

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
JUDGMENT

CASE NO.: HC-NLD-CIV-ACT-OTH-2017/00179

In the matter between:

THOMAS SHIPO

PLAINTIFF

and

TUYENIKELAO ERASTUS

DEFENDANT

Neutral citation: *Shipo v Erastus* (HC-NLD-CIV-ACT-OTH-2017/00179) [2018]
NAHCNLD 36 (16 April 2018)

Coram: CHEDA J

Heard: 20 March 2018

Delivered: 16 April 2018

Flynote: Where in a matter, default judgment is granted in respect of a counterclaim by defendant which renders the main action academic, but where plaintiff on the papers has established a prima facie case, the court is entitled to revisit the default judgment order in terms of rule 103 (1)(c) of the Rules of Court and set aside such order.

Summary: Plaintiff issued summons against defendant which was defended. Defendant then filed a counter-claim. Plaintiff despite being ordered to file a plea, failed to do so under the belief that the filing of a special plea by plaintiff brings the need for the filing of a plea to the counter-claim to a halt. Held that plaintiff was barred as he failed to do so, despite a court order that he should file a plea to the counter-claim. Default judgment was granted.

ORDER

1. The default judgment granted by this Court on the 19th of March 2018 be and is hereby set aside.
2. The matter is postponed to the 14th of May 2018 at 09h00 for Case Management.
3. There shall be no order as to costs.

JUDGMENT

C

HEDA J:

[1] This matter involves the issue of ownership/occupation of communal land. The parties are residents of Ondungulu village in the Ohangwena Region, Namibia. Plaintiff was represented by Mr Aingura while defendant was represented by Ms Mugaviri. Plaintiff issued summons against defendant for ejectment from a certain farming and residential unit situated at Ondungulu village in Okalumbu district (hereinafter referred to as “the property”), which summons was defended and the matter proceeded under case management.

[2] Plaintiff’s right over the disputed property is by virtue on a Certificate of Registration of Recognition of Existing Customary Land Right (hereinafter referred to as “the certificate”), which was filed of record. It is his assertion that defendant is in

unlawful occupation thereof and should therefore be ejected. Defendant entered an appearance to defend and subsequently filed her plea on the merits and a counterclaim. Plaintiff did not replicate in reconvention. The matter was referred to a court connected mediation, but, the parties failed to settle.

[3] While this was going on, defendant filed a special plea on the ground of lack of *locus standi* on the part of the plaintiff and that there is no cause of action for plaintiff to have issued out summons against her.

Locus standi

[4] It is her argument that plaintiff has no *locus standi* to institute legal proceedings as he has not obtained any customary land rights from the Headman of Ondungulu village as is required in terms of section 22 of the Communal Land Reform Act, No. 5 of 2002 (herein referred to as "the Act"). It is for this reason that plaintiff has not submitted evidence that he was allocated the property measuring 11.1 hectares. Defendant went further and pleaded that plaintiff's application for land if any, had not been considered by the Headman and that the relevant Land Board had not verified such allocation. It is further defendant's argument that the occupation and subsequent acquisition of communal land or the allocation, thereof, is governed by sections 22, 24 and 25 of the Act.

[5] The brief background of this matter is that plaintiff is a Sergeant at Arms at the National Council of Namibia and resides at Ondungulu village in the Ohangwena Region, Namibia, while defendant is a lady who also resides at Ondungulu village, Ohangwena Region, Namibia. Plaintiff is in occupation of a certain farming and residential unit situated at Ondungulu village. His right of occupation is by virtue on a Certificate of Registration of Recognition of Existing Customary Land Right.

[6] Defendant, together with her late husband have always been the occupiers of the property until it was transferred to her by her late husband on the 7th of July 1997. On the 7th of July 1997 defendant acquired the customary land rights of the property by

virtue of a permission of occupation issued by the Headman of Ondungulu village, under Oukwanyama Traditional Authority in terms of the Act.

[7] A dispute as to the ownership and/or occupation has arisen which has led to this matter before court. It is alleged that defendant has made improvements on this property amounting to N\$2 million. It is for that reason that plaintiff seeks eviction and/or ejection of defendant. Defendant, however, argues that plaintiff has no *locus standi* to institute proceedings against [him] as he did not follow the provisions of the Act.

[8] The crux of the matter here is who between the two protagonists has a legitimate right either of possession or occupation over this property. Acquisition of communal land is provided for under the Act, specifically section 22(1), (2), (3) and (4) which read:

'Application for communal land right

22. (1) An application for the allocation of a customary land right in respect of communal land must –

- (a) be made in writing in the prescribed form; and
- (b) be submitted to the Chief of the traditional community within whose communal area the land in question is situated.

(2) An applicant referred to in subsection (1) must furnish such information and submit such documents as the Chief or the Traditional Authority may require for purpose of consideration of the application.

(3) When considering an application made in terms of subsection (1), a Chief or Traditional Authority may –

- (a) make investigations and consult persons in connection with the application;
- (b) if any member of the traditional community objects to the allocation of the right, conduct a hearing to afford the applicant and such objector the opportunity to make representations in

connection with the application, and may refuse or, subject to subsection (4) and section 23, grant the application.

(4) In granting an application for a right to a farming unit or a residential unit the Chief or Traditional Authority may –

(a) allocate the right in respect of the specific portion of land being applied for or, by agreement with the applicant, any other portion of land; and

(b) subject to section 23, determine the size and the boundaries of the portion of land in respect of which the right is allocated.’

[9] It is clear therefore that the starting point for the allocation of property is by application on the prescribed form as stipulated in section 22(1), and, that requirement is peremptory. Subsection (4) deals with the allocation of specific portion and size of the land allocated. Further to that, the allocated land is to be ratified by the relevant board and in this case the Communal Land Board.

[10] Plaintiff is in possession of the certificate issued to him by the Ministry of Land and Resettlement. The issuance of the certificate should be after the recommendation of the board. As stated above, plaintiff is indeed in possession of the said certificate, but, there is no evidence that he went through the laid down procedures in acquiring such certificate. The acquisition of land should be after a laid down procedure has been followed which should be through a Headman. It is this procedure which bestows a right on any claimant of a right of possession or occupation. There is no evidence that the board ratified his acquisition either. This legal position is clearly stated in section 24(1) which reads:

‘Ratification of allocation of customary land right

24. (1) Any allocation of a customary land right made by a Chief or a Traditional Authority under section 22 has no legal effect unless the allocation is ratified by the relevant board in accordance with the provisions of this section.’ (my emphasis)

[11] This matter presents two complications which emerged after the parties had made their submissions pertaining to the same issues, though from two different angles. Plaintiff was ordered to file a plea to defendant's counterclaim which he failed to do. Defendant through her legal practitioner then applied that he be barred. In the event that plaintiff is barred that will be the end of the matter. While this indeed would for all intents and purposes be the logical conclusion in litigation, this court indeed granted a default judgment with the following orders:

'Default Judgment is granted as follows:

1. The Certificate of Recognition of existing Customary Land Right is declared to be null and void.
2. The property should be registered in the name of the defendant.
3. Plaintiff should remove the fence erected on defendant's plot within 60 days of this order.
4. Plaintiff should pay costs on the ordinary scale.'

[12] The matter had been set down for argument of the special plea on 20 March 2018 after which the matter was postponed to 16 April for ruling or judgment. What has come to my attention which skipped my mind at the time and indeed escaped the legal practitioners as well was that if the default judgment is left as it is, then there is nothing left for plaintiff to argue. The reality, however, is that plaintiff has filed a certificate issued by the Ministry of Land and Resettlement and has averred that he has already spent over N\$2 million in developing the disputed piece of land. This is a fact which cannot be argued as it goes against the grains of common sense and above all offends the principles of both equity and unjust enrichment.

[13] Having noticed this, I then asked the two counsel, Mr Aingura for plaintiff and Ms Mugaviri for defendant in order to discuss the ambiguity of the order and its unintended consequences. They attended in my chambers, wherein we interrogated this issue and all of us agreed that the default judgment granted and that if left as is will not be in accordance with substantial justice.

[14] It is trite that a court order should be meaningful and effective. It, therefore, means that it should be free of ambiguity and be capable of execution. What motivated me to come to revisit this default judgment is that plaintiff has already spent money on the land and therefore, prima facie has a legitimate claim which must be tested in court. It is every citizen's right to have his/her day in court and plaintiff so qualifies.

[15] I should make it clear from the onset that issues raised by the parties should be properly ventilated in court and defendant should not be allowed to run away with a judgment based on a technicality on a matter that involves a topical and emotional issue like land. In light of the above error which is common to all parties I have no alternatives, but, to invoke the provisions of the Rules of Court of which rule 103(1)(c) reads:

'Variation or rescission of order or judgment generally

103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time rescind or vary any order or judgment –

(a)...

(b)...

(c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or'

[16] It is for the above reason that the following order is made:

1. The default judgment granted by this Court on the 19th of March 2018 be and is hereby set aside.
2. The matter is postponed to the 14th May 2018 at 09h00 for Case Management.
3. There shall be no order as to costs.

