



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

**JUDGMENT**

Case no: A 172/2016

In the matter between:

**OVAMBANDERU TRADITIONAL AUTHORITY**

**APPLICANT**

And

**ALETHA NGUVAUVA**

**FIRST RESPONDENT**

**MUTIMA RIKARERA NGUVAUVA**

**SECOND RESPONDENT**

**REGIONAL COMMANDER OF THE NAMIBIAN  
POLICE FORCE FOR THE DISTRICT OF  
OKAHANDJA (OTJOZONDJUPA REGION)**

**THIRD RESPONDENT**

**INSPECTOR GENERAL OF THE NAMIBIAN  
POLICE**

**FOURTH RESPONDENT**

**Neutral citation:** *Ovambanderu Traditional Authority v Nguvauva* (A 172-2016)  
[2016] NAHCMD 235 (18 August 2016)

**Coram:** PARKER AJ

**Heard:** 10 June 2016

**Delivered:** 18 August 2016

**Flynote:** Practice – Final interdict – When to be granted – Applicant must prove a clear right, act of interference or threatened interference with the right, and that applicant cannot obtain adequate redress in some other form of ordinary relief –

Court finding that the applicant has established its right granted by the Traditional Authorities Act 25 of 2000 and there was an act or threatened act of interference with the Act and the applicant cannot obtain adequate redress in some other form of ordinary relief – Court held that where a statute has vested powers in a statutory body to carry out certain functions and perform certain duties the court should not take any decision that is likely to thwart, without lawful justification, the statutory body in carrying out such functions and from performing such duties.

**Summary:** Practice – Final interdict – When to be granted – Applicant, a traditional authority in terms of the Traditional Authorities Act 25 of 2000, instituting application to interdict and restrain first respondent from carrying out acts that in their view interfered with statutory right of applicant – First respondent sought to lay a wreath on the grave of her late husband without the involvement of applicant – Applicant is the traditional authority of the community of which first respondent is – The grave in question is that of first respondent's late husband – Consequently, the grave and the grave site are a cultural site of the community and was sacred to the community – Court found that the applicant was responsible for maintaining and preserving the site – Applicant was also responsible for supervising and ensuring the observance of the customary law of the community – In that case it was the traditional authority to facilitate, in terms of tradition and traditional values, of the community, the first respondent's laying of a wreath on the grave of her late husband at the grave site – The first respondent cannot proceed to enter the grave site in disregard of the right of the applicant – Consequently, court granted final interdictory order to restrain and interdict the first respondent from laying the wreath without reference to the traditional authority.

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## ORDER

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- (a) The first and second respondents and any other person acting under their directions or on their behalf are interdicted and restrained from proceeding with the commemorations at Okahandja on 3 to 5 June 2016, or any other time.

- (b) The first and second respondents and any other person acting under their directions or on their behalf are interdicted and restrained from entering the Okahandja holy grave site situated at Erf 548, Kahimemua Avenue, Okahandja.
- (c) The first and second respondents and any other person acting under their directions or on their behalf are interdicted and restrained from conducting the annual commemorations on any other weekend other than a weekend before 12 June 2016 at Okahandja holy grave site situated at Erf 548, Kahimemua Avenue, Okahandja.
- (d) The third and fourth respondents are authorized and directed to take all measures as are necessary and required to give effect to this order.
- (e) The applicant's legal representative, Saima Nambinga, is authorised to cause a copy of this order to be served on the respondents in the following manner:
  - (i) On the first and second respondents, by service through the Deputy Sheriff and/or by way of radio announcement on the Otjiherero radio and by causing a copy of the order to be affixed to the entrance of the Okahandja holy grave site situated at Erf 548, Kahimemua Avenue, Okahandja.
  - (ii) On the third and fourth respondents, by faxing copies of the order to their respective offices.
- (f) The first and second respondents must pay the costs of this application.

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### JUDGMENT

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PARKER AJ:

[1] The application started its life as an urgent application and was set down to be heard at 09h00 on 3 June 2016. Having heard counsel the application was not heard; rather, by agreement between the parties, the following order was made:

- (a) The applicant's non-compliance with the forms and service as provided in the rules of the court is condoned and the matter is heard on an urgent basis.
- (b) First respondent shall file her answering papers on or before 7 June 2016.
- (c) Applicant shall file their replying papers, if any, on or before 8 June 2016.
- (d) It is understood that counsel for the third and fourth respondents is holding a watching brief.
- (e) Set down hearing date: 10 June 2016 at 09h00.
- (f) First and second respondents, and any person acting for or under their instructions and directions or on their behalf, shall not proceed with any wreath laying or commemoration on 3 to 5 June 2016 or on any other day before this matter is heard on 10 June 2016 and determined.

[2] The 2 June 2016 order made the granting of a rule *nisi* unnecessary. The application was to be heard on the basis of an opposed motion on 10 June 2016. On the papers I find that the dispute turns on a very short and narrow compass. Ms Angula represents the applicant, and Mr Jones, for first respondent. Mr Kandovazu, counsel for third and fourth respondents, held only a watching brief.

[3] The applicant and the first respondent and their individual causes are not new to the court. The dispute now before the court in the instant proceeding is related in a most significant way to disputes that have been the burden of many a judgement of

the court and the Supreme Court. The judgment and orders of the court in *Nguvauva v Minister of Regional and Local Government* 2015 NR (1) 220 is one such judgment. This particular judgment and its sequel have a very significant bearing on the present proceeding on account of these two orders in that judgment:

- ‘(a) It is declared that the third respondent, Kilus Nguvauva, has been duly proposed to be designated as Chief of the Ovambanderu Community in terms of s 5(1) of the Traditional Authorities Act 25 of 2000.
- (b) That the first respondent is ordered to approve on or before 14 October 2014 the proposed designation of the third respondent, Kilus Nguvauva, as Chief of the Ovambanderu Community in terms of s 5(2) of the Traditional Authorities Act 5 of 2000.’

[4] Government Notice No. 41 of 2015 is a direct product of the aforementioned judgment and orders. By GN No. 41 of 2015 the designation of Gerson Katjivua as acting chief of the Ovambanderu traditional community (‘the community’) was recognised. It need hardly saying that the Ovambanderu Traditional Authority (‘the Authority’) is also recognized.

[5] As I see it, it is not the case of the applicant that first respondent, a wife of the late Chief Munjuku II Nguvauva of the community, is not a member of the community; neither is it the case of the applicant that first respondent may not place a wreath on the grave of her late husband. I have no difficulty, therefore, in holding that in doing that she must proceed according to the traditions and traditional values of the community.

[6] In that regard, it cannot be controverted that the Authority is statutorily responsible for ensuring the observance of the customary law of the community ‘by its members’ in terms of s 3(1) of the Act. The first respondent is a member of the community; and so, the Authority has the statutory duty to ensure observance by first respondent of the customary law of the community; and if the Authority has laid down the manner in which, according to tradition and traditional values of the community, first respondent may lay a wreath on the grave of her late husband, I can

find no basis in law, and none was placed before the court, to intervene in the Authority's lawful observance of the tradition and traditional values of the community in that regard.

[7] Furthermore, I am satisfied that the applicant has established that the grave of the late Chief of the community and the site of the grave is a cultural site of the community, within the meaning of s 3(1)(d) of the Act, and therefore both are sacred to the community. Consequently, the Authority has the statutory duty to preserve and maintain the site and the grave in terms of s 3(1)(d) of the Act.

[8] This is not to say that first respondent may not place a wreath on the grave, but she can only do so in accordance with the tradition and traditional values of the community whose observance the Authority has the statutory duty, as I have said previously, to supervise and ensure. It is significant to note that it is not shown on the papers that first respondent approached the Authority to facilitate her laying of a wreath on the grave of her late husband and the Authority unreasonably refused to accede to her request.

[9] In virtue of the foregoing factual findings and the interpretation and application of s 3 of the Act, the court does not find it necessary to enter upon the debate as to whether or not first respondent was 'born into the Nguvauva clan'. What is rather significant for our present purposes and is irrefragable is that, without meaning any disrespect for the first respondent, first respondent is not the chief or acting chief; and first respondent is not the Ovambanderu Traditional Authority.

[10] In virtue of these findings, the court does not find it necessary to determine who is and who is not a divine priest of the community and, therefore, responsible for conducting community cleansing ceremonies. Such matters are within the responsibility of the Traditional Authority; and if first respondent approached the Authority to facilitate her entry into the grave site containing the grave of her husband and to lay a wreath on the grave, the things that should be done by, or on behalf of the Authority, in order to so facilitate her request are matters that are best left to the Authority, as the Act has done.

[11] I am therefore satisfied that the applicant has established a clear right granted by the Act, and there has been an act or threatened act of interference by the first respondent and the second respondent with that right, and that the applicant cannot obtain adequate redress in some other form of ordinary relief: (See C B Prest, *The Law and Practice of Interdicts*, 1993, p 42 – 47.)

[12] In virtue of the foregoing, I hold that the applicant is entitled to final interdictory relief. In all this, the following is also important: Where a statute has vested powers in a statutory body to carry out certain functions and perform certain duties the court should not without lawful justification take any decision likely to thwart the statutory body in carrying out those functions and performing those duties.

[13] Based on these reasons, the application succeeds to the extent appearing in this order; whereupon, I make the following order:

- (a) The first and second respondents and any other person acting under their directions or on their behalf are interdicted and restrained from proceeding with the commemorations at Okahandja on 3 to 5 June 2016, or any other time.
- (b) The first and second respondents and any other person acting under their directions or on their behalf are interdicted and restrained from entering the Okahandja holy grave site situated at Erf 548, Kahimemua Avenue, Okahandja.
- (c) The first and second respondents and any other person acting under their directions or on their behalf are interdicted and restrained from conducting the annual commemorations on any other weekend other than a weekend before 12 June 2016 at Okahandja holy grave site situated at Erf 548, Kahimemua Avenue, Okahandja.
- (d) The third and fourth respondents are authorized and directed to take all measures as are necessary and required to give effect to this order.

- (e) The applicant's legal representative, Saima Nambinga, is authorised to cause a copy of this order to be served on the respondents in the following manner:
- (i) On the first and second respondents, by service through the Deputy Sheriff and/or by way of radio announcement on the Otjiherero radio and by causing a copy of the order to be affixed to the entrance of the Okahandja holy grave site situated at Erf 548, Kahimemua Avenue, Okahandja.
  - (ii) On the third and fourth respondents, by faxing copies of the order to their respective offices.
- (f) The first and second respondents must pay the costs of this application.

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C Parker  
Acting Judge



## APPEARANCES

APPLICANT: E N M Angula  
Of AngulaCo. Inc., Windhoek

FIRST RESPONDENT: J P R Jones  
Instructed by Ueitele & Hans Inc., Windhoek

THIRD AND FOURTH  
RESPONDENTS: N Kandovazu  
Of Government Attorney, Windhoek