
**CASE NO.: A 336/2010**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

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| **ERASTUS TJIUNDIKUA** | **FIRST APPLICANT** |
| **ZEBALD HIMUEE TJITUKA** | **SECOND APPLICANT** |

and

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| **OVAMBANDERU TRADITIONAL AUTHORITY** | **FIRST RESPONDENT** |
| **KOVERA NGUVAUVA** | **SECOND RESPONDENT** |
| **KILUS NGUVAUVA** | **THIRD RESPONDENT** |
| **RIPUREE TJOZONGORO** | **FOURTH RESPONDENT** |
| **INSPECTOR-GENERAL OF THE NAMIBIAN POLICE** | **FIFTH RESPONDENT** |
| **THE COUNCIL OF THE MUNICIPALITY OF OKAHANDJA** | **SIXTH RESPONDENT** |

**CORAM:** **MULLER J**

Heard on: 24 November 2010

Delivered on: 26 November 2010

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**JUDGMENT**

**MULLER J**

[1] On 5 November 2010 the two Applicants launched an application on an urgent basis for the following relief as contained in their Notice of Motion:

**"1. Condoning the non-compliance with the Rules of this Honourable Court, and hearing the application on an urgent basis as envisaged by Rule 6 (12) of the aforesaid Rules.**

**2. That a Rule Nisi be issued, calling upon the respondents to show cause, on a day to be arranged with he Registrar, why an order should not be granted in the following terms:**

**2.1 Interdicting and restraining the first, second, third and fourth respondents and any member(s) of the first respondent's traditional community from conducting a burial service and burying the late Mr Peter Nguvauva at the scared burial ground of the Ovambanderu Traditional Community, situated at Erf 458, Khimemua Street, Okahandja within the municipal area of the sixth respondent;**

**2.2 Directing that the sixth respondent not take any steps to assist the first, second third and fourth respondents and/or members of the Ovambanderu Traditional Community from clearing or cleaning the grave at the sacred burial ground of the Ovambanderu Traditional Community, situated at Kahimemua Street, Okahandja within the municipal area of the second respondent.**

**3. That sub-paragraphs 2.1 and 2.2 supra operate with immediate effect as an interim order pending the finalization of the application for review**

**brought by the applicant in separate proceedings in the above Honourable Court under case number A 254/2010, launched in August 2010, which matter is still pending.**

**4. That the fifth respondent be authorized and directed to serve this order on the respondents by having it announced at the sacred burial ground of the Ovambanderu Traditional Community, situated at Kahimemua Street, Okahandja within the municipal area of the second respondent.**

**5. Ordering that the costs of the application be paid by the first to fourth respondents, jointly and severally, the one paying the other to be absolved.**

**6. Further and/or alternative relief."**

[2] This application was launched after the normal court hours. Although no papers were filed on behalf of the respondents, they were apparently represented by their legal representatives, who objected *in limine* to the application on the basis of urgency and the applicants' *locus standi*. Swanepoel J heard arguments on these two points *in limine*, whereafter both points were rejected, but the respondents were permitted to file answering affidavits and the applicants' to reply thereto. The application was consequently postponed to be heard on 24 November 2010 and deadlines were determined for the filing of further affidavits and heads of argument on behalf of both parties.

[3] Both parties complied with the court order in respect of the times provided therein for the filing of the documents referred to and the court heard oral arguments presented by the legal practitioners of both parties. The applicants were presented by Mr P. Kauta and the Respondents by Adv T.J. Frank SC, assisted by Dr S Akweenda, respectively. In addition to the applicants' heads of argument supplementary heads were filed by the applicants. The points *in limine* being disposed of on 5 November 2010, the merits of the application had to be adjudicated upon. The applicants, however, also objected to the authority of the deponent of the respondents' answering affidavit. That issue has been argued and will be dealt with hereinafter.

[4] This application comes before this court with a history. I shall briefly refer to the historical facts which are common cause.

- After the death of Chief Munjuku II the late Peter Nguvauva (the deceased) was appointed as acting paramount chief of the Ovambanderu Traditional Community by one part of that community, but another part of that community did not recognise the deceased as a successor and his right to be so appointed; they supported Keharanjo II Nguvauva. However, the deceased apparently acted until his death as acting Paramount Chief;
- On 4 October 2010 Peter Nguvauva passed away;
- The division within the Ovambanderu Traditional community become even more pertinent upon the death of the deceased, with the crucial issue of where he should be buried;

- According to the wishes of one part of the community who supported the deceased as head of the Ovambanderu Community during his lifetime, he should be buried at the scared burial ground in Okahandja where two other former Paramount Chiefs were buried, namely Paramount Chief K. Kahimemua and Paramount Chief Munjuku II Nguvauva. The other group vehemently opposed this and remains adamant that the deceased was neither a paramount Chief nor a hero and does not deserve to be buried there;
- A review, instituted in August 2010, case no. A 254/2010, is currently pending before this court in respect of the leadership issue of the Ovambanderu Traditional Community;
- The constitution of the Ovambanderu Traditional community does not provide for the position of an acting Paramount Chief;
- An application was launched and a *Rule Nisi* obtained on 16 October 2010 by Keharando II Nguvauva, alleging that he is the Paramount Chief, in order to obtain an interdict to prevent the burial of the deceased at the Okahandja sacred burial grounds. This *Rule Nisi* was opposed and a preliminary point taken was to that applicants' *locus sitandi*. On 4 November 2010 Parker J, discharged the *Rule Nisi* on the basis that the applicant, namely Keharando II Nguavauva, had no *locus standi* to bring that application as he was not the Paramount Chief as he alleged. The applicant was ordered to pay the costs of that application;

- The result was that the burial issue was not resolved and the respondents indicated that the deceased would be buried the following Sunday at the Okahandja sacred burial grounds;
- On the next day the Keharando Group, with two new applicants, launched the current application to stop the intended burial on the following Sunday at Okahandja.

[5] I have listened to the arguments presented on behalf of both parties. Please allow me at the outset to make the following remarks:

- It is regrettable that this court should be burdened with an issue which has its roots in a dispute which the Ovambanderu Traditional Community could not resolve for so many years;
- It is tragic that the real dispute amongst groups of this community has led to an unreasonable delay to bury the deceased;
- This whole issue has obviously harmed a very prominent and proud traditional group in Namibia, namely the Ovambanderus, as a whole and not only one part of it.

Having said this, the court does recognise its authority and obligation to adjudicate upon disputes between citizens of Namibia to prevent citizens or groups of citizens from taking the law in their own hands. That will not be tolerated and so will no violence be tolerated in the Republic of Namibia. This court operates in terms of the law, its Rules and how the law has been interpreted in various previous applicable court decisions. This matter will be adjudicated

on those established principles, which will necessarily have the effect that only one party will be successful and will probably be entitled to its costs.

## Authority

[6] The alleged lack of authority by the deponent Gerson Katjiruato oppose the application and depose to the main affidavit on behalf of the respondents will be dealt with first. This is really a non-issue and can quickly be disposed of. The first complaint is that the resolution annexed by the first respondent to the affidavit of Gerson Katjirua is defective, because it relates to the appointment of an acting chief more than two years ago. The respondents concede that is the wrong resolution. Secondly, a resolution handed in during the hearing on 5 November 2010 with the same date mandated another person than the deponent. Thereafter a further resolution purportedly taken on 6 November 2010 was filed on 15 November 2010. The applicants consequently want the opposing affidavit struck.

[7] In several court decisions it has been held that the question whether the deponent to an affidavit is authorized to depose to the affidavit is irrelevant. It is the institution of proceedings and the prosecution thereof that need to be authorized. (*Duntrust (Pty) Ltd v H. Sedlack t/a GM Refrigeration* 2005 NR 147 (HC) at 148 D-J). It is trite that an artificial person, a legal *persona*, can only bring an application through its duly authorized officials. As such that legal *persona* has the onus to prove that the application is duly authorized, as well as the authority of the deponent of the relevant affidavit deposing on its behalf. (*National Union of Namibia Workers v*

*Naholo* 2006 (2) 659 (HC) at 669 C-D). A court considers whether enough has been placed before it to warrant the conclusion that it is the artificial person who is applying and not anybody else who is not authorized to do so. It must also be remembered that a cost order may be impossible to enforce against an artificial person if it did not authorise someone to act on its behalf. (*Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 350 E-F; *Otjozondjupa Regional Council v Dr Ndahafa Nghifindaka and 2 Others*, case no. LC 1/2009, delivered on 22 July 2009 at p10 [18]). The legal position where a person brings an application on behalf of an artificial person has been summarised in the *Otjozondjupa Regional Council* case, supra, in [21] at p12-13.

[8] In this matter the artificial person, namely the first respondent was brought before court by an application of the applicants on 5 November 2010. A resolution was filed authoring the deponent to the respondents' affidavit on 6 November 2010 to represent it. Those decisions were taken by the Supreme Council of first respondent. Although the applicants apparently dispute the existence of the Supreme Council and its ability to take valid decisions, it is submitted (and apparently conceded by the applicants) that the same Supreme Council did take decisions during the impasse' or *interregnum* e.g. in respect of the alleged moratorium and the burial of the previous chief, Chief Munjuku II at Okahandja. The fact that there were two resolutions taken on two consecutive days is neither here or there. The deponent, Gerson Katjirua, was authorised to represent the first respondent in opposing the application.

[9] In the circumstances I am satisfied that enough evidence was placed before the court to prove the authority of Gerson Katjitura to oppose the application and to depose to an affidavit on behalf of the first respondent. I also recognise that apart from the first respondent, the 2nd, 3rd and 4th respondents rely on the affidavit of Gerson Katjirua and confirm under oath what he has deposed to.

## Supplementary heads – The Res judicata argument

[10] The gist of the submission contained in the supplementary heads of the applicants is that Parker J has already decided the issue of the existence and legal ability of the Supreme Council to take decisions, an issue relied on by the respondents. That issue is according the applicants *res judicata.*

[11] The requirements for a defence of *res judicata* have been discussed in several textbooks and court cases. In the authoritive work of *Herbstein and van Winsen* (now under new authors) *The Civil Practice of the High Courts of South Africa*, volume 1, the following is stated on p609:

> **"A defendant may plead *re judicata* as a defence to a claim that raises an issue disposed of by a judgment *in rem* and also as a defence based upon a judgment *in personam* delivered in a prior action between the same parties, concerning the same subject-matter and founded on the same cause of action"**

(*Horowitz v Brock and Others* 1988(2) SA 160 (A) at 178 H-I)

*Bafokeng Tribe v Impala* Ltd 1999(3) SA 517 (B) followed what was stated by the South African Court of Appeal in the case of *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995(1) SA 653 (SCA) to the effect that :

> **"...the essentials for the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject–matter, or thing (*de eadem re.)* Requirements (2) and (3) are not immutable requirements of *res judicata*."**

It must be an issue that was determined on the merits. In *African Farmers and Townships v Cape Town Municipality* 1963 (2) SA 555 (A) Steyn CJ said the following at 562 A in respect of *res judicata*:

> **"The parties are the same, and the appellant in the action it has instituted, seeks the same order as in the original proceedings, i.e. an order declaring the notice of expropriation invalid"**

The learned Chief Justice then went on to analyse the requirements at the hand of old writers like Voet and Huber to establish the legal position in Roman and Roman-Dutch law and concluded at 562D:

> **" The Rule appears to be that where a court has come to a decision <u>on the merits</u> of a question in issue, that question, at any rate as a *cansa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."**

(My emphasis)

A Judgment *in rem* is conclusive against the whole world. *Koster Koöperatiewe Landbou Maatskapy Bpk v Wadee* 1960(3) SA 197 (TPD) at 199G; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (TPD) at 368H – 370A) In the *Tshabalala* case examples of decisions *in rem* are provided. These include status issues including matrimonial status, insolvency, expelling a member of a profession, declaring a person mentally disordered, presumption of death and paternity issues (p369A). There are also other issues mentioned, i.e. the validity of a law. In the case of *Liley and Another v Johannesburg Tirf Club and Another* 1983(4) SA 448 (WLD) Goldstone J stated at 550H:

> **"The *exceptio res judicata* is a form of *estoppel* and means that, where a final judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of a judgment *in rem*, any other person), are not allowed to place in issue the correctness of that judgment. This rule is principally founded upon the public interest: Le Roux Ander v Le Roux 1967(1) SA 446 (A) at 46H."**

Goldstone J also referred with approval to the well known statement in the old case of Bertram v Wood 10 SC 177 at 180 to the effect that *res judicata* induces a presumption of the correctness of a previous judgment based on the requirement of public policy in order to curb long drawn-out litigation. Furthermore, Goldstone J said that a subsequent appeal does not affect the finality of a judgment if it is final in effect (p552 D-G). In *National Sorghum Breweries v International Liquor Distributors* 2001(2) SA 232 (SCA) the South African Court of Appeal rejected the doctrine of issue estoppels in this regard.

[12] The applicants' submission in this regard is wrong and has no substance at all. Firstly, the parties in the two applications are not the same. That is a requirement for a decision of *res judicata.* Parker J's decision cannot be regarded as a judgment *in rem.* Secondly, the question

(cause of action) that arises must be the same. That is not so in these two applications. The applicant in the first application alleged that he is the designated paramount chief of the Ovambanderus and brought the application and sought relief on that basis. Parker J decided only the point taken *in limine* by the respondents in that application, namely that the applicant was not the paramount chief and did not have *lucus standi* to bring the application. The learned Judge did not consider the merits, neither is that a final judgment. The court considered the existence of the Supreme Council in that light. Anything more that the Judge has said is *obiter*. The question to be determined in this issue is not the same as in the first application. Thirdly, in his judgment Parker J makes it abundantly clear that his decision is based on that application.

[13] In all the circumstances the belatedly *Res judicata* point has no merit and is rejected.

## Type of relief

[14] In order to decide what court's approach to this application and the relief craved, should be, it is of paramount importance to determine what the type of relief does the applicants seek, namely whether it is relief of a final or temporary nature.

[15] At first blush it appears to be an interim interdict, but when the relief sought is analysed, it is evident that the applicants in fact seek a final order. This is made absolutely clear in prayer 3 of the Notice of Motion. In prayer 2.1 the applicants seek an interdict against the first to fourth respondents in particular to prevent them to bury the deceased in Okahandja and

in prayer 2.2 a direction to prevent the sixth respondent, the Okahandja Municipal Council, to assist the respondents in respect of the burial of the deceased at Okahandja. The applicants want these two prayers to be made operative with immediate effect as **"an interim order pending the finalisation of the application for review..... under case number A254/2010..."**

[16] In LAWSA, second edition, Vol 11, the following is stated in paragraph 401:

> **"An interim interdict is a court order preserving or restoring the status quo pending the final determination of the rights of the parties. <u>It does not involve a final determination of these rights and does not affect their final determination".</u>**
>
> (My emphasis)

It therefore also follows that the rights that are to be considered by the court at the stage of determining whether an interim interdict should be granted, or not, are the same rights to be considered later. Furthermore, the same parties must be involved, i.e. the rights to be finally determined, must be the rights between the parties who initially obtained the interim relief.

[17] The parties who are involved in the review application are not the same parties as in this application. The applicant in the review application, case number A 254/2010, is Keharanjo II Nguvauva and here are two different applicants. The review application is brought against the Minister of Regional and Local Housing and Rural Development. He does not figure in this application at all. Only the current first and third respondents are respectively second and third respondents in the review application. Second, fourth and fifth and sixth respondents are not parties to the review application. Based on that principle, prayer 3 cannot be granted. That is,

however, not the only prohibition to prevent the court from granting such an order, as will become clear from the further analysis later herein.

[18] The purpose of this application is to prevent the burial of the deceased at Okahandja, while the review application is brought to review and set aside the decision of the said minister and to declare that the respondent, who is not a party to this application Chief of the Ovambanderu Traditional community. The issue of the burial of the deceased is not an issue to be reviewed. Counsel for the respondents submitted that the applicants are in essence seeking a postponement of a decision to bury the deceased until a paramount chief has been appointed after finalisation of the review and consequently has to discharge a lesser *onus* than the *onus* that would eventually be required in the review proceedings, while they (the applicants) full well know that the burial issue will not feature again. I shall withhold any comments in that regard, but I do agree with the submission by the respondents that the relief they now seek, is inappropriate. If the burial of the deceased has to wait until final resolution of the review application, which may be appealed against, that wait may be for many years. That would create an untenable situation.

[19] What is evident, is that if there is no pending claim between the parties to this application, an interim interdict cannot be granted. In *Botha v Maree* 1964 (1) SA 168(0) Smit JP concluded at 171 F-G that where no claim is pending between the parties, the granting of an interdict is of a final nature.

[20] An interim interdict is furthermore an order that preserves the *status quo* pending the final determination of the rights of the parties. To determine whether an interdict is interim or final, one has to look at its substance and not its form. In paragraph 401, LAWSA, *supra*, states:

> **"Whether an interdict is final or interim depends on its effect upon the issue and not upon its form. If the relief sought is interim in form but final in substance, the applicant must prove the requirements for the grant of a final interdict and questions such as balance of convenience do not arise."**

(*Apleni v Minister of Law and Order and Others* 1989(1) SA 195 at 201 A-D.) The test to be applied has been set out in *BHT Water Treatment v Leslie and Another* 1993(1) SA 47 (WLD) at 54J-55E. What the approach of the court in these circumstances should be has often been indicated and followed, namely that what was stated in respect of final relief in the case of *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234(C) at 235. (The Stellenvale Rule)

[21] I have no doubt that the current application is in fact for final relief. This matter should consequently be approached on the basis of the Stellenvale Rule which will be discussed hereafter.

## Stellenvale Rule

[22] The Stellenvale Rule, as expressly stated in the *Stellenbosch Farmers Winery* case, *supra,* indicates where there are factual disputes, a final interdict should only be granted in Notice of

Motion proceedings if the facts stated by the respondents, together with the admitted facts in the applicants' affidavits, justify such order. In the *BHT Water Treatment* case, *supra*, Labe J referred with approval to what has been stated in this regard in the case of *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968(2) SA 528(C) at 259G. In the *BHT Water Treatment* case, after confirming the Stellenvale Rule, Labe J also said the following at 55E:

> **"The court should look at the substance rather than at the form. The substance is that an interdict is being sought which will run for the full time of the restraint. In substance therefore final relief is being sought although the form of the order is interim relief. In my view therefore the correct approach to this matter is that set out in the *Stellenbosch Farmers' Winery* case to which reference is made in the Cape Tex case."**

This approach has frequently been applied by this court in several cases. (E.g. *Clear Channel Independent Advertising Namibia (Pty) Ltd and Another v Transnamib Holdings Ltd and Others* 2006(1) NR 121 (HC) at 129 C-H.)

[23] The papers are full of factual disputes. Nearly all the allegations contained in the affidavits are denied. Very few allegations made by the respondents' deponents are admitted by the applicants. Had his not been an urgent application, the court would have seriously considered to dismiss the application outright, as a result of the disputes, which the applicants knew about and ought to have foreseen. It is nearly impossible to decide this issue on the papers. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (TPD) at 1168.) No application was made to refer the matter to evidence. However, in its discretion the court has decided to attempt to consider this application on the basis of the Stellenvale Rule.

The Stellenvale Rule provides a mechanism to deal with factual disputes and I have already referred to the approach which a court should follow in that regard. If that approach is followed in this matter, then the Court has to accept the facts as stated by the respondents in the affidavit by Gerson Katjirua and supporting affidavits, as well as those facts admitted by the applicants.

[24] With the very few admissions by the applicants, the court approaches the matter mainly by accepting the facts relied on by the respondents. Without dealing with every disputed issue on this basis, the court has to accept the following:

- Although there is no provision for the appointment of an acting paramount chief in the constitution or the Traditional Authorities Act, it is not forbidden;
- Other acting chiefs were appointed in the past;
- The deceased was appointed as acting chief after paramount Chief Munjuku II Nguvauva died and acted as such until his death;
- The Supreme Council met and took certain decisions during the *interregnum*. In fact the Supreme Council also decided on the moratorium and the burial of Chief Munjuku II at Okahandja, issues apparently not disputed by the applicants. The Supreme Council also decided that the deceased should seek permission to be buried at Okaseka from the farm owner and in the event of her denial then to be buried at any other of the sacred places of the Ovambanderu Traditional Community (Minutes of the Supreme Council meeting on 12 June 2010);

- The customary law and history as set out by the deponent Gerson Katjirua, as well as his position;
- That the deceased was the type of person as described by Gerson Katjirua;
- That the applicants are a part of the "concerned group";
- That the third applicant is the designated successor of the deceased;
- That the deceased will be buried at one of the other sacred places of the Ovambanderu Traditional Community, after the refusal by the farm owner that he can be buried at Okaseta;
- That it is the wishes of the wife and family of the deceased that he be buried at Okahandja; and
- In the event of the review application succeeding and the Supreme Council deciding that the deceased should not have been buried at Okahandja or another sacred place, his body can be exhumed and buried elsewhere.

[25] For these reasons the application cannot succeed and falls to be dismissed with costs.

[26] The issue of the burial of the deceased falls outside what the court has to decide, but following the dismissal of the application and the obvious necessity to bury the deceased as soon as possible, I believe the respondents should take the following into consideration. The first respondent through its legal representatives did indicate after the dismissal of the previous court application that the burial would take place at Okahandja. The sixth respondent has indicated through its lawyers, Conradie and Damaseb, that such an event falls under the

jurisdiction of the National Heritage Council, a government institution, who has to decide in that respect. Furthermore, the National Heritage Council has already on 22 October 2010 indicated that there is a government moratorium against the use of sacred places by the Ovambanderu. Consequently, a burial at Okahandja may provide other obstacles. Finally, the court can only express the sincere hope that common sense would prevail to the effect that the division which sadly exists amongst the Ovambanderus would not impede the burial of the deceased, which is long overdue.

[27] In the result, the application is dismissed with costs, costs to include that of one instructing and two instructed counsel.

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**MULLER, J**

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| **ON BEHALF OF THE APPLICANTS:** | **Mr P. Kauta** |
| **Instructed by:** | **Dr Weder, Kauta & Hoveka** |
| **ON BEHALF OF THE RESPONDENTS:** | **Adv Frank SC,** |
| | **assisted by Adv S. Akweenda** |
| **Instructed by:** | **Lorentz Angula** |