

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

HC-MD-CIV-MOT-GEN-2016/00384

In the matter between:

MARIA KAMIA ENDUNDE

APPLICANT

and

**THE CHAIRPERSON OF THE KAVANGO
COMMUNAL LANDBOARD**

1ST RESPONDENT

SABINE MUFENDA

2ND RESPONDENT

PAULUS RAMEKA

3RD RESPONDENT

LEBEUS KAVETO

4TH RESPONDENT

URBAN HAUSHIKU

5TH RESPONDENT

ALOIS GENDE

6TH RESPONDENT

MBUNGA TUGHUYENDERE

7TH RESPONDENT

MAX MUYEMBURUKO

8TH RESPONDENT

ELINA SAHEKE	9TH RESPONDENT
RACHEL NATHANIEL-KOCH	10TH RESPONDENT
FERNANDO MARUNGU	11TH RESPONDENT
PROTASIUS SOMENO	12TH RESPONDENT
MINISTER OF LAND, RESETTLEMENT AND REHABILITATION	13TH RESPONDENT
MBUNZA TRADITIONAL AUTHORITY	14TH RESPONDENT

Neutral Citation: Endunde v The Chairperson of the Okavango East Communal Land Board (HC-MD-CIV-MOT-GEN-2016/00384) [2018] NAHCMD 113 (27 April 2018)

CORAM: MASUKU J
Heard: 20 March 2018
Due: 20 August 2018
Delivered: 27 April 2018

Flynote: Constitutional Law – the necessity to comply with court orders and to maintain the rule of law and thus avoid anarchy. Civil procedure – contempt of court – requirements to be satisfied by applicant therefor. Joinder – whether failure to join a necessary party should result in the application being dismissed or merely stayed or postponed – Service of proceedings – whether it is necessary in contempt proceedings to effect personal service on the respondent.

Summary: This court issued an order dated 1 April 2017 calling upon the respondents to consider and determine an application by the applicant for rights of leasehold to a farm situate in the Kavango Region within a stipulated

period and to also inform the applicant of the decision within a specified time. The respondents did not comply with the order in respect of the time frames and on the merits, made an order confirming their previous decision. The applicant launched contempt proceedings alleging that the respondents were in contempt of the court order.

Held that – it is imperative in a democratic society to ensure that court orders are complied with in order to ensure social cohesion and to allow the courts to decide disputes, in the knowledge that their orders will be complied with, failing which anarchy will reign supreme.

Held – that a party seeking an order for contempt must show that (a) that the court made an order; (b) that the respondent was served with or became aware of the said order; and (c) that the respondent has not complied with the order or neglected to do so.

Held further – that in this case, the applicant had satisfied the first two requirements as the order was issued and the respondents were aware of the order. The only question was whether the respondents were wilful and *mala fide* not complying with the order.

Held that – failure to comply with an order of court of which the respondent is aware attracts an inference of wilfulness and the evidential burden then shifts to the respondent, to show that he or she was *bona fide* in the non-compliance.

Held further that – in the circumstances, although the respondents had not complied with the order, there was no *inducium* that the respondents were wilful and *mala fide* in their non-compliance. In this regard, although the respondents were incorrect in their actions, there was no evidence that they acted in a contumelious manner and with intent to violate the dignity and authority of the court.

Held that – in terms of service of the court order, there may be personal service or the court will be satisfied if there is evidence that the respondent became aware of the court order. In this regard, the court held that as far as possible, because of the likely consequence of being found in contempt, which may result, in the worst case scenario, with the contemnor being committed to gaol, personal service is preferred. The court was nonetheless satisfied that the respondents became aware of the order, particularly because they alleged that they had complied with the order, suggesting inexorably, that they were aware of the said order.

Held further that – that where a necessary party has not been joined in proceedings, it is not appropriate to dismiss the application therefor. The proper order, the court held, is to either stay the proceedings pending the joinder of the necessary party or to postpone the proceedings with an appropriate order as to costs.

Held that – the decision to dismiss is far-reaching and serves to undo the court's policy to deal with cases on their real merits, in an inexpensive and expeditious manner.

At the end, the court held that there was no evidence that the respondents, although they did not comply with the order, did so wilfully and in bad faith. There was some *bona fide* belief in their minds that they were acting within their rights to act as they did, wrong as they were. The respondents were then afforded an opportunity to again comply, on the pain of serious repercussions if they do not comply yet again.

ORDER

1. The respondents are declared not to have acted contumaciously in not complying with an order of this Court dated 1 April 2016.

2. The respondents are ordered, within thirty (30) days from the date of this order, to convene a sitting at which they will, in terms of the provisions of Section 30 of the Communal Land Reform Act, 5 of 2002, consider and make a decision on the Applicant's application in respect of a right of leasehold relating to Farm No. 1851 situate in Registration B, Kavango West Region.
3. The Respondents are ordered to inform the Applicant within five (5) days of the making of the decision referred to in paragraph 2 above, the decision that they will have reached regarding her application.
4. The 1st Respondent, in his capacity as the Chairperson of the Kavango Communal Land Board, is ordered to pay the costs of this application.
5. The Office of the Government Attorney is ordered to fully explain the implications of this Order to the Respondents and to offer them guidance in the compliance with the said Order.
6. The application is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Recently, the Kenyan Court of Appeal made some lapidary remarks regarding the status of court orders in *Dr. Fred Mutiang'i, The Secretary to Cabinet, Ministry of Interior And Co-Ordination of National Government v Miguna Miguna and Others*.¹

[2] The court reasoned as follows:

'When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issued *ex cathrada*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or

¹ Civil Application No. 1 of 2017 (UR 1/2018).

mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, the upholding of the rule of law are not mere platitudes but present realities.'

[3] Up for determination in this matter is the question whether the respondents are guilty of the very conduct that the Kenyan Court of Appeal found it apposite to discourage in those very compelling and strong terms.

Background

[4] This court, 1 April 2016, issued an order in the following terms:

'1. The second respondent is ordered to consider and decide on the applicant's application for a right of leasehold in respect of small scale farming unit No. 1851 situated in Registration B, Kavango West Region, in terms of Section 30 (1) of the Communal Land Reform Act, Act 5 of 2001 within one month of the date of this order.

2. The second respondent is ordered to inform the applicant in writing of its decision in respect of the applicant's application within 7 (seven) days of having taken the decision.

3. The second respondent is ordered to pay the costs of this application.'

[5] The applicant, in this matter, who served as applicant in the proceedings referred to in the court order captured above, cries foul and claims that the said court order was not complied with by the respondents. For that reason, she seeks an order committing the respondents for the contempt of the court order.

[6] The respondents, represented by the office of the Government Attorney, on the other hand, argue that they complied with the aforesaid court order and that in the circumstances, the application should be dismissed. This

is the major and ultimate question that the court is called upon to determine in these proceedings at the end of the day.

Point of law *in limine*

[7] Before into the matter on the merits, the respondents raised a point of law regarding the service of the application on the various respondents. They allege that the respondents should have been personally served with the present application.

[8] The applicant argued that this point of law is devoid of substance and must be thrown out with both hands as it were. This is because, so argued the applicant, the respondents were properly served in terms of the rules of court and there is no intimation that none of the respondents are unaware of the proceedings against them nor the relief sought against them.

[9] In this regard, Ms. Angula pointed out that the respondents were served in terms of the provisions of rule 8(2)(c) by the Deputy Sheriff and as such, the service was congruent with the rules of court appertaining to service. In this regard, the return of service indicates that service on the respondents was effected on the Kavango East Communal Land Board Office and was duly accepted by an officer, who is above the age of 16 years. It was urged on behalf of the applicant that the respondents, who are in the employ of the Government of the Republic of Namibia, in the context, are required to be served in terms of the provisions of rule 8(3)(e), which was done.

[10] The said subrule provides that service on the State, a minister, deputy minister or other official in his or her official capacity, may be effected 'by handing a copy to a responsible employee at the offices of the Government Attorney or the relevant ministry or organ of the State respectively'. Ms. Angula, accordingly submitted and quite forcefully too, that there was no need for personal service on the respondents and that because the service on them was rule-compliant, that should suffice and that the point of law must therefore be dismissed.

[11] Before dealing with Ms. Angula's argument, I should first point out that applications for contempt of court are provided for in rule 74 of this court's rules. In particular, subrule (2) provides the following:

'The application must be served in terms of these rules.'

In this regard, there is no doubt that service of applications for contempt of court, should therefor fall in line with the provisions rule 8 and the various subrules to be found thereunder and this is the argument Ms. Angula advanced as shall be apparent hereunder.

[12] In support of her argument, Ms. Angula referred the court to a decision in *Grey v The Minister of Home Affairs Republic of South Africa and Others*². In that case, which also related to contempt of court, the court held that personal service was in the circumstances, not necessary and in that regard, held as follows:

'There is no merit in the respondents' contention that there is a requirement, as they seem to suggest, that there must be personal service of the order. I am satisfied that service at the State Attorney's office constituted proper service. That service, coupled with the fact that the respondents were represented on both occasions when the *rule nisi* was issued and later confirmed, leads to the conclusion that the applicant has succeeded in proving the requirement of service of the order.'

[13] In regard to the issue of service of court orders in contempt proceedings, the learned authors, Herbstein & Van Winsen,³ state the following regarding service:

'The applicant must show that the order of court with which the respondent failed to comply had either been served personally or had come to the respondent's personal notice. When a person has information, which there are no reasonable grounds to

² (354/2009) [2012] ZAECGHC 100 (6 December 2012).

³ The Civil Practice of the High Courts of South Africa, Volume 2, Juta, 5th ed, at p 1103.

disbelieve, to the effect that an order has been granted against him, such person is bound to act as if the order had been duly served.'

[14] It is accordingly clear that in such matters, there are two alternatives. The first, and if I may say so, the preferred one, is for the order to have been served on the respondent personally. I say preferred for the reason that orders eventuating from a finding that a party is guilty of contempt of court, are serious and may, in proper cases, result in a respondent forfeiting one of his or her primordial rights, namely, that of liberty, even if for a season. For that reason, I incline to the view that it is always preferred that personal service be effected as far as is possible. I will return to this later.

[15] The second alternative, as indicated by the learned authors, is that of the court having to satisfy itself, from the return of service, that although personal service may not have been effected, the order in question did, however, come to the notice of the respondent. In this regard, the court, in the *Grey* case, was of the considered view that the order did come to the personal attention of the respondents, as it was served on the State Attorney's office and the respondents were in any event represented in those proceedings.

[16] I now return to deal with the issue of the preferred nature of personal service I referred to above. Besides the possible consequences of a finding that the respondent is guilty of contempt, which may be punishable by committing the contemnor to gaol, which results in the loss of freedom, a serious matter, rule 8 (2) (a) and (b) read as follows:

'Service of any process referred to in subrule (1) may be effected –

- (a) by delivering a copy thereof personally to the person to be served, but if the person to be served is a minor or a person under disability, service must be effected on the guardian, tutor, curator or the like of that minor person or person under disability;

(b) where personal service is not reasonably possible, by leaving, subject to subrule(5), a copy of the process at the place of residence or place of business of the person to be served. . .’ (Emphasis added).

[17] Although the rule quoted above and emphasised seems to relate only to (b) above, it hardly needs reminding that any court, would, where possible, prefer personal service of process and if not feasible or possible in those circumstance, some other mode of service may then be accepted. In my view, the words underlined should have properly applied to all the alternative methods of service to personal service in rule 8 (2) (a) and not applied, as it would presently seem, to (b) only. There is, in my opinion, no justification for confining the underlined portion only to rule 8 (2) (b) and not the other modes of service stipulated from (c) to (e) of the subrule in question. This may be a subject for another day.

[18] In the present case, although personal service was not effected on the respondents, I am of the considered view that from the manner of service employed by the deputy sheriff, I would have no doubt in my mind that the respondents did have personal knowledge of the order they were called upon to comply with. The papers were served on their legal representatives in this matter and who were in court in any event when the order was issued.

[19] I would be very surprised and shocked if the respondent’s legal practitioners would not have drawn the issue and contents of the order to the respondents upon service of same on their esteemed office. Accordingly, there is no reasonable ground upon which it can be said the respondents could disbelieve that information. As in the *Grey* case, the respondents were represented by counsel from the Government Attorney’s chambers.

[20] More importantly, in the instant case, the respondents contend in their answering affidavits that they complied with the order in question. If they were not personally aware of the order, I am of the considered view that they would have stated in very clear and unambiguous terms in their answering affidavits that they are not aware of the order. For the respondents to raise this point in

the circumstances, is in my considered view, disingenuous and amounts to them approbating and reprobating at the same time, or for lack of a better phrase, they are speaking with a forked tongue, as it were. They either did not receive the order, in which case they should say so without equivocation, or they did, in which case they argue that they complied.

[21] In view of the foregoing, I am of the considered view that the inescapable conclusion, in the circumstances, is that the point of law raised by the respondents is doomed to fail for I am, on the evidence before me, satisfied that the order in question did come to their attention and the highest form of evidence that they did become aware of same, is their statement on oath that they complied with the said order. This point of law *in limine*, must, in the present circumstances, fail and I so order.

Non-joinder

[22] There is a point of non-joinder that was raised by the respondents, in terms of which they contended that a Mr. Shihinga, although having a direct and substantial interest in the matter, had not been joined to the proceedings. This point, whose legal validity was in my considered view doubtful, was in any event overtaken by a letter written by Mr. Shihinga's legal representative, Mr. Silas Kishi-Shakumu, to the effect that his client does not have any interest in the contempt proceedings, which, it must be necessarily mentioned, are aimed at coercing compliance by the respondents. Mr. Shihinga certainly has no interest and I will say nothing further on this matter.

[23] The only issue that I perhaps have to address, albeit briefly, is that in the event I found that the said Mr. Shihinga was a necessary party, the respondents had applied for the application to be dismissed with costs therefor. I am of the considered view that such a drastic measure is wrong and in this regard, I would reiterate the views expressed in *Maseko v The Commissioner of Police and Another*,⁴ which Ms. Angula referred to in this

⁴ (1778/09) [2011] SZHC 66 (17 January 2011).

matter in respect of the issue whether Mr. Hishinga is a necessary party in these proceedings.

[24] The court expressed itself on the issue of the propriety of dismissing an application on the basis of non-joinder as follows at para [12] of the judgment. This was after reviewing discordant approaches on this issue:

[12] I am inclined to the view that the Court should not ordinarily dismiss the proceedings in the event it finds that a necessary party has not been joined. What the Court ought to do in my opinion, unless it is properly satisfied that the party has waived its right to be joined, is to stay the proceedings or order that the said party be joined and that the notice of the proceedings is properly brought to the attention of such a party. In the event, the Court would not proceed with the matter but would postpone or stay the same and make an appropriate order as to the costs which have been occasioned by the postponement or stay, necessitated by the joinder.

[13] A cue to the proper order to grant in circumstances where a necessary party has not been joined is to be found in the works of Herbstein (*supra*) at page 187, where the learned authors state that the defence of non-joinder or misjoinder “being merely dilatory, must be taken *initio litis* before issue is joined . . . Where such a plea is upheld the action is not dismissed but is stayed until the proper party has been joined.”

[25] At para [15], the court, after noting that the issue raised by the authors related to action proceedings, stated that it applied equally to application proceedings. The court then concluded its reasoning as follows in para [15]:

‘The decision to order a dismissal of the proceedings pursuant to non-joinder, it would appear to me, with respect, to be harsh in the extreme. I say so for the reason that the policy of the Court ought, as far as possible, to ensure that its interlocutory orders conduce to a speedy, fair, cheap and effective disposal of cases before it on the merits. In the event that a postponement is granted it would seem to me, none of the parties suffer unjustly as the necessary party will be ordered to be so joined and the matter proceeds most likely on the same papers.

[16] A dismissal, on the other hand, heralds more serious consequences. In the event, the erring party has to launch new proceedings altogether and serving same on all the affected parties. Furthermore, the erring party will be invariably mulcted with an adverse costs order as a result of the dismissal of the as opposed to wasted costs. Dismissal of the application with the concomitant adverse costs is in any event onerous and one that may tend to discourage the guilty party in respect of the non-joinder when that party may otherwise have a legitimate right to vindicate its rights.'

[26] In view of the above reasoning, which I adopt in this matter, lock, stock and barrel, as it were, I am of the considered view that even if Mr. Ncube may have been correct on the issue of non-joinder, his contention for the application to be dismissed because of the non-joinder would have fallen on deliberately deaf ears and would not have carried the day. I say no more of the matter.

The merits

[27] The only outstanding question is whether there is any substance to the respondents' contention that they did comply with the order. Before dealing with that question, it is perhaps helpful, if not necessary, for the court to consider the requirements that an applicant for an order for contempt of court should satisfy. In this regard, the parties appear *ad idem*.

[28] Herbstein & Van Winsen (*supra*), at p. 1109, state the following as the requisites that an applicant for contempt of court should show in order to be granted a favourable court order:

- (a) that an order was granted against the respondent;
- (b) that the respondent was either served with the order or informed of the grant of the order and could have no reasonable ground for disbelieving that information;

- (c) the respondent has either disobeyed or neglected to comply with the order.

[29] I am of the considered view that the first two issues are not contested. It is common cause that the court issued the order in question. Furthermore, the issue of the service of the order on the respondents and them being notified of same, has been resolved in the preceding paragraphs. The only question that remains for resolution is the last, namely, whether the respondents disobeyed the said order, or neglected to comply with it.

[30] I will, unfortunately, have to again refer to the learned authors Herbstein & Van Winsen on this question. At p. 1110, they say the following:

'In general, all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. Accordingly, once it is shown that an order was granted and that the respondent disobeyed it or neglected to comply with it, wilfulness will normally be inferred and the respondent will bear the evidential burden to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*. The court will commit a person for contempt only when the disobedience is due to wilfulness. In *Clement v Clement*⁵ it was held that a person's disobedience must not only be wilful but also *mala fide*. A respondent can defend himself by advancing evidence that establishes that a reasonable doubt as to whether non-compliance was wilful and *mala fide*. Honest belief that non-compliance is justified or proper is incompatible with the intention to violate the court's dignity, repute and authority.'

[31] The respondents' contention in this case was that they complied with the order in question and the question is whether this is correct in all the circumstances of the case. In terms of the said order, the respondents were to decide the applicant's application within one month from 1 April 2016. Evidently, they did not do so within the time stipulated, which is the first non-compliance. Furthermore, they did not inform the applicant, as stipulated, of the decisions within 7 days of the decision as ordered. This much is admitted by the applicants in their heads of argument. No proper reasons to eschew or

⁵ 1961 (3) SA 861 (T) at 866.

negative the inference of *mala fides* are provided in this regard, in my respectful view.

[32] The respondents do, however, contend that although they did not comply with the order within the confines of the time frames stipulated in the court order, they did comply with the order, however. The respondents contend further that they did, after receipt of the order, advertise the hearing of the matter and this was done on 13 July 2016. After the date reserved for accepting any objections lapsed, the Board proceeded to take a decision to 'recognise Mr. Paulus Shihinga as the rightful holder of the leasehold.'

[33] Ms. Angula argued forcefully, with all the powers of persuasion at her command that the respondents did not comply with the order of the court and that all the respondents did, to borrow from her interesting turn of phrase, was to 'copy and paste' a previous decision that they had made to the effect that Mr. Shihinga was the rightful holder of the leasehold in question. Is she correct in this criticism?

[34] In support of her contention that the applicants merely copied and pasted their previous order, Ms. Angula referred to the minutes provided by the respondents of their meeting held on 9 and 10 August 2016. Since the contents of these meetings are central to the applicant's case, I will quote them below in full. They read as follows:

'Matter between the late Sivaza and Paulus Shihinga (Farm No. 1851).

Discussion during the meeting on 14 March 2016.

Mbunza TA representative informed the Board that the TA have looked into the matter. The Hompa is of the opinion that the Farm should be allocated to Sivaza although some members of the TA council feels (*sic*) that Shihinga should get the farm.

- The house was reminded that the Board resolved to allocate the farm to Mr. Paulus Shihinga on the basis that:
- The farm in question is not developed by the late Sivaza who is also a recent applicant.
- The concerned party is deceased and he was not issued with a land right in terms of the CLRA No. 5 of 2002.
- The Mbunza TA consent letter issued to Mr. Shihinga was not withdrawn by the Mbunza TA before allocating to Mr. Sivaza and later another consent letter to the granddaughter (applicant) of the late Sivaza.
- Mr. Shihinga is on the farm engaged with livestock farming.

The Land Board also took note that the lawyers representing the late Sivaza kept on communicating with the Board while the client was deceased.

The matter is rolled to the discussion of the new application Maria Kamia Endunde.'

[35] Mr. Ncube argued that from the minutes recorded above, it is clear that the respondents did consider the application in light of the court order. He was at pains to point out that the court order did not call upon his clients to grant leasehold rights to the applicant but to make a decision, which in his submission, his clients complied with. To this extent, he was of the strong conviction that the applicant failed to make a case for contempt of court and that the proper order to return, in the circumstances, was to dismiss the application with costs.

[36] A few issues need to be considered in reference to the minute quoted above. What is striking, and Ms. Angula pointed this out, was that the respondents, instead of dealing with the applicant's application, appear to have turned back the hands of time and instead considered issues which relate to the applicant's grandfather, Mr. Sivaza, who is not the applicant in this matter nor was before the Board at this time. In this regard, the applicant was left languishing in the shadow of her late grandfather. It further appears, as recorded in the scriptures (that sins of the fathers shall be visited upon the third and fourth generation), his sins, if there were any, were, visited upon her

and this incomprehensible view appears to have coloured the entire trajectory followed in the application.

[37] It is clear that the applicant, from the minutes, was not the subject of the application at all but her grandfather, posthumously, was. Furthermore, the respondents were called upon by the court order to deal with the applicant's application, its merits and demerits if any and these should have been obvious from a reading of the minutes. What one cannot run away from, is that the respondents merely regurgitated their previous decision that the 'house' was reminded of, meaning that the applicant's application was never properly dealt with in this application. Mr. Ncube, to reaffirm the respondent's position, stated in his heads of argument, that the respondents 'recognised' Mr. Shihinga as the holder of the leasehold rights. This does not show, objectively speaking, that the respondents dealt with the application before them as required by the order of court.

[38] I am of the view that Ms. Angula cannot be faulted for submitting, as she did, that the work, if work it is at all, that the respondents did, was to 'copy and paste' and not deal with the applicants' application, as ordered by the court in clear and unambiguous terms. In this regard, the respondents merely endorsed and affirmed their decision taken on 14 March 2016, namely that the leasehold rights to the farm must remain with Mr. Shihinga, regardless of the merits of the applicant's application.

[39] As indicated above, this 'copy and paste' decision was not, from the record, even communicated to the applicant as required and peremptorily so by the court order. How the 'copy and paste' decision would have been allowed stand in the light of the advertisement and the non-objection thereto, even by Mr. Shihinga, is in my view inexplicable and suggests that the respondents, at best, did not understand what they were called upon by the court order to do. They stuck to their guns as it were and would not budge from their previous decision, a misapplied form of *stare decisis*.

[40] In this regard, I can do no better in this regard, than to refer to *Marr v MEC Department of Health, Eastern Cape Provincial Government and Another*,⁶ where the court expressed itself in the following terms:

‘Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and the supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the State in the courts and requires other organs of State to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.’

[41] Our own courts have lent their imprimatur to the importance of complying with court orders, thus propping up the foundations upon which the edifice, which is this great Country, is predicated. In *Sikunda v The Government of the Republic of Namibia*,⁷ Mainga J stated the following:

‘Judgments, orders, are but what the Courts are about. The effectiveness of a court lies in execution of its judgments and orders. You frustrate or disobey a court order you strike at one of the very foundations, which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth of anarchy. A rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded.’

[42] Ueitele J has recently added his voice in this swelling chorus by stating the following in *Ndemuwenda v The Government of the Republic of Namibia (Ministry of Health and Social Services (infra))*:⁸

‘Where the orders of a court are disregarded with impunity such a situation will undermine and erode the foundational basis of our Republic and will inevitably, lead to a situation of constitutional crisis. It thus follows that any action or inaction that displays disregard for judicial orders must be swiftly dealt with.’

⁶ (3908/05) [2006] ZAECHC 16 (10 April 2006).

⁷ 2001 NR 86 (HC) at 92 B.

⁸ At para [16].

[43] The question that then looms large, in the circumstances, is with respect, not whether or not the respondents were legally correct in the view that they took, but whether they acted contumely in not complying with the court order. In this instance, what we have to do, is to gauge their state of mind, and ascertain whether their conduct was, in all the circumstances, beyond reasonable doubt, wilful and *mala fide*.

[44] I have had occasion to read a judgment by my learned Brother Ueitele J. in *Ndemuweda v The Government of the Republic of Namibia (Minister of Health and Social Services)*,⁹ which deals with the subject matter under consideration. In the course of the judgment, the court had to decide whether civil contempt had been proven and the court relied on the judgment of Cameron J. in *Fakkie NO v CCII Systems (Pty) Ltd.*¹⁰

[45] The court relied on the following passage by Cameron J in *Fakkie*,:

‘A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could be evidence of lack of good faith).¹¹

[46] I am of the considered view that although the behaviour of the respondents can be properly described as not only unreasonable but also despicable in the circumstances, one cannot, however, escape from a conclusion that in their state of mind, depraved as it may well be, they appear to have acted in good faith. The legal advice they appear to have received, does not, from all indications appear to have set them on the correct path either.

⁹ (HC-MD-CIV-MOT-GEN-2017/00336) [2018] NAHCMD 67 (23 March 2018).

¹⁰ 2006 (4) SA 326 (SCA).

¹¹ *Ibid* at para 9.

[47] In *Fakkie*,¹² the court held that, 'But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.'

[48] For the reasons advanced above, I am of the considered view that the respondents have advanced evidence that negatives wilfulness and *mala fides*. For that reason, I am of the considered opinion that the respondents' contempt of the court order dated 1 April 2016, has not been proved beyond reasonable doubt.

Conclusion

[49] In view of the foregoing, I am of the considered view that I cannot, without diffidence, find that the respondents had a contumacious intention in the line of thinking and action they embarked upon. Although their conduct is objectionable and not to be emulated but rather to be deserving of a stern rebuke, I am of the view that they appear, objectively, to have acted *bona fide* but wrongly. I cannot in the circumstances find that they, beyond reasonable doubt, acted contemptuously.

Admonition

[50] It is fitting that I send a very clear and unambiguous message to the respondents, jointly and severally, that this court will not again tolerate any non-compliance with this order, considering that the applicant has remained without her remedy for a period in the excess of two years, notwithstanding a court order in her favour. This is totally unacceptable and any failure by the respondents to comply this time round may have deleterious and irreversible consequences to them personally.

¹² *Ibid* at p. 344 para [42] (d).

[51] It is for that very reason that I have fashioned and incorporated as part of the order, that the Government Attorney should assist the respondents by explaining to them what is required of them and to hold their hand as they do so, if necessary. I make bold and say that if this order is not complied with and within the time stipulated, the harshest of censures might need to be applied to the contemnors, including them forfeiting their freedom for a season. This must not be perceived as a threat but a promise that this court is willing to fulfil in order to restore and vindicate its authority, dignity and repute.

Disposal

[52] In the result, I am of the considered opinion that the following order is condign:

1. The respondents are declared not to have acted contumaciously in not complying with an order of this court dated 1 April 2016.
2. The respondents are ordered, within thirty (30) days from the date of this order, to convene a sitting at which they will, in terms of the provisions of Section 30 of the Communal Land Reform Act, 5 of 2002, consider and make a decision on the Applicant's application in respect of a right of leasehold relating to Farm No. 1851 situate in Registration B, Kavango West Region.
3. The Respondents are ordered to inform the Applicant within five (5) days of the making of the decision referred to in paragraph 2 above, the decision that they will have reached regarding her application.
4. The 1st Respondent is ordered to pay the costs of this application.
5. The Office of the Government Attorney is ordered to fully explain the implications of this Order to the Respondents and to offer them guidance in the compliance with the said Order.
6. The application is removed from the roll and is regarded as finalised.

TS Masuku
Judge

APPEARANCE:

APPLICANTS

E Angula
of AngulaCo. Inc., Windhoek

RESPONDENTS

J Ncube
of Government Attorney, Windhoek