



NOT REPORTABLE

CASE NO: A 29/2012

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

SUNCICA HESSEL-ENKE

APPLICANT

and

ANDREAS SINDLGRUBER

1ST RESPONDENT

REGISTRAR OF DEEDS

2ND RESPONDENT

BANK WINDHOEK NAMIBIA LIMITED

3RD RESPONDENT

DR WEDER, KAUTA & HOVEKA INC.

4TH RESPONDENT

ANDRE SWANEPOEL

5TH RESPONDENT

MARIAN HERBST REAL ESTATE

6TH RESPONDENT

CORAM: HOFF, J

Heard on: 07 May 2012

Delivered on: 18 May 2012

JUDGMENT
Urgent Application

HOFF, J: [1] This is an urgent application in which the applicant seeks an interim interdict preventing the second respondent from executing any documents or signing any

deed of transfer effecting the sale of immovable property Erf 3134 Windhoek (the property) to any third party pending the finalisation of an application (the main application) instituted by the applicant relating to the same property under the same case number, and interdicting the sale of afore-mentioned immovable property by the first respondent.

[2] The main application is an application in which the applicant seeks an order that the second respondent be directed to amend and/or vary and/or rectify and/or correct the deed of transfer held under no. T 2384/2001 and the index card at the offices of the second respondent in respect of the property mentioned, to reflect the applicant and first respondent as equal joint owners of the said property. The main application is opposed by the first respondent.

[3] The second, third, fourth, fifth and sixth respondents do not oppose this urgent application.

[4] The first respondent and applicant were married to each other but divorced on 20 November 1998.

[5] After their divorce on 26 January 2001 the property was purchased by applicant and first respondent. A bond in the amount of N\$300 000.00 was registered over the property in favour of Commercial Bank of Namibia (now Nedbank Namibia Limited). Proceeds from a loan taken (and to which the bond was lent) were paid to applicant by the first respondent as agreed and used by applicant to invest in a property described as Flat 11, Barcelona Flats Olympia, Windhoek. First respondent undertook to pay the full monthly instalments on the bond. Subsequently the relationship between the applicant and first respondent deteriorated to the extent that they only communicated through their respective legal representatives or when the exchange of their minor children took place.

[6] During the first week of February 2009 it came to the attention of the applicant that the first bond had been cancelled and that a current bond had been registered over the property in favour of the third respondent. According to the applicant this was done without her consent. The applicant immediately addressed the matter with her erstwhile legal practitioners who in turn addressed a letter to the first and third respondents. From a file at the second respondent's offices, it appears that an application together with an affidavit deposed to by first respondent purportedly in terms of section 4(1)(b) of the Deeds Registries Act of 1937 (Act No. 47 of 1937) (hereinafter referred to as the Deeds Registries Act) was submitted by the fifth respondent. In this affidavit the first respondent stated under oath that the vesting clause and marital status in the deed of transfer no. T 2384/2001 were incorrect due to a conveyancing error and that it was only the first respondent who had purchased the property. Furthermore it was stated in the affidavit that an amendment to the vesting clause and marital status would not affect any transfer of rights whatsoever.

[7] The first respondent in the affidavit requested that the vesting clause in the deed of transfer should be amended to reflect that first respondent is the sole owner of the property. The applicant in her founding affidavit stated that she never sold or relinquished her joint ownership in and to the property and never consented to the amendment of the deed of transfer. The applicant avers that the first respondent is fraudulently seeking to remove her name as joint owner of the property and that the purpose behind this was to register the new bond in favour of the third respondent without her consent or knowledge. The relief applicant seeks in the main application is to rectify the deed of transfer to reflect applicant as joint owner of the property.

[8] On 4 August 2011 a letter was addressed by applicant's legal practitioners to the legal practitioner of the first respondent advising the first respondent that the endorsement of the title deed by the Registrar of Deeds was in contravention of section

4(1)(b) of the Deeds Registries Act and was done without the consent of the applicant and its effect on transfer of rights.

[9] It was further pointed out that the first respondent misrepresented to Bank Windhoek Limited (third respondent) that he had the sole authority to take out a mortgage bond with Bank Windhoek Namibia Limited for the sum of N\$445,400.00 and Bank Windhoek Namibia Limited thereafter, acting on the misrepresentation, took over the bond from Nedbank Namibia Limited and registered a new bond in the sum of N\$445,400.00 in favour of Bank Windhoek Namibia Limited.

[10] Applicant's legal representative demanded the cancellation of the endorsement on the title deed of the property. No response was received from the legal practitioner of first respondent, Mr Brandt, and applicant subsequently launched the main application.

[11] What gave rise to this application was that on 29 March 2012 applicant's husband, Roland Enke, discovered by chance that the first respondent was attempting to sell the property when he noticed the property was being advertised for sale on the internet website of Marian Herbst Real Estates (sixth respondent). The applicant was informed of this development. Marian Herbst confirmed that she had the mandate to sell the property on behalf of the first respondent and confirmed that a contract of sale had already been drafted and signed by an undisclosed purchaser.

[12] It was further established that the purchaser has already obtained bond approval from his or her bank for the purchase of the property in the amount of N\$2,995,000.00. It was also established that the first respondent would be paid N\$2,800,000.00 from the sale save for any outstanding payments on the current bond and that the first respondent was set to sign the contract of sale on 10 April 2012.

[13] On the same day, 29 March 2012, applicant's legal practitioners addressed a letter to first respondent's legal practitioner which was copied to first, second and sixth respondents in which it was specifically recorded that the main application had already been instituted; that the application had been served on second to fifth respondents, but that the deputy sheriff could not locate the first respondent for purposes of service and that an amended notice of motion setting new *dies* was to be served shortly; that an urgent application interdicting the sale of the property pending the determination of the main application would be instituted should the sale not be stopped; that the applicant would be willing for the property to be sold but was not prepared for any amount to be deducted from her half share of the proceeds in order to satisfy any amount still due on the Bank Windhoek bond, and that applicant was still prepared to settle the matter on certain terms once she has again been registered as co-owner of the property.

[14] A response was received from sixth respondent indicating that first respondent has not yet signed the deed of sale and that the first respondent had discussed applicant's "involvement with the deal with his lawyer" and that the lawyer would take up the matter with applicant's legal representative.

[15] The applicant stated in her founding affidavit that as at the date of deposing to her affidavit in this urgent application (on 12 April 2012) no response to the correspondence of her legal practitioner was forthcoming (from the first respondent).

[16] The first respondent in his answering affidavit mainly denies that this application is urgent and avers that the applicant has created the urgency either *mala fide* or through her culpable remissness or inaction by failing to take steps to rectify the registration of Erf 3134 Windhoek at an earlier point in time, that applicant does not offer any explanation why she delayed from the beginning of 2009 to bring the application to interdict the sale

of the property, that she was fully aware about the sale of the property “for a long time”, and applicant was aware that Erf 3134 was registered solely in his name.

[17] These averments were denied by the applicant in her replying affidavit.

[18] Mr Brandt who appeared on behalf of the first respondent, limited himself to the issue of urgency and argued in essence what appears in the answering affidavit of the first applicant.

[19] I do not agree that the applicant has created the urgency herself. When the applicant discovered during February 2009 that the first respondent had unilaterally cancelled the first bond and registered the current bond over the property she took immediate remedial steps by addressing the matter with her erstwhile legal practitioners. Subsequently various letters were exchanged between the various legal representatives without any solution. This impasse appears from the founding affidavit of the applicant to be the result of the attitude of the first, fourth and fifth respondents that the only option for the applicant to have the deed of transfer rectified was for applicant to confirm the application and affidavit in terms of section 4(1)(b) of the Deeds Registries Act to the effect that deed of transfer no. T 2384/2001 had been erroneously endorsed and to sign the current bond in favour of the third respondent, something she was at all material times not prepared to do.

[20] However the urgency came about when it was discovered, after the main application was launched, that the first respondent was in the process of selling the property without the consent of the applicant and that a prospective buyer had already signed the deed of sale. I am satisfied that the applicant has as soon as reasonably possible after becoming aware of the impending sale of the property, and when it became clear that the first respondent intended to proceed with the sale of the property regardless

of the fact that the main application has been launched, instituted the present urgent application proceedings. I am further satisfied that the applicant in these circumstances would not be afforded substantial redress at a hearing in due course.

[21] Ms Schimming-Chase who appeared on behalf of the applicant referred this Court to the requirements that must be met by an applicant in order to succeed in an application for a temporary or interim interdict as set out in the case of *Eriksen Motors Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691 C - F where the following appears:

“The granting of an interim interdict pending an action is an extra-ordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court’s approach in the matter of an interim interdict was lucidly laid down by INNES J.A., in *Setlogelo v Setlogelo* 1914 AD 221 at p. 227. In general the requisites are:

- (a) a right which, “though *prima facie* established, is open to some doubt”;
- (b) a well grounded apprehension or irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of “some doubt”, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities.”

(See also *Alpine Caterers Namibia (Pty) Ltd v Owen and Others* 1991 NR 310 (HC); *Clear Channel Independent Advertising Namibia and Another v TransNamib Holdings Ltd and Others* 2006 (1) NR 121 at para. 15 and 16; *Uffindel t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC)).

[22] The first respondent in his answering affidavit to this urgent application incorporates his answering affidavit to the main application.

[23] In his answering affidavit to the main application the first respondent admits that it is incorrect that he is the sole owner of the property and that applicant never sold or relinquished her joint ownership in the property. He also admits that the applicant never consented to the amendment of the deed of transfer. This is a material contradiction to what is stated in his answering affidavit to the urgent application namely that the applicant was aware of the fact that Erf 3134 was registered solely in first respondent's name.

[24] The first respondent in his answering affidavit to the main application admits that he was never entitled to have the previous bond cancelled and have a new one registered without the applicant's written consent, which she did not provide; first respondent admits that he could effectively sell the property without the knowledge of the applicant and that he could retain the profit; first respondent admits that the property could be sold in execution if he fails to service the bond which was unlawfully registered; and the first respondent further admits to the relief sought by the applicant in the main application.

[25] Having regard to the admissions made by the first respondent it remains an enigma why the first respondent persists with his opposition to this urgent application as well as the main application. I am of the view that a plausible explanation is that the first respondent (mindful of the animosity between first respondent and the applicant) deliberately endeavours to deny, for reasons known only to the first respondent, the applicant the relief being sought by the applicant in the main application. This in my view amounts to an abuse of process.

[26] I am of the view that the applicant has met the requirements set out aforementioned and that the balance of convenience favours the granting of an interim interdict.

[27] Paragraphs 10.2 and 10.3 of the first respondent's answering affidavit in the main application amount to prayers which are in essence a counter application and since this answering affidavit has been incorporated in his answering affidavit to this urgent application the following needs to be mentioned. Firstly, the relief sought by the first respondent is premature *vis-à-vis* this urgent application and secondly, this counter application stands to be struck from the roll as the first respondent has not made out a case for the relief sought to be heard as a matter of urgency.

[28] The applicant in her founding affidavit seeks a cost order on an attorney-client scale. It is trite law that punitive costs would only be awarded in exceptional circumstances and where the conduct of a litigant warrants such an award as a mark of disapproval by a Court. I have indicated previously that the conduct of the first respondent in opposing this urgent application amounts to an abuse of process, is reprehensible, and is oppressive towards the applicant and this Court exercises its discretion in favour of granting a cost order on an attorney-client scale.

[29] In the result, the following orders are made:

1. The Court condones the applicant's non-compliance with the Rules of this Court with regards to forms and service and hears this matter on an urgent basis as envisaged by the provisions of Rule 6(12) of the Rules of this Court.
2. The second respondent is interdicted from signing any deed of transfer or any related documentation for the sale of the property, Erf 3134 Windhoek (Deed of

transfer no. T 2384/2001), pending finalisation of the application instituted by the applicant under Case No. A 29/2012.

3. The first respondent is interdicted to sell the property to any third party.
4. Orders 2 and 3 shall operate as an interim interdict with immediate effect.
5. The counter-application as reflected in paragraphs 10.2 and 10.3 of first respondent's answering affidavit to the main application, in so far as it is relevant to this urgent application, is struck down.
6. The first respondent is ordered to pay the costs of this application on an attorney-client scale.

HOFF, J

ON BEHALF OF THE APPLICANT:

ADV. SCHIMMING-CHASE

Instructed by:

KOEP & PARTNERS

ON BEHALF OF THE 1ST RESPONDENT:

MR BRANDT

Instructed by:

CHRIS BRANDT ATTORNEYS

ON BEHALF OF THE 2ND – 6TH RESPONDENTS:

NO APPERANCE