



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: A 417/2013

In the matter between:

**TOWN COUNCIL OF RUNDU**

**APPLICANT**

And

**RICHARD MUBURU DINYANDO**

**FIRST RESPONDENT**

**THERESIA DINYANDO**

**SECOND RESPONDENT**

**JEFFREY SWARTZ**

**THIRD RESPONDENT**

**BEACON GLOBAL NAMIBIA**

**FOURTH RESPONDENT**

**MANUEL WALTER PINTO**

**FIFTH RESPONDENT**

**DAVID DANIEL**

**SIXTH RESPONDENT**

**PAULUS HANGO**

**SEVENTH RESPONDENT**

**STEVEN PINTO GRACA**

**EIGHTH RESPONDENT**

**MICHAEL MUYAMBANGO THIKUSHO**

**NINTH RESPONDENT**

**LUCAS SHEIMBI ISAAI**

**TENTH RESPONDENT**

**FESTUS KASHIKORO**

**ELEVENTH RESPONDENT**

**RICHARD SIMATAA**

**TWELVETH RESPONDENT**

**MAGRETH NUSHONGO**

**THIRTEENTH RESPONDENT**

**Neutral citation:** *Town Council of Rundu v Dinyando* (A 417-2013) [2015]  
NAHCMD 237 (8 October 2015)

**Coram:** PARKER AJ  
**Heard:** 23 July 2015  
**Delivered:** 8 October 2015

**Flynote:** Estoppel – By conduct – Operation of estoppel – Court held that estoppel cannot be used to make legal what otherwise would be illegal.

**Summary:** Estoppel – By conduct – Operation of estoppel – Applicant launched application to evict respondents from land applicant contends respondents occupy unlawfully – Respondents’ response is that after the land had been allocated to them by the Land Development Committee (which was related to the applicant) they applied to the applicant for water connections, to the land, which they obtained and paid a fee for – On that basis respondents aver that applicant is estopped from denying that respondents occupy the land lawfully – Court found that no proof has been placed before the court establishing that the Land Development Committee allocated the land to the respondents – Court accepted applicant’s averment that persons who paraded themselves as members of the Committee (including 12<sup>th</sup> respondent) were not members of the committee at the material time – Court found further that the traditional headwoman who allegedly allocated the land to fourth respondent did not have power to give land which is within the jurisdiction, and under the control, of a local authority council to another person in virtue of the Local Authorities Act 23 of 1992 – Court found further that applicant’s policy on water connections does not cater for land without erf/plot numbers, like the land in question, and so the water connections relied on to found estoppel was illegal – Court concluded that the doctrine of estoppel is not available to the respondents because estoppel cannot be used to make legal what otherwise would be illegal – Consequently, court concluded that estoppel was not available to the respondents because it cannot apply to the facts of this case – Consequently, court granted the application.

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- (a) The respondents are hereby evicted from the land being a portion of the remainder of Farm Rundu Townlands No. 1329, Rundu, and they should vacate the land on or before 23 October 2015.
- (b) The respondents are interdicted and restrained from erecting any structure or building on the land.
- (c) The applicant must repay to the second respondent the amount of N\$1 460, plus interest thereon, calculated at the rate of 20 per cent per annum from 28 August 2013 to the date of full and final payment.
- (d) I make no order as to costs in favour of, or against, any party.

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## JUDGMENT

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PARKER AJ:

[1] The applicant seeks the relief set out in the notice of motion, and the order it prays for is against all the respondents. The first, second and fourth respondents have moved to reject the application; and so, where the context allows, reference to respondents from here on should be taken to be a reference to the first, second and fourth respondents. The matter concerns the immovable property being land, that is, a portion of the remainder of Farm Rundu Townlands No. 1329, Rundu ('the land').

[2] On the papers, the following cogent fact is not in dispute: The applicant, a local authority council, established in terms of the Local Authorities Act 23 of 1992, is the lawful owner of the land in terms of Title Deed Certificate No. T4396/1991. It follows, as a matter of law, that the land is the property of the applicant and the

applicant's right to it is protected by art 16 of the Namibian Constitution, as Mr Kwala, counsel for the applicant, submitted. Such right includes the applicant's entitlement to possess and keep the land, (b) use, and benefit from, the land, (c) encumber the land in favour of another person, eg by way of a lease, (d) dispose of the land in favour of another person through sale, for example, and (e) vindicate the land, that is, claim the land from another person who occupies the land unlawfully.

[3] I conclude, therefore, that the respondents' contention (in the answering affidavit) that the land 'belongs to second respondent's grand uncle, Mr Kashikoro Festus', is legally incorrect. For the same reasons, the fourth respondent's reliance on a letter by Magreth Mushongo, Headwoman, dated 27 September 2013, as the basis of his lawful occupation of the land has no legal force, and it is rejected. It cannot assist the fourth respondent. A traditional leader or a chief has no power to give land which is within the jurisdiction, and under the control of, a local authority council to another person, in virtue of the Local Authorities Act 23 of 1992. This conclusion disposes of the fourth respondent's opposition to the application.

[4] Keeping in my sights the aforementioned cogent facts and the conclusion thereanent and the applicant's rights under the law, I proceed to the next level of the enquiry. The applicant avers that the respondents occupy the land unlawfully because they do so without the consent of the applicant. Consequently, the applicant gave the respondents seven days' 'notice to vacate the premises (the land)'. The respondents contend contrariwise that they do occupy the land lawfully because it was allocated to them by the applicant. The burden of the court is, therefore, to determine whether the council 'allocated' the land to the respondents, and the nature of such allocation.

[5] As has been said previously, the applicant, as the owner of the land, is entitled to, for example, encumber the land in favour of another person (eg through a lease agreement) or dispose of it (eg by selling it to another person). Since the respondents assert that they occupy the applicant's land lawfully, the respondents bear the onus of proving what they assert. The respondents must prove that they

occupy the land: (a) as, for example, lessees in terms of a lease agreement entered into between them and the applicant, or (b) on the strength of permission to occupy the land given to them by the applicant, or (c) because the land was sold to them in terms of a sale agreement concluded between them and the applicant. Since the land is situate in an unsurveyed area (as attested to in the answering affidavit of the first respondent) the land could not have been sold to the respondents in terms of a sale agreement (ie (c), above). In any case, no sale agreement has been placed before the court. It can therefore be said that only items (a) and (b), above, could possibly apply to the land. But no lease agreement has been placed before the court. The inevitable conclusion is, therefore, that there is no proof that the land was assigned to the respondents in terms of a lease agreement or a sale agreement. That leaves only item (b), that is, the land could have been allocated to the respondents in terms of a permission to occupy the land.

[6] Accordingly, I proceed to consider whether the respondents have placed before the court proof that they were given permission by the applicant to occupy the land. There is no such proof placed before the court, supported by a written document, which would have assisted the court greatly. The absence of such document is significant. The respondents say that they were allocated the land by an entity called the Local Development Committee ('the LDC'). I find that the first and second respondents were aware that they could have requested a written confirmation of such allocation from the LDC, but they did not; and they give no explanation why they did not; not even when they received the eviction notices from the applicant; not even when a threat of legal action stared them in their faces. The only reasonable inference is that the respondents' contention that they were allocated the land by the LDC is not possibly true. Annexure RMD1 (annexed to the first respondent's answering affidavit), which they rely on, is not, and cannot be, permission to occupy the land given by the applicant or, indeed, the LDC. This is an 'Application for Water Connection'. Besides, I reject as false Mr Simataa's statement in his confirmatory affidavit that he is the 'Chairman of the LDC and ... District Chairman of all unsurveyed land (informal settlements) in the area of Rundu'. RMD1 does not indicate such position. Besides, there is no proof presented to the court,

establishing the positions Simataa says he held at the material time; and more important, Simataa does not say during what period he was such Chairman of LDC and such District Chairman 'of all unsurveyed land in the area of Rundu'. Upon the principle enunciated in *Plascon-Evans Paints (Pty) Ltd vs Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635B-C, I accept the applicants averments that Simataa was a member of the build-together programme, but not a member of the LDC; and further, in any case, as from 29 February 2013, Simataa had even ceased to be a member of the build-together programme. I also accept the applicant's averments that Ms Johanna Kambinda was not a member of the committee. On the papers I am, accordingly, satisfied as to the inherent credibility of the applicant's factual averments in that regard (see *Plascon-Evans*, loc. cit.)

[7] In the face of all this factual averments in the applicant's papers which I have accepted as credible, in his heads of argument, Mr Van Vuuren, counsel for the respondents, argues that the lawfulness of the respondents' occupation is based on the doctrine of estoppel. He argues that after the first and second respondents were given RMD1 they applied for a water connection, the application succeeded, and they paid N\$1 460 as 'new connection fee'. The applicant avers that the obtaining of the water meter connection was illegal in itself for the following reasons: The applicant's policy on water connection does not cater for properties without erf/plot numbers, which is what the land is, as the respondents themselves admit. In its stead, the applicant installs water at designated areas within a settlement where the community living there use as a communal water points. I am satisfied as to the inherent credibility of the applicant's averments in that regard, too.

[8] Consequently, I accept as credible the applicant's factual averments about the illegality of the water connection. Indeed, I have found already that RMD1, which the respondents used to obtain the water-meter connection, was itself not proof of permission to occupy the land. The upshot of this finding is that there was no legal basis upon which the applicant would have approved the water connection for the respondents. Consequently, I find that the water connection was illegal. The respondents were aware of the illegality because they knew that RMD1 was in no

way proof of permission to occupy the land, entitling them to use it to obtain the water connection.

[9] Estoppel cannot be used to make legal what otherwise would be illegal. (LTC Harms, *Amler's Precedents of Pleadings*, 4<sup>th</sup> ed. (1993), p 138; and the cases there cited) Consequently, estoppel is not available to the respondents: it cannot apply to the facts of this case.

[10] Based on these reasons, the application succeeds; whereupon, I order as follows:

- (a) The respondents are hereby evicted from the land being a portion of the remainder of Farm Rundu Townlands No. 1329, Rundu, and they should vacate the land on or before 23 October 2015.
- (b) The respondents are interdicted and restrained from erecting any structure or building on the land.
- (c) The applicant must repay to the second respondent the amount of N\$1 460, plus interest thereon, calculated at the rate of 20 per cent per annum from 28 August 2013 to the date of full and final payment.
- (d) I make no order as to costs in favour of, or against, any party.

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C Parker  
Acting Judge

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## APPEARANCES

APPLICANT: F M Kwala  
Of Kwala & Co. Inc., Windhoek

FIRST AND SECOND  
RESPONDENTS: J Van Vuuren  
Of Krüger, Van Vuuren & Co., Windhoek