

REPUBLIC OF NAMIBIA



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

JUDGMENT

Case no: HC-NLD-CIV-MOT-GEN-2018/00005

In the matter between:

STANTOLL PROPERTIES CC

APPLICANT

and

LUKAS JOHANNES

RESPONDENT

Neutral citation: *Stantoll Properties CC v Johannes* (HC-NLD-CIV-MOT-GEN-2018/00005) [2018] NAHCNLD 23 (7 March 2018)

Coram: CHEDA J

Heard: 06 - 07 March 2018

Delivered: 07 March 2018

Flynote: Where government has gazetted land and delegated its authority to a local authority, it is the local authority which has a right to distribute or alienate the said land. Where the local authority has sold the property to a third party and the previous owner or occupier has not been compensated the said previous owner's recourse for a remedy lies in suing the local authority and not the new owner or a third party as the new owner/third party has no contract with him/her.

Summary: The land in dispute has always been occupied by respondent and his forefathers. The State expropriated it and bestowed it to the Council. The Council then sold part of the land to applicant who started developing it. Respondent prevented applicant from continuing with its construction of a shopping Mall on the basis that, Ongwediva Town Council has not yet compensated it. It was held that applicant had fulfilled all the requirements for an interdict and that applicant had nothing to do with the compensation due to respondent, therefore, applicant is entitled to construct its shopping Mall, thereat.

ORDER

1. Applicant's non-compliance with the forms and service provided for by the Rules of the above Honourable Court and hearing this application as one of urgency as contemplated by Rule 73(3) is condoned.

2. The Rule Nisi be and is hereby issued calling upon the respondent to show cause, if any, on the 10th of April 2018 at 10h00, why an order in the following terms should not be made final:
 - 2.1. That the respondent and/or his family members and/or his friends and/or his employees and/or his agents and/or his representatives and/or his animals be evicted from Erf 6315, Extension 13, Main Road, Ongwediva, Oshana Region, Republic of Namibia;

 - 2.2. That the respondent and/or his family members and/or his friends and/or his employees and/or his agents and/or his representatives be interdicted from interfering with and/or obstructing the construction and development of Phase 2 of Erf 6315, Extension 13, Main Road, Ongwediva, Oshana Region, Republic of Namibia;

 - 2.3. That the police officials stationed at the Ongwediva Police Station be ordered to assist the applicant and arrest the respondent and/or his

family members and/or his friends and/or his employees and/or his agents and/or his representatives and/or any other persons who trespasses and/or who attempts to interfere with and/or obstruct and/or interferes with and/or obstructs the construction and development of Phase 2 of Erf 6315, Extension 13, Main Road, Ongwediva, Oshana Region, Republic of Namibia;

- 2.4. Respondent should not pay the costs of this application on an attorney-own client scale.

JUDGMENT

CHEDA J:

[1] This is an urgent application filed on the 06th of March 2018 and was set down for hearing on the same day at 16h00.

[2] Applicant is a close corporation registered as such in terms of the laws of Namibia while respondent is a resident of Ongwediva, Namibia. The property under dispute falls under the jurisdiction of Ongwediva Town Council (the Council).

[3] On the day of the hearing, applicant was represented by Ms Horn, while respondent was unrepresented. Respondent asked for a postponement in order to engage the services of a legal practitioner, which application was granted and the matter was postponed to the 07th of March 2018 at 10h00.

[4] Before the matter was heard he had secured the services of Henry Shimutwikeni & Co. Inc., based in Windhoek who unfortunately filed a defective notice of representation. It was defective in that it did not comply with rules of this court pertaining to address of service. This is not acceptable. However, in light of the importance of the matter to the parties, due to the fact that, the issue of land in my

view is emotive, I indulged respondent's legal practitioner to regularise its representation.

[5] Despite this defect, Ms Amupolo, appeared as a correspondent, but, again could not successfully do so as her appearance was now based on a defective notice. In her wisdom, she applied for an adjournment which was not objected to. In the use of my judicial discretion, I exercised it in her favour in light of the importance of the matter to both parties.

[6] The brief background of facts which are substantially undisputed are that applicant is currently carrying on business in Namibia and in particular is currently involved in the construction of a shopping Mall in Ongwediva.

[7] According to documents filed of record, applicant bought a piece of land from the Council and has a Title Deed to that property. It is on that basis that it embarked on the construction of a shopping Mall. In anticipation of the completion of the said Mall it proceeded to enter into lease agreements with prospective businesses, in particular, Shoprite a business concern. An agreement was entered into on the 29th of August 2017 and Shoprite is due to take occupation of the space on the 01st of August 2018.

[8] It is, therefore, applicant's assertion that respondent together with other people have prevented it from continuing with the present construction of the shopping Mall by:

- a) standing in front of the construction machinery and equipment; and
- b) have assaulted and beaten up applicant's employees.

[9] As a result of respondent's interference, construction has been abandoned which has resulted in applicant's financial prejudice. Further, that, if respondent is not restrained or interdicted, applicant will suffer irreparable harm as Shoprite is likely to institute legal proceedings against it. That is the gist of the application.

[10] Respondent through Ms Amupolo, on the other hand argued that respondent is a resident of the said property or its environs, whereat, applicant is constructing a shopping Mall. It is not in dispute that respondent and his family have been in occupation of this land under the Traditional Authority, this was well before the Council came into existence.

[11] The land in dispute used to be communal land under the Traditional Authority. However, the government of Namibia, has since expropriated it from the Traditional Authority and bestowed it to a Local Authority, being, the Council. This move has not been welcomed by respondent who insists that it was unlawful for the Council to do so, most importantly as he was uprooted from the land of his forefathers without compensation.

[12] What calls for determination in my view is whether or not applicant is entitled to an interim order which it is now seeking. It is clear that respondent's contention is that applicant should not be permitted to carry out any construction on the plot before the Council compensates it. There has been negotiations between the Council and respondent regarding compensation, but, it appears that no agreement has been reached. Applicant was no part of the negotiations.

[13] Ms Amupolo raised a question as to whether or not the matter was urgent, her argument was that applicant had always known that there was a dispute of ownership between the Council and respondent, but, despite this knowledge, proceeded with its construction.

[14] What further calls for determination is whether applicant has proved that the matter is urgent and is entitled to an interim order restraining and instructing respondent's activities.

[15] In our law a matter is urgent if it cannot await its normal place on the roll. In order for it to qualify, a party who is arguing that it is urgent must fulfil certain requirements which I lay down herein under.

[16] These courts have followed requirements laid down in *Setlogelo v Setlogelo* 1914 AD 221 where it was held that in order for applicant to succeed in an urgent matter it must prove that:

- a) it has a *prima facie* right in the matter;
- b) it will suffer irreparable harm if it does not get the relief sought;
- c) the balance of convenience favours the granting of the relief; and
- d) that there is no other substantial redress.

[17] I now examine these requirements *seriatim*.

(a) Prima facie right

[18] It is the duty of applicant to establish this as its right must be founded thereat. Applicant has produced a Title Deed which proves its ownership of the land/plot in question. This land was lawfully transferred from the Council to applicant as per the Title Deed filed of record.

[19] Respondent does not have Title to this land, but, relies on its right of occupation which was bestowed on him and his family by the Traditional Authority. While this indeed is correct, sight should not be lost that of the fact that, the said Authority deprived him of this right by an Act of Parliament. Therefore, as of now ownership rests with the Council.

[20] At this point the Council has a right to alienate the property to whoever, it deems fit, and of course against payment of the purchase price. Applicant has by the production of receipts proved payment of the purchase price. On that note it is clear that applicant has a right over this property.

(b) Irreparable harm

[21] Applicant has construction machinery and equipment on the property as it is constructing a shopping Mall. In addition, to that, it has already entered into a lease agreement with Shoprite in anticipation of the completion of the shopping Mall

timeously in order for it to be ready for occupation on the 01st of August 2018. In my opinion this is a serious commitment, which is binding on both parties and in the event of a breach, Shoprite is entitled to sue applicant which will be financially prejudicial to it. Applicant, has, therefore, shown that, irreparable harm is indeed a live threat to it.

(c) Balance of convenience

[22] Applicant has construction machinery and equipment on site already and it has commenced construction. It has employed 750 people on site. Further, it has committed N\$50 million to this project, which project will come to a standstill should this application fail. Respondent on the other hand, in as much as he has a legitimate grievance against the Council, his prejudice is far less than that of applicant. It, therefore, stands to reason that the balance of convenience favours the granting of the relief sought in this matter.

(d) Substantial redress or alternative relief

[23] Applicant has title to this property and respondent is interfering with its construction. The question then is, if this is allowed to continue, does applicant have any substantial relief? In my view the answer is on the negative as respondent does not have the capacity to make good the damage applicant would have suffered.

[24] I am of the further view that the Council will not be in a position to make good applicant's loss without falling into the bottomless pit of insolvency. Before I conclude, I should make it clear that this is an application for an interim order and is therefore not a final order. It is to be argued further on the return date.

[25] In light of the above, I find that the matter is indeed urgent. It is noteworthy that Ms Amupolo conceded that respondent is the rightful owner of the property. Her argument was therefore, that applicant should not be allowed to construct before the Council has paid compensation to respondent. I do not see the relationship between the two contracts. On one hand there was a contract between applicant and Council and on the other there is an obligation by the Council to respondent. The reciprocal

obligations of these parties are different. The performance of Council to respondent on one hand is not related to that of applicant.

[26] While perusing the documents filed of record, I came across allegations of violence and threats of violence against applicant's employees on site. Namibia is a peaceful and democratic country, while its constitution permits demonstrations as a way of protest, such protests have to be conducted within the confines of the law. Violence or threats thereof, should not and cannot be tolerated in this country.

[27] In simple terms, violence is not within the vocabulary of the State and to my knowledge it has never been its second name. Peaceful demonstrations are indeed constitutional, but, violence is deplored.

[28] The violence perpetrated on innocent employees, is, from the court's point of view, deplorable and should not be allowed to rear its head. As a democratic nation all issues have to be resolved peacefully and orderly. These courts will not tolerate self-help from any quarter, as such conduct is a law of the jungle and will not be allowed by these courts.

[29] In conclusion, I find that applicant has succeeded in fulfilling all the requirements of an interim order and is therefore entitled to its order. With regards to respondent, he has a legitimate claim and should point his arsenal towards the Council, as applicant has nothing to do with the prior or present discussions between the Council and respondent.

[30] The application for an interim order is granted as prayed for in the Notice of Motion.

Interim order:

1. Applicant's non-compliance with the forms and service provided for by the Rules of the above Honourable Court and hearing this application as one of urgency as contemplated by Rule 73(3) is condoned.

2. The Rule Nisi be and is hereby issued calling upon the respondent to show cause, if any, on the 10th of April 2018 at 10h00, why an order in the following terms should not be made final:

- 2.1. That the respondent and/or his family members and/or his friends and/or his employees and/or his agents and/or his representatives and/or his animals be evicted from Erf 6315, Extension 13, Main Road, Ongwediva, Oshana Region, Republic of Namibia;
- 2.2. That the respondent and/or his family members and/or his friends and/or his employees and/or his agents and/or his representatives be interdicted from interfering with and/or obstructing the construction and development of Phase 2 of Erf 6315, Extension 13, Main Road, Ongwediva, Oshana Region, Republic of Namibia;
- 2.3. That the police officials stationed at the Ongwediva Police Station be ordered to assist the applicant and arrest the respondent and/or his family members and/or his friends and/or his employees and/or his agents and/or his representatives and/or any other persons who trespasses and/or who attempts to interfere with and/or obstruct and/or interferes with and/or obstructs the construction and development of Phase 2 of Erf 6315, Extension 13, Main Road, Ongwediva, Oshana Region, Republic of Namibia;
- 2.4. Respondent should not pay the costs of this application on an attorney-own client scale;

M Cheda
Judge

APPEARANCES

APPLICANT: W Horn
Of W Horn Attorneys, Oshakati

RESPONDENT: M M Amupolo
Instructed by Henry Shimutwikeneni & Co. Inc., Windhoek