CASE NO. A 196/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AUGUST MALETZKY & OTHERS	**1st APPLICANT**
HAROLD GORASEB	**2ND APPLICANT**
ALLEN ROSTIEN GORASES	**3rd APPLICANT**

and

JAQUEL KAHUARUKUA NJEMBO	**1st RESPONDENT**
DEPUTY SHERIFF OF THE HIGH COURT	**2nd RESPONDENT**

CORAM: SMUTS J

Heard on: 2011.02.16
Delivered on: 2011.02.17

JUDGMENT

SMUTS J; [1] This Court granted judgment in favour of the first respondent against the second applicant for the latter's eviction and certain sums of money. This was under case number, I 4048/2009. The judgment was granted by Ndauendapo, J on 16

September 2010.

[2] An appeal has been noted against that judgement. It was explained to me in argument that this was primarily on the basis of the third applicant not having been cited in the matter.

[3] It is stated in the urgent application before me that the second and third applicants are married in community of property. It was argued that the third applicant should have been cited in that matter. But that is the subject of that appeal.

[4] After that judgment was granted, the first respondent applied for execution of that judgment. This was granted by Unengu, AJ on 1 February 2011. When granting his order, he stated that, the second applicant had not submitted any argument and the order was granted in his absence.

[5] The execution of the judgment then proceeded. It has however given rise to this urgent application in which the following relief is essentially sought, declaring that two judgments namely those given under case numbers I 4048/2009 and A 196/2009, be declared null and void for non-citation of the third applicant. Furthermore, an order is sought declaring the execution of those judgments to be unlawful and a nullity on the same basis.

[6] Thirdly, an order is sought declaring or ordering the respondents to refrain from interfering with the third applicant's peaceful and lawful occupation of Erf 1200 Gamma Street, Khomasdal, Windhoek Namibia. Further orders are sought to stay the execution of those judgments pending the finalisation of the appeals and directing that all proceedings and execution of all writs and summonses and other processes be stayed

or not instituted or proceeded with, without the leave of the Court and directing the third applicant can take immediate control of the property in question. Costs were also sought in the event of opposition.

[7] When the matter was called I raised certain questions with Mr Maletzky who has joined the application together with the second and third applicants. I pause to reiterate that the judgment in question had been granted against the second applicant at the time-in favour of the first respondent.

[8] Mr Maletzky stated that his standing arose by virtue of the fact that he was an applicant in other proceedings referred to in paragraph 3 of the founding affidavit in which constitutional rights were raised in the form of what he termed as a class action, directed at securing further judicial oversight and supervision of sales in execution of immovable property. He submitted that the ejectment of one of his co-applicants in that matter, which he contends has a direct bearing upon this application, would afford him standing in these proceedings.

[9] He also made further submissions expanding upon the right asserted in paragraph 3 of the founding affidavits. I have carefully considered those submissions and also put it to him in argument that I would be bound by full bench decision of this Court in *Kerry McNamara Architects Inc v The Minister of Works Transportation, and Communication and Others* 2000 NR 1 (HC).

[10] It would appear to me that interest asserted by him as being direct and substantial is however too remote to meet the threshold of that test. His application would thus fall to be dismissed on this basis alone. But he correctly pointed out that the second and

third applicants are before Court, as is their application which would also need to be considered.

[11] When the matter was argued yesterday, I enquired from him about the nature of the *prima facie* right sought to be also asserted in these proceedings. He pointed out that the *prima facie* right is based upon the right to set aside the judgments referred to in paragraph 1.2 of the notice of motion by reason of not citing the third applicant in the proceedings in question. I must also point out that one of the judgments referred to in paragraph 1.2 of the notice of motion namely I 196/2009 is not referred to at all in the founding papers. No connection to it is raised. I am unable to understand quite why it is raised in these proceedings because there is no basis in the founding papers which in any way seeks to connect it to the relief which is sought.

[12] What may have been intended was a reference to case number A 313/2010 in which Unengu, AJ granted an order directed at the execution of the judgment pending the appeal. I am prepared to accept for present purposes that the reference may have been intended to that case number, seeing that the correctness of that ruling was raised in argument as well as in the founding affidavit.

[13] But these issues are however sought to be raised on appeal. What the remaining applicants essentially seek to do in this urgent application is to stop the execution of the judgment granted by Ndauendapo, J in case number I 4048/2009 on 16 September 2010. Leave to proceed with the execution of that judgment has as recently as the 1 February 2011 been granted and authorised by Unengu, AJ. What this application thus seeks to achieve is to undo the very order granted by Unengu, AJ. That cannot however be secured in the manner sought by the applicants.

[14] A notice of appeal directed at that order is attached to the founding affidavit. But this would not have any effect because the order was an interlocutory order and is not appealable without leave. It follows that the *prima facie* right asserted is essentially without foundation. The applicants correctly understand that the judgment would need to be appealed against. That can only occur with leave of this Court. Only then could such an application conceivably arise.

[15] A party accordingly cannot by an application of this nature seek to undo an order of the nature granted by Unengu, AJ. These proceedings are not competent and the *prima facie* right asserted is thus without basis. The application must fail on this basis alone.

[16] It follows that the order I make is to dismiss this application with costs.

SMUTS, J

ON BEHALF OF THE APPLICANT IN PERSON

ON BEHALF OF THE RESPONDENT ADV. GROBLER

Instructed by: GROBLER & COMPANY