

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-MOT-GEN-2017/00002

In the matter between:

FRANS INDONGO GROUP (PTY) LTD

1ST APPLICANT

JOHAN EUGENE VAN DER MERWE t/a OSHAKATI SPAR

2ND APPLICANT

and

NAMIBIA BUS AND TAXI ASSOCIATION

1ST RESPONDENT

OSHAKATI TOWN COUNCIL

2ND RESPONDENT

**THE STATION COMMANDER OF THE NAMIBAN POLICE
FORCE FOR THE DISTRICT OF OSHAKATI**

3RD RESPONDENT

THE INSPECTOR-GENERAL OF THE NAMIBIAN POLICE

4TH RESPONDENT

Neutral citation: *Frans Indongo Group (PTY) Ltd v Namibia Bus and Taxi Association* (HC-NLD-CIV-MOT-GEN-2017/00002) [2017] NAHCNLD 119 (04 December 2017).

Coram: CHEDA J

Heard: 05.10.2017

Delivered: 04 December 2017

Flynote: **Locus Standi** - Where a substantial and direct interest is an issue, a party (local authority) who is delegated to act for and on behalf of the Central Authority has

an obligation to so act. Local Authorities have a reciprocal duty to protect households, commercial and industrial concerns as they pay rates and taxes to them. A party who misleads the other cannot be allowed to benefit from its own deceit.

Summary: Applicants sued 1 - 4th respondents as they required them to restrain and/or remove taxis and street vendors who were operating in front of its shop. Second respondent in response acknowledged the problem and made applicants to believe that it had authority from the Road Authority to act. However, second respondent later changed its mind and sought a joinder of the Road Authority. There was no reason to do so as the direct and substantial interest can be handled and/or protected by second respondent. Applicants fulfilled all the requirements for an interdict, application was granted as prayed for.

ORDER

1. The First Respondent's members are interdicted and restrained from parking and/or stopping in the entrance and the parking area of Spar, Oshakati and continuing with any disruptive behaviour infringing on the First Applicant and/or Second Applicant's right to freely conduct business;
2. The Second, Third and Fourth Respondents are compelled to remove all taxis unlawfully parking and/or stopping in the entrance and the parking area of Spar, Oshakati and continuing with disruptive behaviour infringing on the First Applicant and/or the Second Applicant's right to freely conduct business;
3. The Second, Third and Fourth Respondents are ordered to remove all street vendors unlawfully conducting business and continuing with disruptive behaviour infringing on the First Applicant and/or Second Applicant's right to freely conduct business;
4. The Second Respondent to pay costs of suit;

JUDGMENT

CHEDA J:

[1] This is an application for an interdict in terms of Rule 65 (4). First applicant [hereinafter referred to as “FIG”] is a registered company carrying on business within the lengths and breadths of Namibia and second applicant is Johan Eugene Van der Merwe trading of Oshakati Spar [hereinafter referred to as “OS”] is also a company registered and carrying on business under the name and style of Oshakati Spar.

[2] First respondent is Namibia Bus and Taxi Association [hereinafter referred to as “NABTA”]. Second respondent is Oshakati Town Council [hereinafter referred to as “OTC”] while third and fourth respondents are members of the police under the Ministry of Safety and Security [hereinafter referred to as “The Police”]

[3] Applicant was represented by Ms Angula. There was no appearance by first respondent. Second respondent was represented by Mr Peter Greyling while second and third respondent was represented by Advocate Asino who came into the record on the day of the hearing. I must state that Advocate Asino had sought to oppose this application, but, later abandoned it and was excused from the proceedings.

[4] Applicant in this application seeks to interdict and restrain first respondent’s members from parking and/or stopping in the entrance parking area of OS and continuing with any disruptive behaviour.

[5] Both Ms Angula and Mr Greyling applied for condonation for non-compliance with Rules of court and they did not oppose each other’s application. I thereby considered their applications and found merit in them and I therefore condoned them allowing them to proceed with the matter. Mr. Greyling raised points *in limine*, which I deal with *seriatim*.

[6] It was his argument that the road reserve falls within the control of the Roads Authority and therefore plaintiff’s failure to join them is a non-joinder as they have an interest in the matter. Married to this argument is an attack on applicant’s scanned

documents. This argument is irrelevant at this day and age of modern advanced technology, where communication has been made easy and to revisit that is tantamount to taking one step up and two steps backwards, a serious negation indeed.

[7] In light of that I will only deal with the mundane issue of non-joinder. It was Mr Greyling's argument that second respondent cannot do anything in the absence of an explicit permission to do so from the Road Authority. He went further and submitted that second respondent was only permitted to work within 30 meters of the adjacent road, which roads belong to the Road Authority and as such second respondent cannot be ordered to act outside the 30 meters demarcation. It is therefore his argument that the Road Authority's interest is likely to be prejudiced if it is not joined as a party. Applicant holds otherwise.

[8] He also raised the question of the non-joinder of the street vendors, but, however, acknowledged the fact that they had voluntarily left applicant's premises or space. Despite their departure he still found it necessary to attack applicant's attitude in that the founding affidavit did not lay enough ground for the relief sought. This to me is a side-line to the issue at hand and as such I will not pursue it as the offending conduct by the street vendors is no longer in existence.

[9] Mr Greyling's further argument was that applicant had failed to provide tangible proof that it had suffered injury and/or reasonable apprehension. It is for that reason that he argued that the requirements for an interdict as clearly laid down in *Setlogelo v Setlogelo* 1914 AD 221 at 227 which authority has been followed in the following cases amongst many, *Ondangwa Town Council (A1-2016) [2016] NAHCNLD 56 (7/7/2016)* and *Ovambandero Traditional Authority v Nguvauva (A 172-2016) [2016] NAHCMD 235 (18 August 2016)*:

[10] The Requirements are that the applicant must show;

- a) a clear right;
- b) an injury or reasonable apprehension of such injury; and
- c) that applicant cannot obtain substantial redress in some other form.

[11] Ms Angula for respondent right from the start brought to the court's attention that, second respondent admitted that they were doing work on the "road reserve" and

at that juncture did not tell applicant that the road belonged to the Road Authority, for that reason, the argument concludes that they infact have authority over the place at issue.

[12] Before I go to the main argument, it is essential to deal with the points raised by second respondent. It is trite that these courts as courts of justice and therefore seek to avail an opportunity to every party who has a direct and substantial interest. Mr Greyling could not have been more correct than that.

[13] Second respondent deprives its mandate from either the Ministry of Local Government or Regional Council or some such other authority. It, therefore, operates on delegated authority. It has the authority to levy businesses with rates and taxes and in that process does not exempted special zones in front of people's properties such as the 30 meter space alluded to, to do so, would be to unnecessarily split hairs.

[14] As long as second respondent has a right to levy rates and taxes similarly it must have a reciprocal duty to protect those from whom its rates and taxes are harvested from unless it is expressly exempted by legislation.

[15] It cannot be allowed to cherry-pick the profits and discard the obligations. Mr Greyling in his argument acknowledged this fact, not in many words though and infact in one of the correspondences second respondent acknowledged that it operates under the Road Authority. It, infact wrote to applicant and stated "we are doing work on the road reserve." The question is why would they do work there when they had no authority. By so saying they misled applicants and applicants were entitled to rely on that advise.

[16] If this was not an accurate statement, then it misled applicant and as such second respondent cannot be allowed to benefit from its own deceit.

[17] In my view the issue for determination is whether or not second respondent is obliged to comply with applicants' request. To answer this question it is important to make it clear and understand that implementation of national policy and strategic environmental management is decentralized to municipal or local authorities. These authorities have both the legal and financial means to implement and enforce the decisions and regulations relating to their cities and/or towns.

[18] They have a wide responsibility in their spheres of operations amongst which are the duty to collect waste from households, commercial and industrial activities. They have a duty and power to control pollution, noise and any other nuisance which interferes with the smooth running of households, commercial and industrial activities.

[19] In *casu*, applicant is situated under second respondent's area wherein it pays rates and other taxes. In return, second respondent has a reciprocal duty to ensure that applicant operates in an environment which is conducive to a normal expected environment for a commercial entity. This was admitted by it when it advised applicant that it was attending to the problem complained of. It did not at that stage or at any stage for that matter deny that responsibility. I find that applicant has satisfied all the requirements for an interdict as laid down in *Setlogelo v Setlogelo* (*supra*).

[20] Applicant is not asking second respondent to perform a physical impossibility. All it is asking for, is for it to carry out its duty as a local authority and remove the nuisance which is caused by the taxis outside and within its environment.

[21] Any other excuse by second respondent is a red herring and further any technicalities which second respondent is trying to introduce are tantamount to splitting of hairs and can therefore not be allowed. Second respondent has a responsibility towards rate payers and it cannot be allowed to abrogate that inherent responsibility.

[22] In light of the above, the following is the order of the court.

Order:

1. The First Respondent's members are interdicted and restrained from parking and/or stopping in the entrance and the parking area of Spar, Oshakati and continuing with any disruptive behaviour infringing on the First Applicant and/or Second Applicant's right to freely conduct business;
2. The Second, Third and Fourth Respondents are compelled to remove all taxis unlawfully parking and/or stopping in the entrance and the parking area of Spar, Oshakati and continuing with disruptive behaviour infringing on the First Applicant and/or the Second Applicant's right to freely conduct business;

3. The Second, Third and Fourth Respondents are ordered to remove all street vendors unlawfully conducting business and continuing with disruptive behaviour infringing on the First Applicant and/or Second Applicant's right to freely conduct business;
4. The Second Respondent to pay costs of suit;

M Cheda
Judge

APPEARANCES

APPLICANT:

E. Angula
Of AngulaCo. Inc., Ongwediva

2ND RESPONDENT:

P. Greyling
Of Greyling & Associates, Oshakati