



REPORTABLE

CASE NO.: SA 9 / 2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HELAO NAFIDI TOWN COUNCIL

First Appellant

INGE IPINGE

Second Appellant

and

ANKAMBO EMMANUEL KAMBONDE

First Respondent

DAVID LAMEKA

Second Respondent

Coram: DAMASEB DCJ, HOFF JA and FRANK AJA

Heard: 10 April 2017

Delivered: 12 May 2017

Summary: Appeal to Supreme Court. Clear from record that lawyers representing parties in court *a quo* not acting diligently to further their clients' interests in that their case was initially managed as if it was an action instead of an application.

Record on appeal contained documentation that was not part of the application in the court *a quo* including the discovery affidavits and discovered documents which were

not only inapposite in application proceedings but also not part of the application in the court *a quo*.

Heads of argument on appeal filed late and reasons for such late filing proffered on behalf of the legal representative for appellant such as to suggest the possibility of unprofessional conduct.

Conduct of legal representatives the reason for deviation from the normal costs order where parties were ordered to pay their own costs and certain costs disallowed or limited.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and HOFF JA concurring)

Introduction

[1] First respondent (as applicant) launched an application against the appellants (as first and second respondents) and second respondent (as third respondent) in the High Court seeking the following relief:

- '(a) Compelling the Respondents to remove the encroachment on erf 82, Oshikango, Ohangwena Region, Republic of Namibia and to make good the land upon which it stands;

- (b) Compelling the Respondents to comply with the First Respondent's resolution made on the 28th of January 2009 at its Ordinary Council meeting 05/09;

- (c) Costs of suit;

(d) Further and/or alternative relief.’

[2] The court *a quo* considered the matter and made the following order:

- ‘1. 1st, 2nd and 3rd respondents are jointly and severally ordered to remove the structures complained of by applicant within 30 days of this order.
2. The costs of this application shall be paid by 1st, 2nd and 3rd respondents jointly and severally the one paying the others to be absolved.’

[3] The appeal is directed at the order of the court *a quo*. For the sake of convenience, the first appellant shall be referred to as the Town Council and the second appellant as the CEO, the first respondent as Mr Kambonde and the second respondent as Mr Lameka. In summary and as far as the parties are concerned, the Town Council and the CEO appeal against the order of the court *a quo* that the two of them, together with Mr Lameka, must remove the structures which formed the subject matter of Mr Kambonde’s complaint in the court *a quo*.

Factual background

[4] The complaint of Mr Kambonde, set out in the application launched in the court *a quo*, is that Mr Lameka (the second respondent in the court *a quo*) ‘started erecting structures on my portion of the property’. As is evident from the relief sought in the notice of motion and quoted at the outset of this judgment, the structures complained of allegedly constituted an encroachment on Erf 82 Oshikango, Ohangwena Region and that the Town Council had taken a resolution pertinent to the issue which was also sought to be enforced.

[5] The founding affidavit to the application was deposed to by Mr Kambonde and is a short four page document. It cites the Town Council and the CEO as the first two respondents. It expressly states that the CEO is cited in her 'official and representative capacity'. Mr Kambonde alleges that he is the 'lawful owner of the property' and explained that he bought it in 1994 from a person 'who consequently obtained permission from the headman' to occupy it. Later, and in 1996, Mr Kambonde was informed by an official of the Ohangwena Regional Council that the property had two joint occupiers, namely himself and Mr Lameka and that the property had to be subdivided to give both him and Mr Lameka 'permission to occupy (PTO)'. It seems that Mr Kambonde fenced off the portion that he claimed he could occupy and that Mr Lameka ignored this fence and constructed certain structures on what Mr Kambonde regarded as his portion of the property. Mr Kambonde approached the Town Council which took a resolution that Mr Lameka had to remove the encroachments and notified Mr Lameka that he had to do so.

[6] According to the annexures to the founding affidavit, the Town Council resolved that Mr Lameka must respect the agreement reached (presumably between Messrs Kambonde and Lameka) and 'must demolish the business structure (Shiku Building)' that was deliberately constructed on the portion of the property of Mr Kambonde within 30 days and that failure to do so would leave the Town Council with no alternative but to 'take legal action'. It must be pointed out that the letter containing this information that was forwarded to Mr Lameka is dated February 2009 and that the application that forms the subject matter of this appeal was launched in 2014 when the Town Council had not yet taken any action following its letter. In the correspondence immediately preceding the application and when a letter of demand was forwarded to the Town

Council on behalf of Mr Kambonde, the response of the Town Council is as follows: that it did not exist in 1996 and as far as land disputes predating its establishment are concerned, such disputes must be resolved by the parties to such disputes. It maintained it could only act in respect of 'infrastructures constructed unprocedurally' since the inception of the Town Council.

[7] The CEO deposed to an affidavit on behalf of the Town Council and herself in opposition to the relief sought in the application. She points out that Helao Nafidi was only proclaimed as a town on 1 September 2003. She further points out that the dispute between Messrs Kambonde and Lameka predates the proclamation of the town and that the Town Council has no records relating to the dispute or the boundaries determined between the parties to the dispute, which she states should be with the relevant Regional Council. She points out that although the town was established it did not expropriate the said property with the result that 'the occupation and control thereof remains with' Messrs Kambonde and Lameka. As a result, she maintains, the Town Council has no 'legal basis to pronounce itself on the boundaries or alternatively to direct new subdivisions' or to order Mr Lameka to remove his structures. As a result, the Town Council, on advice of its lawyers, rescinded the resolution ordering Mr Kambonde to remove the alleged encroaching structures. This resolution rescinding the one ordering Mr Lameka to remove his encroaching structures was taken in December 2014 subsequent to the launching of the application. Apart from the legal issues raised by the CEO in the answering affidavit and referring to the rescinding resolution, the factual allegations of Mr Kambonde are not disputed.

Role of lawyers – condonation applications

[8] No replying affidavit was filed which meant the pleadings were closed by the end of January 2015 as the answering affidavit was filed on 12 December 2014. Despite this matter being an application which had to be dealt with in terms of Rule 66(4) of the Rules of the High Court, the matter was initially dealt with in terms of Rule 21 of the High Court which deals with action proceedings. Eventually on 9th March 2015, a case plan was filed in terms of Rule 23(3) which rule likewise applies to actions and not applications. This case plan dealt with the matters mentioned in the rule even though most of them were of no relevance. No allowance was made in this case plan for the fact that the matter was an application that needed to be dealt with as such. In addition, both parties filed discovery affidavits and made discovery as if the matter was an action. These discovered documents are also wrongly included in the record of this appeal. There is nothing in the judgment of the court *a quo* indicating that it relied on documentation that did not form part of the application. The fact that the inclusion of such discovered documents can cause problems is evident from the fact that counsel for Mr Kambonde in this appeal sought to rely on some of the discovered documents. On 10 June 2015 the parties filed a status report, the introduction whereof states that 'whereas the parties were under the mistaken belief that the matter was an action proceeding, when in actual fact it is an application proceeding' and the first paragraph recorded that 'the pleadings have not closed in the matter . . . '.

[9] It is simply astounding that the parties, except for Mr Lameka who did not oppose the application, who were represented by lawyers can state that they were under the mistaken impression that they were dealing with action proceedings. This simply beggars belief. It was an application brought by way of motion proceedings

supported by affidavits as is evident from what is set out above. In addition, by June 2015, the pleadings had long closed seeing a replying affidavit had not been filed in the time allowed for such filing. This slovenish and seemingly lackadaisical approach to the matter is disconcerting and more is required from legal practitioners. I must point out that the legal practitioner acting for Mr Kambonde in this court was not the same legal practitioner who acted for him in the court *a quo*.

[10] The heads of argument filed on behalf of both the appellants and Mr Kambonde were filed late and condonation is sought for this non-compliance of the Rules by both mentioned parties. The reasons advanced by the legal practitioners for the appellants for the late filing is stated as follows:

- ‘5. The reason why I did not comply with the rule is due to the fact that I am the only admitted legal practitioner at the firm with only one candidate. I had a trial in the Keetmanshoop Regional Court during the week of 13 March 2017 which consumed my time. Thereafter, I had to immediately flew (*sic*) to South Africa for another matter in this court of *Oukwanyama Traditional Authority v George Hikumwa and 2 Others (Case No: SA 27/15)*. I am instructed by the Government Attorneys to act as junior counsel in that matter. During the week of 6 March 2017 I had to peruse the record of approximately 500 pages and thereafter research in order to advise senior counsel (Adv Semenya). I needed at least three weeks to peruse and research and to prepare a brief for counsel. We had to travel to Johannesburg on 17 March 2017 to consult with the senior counsel where we only returned on Monday, 20 March 2017. To this day, it remains my responsibility to research and draft supplementary heads for senior counsel based on the consultations we had in Johannesburg. Like this matter, the case law required is not readily available and this research consumes time.
6. Upon my return, I immediately commenced with the polishing up of these heads and only managed to complete the drafting on Thursday, 23 March 2017.

7. I needed at least a clean week to peruse this record, analyze the facts and judgment, research and draft heads. In the mean time I fell ill for three days (flu) and could not do much. That explains my late filing of these heads.'

[11] Where a legal practitioner cannot personally attend to any matter, he/she can instruct (with the client's consent) another legal practitioner to attend to the matter. A quick perusal of the judgments in this court will show more often than not that instructed counsel are utilised in this court. It is common knowledge and practice in this country that members of the Society of Advocates of Namibia (and more recently even those practising with fidelity fund certificates) are instructed to assist those legal practitioners instructing them. In fact, the legal practitioner for appellant knows this because the excuse tendered is that he was instructed by the Government Attorney to assist in another matter. It seems from the explanation tendered that the interest of his wallet weighed heavier for him than the interest of the Town Council and the CEO in this matter. For a legal practitioner to take on work where he/she knows he/she does not have the capacity to attend to it properly within the normal time periods set by the Rules of Court or the law is totally unacceptable and amounts to unprofessional conduct.

[12] As indicated above, the founding affidavit (excluding exhibits) consists of four pages. The facts are not disputed. The answering affidavit (excluding exhibits) consists of five pages. The legal practitioner for appellants represented them in the court *a quo* where he filed heads of argument and argued the matter on their behalf. To suggest that he would need at least a 'clean week' to file heads of argument in this appeal simply does not wash. To invoice his client for a week for his heads of argument in this appeal would be overreaching which would also amount to unprofessional conduct. Here it must be borne in mind that fees charged to a client

must be reasonable and whereas time spent on a matter is indeed relevant, the relentless charging for time spent on a matter can easily result in awarding a lawyer for inefficiency and must be guarded against.

[13] It is clear that neither the Town Council nor the CEO can be blamed in any manner whatsoever for the late filing of the heads of argument. The heads of argument on behalf of Mr Kambonde were filed only two working days prior to the hearing and condonation is sought for such late filing. From the reasons proffered, it is clear that it was caused by a breakdown in communication between the Ongwediva office and the Katima Mulilo offices of the legal practitioners of Mr Kambonde. In fact, it was only the arrival *per facsimile* of the appellants' heads of argument at the said Katima Mulilo office that raised Mr Kambonde's lawyer out of her slumber in the matter and, at least, prompted her to file her heads of argument without needing a 'clear week' but within 2 days of starting to work on the matter. There is no suggestion that the late filing of the heads of argument of the appellants in any way caused the late filing of the heads of argument on behalf of Mr Kambonde or somehow prejudiced him.

[14] In view of the fact that the matter is not voluminous (the relevant portion of the record being in the region of 70 pages) nor very complex, it is apposite that it be dealt with so that finality can be obtained by the parties to the dispute. Before I deal with the merits of the appeal, there are three comments that need to be made. Firstly, the citation of both the Town Council and the CEO amounted to a misjoinder of the CEO. This is so because the CEO is cited in her official capacity and representing the Town Council. The Town Council is already cited as a party and thus it serves no purpose

to cite another party to represent the Town Council.¹ This point was not taken and I leave it at that. Secondly, Mr Lameka chose not to oppose the application or to become a party to the appeal. His position in these circumstances will have to be considered in due course. Thirdly, it is clear that neither Mr Kambonde nor Mr Lameka are owners of the property. They only have a right to occupy. The only way an individual normally can obtain ownership of immovable property is through registration in the Deeds Register.² Where the Town Council alleges that the property of Messrs Kambonde and Lameka have not been expropriated it can only refer to their rights to occupy which have not been expropriated. By virtue of the operation of law, the Town Council is probably the owner of the property. This is so because land falling within a township upon establishment normally becomes that of such Town Council unless already privately owned. This follows from the provisions of the Local Authorities Act.³

Merits

[15] In the court *a quo* and in this court, the lawyer for Mr Kambonde relied on the earlier resolution and sought a mandamus to enforce compliance thereof based on the statement in the *Tumas Granite CC* case:

[6] In an application for mandamus, the court is generally not concerned with the reason why the administrative body or administrative official has not carried out its or his or her statutory duty: it is concerned with the allegation that it or he or she has failed or refused to exercise a statutory power and the applicant has been aggrieved by such failure or refusal. And mandamus lies to serve two purposes: (a) to compel the performance of a specific duty; and (b) to remedy the effects of unlawful action

¹ *Safcor Forwarding (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 671 B-672D; *Sea Gulls Cry CC v Council of the Municipality of Swakopmund and Others* 2009 (2) NR 769 (HC) at 774D para [12]; *Fire Tech Systems CC v Namibia Airports Co Ltd* 2016 (3) NR 802 (HC).

² *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 16.

³ Section 3 of Act 23 of 1992; *Nekwaya v Nekwaya* (SA 5/2010) [2016] NASC (13 December 2016) at para [15].

already taken. See Lawrence Baxter, *Administrative Law* (1991) pp 690-691, and the cases there cited.⁴

[16] As for the rescinding resolution, counsel for Mr Kambonde submitted in the court *a quo* that, as Mr Kambonde was informed of the original resolution, the 'purported rescission' was 'not in accordance with the administrative procedures'. In this court the stance is taken that, as the original resolution had not been rescinded when the application was launched, there was an entitlement to have the matter adjudicated on this basis. In other words, the fact that it was rescinded was irrelevant to the adjudication of the application.

[17] In the court *a quo*, counsel for the Town Council and the CEO relied on the second resolution and maintained that it was effective as it had not been rescinded or set aside. This stance was maintained in this court.

[18] The court *a quo* agreed with the submission on behalf of Mr Kambonde that the initial resolution could be enforced without enquiry into its validity or the reasons for its passing and in this regard also relied on the extract from the *Tumas Granite CC* case quoted above. From the judgment it further appears that the court *a quo* was of the view that once the Town Council had indicated to Mr Kambonde that it would assist him by taking the resolution and writing the letter to Mr Lameka, it 'should not be allowed to wriggle out' of its 'actions at will' and as the land falls within its jurisdiction, it had no excuse for not performing in terms of its original resolution.

⁴ *Tumas Granite CC v The Minister of Mines and Energy and Another* 2013 (2) NR 383 (HC) at 385 para [6].

[19] A problematic feature of the case is the fact that the initial resolution does not form part of the papers. The letter from the Town Council to Mr Lameka during 2009 refers to a resolution taken on 28 January 2009. From the letter it appears that the resolution orders Mr Lameka to 'demolish the business structure (Shiku Building)' within 30 days and that failure to do so will lead to the Town Council instituting legal action against him. It is clear that Mr Lameka did not remove the offending structure and hence the launching of the application. It is also clear that enforcement of the resolution cannot be to compel the Town Council to remove the offending structures but can only be to compel it to institute legal action to seek appropriate relief against Mr Lameka. The order granted against the Town Council and the CEO could thus not have been granted based on the original resolution.

[20] No basis was laid in the founding affidavit to compel the Town Council and CEO to demolish the alleged encroachments. It is not alleged that the Town Council (or its predecessor) was a party to an agreement between Messrs Kambonde and Lameka as to how the occupation of Erf 82 would be divided between them and that somehow it was also agreed that the Town Council (or its predecessor) would be allowed to compel adherence to this agreed division. Furthermore, no basis is laid that the Town Council had a statutory duty in this regard, e.g. that the encroachments were contrary to town planning or building regulations. Shortly put, no basis whatsoever is laid for the application against the Town Council and CEO besides the reliance on the original resolution. As pointed out, the effect of this resolution was, on the evidence disclosed in the affidavits, to institute legal action against Mr Lameka to remove the encroaching structures should he not have done so within 30 days of the letter demanding the removal of such encroachments.

[21] It follows that the court *a quo* could not order the Town Council and the CEO to remove the offending structures.

[22] Whereas a Town Council can rescind a previous resolution where a resolution vests rights in an individual, the doctrine of finality (*functus officio*) may render such new resolution invalid and furthermore, in certain circumstances, an affected person may have a right to *audi* prior to a resolution being rescinded. The Town Council and the CEO submit that until the rescinding resolution is itself rescinded it remains valid until set aside on review. Whereas this may, in general, be correct, it is also clear that a person may, in certain circumstances, launch a collateral attack on such resolutions if invalid from an administrative law perspective. Whether a collateral attack could have been raised in argument in the present matter is not necessary to decide and it would be ill-advised to do so seeing that the matter was not fully addressed and argued.

[23] As pointed out above, the resolution relied upon by Mr Kambonde does not vest the Town Council with the power to demolish the alleged encroaching structures. It, however, does state that the Town Council would institute legal action against Mr Lameka should he refuse to remove the offending structures. The question that arises is whether this order should have been granted. To discuss this option one must assume that the rescinding resolution had no impact on the original resolution.

[24] The problem for Mr Kambonde in this regard is that his case is premised on it being a mandamus to ensure compliance with a resolution and the background facts as to how this resolution came into being are very scant. In these circumstances, the Town Council's defence that it has no jurisdiction to take on Mr Lameka cannot be faulted. The division of what appears to be a single erf between the lawful joint

occupiers thereof is a dispute between private individuals in which the Town Council has no statutory role. If it (or its predecessor) somehow has an interest therein, this is not stated. Furthermore, as already pointed out, there is no other basis established that points to a duty (statutory or otherwise) by the Town Council to act against Mr Lameka. The Town Council thus had a good reason to refuse to institute the legal action it threatened Mr Lameka with. To compel it to institute such action would be a *brutem fulmen*, waste of time and resources and, in my view, to compel the Town Council to do this because they threatened it in a letter as it probably forms part of a resolution would simply be to place form above substance and compel the Town Council to waste public resources. In fact, it would force the Town Council to institute vexatious proceedings which would amount to an abuse of court process. This clearly cannot be countenanced and hence such order should not be made. The fact that such legal action was doomed to fail was, *prima facie* at least, a good reason to rescind the original resolution.

[25] What about the position of Mr Lameka? He did not oppose the application nor did he get involved in this appeal. It is clear from what is stated above he cannot be compelled to remove the alleged offending structures based on the resolution. Can he be compelled to do so independently from the resolution? If he and Mr Kambonde had an agreement in place which he breached when he erected the allegedly encroaching structures then clearly he can be ordered, based on such agreement, to remove the structures. As is evident from the relief sought in the Notice of Motion, the one prayer is premised on the resolution and the other prayer simply seeks the removal of the alleged encroachments without stating the basis thereof. On the basis of the founding affidavit, there is a suggestion of an understanding reached between Messrs Kambonde and Lameka with the intervention of the Ohangwena Regional Council

and/or the Town Council as to the subdivision of the Erf in respect of which they both had PTO's. As indicated, the factual allegations when it comes to the events leading up to the resolution relied upon is very scant but Mr Lameka chose not to oppose the application, and by so doing, abided the decision of the court *a quo*. As there is some evidential basis for an order based on the background evidence, and seeing that Mr Lameka did not appeal or even participate in the appeal despite being cited as a party, there is no basis for this court to assess the merits in respect of the case against Mr Lameka outside the confines of the resolution and he will thus remain bound by the order of the court *a quo* against him.

Disposal

[26] It follows from what is stated above that the order of the court *a quo* against the appellants falls to be set aside. When it comes to costs, I am however of the view that the ordinary costs order is not a proper one in the circumstances. As far as the proceedings in the court *a quo* are concerned, I have pointed out how the matter was originally treated as an action and not an application which situation can be blamed solely on the lawyers involved. These costs should be borne by the parties themselves. Further, the Town Council and the CEO's main point of opposition was a rescinding resolution taken after the application had been launched. It must also be remembered that Mr Lameka took no part in these proceedings so the issue of costs does not concern him. In these circumstances I am of the view that each party should bear their own costs. As far as the appeal is concerned, the record appears to simply be a replication of the file of proceedings *a quo* containing lots of irrelevant matters such as the notices relating to case management and status hearings which would have been relevant had the matter been an action, discovery affidavits, discovered documents not being part of the application, and a transcribed record of the arguments presented

in the court *a quo*. Based on a rough estimate, half the record contains matter that should not be in the record. In addition, I have referred to the condonation application on behalf of the appellants in respect of the late filing of the heads of argument and the attitude of the lawyer for the appellants set out therein. I shall also deal with this in the order set out below. No costs are sought in respect of the said condonation application.

Order

[27] In the result:

1. The late filing of the heads of argument of the parties is condoned.
2. The appeal succeeds to the extent set out below and the order of the court *a quo* is set aside and substituted with the following order:
 - '1. The application against first and second respondents is dismissed.
 2. The third respondent is ordered to remove the structures complained of by applicant within 30 days of this order.
 3. No order as to costs is made.'
3. The appellants are entitled to the costs on appeal subject to the following:
 - 3.1 The costs in respect of the record shall be limited to half of such costs;
 - 3.2 The total costs in respect of perusal of the record and filing of heads of argument shall be limited to two days;

- 3.3 The legal practitioner of the appellants shall not charge them for more than two days in total in respect of the perusal of the record and filing of the heads of argument; and
- 3.4 Neither legal practitioner shall charge their respective clients at all in respect of the condonation applications for the late filing of their heads of argument.

FRANK AJA

DAMASEB DCJ

HOFF JA

APPEARANCES

APPELLANTS:

S K Shakumu

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FIRST RESPONDENT:

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