



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case No. A 195/2007

In the matter between:

BEN ALUENDO ENGHALI

1ST APPLICANT

JOSEF SHEFENI ENGHALI

2ND APPLICANT

and

ERASTUS NGHISHOONO

1ST RESPONDENT

MINISTER OF LANDS & RESETTLEMENT

2ND RESPONDENT

GOVERNMENT OF NAMIBIA

3RD RESPONDENT

Neutral citation: Enghali v Erastus Nghishoono, (A 195/2007) 2013 NAHCMD 66 [1 March 2013]

Coram: NDAUENDAPO J

Heard: 19 May 2009

Delivered: 1 March 2013

REASONS

[1] On 19 May 2009, I gave an order in the following terms:

1. 'That the application by the applicants as per Prayer 2 of the Notice of Motion is hereby dismissed with costs.
2. That the counter applications by First, Second and Third Respondents is hereby granted with costs.
3. That the applicants and all their livestock are ordered to vacate Unit B of farm Schellenberg No. 79 within three (3) months from the end of May 2009.'

I indicated that my reasons will be provided at a later stage. Herein below are my reasons.

Introduction

[2] By notice of motion applicants sought an order in the following terms:

'2. A rule nisi is issued calling upon FIRST RESPONDENT to show cause on Friday, 31 August 2007 why; pending the resolution of the dispute in respect of applicant's right to occupy Unit B of farm Schellenberg No. 79, Omaheke Region, alternatively, allocation of land to them in terms of the Agricultural (Commercial) Land Reform Act, 1995 (Act 6 of 1995), the following order should not be made:

2.1 Ordering first respondent, and anyone acting on his instructions, to immediately restore the water supply on Unit B of the farm Schellenberg No. 79 to applicant's livestock.

2.2 Interdicting first respondent, and anyone acting on his instructions, from in any way interfering with applicants' occupation of Unit B of the Schellenberg No. 79;

2.3. Ordering first respondent to pay the costs of this application on a scale as between attorney and client.'

[3] **Parties**

First applicant is Ben Aluendo Enghali an adult male residing at 1396 Kae Street, Epako, district Gobabis.

Second applicant is Josef Shefeni Enghali, an adult person, residing at 1396 Kave Street, Epako district of Gobabis.

First respondent is Erastus Nghishoono employed with Ministry of Land and Resettlement, Brendan Simbwaye Square, Goethe Street, Windhoek. He works with resettlement and the allocation of land.

Second respondent is the Minister of Lands and Resettlement, c/o Government Attorneys, 2nd floor, Sanlam Building, Independence Avenue, Windhoek. This respondent is responsible for the administration of the AGRICULTURAL (COMMERCIAL) LAND REFORM ACT, 1995 (ACT 6 OF 1995) (the Act), resettlement and the allotment of land in terms of the Act. He was cited because of the interest he may have in the matter.

Third respondent is the Government of Namibia c/o the Government Attorneys, 2nd floor, Sanlam Building, Independence Avenue, Windhoek. This respondent is the owner of the land in question and is cited for the interest it may have in this matter. No relief is sought against second and third respondents.

[4] **Background facts**

Third respondent is the owner of unit B of farm Schellenberg no. 79 On 27 May 2002 the first respondent in terms of a lease agreement with second respondent was resettled on unit B of farm Schellenberg no. 79 (in terms of the Agriculture (commercial) land reform Act 1995 (Act 6 of 1995)

Clause 21 of the lease agreement owner pounds: 'The lessee shall not keep more than 77 cattle or 498 sheep and goats within his property and shall not allow any such animals not owned by him/her on the property.

Clause 22 provides: 'the lessee shall not sub lease, cede, assign, mortgage or hypothecate the property or part thereof or deal with it in any manner without prior written consent of the lessor.'

[5] The first respondent without the consent of the second respondent entered into a private arrangement with the applicants in terms of which the applicants and their livestock were allowed to occupy the camps on farm Schellenberg, Unit B.

On the farm there were two water points, the first one used by the first respondent and the second one by the applicants. Each watering point has separate pipelines and each party pumped its water to its own reservoirs in its own camp.

'As part of the private arrangement the applicants would make use of the watering point of the first respondent but that the applicants should pump the water from the watering point of the first respondent to the camps of the applicant i.e to their reservoirs'

The applicants did not pump the water to their camps but brought their animals to the reservoir of the first respondent causing the animals to mix. The first respondent refused the water supply from its reservoirs when demanded. Dissatisfied with that, the applicants brought the application by notice of motion which I dismissed.

REASONS FOR DISMISSAL

[6] It is clear from clause 22 of the lease agreement between first respondent and second respondent, that 1st respondent (as the lessee) had no right to sublease, cede, assign mortgage or hypothecate the farm or part thereof without the prior written consent of the second respondent (Lessor). It is common cause that the second respondent did not give any consent to first respondent to sublease the farm to the applicants. Furthermore, the animals kept on the farm were more than allowed by clause 21 of the lease agreement. The arrangement between first respondent and the applicants was also contrary to section 64 (1) of the Agriculture land Reform Act 1995 (Act 6 of 1995) which provides that: 'except with the prior written consent of the minister, granted upon a recommendation of the commission, a lessee shall not

- (a) assign, sublet, mortgage or in any manner whatsoever encumber, or part with possession of the farming unit in question or any part thereof, or
- (b) enter into any partnership for the working of such farming unit.

(2) An application for the minister's consent for the purpose of subsection (1) shall be made in writing'

It is clear that the occupation of the farm by the applicants was contrary to the lease agreement and the Agricultural Reform Act 1995 and therefore illegal. On that basis I dismissed the application. The arrangement between first respondent and applicants was a legal nullity.

[7] **Counter application by second and third respondents**

By notice of motion, second and third respondents applied for the following relief: 'That the first and second applicants be ejected from unit B of farm Schellenberg no 79'. I dismissed the application by the applicants on the basis that the applicants were occupying farm Schellenberg unit B illegally. They (applicants) had no right to occupy or any title to farm Schellenberg unit B and for that reason the second and third respondents were entitled to the eviction order prayed for. For those reasons I granted the counter application.

NDAUENDAPO J

Judge

APPEARANCE

FOR THE APPLICANTS

**SISA NAMANDJE
OF SISA NAMANDJE INC.**

FOR THE 2ND AND 3RD RESPONDENTS

**GOVERNMENT ATTORNEY
INSTRUCTED BY THE ATTORNEY GENERAL OFFICE**