'Not Reportable'

CASE NO.: I 808/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EVARISTUS NAUYALA **Plaintiff**

and

TITUS HEITA **First Defendant**

HILJA NAMUPA LOUW **Second Defendant**

***CORAM*:** **PARKER J**

Heard on: 2011 July 4 – 5

Delivered on: 2011 July 22

JUDGMENT

PARKER J: [1] In this matter, evidence was adduced on both sides of the suit. Mr. Namandje represents the plaintiff, and Mr Van Vuuren the second defendant. There is no appearance by the first defendant in person or by counsel. The reason is that the first defendant passed away before

the trial of the action. From the pleadings, the evidence and oral submissions by counsel, it seems to me clear that the essence of the issues at play may be reduced to this critical and crucial question: Is the plaintiff the registered owner of Plots 1746 and 1747 according to the Outapi Town Council. I say 'Outapi Town Council' because the land in the present dispute was part of the land controlled and administered by the Ombalantu Tribal (later 'Traditional') Authority, but in virtue of the Local Authorities Act, 1992 (Act No. 23 of 1992) that land now lies within the boundaries of the Outapi Town Council; and it has been so since 1997 when Outapi was proclaimed a town in terms of Proclamation No. 14 of 1997 (GG1673, as amended).

[2] I now pass to consider what, according to the plaintiff, forms the legal basis of his contention that he is the registered owner of the said Plots 1746 and 1747. The plaintiff's contention may be set out briefly as follows. In 1976 the whole piece of land within which Plots 1746 and 1747 are now situate was assigned to him by the then Ombalantu Tribal Authority for an amount of R200.00 as consideration. And how did the plaintiff know the extent of the land that, as he says, was assigned to him by the Ombalantu Tribal Authority? In this regard, the piece of evidence which stood unchallenged at the close of the plaintiff's testimony, was that after the piece of land had been allocated to him, as aforesaid, a member of the Ombalantu Tribal Authority accompanied him to the land, and as the member indicated to him the extent of the land that had been assigned to him, the plaintiff used a cutlass to cut a path through the thicket to mark the

limits of the land so assigned and shown to him. Thereafter, the plaintiff placed 'traditional trees' along the path he had cut through the thicket. Some years later, that is, after Namibia's Independence, he replaced those 'traditional trees' with poles and wire-mesh. I shall return to this piece of evidence in due course.

[3] As proof of the aforementioned assignment by the Ombalantu Tribal Authority, the plaintiff relies on a letter under the hand of:

> Shilimetindi Annastasia
> Secretary
> CHIEF: O. Mukulu

The letter, which is dated 10 July 2002, is embossed with the date stamp of the Ombalantu Tribal Authority (Exh 1 (in 'Oshiwambo' language), and Exh 2 (in English, translated by a sworn translator)). Exh 2, in material part, reads:

> The land of Okavu Super Market at Okavu belongs to Evaristus Nauyala, which was given to him by the Chiefs in the year 1976. N$200.00

[4] As respects Exh 2, it is the submission of Mr Van Vuuren that the letter should not be accepted by the Court as proof of the aforementioned assignment. Why does Mr Van Vuuren so submit? Mr Van Vuuren says that the letter is vague. And why does counsel say so? Counsel argues that all that the letter says is 'land of Okavu Super Market at Okavu', and according to counsel, that does not mean the entire piece of land, presently consisting of 21 Plots in terms of the Outapi Town Councils zoned plan (Exh

C). Mr Van Vuuren's argument, as I understand it, is that the letter refers to only the land upon which 'Okavu Super Market' sits. It is not in dispute that the plaintiff is the owner of Okavu Supermarket.

[5] Counsel's understanding of the contents of the letter and his argument thereanent are attractive; but, with respect, only superficially so, if regard is had to the following *aliunde* evidence. When the 'Chiefs' of the Ombalantu Tribal Authority gave the land to the plaintiff, it was a free-lying unzoned land: the land had not yet been zoned and demarcated into the present 21 Plots. The plaintiff fenced off the land that had been given to him with traditional trees, and later replaced the fence with poles and wire mesh, as I have found previously. When Outapi was proclaimed a town, as aforesaid, the Council, in terms of the Cabinet 'Compensation Policy' (Exh A), identified the plaintiff as the 'legal occupant' of all that extent of land, consisting of the 21 Plots, and so offered to him the options provided by Exh A. That was the evidence of Ms Saara Ndeshidalwa, Head: Town Planning of the Outapi Town Council; and I have no good reason not to accept her evidence as credible. Accordingly, I find that as respects the entire piece of land, consisting of the aforementioned 21 Plots, it was only the plaintiff who, in terms of Exh A, qualified as an 'occupant of land' within the Local Authority (i.e. the Outapi Town Council) boundary 'who has paid for occupational rights to the respective traditional leaders (the "Chiefs" of the Ombalantu Tribal Authority) in the past (before December 1992)' in terms of the aforementioned Cabinet Policy.

[6] It follows reasonably and inevitably that if the phrase 'The land of Okavu Super Market is read contextually and against the backdrop of the evidence I have accepted above – as it should – it seems to me clear that the phrase cannot mean simply the piece of land into which the Okavu Supermarket fits. As I see it, what the phrase means is the land where Okavu Supermarket is situate; and from the evidence *aliende* referred to previously it refers to the land, presently consisting of the aforementioned 21 Plots.

[7] Keeping this conclusion in my mind's eye, I find that Mr Van Vuuren's argument cannot take the second defendant's case any further than where it is. And the second defendant's case is that she has a better right to Plots 1746 and 1747, which are part of the 21 Plots, as I have mentioned *ad nauseam*. And upon what legal basis does the second defendant say she has a better right to Plots 1746 and 1747, which are included in the 21 Plots.

[8] The defendant says that her bona fide possessory right to Plot 1746 and 1747 is based on two grounds. The first is that she saw her father building on the land and making expansions to the buildings on the land, and fencing the land; and so, the second defendant contends that her father (the first defendant) was a co-owner of the land in question; that is, co-owner with the plaintiff. On that basis, it is the second defendant's position that she holds her right to these two Plots through her father. In my opinion,

the fact that first defendant constructed buildings on the land and expanded those buildings cannot on their own as a matter of law found the first defendant's 'ownership' of the Plots in question. On the totality of the evidence I have accepted previously, I find that the plaintiff had given permission to the first defendant, his uncle, upon the first defendant's begging and entreaties, to build a petrol service station on the plaintiff's land. By a parity of reasoning, I also accept the plaintiff's evidence that, again, upon the begging and entreaties of the first defendant, the plaintiff permitted the second defendant to put up temporary structures on Plots 1746 and 1747 so that she could carry on business on those Plots for the purpose of raising funds to allegedly pay for a deferred fine that had been imposed on her by a court in Windhoek and to repay her former employers monies she had either misappropriated or she owed to them. More important for my present purposes; the plaintiff testified that he had permitted the second defendant to carry on business on those Plots on condition that she constructed temporary structures on his land for the purpose so that if in future the plaintiff and the second defendant had any personal differences pertaining to his land it would be easy for the second defendant to pull down the temporary structures and cart them away. It follows that in my opinion, the contention by the second defendant that she holds her right to Plot 1746 and 1747 through her father (the first defendant) has no basis in law: this first ground is therefore not sound in law.

[9] The second defendant's second ground is that the Ombalantu Tribal Authority confirmed her right to the Plots. And why does the second

defendant so contend? She relies on the following entry at p. 50 (bundle of documents placed before the Court) of the AGRIBANK's loan application form:

> (a) Confirmed by Traditional Authority
>
> Name: OSININ MUKULU
>
> Signature: O. Mukul.....
>
> Date Stamp
>
> OMBALANTU TRIBAL AUTHORITY
>
> Date: 31-12-1997
>
> OUTAPI

[10] The said loan application form is captioned:

> 'AGRIBANK OF NAMIBIA
> Reference No. 4/98
> NATIONAL AGRICULTURAL CREDIT PROGRAMME
>
> APPLICATION FOR A LOAN(S) TO PURCHASE PRODUCTION INPUTS FOR CROP PRODUCTION/STOCK/INFRASTRUCTURE AND OTHER FARMING IMPLEMENTS EQUIPMENT AND MACHINERY IN TERMS OF SECTION 34 OF THE AGRICULTURAL BANK ACT NO. 13/1944.'

And the particulars thereof are at pp. 47-53 of the bundle of documents placed before the Court. There is nothing in the entire document of seven pages remotely indicating the legal basis of the second defendant's ownership of the Plots in question. Indeed, there is also nothing to indicate what the Ombalantu Tribal Authority was confirming. Since, as I have found, the Authority was not confirming the second defendant's ownership of the Plots in the second

defendant's own right or through the first defendant then the second defendant's reliance on the second ground, too, has no basis in law.

[11] The result is that the grounds relied on by the second defendant as supporting her possessory right to Plots 1746 and 1747 have no basis in law. Accordingly, I respectfully reject those grounds.

[12] From the aforegoing conclusions and reasoning, I conclude with a firm conviction that the plaintiff has shown on a balance of probabilities that he is the registered owner of Plots 1746 and 1747 lying within the boundaries of the local authority area of the Outapi Town Council, and that the second defendant uses those Plots subject to the rights and indulgence of the plaintiff. In sum, I am satisfied that the second defendant has no right better than the plaintiff's to the Plots in question: she has no claim adverse to the plaintiff's. The plaintiff gave the second defendant permission – through the first defendant – to carry on business there: on the conditions mentioned previously. It seems to me clear that the second defendant has not only breached those conditions by erecting permanent structures on the Plots where she was permitted to carry on her business, but she also now claims ownership of the Plots in question. The second defendant is not, on the facts of this case, a bona fide possessor of Plots 1746 and 1747 (see *Frankel Pollak Vinderine Inc v Stanton NO* 2000 (1) SA 425 (W)). The second defendant's adverse claim is not sound in law.

[13] The result is that in my judgment the plaintiff's claim succeeds. Whereupon, I make the following order:

(1) Interdicting defendants from continuing their construction on the land occupied by the plaintiff in Outapi Town, Ombalantu.

(2) That the second defendant must vacate the said land and remove the structures erected on it not later than 5 August 2011; and if the second defendant refuses or fails to do that, the Deputy Sheriff responsible for Outapi District is hereby authorized to remove the structures; and any costs involved in the removal must be recovered from the second defendant.

(3) That the second defendant pays the costs of this application.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Mr S Namandje

Instructed by: Sisa Namandje & Co. Inc.

COUNSEL ON BEHALF OF THE DEFENDANTS:

Mr C J J Van Vuuren

Instructed by: Kruger, Van Vuuren & Co.