REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE No. I 1575/2014

In the matter between:

EVANS SANKASI MASHAHU	**1ST APPLICANT**
SHELTON NAMBWE KAMBINDA	**2ND APPLICANT**
BATHOLOMEW KAMBUNDA	**3RD APPLICANT**
LISWANI EDWIN KAMBINDA	**4TH APPLICANT**

And

KATIMA MULILO TOWN COUNCIL	**1ST RESPONDENT**
WILD CONSTRUCTION & CIVILS	**2ND RESPONDENT**
MINISTER OF URBAN AND RURAL DEVELOPMENT	**3RD RESPONDENT**

Neutral citation: Maswahu v Katima Mulilo Town Council (I1575-2015)[2015] NAHCMD 284 (18 November 2015)

CORAM: MASUKU AJ.,

Heard: 28 October 2015

Delivered: 18 November 2015

Flynote: PRACTICE – interim interdict *pendent lite* – requirements thereof; effect of failure to reply to critical depositions in answering affidavits; the need to accurately establish facts before launching an urgent application for interim interdict; STATUTES – provisions of the Communal Land Reform Act, 1992.

Summary: The applicants approached the court on urgency seeking an interim interdict stopping the 1st respondent from continuing with earthmoving works that allegedly interfered with the exercise of their customary land rights. Requirements for the grant of an interim interdict revisited. *Held that* the applicants had failed to establish a *prima facie* right in so far as they did not show that they had a right to occupy the land in question in terms of customary land rights. *Held that* an applicant seeking urgent interdictory relief must establish the correct facts before launching an application. *Held further* that failure to respond to allegations of fact made by the respondent in reply will result in the court upholding the respondent's position advocated on oath. *Held further* that a party alleging existence of land rights must identify the nature of the said rights in terms of s. 15 of the Communal Land Reform Act. *Held that* once land has vests in the State, it cannot thereafter be subject to exercise of customary law powers by traditional leaders. *Held that* the applicants failed to satisfy the requisites for the grant of interim interdictory relief. Application dismissed with costs.

ORDER

That the application is hereby dismissed with costs. Such costs are ordered to include the costs of one instructed and one instructing counsel.

JUDGMENT

MASUKU AJ.,

[1] Serving presently before court is an urgent application for injunctive interim relief. The applicants who are Namibian citizens, approached this court seeking the following relief:

1.1 That the applicants' non-compliance with the Rules of this Honourable Court be condoned and that this matter be heard as urgent as envisaged in Rule 73 of the Rules of this Honourable Court;

1.2 That a rule *nisi* be issued calling upon the Respondents to show cause, if any, on a date and time to be determined by the Honourable Duty Judge, why an order should not be made in the following terms, pending the finalization of the action that has already been instituted by the First Respondent against the Applicants in this Honourable Court under Case Number I 1575/2014, namely:

(a) Interdicting and restraining the First and Second Respondents from servicing and clearing land, and constructing a road on the land comprising Kazauli Village, Zambezi Region, or in any manner whatsoever interfering with the customary land rights of the Applicants on the said land which is the subject matter of the action proceedings in this Honourable Court under Case Number I 1575/2014, pending the finalization of the said action proceedings under the said Case Number.

(b) Directing the First and Second Respondents to rehabilitate and restore the land where they have serviced and constructed a road to its original status.

(c) Ordering that subparagraphs (a) and (b) *supra*, operate with immediate effect as an interim order pending the final outcome of the action referred to in paragraph 2.1 *supra.*

1.3 Ordering that any Respondent who may elect to oppose this application pays the costs of this application, including costs of one instructing and one instructed

counsel on a punitive scale (attorney and own client basis). In the event of more than one Respondent opposing this application, ordering that such Respondents pay the costs on the above scale jointly and severally, the one paying the others to be absolved.

[2] From a reading of the papers, it is safe to say that the issues giving rise to these proceedings is largely common cause. Briefly stated, the facts acuminate to the following: The applicants allege that they own land in a village they call Kazauli, Katima Mulilo. They claim that they were allocated this land in terms of customary land rights in or about 1963. The 1st respondent issued a combined summons under Case No. I 1575/14 seeking the eviction of the applicants from the land they occupy, claiming in the main that the said land belongs to it and that the applicants are in unlawful occupation thereof. These proceedings are defended by the applicants and presently remain pending before Mr. Justice Miller. The trial is set to run from 8 to 12 February 2016.

[3] The applicants state that whilst the said proceedings were and remain pending, the 1st respondent, commenced action in the nature of clearing the land in dispute and servicing same. This prompted the applicants to instruct their legal practitioners to address a letter to the 1st respondent dated 9 October 2015 seeking an assurance that the said respondent would not proceed with servicing the land in question. This letter, the applicants claim, did not elicit a response from the 1st respondent. This then prompted the applicants to approach this court on an urgent basis, seeking the relief set out above.

[4] The version of the 1st respondent, is a horse of a different colour. In the first instance, the 1st respondent, in its affidavits denied the allegation that the land in question belongs to the applicants as claimed. The said respondent claims that the land in question was allocated to it in terms of the law and to this end filed documents from the Registrar of Deeds, showing that the land reverted to the State and it was in due course allocated to it. Secondly, the 1st respondent denies that it is clearing the land for purposes of servicing same. Its version is that it is building a road to serve as a clear mark on the extent of its land *vis a vis* State land so as to leave no person in doubt as to the extent of the precincts of the 1st respondent's land. The insinuation that the 1st

respondent is taking the law into its own hands whilst the legality or otherwise of the occupation of the land which is subject of the action proceedings is vehemently denied.

[5] There is only one crisp question of law that the court is called upon to answer and it is this – have the applicants satisfactorily met all the requisites of an interim interdict? If they have, the result will be that their application for temporary injunctive relief will be granted. If not, there is only one destination, namely, the dismissal of the application. The 1st respondent has unmistakably stated that the applicants have dismally failed to satisfy the said requirements and in their submission, the application is ill-fated and must be dismissed with costs.

[6] I should, before dealing with the all-important question captured above, mention even at this nascent stage of the judgment that no issue was taken regarding the issue of the urgency or otherwise of the application. I took the view that all the requirements of the provisions of rule 73 were met. I presently turn to consider the question whether this is a proper case in which to grant an interim interdict.

[7] The requirements which a party seeking an interim interdict should satisfy have fairly crystallised in this and other jurisdictions. The learned author Prest[1] enumerates the requirements for the grant of interim interdict as the following:

> '(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear, or if not clear, is *prima facie* established, though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he subsequently succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and
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> (d) that the applicant has no other satisfactory remedy. See *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*[2]*; Smallberger v Cape Times Limited*[3]'

[1] C.B. Prest, Interlocutory Interdicts, Juta & Co, 1993 at p 55.
[2] 1969 (2) SA 256 (C) at 267.
[3] 1979 (3) SA 457 (C) at 461.

[8] Coming closer home, Damaseb J.P. dealt with the requisites of an interim interdict *pendent lite* in *EN v D*[4] said the following:

'To succeed in these proceedings, the applicant must establish a clear right worthy of protection and that he would not get substantial redress in due course. He must demonstrate that he has a well-grounded apprehension of irreparable harm which can only be cured by an interim interdict and that the balance of convenience favour him. He can also succeed even if he does not establish a clear right – as long as such right is *prima facie* established but open to some doubt.'

[9] On the other hand, in *Rossing Uranium Ltd v Cloete and Another*[5] Mtambanengwe J (as he then was) dealt with the relevant requirements in the following language:

'To succeed in obtaining an interdict *pendente lite* applicant has the *onus* to satisfy the Court that he has a clear right then he will normally be granted his interdict – *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 687H-688A. If his right though *prima facie* established is open to some doubt he must, to succeed, also show irreparable injury and that he has no other remedy.'

[10] I now turn to deal with requirements *seriatim.* I should, however, mention that these requirements must all be met without exception. Like the Ten Commandments, if you are unable to satisfy one, you have, in a sense breached them all so to speak and you may have the application dismissed for failing to meet even one requirement.

<u>*Prima Facie* right</u>

[11] The learned author Prest states that the applicant for an interdict must show a right, even if open to some doubt, which is being infringed, or which he or she apprehends will be infringed. He continues to say that if he 'does not do so, the application must fail.'[6] The question for determination in this leg of the enquiry, is

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[4] 2012 NR (2) 451 (HC) at 456 para [13].
[5] 1999 NR 98 (LC) at page 100.
[6] *Ibid* at p 56.

whether the applicants herein have shown that thy have a right which is being infringed or which they duly apprehend will be infringed. In order to deal with this issue fully, it is inevitable that regard must be had to the relevant statutory enactments as the gravamen of the applicants' right claimed, as can be seen from their depositions, lies in the Communal Land Reform Act.[7]

[12] Much store has been laid by the applicants on the provisions of s. 28 as the basis for the right. The said section provides the following:

'(1) Subject to subsection (2), any person who immediately before the commencement of this Act held a right in respect of the occupation of use of communal land, being of a nature referred to in section 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right, unless –

(a) Such person's claim to the right to such land is rejected upon an application contemplated in subsection (2): or

(b) Such land reverts to the State by virtue of the provisions of subsection (13).'

[13] Addressing themselves to these requirements, the 1st applicant says the following at para 14 of the founding affidavit, which is confirmed by the rest of the applicants:

'I point out that the Applicants' customary land right was not rejected as contemplated in section 28 (1) (a), and the land in question did revert to the State as contemplated in section 28 (1) (b) of the Act.' (emphasis added).

[14] The above paragraph, especially the underlined portion deserves a comment. I am not certain whether or not there was a typographical error on the part of the applicants particularly regarding the provisions of (b) of the said subsection. I say so because if the applicants meant what they said therein, they have shot themselves in the foot for they contend that the land in question reverted to the State. In that event, a proper reading of the subsection suggests that the occupation of communal land continues unless the claim to the land is rejected upon application or the land in question reverted to the State. It is my understanding that if the land which is the subject of proceedings reverted to the State, then the right to hold or occupy the land in terms of

[7] Act No.5 of 2002.

s. 28 of the Act thus ceases and this, as I understand, was the mainstay of the 1st respondent's argument as shall be addressed below in claiming that the applicants have failed to establish a right due for protection by an interim interdict. (Emphasis added).

[15] The 1st respondent's opposition in relation to this part of the requirements is premised on a number of legal arguments. The first is that the applicants have failed to establish the right they contend to have to the land in question. In this regard, they have referred to the provisions of s. 21 which classifies the species of rights. I shall deal with this argument in due course. Second, the said respondent claims that the land in question vested to the State and subsequently vested in the 1st respondent by virtue of Certificate of Registered Title (CRT) No. T4789/1991. A copy of the said CRT is attached to the 1st respondent's answering affidavit. The 1st respondent contends that the land in respect of which the rights are claimed by the applicants falls within the land transferred to it by the CRT in question.

[16] I now turn to consider the 1st respondent's grounds of opposition in greater detail. The first prong of attack is that the right to land allegedly infringed by the 1st respondent's action is not specified. Section 21, titled 'Customary rights that may be allocated' reads as follows:

> ' The following customary land rights may be allocated in respect of communal land –
> (a) a right to farming unit;
> (b) a right to a residential unit;
> (c) a right to any other form of customary tenure that may be recognized and described by the Minister by notice in the *Gazette* for the purposes of this Act.'

It is accordingly clear that only three categories of customary land rights exist in terms of the law, although the last category is a bit nebulous as it is not certain but seems to lie with the Minister and to be described in the relevant notice.

[17] I am of the considered view that a person who claims any customary land rights allegedly allocated, must identify the said right and which must perforce fall within one of the above categories. It is my view that failure to identify the relevant category may serve to imperil the validity of the right purported to exist. These rights cannot be

anything other than the three stated above. A reading of the applicants' affidavits clearly shows that they have not sought to bring the rights they claim under any of the various rights under s. 21. Any right given or recognized must in my view fall under one or perhaps, depending on the circumstances, more of the categories mentioned above. Rights cannot just be granted *in vacuo* as it were. There is substance in the 1st respondent's contention in this regard.

[18] The second argument, which is my view weighty, relates to the evidence adduced by the 1st respondent to the effect that the land in question vested in the State and was subsequently gazetted as land vesting in the 1st respondent and was accordingly declared as a town. The issue of the land vesting in the State, as earlier mentioned, appears to have been accepted by the applicants in their papers. The vesting of the land in the 1st respondent, it was argued, had the effect of ceased to form part of communal land. I agree.

[19] I agree to this assertion because of the provisions of s. 15 (2) of the Act, which pertinently, have the following rendering:

> ' Where a local authority area is situated or established within the boundaries of any communal land area the land comprising such local authority shall not form part of that communal area and shall not be communal land.'

It is important to mention that the allegations regarding the property vesting in the State and later to the 1st respondent, are contained in para 10 to 17 of the answering affidavit. In response to these critical allegations, the applicants stated the following in their replying affidavit:

> 'The allegations herein will be ventilated at the trial of the action under Case Number I 1575/2014 which is set down for hearing in this Honourable Court from 8th-12th February 2016.'

[20] It is clear that in its affidavits, the 1st respondent stated grounds upon which it claimed that the applicants do not have a right to the relief they seek and sought to demonstrate that the applicants cannot even be said to have a right open to some doubt

primarily on account of the change in status of the land as alleged by them. Instead of responding directly to these critical allegations, which go to the root of the nature of the ownership of the land in question, accompanied by relevant annexures, the applicants chose to postpone their response until the hearing of the trial. I am of the view that they have failed, having been granted an opportunity, to demonstrate that they have a right, or one open to some doubt to be granted a temporary interdict. They can only have themselves to blame because they spurned an opportunity to explain critical issues pertinently raised by the respondents and by which the 1st respondent sought to have the applicants non-suited.

[21] In *Bella Vista Investments v Pombili*[8] this court stated as follows:

> 'The applicant paid Shikida for the land in December 2009. From the date on which the land ceased to be communal land, no traditional leader could exercise customary powers over it.'

In view of the foregoing, I am of the view that the applicants have failed to show that they have a prima facie right in this matter and stress what I have stated above that they did not find it necessary to respond to the gravamen of the 1st respondent's case on the issue of the present status of the land.

[22] I am of the view that the application should fail for other reasons as well. In the first place, it is clear from the affidavits that the applicants totally misunderstood the actions of the 1st respondent. In their founding and supporting affidavits, it is claimed that the 1st respondent is 'clearing and servicing land'[9]. In response, the 1st respondent clarified that it was not clearing and servicing the land as alleged but was merely drawing a line of demarcation between State and town land for ease of identification of the boundaries. It means that the applicants have come to court and canvassed a position that is wrong

[8] 2011 (2) NR (2) 694 at 702, Damaseb JP at para [28].
[9] See para 10 of the founding affidavit.

[23] This is given credence to by the affidavit filed by the 1st respondent deposed to by Mr. Ntesa Mahoto, who is described as Land Survey Technician. He particularly states the following in the latter part of para 3 of his affidavit:

'I have the relevant experience and herewith confirm that the line being built along the boundary of the Farm Katima Mulilo Townlands No. 1328, is strictly speaking the beacons O and P as per the diagram of the Surveyor General, No. A332/91 and does not encroach on State land/Communal land.' (Emphasis added).

[24] It is again noteworthy that the applicants again did not respond to the contents of this affidavit. In point of fact, there was no attempt whatsoever, to respond at all to the affidavit of the said Mr. Mahoto, notwithstanding the devastating effect it appears to have on the applicants' case as underlined above. The applicants could demure to such allegations to their prejudice and their silence leaves the allegations by Mr. Mahoto without rival and should on that account be allowed to stand. The contents of that affidavit cannot be gainsaid.

[25] I will conclude this aspect by making reference to a case cited by the 1st respondent in its heads of argument. This case, in my view, neatly and comprehensively settles the question in this matter. This is the case of *Clear Channel Independent Advertising Namibia and Another v Transnamib Holdings Ltd and Others*[10]. In that case, the learned Judge said the following:

'The consideration at this time in respect of interdictory relief has been set out in *Gool v Minister of Justice 1955 (2) SA 682 at 688 D-E.* This approach is based on the views expressed by Clayden J in *Webster v Mitchell 1948 (1) SA 1186 (W).* With reference to what was said in the case of *Webster v Mitchell* Ogilvie Thompson J (as he then was) said the following in *Gool's* case (at 688D-E):

'In *Webster v Mitchell (**supra**)* the headnote of which reads as follows:

"In an application for a temporary interdict applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any

[10] 2006 (1) NR 121.

facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could obtain could on those facts obtain final relief at trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.'

With the greatest of respect, I am of the opinion that the criterion prescribed in this statement for the first branch of the enquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view, the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in *Webster v Mitchell* (***supra***) is the correct approach for the ordinary interdict applications'.

[26] I am of the view that whichever test one adopts, from the less stringent one i.e. too favourably disposed to the applicant, or that suggested by the learned judge in the local judgment (and with which I am in respectful agreement) I am of the view there can only be one result, having regard to the issues that I have addressed above. The applicants have failed in my judgment to meet the first hurdle. I am of the view that having failed to satisfy the court that he has a *prima facie* right, then the application should fail.

Alternative suitable remedy

[27] I will, for completeness' sake deal briefly with one or two more of the relevant requisites but not in any particular order. First, that the applicants do not have an alternative suitable remedy. It is my considered opinion that having regard to the entire conspectus of the facts at hand, assuming even for a moment that the applicants had brought the application on the correct facts, namely that the applicants are indeed servicing the land (which has been denied without demur), it is clear that the applicants do have an alternative remedy. This is a claim for damages sounding in delict. That, in my view would afford them an alternative suitable relief in the circumstances.

Balance of convenience

[28] I am also of the considered view, dealing with the balance of convenience that the 1st respondent's version, which has not been shaken that the exercise being undertaken is not to evict the applicants as alleged by them but to clarify the precincts of the boundaries is in the public interest. For that reason, I am of the view that the balance of convenience favours the 1st respondent as the latter does not in any event seek to despoil the applicants of the land in question but to serve notice as it were on all and sundry where the boundaries of the council and State land is. This, in my view, is a very important exercise that should bring clarity and avoid meaningless chatter and conflicts over boundaries.

Well-grounded appreciation of harm

[29] Last, but by no means least, and connected to the contents of paragraph [27] above, is the issue of a well-grounded apprehension of irreparable harm. As indicated earlier, the harm that the applicants apprehended from their founding affidavit was that because the 1st respondent had commenced an exercise of servicing the land, they stood to lose their homes and grazing land. In view of the evidence adduced by the 1st respondent and which the applicants have been unable to controvert, namely that the 1st respondent is only engaged in drawing a line of demarcation to make it clear to all and sundry what the precincts of the 1st respondent's land is on the one hand and that of the State, on the other, I am of the view that the applicants' apprehension of harm is not well-grounded. They have acted on the basis of incorrect information and the court would be going too far in the realms of conjecture and surmise if it were to grant the relief sought.

[30] A party that brings an application for urgent interdictory relief must ensure that the facts it presents to the court are not only on oath but they must, more importantly be true and accurate. To rush to court and seek the far-reaching remedy offered by an interim interdict on inaccurate or wrong facts is a serious matter and one that the court will not take lightly. It therefore behooves an applicant in such matters to establish and verify the facts before approaching court. Such a party should not induce the court into issuing orders based on incorrect or inaccurate facts for the reason that such party

simply did not do its home work regarding the basic facts on which the relief sought is predicated.

[31] The court was referred to the judgment of the Full Bench of this Court in *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Qaurries CC*[11] and the introduction of judicial case management. In so far as I tried to follow the argument presented on the applicants' behalf, it was sought to be contended that the applicants were not afforded a hearing before the drawing of the line of demarcation. I have, even after deep reflection failed to see the relevance of the case in question and the principles of judicial case management in the instant case.

[32] I must not be understood, by coming to the view that I have on the papers and evidence before me, be construed to have answered any questions that may arise for determination in trial. It is worth considering that the forum and the procedures followed, together with the nature of evidence led, including the relief sought may differ considerably. The conclusions I have reached should therefore be appreciated in the context of the nature of the present proceedings and the relief sought in the instant case.

[33] Having regard to all the foregoing, I am of the view that the following order is called for:

> [33.1] The application is hereby dismissed with costs. Such costs are ordered to include the costs of one instructed and one instructing counsel.

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TS Masuku

Acting Judge

[11] (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014.

APPEARANCES:

APPLICANTS:	S Akweenda SC Instructed by Conradie & Damaseb
RESPONDENTS:	G Narib Instructed by Sisa Namandje & Co. Inc.