



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CIV-MOT-REV-2017/00115

In the matter between:

<b>CHRISTINE LIKUWA</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>JONAS SHAFOKUTYA</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>ALEX BERENG</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>KASOKA THERESIA</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>LIRUNSA CECILIA</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>NDARA CHRISTINA</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>NDARA BENEDICTUS JOHANNES</b>	<b>7<sup>TH</sup> APPLICANT</b>
<b>LUCAS NGHILENGWA</b>	<b>8<sup>TH</sup> APPLICANT</b>
<b>JUNIAS SHINGUTO</b>	<b>9<sup>TH</sup> APPLICANT</b>
<b>MULUNGA PENDAPALA</b>	<b>10<sup>TH</sup> APPLICANT</b>
<b>SHISHIVENI SAKARIA</b>	<b>11<sup>TH</sup> APPLICANT</b>
<b>UENAANIVE JEKILIEG</b>	<b>12<sup>TH</sup> APPLICANT</b>
<b>MESHUKU PETRUS</b>	<b>13<sup>TH</sup> APPLICANT</b>
<b>OTHILLIE JEZURURA</b>	<b>14<sup>TH</sup> APPLICANT</b>
<b>MUNYNA LYONGA</b>	<b>15<sup>TH</sup> APPLICANT</b>

And

<b>COUNCIL OF THE MUNICIPALITY OF WINDHOEK</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>WINDHOEK CITY POLICE</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Neutral citation:** *Likuwa v Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-REV-2017/00115) [2017] NAHCMD 113 (12 April 2017)

**Coram:** UEITELE J  
Heard: 29 & 30 March 2017  
Delivered 12 April 2017

**Flynote:** *Constitutional law*- Constitution declares the founding values of our society- right to dignity, equality and the advancement of human rights and freedoms.

*Rule of law* - that the exercise of any public power should be authorised by law either by the Constitution itself or by any other law recognized by or made under the Constitution - No person may, without first obtaining an order of court, demolish or remove, together with its contents, any structure or building belonging to another.

*Mandamenten van spolie*- provide robust and speedy relief – to a person who has been illicitly deprived of his or her possession of a thing to restore the status *quo ante*.

*Mandamenten van spolie* – Requirement – applicant must establish peaceful and undisturbed occupation.

**Summary:** The applicants approached this Court on an urgent basis as contemplated in Rule 73 of this Court's rules seeking an interim relief in the form of interdict and *mandamenten van spolie* pending the institution of proceedings to review and set aside the respondents' demolition of their shacks and their eviction from Erf 3162 Otjomuise.

Ms Christine Likuwa and the other fourteen applicants in this case are a group of people who allege that they are homeless and have decided to occupy, without the permission of the owner, a certain piece of land at 7nde Laan particularly Erf 3162, Otjomuise Windhoek. During the morning hours of the 28<sup>th</sup> of March 2017, the applicants' shacks were demolished by the City Police. The respondents denied that they evicted any person from Erf 3162, but what the City Police did, was to stop the people who were unlawfully attempting to occupy Erf 3162 in their tracks.

*Held* that the matter may be considered with due regard to constitutional and historical background of Namibia. No doubt that we as a country are facing extremely serious problems relating to poverty, unemployment and more importantly housing. But these intolerable living conditions cannot be a licence to impel people to resort to 'land grabbing'. Self-help of this kind cannot and must not be tolerated.

*Held further* that no person may, without first obtaining an order of court, demolish or remove, together with its contents, any structure or building belonging to another.

*Held further* that the remedy of *mandamenten van spolie* has found recognition in our modern common law) and it is trite that it is available to protect possession. It is now well established that since it is a possessory remedy, it serves as a counter against spoliation. Its purpose is to provide robust and speedy relief where a person has been illicitly deprived of his or her possession of a thing to restore the status *quo ante* because of 'the fundamental principle ... that no one is allowed to take the law into his or her own hands.'

*Held further* that the applicants did not have peaceful and undisturbed occupation of Erf 3162 at the time the City Police interfered with it and demolished the shacks and structures which the fourteen applicants were in the process of setting up. Therefore the occupation, which the applicants claim they had does not constitute a type of possession that, in law, qualifies for the protection of the *mandamenten van spolie*.

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### ORDER

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1. Part A of the applicants' application is dismissed and the applicants must vacate Erf 3162 7nde Laan Otjomuise, Windhoek, by no later than 28 April 2017.
  2. The matter is, in respect of Part B of the application, postponed to 26 April 2017 for a status hearing.
  3. There is no order as to costs.
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## JUDGMENT

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**UEITELE, J**

### Introduction

[1] The preamble to our Constitution records the Namibian people's resolve to strive for the attainment of justice and peace for everyone. The Constitution declares the founding values of our society to be 'the dignity of the individual, the achievement of equality and the advancement of human rights and freedoms'.

[2] Our courts<sup>1</sup> have affirmed that the rule of law is one of the foundational principles of our State and that the doctrine of legality is one of the incidents that follows logically and naturally from the rule of law. The Courts further more emphasizes that in a country like Namibia where the Constitution is the 'Supreme Law', the Constitution demands that the exercise of any public power should be authorised by law either by the Constitution itself or by any other law recognized by or made under the Constitution. 'The exercise of public power is only legitimate where lawful' said the Supreme Court.<sup>2</sup>

[3] This case grapples with the realisation of the aspirations recorded in the preamble to the Constitution and the exercise of power by public functionaries. The issues in this case remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. The case furthermore reminds us that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions.

[4] The case furthermore brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. The case furthermore reminds us of the principle that no man or woman must be allowed to

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<sup>1</sup> See the case of *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC); *President of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd* (SA 59-2016) 2017 NASC (28 March 2017).

<sup>2</sup> In *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* (*supra*).

take the law into his or her own hands, and that any conduct which is conducive to a breach of the peace which the Constitution promises must not be tolerated and must be discouraged. With that brief introduction I will now proceed to set out who the parties in this case are.

Who are the parties in this case?

[5] Ms Christine Likuwa and the other fourteen applicants<sup>3</sup> in this case is a group of people who allege that they are homeless and have decided to occupy, without the permission of the owner, a certain piece of land at 7nde Laan particularly Erf 3162, Otjomuise Windhoek (I will for the sake of convenience, in this judgment refer to this piece of land as Erf 3162). The applicants brought this application collectively, although somewhat not classified a class action, their collective complaints relate to the alleged conduct of the first and second respondents. For the sake of convenience, unless the context requires specificity of a particular applicant, I will refer to all the 15 applicants collectively as “the applicants”.

[6] The first respondent is the Council for the Municipality of Windhoek a local authority which is established by the Local Authorities Act, 1992<sup>4</sup> and it is assigned the responsibility of managing land situated within its area of jurisdiction and also to deliver basic services for the benefit of the inhabitants of its area of jurisdiction. The Council is as such the owner of the land in question (that is Erf 3162) (I will, in this judgment, refer to the first respondent as the City).

[7] The second respondent is the Windhoek City Police, a municipal police service established in terms of s43C of the Police Act, 1990<sup>5</sup> (I will, in this judgment, refer to the second respondent simply as the City Police). I pause here to express my doubts as to whether the second respondent is a juristic person capable of being sued in its own name, but since this point was not argued I leave it at that. I will, in this judgment, where the context so requires refer to the first and second respondents as the ‘respondents’). In the next paragraphs I will set out the version of the applicants as to why they came to court.

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<sup>3</sup> Ms. Likuwa deposed to the founding affidavit on behalf of all the other applicants.

<sup>4</sup> Act, No. 23 of 1992.

<sup>5</sup> Act, No 90 of 1990.

The applicants' version.

[8] I have indicated above that Ms Likuwa deposed to the founding affidavit on behalf of the applicants and her version of the events that led her and the other fourteen applicants to approach this Court is this.

[9] She is a self-employed informal trader of soft drinks and chips at the Michele McLean Primary School. The Michele McLean Primary School is a primary school situated in the Township of Otjomuise and 7nde Laan is also situated in that Township. She alleges that she has resided on the land in question (i.e. Erf 3162) in a structure made of corrugated iron (which for want of a better term I will, in this judgment, refer to as a shack) for the past 3 years.

[10] For a period of more than 3 years, her shack has been her home where she lived with her 3 minor children, one of whom is only 4 months old. Her children come from that shack to go to school. Because of the appalling conditions in her neighbourhood, the residents are very close and have come to appreciate each other as they often rely on each other for a variety of needs such as sharing of domestic needs like food and other goods like candles. As a result, she came to know and appreciate the other fourteen applicants as her neighbours and she knows them on the first name basis.

[11] On the evening of 27<sup>th</sup> March 2017 her children informed her that the City Police would come and demolish their shacks during the early hours of the following day (i.e. 28 March 2017). Whilst she was preparing the children to go to school during the morning hours of the 28<sup>th</sup> of March 2017, she heard a loud and frightening bang at the door of her shack where she and her children resided. She was not sure as to whether she must open the door as she feared that it may be intruders or robbers who were at her shack.

[12] The persons knocking on her shack's door then shouted that if she does not open the door they will take the excavator and plough away the shack. She ultimately opened the door and found around 6 armed City Police officers pointing fingers at her and shouting vulgar obscenities at her. Anxious and scared the children ran out of the shack and City Police officers started throwing all their belongings from the shack to the outside. The goods that were thrown out included a television set, a television set cabin, her bed, the children's bed, kitchen cutleries and utensils, their clothing, all the clothing closets', the fridge, stove and microwave. She says that because of the manner in which the goods were removed from the shack her television set, the microwave and fridge broke.

[13] After she was removed from her shack she witnessed how her shack was being demolished. She alleges that the members of the City Police used sledge hammers and a bulldozer to remove the shack from the ground where it was steadily built. She alleges that she witnessed how her shack and the concrete foundation on which the shack was constructed cracked under the force of the bulldozer and the sledge hammer and that she was saddened by that experience. She says that she witnessed that process also being carried out against her neighbours, that is, the other fourteen applicants.

[14] Ms Likuwa further alleges that she demanded from the City Police officers a court order authorising them to demolish her shack. She states that a senior member of the City Police a certain Mr Gerry Shikesho told them that the City Police did not have a court order and also did not need a court order allowing them to evict, demolish and remove their belongings.

[15] She says the City Police did not stop at demolishing the shacks, they proceeded to load the materials from which the shacks were constructed onto a truck belonging to a certain Wedeinge Investments and took them away. She does not know where the materials which were removed are being kept or being stored. Ms Likuwa further tells the Court that the material from which she had constructed her shack and which was taken away by the City Police consists of 50 corrugated iron sheets and 10 wooden poles. She further states that all the shacks that were

demolished by the City Police on that day (i.e. 28 March 2017), have been in existence for a period of more than 3 years.

[16] The above alleged conduct by members of the City Police prompted the applicants to, on Wednesday 29 March 2017, approach this Court on an urgent basis as contemplated in Rule 73 of this Court's rules seeking an interim relief in the form of interdict and *mandamenten van spolie* pending them instituting proceedings to review and set aside the respondents' demolition of their shacks and their eviction from Erf 3162 Otjomuise.

The respondents' version.

[17] The crux of the respondents' version is that they deny having evicted the applicants from Erf 3162 Otjomuise (7nde Laan). The respondents' opposing affidavits were deposed to by three of their officers namely the City's Chief Legal Advisors, Mr Benedictus Ngairorue, the City Police's Senior Superintendent Mr Gerhard Nakafo Shikesho and a certain security guard named Thom Frans.

*The affidavit of Mr Ngairorue.*

[18] Mr Ngairorue tells this Court that at some point (he does not say at what point it was), the first respondent realised that there had been unlawful occupation of land at 7nde Laan particularly Erf 3162, Otjomuise Windhoek.

[19] When the City realised that there had been unlawful occupation of Erf 3162, it during November 2016 and January 2017, instructed its legal representative to institute action against the persons who unlawfully occupied Erf 3162, for their eviction from that Erf.

[20] From November 2016 up to towards the end of January 2017, the City took steps to identify and obtain the identities and particulars of the persons who were in unlawful occupation of Erf 3162. The City caused its officials or staff members to collect the names of the persons who were in unlawful occupation of Erf 3162. The City identified and collected the names of 13 persons. The list containing the names



of the 13 persons who were identified as illegal occupiers of Erf 3162, was annexed to Mr Ngairorue's affidavit as 'annexure 1'.

[21] In addition to identifying and taking down the names of the persons who had unlawfully occupied Erf 3162, the City caused a mark, in the form of a numerical number, to be placed on each of the shack or structure that was completed and standing on Erf 3162. The marking and numbering of the shacks or structures was completed by the end of January 2017. Mr Ngairorue explains that the purpose of the marking was to ensure that, pending the institution of legal proceedings for the eviction of unlawful occupiers of Erf 3162, the City Police would be in the position to take preventative measures to prevent further unlawful occupation of Erf 3162.

[22] The City took an additional measure and contracted an independent security company to guard the area and also caused its officials to cordon off the unoccupied portion of Erf 3162. The City took a further precautionary measure and requested the City Police to constantly patrol the area and prevent anyone from occupying the unoccupied portion of Erf 3162.

[23] Mr Ngairorue denies that the version of Ms Likuwa is correct, he disputes her version that she has been living on Erf 3162 for the past three years. He based his denial on the ground that the persons who unlawfully occupied Erf 3162 were identified and registered and were known to the City. Her name was not amongst the persons identified and registered as unlawful occupiers of Erf 3162 she could therefore not have been a resident on that Erf for more than three years says Ngairorue.

[24] Mr Ngairorue continues and states that during 28 March 2017 the City became aware of what he terms 'aggressive unlawful occupation' of Erf 3162. How the City became aware of the unlawful occupation of Erf 3162 is recounted by Mr Thom Frans.

*The affidavit of Thom Frans.*

[25] Mr Thom Frans states that he is employed by Independence Security, which has its offices at No. 15 Mayors Street Windhoek. He states that he is a security guard working at Erf 3162 since 1 February 2017. He says that his tasks was to ensure that no new unlawful occupations occurred on Erf 3162. He continues and state that he was also tasked with the responsibility of informing the City as soon as he noticed attempts to occupy Erf 3162.

[26] Mr Frans tells the Court that since the 1<sup>st</sup> day of February 2017 he has been working a daily shift at Erf 3162. He tells the Court that between 1 February 2017 and the morning of 28 March 2017 no person (apart from the persons who were already on Erf 3162) attempted to or occupied Erf 3162. But in the morning of 28 March 2017 some persons whom he believe included the applicants arrived at Erf 3162 and attempted to occupy part of Erf 3162 and he by telephone and short message service (*sms*) informed his superior and the control room of the City Police of the attempts to occupy Erf 3162. Once the City Police was informed they arrived at Erf 3162 and Mr Thom Frans tells us what they found and how the City Police reacted.

*The affidavit of Gerhard Nakafo Shikesho.*

[27] Mr Shikesho is a senior superintendent with the City Police, he started off by denying that he insulted or used rude language to any person including Ms Likuwa. He admits that the persons that he found on Erf 3162 who may include Ms Likuwa confronted him and demanded to see the Court order authorising him or the City Police to evict them from Erf 3162. He states that his reply to the demand for a court order was that he was obliged by law to prevent the commission of an offence and he was duty bound to stop their unlawful activity. He says that his reply was that the police do not always have to await a court order in order to prevent the commission of an offence.

[28] As regards the events of 28 March 2017 he states that he personally only arrived at Erf 3162 at about 10h00 am, but in the early hours of 28 March 2017 the City Police was alerted by the security guard who was placed at Erf 3162 that there were persons attempting to unlawfully occupy the Erf 3162. Members of the City

Police drove to the Erf and arrived there at approximately 04h25am. When the members of the City Police arrived at Erf 3162 they found persons whom he believe include the current applicants, busy erecting shacks or structures on Erf 3162, he says that there were no completed structures. What the City Police then did was to stop the persons to continue erecting the shacks or structures by confiscating the corrugated iron zincs and the wooden poles they were using.

[29] Mr Shikesho denies that when he and other members of the City Police arrived at Erf 3162 there were completed shacks or structures. He said the structures or shacks that the City Police found when they arrived at Erf 3162 were still in the process of being erected and as such the City Police officers could not have been knocking on doors of any shack including the shack of Ms Likuwa. Mr Shikesho furthermore denies that the members of the City Police touched any of the properties or personal items of the people who they found unlawfully constructing shacks on Erf 3162, he says that what they touched and removed were the iron zincs and the wooden poles that the people were busy setting up.

[30] Mr Shikesho accordingly denied that the City or the City Police evicted any person from Erf 3162, but what the City Police did said Mr Shikesho, was to stop the people who were unlawfully attempting to occupy Erf 3162 in their tracks. He further stated that the people whose structures and shacks were completed and who were known to have occupied Erf 3162, though unlawful, were not interfered with as the City has initiated steps to have those persons lawfully evicted by lawful order of a court.

[31] Having set out the versions of the opposing parties in this matter I will now proceed to set out the relief which the applicants seek and the basis on which they seek the relief. I will also set out the basis on which the respondents are opposing the relief sought by the application.

The relief sought and the basis on which the relief is sought and the basis on which the relief is opposed.

[32] I indicated above that the applicants approached this Court in terms of Rule 73 they brought the application in two parts, the first part of the application which is Part A seeks an interim interdict with immediate effect, pending the finalization of an application to review the actions and decision of the City and the City Police under Part B. In Part A of the application the applicants seek, an order:

- (a) Condoning their non-compliance with the Rules of this Court pertaining to time periods and service of the application, as well as giving notice to parties, as contemplated in terms of Rule 73 of the Rules of this Court; and directing the application to be heard on an urgent basis. Should there be one of the respondents that is not served by the date of the hearing, that such respondent be served with the interim order together with copies of the application.
- (b) Interdicting the first and second respondents from proceeding, without a court order, or from continuing the unlawful eviction, demolition and removal of building materials of applicants and any other person residing at Erf 3162, 7 De Laan, Otjomuise Windhoek.
- (c) Directing the first and second respondents to immediately restore possession of the building materials seized from the applicants on the 28th March 2017.
- (d) Directing the first and second respondents to restore the homes of the applicants which the City Police and the City demolished on the 28th March 2017.

[33] In Part B of the application the applicants seek to review and set aside the decision and action of the City and the City Police taken on 28<sup>th</sup> March 2017 to evict and demolish their homes. In that part of the application the applicants further seek an order declaring the decision and action of the City and the City Police as unlawful, unconstitutional and invalid. Part B of the application was not argued as such I am in this judgment only confined to the relief sought in Part A of the application.

[34] The basis on which the applicants are seeking the interim relief is that the first respondent's decision to evict, demolish and remove the applicants' building

materials is unlawful and liable to be reviewed and set aside because, so argued Mr Amoomo who appeared for the applicants, the respondents did not have a court order authorising them to evict and demolish the applicants homes. He further argued that the respondents' decision was not taken in terms of any law, but if it was taken in terms of any law the respondent misconstrued the ambit of his powers.

[35] Mr Amoomo further contended that the nature, gravity, breadth and ambit of the respondents' actions were unreasonable, unfair and not necessary in a democratic society. The respondents' actions were further unlawful or unconstitutional in that it is inconsistent with the fundamental freedoms envisaged under Article 8, 10 and 12 of the Namibian Constitution. He also contended that the decision of the first respondent was motivated by ulterior purpose or motive, the decision is based on irrelevant consideration or on capricious grounds, the first respondent failed to apply or to properly apply their minds to the facts and the law. Lastly, said Mr Amoomo, the first respondent failed to act fairly in that it did not give the applicants a fair and reasonable opportunity to be heard prior to taking the decision that the applicants' homes will be demolished.

[36] The respondents opposed the application, the basis of their opposition was simply that the respondents did not evict the applicants they argued that what the respondents did was to stop the applicants from committing an illegality. Mr Phatela, who appeared for the respondents contended that the applicants failed to place sufficient evidence before Court to prove that they enjoyed quiet and undisturbed possession of the property which they want restored to them. He argued that the applicants did not demonstrate that their possession of the property was sufficiently stable or durable period for the law to take cognizance of it.

[37] I will now proceed to consider the merits or demerits of the competing claims.

#### Discussion.

[38] Mr Amoomo argued that the application was urgent because the illegality allegedly committed by the respondent was the basis of the urgency. Ms Likuwa alleged that because their homes were destroyed in the morning of 28 March 2017,

in the evening of that day they slept under the open sky exposed to mosquito bites and other harsh natural conditions. Whatever the respondents' position was as regards urgency I am satisfied that there is present, a sufficient degree of urgency to warrant the application (which was brought without delay) being heard on an urgent basis.

[39] Mr Amoomo urged me to consider this application with due regard to the constitutional and historical background of Namibia. He argued that Namibia is founded upon the principles of democracy, the rule of law and justice for all and that all fundamental rights and freedoms including the right to dignity and equality are applicable to all natural (and legal persons in Namibia including the applicants) and that administrative bodies and officials such as the first and second respondents are constitutionally required to act fairly and reasonably and comply with the requirements imposed upon such body by common law, and legislation.

[40] Mr Amoomo further argued that the right to dignity guaranteed by Article 8 of the Namibian Constitution encapsulates the right to housing and the right not be subjected to arbitrary evictions and demolitions.

[41] I have no difficulty to consider this matter with due regard to constitutional and historical background of Namibia. In the South African case of *Grootboom*<sup>6</sup> Yacoob J who authored the Constitutional Court's judgment said:

'Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.'

[42] In the *Soobramoney*<sup>7</sup> case Chaskalson P described the context in which the Bill of Rights is to be interpreted, he said:

'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of

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<sup>6</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para [25].

<sup>7</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (1997 (12) BCLR 1696) at para [8].

unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring'

### *The Legal Principles*

[43] In the matter of *Shaanika and Others v The Windhoek City Police and Others*<sup>8</sup> the Supreme Court declared ss 4(1) and (3) of the Squatters Proclamation 21 of 1985<sup>9</sup> as inconsistent with the Constitution. After declaring the provisions inconsistent with the Constitution the Court effectively held that no person may, without first obtaining an order of court, demolish or remove, together with its contents, any structure or building belonging to another.

[44] The facts in this matter are largely not in dispute. On the morning of 28 March 2017 the respondents caused shacks or structures (the dispute being whether the shacks structures were completed or incomplete). The shacks or structures were either on Erf 3162 or in the process to be erected on that Erf. The respondents allege that before the events that led to the dispute arising, the City had taken stock of the persons who unlawfully occupied Erf 3162 and those persons were known and registered.

<sup>8</sup> 2013 (4) NR 1106 (SC).

<sup>9</sup> Section 4(1) & (3) that was declared unconstitutional reads as follows:

'4 (1) Notwithstanding anything to the contrary in any law contained and without the authority of an order of court or prior notice of whatever nature to any person —

(a) the owner of land may demolish and remove together with its contents any building or structure intended for human habitation or occupied by human beings which has been erected or is occupied without his consent on such land;

(b) any building or structure intended for human habitation or occupied by human beings which has been erected on land within the area of jurisdiction of any local authority, without the prior approval of that or any former local authority of any plan or description of such building or structure required by law, may at the expense of the owner of the land be demolished and removed together with its contents by the local authority or the Secretary of any officer employed in his department and authorized thereto by him.

(3) Unless a person first satisfies the court on a preponderance of probabilities —

(a) that he is lawfully entitled to occupy the land on which any building or structure has been erected; and

(b) in the case of a person whose right of occupation is based on the consent of any person other than the owner of such land, that such other person is lawfully entitled to allow other persons to occupy such land, such first-mentioned person shall not have recourse to any court of law in any civil proceedings founded on the demolition or removal or intended demolition or removal of such building or structure under this section and it shall not be competent for any court of law to grant any relief in any such proceedings to such last-mentioned person.'

[45] The trouble, according to the City began when the applicants attempted to, on the morning of 28 March 2017 unlawfully erect shacks or structures on Erf 3162. The City says it moved in and stopped the applicants in their tracks and confiscated the applicants' corrugated iron zincs and wooden poles. The respondents further deny that they confiscated or touched the personal effects of the applicants.

[46] In view of the above facts the question that has to be answered is whether the applicants had peaceful and undisturbed use of Erf 3162 at the time the City Police interfered with it and demolished the shacks and structures and blocked the applicants from occupying the shacks at Erf 3162? Depending on the answer, the next question might be whether or not the occupation, constituted a type of possession that, in law, qualified for the protection of the *mandamenten van spolie*.

[47] The remedy of *mandamenten van spolie* has found recognition in our modern common law<sup>10</sup> and it is trite that it is available to protect possession.<sup>11</sup> It is now well established that since it is a possessory remedy, it serves as a counter against spoliation. Its purpose is to provide robust and speedy relief where a person has been illicitly deprived of his possession of a thing to restore the status *quo ante* because, of 'the fundamental principle ... that no one is allowed to take the law into his own hands.'

[48] Before I deal with the two questions I posed in paragraph [46] I pause and restate the requisites for interim relief. These are well settled and were neatly summarised in the *Nakanyala*<sup>12</sup> case as follows:

'The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

(a) a prima facie right,

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<sup>10</sup> See the cases of: *Ruch v Van As* 1996 NR 345 (HC), *Kuiiri and Another v Kandjoze and Others* 2009 (2) NR 749 (HC); *Kock t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge & Others* 2011 (1) NR 10 (SC); *Nufesha Investments CC v Namibia Rights and Responsibilities Inc and Others* 2013 (3) NR 787 (HC).

<sup>11</sup> *Nino Bonino v De Lange* 1906 TS 120; *Nienaber v Stuckey* 1946 AD 1049.

<sup>12</sup> *Nakanyala v Inspector-General Namibia and Others* 2012 (1) NR 200 (HC) at para [36].



- (b) a well-grounded apprehension of irreparable harm if the relief is not granted,
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.

'To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion.'

[49] In order to establish a *prima facie* right, the applicants would need to do so with reference to the review of the decision to demolish their shacks. That decision is challenged on the various review grounds set out in the founding affidavit. These include asserting that the applicants were in occupation and possession of Erf 3162 and that the decision to evict them from that Erf was executed without the authority of a Court order, and that the decision was based on ulterior motives and the failure to apply the mind to the issues at hand. It is also contended that the City and the City Police acted arbitrarily and also failed to afford the applicants the opportunity to be heard prior to the eviction and demolition taking place.

[50] In the *Nakanyala*<sup>13</sup> matter this Court held that the degree of proof to establish a *prima facie* right is well established and that it has been consistently applied by the courts, Justice Smuts quoting Justice Harms said:

'The degree of proof required has been formulated as follows: The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate *onus*, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case the latter cannot succeed...'

[51] I have indicated above that although the facts regarding this matter are largely common cause but there are still some disputes with regard some critical facts,

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<sup>13</sup> *Ibid.* at para [46].

particularly the length of the occupation of Erf 3162. In the matter of die *Republican Party of Namibia and Another v Electoral Commission of Namibia and Others*<sup>14</sup> the Supreme Court said:

'It is trite law that where conflicts of fact exist in motion proceedings and there has been no resort to oral evidence, such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent. The facts set out in the respondents' papers are to be accepted unless the court considers them to be so far-fetched or clearly untenable that the court can safely reject them on the papers.'<sup>15</sup>

[52] The approach set out in the cases quoted in the preceding paragraphs is the approach I will adopt in considering the evidence adduced in this application.

[53] The applicants' version that they have been in occupation of Erf 3162 for a period of more than three years has been put in issue by the respondents. With the exception of Ms Likuwa none of the other fourteen applicants placed evidence before this Court as to when exactly they came to occupy Erf 3162. They did also not dispute the version put forward by the respondents thus casting serious doubts on their version that they have been in occupation of Erf 3162 for a period of more than three years. I am in the circumstances bound to accept the version of the respondent that the fourteen applicants only arrived at Erf 3162 on the morning of 28 March 2017 and that the City police stopped them in the process of unlawfully occupying the Erf. I therefore agree with the City that it did not evict the applicants, but only stopped them from unlawfully occupying Erf 3162 and that the City Police is by law entitled to do.

[54] It follows that the first part of the question I posed in paragraph [46] of this judgment must be answered in the negative namely that the applicants did not have peaceful and undisturbed occupation of Erf 3162 at the time the City Police interfered with it and demolished the shacks and structures which the fourteen applicants were

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<sup>14</sup> 2010 (1) NR 73 (HC) at page 108.

<sup>15</sup> Also see the case of *Mostert v The Minister of Justice* 2003 NR 11 (SC) where Strydom ACJ said:

'(A)s the dispute was not referred to evidence, the principles, applied in cases such as *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E - G and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), must be followed. It follows therefore that once a genuine dispute of fact was raised, which was not referred to evidence, the Court is bound to accept the version of the respondent and facts admitted by the respondent.'

in the process of setting up. The consequences of that answer is that the occupation, which the applicants claim they had does not constitute a type of possession that, in law, qualifies for the protection of the *mandamenten van spolie*.

[55] As regards Ms Likuwa, the City also put her allegation that she had occupied Erf 3162 for a period of more than three years in issue. The City states that it had recorded and obtained the names and particulars of the people who were in occupation of Erf 3162 as at November 2016 and by the end of January 2017 Ms Likuwa was not one of the persons so in unlawful occupation. Ms Likuwa does not pertinently deal and answer this contention by the City. The facts put up by the City and the City Police cannot be said to be far-fetched, those facts do, in my view, cast serious doubts on the version put up by Ms Likuwa and she can therefore not succeed.

[56] As regards the corrugated iron zincs and the wooden poles which were confiscated by the City Police, the City police has tendered to return them to the applicants, the City must in my view make good that tender and return the corrugated iron zincs and the wooden poles to the applicants.

[57] Having found that the applicants were not in occupation of Erf 3162 worthy of protection by the law I am of the view that there can be no doubt in the minds of all well-informed persons that we as a country are facing extremely serious problems relating to poverty, unemployment and more importantly housing. But these intolerable living conditions cannot be a licence to impel people to resort to '*land grabbing*'. Self-help of this kind cannot and must not be tolerated.

[58] In conclusion I want to record that this case shows the desperation of people living in deplorable conditions in the City. The Constitution and the Local Authorities Act, 1992 obliges the City to act positively to ameliorate these conditions. One of the obligation of the City is to provide access to urban land to its inhabitants.

[59] The obligation to provide land does not mean and must never be interpreted to mean that conditions of poverty and landlessness is a licence to '*land grabbing*' aimed at coercing the City into making land available on a preferential basis to those who participate in any exercise of this kind. '*Land grabbing*' is inimical to the

systematic provision of land on a planned basis and to the constitutional values we have adopted for ourselves.

[60] Conscious of the words of the Supreme Court where O'Reagan AJA with Maritz JA and Mainga JA concurring said:

'The destruction of a home and the removal of its contents have grave implications for the people concerned. Homes are the centre of people's lives. They are shared by close family members and friends. They are the place where people store their precious possessions. Such possessions will often not have great commercial value, but are precious for personal reasons. The intense personal importance that homes have for human beings is reflected in art 13 of the Constitution, which prohibits 'interference with the privacy of ... homes' save in specified circumstances. It is hard to imagine therefore a more invasive action than the destruction of homes, and the removal of their contents. Given the intense importance of homes to human beings, no matter how small or humble the home, the destruction of homes should take place only once it is clear that destruction is a lawful course.'

I make the following order.

- 1 Part A of the applicants' application is dismissed and the applicants must vacate Erf 3162 7nde Laan Otjomuise, Windhoek, by no later than 28 April 2017.
- 2 The matter is, in respect of Part B of the application, postponed to 26 April 2017 for a status hearing.
- 3 There is no order as to costs.

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Ueitele S F I  
Judge

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