REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 1928/2015

In the matter between:

JESAYA M IIPINGE **PLAINTIFF**

and

ILEKA TAAPOPI **FIRST DEFENDANT**

NEKULILO SHIKWAMBI **SECOND DEFENDANT**

SOFIA KAUPO NUUKULU **THIRD DEFENDANT**

THE CHIEF EXECUTIVE OFFICER

OKAHAO TOWN COUNCIL **FOURTH DEFENDANT**

Neutral citation: *Iipinge v Taapopi* (I 1928/2015) [2022] NAHCMD 567 (18 October 2022)

Coram: UEITELE J

Heard: **13, 14, 15, and 17 June 2022**

Delivered: **18 October 2022**

Flynote: Legislation – Local Authorities Act 23 of 1992 – Section 3, empowers the Minister responsible for local government to, from time to time by notice in the Gazette, establish any area specified in such notice as the area of a local authority, and to declare such area to be a municipality, town or village under the name

specified in such notice.

Legislation - Communal Land Reform Act 5 of 2002 – Section 15 (2), where a local authority area is situated or established within the boundaries of any communal land area, the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.

Legal Ethics – Duty of legal practitioners - to familiarize themselves with the full content and context of the authority which they cite. It has become evident and common practice for legal practitioners in the profession to consider the headnote of a case, and extract the decision, without understanding the context and content within which the decisions were made. It is incumbent for legal practitioners to appreciate the difference in the factual matrix of every single case before court, different to the previous matter, and it is necessary to understand the application of the law to the different circumstances and facts of that case, and the case which they intend to make.

Summary: The plaintiff in this matter avers that he is the lawful holder of a permission to occupy and purchase, what is now known as Erf 731, Extension 3, Okahao. The plaintiff avers that on 21 May 1990, the headman of the then Okahao Village, granted to him a customary land right – for business purposes, and which customary land right he claims was never extinguished by compensation or an alternative land right by the fourth defendant, when Okahao Village was proclaimed a Town, and administration then vesting in the Okahao Town Council.

The plaintiff avers that since about October 2006, he entered into three different oral lease agreements in respect of Erf 731, with the first to third defendants – save that such agreement in respect of the second defendant was concluded with the now deceased brother of the second defendant.

The plaintiff avers that all defendants at some point in time ceased payment of the rentals, whereafter he cancelled the lease agreements, and despite such cancellation and subsequent demand to vacate, the defendants either failed or refused to vacate Erf 731.

It is the case of the first to third defendants that, Erf 731, from which the plaintiff seeks their evictions, alternatively payment for certain amounts of alleged rentals, falls within the jurisdiction of the Okahao Town Council, established in accordance with the Local Authorities Act of 1992. It is thus their defence that the plaintiff is neither the owner nor a *bona fide* possessor of the property, as he has no valid right arising from ownership or on the basis of a valid lease or permit.

Held that, the land title is the legal document that serves as a representation of land for all legal purposes: it can be sold; leased, mortgaged; pass by inheritance; or given away.

Held that, a plaintiff who seeks the eviction or ejectment of someone from immovable property needs to prove only a possessory claim based on his or her right to possess the immovable property and that the person he or she is seeking to evict from the immovable property does not have a better claim than him or her to the property.

*Held tha*t, there is no dispute that Erf 731, is now situated within the boundaries of a local authority area. The effect of section 15(2) of the Communal Land Reform Act, read with the Local Authorities Act, on Erf 731, is that Erf 713 is no longer communal land, because it lies within the boundaries of the Okahao Town Council. The ownership of Erf 731 has thus also been vested in the Okahao Town Council.

Held that, the plaintiff applied for the permission to occupy a piece of land which was situated in communal land during May 1990, which is after 21 March 1990, the day on which Namibia became independent. It thus follows that the permission to occupy the piece of land had to be granted by the Permanent Secretary in the Ministry of Local and Regional Government. There is no evidence of that permission.

Held that, the document on which the plaintiff relied to assert his land rights to Erf 731, is a letter authored by the headman on July 2011. This is five years after Okahao was proclaimed as a local authority and declared a town. It thus follows that in terms of s 15(2) of the Communal Land Reform Act, that piece of land was no longer part of communal land as it became the property of the Okahao Town Council. Thus, the only right the plaintiff could claim in respect of that land is the pre-emptive right to purchase that piece of land from the Okahao Town Council, if he

could establish the possessory right under the Development Trust and Land Act, 1936.

Held that, despite testimony that the plaintiff was requested by officials of the Okahao Town Council, during 2006, to register his permission to occupy Erf 731, no proof of such registration was established at the trial. It thus follows that the claim of the plaintiff must fail.

Held that, it is the duty of a legal practitioner to familiarize themselves with the full content and context of the authority which they cite.

*Held th*at, having considered the pleadings, the evidence led, and argument by counsel, the plaintiff failed in proving his right to the property, customary or otherwise, and the only logical conclusion to this matter is that the claims of the plaintiff must be refused, with costs.

ORDER

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1. The plaintiff's claims are dismissed.

2. The plaintiff must pay the defendants' costs in the action.

3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

UEITELE J:

Introduction and Background

[1] The plaintiff in this matter is Mr Jesaya Iipinge, a major male, subsistence farmer, and referred to in this judgment as 'Mr Iipinge'.

[2] The first defendant is Mr Iileka Taapopi, a major male, and referred to in this judgment as 'Mr Taapopi'. The second defendant is Ms Nekulilo Shikwambi, a major

female, and referred to as ‘Ms Shikwambi’ in the judgment. The third defendant is Sofia Nuukulu, and referred to as ‘Ms Nuukulu’. The fourth defendant is the Okahao Town Council, and referred to as the ‘Council’. Where I need to jointly refer to the first to third defendants, I will refer to them as the ‘defendants’.

[3] The brief background facts in this matter are as follows. Mr Iipinge alleges that during May 1990, (at the time when the Okahao Village was still part of communal land under the jurisdiction of the Ongandjera Traditional Authority), he approached the headman of Okahao Village, a certain Mr Sakeus Joel Kashuna, with a request to be allocated a piece of land where he could exercise his communal land rights to occupy the piece of land and to conduct business on that piece of land. He alleges that his request was considered favourably and Kashuna allocated a piece of land to him in the Okahao Village. Mr Iipinge furthermore alleges that between 1990 and 2005 he constructed three buildings (two bars and a residential property) on the piece of land, which was ‘allocated’ to him by Headman Kashuna.

[4] During the year 2004, and by Government Notice No. 233 of 2004,[1] Okahao was established as a local authority area and declared a town. The piece of land that was ‘allocated’ to Mr Iipinge by headman Kashuna became, after the declaration of Okahao as a town, Erf 731, Extension 3, Okahao. I will in this judgment refer to the piece of land that was ‘allocated’ to Mr Iipinge as Erf 731.

[5] Mr Iipinge furthermore alleged that:

(a) during the year 2006, he approached the first defendant, Mr Taapopi and requested him to assist him (Mr Iipinge) to secure a tenant for his bar as he was about to leave Okahao for work in Opuwo. Mr Taapopi allegedly offered to rent the bar and they thus concluded an oral agreement in terms of which Mr Taapopi rented the bar from Mr Iipinge;

(b) during the year 2007, he was approached by a certain Michael Shikwambi who requested to temporarily lease his small building situated at Erf 731. He alleges that he acceded to Mr Shikwambi’s request and they concluded a temporary (for a period of two months and 20 days) oral lease agreement;

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1 Published in *Government Gazette* No. 3313 of 1 November 2004.

(c) during the year 2005, he was approached by the third defendant, Ms Nuukulu, who requested (to which request he acceded) to rent a piece of open space on Erf 731, for purposes of selling fat cakes and dried fish. He alleges that they agreed that the lease period was 14 months.

[6] Mr Iipinge also alleges that during the year 2007, he left Okahao to work in Opuwo, where he remained until the year 2008. When he returned to Okahao he gave the tenants,[2] notices to vacate the premises. He alleges that the tenants did not heed his notices to vacate the premises, they remained in occupation of Erf 731 and also stopped to pay rent. Some of the tenants (Mr Taapopi and Ms Nuukulu) even erected buildings on Erf 731. He further alleges that when he was unsuccessful in his attempts to remove the tenants from Erf 731, he during August 2012, turned for assistance to the Governor of the Omusati Region, who convened a meeting with all the concerned parties. The outcome of the meeting was that the Governor advised him to approach the court for him to enforce his rights.

[7] On 14 January 2016, Mr Iipinge caused summons to be issued out of this Court against the defendants seeking the following reliefs:

(a) an order confirming the cancellation of the lease agreements between the plaintiff and the first, second and third defendants;

(b) an order ejecting the first, second and third defendants within seven days after judgment;

(c) an order prohibiting the first, second and third defendants from removing any structures that the second or third defendant or both the second and third defendant erected or caused to erect on Erf 731, alternatively an order declaring that the properties so erected by the second or third defendant or both the second and third defendants are the plaintiff's property;

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[2] That is Mr Taapopi, Ms Shikwambi and Ms Nuukulu.

(d) an order directing the first defendant (Mr Taapopi) to pay to the plaintiff the sum of N$101 000 in respect of arrear rental and the sum of N$1 000 rent per month as from February 2016 to the date that the first defendant vacates Erf 731;

(e) an order directing the second defendant (Ms Shikwambi) to pay to the plaintiff the sum of N$29 100 in respect of arrear rental and the sum of N$300 rent per month as from February 2016 to the date that the second defendant vacates Erf 731;

(f) an order directing the third defendant (Ms Nuukulu) to pay to the plaintiff the sum of N$31 300 in respect of arrear rental and the sum of N$300 rent per month as from February 2016 to the date that the first defendant vacates Erf 731.

[8] The plaintiff in addition sought interest at the rate of 20 percent per annum reckoned from the date of judgment to the date of payment of the N$101 000, N$29 100 and N$31 300 and also costs of suit. The first to the third defendants opposed the plaintiff's claims and entered notices to defend the plaintiff's claim. The fourth defendant did not participate in this proceedings, and I will thus say nothing about the fourth defendant. With that short background, I now proceed to consider the pleadings in this matter.

The pleadings

[9] Mr Iipinge amended his particulars of claim on many occasions and in his final amended particulars of claim he alleges that: he is the lawful holder of permission to occupy and purchase from the Okahao Town Council; in that, on 21 May 1990 the piece of land which is now known as Erf 731, was allocated to him by the then headman of the Okahao Village, Ongandjera; and that the Town Council registered him as the holder of the right of permission to occupy and purchase Erf 731, and started charging him rates and taxes and service accounts.

[10] Mr Iipinge further alleged, in his particulars of claim, that during October 2006 he and Mr Taapopi concluded an oral lease agreement in terms of which he let and Mr Taapopi hired a building on Erf 731. The alleged terms of the oral lease agreement were, amongst other terms, that Mr Taapopi would in advance, on or before the 7th day of the relevant month pay to the plaintiff an amount of N$1 000 per month in respect of the rent and if he so fails to pay the rent he will vacate the

building upon being notified to vacate the building; and that he would use the building for business purposes only.

[11] Mr Iipinge continued and pleaded that he complied with the terms of the agreement, in that on or about October 2006, he allowed Mr Taapopi undisturbed occupation of Erf 731, but Mr Taapopi, in breach of the lease agreement refused or neglected to pay rent as from August 2007 to January 2016, and furthermore used Erf 731 for residential and business purposes. He further pleaded that Mr Taapopi has further breached the lease agreement in that he has modified the structures of the building and erected additional structures on Erf 731, without his consent.

[12] Mr Iipinge further pleaded that as a consequence of Mr Taapopi's breach, he during May 2015 cancelled, alternatively cancels the lease agreement and demanded that Mr Taapopi vacate the building, but despite that demand Mr Taapopi has refused or neglected to vacate the building.

[13] As regards Ms Shikwambi, Mr Iipinge further pleaded that on or about January 2008, he and Ms Shikwambi's late brother, concluded an oral lease agreement in terms of which he let and Ms Shikwambi's late brother hired a building on Erf 731. The alleged terms of the oral lease agreement were, amongst other terms, that Ms Shikwambi's late brother would in advance, on or before the 7th day of the relevant month pay to the plaintiff an amount of N$ 300 per month, in respect of the rent and if he so fails to pay the rent, he will vacate the building upon being notified to vacate the building; and that he would use the building for business purposes only.

[14] Mr Iipinge continued and pleaded that he complied with the terms of the agreement, in that on or about January 2008, he allowed Ms Shikwambi's late brother undisturbed occupation of Erf 731. He pleaded that, Ms Shikwambi's brother, has since passed on and Ms Shikwambi has taken over the rental of the building. He continued and pleaded that Ms Shikwambi in breach of the lease agreement refused or neglected to pay rent as from January 2008 to January 2016.

[15] Mr Iipinge furthermore pleaded that as a consequence of Ms Shikwambi's breach of the lease agreement, he during May 2015 cancelled, alternatively cancels

the lease agreement and demanded that Ms Shikwambi vacate the building, but despite that demand Ms Shikwambi has refused or neglected to vacate the building.

[16] As regards Ms Nuukulu, Mr Iipinge pleaded that on or about January 2007, he and Ms Nuukulu, concluded an oral lease agreement in terms of which he let and Ms Nuukulu hired a space on Erf 731. The alleged terms of the oral lease agreement were amongst other terms that Ms Nuukulu would in advance, on or before the 7th day of the relevant month pay to the plaintiff an amount of N$300 per month in respect of the rent, and if she so fails to pay the rent he will vacate the building upon being notified to vacate the building; and that she would use the building for business purposes only.

[17] Mr Iipinge continued and pleaded that he complied with the terms of the agreement, in that on or about January 2008, he allowed Ms Nuukulu undisturbed occupation of Erf 731. He pleaded that, Ms Nuukulu in breach of the lease agreement only paid N$100 in respect of the first fourteen months of the lease agreement, and refused or neglected to pay rent as from March 2008 to January 2016.

[18] Mr Iipinge furthermore pleaded that as a consequence of Ms Nuukulu's breach of the lease agreement, he during May 2015 cancelled, alternatively cancels the lease agreement and demanded that Ms Nuukulu vacate the building, but despite that demand Ms Shikwambi has refused or neglected to vacate the building.

[19] As indicated earlier, the defendants defended the claim. The essence of the defendants' plea is that, Erf 731, from which Mr Taapopi seeks to evict them, alternatively claim payment for certain amounts of alleged rental, falls within the area of jurisdiction of the Okahao Town Council, established in accordance with the Local Authorities Act of 1992.[3] It is thus their defence that, Mr Taapopi is neither the owner nor a *bona fide* possessor of the property, as he has no valid right arising from ownership or on the basis of a valid lease or permit and as such has no right to eject them from Erf 731.

[3] Local Authorities Act 23 of 1992.

[20] The defendants furthermore pleaded that, Mr Taapopi does not reside on Erf 731, but conducts a business from Erf 731; while Ms Shikwambi, also does not reside on Erf 731, but lawfully occupies and operates a milling business from the premises, and that Ms Nuukulu, with her husband and children reside on the premises and have as their primary home the building on Erf 731.

[21] On 15 June 2019, the parties filed a draft pre-trial order which was made an order of court on that date and the matter was referred to trial on the matters raised paragraphs I & II of the draft pre-trial order. In the draft pre-trial order the parties raised fifteen questions for determination by the Court. The first question which the parties required the Court to resolve is the question of whether or not, 'the plaintiff is a lawful owner or holder of a lawful right or permission to occupy a piece of land now known as Erf 731, Extension 3 Okahao prior to the proclamation of Okahao as a Town.'

[22] In my view, an answer to that question will resolve the dispute between the parties. I will therefore first deal with that question, and that question only. But before I venture to answer that question, I will very briefly set out the evidence on which Mr Iipinge relies for the claim that he is the lawful owner or the lawful holder of a permission to occupy Erf 731, which was granted to him before Okahao was declared a town.

<u>The plaintiff's evidence</u>

Jesaya Iipinge

[23] Mr Iipinge testified in support of his claim and also called a certain Mr Kashuna to testify in support of his claim. Mr Iipinge testified that during May 1990, he attended to the headman of Okahao Village and requested that he be allocated a piece of land, to allow him to exercise communal land rights for commercial purposes. He testified that at the time when he approached the headman, Okahao Village was still administered as communal land under the jurisdiction of the Ongandjera Traditional Authority.

[24] Mr Iipinge continued and testified that the headman at the time was a certain Mr Sakeus Joel Kashuna. Mr Kashuna allocated to him the land requested, and issued him a consent letter to occupy the land, on which land he erected poles. He further testified that during 1990, he constructed the first structure on the piece of land, and from which building he ran a bar – where he sold alcohol and other beverages. He further testified that during 2001, he erected another building, this time, for residential purposes for his employees at the bar; and where after during or about 2005, he erected a bigger building – where the bar then moved from the smaller infrastructure to the bigger.

[25] Mr Iipinge further testified that during or about May 2006, Okahao Village was declared a town. After the declaration of Okahao as a town, the piece of land which was allocated to him by headman Kashuna, became known as Erf 731, Extension 3, Okahao Town.

[26] Mr Iipinge further testified that since the declaration of Okahao town, his buildings have remained on the land. He continued and testified that during the year 2006, employees of the Council who are unknown to him, 'delivered' certain documents to his land, advising him to attend to their offices and to register himself as occupant and prospective buyer of the land. He testified that he attended to the offices of the Council and he was registered as the occupant and prospective purchaser of the land and he started paying rates, taxes, and town council levies, to the Council.

Sakeus Joel Kashuna

[27] Mr Kashuna testified that he has since 1980, to the date of the trial, been the headman of Okahao Village, designated as such by the Ongandjera Traditional Authority in terms of the Traditional Authorities Act, 2000.[4] He continued and testified that by virtue of his position as headman and representative of the Ongandjera Traditional Authority, he exercised the powers to allocate communal land rights to the residents of the Ongandjera community under the jurisdiction of the Ongandjera Traditional Authority in terms of the Traditional Authorities Act, and the Communal Land Reform Act, 2002.[5] He testified that he was, with the approval of the

[4] Traditional Authorities Act 25 of 2000.
[5] Communal Land Reform Act 5 of 2002.

Ongandjera Traditional Authority, entitled to cancel communal land rights in respect of the communal land situated in the Okahao Village.

[28] Mr Kashuna proceeded and testified that, as from May 2006, when Okahao was proclaimed a town, he could no longer exercise these powers over the land, as it now fell within the jurisdiction of the Okahao Town Council. He further testified that, the Council did not cancel the communal land rights of occupation which were granted by the Ongandjera Traditional Authority, unless the holder of such a right was compensated and provided with alternative land for residential or business purposes.

[29] Mr Kashuna furthermore testified that on 21 May 1990, he granted communal land rights to Mr Iipinge to occupy a piece of land in the Okahao Village. He testified that he personally pointed out the boundaries of the property to Mr Iipinge. Mr Kashuna furthermore testified that on 06 July 2011, he authored a letter in terms of the regulations to the Communal Land Reform Act, 2002 confirming that Mr Iipinge was allocated a piece of land in the Okahao Village.

[30] Mr Kashuna proceeded and testified that, the communal land right was granted to Mr Iipinge with the condition, amongst others, that should Mr Iipinge desire to abandon the right in the land by means of transfer to a third party, the consent of the Traditional Authority or his consent, as headman, would be required. He proceed, to testify that without such consent, the land right could not transfer.

[31] Mr Kashuna further testified that he was never approached by Mr Iipinge or any other party to either cancel the communal land rights of Mr Iipinge or transfer such right to any other party. He proceed to testify that during the period between May 1990 and May 2006, the communal land rights of Mr Iipinge were at no time transferred to any of the defendants, and neither was it reported to the Traditional Authority that Mr Iipinge had abandoned his communal land rights in respect the land in question (that is Erf 731).

[32] Following his evidence, and that of Mr Kashuna, Mr Iipinge closed his case. The defendants also elected to close their case, calling no witness, leading no testimony, and tendering no evidence to ward off the claims of Mr Iipinge.

Discussion

[33] Land rights in modern societies are recognised by and defined in law. The '*land title'* is the legal document that serves as a representation of land for all legal purposes: it can be sold; leased, mortgaged; pass by inheritance; or given away.[6] It is now a well-established principle of our law that, a plaintiff who seeks the eviction or ejectment of someone from immovable property needs to prove only a possessory claim based on his or her right to possess the immovable property, and that the person he or she is seeking to evict from the immovable property does not have a better claim than him or her to the property.[7]

[34] Because of the complex historical facts that have defined Namibians' right to land, I find it appropriate to briefly set out the historical context in which rights to land in Namibia evolved. It is now an accepted fact that prior to the intrusion of Europeans into Africa, indigenous African communities knew no private ownership of land. Africans for instance, customarily regarded land as a gift from God or a bequest by the ancestors.[8] A basic feature of indigenous communities' perception of their right to occupy land is that land was given to them as a community for that community to use it in a manner that it regards as most beneficial. Pastoral indigenous communities not only had the general right to use the land to sustain themselves by gathering and hunting, but also used specific areas of the land as grazing.[9]

[35] It is a painful reality that at the beginning of the twentieth century, Germany as the colonial power terminated, by, chicanery, 'protection treaties' and violent conquests, the indigenous Namibians land rights. German colonial rule over Namibia (then South West Africa) came to an end with the surrender of the German armed forces during World War I in 1915. South West Africa became a Protectorate of Great Britain, with the British King's mandate held by South Africa in terms of the

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6 SK Amoo, 'Towards comprehensive land tenure systems and land reform in Namibia' (2000) 17 *South African Journal on Human Rights* 87.

7 *Joseph and Others v Joseph* 2020 (3) NR 689 (SC)*; Shimuadi v Shirungu* 1990 (3) SA 344 (SWA).

8 Yanou, MA (2005) "Access to land as a human right: The payment of just and equitable compensation for dispossessed land in South Africa" (unpublished doctoral thesis, University of Rhodes).

9 *Ibid.*

Treaty of Versailles signed in 1919. Under the Treaty of Versailles and the South West Africa Act of 1919,[10] land held by the German colonial administration effectively became Crown (or State) land of South West Africa.

[36] After 1920, land alienation, in Namibia by Europeans and the introduction of new property rights were implemented in a more systematic manner by legislation.[11] The Governor-General of the Union of South Africa had, in terms the Treaty of Versailles and the South West Africa Act, the power to legislate on all matters, including land allocation in South West Africa. During the period 1915 to 1920, Namibia was under military rule and during this period, no legislation existed under which land settlement could be carried out.

[37] When martial law came to an end in 1920, land settlement laws in force in the Union of South Africa were applied to Namibia. I will briefly highlight the most significant pieces of legislation that transformed property rights in Namibia between 1920 and 1990. The first piece of legislation dealing with land that was introduced (by the Union Government) in Namibia was the Transvaal Crown Land Disposal Ordinance of 1903. This ordinance was made applicable to South-West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920. Firstly, the ordinance proclaimed the territory as crown land and, secondly, in terms of section 12 certain areas of crown land could be reserved 'for the use and benefit of aboriginal natives'. The general effect of this ordinance was to vest ownership of tribal land (land historically occupied and utilised by indigenous Africans) in the mandatory power, South Africa.

[38] Another piece of legislation that was introduced by the Union Government was the Native Administration Proclamation 11 of 1922. This law provided that natives not employed by land owners or lessees were not permitted to squat on land without a magistrate's permission. It also authorised the Administrator,[12] to set aside areas as "native reserves" for the sole use and occupation of natives generally or for any race or tribe in particular. Land allocation and utilization in the reserves were regulated by the Native Reserve Regulation 68 of 1924. These regulations vested

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[10] South West Africa Act 49 of 1919

[11] SK Amoo 'Towards comprehensive land tenure systems and land reform in Namibia' (2000) 17 *South African Journal on Human Rights 91*. Also see SK Amoo: *Property Law in Namibia* (2014) 17.

[12] The Administrator was the representative of the mandatory power, South Africa, the then South West Africa.

ownership of the land in the Administration and further provided that, after the land had been set aside as a reserve, 'it [could] not be alienated or used for any other purpose except with the consent of both Houses of Parliament of the Union of South Africa'. In 1928, the Union Government introduced the Native Administration Proclamation 15 of 1928, which amongst other powers gave the Union Government the power to define tribal areas.

[39] In 1936, the Union Government, by virtue of the Development Trust and Land Act, 1936,[13] converted and placed all 'native reserves' or 'tribal areas' into a trust known as the Development Trust. Under section 5(2) of this Act, all land placed under the Development Trust was declared the property of the state, to be administered by the State President of South Africa as trustee. The administration of native affairs was transferred from the Administrator of South-West Africa to the responsible South African Minister. Section 18 (3) & (4) of the Development Trust and Land Act provided:

'(3) With the approval of Parliament signified by resolutions of both Houses the Trustee may for the support, advantage or well-being of natives or purposes connected therewith, grant, sell, exchange, lease or otherwise dispose of land the property of the Trust to persons other than natives.

(4) The Trustee may, in accordance with the regulations, authorise the grant to or occupation by any person, board of trustees, educational authority or religious body for church, school, mission or trading purposes of such areas of land the property of the Trust as he may deem necessary: Provided that no grant of any extent greater than two morgen shall be made without the consent of Parliament signified by resolution of both Houses.'

[40] In 1978, by Proclamation AG 19 of 1978, the trusteeship was transferred from the South African State President, to the Administrator-General of South West Africa. The Development Trust and Land Act, 1936 remained in force in Namibia until 2002, when it was repealed by the Communal Land Reform Act.

[41] What is clear from s 18 (3) & (4) of the Development Trust and Land Act, 1936 is that, that Act formally introduced what has come to be known as a PTO (permission to occupy). A PTO is a licence granted, by the trustee, under the

[13] Development Trust and Land Act 18 of 1936.

Development Trust and Land Act, 1936 which allows the licensee to occupy state land under conditions attached to the permission to occupy certificate. Since the interest granted by the PTO is a licence it as such similar to leasehold, a PTO conveys no rights of ownership, but it does contain an option for the holder to obtain secure title to the land if at any time during the currency of the PTO such title becomes available.[14] A PTO provides a limited right to occupy an identified site for a limited period, but the rights conveyed by a PTO do not amount to a free hold tenure.

[42] Thus, in the scheme of the applicable colonial laws, 'ownership' of land was the exclusive preserve of whites, and 'permission to occupy' land applied exclusively to blacks. Thus, in South-West Africa like in South Africa, blacks could only be granted 'permission to occupy' land in the so-called homelands, which have now become known as communal land, as opposed to 'ownership' of land.

[43] From what I have stated in the preceding paragraphs, it is clear that in the areas known as communal land today the rights to land did not equate to freehold tenure and that only permission to occupy could be granted in respect of the homeland of colonial years. What is furthermore clear is that a permission to occupy had to meet both legal and physical requirements for it to qualify as document that serves as a representation of land for all legal purposes.

[44] In the unreported judgment of *Namundjebo-Tilahun NO and Another v Northgate Properties (Pty) Ltd and Others,*[15] the Supreme Court per Strydom AJA said:[16]

'The granting of a PTO was a matter of record … in terms of s 25(1) of the Black Administration Act, No 38 of 1927, read with s 21(1) and 48(1) of the Black Trust and Land Act, No 18 of 1936 and in terms of Government Notice R188 of 1969, the then State President of South Africa issued certain Black Areas Land Regulations which also applied to the then South West Africa. In terms of Regulation 47(1) a person could apply for a 'trading allotment' in the form of a PTO. Regulation 47(5) provided:

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[14] *Nekwaya and Another v Nekwaya and Another (APPEAL 262 of 2008) [2010] NAHC 8 (17 February 2010);*

[15] *Namundjebo-Tilahun NO and Another v Northgate Properties (Pty) Ltd and Others* (SA 33 of 2011) [2013] NASC 12 (07 October 2013).

[16] At paras [32] to [34]. I have omitted the numbering of the paragraphs in the quotation in order to avoid confusion of number in the judgment.

> "(5) No person shall occupy any Trust land (read: "communal land") within a black area unless he has been or has been deemed to have been duly authorised to do so under these regulations or any other law."

The occupation of land for business purposes was provided for in terms of s 6(1) of the Regulations and stated as follows:

> "6(1) No person shall remain in occupation of any portion of land acquired by the Trust after the commencement of these regulations except with the permission in writing of the Bantu Affairs Commissioner and on such terms and conditions as such Bantu Affairs Commissioner may specify in such permission."

In terms of Article 140(1) of the Namibian Constitution this statutory regime of pre-independence laws, survived the independence of Namibia and Article 140(4) stated that 'any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia, or to a corresponding Minister, official or institution of the Republic of Namibia.

The corresponding officer to the 'Bantu Affairs Commissioner' in R 6(1) is now the Permanent Secretary in the Ministry.'

[45] After the independence of Namibia the Government of the of the Republic of Namibia introduced two pieces of legislation, which have an impact on land rights in respect of land situated in communal land, namely the Local Authorities Act, and the Communal Land Reform Act. Section 3 of the Local Authorities Act, empowers the Minister responsible for local government to, from time to time by notice in the *Gazette,* establish any area specified in such notice as the area of a local authority, and to declare such area to be a municipality, town or village under the name specified in such notice.

[46] Section 15(2) of the Communal Land Reform Act, provides that where a local authority area is situated or established within the boundaries of any communal land area, the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.

[47] In this matter, there is no dispute that Erf 731, is now situated within the

boundaries of a local authority area. The effect of s. 15(2) of the Communal Land Reform Act, read with the Local Authorities Act, on Erf 731, Okahao, is that Erf 713 is no longer communal land, because it lies within the boundaries of the Council. The ownership of Erf 731 has thus also been vested in the Council.

[48] I have set out how under the colonial laws a person could in the former homelands acquire permission to occupy a piece of land. The permission had to be granted by a Trustee (South African State President, Minister or Administrator General) his or her delegate and had to be in a form prescribed under the Development Trust and Land Act.

[49] In the present matter, the evidence of both Messrs Iipinge and Kashuna is that Mr Iipinge applied for and was granted rights to occupy the land that is now known as Erf 731, in 1990. Mr Kashuna tender into evidence a document which he alleges is a letter confirming the allocation. The document is in the Oshiwambo language dated 6 July 2011. The translated version of that document was never handed up. Loosely translated that document provides that:

> 'I Sakeus J Kashuna the headman of Okahao, Ongandyera hereby confirm that Iipinge Mweshiyola Jesaya I.D 54060100854 was granted land on 21/05/1990 for him to construct a building for the purposes of conducting a shop.'

[50] As I have indicated above, section 6(1) of the Black Areas Land Regulations, which also applied to Namibia until at least the year 2002, required a person who occupied communal land for business purposes, after those regulations came in to operation to be in possession of a written permission granted by the Commissioner of Bantu Affairs.

[51] What is not in dispute in this matter is that Mr Iipinge applied for the permission to occupy a piece of land which was situated in communal land during May 1990, which is after 21 March 1990, the day on which Namibia became independent. It thus follows that the permission to occupy the piece of land had to be granted by the Permanent Secretary in the Ministry of Local and Regional Government. There is no evidence of that permission.

[52] The document on which Mr Iipinge relied to assert his land rights to Erf 731, is a letter authored by Mr Kashuna on July 2011. This is five years after Okahao was

proclaimed as a local authority and declared a town. It thus follow that in terms of s 15(2) of the Communal Land Reform Act, that piece of land was no longer part of communal land as it became the property of the Okahao Town Council, and the only right that Mr Iipinge could claim in respect of that land is the pre-emptive right to purchase that piece of land from the Okahao Town Council if he could establish the possessory right under the Development Trust and Land Act.

[53] Mr Iipinge testified that during the year 2006, he was requested by officials of the Council to attend to their office, which he did, and his permission to occupy Erf 731 was registered by the Council. No proof of such was also not established at the trial. It thus follow that Mr Iipinge has failed to establish a right to possess Erf 731, which is better or greater than the rights possessed by the defendants he is seeking to evict from Erf 731. His claim to evict the defendants therefore fails.

A cautionary word

[54] I briefly pause, to share a word of caution to the legal practitioners of who practice in this court. I mentioned to counsel during argument in this matter that this matter is one where the court could have made an order after hearing closing submissions, but for purposes of education, found it necessary to pen this judgment.

[55] I have over the years, in teaching, practice, and on the bench, many a times lamented that there is no remedy in law – for even the best or most intelligent trial legal practitioner, who does not read. With all the authorities on the subject matter, it was clear that counsel for Mr Iipinge, when he took instructions as successive attorney in this matter, did not acquaint himself with the pleadings and the legal principles governing Mr Iipinge's claim. Had counsel taken the trouble to read the relevant authorities, the basis on which the plaintiff was before court would have been clear, and the stumble in the dark that ensued during the trial of this matter would have been avoided.

[56] It is further the duty of a legal practitioner to familiarize themselves with the full content and context of the authority which they cite. It has become evident and common practice for legal practitioners in the profession to consider the headnote of a case, and extract the decision, without understanding the context and content

within which the decisions were made. It is incumbent for legal practitioners to appreciate the difference in the factual matrix of every single case before court, different to the previous matter, and it is necessary to understand the application of the law to the different circumstances and facts of that case, and the case which they intend to make. The only route to success for a trial attorney is to read, read, and read.

[57] Having considered the pleadings, the evidence led, and argument by counsel, and the mere concession by the counsel for Mr Iipinge that in this matter, Mr Iipinge has not succeeded in proving his right to the property, customary or otherwise, the only logical conclusion to this matter is that Mr Iipinge's claims must be refused, with costs, as I hereby do.

Order

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

1. The plaintiff's claims are dismissed.

2. The plaintiff must pay the defendants' costs in the action.

3. The matter is regarded as finalised and removed from the roll.

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UEITELE S F I

Judge

APPEARANCES

PLAINTIFF:	V Alexander Of Veiko Alexander & Co. Inc. Windhoek
FIRST - THIRD DEFENDANTS:	S Namandje Of Sisa Namandje & Co. Inc. Windhoek