NOT REPORTABLE

CASE NO. A 224/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE MUNICIPAL COUNCIL OF WINDHOEK	**APPLICANT**

and

ANDREAS KHAOSEB	**1st RESPONDENT**
MOSES ABRAM	**2nd RESPONDENT**
CHRISTINA KARISES	**3rd RESPONDENT**
MARTHA GAWANAS	**4th RESPONDENT**
FESTUS GAOSEB	**5th RESPONDENT**
HANNES JACOBS	**6th RESPONDENT**
HANS /HOXOBEB	**7th RESPONDENT**
JEFRIED UIRAB	**8th RESPONDENT**
CHIEF JOSEPHAT GAWANAB (NO)	**9th RESPONDENT**
/KHOMANIN TRADITIONAL AUTHORITY	**10th RESPONDENT**
OTHER OCCUPIERS OF WINDHOEK TOWN AND TOWNLANDS NO. 31 ALSO KNOWN AS COMMONAGE FARM NO. 3 WHOSE OCCUPANCY IS UNAUTHORISED BY THE MUNICPAL COUNCIL OF WINDHOEK	**11th RESPONDENT**

CORAM: CORBETT, A.J

Heard on: **9 NOVEMBER 2011**

Delivered on: **1 JUNE 2012**

JUDGMENT

CORBETT, A.J: .

[1] On 5 September 2011 the applicant brought an application on an urgent basis to evict the first to eighth respondents, and the eleventh respondent from their occupation of a farm owned by the applicant, known as Windhoek, Town and Townlands No. 31, and also known as Commonage Farm No. 3 ("the farm") situated in the District of Windhoek. The Court granted condonation in respect of urgency and issued a rule *nisi* (per my brother Swanepoel J) returnable on 23 September 2011 requiring the respondents to show cause why:

> "3. The first to the eighth and eleventh respondents not be evicted from the applicant's farm, being Windhoek Town and Town Lands No. 31 also known as Commonage Farm No. 3 situated 15 kilometres along the Daan Viljoen road in the municipal jurisdiction of Windhoek.
>
> 4. The date by which the first to the eighth and eleventh respondents must vacate the said farm is 23 September 2011.

5. The applicant or any of its agents is/are authorised to demolish, remove and dispose of structures and buildings erected or occupied by the first to the eighth and eleventh respondents on or after 24 September 2011.

6. That the first to eighth and eleventh respondents are interdicted and restrained from erecting any structures or buildings on the said farm after the eviction order set out in prayer 4 *supra*.

7. In the event that any other person occupies the applicant's farm after this notice of motion has been served on the respondents, it is ordered that that person be evicted and authorizing the Deputy-Sheriff of this Honourable Court to demolish, remove and dispose of that person's structure or building on or after 24 September 2011.

8. That the first to the eighth and eleventh respondents are interdicted and restrained from occupying the applicant's farm after their vacation from the said farm without the consent of the applicant.

9. That the ninth respondent is interdicted and restrained from relocating and/or settling any person on the applicant's farm or instigating, aiding and abetting any person to relocate or settle at the applicant's farm being Windhoek Town and Town Lands No. 31 also known as Commonage Farm No. 3 situated 15 kilometres along the Daan Viljoen road in the municipal jurisdiction of Windhoek.

10. That service of this order be effected by the Deputy-Sheriff on all the respondents and the persons referred to in paragraph 7 *supra* as well as by the publication thereof in the Republikein and the Namibian newspapers.

11. That any notice of opposition and answering affidavit(s) be filed by no later than 16 September 2011 at 12h00 and any replying affidavit(s) thereto on or before 21 September 2011 at 12h00.

12. That should any of the respondents oppose this application, such respondents shall be liable jointly and severally to pay the costs of this application."

[2] When the matter served before me on 23 September 2011 application was made by the applicant to postpone the matter and to extend the rule *nisi* to 7 October 2011. I granted this application. Thereafter the matter was further postponed and the rule *nisi* extended to 9 November 2011 for hearing.

[3] At the hearing it was confirmed that the applicant no longer sought a confirmation of the order against the sixth and eighth respondents. This issue was resolved on the basis that the applicant withdrew the application against such respondents and that each party would bear its own costs in the matter.

[4] The history of the matter is briefly as follows. The applicant is the Municipal Council of Windhoek, a local authority constituted in terms of the Local Authorities Act, No. 23 of 1992. The applicant is the owner of the farm, a fact not disputed by the respondents. In the past the applicant has rented the farm out to various individuals and entities. The farm itself consists of approximately 8000 hectares and includes a homestead, three boreholes and five cattle posts. Such leases generate an income for the applicant.

[5] In May 2011 the employees of the applicant noticed that certain individuals had occupied the farm, had erected dwelling structures on the farm and were grazing their livestock there. Neighbouring farm owners had complained about this uncontrolled state of affairs. Officials of the applicant spoke to the persons who had occupied the farm, including the first to fifth respondents, the seventh respondent and the eleventh respondent informing them that they were contravening the law as they had no right to occupy the applicant's farm without the applicant's consent. The farm was visited several times, also with the Superintendent of the City Police, and the respondents were ordered to demolish the structures and vacate the farm. The respondents, however, indicated that they were authorized by the ninth respondent, Chief Josephat Gawanab to occupy the farm and refused to vacate.

[6] The Executive Management of the applicant discussed the matter and on 26 and 27 May 2011 the applicant served eviction notices on the respondents

warning them to vacate the farm, failing which legal steps would be taken to evict them. The respondents still did not vacate the farm. In June 2011 officials of the applicant noticed that the number of persons occupying the farm had increased. In an attempt to resolve the matter, the applicant had discussions with Government agencies to try to resolve the matter, but such efforts were unsuccessful. When the applicant's officials met with the respondents again in July 2011 and warned them that legal steps would be taken to evict them, the respondents again claimed that the ninth respondent had authorized them to settle on the farm.

[7] Also in July 2011 the ninth respondent met with officials of the applicant, including Mr Gerwin Mosimane, the senior property administrator at the Windhoek Municipality. The ninth respondent stated that he represented the respondents and claimed that he was entitled to settle them on the applicant's farm. Mr Mosimane indicated to the ninth respondent that the respondents' actions were illegal and that the relevant government ministries and agencies responsible for re-settling people should be approached, whilst at the same time advising him that the respondents should vacate the farm. The ninth respondent denies that this meeting took place.

[8] In August 2011 the applicant noticed that a further group of persons had settled on the farm. They had brought their livestock, dogs and donkeys with them. The applicant's officials again asked all such respondents to vacate the

farm, but they refused to do so. The applicant again engaged the City Police to approach the respondents to ask them to vacate the farm, but the respondents reiterated their refusal to do so. The applicant had potential lessees who indicated their willingness to lease the farm and accordingly applicant needed them to leave.

[9] The applicant failed to mention that prior to all these events, on 9 March 2011, the ninth respondent had met with the Mayor of Windhoek, Ms Elaine Trepper to discuss the matter. It is common cause that the ninth respondent advised the Mayor that, due to the fact that members of his community were trying to make a living by camping in the road corridors with their livestock, he authorised them to settle on the farm. He pointed out that this "*authorisation*" granted by him was of a temporary nature and subject to certain conditions specified by him. The ninth respondent claims that during the discussion with the Mayor, the Mayor "*agreed to allow the people to stay*" on the farm and requested that the ninth respondent provided her with a list of the names of the heads of the households residing on the farm. The Mayor denies that there was any such agreement.

[10] It is against this factual backdrop that this application falls to be decided.

THE RIGHT TO EVICT

[11] An owner of land is entitled to evict an illegal occupant on that land. All that the owner must allege and prove is, firstly, ownership of the land in question, and secondly, that the occupant of the land is in occupation without any legal basis [1]. The essential approach is summarised in *Chetty's* case, *supra*, where Jansen JA said the following [2]:

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena v. Minister of Lands,* 1955 (2) S.A. 380 (A.D.) at pp. 382 E, 383)."

[12] It is not disputed by the respondents that the applicant is the owner of the farm and that they are currently in occupation of the farm. What is in dispute, is the lawfulness of the respondents' occupation.

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[1] Chetty v Naidoo, 1974 (3) SA 13 (A); De Villiers v Potgieter and Others N.N.O, 2007 (2) SA 311 (SCA), at 316, para [12]; Council of the Municipality of Windhoek v Bruni N.O. and Others, 2009 (1) NR 151 (HC), at 164, para [29]

[2] Chetty's –case, *supra*, at 20 B - D

[13] Ms Conradie who appeared for the respondents, limited the respondents' right to continue to hold out against the applicant as owner on one central submission. The key premise is that an agreement was reached between the Mayor, Ms Elaine Trepper and Chief Josephat Gawanab, the ninth respondent, to the effect that the respondents could on a temporary basis remain in occupation of the farm until alternative land had been found for them to be re-settled on. In his affidavit in opposition to the relief sought in this application, the ninth respondent refers to this "*agreement*" initially as an agreement "*allowing the people to stay*". Later in his affidavit he is more expansive and refers to the agreement as "*giving the respondents the right to occupy the farm*". What is uncontested is that the initial occupation of the farm by the respondents took place without the applicant's permission and accordingly was unlawful.

[14] In my view these are two different bases for any such agreement. The former formulation of the "*agreement*" postulates in essence a temporary concession made by the Mayor rendering lawful the pre-existing occupation by the respondents without the consent of the applicant prior to the date of the "*agreement*". The latter more expansive description of the "*agreement*" suggests that the Mayor acknowledged a right of occupation on a broader basis. The respondents' argument placed great emphasis on their version of what transpired at the meeting of 9 March 2011 between the parties as is reflected in the minutes taken by the secretary of the /Khomanin Traditional Authority. The only reference to the "agreement" in those minutes is a statement attributed to the Mayor where

she is alleged to have stated "*I will talk to my Council members, I will not evict your people from there, but will they move if an alternative place has been found?*". In the replying affidavit of Ms Elaine Trepper, she emphatically denies that any such statement was made by her or that any such "*agreement*" was reached.

[15] Counsel for the respondents contended on the basis of the approach taken in the *Plascon-Evans* matter [3] that any dispute of fact in this regard should be resolved in favour of the respondents. Mr Khama, who appeared on behalf of the applicant, countered this with the contention that had there been any such agreement, then on the probabilities the ninth respondent, when corresponding with the applicant in the letters dated 27 May 2011 and 15 June 2011 addressed to the Mayor, would have referred to the "*agreement*" not to evict the respondents from the farm. No evidence was tendered by the respondents to any further mention of this "*agreement*" besides at the meeting of 9 March 2011. In fact, on his own version, when the ninth respondent wrote to the Mayor on 27 May 2011, in response to the applicant's eviction notices, he made no mention of any such "*agreement*".

[16] Whilst the factors which I have mentioned militate against a mere acceptance of the say-so of the ninth respondent in regard to the "*agreement*" allegedly reached, should my concerns about the veracity of respondents' claims in this regard be unwarranted, this is not the end of the matter. It is common

[3] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A)

cause that the respondents' case is predicated on the notion, firstly, that any such "*agreement*" was of a temporary nature. There is no suggestion that the Mayor was a party to any agreement that the respondents could remain in occupation of the farm on an indefinite basis. It must accordingly have been anticipated that should any such agreement on a temporary basis have been reached with the Mayor, that such consent could be revoked by the applicant at a later stage. On the uncontested facts, and particularly in the light of the eviction notices served on the respondents by the applicant, there can be no doubt that the applicant resolved – despite any agreement that might have been reached between the Mayor and the ninth respondent – to revoke any such agreement (should it have indeed been concluded) and to insist on enforcing its rights as the owner of the farm. The applicant, as the owner, was accordingly within its rights to revoke such temporary permission to occupy the farm.

[17] Secondly, even if I were to accept that such an "*agreement*" was reached between the Mayor and the respondents relating to occupation on the farm on a temporary basis, such agreement was concluded between the Mayor and the respondents. This much is clear from the minutes produced by the secretary of the /Khomanin Traditional Authority. Despite the respondents bearing the onus to prove lawful occupation, nowhere in the answering papers is the allegation made that the Mayor had authority on behalf of applicant to enter into any such "*agreement*". In fact, to the contrary, in rebuttal in the replying papers, the applicant by way of Ms Trepper expressly denies that she had the authority to

grant any such consent and to agree to the respondents' occupation of the farm. There is accordingly no evidence to the effect that the applicant itself granted such consent, or that the applicant delegated to the Mayor the authority to do so.

[18] In view of the approach I take in this matter, it is unnecessary to deal with the further issues raised by counsel in argument in this matter, including the contention that the respondents are not properly before Court.

CONCLUSION

[19] It accordingly follows that the respondents had failed to discharge the onus that they are in lawful occupation of the farm. In so finding, I am mindful of the considerations raised by the ninth respondent relating to the desperate circumstances in which the respondents find themselves, brought upon by landlessness and poverty. However, this socio-economic reality gives way to other considerations, the most predominant of which is the rule of law. I can do no better than to echo the sentiments expressed by Goldstein J [4]:

> "Given the profoundly tragic history of the matter, no Court can grant an order for eviction in the present circumstances affecting hundreds of people without feelings of distress and anguish. But the principle at stake here is a cornerstone of the rule of law. The principle that no man may take the law into his own hands as the respondents have done is sacrosanct. Respect for it is absolutely

[4] Minister of Agriculture and Agriculture Development and Others v Segopolo and Others, 1992 (3) SA 967 (T), at 977 D - F

> necessary for human society to function in conditions of peace, serenity and security. The principle is an ancient one of our common law. It existed long before the misfortune which dispossessed the respondents was conceived of, and, hopefully, it will continue to exist and be respected long after that misfortune is corrected, and it and their pain are no more than a blot on the pages of our history books."

The reality is that courts do not act on abstract ideas of equity and justice. In the words of Innes CJ[5]:

> "The court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law".

[20] I accordingly find that the applicant has made out a case for the eviction order sought in this matter, together with the further ancillary relief contained in the rule *nisi* (and subject to the refinements contained in my order), with the *proviso* that the rule is discharged against the sixth and eighth respondents based upon the settlement reached between the parties in regard to them.

[21] Whilst mindful of the considerations militating against the suspension of the execution of an order of this nature[6], I exercise my discretion to order that the eviction be suspended for a period of two months. The primary consideration is that the abodes from which the respondents are to be evicted constitute their

[5] Kent v Transvaalsche Bank, 1907 TS 765, at 773 – 774; quoted in Belmont House v Gore NNO, 2011 (6) SA 173 (WCC), at 178, para [18]

[6] EP Du Toit Transport Ltd v Windhoek Municipality, 1976 (3) SA 818 (SWA), at 820 B - D

homes and at least part of their livelihoods by virtue of the livestock they keep. The further consideration is that, although the ninth respondent had no authority to authorise the respondents to occupy the farm, the respondents might have genuinely been misled by their Chief on this score.

[22] In the circumstances, I make the following order:

[22.1] The rule *nisi* herein is discharged in respect of the sixth and eighth respondents, each party to pay its own costs.

[22.2] The rule *nisi,* and particularly paragraphs 3 to 10 thereof, in respect of the remainder of the respondents is confirmed, together with costs, provided that the date provided for in paragraph 4 thereof is amended to read 30 July 2012, and the dates provided for in paragraphs 5 and 7 thereof are amended to read 31 July 2012.

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CORBETT, A.J

ON BEHALF OF THE APPLICANT

Adv. Dennis Khama

Instructed by Kwala & Co. Inc.

ON BEHALF OF THE RESPONDENTS

Adv. L Conradie

Instructed by Legal Assistance Centre