

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

IN CHAMBERS

REASONS

Case no: I 4048/2009

In the matter between:

**JAQEUL KAKULYARUKUA NDJEMBO**

**APPLICANT**

And

**HEROLD SAMUEL GORASEB**

**RESPONDENT**

**Neutral Citation:** *Njembo v Goraseb* (A 313/2010) [2012] NAHCMD 59 (12 November 2012)

**Coram:** **NDAUENDAPO J**

**Heard:** 16 September 2010

**Delivered:** 12 November 2012

**Flynote:** Summary Judgment—Respondent has no bona fide defence delaying tactics—Refused to vacate property sold to applicant—Respondent failed to appear in court—Summary judgment granted—Reasons provided.

**Summary:** Applicant applied for summary judgment on the basis that respondent has no *bona fide* defence and filed notice of intention to delay the matter. Respondent in his opposing affidavit stated that he applied for rescission of judgment in the matter of

Standard Bank v Harold Goraseb a case A 196/2009, a case in which the bank obtained judgment against him and repossessed the property which he occupies. The said property was then sold to applicant which property he refuses to vacate. He also raised the defence of non—joinder of his wife and that the default judgment adversely affect his constitutional right. At the hearing of the application, the respondent did not turn up and the court granted summary judgment after hearing submissions by applicant.

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**ORDER**

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The application for summary judgment was granted for all those reasons.

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**JUDGMENT**

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**NDAUENDAPO J:**

[1] On 16 September 2010, I granted an application for summary judgment in the following terms:

- '1 eviction of the defendant from Erf 1200, Gamma Street, Khomasdal, Windhoek, with immediate effect.
2. Payment of the amount of N\$ 25 858.29.
3. Payment of the amount of N\$2873.12 per month from 5 November 2009 to date that the defendant vacates the property
4. Mora interest at the rate of 20% per annum from 5 November 2009 to date of payment.
5. Costs of suit'

[2] The respondent requested reasons for my judgment. Herein below are my reasons:

In support of the application for summary judgment the applicant annexed an affidavit in which she states 'that the defendant does not have a bona fide defence to her claim and that the defendant filed a notice of intention to defend solely for the purposes of delaying the action and that he does not have a bona fide defence to her action'. The (defendant) filed an opposing affidavit to the summary judgment application. The (defendant) raised three defences to the summary judgment application, namely:

- (a) He applied for rescission of the default judgment that was granted against him (in the matter of Standard bank of *(Namibia limited V Herold Samuel Goraseb)* case no: A 196/2009
- (b) The default judgment that was obtained against him adversely affects his constitutional rights as contained in Articles 12 and 16 of the Constitution.
- (c) His wife was not joined as a defendant despite being a joint owner of the property.

When the matter came before me on 16 September 2010, Mr Grobler appeared for the Applicant and the respondent was not represented nor did he attend at Court to argue the matter.

Mr Grobler submitted written heads of argument. In his written submissions he submitted that: (I quote verbatim).

## **RESCISSION OF THE DEFAULT JUDGMENT**

'4.1 The Applicant applied for a rescission of the default judgment against him in case no: A 196/09 on 11 June 2009.

4.2 that application was brought four months after the sale in execution to the Plaintiff of the property by the Deputy Sheriff and three Months after the property was registered in the name of the Plaintiff.

5.

He contended that there is simply no basis to claim that the ownership of the property does not vest in the Plaintiff since 5 February 2009. There is no basis to claim that

there was not a valid sale of the property to the Plaintiff and in any event if the Defendant should succeed to have the default judgment against him set aside, the sale in execution cannot be reversed. It was a valid sale in execution to an innocent third party.

6.

On the non—joinder of the wife of the defendant, he submitted that:

6.1 The property was sold to the Plaintiff on 5 February 2009 in terms of an order of Court granted on 29 August 2008 against the Defendant who is described as unmarried.

6.2 It is therefore of crucial importance to know when the defendant was married. If after the sale in execution the property could never have formed part of the common estate. It is also important to know whether the parties were married in/or out of community of property to establish whether the property formed part of the common estate.

6.3 To establish a prima facie defence the defendant should at least have mentioned when he got married and whether the marriage was in/or out of community of property. To prove his allegations in this regard the defendant should have attached his marriage certificate to his opposing affidavit. That was not done.

6.4 Not only is the defendant completely silent in this regard, but also the application for rescission of judgment was only brought in his own name only, and no mention is made in the said application that he was married.

6.5 The only reasonable inference that can be drawn is that if the Defendant is indeed married he must have married, after the property was already sold to pay his debt with Standard Bank.

7.

**On the defence that the default judgment adversely affected the constitutional rights of the defendant Mr Grobler submitted that:**

The same arguments raised in paragraphs 4 and 5 above mutatis mutandis apply to this defence.

8.

The defendant does not allege:-

- 8.1 That he still has to pay some or other bond over the property.
- 8.2 That he pay any rent to the Plaintiff as the current bondholder.
- 8.3 That he has a right to stay in the property for free until his case for rescission of judgment has been finalized.
- 8.4 Why the Plaintiff must carry the burden to pay the monthly installment whilst he remain in occupation thereof for fee.

9.

Mr Grobler further submitted, correctly in views that the defendant failed to disclose a bona fide defence:

**COMPARE:**

*'[3] Another provision concerns the requirement that in his or her affidavit the defendant must disclose 'fully' the nature and grounds of his or her defence and the material facts relied upon for such defence. In my view, the word 'fully' should not be given a literal meaning: the defendant meets the requirements if the statement of material facts in his or her affidavit is reasonably full to persuade the court that what he or she has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. According to Corbett JA (as he then was): The word 'fully' connotes, in my view, that, while the defendant need not deal exhaustively with the facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'*

NAMIBIA BREWERIES LTD v SERRAO 2007 (1) NR 49 HC ON P 51 C TO E.

ALSO SEE:

EASY LIFE MANAGEMENT (CAPE) v EASYFIT CUPBOARDS WINDHOEK CC 2008 (2) NR 686 HC ON P 691 E TO L.

10.

I submit that the Plaintiff's claims is for liquidated amount of money and ejection as contemplated by Rule 32.

COMPARE:

*"KAMWI v MINISTRY OF FINANCE 2007 (1) NR 167 HC ON P 172 F TO P 173 F.*

11.

By alleging that the application for summary judgment is misplaced because he applied for rescission of judgment of the judgment against him in another matter can perhaps be regarded as a sort of counterclaim. In this regard HANNAH J said the following:-

'A defendant, in raising a counterclaim, should provide full particularity of the material facts upon which it is based. This means that he must be as comprehensive as when advancing only a defence. The Court must be placed in a position to be able to consider not only the nature and grounds of the counterclaim, but also the magnitude thereof and whether it is advanced bona fide. The necessary elements of a completed cause of action must be included. The counterclaim must, moreover, be based on facts and not on mere conjecture or speculation or on the deponent's belief.

RITZ REISE (PTY) LTD v AIR NAMIBIA (PTY) LTD 2007 (1) NR 222 HC ON 225.'

12.

In the present case it is clear that the application for rescission of the default judgment obtained by Standard Bank cannot be a defence or counterclaim to the Plaintiff's claim for ejection and payment of a reasonable rental against the Defendant who is in unlawful occupation of the property of which he is the lawful owner."

13.

I fully agreed with the submissions made by Mr Grobler and in the absence of any representation and counter arguments by the respondent, I was satisfied that a case for

summary judgment was made out and for all those reasons I granted the application for summary judgment.

The application for summary judgment was granted for all those reasons.

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**GN Ndauendapo**  
**Judge**

## **APPEARANCES**

**APPLICANT :**

Zacharias Johannes Grobler  
OF GROBLER & CO

**RESPONDENTS:**

**INPERSON**