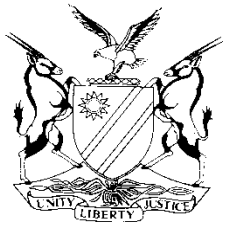

REPUBLIC OF NAMIBIA

CASE NO. A26/12

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

In the matter between:

OMATANDO VILLAGES RESIDENTS'

ADVISORY COMMITTEE

Applicant

and

ONGWEDIVA TOWN COUNCIL First

Respondent

MINISTER OF REGIONAL AND LOCAL Second

Respondent

GOVERNMENT, HOUSING AND RURAL

DEVELOPMENT

REGISTRAR OF DEEDS **Third Respondent**

MINISTER OF LANDS AND RESETTLEMENT **Fourth Respondent**

OKWANYAMA TRADITIONAL AUTHORITY **Fifth Respondent**

CORAM: **VAN NIEKERK, J**

Heard: 25 February 2012

Delivered: 13 March 2012

JUDGMENT

VAN NIEKERK, J: [1] The applicant brought an urgent application which was filed in 24 February 2012 and set down for hearing on Saturday, 25 February 2010 at 9h00. The applicant prayed for a rule *nisi* calling upon the first and second respondents to show cause why a final interdict should not be granted restraining them from demolishing

any structures in Omatando Villages 1, 2, and 3 (“the villages”) without a valid court order.

[2] The first respondent opposed the application. At the hearing the Court was informed that the first respondent had in the meantime furnished the applicant with a formal undertaking not to proceed with any demolition in the villages without a valid court order. In light hereof the applicant abandoned the application. The only issue that was argued was the issue of costs.

[3] In order to understand the submissions made it is necessary to provide a brief overview of the factual allegations in the papers. The applicant alleges that it is a voluntary association, the members of which are the residents of the villages near Ongwediva in the Oshana Region. Prior to Namibia’s independence the villages were allocated by the traditional authorities of the time as homesteads in terms of the customary laws of the Okwanyama community. During or about 1992, the town of Ongwediva was proclaimed under the Local Authorities Act, 1992 (Act 25 of 1992). The land on which the villages are situated was and remains communal land as described in Schedule 5 of the Namibian Constitution, read with Schedule 1 of the Communal Land Reform Act, 2002 (Act 5 of 2002). Applicant alleges that the customary rights of its members, who are residents in the said villages, to occupation of the communal land in the villages are recognized by virtue of section 28 of Communal Land Reform Act.

[4] During or about November 2011 the first respondent was quoted through its spokesperson in a newspaper article to say that the first respondent was intending to take action against persons illegally buying and selling plots of land within its boundaries. He was further quoted as saying that two of the villages became part of the town of Ongwediva during 1992 and that persons who bought land illegally in these villages would not be compensated for their loss when the first respondent starts reclaiming its land.

[5] In response to this news the applicant was constituted on 29 January 2012 by concerned residents of the villages and given a mandate to act on their behalf. As I understand the allegations, all the members are legally in occupation of the land on which they reside. Representatives of the applicant met with the first respondent to address issues of concern to them, but nothing was resolved. The applicant then decided to obtain legal advice and on 6 February 2012 approached the Legal Assistance Centre.

[6] On 9 February 2012 another newspaper report quoted the first respondent's spokesperson as saying that all illegal structures in the town would be demolished on 27 February 2012 and that the villages were earmarked for demolition.

[7] On the same day the applicant's lawyers sent a letter to the chief executive officer of the first respondent requesting information pertaining to any proclamations in terms of which the villages were incorporated into the first respondent's land, any written agreements

between the headmen of the villages in relation to the relinquishment of any customary land rights and records of any compensation payments made pursuant to section 16(2) of the Communal Land Reform Act.

[8] On 10 February 2012 the applicant was invited by the first respondent to a public meeting to be held on 14 February 2012 with all buyers of land in the villages, as well as all owners of traditional homesteads in the villages. The purpose of the meeting was to provide feedback on the concerns raised at the previous meeting on 2 February.

[9] On 10 February 2012 the first respondent replied to the letter by applicant's lawyers and advised that applicant's request for information had been forwarded to their legal practitioners.

[10] On 13 February 2012 applicant's lawyers sent a letter to first respondent's lawyers requesting the same information as earlier requested from first respondent. In reply on the same day first respondent's lawyers in writing confirmed their appointment and indicated that they were awaiting certain relevant documentation from the first respondent and that they would revert.

[11] On 14 February the meeting arranged by the first respondent took place. Applicant's members repeated the previous requests for information, but the first respondent's representatives could not provide any answers and indicated that these matters would be

referred to their lawyers. The first respondent did agree to engage in peaceful negotiations to find an amicable solution, the first round to begin on 20 February 2012. The parties further agreed that no further structures would be built in the villages until the legal issues have been resolved.

[12] On 20 February the applicant's lawyers wrote another letter to the first respondent's lawyers asking for an undertaking not to proceed with demolition of any of the applicant's members' properties.

[13] At the negotiation meeting on the same day none of the issues were resolved, no terms were negotiated and first respondent declined to give an undertaking that it would not commence with the demolitions on 27 February. It invited the applicant instead to another negotiation meeting on 27 February 2012.

[14] On 22 February a further newspaper report was published regarding the proposed demolitions in which it was stated that these were expected to start on 27 February and to continue until 4 March 2012.

[15] Applicant's legal representatives immediately sent a letter to first respondent's lawyers requesting it to provide an undertaking by 16h00 on 22 February that first respondent would not proceed with the demolitions on 27 February. Mr Watson of the applicant's lawyers also telephoned the offices of first respondent's lawyers and as the responsible lawyer was not available, left a message to return the call

urgently. By 13h00 on 23 February when the papers were being drafted, there had been no response, either in writing or by telephone.

[16] The aforesaid state of affairs, coupled with the fact that shortly before in January 2012 another town council nearby, namely Oshakati town council, had unilaterally demolished alleged illegal structures, led the applicant to believe that the first respondent may have been engaging the applicant and its members in bad faith and that the first respondent would follow the example of its neighbour. What further troubled the applicant was the fact that the second respondent had previously taken no action to stop the demolition by the Oshakati town council. The applicant then went ahead and lodged this application on 24 February after having served the papers on first respondent's lawyers at 13h00.

[17] At 16h45 on the same day the first respondent filed a notice of opposition and an answering affidavit in which several points *in limine* are raised. In the affidavit it is stated that the first respondent had instructed Mr Phatela, who also appeared at the hearing, to provide an opinion on the issues previously raised by the applicant and its members and that the opinion is expected soon. It is alleged that Mr Phatela had in the meantime spoken to Mr Watson and informed him that first respondent's instructing legal practitioner would obtain instructions from the first respondent to give an undertaking not to take the law into their own hands, but to do everything within the ambit of the law. The first respondent's chief executive officer had at

about 12h00 on 24 February 2012 given an oral undertaking to its own lawyers that first respondent would not demolish any structures without a valid court order. Before the first respondent's lawyers could forward a letter to this effect to the applicant's lawyers, the urgent application was served. The said letter which further indicated that there is no need to proceed to court with an interdict was nevertheless forwarded by fax at 15h25, but the offices of the applicant's lawyers were already closed.

[18] Mr *Phatela* on behalf of the first respondent made three main submissions on urgency in support of the contention that applicant should pay the first respondent's costs. I shall deal with them in turn.

[19] The first submission is that the certificate of urgency does not comply with paragraph 27(1) of the Judge-President's Consolidated Practice Directives dated 2 March 2009, which directs that all urgent applications are heard on a court day, unless counsel has certified in the certificate of urgency that the urgency of the matter is such that it be heard on any other day. In this case counsel's certificate does not make mention of this. However, there is no prejudice to the first respondent or the court in this omission and I *mero motu* condoned same.

[20] The second submission is that the application is pre-mature. Mr *Phatela* criticized the applicant for relying on newspaper reports, which the first respondent alleges are based on "rumours and unfounded fears and emotional outcries". Counsel referred to the

correspondence exchanged between the parties and the allegations in the answering affidavit that Mr Watson was aware that the matter was receiving attention and also referred to the conversation he had with Mr Watson. Although there is no confirmatory affidavit, I accept, for present purposes, that this conversation took place. It should be noted that the first respondent does not state on what date this conversation took place. Applicant makes no mention of this – it may very well be that this conversation took place after the papers were drafted. But even if the conversation did take place, in the absence of any confirmation, preferably in writing, that the undertaking awaited from the fist respondent is or would be given, one cannot blame the applicant's lawyers for proceeding to court in these circumstances. The applicant took prudent action by bringing the newspaper reports to the attention of the first respondent and its lawyers and by making enquiries about the first respondent's intention and stance in regard to the demolitions which were supposed to take place. In my view the application was precipitated by the lack of any response by the first respondent since its last letter dated 13 February 2012 in which it indicated that it would "revert soonest" and by the fact that there had been no clear and satisfactory reaction to the urgent telephone message on 22 February and the two letters dated 20 and 22 February 2012 in which the applicant's lawyers indicated the urgency of the matter.

[21] The third objection raised strikes me as being somewhat contradictory to the former. It is that the applicant created its own

urgency by waiting too long to approach this court. It was contended that the applicant was constituted already at the end of January 2012 as a result of the issues canvassed in this application and that the applicant waited a whole month to bring this application at the eleventh hour and on a Saturday with only a few Court hours' notice. It was further submitted that the fact that there were meetings and negotiations between the parties does not mean that the applicant should not have taken steps to be in Court earlier and with longer notice to the first respondent.

[22] In *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 (HC) at 50H this Court stated that "[W]hen an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen." The Court also stated in the context of urgent proceedings to stay a sale in execution that non-compliance with the rules in a case where the urgency is self-created through *mala fides* or culpable remissness or inaction would not be condoned (at 49H-I) (See also *MWeb Namibia (Pty) Ltd v Telecom Namibia Ltd and 4 others* (High Court Case No. A91/2007 – unrep. del. on 31/7/2007). However, the Court also stated that each case must be decided on its own facts and circumstances (at 50A).

[23] In my view it cannot be stated that the applicant acted in bad faith or displayed culpable remissness or inaction. It throughout invited the first respondent to provide it with information and/or an

undertaking not to take the law into its own hands. The first respondent promised to revert soonest, but did not. It repeatedly failed to respond to applicant's reasonable requests. When the application was finally lodged, the first respondent was at last prodded into action and provided the required undertaking. I should also point out that it was in fact the first respondent who still wanted to negotiate up to the very day of the intended demolitions.

[24] In my view the applicant was within its rights to have brought the application on an urgent basis. The result is that the first respondent is ordered to pay the costs of the application.

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VAN NIEKERK, J

Appearance for the parties

For the applicant: Mr Mukonda

Instr. by Legal Assistance Centre

For the first respondent: Mr T C Phatela

Instr. by Conradie & Damaseb