

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI
PRACTICE DIRECTION 61

Case Title:	Case No:
Shambyu Traditional Authority	HC-NLD-CIV-ACT-OTH-2024/00148
Kavango East Communal Land Board	Division of Court:
Chairperson of the Appeal Tribunal	High Court, Northern Local Division
and	Heard on: 08 November 2024
Raphael Thikusho	Delivered: 23 January 2025
Amos Ngweda	
1 st Plaintiff	
2 nd Plaintiff	
3 rd Plaintiff	
1 st Defendant	
2 nd Defendant	

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Shambyu Traditional Authority v Thikusho* (HC-NLD-CIV-ACT-OTH-2024/00148) [2025] NAHCNLD 07 (23 January 2025)

ORDER

1. The First Defendant's special plea of *res judicata* is upheld.
2. The Plaintiffs' claim is dismissed with costs.
3. The matter is removed from the roll and is regarded as finalised.

MUNSU J:Introduction

[1] The plaintiffs' instituted eviction proceedings against the first defendant. It is alleged that the first defendant is in occupation of Farm Number 1531, Kayengona, Sambyu Area (the premises). It is further alleged that the second defendant is the holder of customary land rights in respect of the premises.

[2] The first defendant entered appearance to defend the matter, and raised a special plea of *res judicata*. It is the aforesaid special plea that is the subject for determination in this ruling.

The particulars of claim

[3] The plaintiffs alleged that on 10 May 2004, the first plaintiff (Shambyu Traditional Authority) granted consent to the second defendant in respect of the premises. It is further alleged that on 22 January 2009, the second plaintiff (Kavango East Communal Land Board) ratified the land rights to the second defendant and allocated a ninety nine (99) year certificate of leasehold under certificate number KACLB (LH) 0259.

[4] The plaintiffs' further claim that on 15 December 2020, the Kavango East Communal Land Board, after a hearing, issued a Notice to the first defendant to vacate the premises within thirty (30) days of receipt of the Notice. Additionally, it is alleged that the first defendant appealed against the eviction notice to the third plaintiff (Chairperson of the Appeal Tribunal), however, his appeal was dismissed on 30 August 2021.

[5] Furthermore, the plaintiffs' allege that despite the extant decisions of the plaintiffs which are legally binding and of full force and effect, the first defendant refuses and/or neglects to vacate the

premises.

[5] The plaintiffs go on to allege that the actions by the first defendant contravene s 17(1) read with ss 24(1), 22, 29(1) and s 44 of the Communal Land Reform Act, 5 of 2002 (the Act), in one or more of the following ways:

- a) He has illegally erected structures on the land, to wit fences.
- b) He has illegally erected homesteads.
- c) He refuses to vacate the land in question.

[6] The plaintiffs further allege that communal land is vested in the State in terms of s 17(1) of the Act read with Article 100 of the Namibian Constitution.

[7] Accordingly, the plaintiffs seek the following orders:

1. An eviction order against the first defendant and all persons claiming occupation through him to vacate the premises.
2. An order directing the first defendant and all persons claiming occupation through him to remove the illegal structures erected by them on the premises.
3. An order in terms whereof should the first defendant fail to vacate the premises and to provide the second defendant with peaceful and undisturbed possession of the premises within seven (7) days of the order, the deputy sheriff of this court to be authorised to do whatever is within his powers to assist the second defendant to be restored to the premises by removing the first defendant and all those claiming occupation through him from the premises.

The special plea

[8] As stated above, the first defendant raised a special plea of *res judicata* to the plaintiffs' claim. He states in his special plea that on 03 June 2021 at Rundu, the Appeal Tribunal, after a hearing instituted by him against the Shambyu Traditional Authority, the Kavango East Communal Land Board and the second defendant, decided that he be evicted from the premises. He states that he requested for a reasonable time to vacate the premises.

[9] The first defendant further pleaded that on 30 August 2021, the Appeal Tribunal ordered him to vacate the premises within six months from the date of receipt of the judgment. He pleads that the present claim for an eviction order against him is a claim for the same thing on the same grounds and against the same party.

[10] The first defendant specifically pleads that what is stated in the particulars of claim by the plaintiffs is the same claim which was dealt with by a competent tribunal (Appeal Tribunal). He accordingly pleads that the present claim was finally adjudicated upon by a tribunal of competent jurisdiction, of which a judgment, which is final and still binding was delivered. He refers to para 11 of the particulars of claim where the plaintiffs aver that the extant decision of the plaintiffs are legally binding and of full force and effect.

[11] In the premises, the first defendant prays for an order upholding his special plea, with the dismissal of the plaintiffs' claim with costs.

[12] In replication, the plaintiffs pleaded that the effect of the decision of the Appeal Tribunal would only be *res judicata* if the Act was 'capable of making it final and enforceable.' It was further pleaded that it is only this court that can render a judgment of the Appeal Tribunal enforceable.

Submissions by the parties

[13] The gist of the submission on behalf of the first defendant is that the plaintiffs, in the present matter, instituted a new action for eviction, rather than an enforcement of the order of the Appeal

Tribunal. At best, counsel submitted, the plaintiffs ought to have come before this court by way of motion proceedings.

[14] It was argued that the case before this court is not an appeal but rather one that has already been adjudicated upon definitively by a competent authority and that an order has been issued. Counsel emphasised that the parties, the cause of action, and the relief sought are all the same in this matter. Accordingly, it was contended that the requirements of *res judicata* have been met.

[15] Counsel for the plaintiffs on the other hand submitted that the point of departure is as pleaded in the particulars of claim that the first defendant is in defiance of the order of the Appeal Tribunal. The reason for that, counsel argued, is because there is no enforcement mechanism provided for in the Act.

[16] Counsel further drew comparison with the Labour Act, 11 of 2007, that provides for an enforcement mechanism for arbitration awards. He pointed out that s 87(1) (b) of the Labour Act provides that an arbitration award becomes an order of the Labour Court upon filing it with the court. However, there is no corresponding provision in the Act i.e. the enforcement of the order of the Appeal Tribunal.

[17] It was further submitted that the plaintiffs could not have come to court by way of application because of potential dispute of fact. Counsel argued that there is no other remedy available to the plaintiffs.

[18] Furthermore, it was argued that the plaintiffs in this case are seeking additional orders, such as the deputy sheriff to enforce the order in the event of non-compliance. Additionally, it was submitted that in the present matter, the forums are not of equal standing, and as such, the special plea cannot be sustained. Reliance was placed on the decision in *Nestle (South Africa) Pty Ltd v Mars Incorporated*¹ wherein the court had the following to say:

¹ *Nestle (South Africa) Pty Ltd v Mars Incorporated* 20014 All SA 315 (A) (31 May 2001).

[17] There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of action.'

[19] Counsel contended that rather than upholding the special plea, the plaintiffs should be permitted to present evidence to demonstrate that the cause of action and the relief sought differ.

[20] Counsel went on to submit that if the order of the Appeal Tribunal is to be enforced in this court, the plaintiffs' would have to show in terms of which law they seek to enforce it. It was submitted that the plaintiffs needed to err on the side of caution. Counsel emphasised that the special plea raised is drastic, and if upheld, will shut the door for the plaintiffs.

Discussion

[21] In *African Farms and Townships Ltd v Cape Town Municipality*², Steyn CJ succinctly stated that:

'The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.'

[22] The *exceptio res judicata* was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions.³

[23] The first defendant claims that the current matter is the same as the one that served before the Appeal Tribunal, which was decided definitively. The plaintiffs on the other hand contend that

² *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A).

³ See Herbstein & Van Winsen *The Civil Practice of the High Court of South Africa* 5ed (2009) at 611.

they seek to enforce the defied order of the Appeal Tribunal.

[24] It is common cause that the Appeal Tribunal had issued an order evicting the first defendant from the premises. The parties agree that the orders of the Appeal Tribunal are binding in nature. This is notwithstanding the fact that the Act does not make provision for the enforcement of orders of the Appeal Tribunal.

[25] As evident from the papers filed, the Kavango East Communal Land Board had conducted a hearing to determine which of the parties between the first and second defendant was entitled to the premises. The Board dismissed the first defendant's claim of land rights and in the end gave him thirty (30) days to vacate the premises. He contended that thirty (30) days was not sufficient time to allow him to vacate the premises.

[26] On appeal, the Appeal Tribunal's sole task was to decide what constituted a reasonable period for the first defendant to vacate the premises. In the end, the Appeal Tribunal determined six (6) months as the appropriate time frame for the first defendant to vacate the premises. That period has come to pass.

[27] Thus, the question of whether the first defendant must vacate the premises has been finally disposed of in the hearings before the Land Board and the Appeal Tribunal. In the event of non-compliance with the order, the only issue is the enforcement of the said order. Ordinarily, this is supposed to be by way of application.

[28] In *casu*, the particulars of claim shows that the plaintiffs are seeking 'an eviction order' against the first defendant. However, such order was already granted by the Appeal Tribunal. As it stands, the first defendant is already evicted. There is no dispute on the existence of such order, and ordinarily, the order would speak for itself.

[29] Thus, the court finds that there is a repetition of law suits herein, and accordingly, the special

plea must be upheld.

Costs

[30] Costs shall follow the event.

The order

[31] In the result, the following order is made.

1. The First Defendant's special plea of *res judicata* is upheld.
2. The Plaintiffs' claim is dismissed with costs.
3. The matter is removed from the roll and is regarded as finalised.

	Note to the parties:
D MUNSU Judge	None
Counsel:	
Plaintiffs:	Defendant:
J Ncube Of the Government Attorney, Windhoek.	M Nyambe Of Mukaya Nyambe Inc, Ongwediva.