

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Maria Nangie Amupolo // Ondangwa Town Council</i>	Case No.: HC-NLD-CIV-MOT-GEN-2019/00008
	Division of Court: High Court (Northern Local Division)
Heard/tried before: Honourable Mr Justice Damaseb, JP	Date of hearing: 28 January 2020
	Delivered on: 3 February 2020
Neutral citation: <i>Amupolo v Ondangwa Town Council</i> (HC-NLD-CIV-MOT-GEN-2019/00008) [2020] NAHCNLD 16 (3 February 2020)	
The order: Having heard Ms Mugaviri on behalf of the Applicant and Mr Tibinyane on behalf of the respondents, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. The application under case No: HC-MD-CIV-MOT-GEN-2019/0008 is stayed pending the joinder of Teresia Likania Amupolo as a necessary party.2. The applicant is directed to serve all pleadings filed of record to date on the said Teresia Amupolo.3. Upon being duly served, Teresia Amupolo is directed to file opposing papers on or	

before **12 February 2020**. She must serve all such papers on the applicant and the first and second respondent. Should she fail to do so, she will be barred from further participation in the proceedings.

4. The applicant, the first respondent and the second respondent must, if advised to do so, file answering papers to those filed by Teresia Amupolo, on or before **18 February 2020**. Should they fail to do so they will be barred from filing any further papers in opposition to those of Teresia Amupolo.
5. The parties shall convene a parties' meeting to prepare a joint report, alternatively individual reports, making proposals on the future conduct of the matter. Such report is to be submitted on or before **21 February 2020**.
6. The matter is postponed to **24 February 2020 at 9h00** for status hearing and further directions.
7. Any failure to comply with the obligations imposed on the parties by this order will entitle the other to seek sanctions as contemplated in rule 53 and 54;
8. A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor within a reasonable time, by notice to the opposing party.
9. Costs shall be in the cause.

Reasons

Damaseb, JP:

[1] The applicant is a daughter of the late Mr Kilian Amupolo (the deceased) who passed away on 18 December 2006. The deceased's death was reported to the second respondent who is the Master of the High Court (the Master). In the wake of the estate being reported to her, the Master on 15 August 2014 issued the applicant with a letter of executorship vesting

her with authority as such to liquidate and distribute the estate of the deceased.

[2] The first respondent is the Ondangwa Town Council (OTC). The second respondent is cited *nomino officio* for the interest she has in the matter and no relief is sought against her.

[3] The present dispute relates to a piece of land that belonged to the deceased before he passed away. It is common cause that the disputed land is Erf 882, Ondangwa. OTC had resolved to acquire the land for public purposes and is required by law to pay compensation to those with the right of occupation over it. For that purpose OTC, assuming that she was competent to do so entered into an agreement with the applicant to acquire Erf 882 and therefore assumed liability to compensate the lawful occupier of the land.

[4] The origin of the dispute is the agreement entered into between the applicant and OTC on 26 April 2018 to compensate the deceased's estate for the acquisition of Erf 882, Ondangwa, for purposes of urban development, in the amount of N\$ 2 001,009.20 (compensation amount) as full and final settlement for the said land, inclusive of all improvements made thereon.

[5] It emerges from the papers that the applicant's sister, one Teresia Kiliana Amupolo (Teresia) was also appointed executrix to the deceased's estate by the Master on 7 June 2007, in other words pre-dating the appointment of the applicant.

[6] It is common cause that the applicant begun to put pressure on OTC to pay over into the estate account the agreed compensation amount so that she can finalise the estate under the Master's supervision. It then became apparent to OTC that Teresia and others not only still lived on the land but Teresia claimed to be the duly appointed executor to the deceased's estate. OTC then decided that it would not pay the compensation amount to the applicant until (a) the issue of the competing claims to executorship is resolved and (b) the applicant took the steps necessary to remove from the land all those currently in occupation

of it.

[7] The applicant does not agree with the stance taken by OTC and launched the present proceedings to enforce payment of the compensation amount. The proceedings were opposed by OTC which, in addition to pleading over on the merits, raised two points in *limine*, to wit:

1. Non joinder of Teresia as an interested party with a direct and substantial interest in the outcome of the proceedings;
2. Non-compliance with rule 65(7) in that no report was obtained from the registrar.

[8] Having got wind of the proceedings, Teresia wrote a letter to the Court explaining her legal interests in the matter and asking to be joined. The two interests she professes are (a) that she is the rightful executrix as opposed to the applicant and (b) that she is the owner of the land in question. Teresia states in her letter filed with the court on 20 December 2019 that:

‘This house is my house that my late father (while he was still a life[sic]) gave to me and my two siblings (Maria Nangombe Sampofu and Erstus Kazimba Amupolo) which was part of my mother (Agnes Namboga Apolo) inheritance to me when she passed away on 26 July 2003.’

[9] In that letter Teresia stated that she had applied for legal aid and if granted wished to be represented on 27 January 2020 when the matter was set down for hearing. She made clear that if she was to be unable to attend on that day she wished that the matter be postponed so that she obtains legal aid representation.

[10] It was in spite of the point in *limine* clamouring for Teresia’s joinder and Teresia’s wish to be afforded the opportunity to participate in the proceedings, that the applicant persisted to set the matter down for argument so as to enforce payment of the compensation amount.

[11] In the view I take of the matter on Teresia's claim of ownership (whatever its merits when the issue is finally decided), it is unnecessary for me to decide whether or not the applicant has made out the case for enforcement; nor indeed do I need to decide OTC's *in limine* objections save that relating to Teresia's joinder - but joinder on the limited basis that she claims ownership to the land.

[12] The applicant misconceives in a very material respect a part of the interest relied on by Teresia. Even if one were to accept the applicant's premise that the Master's clearly expressed decision (in the report dated 16 July 2019) that she, and not Teresia, is the properly appointed executrix, the obstacle facing the applicant is that if, in fact, Teresia is the lawful owner of Erf 882, Ondangwa, that land cannot, in law, form part of the deceased's estate and therefore cannot be administered by the applicant *qua* executrix.

[13] Therefore, even if all else goes in the applicant's favour as far as the issue of executorship is concerned, Teresia remains improperly excluded from the proceedings to ventilate her ownership claim. There will be grave prejudice to Teresia if she were not joined in the proceedings. To close the doors of justice to an heir, or possible legatee, who might have a legitimate interest in the subject matter of the litigation would fly in the face of her constitutional right to be heard by an impartial and independent court.¹ I conclude therefore that the applicant should not have persisted with the present application without Teresia being afforded the opportunity to participate. The application cannot therefore be granted in its present form and more particularly without Teresia being allowed to participate.

[14] Teresia was not present or represented during the proceedings that took place on 27 January and postponed to the following day, presumably because she had not yet obtained legal aid assistance. She needs to be given another chance to join the proceedings.

[15] Ms Mugaviri has urged that I not dismiss the application in the event I find that Teresia ought to be joined. I will follow that course and make an order staying the enforcement application and directing that Teresia be joined as a necessary party.

¹ *Brink N.O v Erongo All Sure Insurance CC* 2018 (3) NR 641 at 651C-F.

Order

[16] In the circumstances, the following order is made:

1. The application under case No: **HC-MD-CIV-MOT-GEN-2019/0008** is stayed pending the joinder of Teresia Likania Amupolo as a necessary party.
2. The applicant is directed to serve all pleadings filed of record to date on the said Teresia Amupolo.
3. Upon being duly served, Teresia Amupolo is directed to file opposing papers on or before **12 February 2020**. She must serve all such papers on the applicant and the first and second respondent. Should she fail to do so, she will be barred from further participation in the proceedings.
4. The applicant, the first respondent and the second respondent must, if advised to do so, file answering papers to those filed by Teresia Amupolo, on or before **18 February 2020**. Should they fail to do so they will be barred from filing any further papers in opposition to those of Teresia Amupolo.
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8. A failure to comply with any of the above directions will *ipso facto* make the party in default liable for sanctions, at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor within a reasonable time, by notice to the opposing party.
9. Costs shall be in the cause.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Applicant	Defendant
G Mugaviri Mugaviri Attorneys, Oshakati	L Tibinyane Government Attorney, Windhoek