REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 169/2013

In the matter between:

1.1.1.1.	**ZERAEUA TRADITIONAL AUTHORITY**
	APPLICANT

and

JOHN HIJATJIKOKO MATE	**FIRST RESPONDENT**
SAMUELINE SAMBANI HIKO	**SECOND RESPONDENT**
JOHANNES MUTANGA	**THIRD RESPONDENT**
BOESMAN TJITJAHUMA	**FOURTH RESPONDENT**
DAWID ERASTUS	**FIFTH RESPONDENT**
CORNELIA MUROTUA	**SIXTH RESPONDENT**
NOAG TJITUA	**SEVENTH RESPONDENT**
T H MATHEWS TJITOMBO	**EIGHTH RESPONDENT**
GERSON KANDANGA	**NINTH RESPONDENT**
EMGAHARD PURIZ	**TENTH RESPONDENT**
ALL OTHER PERSONS THAT ARE ILLEGALLY OCCUPYING FARM OTJUMUE NO 109, FARM OTJUMUE SUD NO 110 AND FARM GROSS OKOMBAHE NO 193, SITUATED IN THE DISTRICT OF OMARURU, ERONGO REGION IN THE REPUBLIC OF NAMIBIA	**ELEVENT RESPONDENT**

ERONGO COMMUNAL LAND BOARD **TWELFTH RESPONDENT**

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **THIRTEENTH RESPONDENT**

THE INSPECTOR-GENERAL OF THE NAMIBIAN POLICE **FOURTEENTH RESPONDENT**

Neutral citation: *Zeraeua Traditional Authority v Mathe & Onothers (A 169/2013) [2013] NAHCMD 163 (13 June 2013)*

Coram: SMUTS, J
Heard: 6 June 2013
Delivered: 13 June 2013

Flynote: Urgent application for spoliation and eviction brought by traditional authority. Principles relating to urgent applications restated. Application for spoliation refused because applicant could not show deprivation of possession by reason of respondents' occupation predating its possession and control. Applicant found to be in possession after handover of farms by the Government. Respondents could not establish any right to be on the farms. Eviction order granted.

ORDER

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1. A rule *nisi* hereby issues calling upon first to tenth respondents to show cause if any, on 10 July 2013 at 09h00 why an order in the following terms should not be made final:

1.1.2.

1.1.3. 1.1 Evicting the first to tenth respondents from Farm Otjumue No 109, Farm Otjimue Sud No 110 and Farm Gross Okombahe No 193 in the district of Omaruru;

1.2 Directing that the first to tenth respondents forthwith vacate the aforesaid farms together with their livestock and any possessions

that they have unlawfully brought onto the aforesaid farms;

1.3 Directing that the first to tenth respondents refrain in any way whatsoever from interfering with the applicant's possession and control of the aforesaid farms;

1.4 Directing that the first to tenth respondents pay the costs of the application, including the costs of one instructed and one instructing counsel.

2. The orders set out in paragraphs 1.1, 1.2 and 1.3 above are to operate as interim interdicts pending the aforesaid return date.

JUDGMENT

SMUTS, J

[2] In this urgent application, the applicant, a traditional authority duly recognised under s 2 of the Traditional Authorities Act, 25 of 2000, seeks spoliation orders against the first to eleventh respondents. In the alternative the applicant seeks an eviction order against them.

Background

[3] The background to this application is that the Government of Namibia, cited as the thirteenth respondent, had purchased certain farms in the Omatjete and Okambahe areas adjacent to land incorporated in a communal area falling under the jurisdiction of the first applicant. The purpose in doing so was for these farms to be incorporated into the communal land falling under the applicant's jurisdiction. To this end, the Government, represented by the Minister of Lands and Resettlement, proceeded to hand over three farms to the

applicant on 2 May 2013 at a ceremony attended by members of the traditional community under the jurisdiction of the applicant and other members of the public. The three farms in question are Farm Otjumue No 109, Farm Otjumue Sud No 110 and Farm Gross Okombahe No 193. Together they measure some 13,900 hectares.

(d)

[5] In the founding affidavit it is stated on behalf of the applicant that the Government has initiated the process of incorporating these farms into the communal area under the applicant by way of notice in the Government Gazette pursuant to the provisions of the Communal Land Reform Act, 5 of 2002. It is common cause that that process has not as yet been completed and that these farms have not as yet been duly incorporated into the communal area under the jurisdiction of the applicant as is envisaged by that Act.

[6] After the ceremony on 2 May 2013 officials of the applicant inspected the farms and noted that there were persons occupying the farms and that there were cattle grazing on them. In this process, it is stated on behalf of the applicant that the first to eleventh respondents were identified as occupying the farms and that their cattle occupy the farms. The first ten respondents are individuals cited and identified. The eleventh respondent is cited in the following way:

> '. . .all persons that have unlawfully taken occupation of the (farms) . . . without the authorisation and consent of the applicant. . . Despite diligent efforts by the applicant to obtain particulars of these respondents, the applicant was unable to obtain such particulars and has consequently no further particulars of these respondents.'

[7] There had been no prior application for substituted service on these respondents lumped together in this way as the eleventh respondent. Mr Khama who appeared for the applicant submitted that there had been service on these respondents and referred to the deputy sheriff's return. It merely stated that there had been service on the eleventh respondent 'by exhibiting the original document to Gerson Tjitera, a person who is not younger than 16 years of age

and in charge of the premises at the same time handing her (sic) a true copy thereof and explain (*sic)* to her (sic) the nature and contents thereof. I am unable to grasp how this return could constitute service upon the unidentified respondents lumped together as the eleventh respondent in any sense whatsoever. There was no evidence concerning control exercised by Mr or Ms Tjitera referred to in the return other than the reference to the unidentified persons who are alleged to occupy or have their cattle grazing on the farms. Nor was there any application for substituted service before me. When I raised this with Mr Khama, he did not even seek to apply for substituted service by way of alternative relief. It is clear to me that the unidentified persons on the farm have thus not been properly served with this application and in the absence of any application for substituted service, they will not be affected by these proceedings until and unless that occurs.

[8] A point was taken by Mr Denk, appearing on behalf of the first to tenth respondents, that the third and fifth respondents had not been properly served. But a notice to oppose had been provided on their behalf. They had also filed affidavits confirming what was stated in opposition on their behalf by the ninth respondent. It is not clear to me quite why this point was taken. It cannot be of any moment, given the fact that a notice to oppose has been filed on their behalf and they have also deposed to affidavits opposing the affidavit and confirming the opposition stated on their behalf.

[9] It was further stated on behalf of the applicant that, after the inspection was conducted of the farms on 7 May 2013, members of the applicant called a public meeting at a nearby village to inform persons occupying the farms and the general public that they were not allowed to graze their livestock on the farms or to occupy them. It was further stated that these people were informed that the correct procedure would be to apply to the applicant for the allocation of customary land rights in respect of the farms. The applicant however states that the farms were not vacated and people and cattle remained on the farms, despite being heeded by the applicant not to be there. It was further stated that the applicant then served demands upon certain of the respondents on 14 May 2013. When this did not have desired result, the applicant lodged an urgent

application in the Magistrate's Court of Omaruru to have the respondents evicted from the farms. It was stated that the Magistrate's Court held the view that there had been non-compliance with its rules and struck the application from the roll. The applicant then instructed the institution of this application which was issued on 30 May 2013 and served upon most of the respondents on 31 May 2013.

[10] The ninth respondent filed an answering affidavit on behalf of the first ten respondents. The Government of Namibia, the Inspector-General of the Namibian Police and the Erongo Communal Land Board, all cited as respondents in the application, have through the Government Attorney indicated that they abide by the decision of this Court. The first to tenth respondents' answering affidavit was served a day before the hearing, on 5 June 2013. On the morning of the hearing, a replying affidavit was served and filed. The matter stood down for a few hours for the respondents' representatives and the court to consider the replying affidavit and argument proceeded later on 6 June 2013.

(k) **The 1st to 10th respondents' opposition**

[12] Apart from opposing the merits of the application and its alternatives, the respondents have taken certain preliminary points as well. In the first instance, they raised the defence of *lis pendens*. In doing so they referred to the eviction application in the Magistrate's Court which was attached to the answering affidavit. They state that the parties cited in the first application are identical except for a respondent incorrectly cited. They state that the application has not been withdrawn and thus remains pending in that court. These facts were confirmed in the replying affidavit. The first to tenth respondents submit that the same relief is claimed in both the Magistrate's Court application and in this application and that the doctrine of *lis pendens* would then find application and that this application thus constitutes an abuse of process and should be dismissed for this reason.

[13] In the second instance, the respondents take the point that their rights to a fair trial have been truncated by the short service of the application. When I

asked Mr Denk on behalf of the respondents if they would seek time to supplement their opposition to the application, he declined the invitation. I then enquired as to why a point of truncation of time periods resulting in the infringement of their rights to a fair trial should arise if those respondents were offered the opportunity of supplementing their affidavits and declined it. I then understood that he accepted that this point would then not avail the respondents.

[14] The respondents also took the point that the applicant had not properly brought the application as one of urgency. I understood from the argument advanced on their behalf that the respondents took the point that the applicant had delayed the bringing of the application and that if any urgency attached to the application, it was self-induced or created by their remissness or inaction.

[15] The respondents also took the point that the applicant lacked *locus standi* to bring the application by virtue of the fact that the land had not as yet been incorporated in the communal area by way of notice in the Goverment Gazette, as is required by the Communal Land Reform Act and that the applicant as a consequence did not have jurisdiction over the land and therefore could not seek the relief set out in the application.

[16] A point of non-joinder was also taken in respect of the registered owners of the farms because the farms had not as yet been registered in the name of the Government. These points are considered in that sequence, except for the points of locus and non-joinder which are dealt with in the segment concerning eviction.

Lis Pendens

[17] Both counsel referred me to the decision of this court in *Jacobson and another v Machado.* [1] This court referred to the elements of the defence of *lis pendens* stating that the onus rests upon a party raising that defence to prove

(a)

[1] 1992 NR 159.

'(a) that there is litigation pending between the same parties;

(b) that the other proceedings are pending between the same parties or their privies;

(c) the pending proceedings are based on the same cause of action, and it is in respect of the same subject-matter, although it is not exactly identical.'[2]

[18] At the conclusion of oral argument I invited both counsel to provide me with further authorities in writing on the issue by 10 June 2013 and particularly as to the position of the High Court exercising jurisdiction even when there were proceedings in the Magistrate's Court which had not become finalised.

[19] Counsel provided further the authority on the issue of *lis pendens*. Much of this authority has been helpful although none of the cases dealt directly with the point raised in this matter, namely where proceedings in a Magistrate's Court had been struck from the roll and other proceedings were commenced in the High Court.

[20] Whilst it is clear to me that the proceedings in both the Magistrate's Court and in this Court may involve the same parties and the same cause of action, it is not clear to me that the proceedings in the Magistrate's Court are presently pending in the sense contemplated by the defence of *lis pendens*. The application in the Magistrate's Court was struck from the roll by that Court – for want of urgency, so I have been informed. Whilst those proceedings had begun, they were brought to a halt by the Magistrate striking the application from the roll. The applicant would need to take further steps to re-enrol those proceedings. Until those steps are taken, those proceedings are not in my view pending in the sense required for the defence of *lis pendens*. The applicant instead decided to bring these proceedings in this Court.

[21] But even if I were to be wrong upon this issue, it is well established that

[2]Supra at 162I – 163A.

the defence of *lis pendens* is not an absolute bar and that it is strongly underpinned by considerations of convenience and fairness which should be decisive in the exercise of a Court's discretion when the defence is raised, as was held in this Court in *Ex Parte Momentum Group Ltd and Another*:[3]

> 'The defence of lis pendens is not an absolute bar. It is within the court's discretion to decide whether proceedings before it should be stayed pending the decision of the first-brought proceedings, or whether it is more just and equitable that the proceedings before it should be allowed to proceed. (*Michaelson v Lowenstein* 1905 TS 324 at 328; *Westphal v Schlemmer* 1925 SWA 127; *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T).) Considerations of convenience and fairness are decisive in determining this issue (*Van As v Appollus en Andere* 1993 (1) SA 606 (C) at 610D and cases cited there.) I therefore proceed to consider these issues.' [4]

[22] In my view these proceedings cannot in the circumstances be described as an abuse or as vexatious in any sense. Taking into account considerations if convenience and fairness and the importance of the rule of law in the Republic of Namibia, I would in any event exercise my discretion in not upholding the defence of *lis pendens* and permitting the matter to proceed.

Spoliation

[23] Turning to the question of spoliation, Mr Denk correctly submitted that relief of that nature is final in effect by its very nature and that, in the event of a dispute of fact arising on the papers, in the absence of any application for a referral to oral evidence, the disputed facts are to be determined in accordance with the well established approach in motion proceedings on the basis of what is contained in the respondents' answering affidavit where the facts are in dispute.[5]

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[3]2007(2) NR 453 at 462 (par 37).

[4]See also *Veneta Mineraria Spa v Carolina Colleries (Pty) Ltd* (in liquidation) 1987(4) SA 883 at 888; *Kempster v Sedgwick (Pty) Ltd* v Rajah 1959(1) SA 319 (N).

[5]On the basis of what is been termed the Stellenvale-rule with reference to Stellenbosch. *Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234 (C) at 235, as followed and explained in *Plascon Evans Paints v Van Riebeek Paints* 1984(3) SA 623 (A) at 634 and as has

[24] Mr Denk referred to the unequivocal statements by the respondents that their cattle had grazed on the farms prior to the symbolic handover on 2 May 2013. He further submitted that not only were these statements essentially unchallenged in reply, but there was also support for them in the founding affidavit where there was repeated reference on behalf of the applicants to people occupying the farms prior to the symbolic handover.

(y)

[26] Mr Denk further submitted that once this fact was accepted, there could be no question of deprivation of possession in the sense contemplated by a spoliation remedy. This submission is in my view sound. Being required to apply the Stellenvale rule, and accepting the respondents' statements to this effect, namely that their cattle had been grazing on the farms prior to the symbolic handover, there can in my view be no question of deprivation of possession as is required in spoliation proceedings. At best for the applicant, it acquired possession on 2 May 2013 at a time when others occupied the farms personally or with their cattle. It was thus not deprived of its possession thereby. For this reason alone, the application for spoliation orders must in my view fail.

Urgency

[27] Mr Denk also strenuously contended that the application was not properly brought as one of urgency in the sense that any urgency was self created. The papers were served on certain respondents only on 31 May 2013. He further submitted that the striking of the application in the Magistrate's Court would not assist the applicant in the context of urgency if the proceedings there had not been properly brought. He submitted that the respondents had been prejudiced by reason of the truncation of the time periods for filing answering affidavits and in their preparation. As I have already indicated, I enquired as to whether the respondents sought further time to file further answering affidavits and to prepare for the proceedings. This was declined by Mr Denk, and understandably so, given the fact that the respondents had filed full answering papers and that Mr Denk was well prepared and advanced considered

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been consistently applied in this court.

argument before me.

(bb)

[29] Mr Khama on the other hand referred to the test for urgency recently restated in this Court in *Khomas Investments Three Seven CC and another v Maivha Construction CC* [6] where it was stated: [7]

> '[16] Whilst this Court has recognised that there are varying degrees of urgency including in commercial matters, it has been repeatedly emphasised that it is incumbent upon applicants to demonstrate with reference to the facts of the specific matter that they are unable to receive redress in the normal course and that the facts of their matter would justify the urgency with which the application has been brought. It has also been repeatedly stressed that applicants would need to show that they have not created their own urgency and that the respondents have been afforded sufficient opportunity to deal with the matters raised.
>
> [17] It has also been stressed that a Court could also take into account logistical difficulties in the bringing of an application, provided that these are fully and satisfactorily explained.'

[30] Mr Khama also referred me to the decision of this Court in *The Three Musketeers (Pty) Ltd and another v Ongopolo Mining and Processing Ltd and others* [8] which applied the *dictum* in *Radebe v Government of the RSA* [9] concerning factors to be taken into account in review proceedings when considering whether there had been any unreasonable delays in bringing that review and applying these when considering whether there was an unreasonable delay in bringing an application as one as urgency as contemplated by Rule 6:

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[6]Unreported (Case No A170/2012), 30 August 2012.

[7]*Supra* par 16 and 17 with reference to *Petroneft International and Another v Minister of Mines and Energy and Others*, unreported, 28 April 2011, case no. A 24/2011; *Bergmann v Commercial Bank of Namibia and Another* 2001 NR 48 (HC); *Mweb Namibia (Pty) Ltd v Telecom Namibia and Others* 2012 (1) NR 331 (HC).

[8]Unreported 30 November 2006, confirmed on appeal.

[9]1995(3) SA 787 (N).

> 'When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation (*Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1192); to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.
>
> When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates.'[10]

[31] In taking into account these factors and those raised in argument, including the distances involved, the steps taken by the applicant in seeking the removal of those occupying the farms firstly by holding meetings and thereafter by sending demands through its legal practitioners, I do not consider that the applicant unreasonably delayed in bringing this application. In the exercise of my discretion, I accordingly grant condonation for the non-compliance with the rules of court and hear this application as one of urgency.

Eviction

[32] The points of a lack of standing and joinder are dealt with under this heading.

(gg)

[34] The applicant in the alternative claims the eviction of the respondents from the farms. Mr Denk takes the point that the applicant has not established its possession of the farms and thus has no standing to bring this application. He correctly points out that it would need to do so by reason of the fact that, as

[10] Supra at 799.

was shown in the answering affidavits, the Government does not yet have title of the farms and that the forms have furthermore not as yet been incorporated in the communal land under the jurisdiction of the applicant in accordance with the Communal Land Reform Act.

(ii)

[36] Mr Khama countered that possession and control had been transferred to the applicant when the Minister handed over possession to the applicant on 2 May 2013. When making this submission, I requested him to refer to facts in the papers establishing the applicant's possession and control. The passages he referred me to did not deal with this issue directly. This may have been because the main relief sought by the applicant was that of spoliation. But the applicant did however stated that the Government handed over the control and possession of the farms to it on 2 May 2013. This was confirmed in an affidavit by the Minister of Lands and Resettlement.

(kk)

[38] The stated purpose of the handover was to confer upon the applicant the possession and control of the farms with a view to administering the process of allocation of customary land rights and other rights for the traditional community under the jurisdiction of the applicant. This was also confirmed by the Minister. These rights include grazing. It is also pertinently stated on behalf of the applicant that it accepted 'the conferment of possession and control by the Government'.

[39] Mr Denk however contended that there was no evidence that the Government had possession because possession would ordinarily be conferred by title and that transfer into the Government's name from the sellers had not as yet occurred. It was for this reason the point of non-joinder of the registered owners was required. In reply, certificates were attached to demonstrate that the process of transfer is proceeding.

(nn)

[41] Whilst Mr Denk is entirely correct that title and possession would coincide if not otherwise provided for, experience shown that this does not necessarily occur in practice. Possession can by agreement be conferred upon a purchaser prior to the date of transfer. Indeed, the transfer of title and possession

frequently do not coincide for practical or other reasons which parties may have in coming to their respective agreements on the issue.

(pp)

[43] In this instance, the Minister of Lands on behalf of the Government confirmed that possession and control had been conferred upon the applicant. This could not have occurred in the absence of the Government itself having possession. The respondents placed no facts before me to place that in issue in any sense but have merely disputed that this has been established. This cannot in my view override the unequivocal statement to that effect by the Minister and confirmed by the applicant as to possession and control being conferred in the context of the Government's acquisition of the farms for the uncontroverted stated purpose of doing so and the uncontroverted fact that the Government was in the process of acquiring title to the farms.

(rr)

[45] I further take into account the respondents' statements that they and others had occupied or or had grazed their cattle on the farms in question for some time, thus further indicating that the registered owners of the land would not appear to have been exercising possession or control over them prior to the conferral of possession and control by the Minister on behalf of the Government to the applicant.

(tt)

[47] In the circumstances, I am of the view that the applicant has established its possession and control of the farms for the purpose set out in the founding papers. It thus follows that the assertion if lack of standing does not avail the respondents. Nor does the point of joinder in the circumstances where those registered owners no longer exercised possession and in the context of the imminent transfer if title to the Government.

[48] Having established possession of the farms on the part of the applicant, the question arises as to the rights asserted by the respondents to graze their cattle on the farms. In this context I asked Mr Denk in argument what right they asserted to graze their cattle on that land. He was unable to refer to a legal basis for the respondents to graze their cattle on the farms, apart from stating that the cattle would proceed onto the farms by virtue of the fact that they were

not properly fenced. This however does not entail the invocation of a right to graze their cattle on those farms.

[49] As I pointed out during argument, the Republic of Namibia is by virtue of Article 1 of the Constitution, founded upon the rule of law. This court cannot countence parties taking the law into their own hands and engaging in seek help or a free for all when it comes to grazing and occupying land. That is inimical to the rule of law. The property of others, including the State, is to be respected and, as in this case, the possession and control of statutory authorities such as duly constituted traditional authorities in respect of the land under their possession and control.

[50] As the respondents have not been able to assert any right to graze their cattle on the farms, it is clear to me that the applicant as possessor is entitled to their eviction and to require that they must desist from doing so. I would accordingly grant the alternative relief of eviction in the form of a rule *nisi* as against those respondents who have been properly served. As far as the people grouped together as the eleventh respondent are concerned, the applicant would need to take steps to properly bring those persons before court if it wanted to exercise any remedy against them.

(yy)

[52] As to the question of costs, even though the primary relief sought by the applicant was spoliation which cannot succeed as I have pointed out, it has been substantially successful against the first to tenth respondents. This, in my view, and in the exercise of my discretion would entitle the applicant to its costs, thus far as reflected in the rule nisi.

[53] I accordingly grant the following order as against first to tenth respondents:

(bbb)

1. A rule *nisi* hereby issues calling upon first to tenth respondents to show cause if any, on 10 July 2013 at 09h00 why an order in the following terms should not be made final:

54.1.1.

54.1.2. 1.1 Evicting the first to tenth respondents from Farm Otjumue No 109, Farm Otjimue Sud No 110 and Farm Gross Okombahe No 193 in the district of Omaruru;

1.2 Directing that the first to tenth respondents forthwith vacate the aforesaid farms together with their livestock and any possessions that they have unlawfully brought onto the aforesaid farms;

1.3 Directing that the first to tenth respondents refrain in any way whatsoever from interfering with the applicant's possession and control of the aforesaid farms;

1.4 Directing that the first to tenth respondents pay the costs of the application, including the costs of one instructed and one instructing counsel.

2. The orders set out in paragraphs 1.1, 1.2 and 1.3 above are to operate as interim interdicts pending the aforesaid return date.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	B. Khama Instructed by JR Kaumbi Inc.
RESPONDENTS:	A. Denk Instructed by Hengari, Kangueehi & Kavendjii Inc.