

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2023/00063

In the matter between:

**HENDRICK NDANGI JACOB**

**APPLICANT**

and

**ONIIPA TOWN COUNCIL**

**1<sup>st</sup> RESPONDENT**

**NAFTAL NGETEYA NENDONGO**

**2<sup>nd</sup> RESPONDENT**

**MINISTER OF URBAN AND RURAL DEVELOPMENT**

**3<sup>rd</sup> RESPONDENT**

**Neutral citation:** *Jacob v Oniipa Town Council* (HC-MD-CIV-MOT-REV-2023/00063) [2024] NAHCMD 99 (8 March 2024)

**Coram:** USIKU J

**Heard:** 19 October 2023

**Delivered:** 8 March 2024

**Flynote:** Review – Applicant seeking review and setting aside of a decision of a Town Council revoking its earlier decision to sell certain immovable property to him – Court finding that decision to revoke an earlier decision was not reasonable in the circumstances – Court setting aside the Town Council’s decision to revoke the earlier decision.

**Summary:** The Oniipa Town Council had offered certain immovable property to the applicant for sale. The respondent lodged an objection to the sale of the immovable property to the applicant claiming certain rights to the same land. The Minister of Urban and Rural Development approved the sale of the immovable property to the applicant. The Minister subsequently informed the respondent that his objection to the sale could not be 'considered' on account of certain reasons outlined by the Minister. The Town Council later revoked its decision to offer the immovable property to the applicant for sale. The applicant brought the present application seeking an order reviewing and setting aside the revocation decision.

*Held that* the decision by the Town Council revoking its earlier decision to sell the immovable property to the applicant is not reasonable in the circumstances and is therefore reviewed and set aside.

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### **ORDER**

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1. The decision taken by the first respondent on 6 December 2022 revoking its earlier decision to sell certain immovable property described as Portion of Oniipa Town and Townlands No 1164, is hereby reviewed and set aside.
  2. It is declared that the applicant is the lawful occupier and holder of customary land rights in respect of the abovementioned immovable property.
  3. The first respondent is directed to attend to and sign all relevant documents to effect transfer of ownership of the abovementioned land in favour of the applicant, in accordance with the approval granted by the Minister on 15 March 2022.
  4. The second respondent is ordered to pay the applicant's costs of suit.
  5. The matter is removed from the roll and is regarded finalised.
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### **JUDGMENT**

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USIKU J:

Introduction

[1] This is an opposed review application brought by the applicant seeking an order reviewing and setting aside a decision taken by Oniipa Town Council on 6 December 2022 revoking its earlier decision to sell certain immovable property to the applicant.

### The parties

[2] The applicant is Hendrick Ndangi Jacob, a major Namibian male.

[3] The first respondent is Oniipa Town Council ('OTC'), a local authority established in terms of the relevant provisions of the Local Authorities Act 23 of 1992 ('the Act'), with its principal place of business situated along Onandjokwe Road, Oniipa, Oshikoto Region. The OTC does not oppose the application.

[4] The second respondent is Naftal Ngeteya Nendongo, a major male. Only the second respondent opposes the application. The second respondent is referred to as 'the respondent' herein.

[5] The third respondent is the Minister of Urban and Rural Development ('the Minister'). No relief is sought against the Minister.

### Background

[6] The applicant approached this court on 10 February 2023 seeking an order in the following terms:

'1 Reviewing and setting aside first respondent's decision as contained in its letter dated 6 December 2022;

2 Declaring the applicant to be the lawful occupier and holder of customary land rights over a certain piece of land forming part of Oniipa Town and Townlands being ERF 116 (also bearing temporary reference number: D306) situated in Oniipa and owned by first respondent;

3. Directing and compelling the first respondent to attend to and sign all relevant documents to effect transfer of ownership of the abovementioned piece of land to the applicant;

4. Directing the applicant to pay the purchase price in the amount of N\$17 000 to the first respondent and any other ancillary costs involved in the transfer of the said townland;

5 Declaring that second respondent has no legal right title whatsoever in the aforesaid piece of land;

6 Costs of suit against any respondent who opposes the application;

7 Further and/or alternative relief.'

### Applicant's case

[7] In his founding affidavit, the applicant avers that he is the lawful occupant and holder of customary land rights over a piece of land described as Portion of Oniipa Town and Townland No 1164 ('the property').

[8] According to the applicant, he inherited the property from his late mother, Sarah Jacob Ambambi who inherited it from her grandparents Toivo Ambambi and Linda Ambambi, who had occupied and held customary land rights over the property since the 1950s. The applicant asserts that he acquired the customary land rights over the property upon the death of his mother.

[9] The property was part of land designated as communal land under the authority and jurisdiction of Ondonga Traditional Authority. In 2004, Oniipa was declared a settlement area in terms of the provisions of the Regional Councils Act 22 of 1992. Ondonga Traditional Authority consequently ceased to have jurisdiction to allocate any customary rights over the settlement area.

[10] In 2015, Oniipa was declared a local authority area and ownership of the land was transferred from Oshikoto Regional Council to OTC who had assumed authority over the land since.

[11] On 22 December 2017, the applicant and the OTC entered into a lease agreement in terms of which OTC let the property to the applicant for an indefinite period. The lease agreement contains an option to purchase clause in favour of the applicant.

[12] On 29 April 2021, OTC resolved to sell the property to the applicant subject to approval by the Minister.

[13] On 16 September 2021, OTC applied to the Minister for approval to sell the property to the applicant.

[14] On 26 January 2022, the respondent lodged an objection to the Minister against the approval of the proposed sale.

[15] On 15 March 2022, the Minister approved the proposed sale of the property to the applicant at the purchase price of N\$17 000.

[16] On 18 March 2022, OTC held a consultative meeting between the applicant and the respondent. This meeting was also attended by representatives of Ondonga Traditional Authority. According to the minutes taken at this meeting, the applicant and the respondent were requested to show the extents of their respective land on the aerial map projected on a screen. The applicant indicated a mahangu field which was previously occupied by the late Toivo Ambambi and Linda Ambambi since the 1950s. The respondent indicated a portion of land given to him in 2012, covering an area of one hectare, which lies in the mahangu field of the land now occupied by the applicant. At this meeting, OTC indicated that it shall move forward with the approval as granted by the Minister.

[17] On 21 May 2022, the Minister responded to the respondent's objection, stating that the objection to the sale of the property could not be 'considered' on account that:

- (a) the objection was not formally submitted to OTC for consideration and deliberation as stipulated in s 63(3)(b)(i) of the Act;
- (b) the information that was provided during the consultative meeting held on 18 March 2022 indicated that the piece of land allocated to the respondent in 2012 did not form part of the land that is sold to the applicant and that;
- (c) documentary proof indicate that land allocation by Ondonga Traditional Authority to the respondent in 2012 was unprocedural as Oniipa was already proclaimed as a settlement area in 2004 and the land claimed by the respondent is within the jurisdiction of OTC.

[18] On 6 December 2022, OTC informed the applicant's legal practitioner that it has decided to revoke its offer to sell the property to the applicant on account of the existing dispute between the applicant and the respondent. OTC also advised the parties to seek external assistance in reaching a consensus or to resolve their dispute through litigation.

[19] The applicant submits that OTC's refusal and/or failure to proceed with the sale of the property to him is irregular, unjustified and at variance with the ministerial approval dated 15 March 2022. In addition, the applicant contends that OTC's decision to revoke the offer to sell the property to him violates the provisions of article 18 of the Namibian Constitution.

#### Respondent's case

[20] In his answering affidavit, the respondent avers that, on 8 October 2012, he was allocated customary land rights over a portion of land (mahangu field), which portion forms part of the area which is the subject matter of this application. The allocation was made by Ondonga Traditional Authority.

[21] After he learnt that OTC intends to sell the land described as Portion of Oniipa Town and Townlands No 1164, the respondent lodged an objection against the approval of the proposed sale on the ground that the size of the proposed land for sale encroaches the portion of the land allocated to him.

[22] The respondent contends that the applicant has not placed evidence before this court as to the boundaries determined for Oniipa when it was declared a settlement area in 2004, in order to show that at the time the Traditional Authority allocated to him the customary land rights, the portion in question fell within the boundaries specified in the general plan of the declared settlement area. The respondent further contends that the applicant has not placed evidence before this court that his late mother was allocated any customary land rights over the property which is the subject matter of this application.

[23] The respondent submits that the decision by OTC to revoke its approval of the sale because of the existing dispute between him and the applicant is fair,

reasonable and rational in the circumstances. The respondent further submits that there are many facts in dispute between the parties that the court is not in position to determine the issues in dispute judicially. The respondent therefore prays that the review application be dismissed with costs.

### Analysis

[24] From the joint case management report filed by the parties, the following issues are not in dispute as between the parties:

- (a) the land in question initially fell under the jurisdiction of Ondonga Traditional Authority;
- (b) Oniipa was declared a settlement area in 2004;
- (c) Oniipa was proclaimed as town in 2015 and ownership of the land was transferred to OTC;
- (d) the land in question now falls under the jurisdiction of and is owned by OTC;
- (e) the applicant applied to OTC to develop the land and OTC resolved to sell the land to him and;
- (f) the Minister has approved the sale of the land to the applicant pursuant to an application made by OTC.

[25] It is also common cause that the respondent addressed a notice of objection to the Minister on 26 January 2022. Thereafter, on 18 March 2022, OTC held a consultative meeting between the applicant, the respondent and representatives of Ondonga Traditional Authority. According to the minutes of this meeting, the notice of objection addressed by the respondent to the Minister on 26 January 2022 formed part of the background issues that were considered at this meeting.

[26] According to the minutes of the consultative meeting, a certain Mr Paulus Hafeni, a representative of Ondonga Traditional Authority, asserted that he was approached by the respondent in 2012 who wanted a piece of land near Onandjokwe State Hospital. The respondent's request was approved. Mr Thomas Amuthenu, another representative of Ondonga Traditional Authority confirmed the version of Mr Hafeni. He asserted that the late Mr Ambambi surrendered certain land outside his

fence. That land now houses a Post Office, car wash etc. The respondent was given a piece of the surrendered land, which according to Mr Amuthenu was a small land that 'did not measure up to a hectare'.

[27] The minutes also note that information was presented to the meeting to the effect that the respondent was allocated land in 2012 by the Traditionally Authority, after Oniipa was proclaimed as a settlement area in 2004 and that the traditional leaders had ceased to have power to allocate land in Oniipa settlement area in 2004. From the minutes, it appears that none of the attendees at the meeting contradicted that information.

[28] The consultative meeting was also informed that OTC will respond to a letter from the Ministry regarding the respondent's notice of objection and that the Ministry will in turn respond to the respondent's objection.

[29] On 21 May 2022, the Minister responded to the respondent's notice of objection and indicated that the objection could not be 'considered' for reasons already referred to.

[30] The principal issue for determination is whether OTC was justified in revoking its decision to sell the property to the applicant on 6 December 2022.

[31] It is significant to note that the respondent does not lay claim to the whole land which is offered by OTC to the applicant for sale. Rather, the respondent lay claim to a portion of land that 'has encroached on the portion of the land' allegedly allocated to him by the Traditional Authority. In the minutes of the consultative meeting, the disputed land is described as 'a portion of land ... covering an alleged area of 1ha, which lies in the mahangu field now owned by Mr Jacob'. In justifying his claim to the portion of land that lies in the mahangu field claimed by the applicant, the respondent contends that in terms of s 26(2) of the Communal Land Reform Act 5 of 2002, upon a death of a holder of customary land rights, such rights revert to the Chief or Traditional Authority for reallocation.

[32] On the analysis of the evidence presented, it appears apparent that when the Ondonga Traditional Authority purported to allocate customary land rights to the



respondent, it was not allocating customary land rights that have reverted to it upon a death of a previous holder of such rights. Therefore, reliance on the provisions of s 26(2) by the respondent is misplaced. Furthermore, according to the minutes of the consultative meeting, the respondent was granted communal land rights in respect of a portion of land that was outside the fence of the late Mr Ambambi that was surrendered to the Traditional Authority. The claim by the respondent to a portion of land that is in a mahangu field of the applicant, does not have basis on the evidence on record.

[33] OTC has resolved to sell the property in question to the applicant. The respondent had raised an objection. OTC held a consultative meeting at which respondent's notice of objection was discussed and considered and the matter was referred to the Minister for decision. The Minister declined to consider the objection on account of the reasons already referred to. By that time the Minister had already granted approval, on 15 March 2022, to the sale of the property to the applicant. Against the above background, I am of the view that OTC was not justified to revoke its decision to sell the property to the applicant as there was no live objection at the time for consideration by the Minister in terms of s 63(3) of the Local Authority Act.

[34] In his answering affidavit, the respondent submits that there are disputes of facts between the parties and that the court is not in position to determine any issue in dispute judicially.

[35] The approach to be adopted when factual disputes arise in motion proceedings is that, in the event of conflict, the court accepts the version set up by the respondent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.<sup>1</sup>

[36] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.<sup>2</sup>

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<sup>1</sup> *Plascon-Evans Paints Ltd. v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623; at 634E – 635C.

<sup>2</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

[37] In the present matter, the respondent raises the following as the dispute of facts:

- (a) there is no evidence placed before this court as to the boundaries determined for Oniipa as of 2004 when it was declared a settlement area;
- (b) the applicant did not place before court any evidence that his late mother was allocated customary land rights over the piece of land in question;
- (c) the respondent disputes that the applicant is the only occupant and holder of customary land rights over the piece of land in question; and; that
- (d) there is no evidence to demonstrate the sequence of inheritance alleged by the applicant.

[38] Having had regard to the evidence on record, I am of the view that the facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by respondent justify the granting of the order in favour of the applicant.

[39] The basis for the relief sought by the applicant in prayers 2 to 4 (as set out in para 6 hereof) is premised on the facts that:

- (a) the late Mr and Ms Ambambi had occupied the property as holders of customary land rights since the 1950s;
- (b) their customary land rights survived the proclamation of Oniipa as a settlement area and as a town;
- (c) upon their death, the customary land rights devolved upon the applicant's mother, upon whose death the rights devolved upon the applicant;
- (d) OTC has resolved to sell the property to the applicant; and;
- (e) the Minister has approved the sale of the property to the applicant and that there is no live objection currently being considered by the Minister in respect of the sale of the land to the applicant.

[40] The respondent does not allege that upon the death of Mr and Ms Ambambi, the customary land rights reverted to the Ondonga Traditional Authority and that such rights were allocated to him. I am of the view that there is no real and *bona fide* dispute that such rights devolved upon the applicant by way of inheritance. Thus, the traditional authority could not have validly granted to the respondent customary land rights in respect of the portion of the mahangu field now being claimed by the applicant in respect of which the late Mr and Ms Ambambi previously held customary land rights.

[41] I am therefore of the view that, given the facts as they stood on 6 December 2022, OTC was not justified in revoking its decision to sell the property to the applicant. The court shall therefore grant relief in favour of the applicant in the terms as set out herein below.

[42] In regard to the issue of costs, the general rule is that the successful party is entitled to costs. There is no reason to deprive the applicant who is successful in this matter, of his costs. I shall therefore grant an order to that effect.

[43] In the result, I make the following order:

1. The decision taken by the first respondent on 6 December 2022 revoking its earlier decision to sell certain immovable property described as Portion of Oniipa Town and Townlands No 1164, is hereby reviewed and set aside.
2. It is declared that the applicant is the lawful occupier and holder of customary land rights in respect of the abovementioned immovable property.
3. The first respondent is directed to attend to and sign all relevant documents to effect transfer of ownership of the abovementioned land in favour of the applicant, in accordance with the approval granted by the Minister on 15 March 2022.
4. The second respondent is ordered to pay the applicant's costs of suit.
5. The matter is removed from the roll and is regarded finalised.

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B USIKU  
Judge

## APPEARANCES

Applicant: F Bangamwabo  
Of FB Law Chambers, Windhoek

1<sup>st</sup> Respondent: No-appearance

2<sup>nd</sup> Respondent: H Hamunyela  
Of Andreas-Hamunyela Legal Practitioners, Windhoek

3<sup>rd</sup> Respondent: No-appearance