REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 101/2014

In the matter between:

REHOBOTH TOWN COUNCIL **APPLICANT**

and

REHOBOTH BASTER GEMEENTE **FIRST RESPONDENT**
JOHN C A MACNAB **SECOND RESPONDENT**
JAN C VAN WYK **THIRD RESPONDENT**
INSPECTOR-GENERAL OF THE NAMIBIAN POLICE **FOURTH RESPONDENT**

Neutral citation: *Rehoboth Town Council v Rehoboth Baster Gemeente* (A 101/2014) [2017] NAHCMD 63 (9 March 2017)

Coram: PARKER AJ
Heard: **7 December 2016**
Delivered: **9 March 2017**

Flynote: Final interdict and Declaration – Application to declare act of first and second and third respondents unlawful and interdicting act from continuing – Court held that applicant Council has established clear right to land falling within control and administration of applicant Council – Court held further that applicant Council has established a right in terms of the Local Authorities Act 23 of 1992 over land falling within Councils control and administration which court should protect by declaration – Relying on judgment in *Rehoboth Bastergemeente v The Government*

of the Republic of Namibia and Others 1996 NR 238 (SC) court held that there was no land which second respondent in his capacity as *Kaptein* of the community could lawfully survey, partition into *ervens* (plots) and allocate to persons where the land is under the control and administration of the application Council – Court held further that in terms of Act 23 of 1992 the land fell within the control and administration of applicant Council – Consequently, court granted declaration and final interdict.

Summary: Applicant sought an order to interdict and restrain first, second and third respondents from surveying and partitioning into plots and allocating certain land to other persons – Court, relying on *Rehoboth Bastergemeente v The Government of the Republic of Namibia* held that there was no land which second respondent in his capacity as *Kaptein* of the community could lawfully survey, partition into ervens (plots) and allocate to any persons where the land is under the control and administration of the applicant Council – Court found that the land in question fell within the control and administration of the applicant Council in terms of Act 23 of 1992 – Consequently, court granted the relief sought to interdict and restrain first and second respondents from allocating the land and declaration that they have no lawful authority to allocate pieces of land on the land in question.

ORDER

(a) It is declared that first, second and third respondents do not have the authority to survey, partition and allocate the plots (erven) in the area falling under the control and administration of Rehoboth Town Council.

(b) First, second and third respondents are interdicted and restrained from surveying and partitioning the (plots) erven under the control and administration of the Rehoboth Town Council.

(c) First, second and third respondents are interdicted and restrained from allocating to any person the (plots) erven in Rehoboth Town area, including Rehoboth Block G.

(d) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] We have before us a matter which in this court has been coming since April 2014. Bereft of the various interlocutory applications, several orders granted in the interim and interruptions from certain quarters, the case turns on a short and narrow compass. I do not propose to go into the history that lies at the root of the case. In a very comprehensive and incisive judgment the Supreme Court traversed the history and the law which are indubitably foundational and extremely crucial to the determination of the present application. That judgment was in the case of *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others* 1996 NR 238 (SC).

[2] The long and short of what the applicant seeks is an order to restrain and interdict the first, second and third respondents from allocating pieces of land on land which is under the control and administration of the applicant and from surveying that land and 'portioning erven' within that land. The applicant also seeks a declaration that any allocation of pieces of land on that land which has already taken place is 'null and void and of no force or effect'. The rest of the relief sought is, with respect, inelegantly framed and they are not clear. The narrow and short compass on which the case turns is whether on the facts an interdictory order and a declaratory order are available to the applicant, who is represented by Mr Phatela.

[3] The first and second respondents ('the respondents') have moved to reject the application, and are represented by Mr Botes as counsel. The respondents have raised preliminary objections which I propose to consider at the threshold.

Non-joinder of parties

[4] The first is that applicant did not cite the persons to whom the respondents have allocated land – unlawfully, according to the applicant. Those persons can trace their right to possess the land allocated to them to only the right the respondents may have to allocate the pieces of land. It is that right which is the subject matter of the present application, and which the court is called upon to determine. In such an arrangement; those persons may have a direct and substantial interest in the outcome of these proceedings but their direct and substantial interest cannot be said at this stage to be legitimate, and the order that the court may make at the end cannot be said to be capable of being *brutum fulmen* in relation to those persons. I hold, therefore, that joining those persons is not necessary (see *Council of Itireleng Village Community v Madi* [2013] NAHCMD 363 (29 November 2013), para 9). For these reasons, I respectfully reject the respondents' point that there has been a non-joinder of parties.

Authority to institute proceedings on behalf of applicant

[5] The other preliminary objection concerns the question of authority of Mr Willie Isaskar Swartz to institute proceedings on behalf of the applicant. The issue of authority to institute motion proceedings has been considered by the court. In *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799 (HC), where the authorities are gathered, the court said:

> '[11] The golden thread that runs through these cases, starting from *Mall (Cape) (Pty) Ltd* supra is set out succinctly in the following passage, *per* Strydom J (as he then was) from *Tjozongoro and Others* supra at 381E:
>
> > In all these cases (ie cases the learned judge referred to) the Courts concluded that in motion proceedings by an artificial person, although prudent, it is not always necessary to attach to the application the resolution authorising the institution of proceedings and that a deponent's allegation that he was duly authorised would suffice in the absence of a challenge to his authority.
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> [12] Thus, from *Tjozongoro and Others*, it seems to me clear that where such authority is challenged, there is no rule of practice preventing the deponent from proving such of his or her authority by annexing the resolution authorising the

institution of proceedings to his or her replying affidavit. If a deponent did that, he or she was not extending the issue by raising new matters in the replying affidavit, as Mr *Oosthuizen* appears to argue. That being the case, I do not think *Director of Hospital Services v Mistry* supra is of any real assistance on the point under consideration. By a parity of reasoning, *Riddle v Riddle* supra too, cannot assist the court in determining the issue at hand.

[13] To the principle in *Tjozongoro and Others* supra should be added the principle in *Ganes and Another* supra in the following passage at 615G-H:

> In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, and he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.'

[6] In the instant case, the applicant did not wait until Swartz's authority to institute the proceedings on behalf of the applicant Council was challenged. The applicant Council (through Swartz) attached a resolution authorising the institution of the proceedings. The respondents say the resolution is not good. I do not agree, considering the purpose for which such authority is insisted on by courts. Such authority is required in order to prevent a situation where unbeknown to an artificial person someone – who is unauthorized – institutes proceedings purportedly on behalf of the artificial person with the result that the artificial person is unduly saddled with the consequences of judicial proceedings, including a costs order.

[7] In the present case the resolution annexed to the founding affidavit is on the official headed paper of the applicant Council. The minutes of the meeting at which the resolution was passed is signed by the Chairperson and the Executive Officer of the Town Council of Rehoboth (the applicant Council), indicating that the minutes are a true record of the deliberations at the meeting of the applicant Council.

[8] What the authorities are one on is that in motion proceedings by an artificial person it is prudent to attach to the application the resolution authorising the institution of proceedings. I am satisfied that in the present case the resolution authorizes the institution of the present proceedings. The applicant will not be saddled with consequences of proceedings which are unknown to it.

Extent of authority granted by the resolution

Faced with a similar point as to the interpretation of a resolution and the extent of authority granted by the resolution, Strydom J had this to say in *SWA National Union v Tjozongoro and Others* 1985 (1) SA (SWA) 376 at 382A-H:

'The question is now on what basis must the Court construe the resolution. In the case of *D & D H Fraser Ltd v Waller* 1916 AD 494 the Appellate Division considered the meaning of the words "to proceed to the final end and determination" which appeared in a power of attorney to a suit in a magistrate's court and who, on the strength thereof, noted an appeal. At 498 INNES CJ said the following:

> "… it has not been the general practice in South African Courts to apply a rigid interpretation to documents like the one before us."

'This attitude was also adopted by CENTLIVRES JA in the case of *Mahomed v Padayachy* 1948 (1) SA 772 (A) in construing an authority given by a principal to his agent. See also *National Board (Pretoria) (Pty) Ltd v Swanepoel* 1975 (1) SA 904 (W) where the following is stated by CILLIÉ JP at 911D:

> "I considered the power of attorney keeping in mind that in construing a general power of attorney the extent of the agent's authority is restricted to the powers expressly conferred on him or necessarily incidental to them for the due performance of his mandate, but that the powers must be given a reasonable interpretation."

'In my opinion the resolution authorizing the president to obtain an interdict to stop the congress is a document empowering an agent to represent the party in a court of law and must be construed on the same principles as set out in the cases referred to.

'Bearing in mind the above principles, Mr *Gauntlett's* contention that the president was not authorized to institute proceedings against the respondents personally is, in my opinion, giving too rigid an interpretation to the resolution taken by the central committee.'

[9] I am satisfied that the case that has been brought to court answers substantially to what the resolution authorizes. One must not, as Strydom J held in *Tjozongoro and Others*, give 'too rigid an interpretation' to the applicant Council's resolution. It follows inevitably that the respondents' challenge to authority to institute the instant proceedings also fails.

The merits: Are final interdict and declaration available to applicant

[10] Having gotten these preliminary points out of the way, I proceed to consider the application on the merits. The narrow and short compass on which the case turns (see paras 1 and 2 of this judgment) is whether on the facts an interdictory order and declaratory order are available to the applicant (represented as counsel by Mr Phatela), that is whether a case has been made out for the relief sought.

[11] Our most single important port of call must perforce be the Supreme Court decision in *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others* which, I should signalise, binds 'all persons in Namibia', including the High Court (see art 81 of the Namibian Constitution). I must state it firmly and unwaveringly that the decision in *Rehoboth Bastergemeente v The Government of the Republic of Namibia*, as far as this court is concerned, lays down the lines along which one's mind should indubitably proceed in exercising the discretion which the law reposes in the court when considering whether to grant a final interdict and declaration, which are the relief sought by the applicant. It is therefore to the Supreme Court decision that I now direct the enquiry.

[12] In order not to overburden this judgment unduly with copious extracts from the Supreme Court judgment in *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others*, unless where it becomes necessary so to do, I set out here extracts from the judgment which are relevant for our present purposes:

‘. . . This is an appeal against a judgment of the Full Bench of the High Court in which an application was dismissed with costs. The appellant sought an order which would prevent certain immovable property and money from becoming the property of the Government of Namibia. Before dealing with the legal questions involved it is apposite to briefly sketch the history pertaining to the appellant and the property insofar as it appears from the 1996 NR p 241 DUMBUTSHENA AJA papers and has relevance to the issues to be decided so that the matter can be viewed in its proper perspective.

‘Toward the end of the eighteenth and the beginning of the nineteenth century a number of Baster communities emerged in what was then known as the Cape Colony. One of these communities inhabiting the area known as de Tuin decided to emigrate north. It is this community that settled in Rehoboth and the vicinity around 1871. En route to Rehoboth they settled their own constitution which was eventually promulgated at Rehoboth during January 1872 and which constitution came to be known as the Paternal Laws. The Basters acquired land at and around Rehoboth pursuant to negotiations with the then existing Tribal Governments laying claim to this area principally the Nama tribe known as the Swartboois.

‘The Paternal Laws, although dealing also with matters one would not find in a modern day constitution such as civil and criminal matters, provided a framework of rules defining the organs of government of the Baster people and their rights and duties. Thus as Hannah J pointed out in his judgment where certain in limine objections were dealt with by the Full Bench:

> “They provided for the appointment of an elected supreme ruler known as the Kaptein who was to hold such office for life. Also for a Raad (Council) consisting of two citizens to assist the Kaptein and a Volksraad (Parliament) consisting of a further two citizens. They provided that every Baster, or anyone married to a Baster, should be a citizen and that all Taxpaying citizens should have the right to vote in the election of the Kaptein and member of Parliament. Provision was also made for non-Basters to become citizens. . . The Paternal Laws also provided for the appointment of judges by the Kaptein to hear criminal and civil matters and for the appointment of field-cornets, the equivalent of modern-day deputy-sheriffs. A number of offences were specified together with the penalties to be imposed. A system of taxation was created "in order to defray the necessary government expenditure." There were laws pertaining to marriage and restrictions were imposed on the sale of land. There was a call-up system in the event of attack by enemies.”

‘After German annexation of the whole area presently known as Namibia (excluding the Walvis Bay enclave) a “Treaty of Protection and Friendship” was concluded between the German Imperial Government and the Basters. This Treaty recognised “the rights and freedom which have been acquired by the Basters at Rehoboth for themselves”. Despite this Treaty the German Imperial Government in true colonial tradition ignored it when it suited their purpose and made several laws which were applicable in Rehoboth, opened several Police stations in the area and even appointed a District Officer for the area. However, it is clear that the *Kaptein* and his Council continued to function throughout this period up to the time of the German defeat by South Africa in 1915.

‘After the defeat of the Germans the Basters continued basically to govern themselves according to the provisions of the Paternal Laws. The South Africans and the *Kaptein* and Council of the Basters came to an agreement which formed the basis of Proc 28 of 1923 wherein, inter alia, the right and title of the Rehoboth Community to the land then occupied by it was acknowledged as well as their right to local self-government in accordance with the Paternal Laws.

‘The boundaries of the Rehoboth Territory were also defined in this proclamation comprising an area of approximately 14 200 square kilometres. Political dissension in the Baster Community however followed upon the agreement which formed the basis of this proclamation and a further proclamation, No 31 of 1924, was enacted. In terms of this proclamation the powers of the *Kaptein* and certain other officials were transferred to the Magistrate and his Court. The Magistrate was an appointee of the South Africans. From this point onward there was a gradual restoration of the powers back to the community who also all along insisted on self-government. This process was completed with the enactment of the Rehoboth Self-Government Act 56 of 1976 the long title whereof reads as follows:

> “To grant self-government in accordance with the Paternal law, of 1872 to the citizens of the ''Rehoboth Gebiet'' within the territory of South West Africa; for that purpose to provide for the establishment of a Kaptein's Council and a Legislative Council for the said ''Gebiet''; to determine the powers and functions of the said councils; and to provide for matters connected therewith.”

‘Elections were held under this Act, the structures were put in place and the Rehoboth area was governed in terms of this Act up until 1989. By Proc 32 of 1989 the powers granted by Act 56 of 1976 were transferred to the Administrator-General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. In terms of Schedule 8 of the Constitution of the Republic of Namibia, Act 56 of

1976 was repealed *in toto* and the form of self-government which the Basters enjoyed from their arrival at Rehoboth during 1871-1872 up to the independence of Namibia during 1990 had come to an end.

'As is stated above the Basters initially acquired the land at and surrounding Rehoboth by negotiations mainly with the Swartbooi Tribe. This land was apparently acquired for and on behalf of the community and there was no individual title to the land as such. There however evolved a custom of issuing papers ('*papieren*') to evidence the granting of land to private owners. In the fullness of time much of the land owned by the Community passed into private ownership. It needs to be stated in passing that none of the land which passed into private ownership in this fashion is the subject-matter of this appeal. In terms of Proc No 52 of 1939 the Community was entitled as 'an association of persons' to acquire immovable property and this property had to be registered in the name of the *Kaptein* "for and on behalf of the Community". In the Registration of Deeds in Rehoboth Act 93 of 1976, provision was made for the establishment of a Deeds Officer and Registry in the Rehoboth area for that area.

'Act 56 of 1976 which sought to restore local self-government to the Basters dealt with the question of ownership of movable and immovable property in the Rehoboth area in s 23 which reads as follows:

> "(1) From the date of commencement of this Act the ownership and control of all movable and immovable property in Rehoboth the ownership or control of which is on that date vested in the Government of the Republic or the administration of the territory of South West Africa or the Rehoboth Baster Community and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws, shall vest in the Government of Rehoboth.
>
> (2) The said property shall be transferred to the Government of Rehoboth without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to C the provisions of this Act.
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> (3) The Registrar of Deeds concerned shall upon production to him of the title deed to any immovable property mentioned in ss (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Rehoboth and shall make the necessary entries in his registers, and thereupon the

said title deed shall serve and avail for all purposes as proof of the title of the Government of Rehoboth to the said property."

'As already mentioned Act 56 of 1976 was repealed by the Constitution. The Constitution does however also have provisions relating to property. Thus art 129 stipulates that 'The assets mentioned in Schedule 5 hereof shall vest in the Government of Namibia on the date of Independence.

'Schedule 5 reads as follows:

"(1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proc AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

(2) For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.

(3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in para (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property."

'The important part of the history narrated above was the passing of the Rehoboth Self-Government Act 56 of 1976, hereinafter referred to as Act 56 of 1976 or the Act.

‘The Baster Community asked for it. Self-government was granted on the basis of proposals made by the Baster Advisory Council of Rehoboth. In short the Baster Community asked for self-government and they got it. The South African Government in response to their request obliged by enacting Act No 56 of 1976.

‘The most important asset of the people of Rehoboth was their land. Before the passing of Act No 56 of 1976 the land acquired by the Baster Community was registered in the name of the Kaptein who held the land on behalf of the people, that is, the community.

‘When Act No 56 of 1976 was promulgated on 10 December 1976, the ownership or control of the land vested in the Rehoboth Government. It is easy to assume that the arrangement pleased them. The government was theirs. The property was theirs too. Besides, *they had self-government in accordance with the Paternal Law of 1872*. (Italicised for emphasis) The new Act provided them with a *Kaptein's* Council and a Legislative Council. What would self-government do for them? The Preamble to Act 56 of 1976 says it all. The new government would maintain law and order and would ensure justice for all; it would promote the material and spiritual well-being of Rehoboth and its inhabitants; it would protect and develop their own traditions and culture; it would propagate the ideals of Christian civilisation; and it would strive after peace with, and goodwill, to the other inhabitants of the territory of South West Africa. They had property both immovable and movable.

‘They must right from the beginning of self-government have appreciated that the ownership and control of their property would vest in the new government. Act 56 of 1976 contained among other sections ss 23 quoted supra and 25.

‘. . . The critical question is whether with the enactment of Act No 56 of 1976 the Rehoboth Baster Community continued to own and control the land and moneys in Rehoboth. Mr De Bruyn, with him Mr Olivier, for the appellant, contends that the Baster Community continued to own the property and that the Rehoboth Government was vested with the ownership and control of the property on behalf of the Rehoboth Baster Community and kept it for them.

‘Mr Gauntlett, with him Mr Maritz, for the respondents, contends that the Rehoboth Baster Community, then a body politic, had its political and constitutional identity subsumed together with those of the Government of the Republic of South Africa and the Administration of the Territory of South West Africa in as far as scheduled matters relating to self-

government were concerned. The only affairs that were left out of the responsibility of the Rehoboth Government were under functions such as foreign affairs, defence and telecommunications which were shared between the Government of the Republic of South Africa, the Administration of the Territory of South West Africa and the Advisory Council. Otherwise, assets held by the South African Government, the Administration and the Rehoboth Baster Community which were related to scheduled matters vested in the Rehoboth Government under the new constitutional dispensation brought about by Act 56 of 1976.

'Mr Gauntlett argued that the appellant was not 'driven by an urge to escape the then apartheid government. . .' but the appellant in voluntarily entering into the new arrangement was cooperating in the implementation of the Odendaal Plan, a cornerstone of apartheid in the then territory of South West Africa. Section 24 of the Act supports this argument. It reads as follows:

> '24 Acquisition of land and interest in land in Rehoboth –
>
> (1) Notwithstanding anything to the contrary contained in any law in force in Rehoboth no person, other than a citizen of Rehoboth of the Rehoboth Investment and Development Corporation, shall, without the prior approval of the Minister and the *Kaptein's* Council, acquire any land or any interest in land in Rehoboth.
>
> (2) The acquisition of any land or any interest in land contrary to the provisions of ss (1) shall be invalid.

'The contents of s 24 may account for the Rehoboth Baster Community wanting back its property in order to preserve what s 24 reserved only for their Community. The second inquiry according to the respondent is whether if they are correct in contending that ownership and control of the assets vested in the Government of Rehoboth in terms of ss 23 and 25, art 124, read with Schedule 5 to the Constitution, had the effect of passing ownership of those assets (like the ownership and control of many other fragmented authorities created in the then Territory pursuant to the Odendaal Plan and later, Proc AG 8 of 1980) in the new democratic and unitary state of Namibia.

'There is a lingering question in the minds of people listening to arguments in this appeal. That question is: Why does the Rehoboth Baster Community want back its property? Is it because they want to perpetuate the structures set up under the Odendaal Plan?

Strydom JP, who wrote the judgment for the Full Bench of the High Court remarked as follows at 876-7 of the judgment:

> ". . . it is in my opinion significant to note that when the Administrator-General suspended the operation of the Act by Proc AG 32 of 1989, the control over land and transactions in regard thereto, such as leases, etc was also taken over by him, also in regard to property which, in terms of the First Applicant, was property owned by it and not by the Government of Rehoboth. Given the allegation by First Applicant that such land was privately owned, by itself, this control by the Administrator-General cannot be explained, and less so the acceptance thereof by the Community."

'Be that as it may, the critical issue in this appeal is the interpretation of ss 23(1) and 25 of the Act and the provisions of art 124, as read with Schedule 5, of the Constitution of Namibia. Mr De Bruyn's approach to the construing of s 23(1) of the Act is tied to the belief that the ownership and control of the property never left the appellant which 'has always been an entity in private law'. He therefore submitted that the Act as a whole should be interpreted as a constitutional instrument. An examination of the Preamble to Act 56 of 1976 reveals the intention of the Legislator and the reasons why the Legislature passed the Act…'

'We agree with Mr Gauntlett that any limitation or qualification to the 'relation' between ownership or control on the one hand and the scheduled matters on the other hand is not found in s 23 itself but is found in the way the individual items in the Schedule are defined. The law giver did not seek to restrict or qualify the extent of the nature of the required 'relation' in s 23 itself by the use of phrases such as 'necessarily relates'.

. . .

'In our view the ownership or control of the property did not vest in the Government of Namibia in order to hold the property on behalf of the appellant. It held the property because it was the Government of Namibia entrusted with the duty to administer the country for the good of its citizens. The ownership or control of the property like the ownership and control of properties from the rest of Namibia enables the Government of Namibia to perform its duties in the administration of the country.

'The Court a quo was right in rejecting appellant's claim that the ownership or control of movable and immovable property previously under the ownership and control of the Rehoboth Baster Community never passed into the hands of the Government of Rehoboth and that if it did the Rehoboth Government held the property on behalf of the appellant.

Looked at in whichever way, reaching either of the two conclusions submitted by appellant would result in an erroneous interpretation of ss 23 and 25 of the Act. It has not been shown by the appellant that the Court a quo was wrong in its interpretation of ss 23 and 25. Once it is accepted that the ownership or control of movable and immovable property vested in the Government of Rehoboth and that subsequent vesting of ownership or control at the date of independence in the Government of Namibia becomes incontestable.

'Mr Gauntlett rightly submitted that the Government of Rehoboth subdivided the disputed properties consolidated them, sold portions of them, leased the whole or portions of them for livestock grazing and farming and for other purposes, collected rented, developed townships on Rehoboth Townlands No 302 and Groot-Aub, managed and controlled such townships, provided agricultural services to farmers, improved the properties and did perform many other functions in relation to these properties. How can the ownership or control be challenged?

The Government of Rehoboth was in total control. Subsequently the Administrator-General of the territory of South West Africa, acting in terms of Proc AG 32 of 1989 controlled the properties as an incident preparatory to handing over ownership and control to the Government of an independent Namibia. And once it is accepted that ownership and control of scheduled matters was in the hands of the Government of Rehoboth, a fact accepted by the appellant, the vesting of their ownership or control in terms of art 124 and Schedule 5 of the Constitution of Namibia in the Government of Namibia cannot be disputed.

'Article 124 vested in the Government of Namibia assets mentioned in Schedule 5. And para (1) of Schedule 5 states that the assets concerned were those previously held by the Government of Rehoboth. A careful reading of Schedule 5 quoted supra makes it clear that there can be no other meaning which casts doubt on the vesting of ownership or control in the Government of Namibia.

'Mr De Bruyn submitted in the alternative that in so far as ownership did not revert back to the Rehoboth Baster Community but vested in the first respondent in terms of the provisions of Schedule 5(1) it was tantamount to an expropriation of the appellant's land and it should have been compensated. He cited *Blackmore v Moodies GM and Exploration Co Ltd* 1917 AD 402 at 416-17.

'Article 16 gives the right to all persons in Namibia to acquire, own and dispose of all forms of property. Sub-article (2) provides that:

"(2) The State or a competent organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament."

'There is no need to repeat what happened before Namibia became independent. Suffice to mention that by the time independence was granted to Namibia the Rehoboth Baster Community had no ownership or control of scheduled matters. In terms of s 23 and s 25 of Act 56 of 1976 what once was its property and which it held because it was the Government of Rehoboth passed over to a new government entity, the Government of Namibia. What is more the Rehoboth Baster Community ceased to exist as a public association with governmental authority long before the independence of Namibia. How can the Rehoboth Baster Community now claim that which it lost many years before the date of the independence of Namibia?

'Mr De Bruyn also contended that it was inconceivable that art 0124 read with Schedule 5(1) could be interpreted to mean that the appellant should lose all its land that it had negotiated for over many years, paid for and held for over one hundred years without receiving any payment for it whatsoever. If the appellant lost its land it lost it with its eyes open when it agreed to self-government and surrendered all the property it had acquired, as the Government of Rehoboth, to the new Government of Rehoboth.

'The Rehoboth Baster Community asked for self-government. It was granted self-government with all its attendant consequences. One of those consequences was the surrender of ownership or control of property.

'We do not see how under these circumstances Schedule 5(1) could be interpreted in accordance with the provisions of art 16(2) of the Constitution as contended for by Mr De Bruyn.

'The Government of Namibia did not expropriate appellant's property. The property did not belong to appellant. The ownership and control of all movable and immovable property vested in the Government of Rehoboth and para (1) of Schedule 5 says, among other things, that 'all property of which the ownership or control immediately prior to the date of independence vested . . . in the Government of Rehoboth . . . shall vest in or be under the control of the Government of Namibia'.

‘It is difficult to understand why the appellant brought this action. It is difficult to understand why appellant changed its mind. Hannah J expressed the doubt on the appellant's apparent change of mind in his concurring judgment in this way:

> “In 1976 the Baster Community, through its leaders, made a decision opting for Self-Government. The Community freely decided to transfer its communal land to the new Government. Clearly it saw advantage in doing so. Then, in 1989, the Community, through the political party to which its leaders were affiliated, subscribed to the Constitution of an independent Namibia. No doubt, once again, the Community saw advantage in doing so. It wished to be part of the new unified nation which the Constitution created. The constitution, to which the Community freely subscribed, transferred, as the Judge-President has, if I may respectfully say so, amply demonstrated in his judgment, the property of the Government of Rehoboth to the newly constituted Government of Namibia. That it did so is perfectly understandable.”

‘One aim of the Constitution was to unify a nation previously divided under the system of apartheid. Fragmented self-governments had no place in the new constitutional scheme. The years of divide and rule were over.

‘Given these circumstances the Baster community can, in my opinion, have no justifiable complaint that the communal lands which it owned over the past generations became vested, after independence, in Central Government. That they did so was a result of decisions freely taken by its leaders on its behalf, decisions which, at the time, were regarded as advantageous. As is made clear by this application the Community's leaders, or some of them, now see matters in a different light. They regret the decisions which were made. But it is not for this Court to attempt to change history even if it wished to do so.

‘If the appellant had intended to keep the property permanently because it was an association of persons at public law, it should never have agreed to the creation of the Government of Rehoboth. It, however, agreed to its formation because self-government was negotiated with the Government of South Africa on 'the basis of the proposals by the Baster Advisory Council of Rehoboth and at the request of the said people and without prejudicing any further constitutional development of the territory of South West Africa...'. It has not been shown why there has been a change of mind.

‘And more importantly it has not been shown that the full bench of the Court a quo erred in its interpretation of ss 23 and 25 of the Act and its holding that the disputed properties and the ownership or control of the moneys vested in the Government of

Rehoboth was wrong. Further it has not been shown that the Court a quo erred in its interpretation of art 124 and Schedule 5 of the Constitution.'

[13] It seems to me clear from the Supreme Court decision that the Community which the second respondent leads as '*Kaptein*' 'freely decided to transfer its communal land to the new self-Government of Rehoboth; and subsequently, the Namibian Constitution – in virtue of art 124 and Schedule 5 thereof – 'transferred … the property of the Government of Rehoboth to the newly constituted Government of Namibia'. 'The Community's leaders, or some of them, now see matters in a different light'. 'They regret the decisions' which were made in yester years; 'but it is not for this Court to attempt to change history even if it wished to do so' (see *Rehoboth Bastergemeente v The Government of the Republic of Namibia and Others* at 253G-254F); and *a priori*, with the greatest deference to the first respondent and to the person and office of second respondent, there is no land which the second respondent may allocate to other persons on the basis that he is the '*kaptein*' of the community. On this basis alone, the first and second respondents cannot justify surveying and partitioning land and allocating pieces of land on the land under the control and administration of the applicant Council to other persons.

[14] Since the proclamation of Rehoboth as a town, the land lies within the boundaries of the applicant Council in virtue of s 3 of the Local Authorities Act 23 of 1992. The first and second respondents aver that it 'is evident that Block G which forms the subject matter of this application does not form part of the schedule to the township as published in the Government Gazette'. With respect, that is not entirely correct. For good reason; I set out, hereunder, the material part of GN 63 of 1999 of 29 March 1999:

'AMENDMENT OF SCHEDULE TO TOWNSHIPS AND DIVISION OF LAND ORDINANCE, 1963

Under section 4(2) of the Townships and Division of Land Amendment Act, 1998 (Act No. 21 of 1998), I hereby amend the First Schedule to the Townships and Division of Land Ordinance, 1963 (Ordinance No. 11 of 1963), by the insertion of the following after Rehoboth:

"Rehoboth Block A
Rehoboth Block A (Extension 1)
Rehoboth Block A (Extension 2)
Rehoboth Block B
Rehoboth Block C
Rehoboth Block D
Rehoboth Block D (Extension 1)
Rehoboth Block E
Rehoboth Block E (Extension 1)
Rehoboth Block E (Extension 2)
Rehoboth Block E (Extension 3)
Rehoboth Block F
Rehoboth Block F (Extension 1)
Rehoboth Block F (Extension 2)
Rehoboth Block G [Italicised and underlined for emphasis]
Rehoboth Block H" '

[15] Based on these reasons and on the authority of CB Prest, *The Law & Practice of Interdicts* (1996), pp 42-48, I am satisfied that a case has been made for the grant of a final interdict. I, therefore, exercise my discretion in favour of granting the order sought. I am also satisfied that the applicant has established a right over the land which falls under the control and administration of the applicant Council. I also find, accordingly, that the applicant Council has established a right which in the exercise of its discretion the court should protect by declaration.

[16] The preponderance of the foregoing reasoning and conclusions are unaffected by the 'Cabinet Resolution' and the 'Rukoro Report' referred to the court by the first and second respondents.

[17] In the result, I make the following order:

(a) It is declared that first, second and third respondents do not have the authority to survey, partition and allocate the plots (erven) in the area falling under the control and administration of Rehoboth Town Council.

(b) First, second and third respondents are interdicted and restrained from surveying and partitioning the (plots) erven under the control and administration of the Rehoboth Town Council.

(c) First, second and third respondents are interdicted and restrained from allocating to any person the (plots) erven in Rehoboth Town area, including Rehoboth Block G.

(d) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	T C Phatela Instructed by Isaacks & Associates Inc., Windhoek
FIRST, SECOND AND THIRD RESPONDENTS:	L C Botes Instructed by Agenbach Legal Practitioners, Windhoek
FOURTH RESPONDENT:	No appearance Government Attorney, Windhoek