TRANSNAMIR HOLDINGS I .TT vs .TOHAN VENTER
A. 340/2000

Levy. A J

2000-12-05

Vindicatory action - Defence of lack of urgency *lis pendens*, non-joinder, factual dispute dismissed.

Case No.: A. 340/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TRANSNAMIB HOLDINGS LIMITED APPLICANT

and

JOHAN VENTER RESPONDENT

CORAM: LEVY,

AJ Heard on: 27th November 2000

Delivered on: 5th December 2000

JUDGMENT

LEVY,AJ: This is the return day of a *rule nisi* granted on 17th November 2000.

Applicant is represented by Mr P J van L Henning, SC duly assisted by Mr P Ellis and respondent is represented by Mr R Heathcote.

On 15th November 2000, applicant came to Court as a matter of urgency and on 17th November 2000 this Court granted the following *rule nisi*, calling upon respondent to show cause, if any, on Monday, 27th November 2000, why:

> "(i) he should not be ejected forthwith from the Phillip Troskie Building situated on Erf 842, Windhoek and from house number 65 situate on Erf 1209, Windhoek.
>
> (ii) in the event of respondent or anyone holding under him failing to vacate the premises when called on so to do, the Deputy Sheriff shall not physically remove such person or persons with their belongings from the aforesaid premises.
>
> (iii) he should not pay the costs of these proceedings which shall include the costs of two instructed counsel and one instructing counsel."

In its founding affidavit applicant alleged *inter alia* that it is a parastatal company and the registered owner of immovable property known as the Phillip Troskie Building situated on Erf 842 Windhoek and a house situate on Erf 1209 Windhoek. In the affidavit both properties were for convenience referred to as "the property" and in this judgment unless the context requires otherwise the terminology will be maintained.

Applicant alleged that the respondent was in possession of the property and in the circumstances applicant was entitled to an order of ejectment of the respondent from the property.

Originally, applicant did not ask for a *rule nisi* but requested an outright order. During argument, Mr Henning moved for the grant *of a rule nisi* instead of an outright order.

The *rule nisi* was not served on respondent but Mr Heathcote agreed that inasmuch as counsel was in Court and noted judgment when the *rule nisi* was granted, service would have been superfluous and unnecessary.

In response to a query from Mr Heathcote, the Court ruled that applicant was obliged to prove its case and that any objections taken by respondent at the initial hearing could be taken again and argued afresh. The matter "transcends from the *rule nisi* stage to the final stage".

Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982(3) SA 654 (A) at 676 E

Similarly, in this judgment a certain amount of repetition of matter and law referred to in the initial judgment is inevitable.

Mr Heathcote repeated the argument that this application was not a matter of urgency and that applicant has not shown why the normal rules in respect of time periods should be dispensed with and that applicant would not be afforded substantial redress at a hearing in due course.

Mr Heathcote argues that the matter has been allowed to linger for some four or five months and that any urgency is self-contrived.

It is common cause that there are a large number of rooms in the Phillip Troskie Building and that a large number of student hire these rooms. In his affidavit respondent lists the number of students and the months during which they occupied the rooms.

I quote from paragraph 28 of his affidavit:

"MONTH	TOTAL NUMBER OF STUDENTS
July 1999	125
August 1999	130
September 1999	130
October 1999	129
November 1999	97
December 1999	81
January 2000	29
February 2000	66
March 2000	85
April 2000	95
May 2000	102
June 2000	106
July 2000	118
August 2000	117
September 2000	121
October 2000	119
November 2000	115'

Except for the months of August and September 1999 their numbers fluctuate. Respondent says he receives NS450-00 per month for each student.

It is obvious therefore that the property has a high rental valuation to the owner. The parties agree that it is approximately N$60 000-00 per month.

Applicant says that rental has not been paid or received for some time and that its loss is accumulating and is in excess of one million dollars. Respondent, however, says that it has tendered to pay N$72 000-00 and refers to a letter annexed to his affidavits but this letter as read with respondent's affidavit shows that the NS72 000-00 was tendered to TansNamib Properties (Pty) Ltd. The latter company is not applicant. TransNamib Properties (Pty) Ltd is a separate and distinct company with a legal persona

of its own.

Applicant alleges in its founding affidavit that on 31st May 1999 respondent purported to conclude a lease with a company known as TransNamib Limited and it annexed a copy of the purported lease to its affidavit. Notwithstanding the aforegoing as from 1st April 1999 the company TransNamib Limited had already ceased to exist. The aforegoing is common cause. Respondent contends, and has now contended for several months, that it is entitled to a rectification of the purported lease by substituting TransNamib Properties (Pty) Ltd for the non-existing company. This accounts for the tender of N$72 000-00 as rental to TransNamib Properties (Pty) Ltd. Despite respondent's contention that it is entitled to rectification and despite the lapse of well over one year, he has not instituted the said action for rectification.

Applicant denies that respondent is entitled to rectification but whether he is so entitled or not, is irrelevant to these proceedings. Applicant's case against respondent is based on the simple proposition that applicant is the owner of the property and respondent is in possession thereof.

In the initial judgment the Court referred to *Krugersdorp Town Council v Fortuin* 1965(2) SA 335 and to *Chetty v Naidoo* 1974(3) SA 13 (A) which specifically deal with the principles of vindicatory actions and their nature and it is unnecessary to repeat these principles.

Respondent tries in vain to meet the situation by denying that he is in possession of the Phillip Troskie Building. He says the students are in possession thereof. This is naive particularly as he is the lessor of the students. Mr Heathcote furthermore, argued previously and repeats the argument that "the respondent in this matter is not holding the property through or under the applicant". It would appear that respondent maintains that he "holds" the property because of some rectification action against TransNamib Properties (Pty) Ltd, an entirely separate entity, which he has not instituted despite the lapse of more than one year.

In any event applicant denies that respondent is entitled to rectification and denies that respondent is entitled to "hold the property" which phrase in the circumstances of this case is a euphemism (for "posses" the property) . According to the judgments aforesaid and referred to the Court's initial judgment, the onus is on respondent to show that he has a right to possess the property. As respondent has not been able to do this (and in fact even alleges that the students and not he are in possession thereof) he has resorted to several procedural and technical defences.

The Court has already referred to respondent's contention that these proceedings should not have been brought as an urgent application. I shall return to that defence later.

At the initial hearing and again on the return day, Mr Heathcote argued that there was a nonjoinder in that all the students, these fluctuating tenants of respondent, had to be joined as corespondents. For this proposition he relied on the judgment of the *Rehoboth Bastergemeente & Another* v *The Government of the Republic of Namibia and Others* delivered on 22nd October 1993.

An analysis of the reasoning in that case reveals that the case supports the argument advanced by Mr Henning and not Mr Heathcote. In that case the Court relied on the case of *United Watch and Diamond Co. (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972(4) SA 409 (C) where Corbett J (as he then was) said;

> "It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make.....In *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953(2) SA 151 (O), Horwitz AJP (with whom Van Blerk J concurred) analyzed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 196) -
>
> '.....an interest in the right which is the subject matter of the litigation

> and.....not merely a financial interest which is only an indirect interest in such litigation'.
>
> This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions.....and it is generally accepted that what is required is a legal interest in the subject -matter of the action which could be prejudicially affected by the judgment of the Court....."

In the *Bastergemeente* case it was common cause that if the order asked for were granted, the effect would be to render a large number of sales of immovable property void. Accordingly, the contracting parties to those sales had a direct and substantial interest in the outcome of the proceedings and should have been joined. Their interest was not an indirect interest which a subtenant has in litigation by the owner or lessor against the tenant for the latter's ejectment.

It is trite that where the relief in litigation involves a decision on the validity of a contract joinder of all contracting parties is essential unless there is a waiver.

Abrahamse & Others v Cape Town City Council 1953(3) SA 855

confirmed on appeal in 1954(2) SA 178

However, it is also trite that persons who are not parties to the contracts concerned need not and should not be joined. Thus a subtenant has no legal interest in the contract between the landlord and the tenant and need not be joined in an action either on the landlord's lease with the landlord's tenant or in ejectment proceedings brought by the landlord against his tenant. *Sheshe v Vereeniging Municipality* 1951(3) SA 661 (A)

The Henri Viljoen case quoted by Corbett J and referred to in the *Bastergemeente* case.

The *United Watch and Diamond* case *supra*

Ntai & Others v Vereeniging Town Council & Another 1953(4) SA 579 (A)

In the instant case respondent is not even applicant's tenant although the students are respondent's tenants. Respondent "holds" the property but he does not hold the property "through or under the applicant" according to Mr Heathcote.

The students therefore have no "direct and substantial interest" in this litigation which is not contractual but is brought by applicant to recover possession of its property. It is vindicatory. Once again I find that respondent's objection to non-joinder fails.

Mr Heathcote once again argued most strenuously the question of *lis pendens.*

The general principle is that "if an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first".

(Herbstein & Van Winsen 'Supreme Court Practice 4th Ed. P 249)

It is common cause that on 22nd November 1999, applicant issued summons out of the High Court against respondent. Applicant's cause of action in the original Particulars of Claim as well as its action as set out in the amended Particulars of Claim, was based on contract and the relief which applicant claimed included an Order confirming cancellation of the contract, the payment of large sums of money alleged to be due by respondent arising from rentals and an order ejecting respondent from the very property in respect whereof applicant has now brought this application.

Respondent tries to draw strength from the fact that on or about 7lh November 2000, subsequent to

the service of the present application on respondent, applicant gave respondent notice of an amendment to its Particulars of Claim in the earlier case of 22nd November 1999, withdrawing its claim for ejectment of respondent from the property.

Mr Heathcote argued that a plaintiff cannot withdraw or amend pleadings as of right and that applicants attempt to do so is an admission of the fact that there is a pending *lis* between the parties in respect of the same subject matter.

It is abundantly clear that the cause of action in the case launched by applicant in 1999, is not the same as the cause of action in the present proceedings. The present case is a vindicatory action for the property concerned whereas in the former action the claim is for a cancellation of a contract and for ejectment from the property concerned. One of the many consequences of a contract for ejectment from property pursuant to a cancelled lease (I am not saying that this is the case here) could be that if there is damage to the property concerned, applicant's claim may well be for payment of damages arising from the contract, while in a vindicatory action should the property be damaged, the owner would probably have to look to the person or persons who cause the damage. This aspect was not argued before me and inasmuch as it is possible to decide this matter on other grounds it is unnecessary to consider this aspect.

The action instituted on 22nd November 1999 has as yet not been set down for hearing and in terms of Rule of Court 42, a litigant can amend its pleadings any time before set down provided it pays the costs. Applicant has tendered such costs. The pleadings in that action having now been amended to delete the claim for ejectment the claim and the cause of action certainly bear no resemblance to the cause of action in the vindication proceedings. Even had the amendment not been made, the cause of action would be substantially different.

Mr Heathcote protests that, because the amendment was made after the vindicatory proceedings were instituted, the plea of *lis pendens* was not adversely affected.

Both counsel relied on *Ntshicja v Andreas Supermarket (Pty) Ltd* 1997(1) SA 184, where the purported withdrawal of the earlier proceedings was after the second case was instituted.

The *Ntshicja* case is of no help to either side. In *Ntshiqa's* case the applicant purported to withdraw an action instituted by him in the Magistrate's Court but the Transkei Supreme Court w here the second action was being prosecuted held that on the facts placed before it, it "could not be concluded that the action had been effectively withdrawn". In the instant case by virtue of compliance with Rule of Court 42(l)(a) the claim for ejectment from the property in the Particulars of Claim has been effectively withdrawn.

In any event on 30,h October 2000 Mr Tjitemisa on behalf of applicant and one J.D. Strauss inspected Phillip Troskie Building and found the premises neglected, dirty and damaged. The said Strauss supports the allegations of applicant of and concerning the damage to and neglect of the property and photographs are annexed to the proceedings to illustrate this. Considering that these are residential premises the fdth deposed to is astounding. Furthermore door knobs were found lying on the floor and floor tiles removed while "the removal of equipment" from the walls left bare wires exposed. The fire fighting extinguisher was lying on the floor with powdery substance thereon indicating that it had been activated.

The condition of the premises came to the notice of the applicant only on 30lh October 2000 when the premises were inspected. This fact as well as the fact that the applicant was losing income from the property which loss exceeded a million dollars and was appreciating monthly, were factors influencing this Court's discretion. I stress, however, that these were not the only factors. The action

on contract with or without the amendment involves a protracted trial and is not the same *"lis"* as a vindicatory action where an owner of property implements a fundamental right, that is, to regain possession of his property.

The plea of *lis pendens* therefore fails.

Mr Heathcote once again contended that applicant launched these motion proceedings knowing full well that there was a material dispute of fact. Therefore he argued the application must be dismissed.

There is general judicial agreement that the Court can entertain proceedings on motion only when there is no genuine dispute of fact.

Whether or not a genuine dispute of fact exists, is for the court to decide and the respondent's allegations thereanent are of little, if any, assistance. In *Peterson* v *Cuthbert & Co Ltd* 1945 A.D.

420 at 428 the Appellate Division said; "In every case the Court must.....see whether in truth

there is a real issue of fact which cannot be satisfactorily determined without the aid of oral

evidence."

See also *Ismail & Another v Durban City Council* 1973(2) SA 362 (N) at 374 *Room Hire Co (Pty) LtclvJeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155 (T)

In the present case this principle is well illustrated by respondent's denial that he is in possession of the property whereas in truth and in fact he is clearly in possession thereof. A respondent should not make a bare denial of an essential fact but should produce some evidence to support such denial. The respondent in this matter claims that he has produced such evidence namely that the students his sub-tenants are the possessors. The students may indeed be occupiers but it is clear that respondent's

admission that he "holds" the property but not "through or under applicant" is an admission of possession.

The dispute which respondent has with TransNamib Properties (Pty) Ltd has nothing whatsoever to do with applicant's vindicatory action.

The applicant has established the essentials to vindicate the property from respondent who is clearly in possession thereof.

The only question left for decision is whether this application could have been brought as a matter of urgency.

I have already dealt with the loss, applicant is sustaining which is accumulating monthly. I have already dealt with the condition of the property. The condition of the fire-extinguisher may well constitute a threat to the property should there be a fire in the premises.

Mr Heathcote says that applicant must show that it would not "have been afforded redress at a hearing in due course".

If applicant had come to Court by way of summons and Particulars of Claim, there would have been a considerable lapse of time before the matter could be heard. The property would have deteriorated further and applicant's financial loss would have become very much greater while the prospects of recovering financial compensation would become more and more remote. Even at this stage respondent does not offer to pay any debt due to applicant. If respondent was *bona fide* the "rental" could have been paid into trust ^pending the result of the rectification action. It has failed to launch such action and furthermore fails to allege that it can pay all monies which may become due to applicant. The fact that applicant has delayed until now before instituting this applicant, is of no

assistance to respondent. A creditor is not obliged to sue his debtor immediately the debt falls due.

I am satisfied that applicant was entitled to come as a matter of urgency.

Applicant has asked this Court that the *rule nisi* issued on 17th November 2000 and referred to above be made final and absolute. The court dismisses opposition to the rule being made final.

Accordingly, the *rule nisi* issued on 17,h November 2000 is made final and absolute and respondent is ordered to pay the costs as therein provided and to pay the costs incurred by opposition to the application to have the rule made final and which costs shall include the costs of two instructed counsel and one instructing counsel.

For the applicant: **Advocate P.J.v.L. Henning and with him Mr P. Ellis**

Instructed by: Messrs Ellis & Partners

For the respondent: **Advocate R. Heathcote**

Instructed by: Messrs van Vuuren & Partners