



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2017/00069

In the matter between:

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA
(MINISTER OF LAND REFORM)**

1st PLAINTIFF

MAHARERO TRADITIONAL AUTHORITY

2nd PLAINTIFF

and

BENESTUS KAMUNGUMA

1st DEFENDANT

INSPECTOR-GENERAL NAMIBIAN POLICE FORCE

2ND DEFENDANT

CHAIRPERSON OF OMAHEKE LAND BOARD

3rd DEFENDANT

Neutral citation: *Government Republic of Namibia v Kamunguma* (HC-MD-CIV-ACT-OTH-2017/00069) NAHCMD 260 (30 June 2020)

Coram: PARKER AJ

Heard: 27 January, 5 February, 14 May 2020

Delivered: 30 June 2020

Flynote: Practice – Plaintiff instituting action proceedings for ejectment of defendant from a communal land – Held, that since there is an absence of a real

dispute between the parties on any material question of fact because the decisions by the statutory bodies are valid and enforceable and have not been set aside by a competent court and since the statutory bodies bear no onus to justify their decisions, action proceedings would, contrary to the authorities, call upon third defendant to justify its decision, plaintiff adopted the wrong procedure and also failed to exhaust domestic statutory remedies – Consequently, on the two grounds the action should be dismissed with costs.

Summary: Practice – Plaintiff instituted action proceedings to eject defendant from communal land – Some seven years ago the responsible traditional authority in terms of the Communal Land Reform Act 5 of 2002 decided that defendant unlawfully occupied the land in question and land fenced it off unlawfully and ordered defendant to vacate the said land – Aggrieved by the traditional authority’s decision defendant appealed that decision to the appeal tribunal in terms of Act 5 of 2002 – Appeal tribunal upheld the decision of the traditional authority and directed first defendant to apply to ratify the granting of the communal and tenure right by following the correct procedure which first defendant did resulting in the right being ratified – Plaintiff’s legal practitioners instituted action proceedings for ejectment of defendant from the land – Court finding that because the decisions of the statutory bodies are valid and enforceable as they have not been set aside by a competent court but on the action proceedings third defendant would have to justify those decisions contrary to the authorities, and since on the facts there is an absence of a real dispute between the parties on any material question of fact plaintiff adopted on incorrect procedure – Furthermore, plaintiffs failed to exhaust domestic statutory remedies – Consequently, the action proceedings dismissed with costs.

ORDER

- (a) The action is refused.
- (b) There is no order as to costs.
- (c) The matter is considered finalized and is removed from the roll.

JUDGMENT

PARKER AJ

[1] It would be an understatement to say that the instant matter has made tedious rounds in the court, and quite unnecessarily, I should say. Plaintiffs instituted action proceedings on 16 January 2017 to evict defendant from the commonage in Erindirozondjou, Otjinene Constituency in the Omaheke Region ('the land'). This matter concerns communal land, which is governed by the Communal Land Reform Act 5 of 2002; and it is a case where the plaintiffs' legal practitioners, I dare say, gave wrong legal advice to plaintiffs regarding the administration of Act 5 of 2002, as well as regarding rules of practice. But such bad legal advice, we will not be in the court in action proceedings – of all proceedings. The dispute turns squarely on the interpretation and application of the relevant provisions of Act 5 of 2002 and the disinclination of plaintiffs to act in terms of the powers given to them by Act 5 of 2002, apparently on the bad advice of their legal practitioners, as can be gathered from the series of correspondence that flowed from the legal practitioners.

[2] On the papers, the procedure pursued by plaintiff is wrong. It is not in accordance with law and the rules of practice, as I demonstrate. In our law where no dispute of fact is likely to arise, save in the case of matrimonial causes and claims for damages, motion proceedings are always competent. (I. Isaacs, *Beck's Theory and Principles of Pleading in Civil Actions*, 5th ed (1982) at 304) I am aware that the authorities are clear that 'where facts relied on are disputed, an order for ejection will not be made on motion'. (*Frank v Ohlsson's Cape Breweries Ltd* 1924 AD 289 at 294, per Innes CJ) But as I say, there is no material dispute of fact. It is principally about the interpretation and application of Act 5 2002.

[3] Somewhere in 2010 first defendant occupied the land for residence and use. He did so initially with the permission of the Ovaherero Traditional Authority. In due course, the occupation and use of the land was considered unlawful, not least

because first defendant had fenced off the land much to the agitation of his neighbours. The dispute came to a head at a meeting by second plaintiff. Second plaintiff ordered first defendant to vacate the land and remove the fence.

[4] Filed of record is this crucial document: 'Summarized minutes of the hearing conducted by the Maharero Traditional Authority about the illegal occupation and fencing by Mr Uatombonge Kamunguma (ie the defendant) at Erindirozondjou-Village, Otjinene Constituency of Omaheke Region (ie the land) on 5 November 2011'. Contained in this document is the following categorical and unambiguous decision of the Maharero Royal House Traditional Authority ('the traditional authority').

'The hearing concluded that Mr. Kamunguma (ie defendant) did not consult his fellow villagers prior to his action of occupying and fencing the common grazing area illegally. Mr. Kamunguma was instructed to vacate the land that he has illegally occupied (and) fenced off and to return to his homestead and to initiate consultation with his fellow villagers if he intends to relocate his homestead. On the charge of illegal fencing of communal land Mr. Kamunguma was strictly told to remove his fence within a period of seven (7) days hence it contravene(s) the laws that regulate(s) fencing of communal land. Failure to remove the fence will leave the Maharero Traditional Authority with no option but to institute legal action against him'.

[5] Aggrieved by the decision of the second plaintiff, first defendant appealed that decision to the appeal tribunal in terms of s 39 of Act 5 of 2002. Filed of record is the appeal tribunal's judgment. The order of the appeal tribunal, dated 21 August 2012, as follows:

- (1) The decision of the Maharero Traditional Authority is confirmed.
- (2) Mr. Kamunguma must remove the fence and his homestead with immediate effect as ordered by the Maharero Traditional Authority and cease forthwith all activities on the land in question.
- (3) Mr. Kamunguma may apply for land rights as set out in section 22 of the Communal land Reform Act of 2002.

(4) The Maharero Traditional Authority should look into such application in terms of section 22(4) of the Act.

(5) On the issue of fences erected by other villagers, Mr Kamunguma has a right to file a complaint with the Maharero Traditional Authority and the Omaheke Regional Communal land Board'.

[6] It is important to note this crucial point. The order of the appeal tribunal is not only hectoring, it is also directory and promotional. It ordered first defendant to vacate the land and remove the fence. It also directed him to apply for ratification of the right to occupy the land in accordance with s 22 of the Act. I find that the proactiveness of the decision of the appeal tribunal was greatly influenced by the tribunal's critical finding that '[T]he residency of Mr Kamunguma in this village is not in dispute. The focus of the dispute is the fact that the appellant erected a fence in the commonage'.

[7] I accept first defendant's counsel's submission that both first defendant and second plaintiff complied with the appeal tribunal's order.

[8] Relying on the appeal tribunal's finding that first defendant's residency was not in issue, but the fence was in issue, first defendant removed the fence and remained in occupation of the land. Meanwhile, first defendant proceeded with his application for the ratification of his tenure right to the land and lodged it for third defendant's consideration.

[9] As luck would have it, first defendant's right was ratified in November 2016 by third defendant. It would seem that while third defendant was busy carrying out its statutory duty by first defendant in terms of Act 5 of 2002, plaintiffs were busy preparing their pleadings, unbeknown or known to them that the ratification was effected on 29 November 2016. The ratification by third defendant was in terms of s 24 of Act 5 of 2002. It remains a valid and enforceable act unless set aside by the granting of any domestic statutory remedies provided by Act 5 of 2002 against that act, that is, the decision of third defendant.

[10] Submission by Ms Tjahikika, counsel for plaintiffs, that s 20 of Act 5 of 2002 gives the power to the Chief or the Traditional Authority to cancel customary land right is correct. But that is not the end of the matter. A person aggrieved by the decision of a Chief or Traditional Authority has statutory appeal remedies, the Chief or Traditional Authority is therefore not the final authority in matters of allocation or cancellation of a communal land tenure right, as I have said previously. In the instant matter, second plaintiff was entitled to cancel the right first defendant had. But as I have demonstrated previously, from then on, it was the appeal tribunal that now took the stage. And it did, as I have found previously.

[11] Ms Tjahikika's further submission is that if first defendant obtained approval from the Ovaherero Traditional Authority, 'then such approval is unlawful and not in terms of the Traditional Authorities Act simply because the portion of land in dispute falls within the jurisdiction of the Maharero Traditional Authority (second plaintiff) and Ovaherero Traditional Authority'. This submission, with respect takes plaintiff's case no further. It has no weight. The traditional authority whose decision was taken on appeal to the appeal tribunal is the Maharero Traditional Authority (second plaintiff).

[12] Thus, what still stood was the aforementioned decision of third defendant which is lawful and valid unless set aside by the granting of domestic statutory remedies or an order of a competent court.

[13] It is not disputed that plaintiffs have not pursued any domestic statutory remedies provided by Act 5 of 2002 in ss 27 and 39. In our law, judicial remedy is not to be made available where the domestic remedies are capable of providing effective and practical relief. (Lawrence Baxter, *Administrative Law* (1984); *Namibia Competition Commission & Another v Wal-Mart Stores* 2012 (1) NR 69 (SC).)

[14] There is nothing on the papers to explain why plaintiffs have not sought relief in terms of the Act. For this reason alone, the court is entitled to refuse to hear the action.

[15] The court is entitled to refuse to hear the matter on second related grounds. It is well settled in our law that –

- (a) there is no onus on third defendant and the appeal body, *qua* administrative bodies, to justify their acts (*New Era Investment v Roads Authority* 2014 (2) 596 (HC); *Immanuel v Minister of Home Affairs & Others* 2006 (2) NR 687 (HC); and
- (b) a person aggrieved by an administrative action should take a stand and attack the action by judicial review. He or she fails to do so at his or her own peril. The reason is this:

'The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[*Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) para 51, approving *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), at 242B-C]

- (c) public authorities have a duty to ensure that their actions are enforced. Thus, the 'daily performance of public administration requires public authorities to take decisions and to implement them ... and it is essential for the efficacy of orderly government that public authorities be obeyed.' (Lawrence Baxter, *Administrative Law* (1991) at 369)

[16] It follows indubitably that as at 7 November 2016 (the date of the decision of third defendant), first defendant has the right to occupy the land. The decisions of the appeal tribunal and third defendant (ie the public authorities) exist, as a matter of law and fact; and *a fortiori*, they cannot be disputed. In that regard, we should not lose sight of the fact that those decisions are valid and enforceable as a matter of law; and what is more, the public authorities have a duty to ensure that their decisions are implemented. For the efficacy of orderly government the decisions must be obeyed. (Lawrence Baxter, *Administrative Law*, loc cit)

[17] It is, therefore, not open to doubt that plaintiff adopted the wrong procedure when it proceeded by action to evict first defendant. To start with, in the action

proceedings third defendant and the appeal tribunal would have to justify their decisions, and that will be against the authorities; and what is more, there 'is an absence of a real dispute between the parties on any material question of fact (see *Mohamed v Malk* 1930 TPD 615). Indeed, the action proceedings amount to asking the court to overlook the authorities and reconsider what are clearly final, valid and enforceable decisions of the public authorities. But the court has no colour of power in law to do that.

[18] Be that as it may, the fact that plaintiff has dragged defendant to court in action proceedings; the fact that defendant has played along with plaintiff's misstep; the fact that the matter has been subjected to judicial case management; and the fact that steps have been taken leading to the conduct of a trial matter tuppence. All these are of no moment. Indeed, for this court to continue that which is clearly wrong is to perpetuate a wrong procedure. Due administration of justice would not permit it.

[19] It must be remembered; this is not a case where plaintiff has approached the court to eject a party unlawfully occupying plaintiff's property, and there is a presence of a real dispute between the parties on some material question of fact. (See para 16 above.) In the instant case, as I have said more than once, the statutory bodies have already decided, and those decisions are valid and enforceable, and they have not been set aside through the granting of domestic statutory remedies or by a competent court.

[20] It is not open to this court, as I have said previously, to determine the validity and enforceability or otherwise of the decisions of the statutory bodies. To be asked by plaintiff to conduct a trial for that purpose is wrong in law. Therefore, as far as this court is concerned there is no proceeding properly before the court for the court to determine without offending the authorities.

[21] I conclude that plaintiffs have not exhausted domestic statutory remedies and the incorrect procedure has been adopted; and so, the court is entitled to refuse to hear the matter. (*Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa*, 4th ed (1997) at 230; and the cases there cited.) And I make no order as to costs. Defendant is represented by legal representatives from the Legal

Assistance Centre free of charge and he is not entitled to recover any costs, as LAC submitted.

[22] In the result, I order as follows:

- (a) The action is refused.
- (b) There is no order as to costs.
- (c) The matter is considered finalized and is removed from the roll.

C Parker
Acting Judge

APPEARANCES:

FIRST AND SECOND PLAINTIFF:

AT Ndungula
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Windhoek

FIRST DEFENDANT:

Y Van Der Byl and W Odendaal
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