

[20] On 9 December 2021 the applicant approached this court on an urgent basis seeking a spoliation order, coupled with interim interdictory relief, for hearing on 15 December 2021.

[21] The respondents delivered notices to oppose the application, however, one day before the hearing of the application, the parties agreed (via a joint status report accompanied by a draft order) to the issuance of a court order granting the spoliatory and interim interdictory relief sought by the applicant. The relevant portions of the order granted on 14 December 2021 are reproduced below:

'1. The applicant's non-compliance with the forms and service provided for in the rules of

[1] Paragraph 49 of the applicant's founding affidavit.

this Honourable court is hereby condoned and the application is heard on an urgent basis as contemplated in rule 73(3) of the rules of Court.

2. The applicant and its members, employees, agents, officials and contractors, must be restored, ante omnia, the free and undisturbed possession of the communal land measuring 763.86 ha, situated at the Muroro Village of Mashare Constituency, Kavango East, Rundu.

3. A rule nisi is hereby issued, returnable on 22 March 2022 at 11:30 calling upon the respondents to show cause as to why the following order should not be made final:

3.1 That the members of the first respondent, with or without the assistance of the members of the fourth respondent, be interdicted from interfering in the operations of the applicant in respect of the agricultural activities on the land measuring 763.86 ha, situated at the Muroro Village of Mashare Constituency, Kavango East, Rundu.

3.2 That the members of the fourth respondent are directed to assist the applicant in protecting its rights to leasehold in respect of land measuring 763.86 ha, situated at the Muroro Village of Mashare Constituency, Kavango East, Rundu.

3.3 That the respondents are directed to pay the costs of this application, such costs being the costs of one instructing and one instructed legal practitioner.

4. The orders in 3.1 and 3.2 shall operate as an interim interdict against the members of the first respondent pending the return date of 22 March 2022.'

[22] The remainder of the order gave directions as to the exchange of further affidavits and the filing of heads of argument, for purposes of the determination of the application finally on the return date. In this regard, the respondents delivered answering affidavits and the applicant delivered replying papers. Both parties further delivered heads of argument.

Respondents' case and the applicant's response thereto

[23] The respondents' answering affidavit was deposed to by the third respondent,

namely the Minister of Agriculture, Water and Land Reform.

[24] In addition to dealing with the merits of the applicant's application, the respondents raised four points *in limine*, namely the non-joinder of Inspector Petrus Kasiki; the non-joinder of the Regional Commander; the misjoinder of the first to fifth respondents; and lastly, the incompetent relief sought by the applicant.

First and second points in limine: The non-joinder of Inspector Petrus Kasiki and the Regional Commander

[25] In support of these points, the respondents asserted that the applicant appears to be aware of the identity of the person whose conduct caused the spoliation complained of during November 2021, namely Inspector Petrus Kasiki. The respondents submitted that based on the applicant's own account, when Inspector Kasiki directed the members of the applicant to stop their activities on the land, he acted unlawfully by infringing on the applicant's right to free and undisturbed possession of the land. By virtue of his conduct, he is an interested party to these proceedings and should have been cited as such by the applicant. Under the circumstances, the court should not consider the merits of the application in the absence of Inspector Kasiki as a party to these proceedings.

[26] The respondents further asserted that it was necessary to also join the Regional Commander to these proceedings as Inspector Kasiki – who is alleged to have committed the spoliation – works directly under the command and supervision of the Regional Commander.

[27] In reply, the applicant contended that Inspector Kasiki and the Regional Commander had no direct and substantial interest in the matter relating to the applicant's right of leasehold and no order made by this court would affect their respective interests. Thus, it was neither necessary for Inspector Kasiki, nor the Regional Commander to be joined in these proceedings.

[28] Moreover – so it was argued – the mere mention of Inspector Kasiki and the Regional Commander in the applicant's papers did not automatically make them necessary parties. In any event, Inspector Kasiki and the Regional Commander acted within the course and scope of their employment and it was in the circumstances sufficient that their supervisor, the fourth respondent, was cited as a party to these proceedings.

Third point in limine: misjoinder of the first to fifth respondents

[29] In summary, the respondents averred that the applicant failed to establish a legal and factual basis to have the first to fifth respondents joined in these proceedings and on this basis alone the application stood to be dismissed with costs. The applicant stated that the first to fifth respondents were all properly joined and were necessary parties who had a substantial interest in the outcome of this application. I deal below with the arguments by each of the parties on the joinder points raised.

(i) Misjoinder of the first respondent: The Shambyu Traditional Authority

[30] The respondents began their attack on the applicant's joinder of the first respondent by reliance on the definition of a traditional authority contained in the Act. Section 2 of the Act defines a traditional authority as being one 'which consists of a chief or head of that traditional community, or senior traditional councillors and traditional councillors'.[2]

[31] It is the respondents' case that the first respondent does not have a chief, and although it has traditional councillors, none of those councillors have been linked to the alleged act of spoliation complained of in the applicant's papers. The applicant sought relief against members of the first respondent, but its complaint lay against those members of the first respondent alleged to have committed the spoliation.

[32] Accordingly, the respondent argued that the applicant failed to link the first

[2] Paragraph 18.1 of the respondents' answering affidavit.

respondent (the traditional councillors) to the act of spoliation, alternatively failed to lay the basis for citing the first respondent as a party to its application and therefore misjoined the first respondent to these proceedings.

[33] The applicant on the other hand, argued that the first respondent is indeed joined as a necessary and interested party on the following bases:

> '5. . . .firstly, because of the community members, who could not be identified, as opposed to the members of its executive wing, over which it exercises jurisdiction and authority. The community members of the first respondent. . .who were directly linked and have carried out the spoliation of the applicant's land. Although prayer 3.1 does not clearly mention community members of the first respondent, it is common cause between the parties that it was the unidentified community members of the first respondent who were involved in the spoliation act.
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> 6. Secondly, the first respondent exercises control and authority over the land in question as the traditional authority over the communal land in question and is therefore an interested party in the outcome of this matter and the decision on the rights in question.'[3] (emphasis supplied)

(ii) Misjoinder of the second respondent: The Kavango East Communal Board

[34] The respondents also took issue with the joinder of the second respondent to these proceedings. It was argued that save for referring to the second respondent as having designated jurisdiction over all communal land within the Kavango East region, no basis was laid apart from linking the respondents to the spoliation complained of, connecting the second respondent to the spoliation. Therefore the second respondent was misjoined.

[35] The applicant argued that the second respondent is designated to exercise control over the allocation and utilisation of all communal land within the boundaries of Kavango East and Kavango West, and is responsible for the approval of communal land rights in the

[3] Paragraphs 5 and 6 of the applicant's replying affidavit.

area, such as the right of leasehold held by the applicant.

(iii) Misjoinder of the third respondent: The Minister of Agriculture, Water and Land Reform

[36] The third respondent, cited in his official capacity, deposed to the answering affidavit on behalf of the respondents. He averred that no reasons have been advanced for citing him in the application.

[37] The applicant argued that the third respondent – in consultation with the first and second respondents – plays a significant role in granting rights of leasehold in terms of the CLR Act. Consequently, the third respondent was involved in the applicant obtaining its now threatened right of leasehold in respect of the land, which threat if not curbed could result in the applicant's eviction and cancellation of its right of leasehold. These powers are vested in the first to third respondents in terms of the CLR Act. Thus, the third respondent was properly cited because of the substantial interest he has in the outcome of this application, which – as in the case of the second respondent – may affect his statutory powers.

(iv) Misjoinder of the fourth respondent: Inspector General of the Namibian Police

[38] The respondents contended that the applicant appeared to refer to the fourth respondent as an institution. This is inferred because of the applicant's reference to the fourth respondent's 'members', whereas the fourth respondent is a person and therefore incapable of having members. It was argued that the Inspector General had been misjoined as no basis has been laid linking him to the act of spoliation.

[39] In reply, the applicant referred to the merits of its application, where it was averred that members of the Namibian Police were at the scene on the specified days and advised the applicant's employees to halt their activities on the communal land. As the police were acting within the course and scope of their employment, the fourth respondent was properly cited in his official capacity as their supervisor.

[40] Furthermore, an order was sought directing the police to assist the applicant in protecting its right to leasehold. Since the police officers could not be identified, the fourth respondent would ensure that the order is carried out by any member of the Namibian Police.[4]

(v) Misjoinder of the fifth respondent: Governor of the Kavango East Region

[41] Similar to the other respondents, it was contended that the applicant had failed to advance a link between the fifth respondent and the act of spoliation.

[42] The applicant submitted that in its founding papers it identified the fifth respondent as the person who gave the directive that the applicant's activities should be halted. It was pointed out that in the answering affidavit the respondents admitted that the directive could have in fact come from the fifth respondent. Therefore the fifth respondent was directly linked to the acts of spoliation complained of and was thus properly joined as a necessary party in the application.

Fourth point in limine: Incompetent relief sought by the applicant

[43] This point is a repetition of the respondents' third point *in limine* which deals with the alleged misjoinder of the first to fifth respondents on the basis that the applicant has failed to establish a nexus between the respondents, the act of spoliation, and the relief sought by the applicant. As a result of this failure, no relief against the respondents could be sustained.

[44] To buttress this point, the respondents submitted that the interim relief should not, upon the respondents' further consideration of the issues, have been granted, especially when one had regard to the merits of the case.[5] In response, the applicant reiterated its

[4] Paragraph 16 of the applicant's replying affidavit.

[5] Paragraph 34 of the respondents' answering affidavit.

argument that the first to fifth respondents were all necessary parties to the application.

[45] The applicant further argued that the respondents' assertion that the applicant was not entitled to the spoliation order is superfluous and served no purpose, as the parties agreed to the granting of the order on 14 December 2021.

Merits of the application

[46] The *mandament van spolie* is a restitutory interdict which is available to a possessor who was in peaceful and undisturbed possession of property and has been unlawfully deprived of such possession by another. The object of the remedy is that possession of the things of which the applicant has been dispossessed should be restored to him. In *Ludik v Keeve and Another*[6] Ueitele J referenced the following passage by Greenberg JA in *Nienaber v Stuckley*[7]:

'Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order. . . .' (emphasis added)

[47] The respondents repeatedly averred that upon a further and proper consideration of the application – subsequent to the granting of the order – they found that the spoliation order should not have been granted. Quite frankly, this amounts to the respondents crying over spilled milk, as it were. It is no longer of any consequence whether or not the respondents are of the stance that the applicant had not made a case for the spoliatory relief that was sought and subsequently granted. By agreement between the parties, the spoliatory relief granted was final in effect. This is apparent from paragraph 2 of the order quoted in paragraph [21] of this judgment. I will therefore not consider the parties' further averments on the relief that has already been granted (with costs). The court is *functus officio* in this regard.

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[6] *Ludik v Keeve and Another* (A 316/2015) [2016] NAHCMD 4 (20 January 2016).

[7] *Nienaber v Stuckley* 1946 AD 1049 at 1053; *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) at 494 at par 43 and the authority collected at fn16.

[48] What falls for consideration by this court, is whether the rule *nisi* granting interdictory relief against the respondents should be confirmed or discharged.

[49] It is also concerning that the respondents would have agreed to the granting of such an order without a proper consideration of the application in light of the implications of the resultant court order that would be made.

[50] I now deal with the points *in limine*, as they relate to the interdictory relief sought and whether the rule nisi should be made final or not.

The law on joinder

[51] The test for joinder of a party to litigious proceedings is whether such party has a direct and substantial interest not only in the subject matter of the proceedings, but also in the outcome of such proceedings.

[52] Miller AJ expounded on the test for joinder when he stated the following in *Traditional Authority v Oukwanyama Traditional Authority*[8]:

'It is trite law that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any judgment given in the action, it is essential that such person be joined either as an applicant or as a respondent. The objection of nonjoinder may be raised where the point is taken that a party who should be before court has not been joined or given notice of the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.'

[53] The learned judge[9] continued by referring to the oft quoted passage in *Kleynhans v*

[8] *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (A 44-2013) [2015] NAHCMD 170 (27 July 2015) para 13.

[9] *Ondonga Traditional Authority* supra para 13.

Chairperson of the Council for the Municipality of Walvis Bay and Others[10] where Damaseb JP at paragraph 32 said:

'The leading case on joinder in our jurisprudence is Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A). It establishes 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 the 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 the 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.'

Non-joinder of Inspector Kasiki and the Regional Commander

[54] Applying the above-mentioned authorities, the respondents have not shown that Inspector Kasiki and the Regional Commander, in their personal capacities or otherwise, have a direct or substantial interest in the outcome of these proceedings. The issue is not whether a granting of the order sought by the applicant cannot be carried out or sustained without prejudicing either of them. On the facts, their interaction with the applicant and involvement in the events preceding this application do not call for their joinder as interested parties. The respondents' first and second points *in limine* are accordingly dismissed.

Misjoinder of the first to fifth respondents and incompetent relief sought by the applicant

[55] The subject matter of the applicant's application concerns a certain portion of communal land in the Kavango East Region and its leasehold right in respect of the land. The applicant's title to the land was threatened by unidentified community members who allegedly reside in the communal area where the land is situated.

[56] The first respondent, the Shambyu Traditional Authority is the traditional authority

[10] *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437.

which exercises jurisdiction over the members of the traditional community which the applicant alleges were responsible for interfering with the applicant's title to the land.

[57] The second respondent, the Kavango East Communal Land Board is empowered in terms of section 2 of the CLR Act to both allocate and cancel land rights in respect of communal land in the Kavango East region. Moreover, in terms of section 30(1) and (2) the first, second and third respondents are all involved in the granting of rights of leasehold for agricultural purposes, such as that held by the applicant.

[58] Section 36 of the CLR Act also provides that:

'In addition to the grounds for cancellation set out in a deed of leasehold, a right of leasehold may be cancelled by a board if the leaseholder fails to comply with the requirements or to adhere to any restrictions imposed by or under any other law pertaining to the utilisation of the land to which the right relates.'

[59] It cannot be disputed that certain community members interfered with the applicant's ability to exercise its right of leasehold and to utilise the land, which could result in its failure to comply with the requirements connected to the leasehold. It stands to reason, therefore, that any interference with the applicant's right to utilise the land is also an interference with the statutory powers vested in the first to third respondents in respect of the right.

[60] As the applicant' application effectively involves the control and utilisation of the land, it was therefore necessary for the first, second and third respondents to be cited as interested parties in these proceedings.

[61] Part of the relief is sought by the applicants is against the Namibian Police Force. The applicant seeks an order that members of the police be directed to assist the applicant in protecting its leasehold right in respect of the land.

[62] When a court order is made directing members of the police to carry out certain duties, such duties are carried out by the members in the course and scope of their

employment under the supervision of the fourth respondent, namely the Inspector General. The applicant therefore correctly cited the fourth respondent as commander of the police force as provided for in section 3(1) of the Police Act, 19 of 1990.

[63] As regards the fifth respondent, the Kavango East Regional Governor, it is alleged that he gave the directive that the applicant halt its operations on the land pending the outcome of the alleged land dispute. It is the applicant's case that this directive was directly linked to the conduct of the community members. The respondents did not deny this allegation, and instead proffered an explanation justifying the directive. Worth noting is that the fifth respondent deposed to affidavit wherein he too did not deny the allegations made connecting him to the act of spoliation which gave rise to this application.

[64] The third and fourth points *in limine* are accordingly also dismissed.

Final interdict

[65] It is by now trite that the requisites for a final interdict are a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.[11]

[66] The respondents' denied the applicant's allegation that the members of the first and fourth respondents unlawfully and without legal course interfered with the applicant's operations on the land. Moreover, the respondents denied that members of the first respondent as defined and members of the fourth respondent were on site at the time of the alleged incidents.

[67] In response, the applicant stated that it was the community members of the first respondent who were on site and who carried out the acts of spoliation. Additionally, it was clear that the members of the first respondent were also at the scene. It is not the applicant's case that the first and fourth respondents were present in person, which would in

[11] *Namib Mills (Pty) Ltd v Bokomo Foods Namibia (Pty) Ltd* 2020 (3) NR 870 (HC) para 82.

any event be impossible in the case of the first respondent which is a statutory body.

[68] The respondents also submitted that the applicant obtained the right of leasehold by irregular and unlawful means. As a result of complaints forwarded to his office regarding the alleged irregularities, the third respondent constituted an investigation committee which provided him with a report in October 2021. This report has since been conveyed to the Board for its advice and the applicant will be contacted to make representations before any decision is made. Despite this, the respondents did not dispute that the applicant was granted a right of leasehold which entitled it to possession of the land.

[69] The respondents submitted that the applicant specifically and clearly stated who the spoliators were, who according to the applicant are the community members of the first respondent. Despite this, the applicant failed to cite the community members in its application.

[70] In response to the applicant's allegation that the directive to halt the operations came from the Governor, the respondents submitted that even if the directive did in fact come from the Governor and may have amounted to an act of spoliation, such directive was justified taking into account the Governor's responsibility to ensure the protection of the lives of persons in the region and the prevailing circumstances at the time.

[71] They further submitted that the presence of the members of the Namibian Police Force on site was to restore order in the face of the looming threat of violence against the applicant and/or its property at the time. Any implication by the applicant that members of the police involved themselves in the illegal activities of the members and the confrontations with the applicant are thus denied.

[72] Much was made by the respondents about the fraudulent means by which the applicant obtained its right of leasehold and the investigative process launched by the third respondent into how the right was obtained. Nevertheless, the respondents conceded that that the applicant has a valid right to the land.

[73] Considering the allegations made, the applicant has met the requisites for the granting of a final interdict, which will impact the order for costs made herein. However, the applicant has one hindrance to the order being granted.

Applicant's failure to identify the respondents

[74] In *City of Cape Town v Yawa*[12], the applicant sought to interdict unnamed respondents from unlawfully occupying and/or residing on certain property. In making his finding, Budlender AJ stated the following with reference to the judgment in *Kayamandi Town Committee v Mkhwaso and others*[13]:

'Conradie J (as he then was) held that one of the essential tests for determining whether a particular act is to be classed as a judicial act is whether there is a *lis inter partes* (at 634 B). He said that "a failure to identify defendants or respondents would seem to be destructive of the notion that a Court's order operates only *inter partes* .... An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree and not a Court order at all" (at 634 FI).'"

[75] The learned judge[14] further referred to *Illegal Occupiers of Various Erven Philippi v Monwood Investment Trust Company (Pty) Ltd*[15] stating the following:

'Ngwenya J also stated at 121h that the parties in legal proceedings must be clearly identified. There are serious difficulties when the applicant, as is the case here, does not have the requisite details of the respondents. The respondents did not and do not have the particulars of the appellants. Regrettably our rules of procedure here do not assist us at all as to what to do when faced with this dilemma. Therefore, each case will have to be considered on its own merits

[12] *City of Cape Town v Yawa* [2004] 2 All SA 281 (C) at 282.

[13] *Kayamandi Town Committee v Mkhwaso and others* 1991 (2) SA 630 (C).

[14] *Yawa* supra at 283.

[15] *Illegal Occupiers of Various Erven Philippi v Monwood Investment Trust Company (Pty) Ltd* [2002] 1 All SA 115 (C).

(at 121H).'

[76] The court in *Yawa*[16] found that the unnamed respondents were neither an ascertainable nor an identifiable group against whom an effective order could be made. It however held that a failure to identify the individuals who comprised the unidentified respondents was not of itself an absolute bar to the proceedings.

[77] In the present application the applicant seeks to restrain unnamed community members of the first respondent from interfering in the applicant's operations.

[78] The applicant averred that it was unable to identify the members of the community. This court is appreciative of the difficulty a party in the applicant's position may have had in identifying the individuals who were involved in the conduct that gave rise to these proceedings (even though the applicant has not apprised the court of the steps, if any, that it took in attempting to identify the members of the community). This inability does however not justify granting an order against the members of the community as a whole based on the present facts before court. The difficulty is also the issue of serving the order on the members who interfered with the applicant's rights.

[79] The court in *Rhodes University v Student Representative Council of Rhodes University and Others*[17] the Eastern Cape Division of the South African High Court discussed litigants' inability to identify the opposing party against whom it seeks relief. It stated the following:

'. . . it is a well-established principle in our law that a litigant is not entitled to an order against which no cause of action is being made calling upon that person to desist from some "unlawful" action. In ex parte Consolidated Fine Spinners and Weavers Ltd v Govender (1987) 8 ILJ 97 (D) referred to with approval in Durban University of Technology v Zulu and Others 1693/16 P 2016 ZAZPHC 58 (27 June 2016), it was pointed out that the inability of Applicants to identify particular

[16] *Yawa* supra at 283-284.

[17] *Rhodes University v Student Representative Council of Rhodes University and Others* [2017] 1 All SA 617 (ECG) (1 December 2016) para 117-118.

perpetrators does not afford any justification in for granting an order against a number of people including persons against whom no cause of action has been established. Importantly the court pointed out that the practical exigencies of the situation also do not afford justification for such course however desirable this may appear to be.

[117] This is a fundamental principle which cannot be overlooked.'

[80] Additionally, there is nothing before this court to suggest that these proceedings were brought to the attention of the members of the community whom the applicant seeks to interdict. In this regard, and for purposes of the final relief sought, I do not accept that service of the process on the traditional authority counts as service of on the members of the community. This court cannot grant a final interdict against respondents who were not given notice of the suit against them and thus not given an opportunity to place their case, if any, before this court.

[81] For the aforegoing reasons the following order is made:

1. The rule *nisi* granted on 14 December 2021 is discharged.

2. There shall be no order as to costs.

3. The applicant is granted leave to approach this court, on papers duly amplified, to seek interdictory relief against specified persons, if so advised.

4. The matter is removed from the roll and is regarded as finalised.

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EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT:	Ms L Ambunda-Nashilundo On instructions of Sisa Namandje & Co Inc
FIRST TO FIFTH RESPONDENTS:	Ms N Tjahikika Office of the Government Attorney