

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 890/2007

In the matter between:

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA
(MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION)**

PLAINTIFF

and

FRANS RISURO

DEFENDANT

Neutral citation: *The Government of the Republic of Namibia (Ministry of Works, Transport and Communication) v Risuro* (I 890-2007) [2013] NAHCMD 302 (29 October 2013)

Coram: UNENGU AJ

Heard: 20, 21, 23-24 May and 9 July 2013

Delivered: 29 October 2013

Flynote: Plaintiff – suing defendant for unlawful occupation and damages – Defence of defendant that the plaintiff offered him to buy the property rejected – Defendant ejected from property due to failure to establish a right to occupy the property.

Summary: The plaintiff has sued the defendant for unlawful occupation of its house and damages at a rate of N\$3500.00 per month from date of unlawful occupation to date of judgment. Defendant alleging that an offer was made to him by plaintiff to buy the house. Court has rejected defence of the defendant and held that the defendant did not establish a right to occupy the house and such ordered to vacate the house within fourteen (14) days of service of the order on him and to pay damages for unlawful occupation of the house.

ORDER

1. The claim of plaintiff succeeds;
2. The defendant and all other unlawful occupants living with him in the house are ordered to vacate the house within fourteen (14) days, with all their belongings from the date of service of the order on the defendant.
3. The defendant shall hand over the keys of the house and rooms currently in his possession, to the representative of the Ministry of Works and Transport in Swakopmund or to the Chairperson of the Housing Committee in Swakopmund on the day of vacating the house.
4. Payment of N\$3500 for damages per month suffered by the plaintiff as a result of the unlawful occupation of the house by the defendant since august 2005 to date of judgment.
5. Interest thereof at the rate of 20% per annum a *tempore morae* to date of payment.
6. Costs of suit.

JUDGMENT

UNENGU AJ:

[1] The plaintiff has instituted an action against the defendant in which action it is claiming the relief in the terms:

1. An order ejecting defendant and all other unlawful occupants from House BM 96/249/566, 19 Davies Street, Vineta, Swakopmund;
2. Further and/or alternative relief;
3. Payment in of N\$3500.00 for damages per month of unlawful occupation since 1 August 2005;
4. Interest thereof at the rate of 20% per annum *tempore morae* (sic) to date of payment;
5. Costs of suit;
6. Further and/or alternative relief.

[2] In its particulars of claim, the plaintiff alleges as follows:

'The PLAINTIFF is THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA (MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION) duly constituted in terms of Article 1(1) of the Namibian Constitution, with its address of services care of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek, Republic of Namibia.

The DEFENDANT is MR FRANS RISURO, an adult male person, currently residing at 19 Davies Street, BM 96/249/566, Vineta, Swakopmund, Republic of Namibia, and whose full and further particulars are to the Plaintiff unknown.

The Plaintiff and or Government of Namibia is the owner of 19 Davies Street, BM 96/249/566, Vineta, Swakopmund.

Defendant is unlawfully occupying the aforesaid property since or about August 2005.

On 19 August 2005 and 8 December 2006 the Plaintiff gave notice to the defendant to vacate the property. (See Annexures "A" and "B").

Defendant has no right to occupy the property, despite demand, Defendant has failed to vacate the property.

As result of Defendant's continued unlawful occupation of the property, Plaintiff is suffering damages in the amount of N\$3500.00 per month being the fair market value for the monthly rental.'

[3] In his plea to the particulars of claim of the plaintiff the defendant admits that the plaintiff in this matter, the Government of the Republic of Namibia, is the owner of house BM 96/249/566, Davies Street, Vineta, Swakopmund and that he (defendant) is residing in the said house. The defendant also admits that he was given notice on 19 August 2005 and on 8 December 2006 to vacate the house. However, he denies that he is unlawfully occupying the aforesaid property since or about August 2005. The reasons for such a denial being that the plaintiff informed him that an offer would be given to him to purchase the property in 2000 which he had been waiting for to buy the property since then.

[4] In the parties' joint case management report in terms of rule 37(4) of the High Court which was signed by the legal practitioners of the plaintiff and the defendant on 22 November 2012, the following admissions of facts were made by consent of the parties in paragraph 'd' of the report;

'(d-1) The admitted (by the parties) and common cause facts are the following:

(d-1.1) the parties' identities, citation and *locus standi*;

(d-1.2) the defendant's physical occupation of and residence in the immovable property, House/Erf No. BM 96/249/566, Vineta, Swakopmund, Namibia;

(d-1.3) the plaintiff's ownership of the aforesaid immovable property;

(d-1.4) that on the 19th of August 2005 and on the 8th of December 2006 respectively, the plaintiff demanded and gave notice to the defendant to vacate its aforesaid immovable property. Proof of such demand is borne (sic) by Annexures "A" and "B" to the plaintiff's summons (commencing this civil action) and Particulars of Claim; and

(d-1.5)that the defendant remains in occupation of the plaintiff's aforesaid immovable property to this date.'

[5] The admissions made by the parties and recorded in the joint case management report as indicated in paragraph 4 above, were repeated in the proposed pre-trial conference order of 8 April 2013 which proposed order was made an order of court during the conference.

[6] Before attending to the evidence presented in the matter by the opposing parties, first the background of the episode.

[7] As a civil servant, then, employed in the Ministry of Basic Education and Culture, a Deputy Director of General Services, the defendant applied for official accommodation on 27 April 1999. On 14 December 1999, an official quarter BM 96/249/566, Erf 2043, 19 Davies Street, Swakopmund, previously occupied by a Mr AJ van Wyk, was allocated to him. The keys to the quarter were handed to him by Mr S Tjiurutuee from the Ministry of Works, Transport and Communication (Department of Works), who represented the Fixed Asset Management on the same day, 14 December 1999.

[8] Through his employer, the Ministry of Basic Education and culture, house rent was deducted from his salary on a monthly basis. This process continued until May 2004 when Mr Risuro (the defendant) was transferred to the Erongo Regional Council with Swakopmund as his duty station.

[9] His stay in the house was not affected by this transfer to the Erongo Regional Council. He remained in the house but paid more for house rent than the amount he previously paid.

[10] On 20 June 2000, the Permanent Secretary for the Ministry of Works, Transport and Communication issued a circular to Secretaries of the Office of the President, to Cabinet, National Council, National Assembly, National Council, all Permanent Secretaries of various Ministries, as well as to the Auditor General and the Director of National Central Intelligence Agency informing them about Cabinet

Decisions No 23rd/23.08.98/001 and 9th/20.04.99/005 wherein Cabinet resolved that some Government houses be alienated to sitting tenants under specific modalities, rules and regulations. This Alienation Scheme Programme (as it was known) was expected to run for a period of three to five years; meaning that not all houses were to be alienated at the same time but gradually.

[11] The circular also contained guidelines pertaining to which types of houses, located where, should be identified for the purposes of the scheme and which type of houses should not be so alienated.

[12] The circular also provided that a letter of offer will be issued to the tenant of a house identified, and valued, and such offer to contain all essential terms of the agreement like the price of the house to be alienated as well as other terms. The circular also provided that, should the tenant wished to accept the offer, he or she should first confirm the purchase price with the Alienation Unit in the Ministry of Works, Transport and Communication by providing the required documents for the confirmation of the price and then sign the letter of offer before handing it to the Alienation Unit.

[13] The circular also directed that those who did not receive a letter of offer, should wait until they do, and that tenants should not phone the Ministry of Works until such time that they have been contacted by means of a letter of offer.

[14] However, on 13 July 2005, the defendant resigned from the Erongo Regional Council before receiving the letter of offer and even before the house he was staying in was valued. The defendant remained in the house though. When the Ministry of Works discovered that he was still living in the house after he had resigned, the Acting Regional Representative of the Ministry, on 19 August 2005 wrote him a letter which reads as follows:

'19 August 2005

Mr Frans Risuro
P.O. Box 2285

SWAKOPMUND*Dear Sir***RE: DAVIES STREET NO. 19. BM 96/566/249.**

It has come to the attention of the Housing Office that you have resigned from the Erongo Regional Council on the 13th of July 2005.

It means that you are now a month and six days an illegal occupant in the abovementioned house. We request you to vacate the house as soon as possible.

If any problems occur during this time, please feel free to contact me or see me during office hours so that something can be arranged.

Yours faithfully

ACTING REGIONAL REPRESENTATIVE'

[15] The defendant defied the request, instead wrote back and referred the Acting Regional Representative to the Cabinet Decisions already indicated above, and questioned why the aforesaid Cabinet Decisions have not been implemented within the five years period as resolved.

[16] On 8 December 2006, another letter by the Permanent Secretary of the Ministry of Works was addressed to the defendant, which the contents thereof are quoted hereunder:

'Our Ref:MFH.....

Your Ref:

Enquiries: Mr. L.N. Nicodemus

Tel: 247876

STAFF MATTER/CONFIDENTIAL

Mr. Frans Risuro

P.O. Box 2285

SWAKOPMUND

OCCUPATION OF GOVERNMENT HOUSE (BM 96/249/566): SWAKOPMUND

1. The above-cited subject has reference.
2. It came to the attention of our office that you still resides in a Government House after you resigned from the Erongo Regional Council on 13 July 2005.
3. In terms of regulation H 1.3 and the Procedures for Alienation of Official Quarters, you should have notify the Housing Office timeously about your resignation as the occupant has to vacate the official dwelling on the last working day. Hence, you are responsible to compensate the Government economical rent as calculated from 01 August 2005 to 31 December 2006. This letter serves to inform you that you owe the Government an amount of N\$56 000-00 to date (N\$3 500-00 per month) for the period you occupied the Government House after your resignation.
4. a) Kindly indicate to this office how you intend to settle the amount above within a reasonable period of time. Failure to adhere to this request within thirty (30) days from the date of receipt of this letter may lead to legal measures being instituted against you.
b) Furthermore, you are required to vacate the Government House BM 96/249/566 within thirty (30) days from the date of receipt of this letter as your privilege to occupy or buy this house ceased when you resigned from the Public Service without taking up employment elsewhere in the Public Service or Parastatal Company.

Yours sincerely

S. E. NJDABA
PERMANENT SECRETARY'

[17] In his letter dated 3 January 2007, the defendant acknowledged receipt of the letter and indicated that he had forwarded the letter to the Office of the Ombudsman, the Legal Assistance Centre and to Conradie and Damaseb Attorneys for further actions. Thereafter, the Ministry through the Government Attorney's Office decided to institute this action.

[18] During the trial, the plaintiff was represented by Mr Khupe from the Government Attorney's Office while the defendant was represented by Ms Shifotoka of Conradie and Damaseb Attorneys.

[19] Four witnesses testified on behalf of the plaintiff while the defendant was the only witness to testify in his own defence.

[20] As already indicated, most of the issues are common cause between the plaintiff and the defendant. And most importantly is the fact that the defendant has admitted ownership of the property (house) by the plaintiff. It is also not in dispute that he still lives in the particular house, therefore in possession thereof in spite the fact that he is no longer an employee of the Government of the Republic of Namibia or the Erongo Regional Council. These common cause facts are corroborated by the evidence of the witnesses for the plaintiff.

[21] For clarity sake and to avoid a repetition of the testimonies of all four witnesses of the plaintiff, I shall give a brief summary of only the testimony of Mr Kalomo. I have chosen the version of Mr Kalomo because he was directly involved in the implementation of this Cabinet Decision regarding alienation of some government houses which started towards the end of 1999 or beginning of 2000.

[22] Mr Kalomo told the court amongst others that he was employed by the Ministry of Works and Transport as a Director Railway Infrastructure Management attached to the department of Fixed Asset Management. He said that one of his functions was to deal with actual implementation of the alienation scheme of government houses. He said that although Cabinet decided to alienate some houses to sitting tenants towards the end of 1990 – the actual process of selling houses started in 2000. According to him, Cabinet took a decision to alienate some Government houses to civil servants and Political Office Bearers and instructed that a Committee which will include members from other institutions, be put in place, to oversee the alienation. Mr Kalomo stressed that Cabinet approved modalities which stipulated that only legal sitting tenants should receive offers to buy these houses – therefore, they were to receive first offers to buy. He said that should these sitting legally tenants not be willing to buy the houses offered to them to buy, they then would vacate the houses which houses would then be offered to other public servants on tendering basis.

[23] In his evidence, Mr Kalomo also explained the whole process and the procedure followed to carry out the alienation scheme. He said that houses have to be identified first and once identified, a list of identified houses was sent to the Ministry of Lands and Resettlement for valuations, who provided the alienation Unit of the division Fixed Asset Management with a list of the houses valued. The Unit will then issue letters of offer to sitting tenants after determining their eligibility. With regard the defendant, Mr Kalomo testified that the defendant was not eligible to buy the house because he was not a civil servant and was unlawful in the house. Further, he said that no offer to buy the house nor any promise was made to the defendant by the Ministry as the offer to buy the house could only be made in writing to a sitting tenant. Mr Kalomo denied that the Cabinet Decision constituted an offer made to all civil servants. He said that the Cabinet Decision was only a guideline because further to that Cabinet also took a decision that modalities to sell these houses to the tenants must be put in place with requirements that a tenant must be a civil servant and a Namibian citizen.

[24] In cross-examination by Ms Shifotoka, it was put to the witness that there were two ways to buy the houses. He disagreed and said that there was only one way and that is for tenants to wait until they had received a communication from the Ministry in the form of an offer to buy the house. Further suggestions were made to the witness, amongst others, that the house in which the defendant is staying was valued in 2001 and that some of his colleagues, Messrs Van Aarde and Pretorius were present when the valuation was done, which he denied. The pattern of cross examination followed by Ms Shifotoka was not helpful to the case of the defendant at all. Counsel repeated what the witness said in his evidence in chief which the witness just confirmed or denied and explained why he disagreed. Therefore, his evidence has not been shaken in cross examination.

[25] On his side, the defendant also testified under oath in his defence. Apart from one aspect, his evidence corroborated the version of the plaintiff in many material respects. He said, amongst others, that he is still staying in House no 19 Davies Street, Swakopmund even though he is no longer a civil servant. According to him, he is entitled to stay in the house by virtue of the lease agreement he had signed with the Ministry of Works and based on that, he had an expectation to be given an

offer to buy the house. However, the defendant was not sure when this offer would be made to him, but was supposed to be made to him between 2000 and 2005. On a question put to him by his counsel as on what basis he was expecting the government to give him an offer, he replied that government said to him that his house will be valued in 5 years' time whereafter an offer to buy will be given to him and still believe that the government owes him this offer.

[26] Be that as it may. The issue for determination by this Court is whether the Cabinet Decisions mentioned in paragraph 10 above, were offers to civil servants and political office bearers which may entitle the defendant to occupy the house after he had resigned from public service in July 2005 or had created an expectation in the defendant that the house he now occupies will be valued and sold to him even after he had ceased to be a civil servant.

[27] It is clear from the pleadings and the evidence presented, in fact not disputed by the defendant that the plaintiff is the owner of the house in question. As owner of the house, the plaintiff has merely to allege that it was the owner thereof but the defendant was in occupation thereof. This the plaintiff has done in its particulars of claim. It was then for the defendant to establish his right to be in occupation of the house from August 2005 to date¹. However, if the defendant is unable to establish a right to occupy the house, then an eviction order should follow², and the plaintiff will also be entitled to be awarded damages in the amount of N\$3500.00 per month from August 2005 until the date of judgment, being the fair market value for the monthly rental.

[28] It would seem from the written heads of argument by counsel for the defendant that she is in agreement that the law is that an owner has a real right over his or her property and this should enjoy such right undisturbed from any third person and further that the rightful owner has the right to evict any person that may claim or be found in its possession.

¹ De Villiers v Potgieter 2007 (2) SA 311 at 316 H

² Chetty v Naidoo 1974 (3) SA 13(A) at 20 A-E

[29] Quoting from Badenhorst *et al* in Sieberberg and Schoeman's Law of Property³, Ms Shifotoka submits that one of the characteristics of ownership is a 'mother right' in the sense that it confers the most comprehensive control over the thing. Counsel goes further and submits that it is still generally accepted that owners exercise and retain control over property, thereby justifying extensive protective measures when ownership or entitlement is infringed. I agree. It's also what the plaintiff was attempting to do when it gave notices to defendant to vacate the house which notices were disobeyed by the defendant.

[30] Counsel contends that Cabinet Circular constituted a contract in that the Government of the Republic of Namibia being represented by the plaintiff upon issuing the Circular did so with the intention to create an enforceable obligation which the defendant relied on.

[31] The aforesaid contention by counsel is in direct conflict with the evidence of the defendant. He testified that the Cabinet Decision with regard the alienation of government houses constituted an offer, not a contract, upon which he relied for his occupation of the house, even though he had resigned from public service. The Circular counsel is talking about was issued by the Permanent Secretary for the Ministry of Works, Transport and Communication on 20 June 2000.

[32] I am not surprised by the two versions of the defendant, how he considered the Cabinet Circular. However, the evidence is overwhelming that neither the Cabinet Letter of Action (Cabinet Decision) nor the Circular by the Permanent Secretary was an offer. The position is correctly summarised by Mr Khupe, counsel for the plaintiff, which assessment of the evidence I agree with. He submitted as follows:

'it is clear from the testimony presented to the Court during the trial and the documentary exhibits produced that the alienation scheme amongst other things constituted the following:

³ 5th Edition at pp 93 and 241

- 1 a scheme that laid down procedures that had to be followed prior to the formal sale offers were made to prospective civil servant buyers of government houses;
- 2 a scheme where the aforesaid implementation procedures necessarily took some time before the formal sale offers could be made to prospective buyers;
- 3 a scheme where the aforesaid implementation period was initially estimated to be in the region of 5 years but eventually took a much longer time with alienation still being undertaken today, some 13 years from the time it was first implemented;
- 4 a scheme whose pace the implementation government department, the Ministry of Works and Transport, could not always determine due to the necessary processes that were not in the implementing Ministry's control, for example, the pace at which the houses earmarked for alienation were valued by the Ministry of Lands and Resettlement;
- 5 a scheme that resulted with the making of a formal offer of sale to prospective buyers who met the set criteria, amongst which criteria was the status of being a civil servant at the time of the offer of sale;
- 6 a scheme where the valuation of the houses earmarked for alienation was a necessary step preceding the making of the formal sale offer. The valuation of the houses was to determine the appropriate selling price of the houses for alienation. An essential element of a contract of sale'.

[32] Besides, it is the testimony of Mr Kalomo that an offer to a tenant who is eligible to buy his house, is forwarded to such a tenant to accept by signing the letter if he or she agrees with what is contained in the offer letter. This letter, the defendant never received. The defendant himself testified that he is still waiting for an offer to buy the house. Therefore, in view of the above stated reasons and on the authority of the matters of *De Villiers v Potgieter and other* and *Chetty v Naido* quoted above, it is my view that the defendant failed to establish a right for him to occupy the said house and as such is causing the plaintiff to suffer damages monthly as a result of his unlawful occupation of the house.

[33] Consequently I make the following order:

1. The claim of plaintiff succeeds;
2. The defendant and all other unlawful occupants living with him in the house are ordered to vacate the house within fourteen (14) days, with all their belongings from the date of service of the order on the defendant.

3. The defendant shall hand over the keys of the house and rooms currently in his possession, to the representative of the Ministry of Works and Transport in Swakopmund or to the Chairperson of the Housing Committee in Swakopmund on the day of vacating the house.
4. Payment of N\$3500 for damages per month suffered by the plaintiff as a result of the unlawful occupation of the house by the defendant since august 2005 to date of judgment.
5. Interest thereof at the rate of 20% per annum a *tempore morae* to date of payment.
6. Costs of suit.

PE Unengu
Acting

APPEARANCE:

For the applicant:

Mr Khupe
of Government Attorney

For the respondent:

Ms E Shifotoka
of Conradie & Damaseb