**REPUBLIC OF NAMIBIA**


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

**JUDGMENT**

Case No.: HC-MD-CIV-ACT-OTH-2021/00939

In the matter between:

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| **ERNST KAMBATUKU** | **FIRST PLAINTIFF** |
| **EPHRAIM KAMBATUKU** | **SECOND PLAINTFF** |

and

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| **LISIAS TJAVEONDJA** | **FIRST DEFENDANT** |
| **MINISTER OF AGRICULTURE, WATER AND LAND REFORM** | **SECOND DEFENDANT** |
| **THE LAND ADVISORY COMMISSION** | **THIRD DEFENDANT** |
| **THE DEPUTY SHERIFF: GOBABIS DISTRICT** | **FOURTH DEFENDANT** |

**Neutral citation:** *Kambatuku v Tjaveondja* (HC-MD-CIV-ACT-OTH-2021/00939) [2023] NAHCMD 256 (12 May 2023)

**Coram:** SIBEYA J
**Heard:** **6-7 March and 24 April 2023**
**Delivered:** **12 May 2023**

**Flynote:** Administrative law – Administrative Act – Failure to comply with Art 18 of the Namibian Constitution – The Minister of Agriculture, Water and Land Reform failed to consider and respond to objections raised by the first defendant against the intention to allocate Camp K4 of Farm Goab to the plaintiffs – The Minister further failed to comply with the court order which compelled him to consider and respond to the objections – Effect of failure to comply with a court order – First defendant's objections not yet considered and responded to – The court order found to constitute a review – Plaintiffs' claim for eviction dismissed as the Minister must first consider and respond to the objections – The Minister found liable for punitive costs for the successful party.

**Summary**: The plaintiffs instituted proceedings where they seek to evict the first defendant from Camp K4 of Unit B of Farm Goab, Omaheke Region. On 20 October 2015, the Minister notified the public in the newspaper, of the intention to allocate Unit B, including Camp K4, to the plaintiffs and called for objections, if any. On 23 October 2015, the first defendant who occupied Camp K4 from the year 1995 raised objections to, *inter alia*, the intended allocation of Camp K4 to the plaintiffs. On 30 July 2019, Unit B of Farm Goab was allocated to the plaintiffs by the Minister of Agriculture, Water and Land Reform through a resettlement programme. The first defendant still occupies Camp K4. The plaintiffs state that from 30 July 2019, the first defendant has occupied Camp K4 without their consent, rendering such occupation unlawful, and on which basis, the plaintiffs seek his eviction. The plaintiffs' claim is defended by the first defendant.

*Held* – Hearsay evidence is a matter of law and not open to the court to exercise a discretion on whether or not to admit such evidence.

*Held that* – No sufficient and acceptable evidence was led to prove that the Minister considered the objections of the first defendant before allocating Camp K4 to the plaintiffs.

*Held further that* – The order of 2 October 2020 compelling the Minister to consider and respond to the objections raised by the first defendant was found to have constituted a review of the decision that was made after the objections were raised and not considered.

*Held* – The Minister failed to comply with the order of 2 October 2020, to consider and respond to the objections raised by the first defendant within 30 days of the date of the order.

*Held that* – Failure to comply with court orders should be condemned, lest justice, the rule of law and ultimately our hard earned democracy be eroded and the Minister ought to be visited with the necessary sanction for his dereliction.

*Held further that* – The first defendant succeeded to repel the plaintiffs' eviction claim on account of having his objections which are still not considered by the Minister, and the Minister must pay the legal costs of the first defendant as a sanction for failure to comply with the order of 2 October 2020.

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**ORDER**

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1. The plaintiffs' claim is dismissed.

2. The second defendant is ordered to pay the costs of the first defendant on the scale as between party and party.

3. The matter is removed from the roll and regarded as finalised.

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**JUDGMENT**

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SIBEYA J:

Introduction

[1] This court, in *Victor v Victor,*[1] had occasion to consider non-compliance with court orders and consequences thereof, and remarked as follows at paragraphs 1 and 2:

'[1] Court orders are not made for fun or as mere judicial exercises. They are not suggestions or guidelines, to the contrary, they are mandatory and command compliance. Court orders must be obeyed without fail and this is necessary for the rule of law to be maintained in our country and for democracy to be sustained. Anarchy may be inevitable where there is disobedience of court orders.

[2] A person who is disgruntled by a court order may subject such order to variation, review or appeal, but may not simply disregard such order at will. Non-compliance with court orders has consequences.'

[2] The plaintiffs' claim is that the first defendant is in unlawful occupation of a farm that was allocated to them. As a result, they seek the eviction of the first defendant from the farm. The claim is defended by the first defendant.

[3] The court is, therefore, tasked to determine the propriety of the eviction claim.

The parties and their representation

[4] The first plaintiff is Mr Ernest Kambatuku, an adult male pensioner residing at Farm Goab, Gobabis.

[5] The second plaintiff is Mr Efraim Ngurunjoka, an adult male, previously a resident of Farm Goab, Gobabis.

[6] The first plaintiff has passed away on an undetermined date but after these proceedings were already underway. There was no substitution applied for to substitute the first plaintiff, therefore, making the second plaintiff, strictly-speaking, the only plaintiff in the matter. The second plaintiff will thus be referred to as 'the plaintiff'. Where it becomes necessary to refer to the first plaintiff he shall be referred

[1] *Victor v Victor* (HC-MD-CIV-ACT-MOT-GEN-2021/00239) [2022] NAHCMD 302 (17 June 2022) para 1-2.

to as ‘the first plaintiff’. Where the first and second plaintiffs are referred to jointly they shall be referred to as ‘the plaintiffs’.

[7] The first defendant is Mr Lisias Tjaveondja, an adult male residing in Okahandja. As alluded to above, the first defendant is the only person who defended the claim and he shall, therefore, be referred to as ‘the defendant’.

[8] The second defendant is the Minister of Agriculture, Water and Land Reform, duly appointed as such in terms of Art 32(3)(i)*(dd)* of the Namibian Constitution (“the Constitution”) and whose address of service is care of the Office of the Government Attorney, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek. The second defendant shall be referred to as ‘the Minister’.

[9] The third defendant is the Land Reform Advisory Commission, duly established as such in term of s 2 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (‘the Act’) and whose address of service is care of the Office of the Government Attorney, 2nd Floor, Sanlam Building, Independence Avenue, Windhoek. The second defendant shall be referred to as ‘the Advisory Commission’.

[10] The fourth defendant is the Deputy Sheriff for the district of Gobabis, an adult male practising as such and whose address of service is Erf 19, Dr Mbuende Street, Gobabis.

[11] No relief is sought against the Minister, the Advisory Commission and the Deputy Sheriff, who are cited in these proceedings for the interest that they may have in the matter.

[12] The Minister and the Advisory Commission did not defend the plaintiff’s claim but opted to abide by the decision of the court.

[13] The plaintiff is represented by Mr Kaurivi, while the defendant is represented Mr Tjiteere, and the Minister and the Advisory Commission are represented by Ms Kastoor. The arguments of counsel, both written and oral, were helpful in the determination of the matter and, thus, appreciated.

Background

[14] Camp K4 of Farm Goab, which forms the centre stage of the dispute between the parties, was allocated jointly to the plaintiffs by the Minister on 30 July 2019. The first defendant resided on Camp K4 where he carried out farming activities, years prior to the allocation of Camp K4 to the plaintiffs. The plaintiff's claim is that as of 30 July 2019, they did not consent to the defendant occupying Camp K4. The defendant, therefore, as of 30 July 2019 unlawfully occupied Camp K4, so contends the plaintiff.

[15] The plaintiff claims that, due to the defendant's continuous unlawful occupation of Camp K4, he is entitled to evict him from Camp K4.

[16] The defendant's position is a different kettle of fish. He states that antecedent to the allocation of Camp K4 to the plaintiffs, the Minister advertised the intention to allocate Unit B of Farm Goab, inclusive of Camp K4, to the plaintiffs and called for objections. The defendant raised objections to the intended allocation. The defendant avers that without considering his objections, the Minister allocated Unit B of Farm Goab including Camp K4 to the plaintiffs.

[17] The defendant then approached this court on notice of motion, seeking relief against the Minister, which included an order to compel the Minister to consider and respond to his objections and to direct the Minister not to disturb his peaceful and undisturbed possession of Farm Goab. The order sought to direct the Minister not to disturb the defendant's peaceful possession of Camp K4 of Farm Goab was resolved between the parties.

[18] The defendant avers that the said relief to compel the Minister to consider and respond to the objections is akin to a review application challenging the allocation of Unit B of Farm Goab to the plaintiffs. The court ordered the Minister to consider and respond to the objections. The defendant claims that the said order of court entitles him to occupy Unit B of Farm Goab. The parties thus locked horns on the question as to who has the right to occupy Camp K4 of Unit B of Farm Goab.

Relief sought

[19] The plaintiff seeks the following relief:

'1. An order evicting First Defendant, including any person claiming a right to the land through him, from the portion of land accorded to the Plaintiff(s) by the Second Defendants;

2. An order authorizing the Fourth Defendant to evict the First Defendant, including any person claiming a right to the land through him, from the portion of land accorded to the Plaintiff by the Second Defendant;

3. An order authorizing the Fourth Defendant to evict any livestock and/or other movable property belonging to the First Defendant, including that (of) any person claiming a right to the land through him, from the portion of land accorded to the Plaintiff(s) by the Second Defendant;

4. Costs of suit;'

Pleadings

[20] The plaintiff alleges, in the particulars of claim, that from the year 1995, he carried out farming activities together with a Ms Erika Tjaveondja, on farm Goab. Ms Tjaveondja, who passed on during the year 2000, was the mother of the defendant. The plaintiffs allege further that during 2014, he and the first plaintiff applied to the Minister to be resettled at Farm Goab.

[21] The plaintiff further alleges that on 21 March 2018, the officials of the Ministry and the Advisory Commission announced the allocations for resettlement at farm Goab to several applicants. Unit B of Farm Goab was allocated to the plaintiffs while Unit G was allocated to Ms Tjaveondja. The plaintiff further alleges that on 30 July 2019, the Minister on the recommendation of the Advisory Commission, informed the plaintiffs that they were allocated a portion of land described as Unit B of farm Goab No. 362, Registration Division "L", Omaheke Region.

[22] The plaintiff further alleges that the defendant has occupied Unit G in the place of Ms Tjaveondja. The defendant and other persons who reside and claim the

right to occupy camp K4, have, however, been residing and/or carrying out farming activities at camp K4, which is part of Unit B allocated to the plaintiffs unlawfully and without the consent of the plaintiffs. The plaintiff claims further that the defendant and the above-mentioned persons are occupying camp K4 are liable for eviction. It is on this basis that eviction is sought.

[23] The defendant raised a special plea of *locus standi in judicio* i.e. the standing in law to instate the proceedings, alleging that the plaintiffs lack the necessary *locus standi* required to seek his eviction from Camp K4 of Farm Goab. The defendant alleged that the plaintiffs failed to establish ownership or possession of Camp K4 or any right on which basis they could seek the eviction of the defendant. The plaintiffs opposed the special plea. In the ruling delivered on 18 May 2022, this court found that in view of the fact that the plaintiffs' claim to evict the defendant stems from the allotment of Farm Goab, which incorporates Camp K4, to the plaintiffs, the plaintiffs have a direct and substantial interest in the occupation of Camp K4 and have the right to enforce their consequent rights or to seek clarity to their legitimate rights arising from the allocation. As a result, the special plea of *locus standi in judicio* was dismissed.

[24] On the merits, the defendant pleaded that before the Camp K4 was allocated to the plaintiffs, the Minister placed a notice in the print media indicating the intention to allocate the concerned portion of the farm to the plaintiffs and called for objections, if any, within seven days of the issue of the notice.

[25] On 23 October 2015, the defendant submitted objections to the allocation of Camp K4 to the plaintiffs on, *inter alia*, the following grounds:

(a) That Camp K4 constitutes the main farming unit of the defendant;

(b) That the relocation of Camp K4 to another family will be detrimental to the defendant's farming production system and the Minister was urged to reallocate Camp K4 to the defendant.

[26] The defendant's objections were supported by the plaintiffs.

[27] The defendant alleges further that the Minister and the Advisory Commission failed or neglected to consider his objections and allocated Camp K4 to the plaintiffs. The defendant avers further that he instituted proceedings in this court to review the decision to allocate Camp K4 to the plaintiffs. On 2 October 2020, the court directed the Minister to consider and respondent to the objections made by the defendant within 30 days of the date of the order. The defendant avers that the Minister did not comply with the said court order.

[28] The defendant avers further that he has been carrying out farming activities at Camp K4 since the year 1995 where he erected a residential unit and water infrastructure. The defendant claims that the plaintiffs are not the lawful owners or lawful possessors of Camp K4 and prays for the dismissal of their claim with costs.

[29] In replication, the plaintiffs averred, *inter alia*, that they initially supported the defendant's objections to the allocation of Camp K4 to them, but in a letter of 18 October 2018, they withdrew their said support and opted to stand by the allocation letter. The plaintiffs further stated in reply that the defendant utilised camp K4 but with effect from 30 July 2019 when Camp K4 was allocated to the plaintiffs, the defendant occupied it unlawfully.

[30] The plaintiffs proceeded to state further in their replication that:

'4.4 The plaintiffs admit that the High Court ordered a review of the allocation of Camp K4 to the Plaintiffs. However, the Plaintiffs bear no personal knowledge as to why 2nd and 3rd defendants have not complied with the order of the High Court…'

[31] The Minister and the Advisory Commission filed a plea in order to assist the court in the adjudication of the matter and took a neutral position considering the stance which they took to abide by the decision of the court. The Minister and the Advisory Commission stated in their plea that Unit B of Portion 1 of Farm Goab No. 363, which includes Camp K4, was allocated to the plaintiffs.

[32] The Minister and the Advisory Commission further stated in their plea that Farm Goab was not advertised for resettlement but was allocated to beneficiaries after consultations with persons who occupied the farm before and after the

advertisement of such beneficiaries for objection was made. They further state that following the advertisement that called for objections, no objections were received by the Minister and allocations were subsequently made. In interpose to mention that the allegation that no objections were received is not correct as it is common cause between the parties that the defendant raised objections to the intended allocation.

The pre-trial order

[33] The parties filed a joint pre-trial report which was made an order of court at the pre-trial conference hearing of 27 October 2022. The pre-trial order sets out the following issues to be determined by the court:

(a) Whether or not the defendant resides or conducts farming activities at Unit B of Farm Goab, particularly at Camp K4, without the plaintiffs' permission or consent;

(b) Whether or not the defendant has enjoyed exclusive and peaceful possession of Camp K4;

(c) Whether or not the defendant is entitled to reside or conduct farming activities at Camp K4;

(d) Whether or not the allocation of Unit B, particularly Camp K4, to the plaintiffs by the Minister and the Advisory Commission was reviewed and set aside by this court;

(e) Whether or not the plaintiffs are entitled to evict the defendant from Camp K4.

[34] The parties further listed the following facts as constituting agreed facts between them:

(a) That the plaintiffs were resettled on Unit B of Farm Goab, No. 362, Gobabis District by way of a leasehold granted to them in terms of the Act;

(b) That the defendant's late mother was resettled on Unit G of Farm Goab No. 362, Gobabis District, by way of a leasehold granted to her in terms of the Act;

(c) That the defendant raised objections to the allocation of Camp K4 to the plaintiffs;

(d) That Camp K4 forms part of the portion allocated to the plaintiffs.

[35] I now turn to consider the evidence led in order to ascertain the propriety of the plaintiff's claim.

Plaintiff's evidence

[36] The plaintiff took to the witness stand. He testified, *inter alia*, that he is a pensioner residing at Farm Oruna while his livestock is kept at Farm Goab No. 363, Gobabis. He stated that, together with the first plaintiff, they were resettled by the Minister and the Advisory Commission on Unit B of Farm Goab. He testified that he resided at Farm Goab together with the defendant's mother since 1995 until she passed away in 2000.

[37] The plaintiff testified further that on 30 July 2019, the Minister, on the recommendation of the Advisory Commission, allocated Unit B inclusive of Camp K4 of Farm Goab to the plaintiffs while Unit G was allocated to the first defendant's mother. The plaintiff stated further that neither the first plaintiff nor himself, permitted any other person, including the defendant, to occupy and carry out farming activities at Camp K4 and, therefore, the defendant and any other persons occupying Camp K4 through him, are in unlawful occupation thereof.

[38] The plaintiff testified that the unlawful occupation of Camp K4 by the defendant has denied him the right to occupy it. He further stated that together with the first plaintiff, they, on 18 October 2018, withdrew their earlier endorsement of the objections of the defendant to their allocation of Camp K4. On the basis of his testimony, the plaintiff stated that a case for the relief of eviction sought has been made out.

[39] In cross-examination, Mr Tjiteere put to the plaintiff that the defendant is the one who carries out farming activities at Camp K4 since the year 1995 and the plaintiff agreed. When questioned whether he supported the defendant's objections to the intended allocation of Unit B of Farm Goab to the plaintiffs, the plaintiff testified that before the allocation, he supported the objections in order to avoid having a conflict with the defendant, who is his family member and who resided at Camp K4.

[40] Mr Tjiteere further questioned the plaintiff that despite the defendant raising objections to the intended allocation, the Minister proceeded to allocate the Unit B of Farm Goab to the plaintiffs without considering the objections and informing the defendant of the outcome of such consideration. To this, the plaintiff offered no comment and suggested that the Minister will be better placed to respond to the question.

Defendant's evidence

[41] The defendant testified, *inter alia*, that he resides in Okahandja and carries out farming activities at Farm Goab. He stated that the plaintiff resides at Oruna Settlement and not at Farm Goab nor does he carry out farming activities at Farm Goab. He confirmed that his late mother was allocated Unit G of Farm Goab. It was his further evidence that he has been residing and carrying out farming activities at Farm Goab from November 1995.

[42] The defendant testified further that several persons were farming at different camps of Farm Goab without the formal allocation by the Minister and he occupied Camp K4. On 20 October 2015, the Minister notified the public in the newspaper of his intention to allocate portions of Farm Goab to various persons. The notice also invited interested persons to lodge objections, if any, within seven days of the date of its publication regarding the recognition and registration of farming units as advertised.

[43] The defendant testified further that on 23 October 2015, he filed his objections to the intended allocation, which included the allocation of Camp K4. The thrust of the objections in respect of Camp K4 were that the main house of Farm Goab situated at Camp K4 belongs to the defendant and that he occupied it since 1995.

He said further that most of his infrastructure including the settlements of his two workers are situated at Camp K4 and uprooting him from Camp K4 will have devastating consequences to his farming activities.

[44] The defendant testified further that without considering the objections and responding to him about the outcome thereof, the Minister, on 30 July 2019, allocated Camp K4 to the plaintiffs. Upon becoming aware of the said decision of the Minister, the defendant approached this court seeking relief, *inter alia*, an order to compel the Minister to consider his objections and to provide him with the outcome of such consideration.

[45] On 2 October 2020, the court ordered that the Minister should consider and respond to the objections raised on 23 October 2015 regarding the recognition and registration of farming units at Farm Goab. The defendant testified further that the decision to allocate Camp K4 to the plaintiffs was, therefore, reviewed and nullified by the court, and the plaintiffs cannot enforce any right emanating therefrom.

[46] The defendant stated further that the Minister did not comply with the order of 2 October 2020. It was his evidence that he made several inquiries at the Office of the Minister regarding consideration of his objections but ran into a brick wall. Neither the plaintiffs nor the defendant enforced the said order upon realising the default of the Minister.

[47] Mr Kaurivi, in cross-examination, questioned the defendant and pointed out that his application made to court referred to above, does not make reference to seeking an order for the review and setting aside of the decision of the Minister to allocate Farm Goab to the plaintiffs. The defendant responded that, as far as he could understand, the application instituted at court has the same effect as a review to set aside the decision of the Minister.

<u>The Minister and the Advisory Commission's case</u>

[48] Although the Minister and the Advisory Commission did not defend the plaintiffs' claim and opted to abide by the decision of the court, they led the evidence of Mr Alfred Sikopo in order to assist the court in the determination of the matter.

[49] Mr Sikopo testified, *inter alia*, that he is employed by the Ministry as a Director for Resettlement and Regional Programme Implementation, a position he held from 1 August 2020. Before 1 August 2020, he was never an employee of the Ministry. His duties include managing resettlement programmes and providing support to the Regional Resettlement Committees and the Advisory Commission. He testified that Unit G of Farm Goab was allocated to the defendant's mother while Unit B was allocated to the plaintiffs. He stated further that the defendant raised objections to the allocations in 2015. The objections, according to Mr Sikopo, were attended to in March 2016 by the Regional Resettlement Committee and the outcome was verbally communicated to the defendant.

[50] Mr Sikopo testified further that he was unaware of a review application launched in this court to set aside the decision of the Minister to allocate Unit B including Camp K4 to the plaintiffs. He was also unaware of the court order of 2 October 2020 until 6 March 2023, a day before his testimony was led. He stated further that he was not aware if objections were considered by the Minister after October 2020.

Arguments by counsel

[51] Mr Kaurivi argued that the plaintiffs were allocated Unit B of farm Goab inclusive of Camp K4 by the Minister and that decision was never reviewed and set aside by the court and, therefore, remains valid and enforceable. He relied on the notorious principle which has attained the name of the *Oudekraal* principle from the matter of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*.[2] The *Oudekraal* principle entails that an administrative decision remains valid with its consequences until set aside by a court. On this basis, Mr Kaurivi argued, the allocation by the Minister stands unscratched, so to speak.

[52] In respect of the Minister's non-compliance with the court order of 2 October 2020, Mr Kaurivi argued that while such conduct of the Minister cannot be condoned, it does not invalidate the decision of the Minister to allocate Unit B of Farm Goab to

[2] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

the plaintiffs, and as a result, the plaintiffs are entitled to evict the defendant as sought from this court.

[53] Mr Tjiteere argued the contrary. He argued that the plaintiffs have no right to evict the defendant from Unit B of Farm Goab. This is premised on the argument that s 42(2) of the Act was not complied with in that no lease agreement was registered over the farm between the Minister and the plaintiffs. The allocation letter merely created hope *(spes)* and that does not entitle the plaintiffs to evict the defendant on that basis, argued Mr Tjiteere.

[54] Mr Tjiteere further submitted that the court order of 2 October 2020 constituted a review of the Minister's decision to allocate Camp K4 to the plaintiffs as the Minister allocated Camp K4 despite the objections made and without considering such objections. He argued that the Minister's decision was reviewed and set aside by the said court order. He wrapped up his arguments by urging the court to dismiss the plaintiffs' claim for lacking merit.

[55] This court ordered Ms Kastoor to prepare and address it on the following:

(a) The consequences of the failure of the Minister to comply with the court order of 2 October 2020; and

(b) Why the necessary sanctions should not be imposed, including, why the Minister should not pay the costs of the plaintiffs and the first defendant.

[56] Ms Kastoor filed written arguments supplemented by oral arguments. She argued that the objections raised by the defendant were considered by the Omaheke Land Reform Advisory Commission – Resettlement Committee and addressed. She argued that the said Committee found that the defendant carried out farming activities under his mother's names and that an allotment letter will be issued in his mother's names.

[57] In paras 20, 21 and 61 of heads of arguments Ms Kastoor states that:

'20. During the present trial it became evident that the 2nd and 3rd defendants had considered and communicated the objections to the First Defendant both verbally and in writing during the period of 2016 – 2018.

21. It is further submitted that oral communications were made to the 1st Defendant in respect of his objections after the court order dated 02 October 2020, there is, however, no documentary proof that the Minister responded to the 1st Defendant in writing...

61. The 2nd and 3rd Defendants submit that the 2nd Defendant considered the objections orally, and do agree that it should have been done in writing and that there should be proof to that effect and it is against this background that the 2nd and 3rd Defendants would contribute to paying 50% of the taxed legal cost of the parties if that is the position of this Honourable Court,'

[58] Ms Kastoor argued that the decision to allocate Unit B of Farm Goab which includes Camp K4 to the plaintiffs is valid until reviewed and set aside. She further argued that Unit B of Farm Goab was correctly allocated to the plaintiffs. The court order of 2 October 2020 did not review and set aside such decision but rather directed the Minister to consider and respond to the defendant's objections, she argued. She argued further that none of the parties applied to court for an order that the Minister was in contempt of court, and also that the consequence of the Minister's failure to comply with the court order was not listed in pre-trial order as an issue to be determined at the trial. She argued further without substantiation that the Minister partially complied with the order of 2 October 2020.

Burden of proof

[59] The parties are *ad idem*, correctly so in my view, that the plaintiffs bear the burden of proof of their claim on a balance of probabilities.

[60] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd,*[3] Corbett JA had occasion to discuss the difference between the burden of proof and the evidential burden, and remarked as follows:

[3] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*? 1977 (3) SA 534 (A) at 548A.

'As was pointed out by DAVIS, A.J.A., in Pillay v Krishna and Another, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice and Another,* 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea and Another v Godart and Another, 1939 AD 16 at p. 28; Marine and Trade Insurance Co. Ltd. v Van C der Schyff, 1972 (1) SA 26 (AD) at pp. 37 - 9.)'*

[61] I endorse the above passage as indicating of our law on who bears the onus to prove a claim or defence. Such onus is well-established and attracts no contestation between the parties, at least not in the present matter.

Analysis

[62] As alluded to before, on 20 October 2015, the Minister notified the public in the newspaper of his intention to recognise and allocate Farm Goab in several farming units to various persons, and invited objections. On 23 October 2015, the defendant raised objections to the intended allocation of several units, including Unit B which encompasses Camp K4 that forms the basis of the present dispute.

[63] The objections raised by the defendant against the intended allocation of Camp K4 of Unit B to the plaintiffs included that:

(a) Camp K4 where the main house was situated belonged to him from the year 1995 and this was supported by a letter signed by the plaintiffs annexed to the objections where the plaintiffs stated that Camp K4 was wrongly allocated to them as it belonged to the defendant, proven by his infrastructures on the said camp, and the plaintiffs called for a rectification of the allocation which was termed a technical mistake;

(b) Camp K4 is his main farming unit where most of his infrastructure, including the settlement of two of his workers and allocating it to another person will have devastating effect to his production system which includes gardening as it is the main camp for production.

[64] On 18 October 2018, the plaintiffs penned a letter to the Lands Division of the Omaheke Regional Council where they sought to withdraw their earlier letter which supported the objections of the defendant. They contended in this letter of 18 October 2018, that the reason for supporting the objections of the defendant then was to avoid disputes. They, therefore, sought to withdraw their support for the objections and accept the allocation made by the Minister.

[65] On 30 July 2018, the defendant approached this court on notice of motion seeking, *inter alia*, the order directing the Minister to respond to his objections.

[66] On 2 October 2020, the court ordered that the Minister to consider and respond to the objections made by the defendant on 23 October 2015 in respect of the recognition and registration of farming units at Farm Goab within 30 days from the date of the order. It is this order that has clouded the present litigation between the parties.

[67] Mr Kaurivi and Mr Tjiteere argued that the Minister failed to comply with the above order of 2 October 2020. Ms Kastoor's argued the contrary. She argued that the Minister partially complied with the order in that the objections were considered and the outcome was verbally communicated to the defendant. The only default that the Minister finds himself in is the failure to communicate the result of the consideration of the objections to the defendant in writing, so she argued. It is the sustainability or otherwise of this argument that I find prudent to immediately address and I proceed to do so.

[68] The only trace of written communication that comes close to the alleged consideration of the objections is found in the report titled: Objection Consultations on the issues of allotment letters for farms acquired before the enactment of the Agricultural (Commercial) Land Reform Act of 1995 in Omaheke Region: By the

Omaheke Land Reform Advisory Commission – Resettlement Committee of 2 - 9 March 2016. This report was introduced into evidence by consent of the parties as Exhibit “K”. In respect to the objections raised by the defendant (bearing in mind that the objections related to several Camps of Farm Goab and not only Camp K4), the said report provides that:

‘4.5 Lisias Tjeripo Tjaveondja

The number of objections from the objector was (sic) addressed through the fact that he is farming under his deceased mother and the Allotment Letter will be issued in the name of late Mrs. Erica Tjaveondja. Mr Tjaveondja and his family were advised to wait until the Allotment Letter is in their possession before they start with the inheritance process. The meeting was advised that a new order is anticipated to commence at farm Goab since the camps will be replaced by farming units, this process created considerable changes to the current set-up, but farmers were advised to stick to the current status quo until such time the Allotment Letters are issued to them.’

[69] The above passage does not, by any stretch of imagination, reveal consideration of the objections raised by the defendant. The defendant’s objections, which are particularly raised in respect of the allocation of Camp K4 to the plaintiffs, called for specific consideration and that the outcome thereof be communicated to the defendant. This was not done, at least not from the above report.

[70] Mr Sikopo’s testimony that the defendant’s objections were considered by the Regional Resettlement Committee, in March 2016, and that the outcome was verbally communicated to the defendant does not assist this court. This is premised on the fact that Mr Sikopo relies on the above report marked Exhibit “K” for the contention that the objections were considered. In view of my aforesaid finding regarding the said report, I find that nothing turns on the testimony of Mr Sikopo in as far as he relies on the said report for his contention that the defendant’s objections were considered and responded to.

[71] Mr Sikopo testified repeatedly that the defendant was engaged verbally where his objections were considered and responded to. This happened prior to Mr Sikopo joining the Ministry on 1 August 2020. Mr Sikopo tendered no direct evidence of such

verbal communications. No evidence was led as to who verbally communicated to the defendant and what was said.

[72] Damaseb AJA while sitting in the Court of Appeal of the Kingdom of Lesotho in *Mokhosi & Others v Mr. Justice Charles Hungwe & Others*[4] remarked as follows regarding hearsay evidence:

> 'As we have said before, admissibility of evidence is a question of law and not of judicial discretion. Evidence is admissible either under the rules of the common law or under statute. Hearsay evidence is no exception. Once an item of evidence constitutes hearsay, it must either be sanctioned by statute or the common law to be admissible. If it does not, it remains inadmissible as a matter of law and stands to be rejected by the court even if not specifically objected to by the opposing party.'

[73] I find the above passage to constitute good law in the court's approach to hearsay evidence.

[74] It is apparent from the evidence of record that Mr Sikopo was not an employee of the Ministry at the time that he alleges that the objections were orally considered. He was further not present when the defendant was allegedly provided feedback of the consideration of the objections. In my view, therefore, it follows as a matter of consequence that the testimony of Mr Sikopo that the objections were considered and the outcome thereof was communicated to the defendant verbally constitute inadmissible hearsay evidence and falls to be dismissed.

[75] Ms Kastoor could not point out to a meaningful occasion where the Minister considered the objections of the defendant. She was, however, clutching at straws in attempt to argue that some of the officials at one point or the other verbally communicated to the defendant about consideration of his objections. Without breaking a sweat, I find that no admissible evidence was led to prove that the objections raised by the defendant regarding the allocation of Camp K4 to the plaintiffs were considered and responded to.

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[4] *Mokhosi & Others v Mr. Justice Charles Hungwe & Others* (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019) para 55.

[76] What is astounding is that, notwithstanding the objections raised by the defendant on 23 October 2015, the Minister proceeded to allocate Camp K4 to the plaintiffs on 30 July 2019 without addressing the said objections. It is against this backdrop that the defendant approached this court and obtained the order of 2 October 2020.

[77] In the proceedings leading to and the order of 2 October 2020, the Minister was a party and was duly represented by counsel. I thus hold no doubt that the content of the order of 2 October 2020, which compelled him to consider and respond to the objections of the defendant within 30 days of the order, was brought to his attention. No evidence was led nor was it argued by Ms Kastoor that the Minister had no knowledge of the order of 2 October 2020. What is clear is that the Minister failed to comply with the said court order.

The consequence of failure to comply with the order of 2 October 2020

[78] As it was put by the Supreme Court of Appeal of South Africa in *Minister of Water and Environmental Affairs v Kloof Conservancy* at para 14:[5]

> 'An order or decision of a court binds all those to whom, and all organs of State to which, it applies.'

[79] Ms Kastoor, while acknowledging that the order binds the Minister, argued that the Minister is not in contempt of court and the court is seized with no such application. It is indeed correct that there is no application before court for an order that the Minister is in contempt of court. This, however, does not mean that on befitting facts the court cannot *mero moto* inquire into the action or inaction of a party in order to determine whether or not such party is in contempt of court. The court is well within its authority to jealously guard its orders, demand compliance thereof, and penalise non-compliance with its orders.

[5] *Minister of Water and Environmental Affairs v Kloof Conservancy* 2016 (1) All SA 676 (SCA) para 14.

[80] For civil contempt of court to be established, it must be proven that there exists an order; which has been serviced or where the concerned party has been notified; and that there is wilfulness and *mala fides* beyond reasonable doubt.[6]

[81] Save for alleging that there was verbal and partial compliance with the order of 2 October 2020, there is nothing of substance submitted to court to support such bare allegations. To his credit, if at all it can be labelled as such, the Minister through Ms Kastoor, requested of this court to still be afforded time to respond to the objections raised. The objections were due to be considered and responded within 30 days from 2 October 2020 and that was not complied with. In my view, the actions or lack thereof by the Minister cannot be condoned.

[82] In the absence of the application to hold the Minister in contempt of court and the willingness expressed by the Minister to consider the objections and respond to the defendant, in my view, demonstrates the absence of *mala fides* in non-compliance with the order. The Minister was further not called upon to explain why he should not be found to be guilty of contempt of court. It is for the above reasons coupled together, and in the exercise of my discretion, that I decided not to inquire into whether or not the Minister is guilty of contempt of court.

[83] What is the effect of the decision of the Minister of 30 July 2019 in as far as Camp K4 is concerned where there were objections raised by the defendant but not considered? It is this decision that Mr Kaurivi, while relying on *Oudekraal*, argued that the decision stands until set aside by a court of law. Mr Tjiteere on the other hand argued that the decision of 30 July 2019 was reviewed by the order of 2 October 2020 and set aside.

[84] Bearing in mind that the defendant's objections were raised on 23 October 2015 towards the notice of intention to allocate farming units of Farm Goab including Camp K4, it is apparent that Camp K4 was not yet allocated to the plaintiffs by the time that the objections were made. By the time the proceedings were instituted on 30 July 2018 to compel the Minister to respond to the objections, Camp K4 was not yet allocated to the plaintiffs. The Minister, therefore, despite being apprised of the defendant's objections, proceeded to allocate Camp K4 to the plaintiffs while

[6] *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] SA 54 (SCA).

neglecting to address the said objections. The Minister's decision constituted administrative action which is required by Art 18 of the Namibian Constitution to be lawful, fair and reasonable. It should be remembered that what constitutes fairness depends on the facts of each case.

[85] In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another,*[7] the Supreme Court of Appeal of South Africa at para 56 cited the following passage from *Oudekraal Estates (Pty) Ltd v City of Cape Town:*[8]

'[A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.'

[86] At para 37 of *Oudekraal,* the Supreme Court of South Africa proceeded to state that:

'[37] …unlawful administrative action recognizes the value of certainty in a modern bureaucratic state, a value that the legislature should be taken to have in mind as a desirable objective when it enacts enabling legislation, and it also gives proper effect to the principle of legality, which is fundamental to our legal order. (*Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* **[1998] ZACC 17**; **1999 (1) SA 374** (CC) paras 56, 58 and 59; *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* **[2000] ZACC 1**; **2000 (2) SA 674** (CC) para 50). While the legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid. And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.'

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[7] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2010 (2) All SA 519 (SCA) 17 February 2010.
[8] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36.

[87] It is plain from the above authorities that the court exercises a discretion whether to grant or refuse a review application. The question begging for an answer is whether or not the order of 2 October 2020 constituted a review.

[88] The order of 2 October 2020, directed the Minister to act. It compelled the Minister to consider and respond to the objections. It cemented the right that the defendant had to raise objections, as invited by the Minister and to have such objections considered and responded to by the Minister. Since the order of the court creates a right of the defendant to have the objections considered and responded to, failure by the Minister to so comply creates a remedy for the defendant. This, in my view, is in keeping with the common law principle of *ubi jus ibi remedium,* i.e. where there is a right there is a remedy. To give a person a right but not a remedy to protect it has long been held as an anomaly.[9]

[89] The default of the Minister in *casu*, is so fundamental that he, by law, called for objections, if any, to his intention to allocate the farming units. Where objections are raised, same should be considered before the decision to allocate the farming units is taken. In the same vein, the decision on the objections raised should be communicated to the objectors.

[90] On the facts of the present matter, neglecting the objections is prejudicial to the defendant, as it results in the allocation of Camp K4 to the plaintiffs despite the fact that the defendant had resided or occupied Camp K4 from the year 1995. The prejudice is further manifest in that the allocation threatens the defendant's utilisation of camp K4 for production purposes, as well as his infrastructure on Camp K4 without any reason. Surely this contravenes Art 18 to the core.

[91] All counsel involved in the matter argued that a consideration of the objections may swerve the decision to allocate Camp K4 in any direction. If objections are considered in favour of the defendant then Camp K4 could be allocated to him while if the objections are considered and dismissed, the allocation of Camp K4 to the plaintiffs may be confirmed.

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[9] *Joseph v Joseph* 2020 (3) NR 689 (SC) para 37.

[92] In the exercise of my discretion and in consideration of the facts of this matter and the wording of the order of 2 October 2020, I find that the order which directed the Minister to consider and respond to the objections of the defendant meant that that any processes that occurred subsequent to launching the objections which were not considered are invalid for being materially flawed. It follows, in my view, that the order of 2 October 2020, set aside the allocation of Camp K4 to the plaintiffs and ordered the consideration and response to the objections and thereafter the process could take its normal course.

[93] As I draw this judgment to a close it should be noted that the plaintiffs were originally not parties to the said matter where an order was sought to compel the Minister to consider and respond to the objections. The plaintiffs undisputedly stated that by the time that they instituted these proceedings they were unaware of the existence of the order of 2 October 2020. I was made to understand that had the plaintiffs been aware of the existence of the said order, they would have insisted on the Minister to comply with the order before launching these proceedings.

[94] The finding that I made above that the order of 2 October 2020 constitutes a review of the decision of the Minister to allocate Camp K4 to the plaintiffs is contrary to the argument raised by Mr Kaurivi. Notwithstanding Mr Kaurivi's spirited argument, the said finding finds support in the plaintiff's replying affidavit referred to above where the plaintiffs state as follows:

'4.4 The plaintiffs admit that the High Court ordered a review of the allocation of Camp K4 to the Plaintiffs. However, the Plaintiffs bear no personal knowledge as to why 2nd and 3rd defendants have not complied with the order of the High Court…'

Conclusion

[95] After considering the pleadings, evidence led, and arguments by counsel, I find that the Minister's failure to consider and respond to the objections raised by the defendant affected the subsequent decision to allocate Camp K4 to the plaintiffs. I further find that the order of 2 October 2020, emphasised the defendant's right to have his objections considered and responded to. It also reviewed and set aside the allocation of Camp K4. The order set aside every subsequent act taken regarding

Camp K4 after the objections were received without being considered and responded to.

[96] In view of the conclusion that I have reached regarding the effect of the order of 2 October 2020, I deem it unnecessary to address the defendant's argument of alleged non-compliance with s 42(2) of the Act on which it was argued that the plaintiff's do not have the right to institute this action for eviction.

[97] In the premises of the foregoing conclusions and findings, I find that the plaintiffs' claim falls to be dismissed.

Costs

[98] It is an established principle of law that costs follow the result. Traditionally, the losing party will ordinarily be mulcted in costs. In this matter, the defendant succeeded to fend off the plaintiffs' claim and is consequentially entitled to costs. The question I turn to consider is whether or not the plaintiffs should be mulcted in costs.

[99] In keeping with my finding made hereinabove that the Minister failed to comply with the court order of 2 October 2020, and that the Minister further failed, at the very least, to provide this court with an explanation for his dereliction. The Minister, therefore, ought to be visited with a punitive costs order, let it may be misunderstood that courts condone non-compliance with their orders. Had the Minister complied with the court of 2 October 2020 and considered the objections and responded thereto to the defendant this matter may have taken a different turn.

[100] It is possible that after consideration of the objections and communicating such decision to the defendant where the Minister, for example, could state that he sticks to his decision to allocate Unit B of Farm Goab including Camp K4 to the plaintiff, the defendant might have long vacated Camp K4, and might not have opposed the eviction claim or might have challenged such decision on other grounds. It is also possible that if the Minister could uphold the objections of the defendant then he could have a made a different decision contrary to allocating Camp K4 to the plaintiffs.

[101] In view of what I have stated above, I find that the Minister should solely bear the blame for the predicament that the parties find themselves in at the present moment. Had the Minister complied with the order of 2 October 2020, this case could not be lingering in this court today, at least not in its current state.

[102] It is court orders that bring meaning to the court's adjudicatory machinery. Failure to comply with court orders should be condemned, lest justice, the rule of law and ultimately our hard earned democracy be eroded. One imagines how devastating the consequences will be if compliance with court orders is suspended even for a day. It is a scary thought full of chaotic scenes that should remain a theory and never be realised.

[103] Similarly, the Minister, in the present matter, does not deserve to be spared from the necessary sanction that the court can reasonably impose for the aforesaid failure. This will signify the abhorrence of the court towards non-compliance with its orders.

[104] Ms Kastoor is correct that none of the parties applied for the Minister to be found in contempt of court. This, however, does not clip the court of its authority to enforce its orders or sanction non-compliance with orders. The court, as it is entitled to do, in fairness to the parties and the Minister, sought reasons and arguments why the Minister should not be held liable for the costs of the plaintiffs and the defendant in view of the Minister's failure to comply with the court order of 2 October 2020 as aforesaid.

[105] Mr Kaurivi appeared for the plaintiff on the instructions of the Directorate of Legal Aid. Section 18 of the Legal Aid Act 29 of 1990 ('legal Aid Act'), prohibits an order of costs against the state in any proceedings where a party sought to be awarded costs was legally aided. This provision in the statute books is for good reason as such party to be awarded costs would not have expended costs in litigation of the concerned matter. An order of costs in such a matter will be for the benefit of the State as per s 17(4) and (5) of the Legal Aid Act, and will be tantamount to an academic exercise of removing funds from the left hand of the state to the right hand. It is for this reason that the Minister will be spared from paying the

costs of the plaintiffs. The Minister, will, however, be ordered to pay the costs of the defendant.

Order

[106] In the result, I order that:

1. The applicants' claim is dismissed.

2. The second defendant is ordered to pay the costs of the first defendant on the scale as between party and party.

3. The matter is removed from the roll and regarded as finalised.

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O S Sibeya

Judge

APPEARANCES:

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|---|---|
| PLAINTIFFS: | T K Kaurivi<br>Of TK Kaurivi Legal Practitioners,<br>Windhoek. |
| FIRST DEFENDANT: | M Tjiteere<br>Of Dr Weder, Kauta & Hoveka Inc,<br>Windhoek |
| SECOND AND THIRD DFENDANTS: | M L Kastoor<br>Of the Office of the Government Attorney,<br>Windhoek |