

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2022/02121

In the matter between:

**MINISTER OF WORKS AND TRANSPORT**

**PLAINTIFF**

and

**LYLIE PEINGEPAWA KASHULULU**

**1<sup>ST</sup> DEFENDANT**

**ALL PERSONS FOUND ON PROPERTY**

**2<sup>ND</sup> DEFENDANT**

**INSPECTOR-GENERAL OF THE NAMIBIAN POLICE**

**3<sup>RD</sup> DEFENDANT**

**Neutral Citation:** *Minister of Works and Transport v Kashululu* (HC-MD-CIV-ACT-OTH-2022/02121) [2024] NAHCMD 628 (24 October 2024)

**Coram:** MASUKU J

**Heard:** 17 June and 22 July 2024

**Delivered:** 24 October 2024

**Flynote:** Civil Action – Ejection of first and second defendants – No lease agreement concluded between the parties – Plaintiff alleges unlawful occupation of property by the first defendant – First defendant claims occupation of property, was based on official accommodation allocation –

Evidence presented by plaintiff includes title deed – First defendant did not effectively challenge plaintiff's evidence in cross-examination – Court considers principles of contract law – Relief sought in favour of plaintiff granted.

**Summary:** The plaintiff instituted legal action primarily against the first defendant, seeking her eviction from Flat 2, Luna Court, located at Erf No. 5484, Ausspannplatz, Lazarett Street, Windhoek, Namibia, ('the property'), together with those occupying the property at her instance or behest. The plaintiff's case is based on allegations that the first defendant illegally took occupation of the property in April 2018, without entering into a formal lease agreement or obtaining authorisation from the plaintiff to occupy the said property.

The first defendant defended the action and averred, in her defence, that she was in lawful occupation of the flat in question, having received official allocation of the property on 8 October 2021.

The core issue before the court is whether the first defendant's occupation of the premises, is lawful in the absence of an agreement with the plaintiff. The plaintiff argues that the defendant has no legal right or privilege to occupy the premises and seeks her eviction, together with those who may be occupying the property or holding over same at her behest.

Despite the first defendant's claim of lawful occupancy based on an official accommodation allocation, the plaintiff maintains that no valid agreement exists between the parties entitling the defendant to occupy the property. The plaintiff provided evidence, including a title deed to the property, and argues that the deductions from the first defendant's salary were in respect of penalties imposed on the defendant for unauthorised occupation of the plaintiff's property. The plaintiff averred that such payments were not rental payments as alleged by the defendant.

*Held:* That 'Evidence is the most important means of proof. The term is not always used in the same sense. Its common meaning is that of all the information given to a court to enable it to decide a factual issue, so that it not includes the testimony given by the witnesses but also documents and objects brought forth to be viewed by the court.'<sup>1</sup>

*Held that:* 'In order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties as one cannot contract with himself alone.'<sup>2</sup>

*Held further that:* 'There is no contract if the parties find themselves in disagreement on such use and enjoyment, because the use and enjoyment of the property let is the subject matter of a contract of lease.'<sup>3</sup> The principles of contract law, as stated by Christie & McFarlane, require a clear agreement by the consent of both parties, which is lacking in this matter.

*Held:* That the first defendant's failure to cross-examine the plaintiff's witnesses effectively means that the plaintiff's evidence remains largely unchallenged and stands as the accepted evidence before the court, following the standard practice outlined in *Small v Smith*.<sup>4</sup>

Plaintiff's claim granted as prayed.

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<sup>1</sup> Schmidt, C. W. H & Rademeyer, H. (2003). *Law of Evidence*. Durban: LexisNexis. P 1-4.

<sup>2</sup> Christie, R. H & Mcfarlane, V. (2006). *The Law of Contract in South Africa*. Durban: LexisNexis Butterworths. P 21.

<sup>3</sup> Kerr, A.J. (2004). *The Law of Sale and Lease*. Durban: LexisNexis Butterworths. p 256.

<sup>4</sup> *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438E-G.

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## ORDER

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1. The first defendant, together with any other person holding over the property hereinafter described, on her behalf or at her behest, be and are hereby ejected from property, *to wit* Flat No 122/1021, Erf No: 5484 Luna Court Flat 2, Ausspannplatz, Lazarett Street, Windhoek, Republic of Namibia.
2. The Deputy Sheriff for the District of Windhoek, is hereby authorised to eject the first defendant and any other person holding over the property at her behest or on her behalf within thirty (30) days from the date of this order.
3. The first defendant is ordered to pay the costs of suit.
4. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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**MASUKU J:**

Introduction

[1] This is a rather unusual matter. Unusual, not due to the nature of the relief sought but for the reason that the Government, as represented by the Minister of Works and Transport, is the plaintiff in this case. In the ordinary run of the mill cases serving before this court, the Government is normally at the receiving end of summons and other legal processes initiating proceedings. In this case, however, the tables have turned and the Minister is the plaintiff. He seeks relief against the defendants in terms that shall become apparent as the judgment unfolds.

[2] The primary question the court is called upon to determine in this matter, is whether the first and second defendants have any legal right or entitlement at law, to remain in occupation of Flat 2, Luna Court. Specifically, the court must decide whether the plaintiff, the owner of the flat in question, is entitled to an order for the eviction of the defendants on grounds of unlawful occupation. The relief is sought despite the first defendant's averral that she was allocated the flat in question as official accommodation in terms of Government procedures applicable.

### The parties

[3] The plaintiff is the Minister of Works and Transport, duly appointed as such in terms of Article 32 (3)(j)(b) of the Namibian Constitution. His address of service is that of the office of the Government Attorney, Second Floor, Sanlam Centre, Independence Avenue Windhoek, Republic of Namibia.

[4] The first defendant is Ms Lylie Peingepawa Kashululu, an adult female with full legal capacity, employed by the Namibian Defence Force. Her residential address is at Flat No 122/1021, Erf No: 5484 Luna Court Flat 2, Ausspanplatz, Lazarett Street, Windhoek, Republic of Namibia.

[5] The second defendant is any and all other persons found to be in possession and/or occupation of the aforesaid immovable property and those holding the immovable property on behalf of the first defendant at the time of service hereof, to wit Flat No 122/1021, Erf No: 5484 Luna Court Flat 2, Ausspanplatz, Lazarett Street, Windhoek, Republic of Namibia, at the time of service hereof, whose particulars are unknown to the Plaintiff.

[6] The third defendant is the Inspector-General of the Namibian Police Force, herein cited in his capacity as such, whose address is National Police Headquarters, Cnr. Jan Jonker Street and Lazarett Street, Windhoek, Namibia. No relief is sought against the third defendant. He is cited herein for

any interest he may have on the subject of this civil action, especially if an order for eviction is granted and is in need of enforcement by his charges.

[7] The plaintiff is represented by Ms Nghishekwa, whereas the first defendant appeared in person and represented herself during the duration of the trial. It would seem that some discord eventuated between her and her legal practitioners before the hearing of the matter. She accordingly took the bull by the horns and conducted her defence.

[8] The first defendant will accordingly be referred to hereinafter as 'the defendant', as neither the second nor the third defendant, partook in the proceedings. The first defendant is, for all intents and purposes, the only active defendant in this matter.

#### Background

[9] The genesis of this matter can be traced back to April 2018. The plaintiff sued out summons from this court, alleging that the defendant unlawfully took occupation of his property, *to wit*, flat No. 122/1021, Erf No. 5484, Luna Court flat 2, Ausspannplatz, Lazarett Street, Windhoek, Republic of Namibia, ('the property').

[10] The defendant was served with the combined summons and she defended the proceedings. In disputing the averrals made by the plaintiff, the defendant claims that she was in lawful occupation of the said property as it was allocated to her through official Government channels, as official accommodation on 8 October 2021.

[11] The plaintiff accordingly seeks the eviction of the defendant from the property. The question for the court to determine, in the circumstances, is whether the plaintiff is, in law entitled to the relief that he seeks. The balance of this judgment will be dedicated to deciding this very question, together with any defences the defendant raises in the pleadings.

### The plaintiff's case

[12] The plaintiff called two witnesses in support of his case. The evidence they adduced, is narrated below.

#### *Ms Fatima Ndawedwa*

[13] This witness testified that she is employed by the Ministry of Works and Transport as a Chief Administrative Officer. Her duty station is the Ministry of Works and Transport Head Office, in Windhoek, Khomas Region, Republic of Namibia.

[14] As a Chief Administrative Officer in her department, she testified, she deals with official accommodation for Government employees when it comes to allocation of accommodation of Governmental houses and flats to public servants.

[15] She testified that, according to the records maintained by the plaintiff, the defendant on or about April 2018, illegally took occupation of the property, which belongs to the Government. It was her evidence that the defendant took occupation of the property without entering into an agreement with the plaintiff on the basis of her employment with the Government. She further placed on record that to date, no agreement exists between the plaintiff and first defendant over the defendant's occupation of the property in question.

[16] It was her evidence that the defendant moved into the property after a former Government employee, Mr E Museta, had retired from the public service. It would appear that the latter transferred the official accommodation to the first defendant illegally and without obtaining official authorisation from the plaintiff as required by Government procedure.

[17] She testified further that Mr Museta does not have the power or authority to have transferred occupation of the property over to the defendant

without obtaining such authorisation from the plaintiff. It was her evidence that the plaintiff has never to date, arrogated upon Mr Museta, any power or authority to transfer the property he was occupying to anyone upon his retirement, including the defendant.

[18] It was her further evidence that the defendant, after the illegal occupation of the property, following the unlawful arrangement with Mr Museta, then applied for allocation of official accommodation to her through the plaintiff in or about January 2020. Her application was approved during February 2020 and she was placed on the waiting list by the plaintiff until there was official accommodation available to accommodate her. The witness referred the court to a copy of the defendant's application for official accommodation and her being placed on the waiting list for official accommodation. The letter in question was handed in evidence as exhibit 'C.'

[19] Ms Ndawedwa testified further that as a result of the illegal and unauthorised occupation of the property by the defendant, the plaintiff has been charging the defendant a penalty fee of N\$2500 per month for being in the plaintiff's property without official authorisation. This, she testified, was in accordance with clause 1.14 of the procedures for allocation of official quarters. This was handed into evidence as exhibit 'D.'

[20] She further testified that the defendant cannot even afford the penalty fee of N\$2500 per month and as a result and regard had to her salary, the only amount the defendant can afford to pay as the penalty fee, is in the sum of N\$ 500 per month for arrears and N\$ 563.31 to cover the penalty fees as illustrated on her pay-slip handed up into evidence as exhibit 'G'.

[21] It was her further evidence that the defendant is currently in arrears for her illegal occupation of the premises as a result of her not being able to afford the penalty fee in accordance with clause 1.14 of the procedures for allocation of official quarters for Government employees.

[22] She added that defendant has to date never received any authorisation to continue occupying the property in question. It was her evidence that



defendant's unauthorised continued occupation of the property in question is setting a bad precedent for other Government employees. If allowed to continue unabated, this practice can result in Government employees illegally and forcefully appropriating government housing to themselves, without following the proper procedures and obtaining the requisite authorisation.

[23] She concluded her evidence by testifying that the first defendant's unauthorised continued occupation of the plaintiff's property sets a bad example towards other Government employees who are currently placed on the waiting list for official accommodation. They can, in following the defendant's bad example, also occupy government property without consequence. This marked the end of her testimony.

*Mr Katjingurukee Tsepo Mutenge*

[24] Mr Mutenge testified that he is employed by the Ministry of Works and Transport as an Administrative Officer. His duty station is the Ministry of Works and Transport Head Office, in Windhoek, Khomas Region, Republic of Namibia.

[25] He testified that as an Administrative Officer in his department, he deals with official accommodation for Government Employees in respect of allocation of Government houses and flats.

[26] He testified that, on or about April 2018, the defendant unlawfully and illegally took occupation of the property. This property, it was his evidence, belongs to the plaintiff. He referred to a copy of the title deed which was handed in evidence and marked exhibit "A"

[27] It was his evidence that the defendant illegally took occupation of the property without entering into an agreement with the plaintiff on the basis of employer-employee relationship. He further testified further that to date, no such agreement exists between the plaintiff and the defendant over her occupation of the property in question.

[28] He corroborated the evidence of Ms Ndawedwa, to the effect that the defendant moved into the property after a former Government employee, Mr E Museta had retired. The latter, it would appear, transferred the official accommodation to the first defendant illegally and without official authorisation from the plaintiff.

[29] He further testified that the defendant later applied for allocation of official accommodation through the plaintiff on or about 6 April 2021. In response to her application, she was placed on the waiting list for official accommodation by the plaintiff until there was official accommodation available to accommodate her. The witness also referred the court to a copy of the first defendant's application for official accommodation and the letter placing her on the waiting list for official accommodation. It was annexed to his witness statement and handed into evidence as exhibit 'C.'

[30] Mr Mutenge further testified that as a result of the illegal and unauthorised occupation of the property in question by the defendant, the plaintiff has been charging her a penalty fee of N\$2500 per month for being in the plaintiff's property without official authorisation in accordance with clause 1.14 of the procedures for allocation of official quarters. This was handed into evidence as exhibit 'D.'

[31] It was his further evidence that the defendant cannot afford to pay the penalty fee of N\$2500 per month imposed. As a result, the only way she can afford to pay the penalty fee is in the form of N\$500 per month to settle the arrears and a further N\$ 563.31 to cover the penalty fees as illustrated on her pay-slip annexed to his witness statement. This was handed into evidence as exhibit 'G.'

[32] The witness testified further that defendant is currently in arrears for occupation of the plaintiff's property resulting from her inability to pay the penalty fee in full and in accordance with clause 1.14 of the procedures for allocation of official quarters for government employees.

[33] It was his evidence that to date, the defendant has never received any authorisation to continue occupying the property in question. He testified that the first defendant's unauthorised continued occupation of the property in question is setting a bad example for other Government employees who are placed on the waiting list for official accommodation. They can, in like manner, appropriate to themselves Government property without following the laid down procedures, which can cause problems for the Government. This was the extent of his testimony.

#### The defendant's case

[34] The defendant testified as the only witness for the defence. It was her evidence that during the year 2018, she entered into a partially written and partially oral lease agreement with the plaintiff for occupation of the property in question. She further testified that later, during the month of April 2018 she was allocated the flat number BM122/1021/25 as an official accommodation under the Ministry of Works and Transport.

[35] To her surprise, on the 17 May 2021, she received an eviction notice from the plaintiff through one Mr Sepho, who is an official from the office of the plaintiff. She approached Mr Sepho and informed him of the decision taken by the chief of accommodation and the letter of allocation that she received allocating her official accommodation. She testified that Mr Sepho did not afford her any opportunity to defend herself or to speak to him. He indicated that he is not interested in the arrangements made by the chief of accommodation and needed her to move out of the apartment without further ado. It was her evidence that every other day she received calls from Mr Sepho threatening her.

[36] She testified that in light of the threats breathed on her by Mr Sepho, she approached the office of the Executive Director of the plaintiff, who informed her that there are currently two other people with the same issue

and that she should submit her complaint in writing and that it could be referred for discussion at their meeting.

[37] She testified further that she received no response from the office of the Executive Director. At the end of the month, she realised that her salary was being deducted twice for official accommodation, namely rental and the other deduction was for official accommodation arrears. She then approached the office of the plaintiff and enquired about the double deduction and why she was being evicted because she has an official allocation letter from the plaintiff.

[38] It was her further evidence that after she received the notice of eviction, she approached the Ministry of Defence, her employer and requested for her employment file in which she found the allocation letter and requested for a copy, which she then took to the plaintiff's office as proof of the allocation. There was, however, no proper response to her enquiries. She accordingly proceeded to stay at the property due to the lease agreement between the plaintiff and herself, she testified.

[39] She testified that during the year 2022, she received a combined summons from the Deputy-Sheriff, which initiated the present proceedings. It was her evidence that she has always paid her rent in the amount of N\$2500, including the arrears that the plaintiff's office claims. It was her evidence that she has never defaulted in payment of the monthly dues, to date. Lastly, it was her evidence that her housing and rental allowance has been suspended as she has been allocated the property by the plaintiff. That was the extent of her evidence.

### *Counterclaim*

[40] The first defendant further filed a counterclaim. The defendant did not pursue the counterclaim during the trial. In the said counterclaim, she averred that a partially written and oral agreement was concluded between the plaintiff and herself. The express, alternatively tacit, alternatively implied terms of the lease agreement, are as follows:

1. The first defendant shall occupy the property described as BM122/1021/25.
2. The first defendant shall pay a monthly amount of N\$2500 in the form of rent.
3. The date of occupation shall be recorded to be the 2<sup>nd</sup> April 2018.
4. Rental shall be paid monthly and in advance. That the housing and rental allowance of the 01st defendant shall be suspended due to having been allocated official accommodation.
5. The lease agreement shall be valid until the retirement of the first defendant.

[41] According to the first defendant, she complied and acted in accordance with the agreement reached by the parties. The written portion of the said lease agreement was attached to the first defendant's plea and marked as 'C'. It must be stated that the said letter is the communication from the plaintiff that allocated the first defendant official accommodation, referred to previously.

[42] The defendant alleged that the decision of the plaintiff to engage in conduct aimed at terminating the lease agreement and evicting her is reviewable and is to be set aside on the basis that:

1. The decision is unreasonable in the circumstances.
2. The plaintiff took into account irrelevant considerations.
3. The plaintiff has failed to take into account the relevant considerations.
4. The plaintiff is acting out of ulterior motives.
5. The defendant was not afforded an opportunity to be heard before the plaintiff decided to terminate the lease agreement and to evict her from the premises.<sup>5</sup>

### The law

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<sup>5</sup> The first defendant's plea and counterclaim p 7.

[43] The plaintiff alleged that the defendant unlawfully took occupation of the property, without entering into an agreement with the plaintiff on the basis of the employer and employee relationship. The plaintiff further submitted that the defendant had no authorisation for the occupation of the property from plaintiff, as owner of the property in question. The plaintiff's case is further that, the defendant has been in continued occupation and/or in possession of the property, with no right, privilege, or entitlement in law to be in occupation and/or in possession thereof. On 17 May 2021, in view of the illegal occupation of the property, the defendant was then served with a notice to vacate the property within seven days from the date of the notice but to no avail.

[44] It is common cause that the plaintiff handed up a title deed marked as Exhibit "A". The document, is entitled 'Certificate of Consolidated Title' issued under the provisions of section 40 of the Deeds Registry proclamation, 1939 (No. 37 of 1939). There is no dispute that the plaintiff is the owner of the property. This, the defendant accepted unequivocally.

[45] The learned authors, Schmidt and Rademeyer state the following:<sup>6</sup>

'Evidence is the most important means of proof. The term is not always used in the same sense. Its common meaning is that of all the information given a court to enable it to decide a factual issue, so that it not includes the testimony given by the witnessed but also documents and objects brought forth to be viewed by the court.'

[46] I accordingly find that the plaintiff is the owner of the property in question. As such, he has the right to the use and occupation of the property in question. This includes the right to evict persons who illegally occupy the property in question. The only question to determine, in the circumstances, is whether the defendant, in light of the uncontested ownership of the property, has any colour of right that would entitle her, in the circumstances, and regard had to the evidence led, to continue in occupation of the property.

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<sup>6</sup> Schmidt, C. W. H & Rademeyer, H. (2003), *Law of Evidence*. Durban: LexisNexis, p 1-4.

[47] The principles of contract have long been stated and I do not wish to dive in deep waters trying to narrate them out, however, I may state the facts that will remain unchanged.

[48] According to the learned authors, Christie & Mcfarlane,<sup>7</sup> 'in order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties as one cannot contract with himself alone.'

[49] From the evidence placed before court, the defendant is alleging that there is a partly written and partly oral lease agreement between the parties. The plaintiff's case is a horse of a different colour. The plaintiff flatly denies the existence of any lease agreement between the parties, whether oral or written.

[50] Kerr,<sup>8</sup> the learned author, states that ' . . . there is no contract if the parties find themselves in disagreement on such use and enjoyment, because the use and enjoyment of the property let is the subject matter of a contract of lease.'

[51] The defendant did not dispute the plaintiff's evidence in cross-examination of the plaintiff's witnesses despite being advised to do so by the court. In fact she chose not to effectively cross-examine the plaintiff's witnesses, let alone to put her version to them. The applicable position in such cases, was neatly summarised in *Small v Smith*<sup>9</sup>. There the court stated the following:

'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue

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<sup>7</sup> Christie, R. H & Mcfarlane, V. (2006). *The Law of Contract in South Africa*. Durban: LexisNexis Butterworths. P 21.

<sup>8</sup> Kerr, A.J. (2004). *The Law of Sale and Lease*. Durban: LexisNexis Butterworths. p 256.

<sup>9</sup> *Small v Smith* 1954 (3) SA 434 (S.W.A) at 438E-G.

that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of a notice to the contrary that the witness's testimony is accepted as correct. Unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever.'

[52] The defendant is however, against her eviction from the said flat. She argued that she was allocated official accommodation by a letter dated 8 October 2021. Further, the defendant submitted that there were on-going deductions from her salary and reflected on her payslip, suggesting that there was some agreement of lease between the parties. On the other hand, the plaintiff's witnesses, in evidence, stated that the deductions from the defendant's salary constitute the penalty fee in the amount of N\$500 per month as arrears and N\$563.31 to cover the penalty fee.

[53] The defendant submitted that if the eviction is sanctioned by the court, she will be rendered homeless together with her family. What must, however, be considered in this connection, is that, there is no lease agreement between herself and the plaintiff. I find this for a fact on the evidence before court. The letter dated 8 October 2021, for allocation of official accommodation by the plaintiff was just the start, as she had to be placed on the waiting list. It never fructified into allocation of official accommodation, with the parties' rights and duties agreed upon and sealed.

[54] It should be pertinently observed that in the plea, counterclaim and her evidence, that the defendant failed to produce any lease agreement, other than the letter dated 8 October 2021 mentioned above. Its purpose, as can be gleaned from its contents, was to acknowledge the defendant's application for official accommodation and to indicate that she had been placed on the waiting list. I find this for a fact. There is thus no evidence, admissible or otherwise that she was, at any stage, officially granted the right to occupy the property in terms of the procedures for allocation of Government quarters.



[55] In the matter of *Endobo Properties CC v Nambundu*, Usiku J, stated the following:<sup>10</sup>

[42] An action for eviction may be based on the owner's ownership of a property or on a contract. Where a plaintiffs' claim for eviction is based on ownership, the plaintiff merely has to allege and prove his ownership and the fact that the property is held by another person. The onus is then on that other person (the defendant) to allege and prove a right to stay in possession of the property.<sup>11</sup>

[43] It is inherent in the nature of ownership that possession of a property should normally be with the owner thereof and as a corollary, no other person may withhold it from the owner, unless that other person is vested with some right enforceable against the owner.<sup>12</sup>

[56] I am of the considered view that the plaintiff has succeeded to show that the Government is the owner of the property in question. The burden of proof, in that event, then rests on the defendant in this case, to show on the balance of probabilities that she has some colour of right that entitles her to remain in occupation of the property.

[57] Has the defendant succeeded in satisfying the burden resting on her in this case? I am of the considered view that the defendant has dismally failed to show that she has any colour of right to remain in occupation of the plaintiff's property. The evidence before court shows indubitably that the defendant occupied the property after Mr Museti left. This was before the letter of allocation, which the defendant lays a lot of store on, was written to her and which placed her on the waiting list.

[58] There is, as such, no evidence that the defendant was, after the letter acknowledging her application and placing her on the waiting list, allocated

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<sup>10</sup> *Endobo Properties CC v Nambundu* (HC-MD-CIV-ACT-CON-2018/03628) [2020] NAHCMD 405 (11 September 2020).

<sup>11</sup> *Angula v Mavulu* (I 2690/2010) [2014] NAHCMD 250 (22 August 2014) para 17.

<sup>12</sup> CP Smith, *Eviction and Rental Claims: A practical guide*, para. 1.2.

any official accommodation, particularly the property in question in these proceedings.

[59] In the present circumstances, I am compelled to find for a fact that the plaintiff has, with admissible and compelling evidence, shown on a balance of probabilities that it is the owner of the property in question. The defendant has, however dismally failed to show that she is entitled at law to remain in occupation of the plaintiff's property in the circumstances. The plaintiff's claim must thus succeed.

[60] Concomitantly, the defendant's counterclaim, must fail. The defendant failed to show, as stated earlier, that she was entitled at law to occupy the property in question. If anything, the evidence adduced suggests indubitably, that the defendant moved into and occupied the property illegally, behind the plaintiff's back and without following the laid down procedures for occupation of the official accommodation. The defendant cannot, in the circumstances, expect to benefit from her illegal conduct.

[61] I am of the considered view that the fact that the defendant was ultimately placed on the waiting list falls short of admissible proof that she was allocated the property legally and in line with the applicable Government procedures. She has dismally failed, in my considered opinion, to place any admissible evidence that can succeed in deflating the plaintiff's claim, nor is there any evidence that would even marginally suggest that her counter-claim has any merit.

[62] Should the court acquiesce to and allow the defendant to continue in occupation of the property, it would indeed be participating in the perpetration of illegal conduct. This would water down the plaintiff's right to its property, in circumstances where illegal occupants would be allowed to remain in occupation of the owner's property without any lawful authority.

[63] As argued by Ms Nghishekwa, and the plaintiff's witnesses, to allow the defendant's case to prevail, can set a dangerous precedent for Government

employees to allocate Government houses to themselves in complete violation of the established procedures and processes. This must be avoided at all costs.

[64] The defendant pleaded with the court to show some leniency towards her. She argued that if she were to be evicted, she would be affected, as she has no accommodation available to her and her child. Furthermore, she argued that the property is in close proximity to her work place and is so to speak, tailor-made for her personal circumstances, to occupy.

[65] While the court may have all the sympathy for the defendant because of the cold fact that she may not readily find suitable and probably affordable accommodation and may as a result have no accommodation available to her, it would be odd and in fact odious for this court to participate in the violation of the plaintiff's right to its property by allowing an employee to occupy property that does not belong to him or her. To do otherwise, would set a very bad precedent and render the rule of law, a mockery of the first order.

[66] The defendant is in gainful employment and she should do her level best to, within her means, find accommodation for her and her child in the interregnum. I am not certain of the implications of this judgment on her status as one who had been placed on the waiting list, considering the lengths to which the Government has had to go to regain possession of her illegally appropriated property.

[67] I am accordingly satisfied that having regard to all the foregoing, this matter presents itself as an appropriate one in which the court should grant the plaintiff's claim and concomitantly dismiss the defendant's counterclaim. The defendant simply has no defence to the plaintiff's claim and the plaintiff should be allowed to vindicate the Government's property from illegal occupation.

Conclusion

[68] The court finds that the defendant has not successfully challenged the plaintiff's evidence regarding the occupation of the property. She has further not provided evidence of a valid lease agreement or other legal arrangement with the plaintiff. The only document presented by the defendant is a letter of allocation dated 8 October 2021, which does not constitute a binding lease agreement. It rather indicates the beginning of a process that would, all things being equal, ultimately result in allocation of official accommodation to the defendant when that accommodation becomes available in the future.

[69] The principles of contract law, as stated by Christie & McFarlane, above, require a clear agreement by the consent of both parties. This is evidently lacking in this matter. Furthermore, the defendant's failure to cross-examine the plaintiff's witnesses effectively means that the plaintiff's evidence remains largely unchallenged and stands to be regarded as the only acceptable version before the court, following the compelling standard principles outlined in *Small v Smith, supra*.

[70] The court also takes into account that the defendant has acknowledged the ownership of the property by the plaintiff and does not dispute this fact. The deductions reflected on her payslip, which she refers to as rental payments, are clearly identified by the plaintiff as penalty fees for the defendant's unauthorised occupation of the plaintiff's property. I find this for a fact, as the defendant failed to meaningfully or at all, dislodge the plaintiff's evidence in this regard.

[71] The evidence before court, clearly favours the plaintiff, as the Government stands to suffer financial losses that it may not be able to recover from the defendant. The Government's continued deprivation of its property rights, in the circumstances detailed above, cannot be allowed to continue. The court is inclined, in fact obliged by the foundational dictates of the rule of law, on which this Nation is in part, predicated, to protect the plaintiff's rights and interests in this case.

[72] In conclusion, the court finds in favour of the plaintiff. The plaintiff's claim for eviction of the defendant from the property, is hereby granted. The

defendant's counterclaim, which as I said, was not pursued during trial, is dismissed. Consequently, the defendant, with all who hold the property under her or at her instance and behest, are ordered to vacate the premises within the period that is stipulated in the order that follows below.

### Costs

[73] It is settled law that costs ordinarily follow the result. The court was not presented with any reason, substantial or otherwise, to depart from the said general rule. Consequently, the plaintiff will be awarded his costs.

### Order

[74] I am of the considered view, in the circumstances, that following order will, in the premises, be appropriate:

1. The first defendant, together with any other person holding over the property hereinafter described, on her behalf or at her behest, be and are hereby ejected from property, *to wit* Flat No 122/1021, Erf No: 5484 Luna Court Flat 2, Ausspannplatz, Lazarett Street, Windhoek, Republic of Namibia.
  2. The Deputy Sheriff for the District of Windhoek, is hereby authorised to eject the first defendant and any other person holding over the property at her behest or on her behalf, thirty (30) days from the date of this order.
  3. The first defendant is ordered to pay the costs of suit.
  4. The matter is removed from the roll and is regarded as finalised.
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T S MASUKU

Judge

## APPEARANCES

PLAINTIFF: R Nghishekwa  
Of Office of the Government Attorney

1<sup>ST</sup> DEFENDANT: L Kashululu  
Appearing in person.