"Reportable"

IN THE HIGH COURT OF NAMIBIA **CASE No A 158/10**

HELD AT WINDHOEK

In the matter between

BELLA VISTA INVESTMENTS **APPLICANT/PLAINTIFF**

and

SACKEUS KANYUGULI POMBILI **1ST RESPONDENT/DEFENDANT**
OMUTHIYA TOWN COUNCIL **2ND RESPONDENT/DEFENDANT**

Coram: DAMASEB, JP

HEARD: 21 June 2011
DELIVERED: 10 August 2011

JUDGMENT

DAMASEB, JP: [1] This case started life as a claim for *rei vindicatio* against the first respondent who is in occupation of the land to which the vindication claim relates. It was brought by way of notice of motion. Ancillary relief was also sought. Based on registered title, the applicant wanted the first respondent:

(i) to be ejected from the land;

(ii) to be ordered to stop construction work on the land;

(iii) to be ordered to remove his building material and structures from the land; and

(iv) to be ordered not to come on to the land.

[2] The respondent put up a spirited defence against all of the above relief and put forward a rival claim to the land from which he was sought to be ejected, on the basis that the land formed part of communal land and that he had become owner of that land by having bought it from a person who was its owner under customary law. Although the second respondent is cited because of the fact that the disputed land falls under its municipal jurisdiction, no relief is sought against it and it has also not opposed the matter.

[3] At the close of pleadings in the application, the crisp issue between the parties was whether or not the applicant is the registered title holder over the disputed land, or whether the first respondent was the owner of that land by virtue of the purported transfer

made to him by a traditional leader purporting to act in terms of customary law.

THE BASIS OF APPLICANT'S CLAIM TO OWNERSHIP

[4] As will soon become apparent, the applicant’s claim to ownership of portion 491, Omuthiya Townlands NO. 1013, situated in registration division ‘A’ in the Oshikoto Region, measuring 14,1449 hectares, is based on a deed of transfer No. 4525/2008 taken on 19 August 2008. It is now common cause that the disputed property is part of land that had in 2002 ceased to be communal land as it was declared a settlement area falling under the Oshikoto Regional Council since December 2002.[1] The land was transferred to that Local Authority's jurisdiction in December 2007.[2]

THE BASIS OF RESPONDENT'S CLAIM TO OWNERSHIP

[5] Although the issue had since become moot as the applicant’s ownership of portion 491, Omuthiya Townlands has since been conceded, the first respondent laid claim

1 Government Notice no. 226 of 2002 of 16 December 2002.
2 Government Notice no. 4 of 2007 of 9 January 2008.

to the land based on an agreement he concluded with one Leonard Kaloo Shidika on 18 June 2010 in which Shidika declared as follows:

> 'I am selling my plot to Sakeus Pombili Kanjuguli...at Omuthiya at the amount of NS 250 000...and it is without any complain.' (Sic)

[6] According to the first respondent, Shidika had on his part acquired the land from a traditional leader, Thomas Nakaziko, who deposed to an affidavit in the following terms:

> 'I am a traditional leader, duly recognized in terms of the Traditional Authorities Act, 25 of 2000 as a Chief of the traditional community at Ekolu Village at Omuthiya. During 1995 I allocated the plot (currently registered in favour of Mr. Leonald Shidika as No. 24 in my register of persons with customary land title to one Mr. Johannes Martin. Mr. Martin later died and the said plot was allocated to his brother Mr. Titus Alfeus. In 2004 Mr. Alfeus transferred his right to the plot to Mr. Shidika and I registered the transfer as No. 24 in the aforesaid register. I attach an extract of the register hereto as Annexure TNI.'

CASE CHANGED FROM MOTION TO ACTION

[7] A significant development in the case is the pre-trial hearing that took place on 29 April 2011. At that hearing the applicant was represented by Mr Kauta and the first respondent by Mr Strydom. Mr Strydom took the view that many disputes had arisen on the papers as regards the ownership of the land which were irresolvable without recourse to oral evidence. It appeared that without fully considering the implications of that, but principally in order to avoid a potential delay in the hearing of the matter on the set-down date, Mr Kauta agreed that, instead of the matter proceeding as an opposed motion which it started life as, it proceed as a trial action.

[8] I then made an order in the following terms in order to give effect to what was agreed between the parties:

> ‘1. The present application will now proceed by way of trial action and shall be heard on 23 June 2011; accordingly, the affidavits filed to date will constitute the pleadings in the action.
>
> 2. The first respondent (now first defendant) having expressed the wish to do so, is permitted to file a further pleading in the action in the form of a

plea, and in that respect it is hereby directed that such plea be filed not later than 6 May 2011.

3. Should the applicant (now plaintiff) wish to replicate to the plea aforesaid, he must file such replication not later than 11 May 2011.

4. Upon the close of pleadings as hereinbefore set out, but in any event not later than 2 (two) court days after the replication by the applicant has been served on the first defendant, the parties' counsel are directed to meet and to discuss the future conduct of the trial action, including but not limited to the following bearing in mind the proximity of the trial date:

(i) The dates by which the discovery of documents Will be done by either party;
(ii) Preparation of a list of the issues that the parties seek the court's adjudication on, having regard to the pleadings and admissions made, if any;
(iii) Preparation of an agreed bundle of documents; and
(iv) Preparation of the list of either party's witnesses to be called at trial.'

[9] In compliance with that order the then-first defendant filed a notice of amendment of its plea raising 2 special pleas: one challenging the applicant's locus standi (since abandoned) and the other, a right of retention (pleaded in the alternative to his ownership

claim) over the disputed land, based on an alleged improvement lien. The latter is pleaded as follows:

> "At all relevant times hereto the first respondent/first defendant has been in possession and occupation of a portion of Erf 491, Omuthiya. Further, at all relevant times hereto and pursuant to such possession and such occupation, the first respondent/first defendant has embarked upon various improvements incidental to the property, the value of which amounts to N$ 2 000 000-00. The first respondent/first defendant has a valid improvement lien over such portion of Erf 491, Omuthiya that relates to the area which is the subject of such improvements, and which lien the first respondent/first defendant herewith invokes. In the premises and even in the event of the Honourable Court finding that the applicant/plaintiff is the owner of Erf 491, Omuthiya, all of which is still denied, then and by virtue of such improvement lien, the first respondent/first defendant is entitled to remain in possession and occupation of such a portion of Erf 491, Omuthiya until such time as he has been duly reimbursed for such improvements."

[10] The by-then-plaintiff in its replication admitted that the first respondent was in occupation of the land and had effected certain construction work on the land but denied its right to an improvement lien. It replicated in the alternative that in the event of the

Court finding that the first respondent had such a lien, it tendered security as follows:

> 'Insofar as it may be held that first respondent has established a valid improvement lien (which is denied), applicant tenders security in the form of a bank guarantee to be given by a Namibian banking institution in the amount of N$250 000,00; alternatively, and only if it is held that the said amount is inadequate, then in the amount of N$2 million, pending the outcome of an enrichment action to be instituted by first respondent within 10 days after receipt of the said security.'

[11] On 17 May 2011, following a status hearing, the parties filed a joint report under the new case management rules. The first respondent recorded the following in paragraph 1.8 of the joint report:

> '1.8 addition by the first respondent/defendant
>
> At the meeting it was unequivocally stated on behalf of first respondent/ defendant that should it be necessary for the court to determine the issue of ownership, then the pleadings will need to be extensively amended and the matter will have to be dealt with on a completely different basis than currently reflected on the pleadings nor would the first respondent/defendant be in a position to proceed due to a series of logistical problems which

it is not foreseen will be resolved by the time the trial is due to commence. The first respondent/defendant's rights in this regard remain strictly reserved.'(My underlining for emphasis)

[12] As regards the future conduct of the litigation, the parties agreed on the following:

'2.1 The parties agree that applicant/plaintiff's founding affidavit will constitute the particulars of claim, the answering affidavit first respondent/defendant's plea and the replying affidavit Applicant/plaintiff replication.

2.2 The parties further agree that first respondent/defendant's notice of intention to Amend will constitute an amendment to his Plea introducing two special pleas and that it is not required of first respondent/defendant to file an amended plea.

2.3 at the meeting, Mr Slabber indicated that applicant/plaintiff will not be replicating to two special pleas.

2.4 Subsequently, it was agreed that applicant/plaintiff could replicate to the two special pleas should it be so advised and the replication attached hereto marked 'C' was then transmitted by telefax to first respondent/defendant's legal practitioners of the first instance and to his instructed counsel on 23 May 2011 and filled at Court on 24 May 2011.' (My underlining for emphasis)

[13] On the understanding that the matter had become a trial action, the plaintiff filed a discovery affidavit

setting out the documents that it intended to use at the trial. The first respondent did not discover and just before trial applied for postponement of the matter which was opposed. That application was never moved. In fact, Mr Frank asked the Court to reverse its ruling converting the matter in a trial because, he argued, what was alleged on behalf of the first respondent as a dispute in relation to ownership, was a 'diversionary ripple' because the land in question was not subject to the customary law powers of Traditional Authorities and a traditional leader could therefore not have passed a valid title to Shidika who in turn purported to have alienated it to the first respondent. Mr Frank argued further that in any event, the land had passed to the applicant on 19 August 2008 while the first respondent only approached Shidika in respect of the land during December 2009. The consequence of the latter being that - as Mr. Frank put it–‘whatever rights and obligations the defendant’s predecessor in title had to the land (assuming he had any) he could not have transferred during December 2009 to the defendant without the consent of the owner of the land.’

[14] I proceeded to hear oral argument on 21 June 2011, based on the affidavits filed at the close of pleadings in the application and also based on the amended plea and the replication thereto. During the course of argument Mr Strydom for the first respondent conceded that the applicant's claim to ownership of portion 491, Omuthiya Townlands NO.1013, was unassailable based on the title deed, and that prayer 1 in the Notice of Motion was no longer opposed. Upon my enquiring he agreed that an order could immediately be made in terms of prayer 1 of the notice of motion.

[15] It was for that reason that on 21 June 2011, I made an order in the following terms:

> 'The first respondent is hereby interdicted and restrained from undertaking or continuing to undertake any construction activities on Erf 491, Omuthiya, a part of portion 3 of the Farm Omuthiya Townlands No 1013, situated in the registration division "A" in the Oshikoto Region, Republic of Namibia ("the premises"). Judgment is reserved in respect of prayers 2 – 4 of the Notice of Motion.'

[16] What remains to be decided now is the remainder of the relief set out as follows in the Notice of Motion:

> '...
> 2. Ordering the first respondent to forthwith remove all and any construction materials and structures from the premises with immediate effect.
>
> 3. Ordering the first respondent and/or his agents to refrain from entering on the premises at any time.
>
> 4. Costs of suit.'

[17] Whether or not the applicant is entitled to the remainder of the relief is bound up with the question whether or not the first respondent is a *mala fide* possessor. The applicant maintains he is and is not entitled to lay claim to an improvement lien. Mr Frank argued that even if he were not, he had failed to prove the value of the necessary improvements to the land that would entitle him to the lien. In the event that I find that an improvement lien has been proved, the applicant tenders security in the amount of N$ 2000 000 which the Court may perfect subject to the first respondent bringing an action within a specified period and on the basis that he vacate the land.

[18] Mr Strydom argued that the first respondent is not a *mala fide* possessor because he had taken possession of the land and invested considerable sums of money on it based on an agreement concluded with a traditional leader who made himself out to have the authority to do so and that both the applicant and the second respondent, who ought to have known better, recognized the authority of the traditional leader and first respondent's right to the land. Mr Strydom argued that the fact that, with the benefit of hindsight, in law the traditional leader did not have the competence on the strength of which he bestowed rights on the first defendant, does not detract from the fact that the first respondent took occupation of the land in good faith and could not be denied the benefit of the expenditure incurred on the land on that basis.

[19] Mr Strydom wants the Court to decide that (a) the first respondent is not a *mala fide* possessor;(b) that the money spent in erecting structures on the land was in pursuit of what he thought was good title; and (c) the first defendant is entitled to remain on the land as security for his investment and can only vacate upon the provision of sufficient security to cover the investment,

coupled with an order for him to bring an action within a specified period.

[20] Mr Strydom relied on the following in particular: Although with hindsight, it is clear that the land on which the first respondent constructed the buildings for which he seeks compensation had belonged to the applicant by way of registered title since 2008, since first respondent took occupation of the land, the applicant itself had been under the belief that the piece of land on which those buildings were constructed in fact belonged to the first respondent. That is demonstrated by the fact that the applicant offered to buy from the first respondent the very land from which it sought to eject the first respondent in the present proceedings. On 18 January 2010 a director of the applicant wrote to the first respondent (copied to the second respondent) as follows:

> 'Following our discussion in December 2009 in which you indicate[d] the willingness to sell your Erf at Omuthiya gwiipundi that is bordering our erf. I therefore want to state that after further consultations we came to a conclusion not to stand in your way, thus you can go ahead to sell your erf.' (My underlining for emphasis)

[21] The second respondent under whose jurisdiction the land fell since 2002 had itself also believed that the land was still subject to communal land tenure, when on 23 March 2010 in response to a letter of demand by the applicant, it stated:

> 'Again Omuthiya Town Council took cognizance of your letter dated 25 February 2010 and carefully studied its content thereon... but it seemed that the demarcation of your land was not communicated/shown to the people who had the rights of occupation by the Traditional Authority. As a result the Council was inundated with questions and claims of ownership by different individuals'.

Before that the second respondent had approved building plans submitted to it by the 1st respondent in respect of the very same land. The second respondent's chief executive officer had also on 3 march 2010 in a '*TO WHOM IT MAY CONCERN'* letter confirmed that the first respondent had 'bought a land from Mr Leonard Kaloo Shidika...at Omuthiya at the amount of N$ 250 000...on 30 December 2009.' The second respondent had also approved first respondent's application for sub-division of the very same land. It is clear therefore that the second respondent under whose municipal jurisdiction the land

fell since 2002 had itself believed, not only that portion 491, Omuthiya Townlands was the property of the first respondent, but that the land was still subject to communal land tenure.

[22] I must record for completeness that Mr Frank argued that even if the Court were to find that the first respondent were not a *mala fide* possessor initially, he so became on or about 23 March 2011 and beyond and that the security he would be entitled to can only relate to investments in the land before that period.

[23] Against the backdrop that the first respondent occupied portion 491, Omuthiya Townlands and begun to construct on it at a time that both the applicant as legal owner, and the second respondent under whose municipal jurisdiction that land fell, were under the belief the land belonged to the first respondent, what falls for decision are the following: Is the first respondent a *mala fide* possessor? What rights does a *mala fide* possessor have? Has an improvement lien been proved and if so what security would be sufficient?

THE LAW

[24] I find a useful discussion of the law on *bona fide* and *mala fide* possessors in *Maasdorp's Institutes of South African Law*, Vol. II, *The Law of Things*, where the learned author states the following (at p.43):

> '... [W]where a person has built with his own material, or planted his own trees, or sown his own seed, or made other improvements, at his own expense, or by means of his own labour, on the land of another, and the latter claims back his property the former is entitled to claim compensation for all necessary and useful expenses he has incurred. The amount of the compensation is limited to the sum which he has expended in effecting the improvements.'

The learned author also states (at p 42.):

> 'Where possession has been *bona fide* up to a certain point and then becomes mala fide through the possessor coming to know that he was not entitled to the possession, he only acquires the fruits gathered by him before that date.'

[25] To facilitate recovery of the compensation, when the owner of the land claims back his property, *a bona fide*

possessor enjoys a lien or right of retention of the land until his claim has been satisfied.[3]

[26] It is important to distinguish the right to claim compensation from the right to retention until compensation is paid. The latter would always include the former while the former does not always include the latter. This is amply demonstrated by what is stated in *Maasdorp's Institutes* at p.45 as follows:

> 'A *mala fide* possessor has no right of retention although he may have a right of compensation.'

And further:

> 'A *mala fide* possessor is in the position of a spoliator, who is bound before everything else to restore that which he has obtained by spoliation, and is therefore not entitled to a right of retention, and be bound to restore the land before the question of compensation can be raised by him. If, however, the owner of the ground has stood by and allowed the building to proceed without any notice of his own claim, the *mala fide* possessor is, owing to the fraud of the owner, placed in the same

3 Voet 41.1.25; 5.3.23; *Bellingham v Blommetje*, Buch. 36.

position as a *bona fide* possessor, and entitled to the same rights of retention.'

[27] Whether or not a *mala fide* possessor has a right to compensation does not arise in the present case, and I prefer to express no view on it.

COMMON CAUSE OR UNDISPUTED FACTS

[28] With the concession by the first respondent that led to my granting prayer 1 of the Notice of Motion, there is no longer any dispute that the land being occupied by the first respondent is part of the land covered by the deed of transfer held by the applicant over portion 491 of Omuthiya Townlands. The applicant became the registered owner of that land on 19 August 2008. The person (Shidika) to whom the first respondent paid N$ 250 000 for the land had 'acquired' it from a chief for communal use in 2004. The applicant paid Shidika for the land in December 2009. From the date on which the land ceased being communal land, no traditional leader could exercise customary law powers over it. In terms of the Deeds Registries Act, No.47 of 1937, and s16:

> ‘Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar’.

[29] The irrefutable evidence is that on 23 March 2010 the applicant informed the first respondent of its legal claim to the land as follows:

> ‘You are herewith informed that you are illegally occupying a large portion of Erf 491 Omuthiya, which belongs to BELAVISTA. We are the registered owners of the land as can be established in the Deeds Office. You have also instructed Messrs Stubenrauch Planning Consultants to subdivide Erf 491 without having any legal right to it and without having consulted this with us, the owners of the land. We are also aware of the fact that you have started constructing on this land and we hereby demand from you to vacate our land and seize construction on or before 12h00 noon on 24 March 2010, failing which we have no alternative but to apply to court for an order to remove you and stop you from constructing on our land, requesting also the court to order you to pay all legal costs.’

[30] As can be seen, the applicant did not attach the title deed to that letter or specify it in some way that could enable the first respondent independently verify

the claim. Its right of ownership was then denied in a letter to the applicant written by Shikongo Law Chambers on 24 March 2011. Given applicant's earlier recognition of the first respondent as the owner of portion 491, Omuthiya Townlands, that attitude was both understandable and excusable.

[31] However, on 6 April 2011, applicant's present legal practitioners of record then wrote to Shikongo Law Chambers in the following terms:

> ‘We respectfully submit that your client has no legal right to the property which he is currently occupying and developing. Our client is the lawful and registered owner of the land by virtue of Deed of Transfer No T. 4525/2008 and should your client claim any ownership, we put him to the proof thereof. Ne again request you to notify your client that he is unlawfully occupying the property and any development he is conducting upon it will be at his own risk and peril and any advice to the contrary will be reckless in the circumstances.’

[32] The significance of the 6 April letter is that for the first time the applicant provides proof of its ownership of the disputed land; and having been referred to a deed of transfer by number the first respondent from that date onwards begun to act at its peril.

MALA FIDE OR BONA FIDE POSSESSOR?

[33] For the reasons set out above, I must agree with Mr Strydom that before 6 April 2010,[4] the first respondent was not a *mala fide* possessor. In the first place, the applicant did not consider him as such and, secondly, the second respondent who should have known better did not.

[34] To the extent that on or about January 2010, the applicant, the 2nd respondent and the first respondent had all believed, although mistakenly as it now turns out, that the first respondent was lawfully on the land on which he constructed some buildings, he was not a *mala fide* possessor. That position changed on 6 April 2010 when the applicant provided him proof that it was the registered title holder of the land. That he insisted in the face of that to be the owner is unreasonable. He should reasonably have entertained a doubt about his claim to ownership; not least because his erstwhile lawyers warned him on 16 July 2010 not to continue with further construction on the land.

4 He seemed to suggest that the period should begin to run from the moment security was tendered. For the reasons I set out in the body of this judgment I cannot agree with that.

[35] On 16 July 2010, the legal practitioners of applicant wrote a letter to the first respondent's legal practitioner from Shikongo Law Chambers in which they, amongst others, stated the following:

> 'Our client has also informed us that he recently established that your client has continued building on our client's property, despite having received our client's application for an interdict. Our client also informed us that your client has now fenced off an even bigger portion of his illegal building activities. Your are kindly requested to advice your client to immediately cease building operations, pending finalization of the hearing of this application, failing which an urgent application shall be brought for interim relief to the High Court of Namibia.'

[36] In reply to that letter, Shikongo Law Chambers replied in their letter, dated 16 July 2010, as follows:

> 'Having noted the content of your latter regarding the construction, we have requested our client not to proceed with the construction in case he is proceeding (copy enclosed).'

[37] Mr Frank referred me to the case of *B C v Commissioner of Taxes* 1958 (1) SA 172 (SR) where the following is stated by Beadle J at 179:

> ‘I do not think that a man who remains in possession after having been lawfully told to quit can be said to be in *bona fide* possession pending the decision of a suit to eject him. In my view B C’s state of mind during this period must have been one of doubt as to his right to remain in possession. A man whose state of mind is that of doubt cannot be classed as a bona fide possessor. Voet 41.3.9.’

This dictum is in point. I am satisfied that after 6 April 2010 the first respondent had become a mala fide possessor.

HAS THE VALUE OF THE IMPROVEMENT LIEN BEEN PROVED?

[38] Having come to conclusion that the first respondent was *bona fide* possessor before 6 April 2010 and *mala fide* after that date, the next question is what proof the first respondent provided of the value of his improvements on the occupied land before he became *mala fide* possessor.

[39] In the answering affidavit the first respondent stated that he had in December 2009 paid N$ 250 000 to one Shidika for the land. As far as other amounts spent

are concerned, he states the following in the answering affidavit:

> 'I have incurred considerable costs in developing Erf 491 and spent more than N$500,000 already in acquiring the plot from Mr. Shidika and erecting buildings thereon.'

[40] The first respondent gives no details of what was actually built and in the notice of intention to amend filed after the case was converted into a trial action, the amount of N$500 000 inexplicably became N$ 2000 000. At all events that amount has been tendered in the event that I am satisfied that an improvement lien has been proved.

[41] Although as things stand at the moment I am satisfied that given the rather short period between his acquisition of the land and when he became a *mala fide* possessor,[5] the first respondent's claim that he expended N$2000 000 on the disputed land sounds exaggerated and is in fact unsubstantiated, it is possible that if the matter proceeded to trial he could have proved that amount. Given the parties' agreement on 28 April 2011 as I have shown, the case had metamorphosed into a trial

5 December 2009 – 6 April 2010.

action and gave the parties certain rights, including the calling of oral evidence to prove facts. I cannot agree with Mr Frank's suggestion that, regardless of the parties' agreement, it was open to the Court to just reverse its earlier order. It would have required the consent of the parties in light of their earlier agreement, to remove the right to have recourse to oral evidence to prove a fact in issue.[6] As was stated by the Namibian Supreme Court in *Stuurman v Federal Insurance Company of Namibia Ltd* 2009(1) NR 331 (SC) at 337 para [21]:

> 'Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If any one of them want to resile from such agreement it would require the acquiescence of the other side, or the approval of the tribunal seized with the matter, on good cause shown. As was held by the Supreme Court of South Africa in *Filta-Matix (Pry) Ltd v Freudenbergand Others* 1998 (1) SA 606 (SCA) ([1998] 1 All SA 239) at 614B-D: "To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation.

6 *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and 5 Others* Case NO. SA 25/2008, NmSC (unreported), at p.25 paras [39] and [40].

If a party elects to limit the ambit of his case, the election is usually binding."

[42] Although the value of the improvements by the first respondent is not properly established; and while it would be onerous on the applicant to simply order security in that amount just because it made a tender for that amount, in light of the manner in which the case was transformed into an action, it would work to the prejudice of the first respondent to simply dismiss his claim of N$ 2000 000 for lack of proof. In all fairness, he needs to be afforded the opportunity to prove the value of the improvements covering the period for which he was a *bona fide possessor*.

[43] In order to avoid delay and costs I will afford the parties the possibility to agree on the amount of security without returning to Court for trial of that one issue.

COSTS

[44] The applicant came to this Court seeking the eviction of the first respondent from portion 491 of

Omuthiya Townlands. In that respect it has been substantially successful. As it happens, the issue of an improvement lien was raised on the eve of trial and featured nowhere in the answering papers. As I demonstrated in paragraph [11] the first respondent's initial case never included reliance on an improvement lien giving rise to the right of retention. The applicant then tendered security without delay although the alleged value of the improvements is so vague and is incapable of precise determination. In any event, the applicant's ownership of the land has since been conceded and the value of the improvement lien remains unspecified. In all the circumstances the applicant is entitled to its costs. The matter was of sufficient complexity to justify the employment of senior and junior instructed counsel.

THE ORDER

[45] Accordingly, I make an order in the following terms:

1. Not later than 15 days from the date of this order being handed down, the parties shall meet and discuss a mutually acceptable amount to constitute sufficient security for the improvements to the land brought about by the

first respondent from the date of his occupation of that land following the transaction with Shidika, up to and inclusive of 6 April 2010. If the parties are able to reach agreement on the amount and the form in which such security must be provided by the applicant, they must reduce their agreement in writing, and such agreement shall be subject to the following conditions:

1.1. Within 10 days of the security being perfected, the first respondent must bring an action for compensation for improvements made on portion 491 of Omuthiya Townlands covering the period from the date of his occupation of the said land following the transaction concluded with Shidika, up to 6 April 2010; and such action shall be limited to that period only.

1.2. Within 14 days of the agreed security being furnished by the applicant in the form agreed between the parties, the applicant shall vacate portion 491 of Omuthiya Townlands and shall remove any and all **construction material** from the land and shall refrain from entering upon the land again save for removing **only the construction material**; and failing that the deputy sheriff for the district of Ondangwa is hereby authorized to evict the first respondent from the premises and he shall

be liable for all costs associated therewith on the scale as between attorney and own client.

2. In the event of the parties being unable to agree on the amount of security and the form in which it is to be furnished for the purpose stated in 1 above, the first respondent must within 5 days of the parties failing to reach agreement, request from the managing judge dates for the hearing of oral evidence on the value of improvements made to portion 491 of Omuthiya Townlands in respect of the period stated in 1 above. The managing judge shall then issue further directions for the trial.

3. Costs are awarded to the applicant, including the costs of one instructed and two instructed counsel.

_____

DAMASEB, JP

ON BEHALF OF THE APPLICANT: Adv T J Frank, SC

Assisted By: Adv G Narib

Instructed by: **Dr Weder, Kauta & Hoveka Inc.**

ON BEHALF OF THE first RESPONDENT: Adv A Strydom

Instructed By: **Shakumu Legal Practitioners**