

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

JUDGMENT

CASE NO.: HC-NLD-CIV-MOT-GEN-2018/00001

In the matter between:

ONGWEDIVA TOWN COUNCIL

APPLICANT

and

TUHAFENI JONAS

RESPONDENT

Neutral citation: *Ongwediva Town Council v Jonas* (HC-NLD-CIV-MOT-GEN-2018/00001)
[2018] NAHCNLD 22 (12 March 2018)

Coram: CHEDA J

Heard: 19 February 2018

Delivered: 12 March 2018

Flynote: Where the State has expropriated land and given it to a local authority it is the local authority which is then bestowed with the right to protect, develop and further alienate it as per its mandate by the State. A former occupier of a piece of land which has

been acquired by a local authority has no right to remain on it on the basis that he has not been compensated. Compensation is a separate legal process. Application is granted.

Summary: Applicant, by urgent application sought to restrain and interdict respondent from proceeding with some construction on the said property. Respondent resisted this move on the basis that applicant must compensate him first. As applicant is the lawful owner of the land or is a holder of it in trust on behalf of the State, which bestowed the right on it, it has a right to prevent unlawful occupation.

Respondent had started building structures on the property as he believed the land is his as it belongs to his family. The property had been expropriated by the State and given to applicant in trust. Respondent argued that it cannot halt the construction as he has not been compensated. Compensation does not entitle respondent to refuse to vacate the property. Respondent is in unlawful occupation. Should he require compensation, he can proceed separately. The Application succeeds.

ORDER

1. The applicant's non-compliance with the rules of this Court relating to service and forms is hereby condoned and the applicant is authorized to bring this application on an urgent basis as contemplated in Rule 73 of the Rules of this Honorable Court.
2. The respondent is interdicted and restrained from carrying on any construction on the applicant's property currently described as Omatando as per annexure "OTC1".
3. The respondent is ordered to vacate the aforesaid applicant's property within 7 days from the date of this order being made final, and to demolish any and all structure(s) already constructed on the property, failing which the Deputy-Sheriff, Ongwediva, be

and is hereby authorized to take such steps as are necessary to give effect to this order.

4. The respondent is ordered to bear the costs associated with his removal and/or demolishing of structures from the applicant's aforesaid property.
5. The respondent is ordered to bear the costs of this application at the rate between attorney and own client scale.

JUDGMENT

CHEDA J:

[1] This is an application for an interdict, the relief of which is as follows:

- '1. Condoning Applicant's non-compliance with the Rules of this Honourable Court relating to service and forms and authorizing the Applicant to bring this application (sic) on a urgent basis as contemplated in Rule 73 of the Rules of this Honourable Court;
2. Interdicting and restraining the Respondent from carrying on any construction on the applicant's property currently described as Omatando as per annexure "OTC1";
3. Ordering the Respondent to vacate the aforesaid applicant's property within 7 days from the date of this order being made final, and to demolish any and all structure(s) already constructed on the property, failing which the Deputy-Sheriff, Ongwediva, be and is hereby authorized to take such steps as are necessary to give effect to this order;
4. That the Respondent's be ordered to bear the costs associated with his removal and/or demolishing of structures from the applicant's aforesaid property;

5. That the Respondent be ordered to bear the costs of this application at the rate between attorney and own client;

6. That the Applicant be granted such further relief and/or alternative relief as to this Honourable Court may deem fit.¹

[2] The said application was opposed by respondent and set down for hearing on 19 February 2018. Applicant is the Town Council of Ongwediva, Oshana Region, Namibia, a town council established as such in terms of the Local Authorities Act, 23 of 1992 (hereinafter referred to as "council"). Respondent is Tuhafeni Jonas, an adult male residing at Erf 5525, extension 12, Ongwediva, Oshana Region, Republic of Namibia (hereinafter referred to as "TJ"). Applicant was represented by Ms Miller of Shikongo Law Chambers while the respondent was represented by Ms Shailemo of Shailemo & Associates. It is common cause that the cause of action arose within the jurisdiction of this Court.

[3] Applicant avers that it is the lawful owner of certain immovable property situated at Omatando area, Ongwediva as depicted on annexure **OTC 1**. It is not in dispute that on 14 September 2012 the boundaries of applicant were altered to include farm Ongwediva Townlands Extension 1156 by Proclamation no 238 of 2012 (annexure **OTC 2**), which included Omatando area, thereby affecting the plot in question. On 8 July 2017, applicant announced to the residents of Omatando that it will be formalizing the area where respondent was occupying and that the residents should not erect any structures thereon forthwith.

[4] Despite the advice from council, respondent commenced building structures on the plot in question which plot was now owned by council. Applicant averred that these structures are unapproved and therefore illegal. It is also applicant's assertion that they have encroached in the middle of the road thereby obstructing access to the public road. On 4 January 2018, respondent was verbally informed by applicant's official that the

¹ See applicant's notice of motion filed of record.

structures are illegal and that they are on a public road. He was further instructed to stop further construction, but, he ignored this advice. Two letters and a council resolution² were forwarded to respondent, but, he remained adamant and persisted in his unlawful conduct as revealed by an inspection by applicant.³

[5] Applicant therefore claims that it is and will continue to be prejudiced by the respondent's conduct, if the relief sought is not granted. Respondent's assertion is contrary to that of applicant. He submitted that he purchased the plot in question from one Karolina Mulongeni in August 2010 for N\$35 000 and the piece of land was allocated to him by the Village Headman, one Mr Johannes Mulongeni, in terms of section 20 of the Communal Land Reform Act, 5 of 2002. To support that assertion, he relied on a translated letter issued to him by the Headman⁴. It is his testimony that he started building on the property on or about 8 December 2017. He is of the firm belief that the plot in question does not belong to the applicant because he was never compensated in terms of Article 16(2) of the Constitution of Namibia⁵ as read with section 16 of the Communal Land Reform Act.⁶ As such, respondent is of the opinion that he is within his rights to construct structures on the plot in question.

[6] In reply, applicant reiterated its case as pleaded in its founding affidavit. Furthermore, applicant relied on a letter from Legal Wise dated 12 January 2018 marked annexure "A" wherein the respondent claimed that he obtained consent from applicant before commencing the construction and that he had adhered to the rules and regulations of applicant. However, in its letter of 25 January 2018, applicant denied giving such consent.⁷

[7] At the start of the hearing, counsel for applicant informed this court that the issues would be limited to ownership of the plot in question and/or the right/permission to occupy

² Annexures OCT 3 and, OCT 5 and OCT 4 to Applicant's founding affidavit.

³ Annexures OCT 6 (1) – (3) to Applicant's founding affidavit.

⁴ Annexure JT 1 (in Oshiwambo) and JT 2 (translated into English) of the respondent's replying affidavit.

⁵ Act 1 of 1990.

⁶ See annexure JT 3 to the respondent's answering affidavit.

⁷ Annexure B.

thereof. Counsel for applicant argued that in terms of Article 100 of the Constitution of Namibia, all land belongs to the state and is held in trust on behalf of the people of Namibia. Therefore, it stands to reason that such land can be availed to Local and/or Traditional Authorities. In *casu*, the piece of land in question was incorporated into applicant's jurisdiction by Proclamation 238 of 2012 and it therefore became its lawful owner forthwith.⁸ Although at the time of incorporation, respondent was already in occupation of the land, he did not acquire ownership or permission to occupy such land after the incorporation. A point was made that the respondent has acknowledged that the applicant is the lawful owner of the land.

[8] Ms Shailemo, counsel for the respondent essentially argued firstly, that the respondent acquired the land in 2010 after it was allocated to him by the Village Headman in terms of section 20 of the Communal Land Reform Act. She further argued that at the time of incorporation, the applicant did not compensate the respondent for such land as required by Article 16(2) of the Constitution read with section 16(6) of the Communal Land Reform Act and as such, the applicant is not the lawful owner of the land in question. Thus, the respondent is still the lawful owner of the land. When asked about the letter of 12 January 2018, and the reply, thereto, of 25 January 2018, counsel for the respondent could not provide a satisfactory answer as to why the respondent sought consent from applicant if he was indeed the lawful owner thereof.

[9] Counsel for the applicant further submitted that a Headman has no power to allocate land in terms of the Communal Land Reform Act. She further buttressed her point by stating that in terms of section 17(3) of the same Act, it is not possible to hold communal land rights in a local authority. In as far as compensation is concerned, she stated that same does not apply in this case.

[10] What falls for determination is whether or not the applicant rightfully acquired the land in question and whether, consequently, it is the lawful owner thereof.

⁸ Annexure OTC 2 *supra*.

[11] The High Court had an opportunity to determine this question when it was confronted with a similar question in *Town Council of Rundu v Dinyando* (A 417-2013) [2015] NAHCMD 237 (8 October 2015), where Parker AJ clearly and emphatically stated:

[2] On the papers, the following cogent fact is not in dispute: The applicant, a local authority council, established in terms of the Local Authorities Act 23 of 1992, is the lawful owner of the land in terms of Title Deed Certificate No. T4396/1991. It follows, as a matter of law, that the land is the property of the applicant and the applicant's right to it is protected by art 16 of the Namibian Constitution, as Mr Kwala, counsel for the applicant, submitted. Such right includes the applicant's entitlement to possess and keep the land, (b) use, and benefit from, the land, (c) encumber the land in favour of another person, eg by way of a lease, (d) dispose of the land in favour of another person through sale, for example, and (e) vindicate the land, that is, claim the land from another person who occupies the land unlawfully.

[3] I conclude, therefore, that the respondents' contention (in the answering affidavit) that the land 'belongs to second respondent's grand uncle, Mr Kashikoro Festus', is legally incorrect. For the same reasons, the fourth respondent's reliance on a letter by Magreth Mushongo, Headwoman, dated 27 September 2013, as the basis of his lawful occupation of the land has no legal force, and it is rejected. It cannot assist the fourth respondent. A traditional leader or a chief has no power to give land which is within the jurisdiction, and under the control of, a local authority council to another person, in virtue of the Local Authorities Act 23 of 1992. This conclusion disposes of the fourth respondent's opposition to the application.'

[12] As recently as in 2017, the High Court in *Kashela v Katima Mulilo Town Council & 7 others* (I 1157/2012) [2017] NAHCMD 49 (01 March 2017), Miller AJ stated the following in respect of communal land *vis-à-vis* local authorities:⁹

[15] In terms of Article 100 of the Namibian Constitution;

Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State, if they are not otherwise lawfully owned.

⁹ Pages 7-10 thereof.

[16] In Namibia certain areas of land are designated as communal land. Their distinguishing feature is that, the ownership thereof vests in the State who (sic) according to the provisions of the Communal Land Reform Act, Act No. 5 of 2002

[17] When circumstances require it, the Local Authorities Act, Act 23 of 1992 entitles the Minister of Local Government and Housing to establish by notice in the Gazette any area as a local authority and to declare that portion of communal land to be a municipality, town or village under the name specified in that notice.

[22], if the area of a local authority thus established is in an area of communal land, the ownership of the immovable property vests henceforth in the local authority so established. The rights of ownership insofar as they concern amongst others the alienation of such immovable property is not unlimited but curtailed by several provisions contained in the Local Authorities Act.

[26] Once the land or portion of land ceased to be communal land in terms of Section 15(2) of the Communal Land Reform Act, read with Section 3 of the Local Authorities Act, the effect is that the Town Council becomes the owner of the land. As a result, from the date that the land ceased to be communal/customary land, no traditional leader could exercise customary powers over it. The effect is that all customary rights relating to PTO's cease to exist.'

[13] As far as the issue of compensation is concerned respondent cannot refuse to vacate the plot on the basis that he has not been compensated. Respondent has a right to pursue compensation separately. He cannot hold on to the plot as a *lien*. In *Kashela* the learned Judge went on and remarked at page 11 that:

'[28] As for the plaintiff's right to claim compensation for the loss of land in terms of Article 16(2) of the Namibian Constitution, such claim would be against the State who in fact expropriated the rights of occupation.'

[14] In another recent case of *Katima Mulilo Town Council v Maswahu* (I 575/2014) [2017] NAHCMD 188 (14 July 2017), the court had to determine whether the defendants were in lawful occupation of, and whether they occupied the land in question under

customary land right. Further, whether in law, the plaintiff had an obligation to consult and compensate the defendants before it would be entitled to an order for eviction.¹⁰ In that case, Bassingthwaite AJ stated that:¹¹

[40] A customary land right is defined in the Communal Land Reform Act, Act 5 of 2002 as a right to a farming unit, a right to a residential unit and a right to any other form of customary tenure that may be recognised by the Minister.¹² These are the types of customary land rights which may be allocated in terms of the Communal Land Reform Act in respect of communal land. The Act recognises that people may have had pre-existing land rights allocated to them before the Communal Land Reform Act came into operation and allows such persons to apply for recognition and registration of such rights.¹³ The defendants did not provide any evidence that they applied for such recognition and registration. Thus, I must accept that they never applied for such recognition or registration.

[41] Furthermore, when the Certificate of Registered State Title was issued to in 1991 in respect of the land in question, it ceased to be communal land. No customary land could thereafter have been obtained in respect of that land.'

[15] In respect of compensation, that:¹⁴

[43].....The defendants claim they are entitled to compensation in terms of Article 16(2) of the Constitution read with the Compensation Policy.

[44] The defendants' reliance on article 16(2) is misplaced. Article 16 (1) recognises the fundamental right of all persons to acquire, own and dispose of property in Namibia. Article 16 (2) protects ownership rights. The protection afforded in article 16 (2) is against expropriation without just compensation. Expropriation takes place when someone is deprived of ownership of his property. With the concession made by the defendants, and correctly so in my view, they acknowledged that they do not have ownership of the land. Thus there could not have been any expropriation.'

¹⁰ At page 6 paragraph 11.

¹¹ At page 13.

¹² Section 1 read with section 21.

¹³ Section 28(2).

¹⁴ At page 14 *supra*.

[16] And at page 16, she continued to state the following in respect of whom a claim for compensation would lie after communal land has been withdrawn:

'[53] As an aside, section 16(2) and (3) also makes it clear that any compensation payable where land is withdrawn from communal land, is payable by the Minister responsible for affairs relating to land matters. This is so because the land may only be withdrawn once the rights held by any person in respect of such land had been acquired by the State. If the land was communal land and was withdrawn after 2002, the defendants' rights would have been against the State represented by the Minister of Lands and Resettlement.'

[17] It is clear to me that respondent's argument is hinged on the council's failure to compensate. While it is indeed a valid reason, it is not a legal reason, but, purely a moral one, which this court is not empowered to entertain. If respondent feels that he is entitled to compensation, he should take appropriate action against the council. Having stated the above, it is clear that the applicant has a clear right over this property and the respondent lost his right of occupation when the state bestowed the right of ownership to applicant. For that reason the respondent has absolutely no reason to construct any structure on the applicant's property and such would be unlawful. Accordingly the application succeeds as prayed for in the notice of motion, namely:

Order -

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5. The Respondent is ordered to bear the costs of this application at the rate between attorney and own client scale.

M Cheda
Judge

APPEARANCES:

For Applicant:

Miller

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For Respondent:

Shailemo

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