

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: A 28/2014

In the matter between:

ANKAMBO EMMANUEL KAMBONDE

PLAINTIFF

And

HELAO NAFIDI TOWN COUNCIL

1ST DEFENDANT

INGE IPINGE

2ND DEFENDANT

DAVID LAMEKA

3RD DEFENDANT

Neutral citation: *Ankambo Emmanuel Kambonde v Helao Nafidi Town Council* (A 28/2014) [2016] NAHCNLD 07 (12 February 2016).

Coram: CHEDA J

Heard: 30/02; 11/03; 10/04; 27/04; 10/06; 07/09; 28/09; 23/11/2015 & 01/02/2016.

Delivered: 12 February 2016

Flynote: **Law of Obligations** - A party which undertakes to take remedy a certain anomaly is expected and should carry out that obligation unless it can show some reasonable excuse for such failure. The fact that the same council has changed its structure or that the previous office that had made an undertaking had no authority is not an excuse. Plaintiff succeeded.

Summary: Applicant was allocated a certain property by 1st respondent. At the sametime 1st respondent allocated it to 3rd respondent. However, 1st respondent went ahead to demarcate it in order for the two parties to occupy it. After the demarcation, 3rd respondent erected certain structures which offended applicant. First respondent by letter threatened 3rd respondent to remove the offending structures. Third respondent did not comply. Applicant approached the court to compel 1st respondent to carry out its threat. First respondent opposed it on the basis that the dispute was a private matter and that their official had no authority to do act on its behalf. This excuse was not acceptable and 1st respondent was ordered to remove the offending structures as they had a legal obligation to do so.

ORDER

1. 1st, 2nd and 3rd respondent are jointly and severally hereby ordered to remove the structures complained of by applicant within 30 days of this order.
2. The costs of this application shall be paid by 1st, 2nd and 3rd respondents jointly and severally the one paying the others to be absolved.

JUDGMENT

CHEDA J:

[1] This is an application seeking to compel respondent to remove a certain encroachment on Erf 82, Oshikango, Ohangwena Region in the Republic of Namibia.

[2] First respondent is Helao Nafidi Town Council, a town council duly established in terms of the provisions of the Local Authorities, Act 23 of 1992, with its offices situated at Main Road, Ohangwena. The second respondent is Inge Ipinge who is employed by the first respondent as the Chief Executive Officer while third respondent is David Lameka who also occupies Erf 82 Oshikango.

[3] It is common cause that applicant is the owner of Erf 82 (hereinafter referred to as "the property") which ownership he acquired in 1994 after purchasing it from a Mr. Robert Nashinge who consequently obtained the requisite permission from the Headman of Oshikango. In 1996 he was informed by one David Kashikola of Ohangwena Regional Council that the said property had joint occupiers, being himself and third respondent.

[4] According to applicant, he fenced his property for boundary purposes in 2007, however, two months after fencing, 3rd respondent, removed the lock on the gate and started erecting his own structures on his property.

[5] On the 11 February 2009, 1st respondent advised 3rd respondent by letter of the 11 February 2009 to remove the structures which he had erected within 30 days, but, however, he did not do so. The said letter was couched in the following manner:

"Helao Nafidi Town Council, 11 February 2009

By Hand

David Lamek, Oshikango, Namibia

Dear Sir

RE: DEMOLITION OF YOUR STRUCTURE (SHIKU BUILDING) ON THE
PROTION OF MR. ANKAMBO ON ERF 82, OSHIKANGO.

The above-mentioned matter refers.

The Council of Helao Nafidi Town has on its Ordinarily Council meeting, 05/09 held on the 28th January 2009 has resolved on the above-captioned subject as follows;

- That yourself, David Lamek must respect the decision agreed earlier with regard to the boundaries between the duos.
- That Lamek must demolish the business structure (Shiku Building) that was deliberately constructed with on the portion of Mr. Ankambo within Thirty (30) day from the date of receipt of this correstpondence.
- That failure to this, Council will be left with no option but to take legal actions against you.

We hope that you will find the above in order.

Yours faithfully

(signed) Mr. Michael P Sheelongo
Acting Chief Executive Officer” (emphasis added)

[6] Applicant instructed his legal practitioner of record who called upon 1st respondent to demolish the illegal structures which had been put up by 3rd respondent. On the 11 July 2012, 1st respondent responded as follows:

“ Helao Nafidi Town Council, Wednesday,11 July 2012

Inonge Mainga Attorneys
P.O. Box 3489
Ongwediva

Fax: 088641851
Attention: Ms. I. Mainga

RE: ANKAMBO EMMANUEL KAMBONDE // DAVID LAMEKA CASE NUMBER:
198/09

Kindly take note that the administrateion of the Council could not reply to your letter dated 19 June 2012 earlier than now.

The attachments mentions in your letter are not received.

The Helao Nafidi Town Council did not exist in 1996. The Council respects all infrastructures existed prior to the inception of the council, hence it leaves the responsibility of clearing land disputes to the disputers if they were all found at the disputed area.

The Council has procedures of demolishing unauthorised infrastructures constructed during the time of Council and such cannot be dragged into the land dispute of those found on the land by the Council.

Sincerely Yours,

(signed) Inge Ipinge
Chief Executive Officer”

[7] Again on the 20 July 2012, 1st respondent wrote to applicant’s legal practitioner in the following manner:

“ Helao Nafidi Town Council, Wednesday,11 July 2012

Inonge Mainga Attorneys
P.O. Box 3489
Ongwediva

Fax: 088641851
Attention: Ms. I. Mainga

RE: ANKAMBO EMMANUEL KAMBONDE // DAVID LAMEKA CASE NUMBER:
198/09

Your letter dated 12 July 2012 is hereto referred.

The administration of the Council would like to thank you for the self-explanatory information. However, the council cannot be dragged into the land dispute of the infrastructures found on the ground constructed before the inception of the council.

In the case of the infrastructures constructed unprocedurally at the time of Helao Nafidi, the procedures to demolish them are handled accordingly, but not related to this matter.

Yours Faithfully,

(signed) I Ipinge
Chief Executive Officer

[8] First and second respondents are represented by Mr. Shakumu while 3rd respondent is unrepresented. 1st and 2nd respondents have argued that the resolution that was passed by 1st respondent was rescinded on the 08 December 2014 on the advise of the lawyer, the basis for that was that:

- a) The current council has no record as to why the previous council did not enforce its own resolution and

b) There is no logical or legal basis as to why the 1st respondent should be dragged into a private dispute in which it has no direct interest.

[9] It is further their argument that 1st respondent is entitled to rescind its own resolution and that the said resolution was brought about irregularly as then council did not have the power to intervene in a private matter.

[10] Applicant applied for condonation of non-compliance with the Rules this application was unopposed by Mr. Shakumu, therefore nothing turns on it.

[11] The question which calls for determination in my view is whether or not all the respondents can be compelled to remove the structures complained of. In order to come to a reasoned and just conclusion the following factors are inescapable of interrogation.

[12] Applicant is the owner of the property. He approached 1st respondent for assistance after meeting some resistance from 3rd respondent. First respondent wrote a letter of demand to 3rd respondent calling upon him to comply and gave him 30 days within which to comply. Third respondent did not comply. Herein lies the issue. At that stage 1st respondent recognised its legal obligation to ensure peaceful co-existence by both applicant and 3rd respondent.

[13] If the said obligation by 1st respondent did not exist at that stage, it assumed it when it arrogated itself the authority to ensure that 3rd respondent should remove the offending fence.

[14] The next question is, what impression did it create on both parties? The only logical conclusion is that it was in control of the situation and logically so, in my view because it had caused the demarcation and marked the boundaries for the parties. The argument that 3rd respondent had no authority is a lame excuse for the following reasons. Applicant was allocated land and a boundary was marked by 1st respondent which he did not contents. Applicant at all material times relied on 1st

respondent's approach and undertaking that 3rd respondent would comply with its demand by it when 1st respondent undertook to deal with 3rd respondent. Applicant was made to believe that his grievance was being addressed by 1st respondent and relied on that undertaking. It was reasonable for him to rely on advice of 1st respondent's official.

[15] An official who holds himself out as authorised to make certain administrative decisions and an innocent party relies on that decision and subsequently acts on it much to its prejudice should not be allowed to wriggle out of his actions at will.

[16] Applicant does not know what structures or operations were in existence at 1st respondent's offices. In addition, thereto, the fact that 1st respondent has already assumed responsibility for the effective demolition of this structure, it is only legally prudent for it to carry out its threat as per their letter of the 11 February 2009 wherein they threatened legal action.

[17] Mr. Ipinge, for 1st respondent states that they relied on the advice given by their lawyer, unfortunately for them, he/she did not advise them that they cannot neglect their undertaking merely on the change of the introduction of new legislation. For the avoidance of doubt that advice was wrong.

[18] It is common cause that whatever name changes and/or operations came into effect, one fact remained being that the same property still falls under the new administration and for all intents and purposes 3rd respondent is still materially the same. First respondent assumed and took over the previous council's profits and losses. It cannot pick on profits while ignoring the obligations. William Shakespeare in Romeo and Juliet stated "What's in a name? that which we call a rose by any other name would smell sweet. The name change or officials would not change the local authority.

[19] The current legal position in this matter was clearly laid down in the matter of Tumas Grahute Close Corporation v The Minister of Mines & Energy & Another

(A257/2011) [2012] NAHCMD 99 (December 2012) at para 6 where it was stated by the learned Judge:

"[6]In an application for mandamus, the court is generally not concerned with the reason why the administrative body or administrative official has not carried out its or his or her statutory duty: it is concerned with the allegation that it or he or she has failed or refused to exercise a statutory power and the applicant has been aggrieved by such failure or refusal. And mandamus lies to serve two purposes: (a) to compel the performance of a specific duty; and (b) to remedy the effects of unlawful action already taken. See Lawrence Baxter, Administrative Law (1991) pp 690-691, and the cases there cited."

[20] In *casu* 1st respondent has not carried out the obligation which it undertook to carry out and it cannot escape that responsibility. It is constrained to see to it that applicant enjoys peaceful possession of its property without hindrance as per its promise to him.

[21] Third respondent did not file an opposition in this matter and his views are not known and nothing can be said about him, save to say that he will be bound by the decision of this court. I agree with Ms. Mainga that applicant has made a good case for himself. Respondents remain saddled with their undertaking and should be compelled to remove the offending fences, so that applicant can be accorded a peaceful enjoyment of his property.

[22] The order of this court is as follows:

1. 1st, 2nd and 3rd respondents are jointly and severally ordered to remove the structures complained of by applicant within 30 days of this order.
2. The costs of this application shall be paid by 1st, 2nd and 3rd respondents jointly and severally the one paying the others to be absolved.

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M Cheda
Judge

APPEARANCES

PLAINTIFF: I Mainga
Of Inonge Mainga Attorneys, Ongwediva

DEFENDANT: S.K Shakumu
Of Kishi Shakumu & Co. Inc., Windhoek