



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

Case no: A88/2016

In the matter between:

OTJIKAOKO TRADITIONAL AUTHORITY

APPLICANT

and

TJIMAKA TJAVARA

1ST RESPONDENT

TJIJATU HERUNGA

2ND RESPONDENT

RUPUTU TJISUTA

3RD RESPONDENT

INSPECTOR-GENERAL OF THE NAMIBIAN POLICE

4TH RESPONDENT

Neutral citation: *Otjikaoko Traditional Authority v Tjavara* (A 88/2016) [2017]
NAHCMD 305 (26 October 2017)

Coram: USIKU J

Heard: 18 APRIL 2017

Delivered: 26 OCTOBER 2017

Flynote: Application – Application by a Traditional Authority for ejectment orders against the Respondents and for interdicting them from settling on any

communal area under the authority of the Applicant - No indication shown by Applicant that Respondents are not members of the traditional community – Application dismissed with costs.

Summary: The Applicant seeks orders to evict the Respondents from the communal land under its jurisdiction – Respondents allege they were granted temporary grazing rights to graze their livestock at the area in question – Applicant seek orders that Respondents be interdicted from settling on any communal area under its jurisdiction – Applicant has not shown whether or not the Respondents are members of its traditional community – The relief sought is final in nature and has drastic consequences for Respondents – Application is dismissed with costs.

ORDER

1. The Applicant's application is dismissed.
2. The Applicant is directed to pay the costs of the Respondents, such costs to include costs of one instructing and one instructed counsel.

JUDGMENT

USIKU, J

INTRODUCTION

[1] The matter before me comes by way of notice of motion instituted by the Applicant. The Applicant comes to court in order to evict the three respondents from certain areas situated in the Kunene Region.

[2] The specific areas in dispute are Okanandjira and Oupako which are situated in the Kunene Region.

[3] The parties to this dispute are, the Otjikaoko Traditional Authority, which is a traditional authority recognized under the Traditional Authorities Act, Act 25 of 2000 and the three respondents who are natural persons and reside in the area aforesaid. The fourth respondent is the Inspector-General of the Namibian Police (whom was cited but no relief claimed against him).

[4] The Applicant prays for the following relief, namely:

1. An order directing the first to third respondents to vacate the Okanandjira and Oupako Settlement areas in Kunene Region resort under the authority and custodianship of Otjikaoko Traditional Authority within 30 days from the date of such order.

2. In the event that the first to third respondents fail to comply with such order, an order directing the fourth respondent to render or assist the Messenger of the Court in evicting the 1st to 3rd respondents from the said communal areas.

3. An order interdicting and restraining the 1st to 3rd respondents from settling and or grazing their animals in any communal area under the authority and custodianship of the applicant without any prior written authorization from the applicant.

4. An order directing the 1st to 3rd respondents to pay all the costs that may be incurred by the Messenger of Court in the execution of this order.

5. An order directing the 1st to 3rd respondents to pay the cost of this application jointly and severally the one paying the other to be absolved.'

APPLICANT'S ARGUMENT

[5] The Applicant states that it is a traditional authority, with its seat at Opuwo in Kunene Region. Okanandjira and Oupako settlement areas fall under its authority. The traditional chief of the Applicant is Chief Paulus Tjavara.

[6] The Applicant further states that the First Respondent came from Orotjitombo area and settled at Oupako in November 2014. He settled at Oupako without authorisation and has been staying at Oupako ever since. The First Respondent grazes his livestock at Okanandjira without authority from the Applicant.

[7] According to the Applicant, the Second Respondent is a lawful resident of Okozonguehe communal area. He also resides at Ekango, Oupako and Okanandjira.¹ It is not indicated whether or not Okozonguehe and Ekango are outside the area of jurisdiction of the Applicant. If they are not outside the Applicant's area of jurisdiction and the Second Respondent is a lawful resident there, it is not indicated why he is to be interdicted from settling on any communal area under the authority of the Applicant.

[8] The Applicant contends that Second Respondent's residence at Ekango is unlawful and that Oupako and Okanandjira are earmarked only for seasonal and rotational grazing by the community. The Second Respondent's occupation thereof is therefore unlawful.

[9] According to the Applicant, the Third Respondent arrived and settled at Okanandjira with his livestock in year 2011. He has been residing there ever since and conducted subsistence farming there. The Applicant had asked the Respondents to leave the areas they occupy but the Respondents refused to vacate.

¹ Paragraph 8 of Applicant's Founding Affidavit.

THE RESPONDENTS' ARGUMENT

[10] The Respondents contend that they have temporary grazing rights and are authorised to reside at Okanandjira and Oupako. The First and Second Respondents were authorised to reside at Okanandjira and Oupako by the Second Respondent whom they say is the Chief of those areas. The Respondents contends that Chief of the Applicant, Chief Paulus Tjavara, did not consent to their eviction, and they annexed a letter purportedly from Chief Paulus Tjavara², in which Chief Paulus Tjavara challenges the validity of the decision taken by the Applicant to evict the Respondents.

[11] It is the contention of the Respondents that the Second Respondent was born and raised at Ekango and has right to reside at Oupako and Okanandjira. I hasten to add here that it is not clear from the evidence how all these places relate to one another.

ANALYSIS

[12] From the papers of the Applicant, it is difficult to determine whether or not the Respondents are members of a different traditional community, who left their traditional community and settled on an area under the jurisdiction of Applicant. This aspect is crucial because part of the prayers sought by the Applicant seeks to interdict the Respondents from settling on any communal area under the authority of the Applicant.

[13] Nowhere is it alleged by the Applicant that the Respondents are members of a different traditional community.³ The closest the Applicant came to this, is when it

² Annexure TT1 to the Respondents' Answering Affidavit.

³ See definition of "member" and "traditional community" as defined under Section 1 of the Traditional Authority Act No. 25 of 2000, namely:

"member", in relation to –

(a) a traditional community, means a person either or both of whose parents belong to that traditional community, and includes any person who by marriage to or adoption by a member of that traditional community or by any other circumstance has assimilated the culture and traditions of that traditional community as a member thereof;

stated that the Respondents came from different communal areas,⁴ which does not assist in providing clarity, as such area(s) could be part of the communal land, under the authority of the Otjikaoko Traditional Authority. This theory is not far-fetched, especially in the light of Applicant's own admission that the Second Respondent is a lawful resident of Okozonguehe⁵, but still want to interdict him from settling on any communal area under its authority.

[14] The Applicant stated that the First Respondent is from Orotjitombo⁶ and came to what is described as "our area". It is not clear whether or not Orotjitombo forms part of the Applicant's communal land and whether "our area" refers to the area of residence of the deponent to the Applicant's founding affidavit.

[15] The relief prayed for by the Applicant is final in nature and has drastic consequences for the Respondents. A dispute of fact arises on the papers, especially when it comes to authority and legal right to reside on the communal land in question. Such dispute of fact must be determined on the basis of what is contained in the Respondents' answering affidavit.

[16] For the reasons foregoing I am not satisfied that the Applicant has made out a case for the relief it seeks. The application therefore falls to be dismissed with costs.

[17] In the result, I make the following order:

- (a) The Applicant's application is dismissed.
- (b) The Applicant is directed to pay the costs of the Respondents, such costs to include costs of one instructing and one instructed counsel.

"traditional community" means an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognises a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area.

⁴ See paragraph 19 of the Applicant's founding affidavit.

⁵ See paragraph 8 of the Applicant's founding affidavit.

⁶ Paragraph 7 of Applicant's founding affidavit.

B Usiku
Judge

APPEARANCES**APPLICANT:**

Mr Rukoro
Instructed by Tjituri Law Chambers
Windhoek.

1st to 3rd RESPONDENTS:

Ms Visser
Instructed by Dr Weder, Kauta &
Hoveka Inc.
Windhoek.