



NOT REPORTABLE

CASE NO. A 106/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANTHONY ABRAHAMS

APPLICANT

and

FRANS GEORGE NAIBAB

1st RESPONDENT

LYDICIA NAIBAS

2nd RESPONDENT

CORAM: CORBETT, A.J

Heard on: **26 OCTOBER 2011**

Delivered on: **5 APRIL 2012**

JUDGMENT

CORBETT, A.J: .

[1] This is an application brought by the owner of Erf No. 4549, Kroon Road, Khomasdal, Windhoek (“the property”) for an order evicting the first and second respondents, as well as all other persons residing or occupying the premises with them from the property, and in the event that they should refuse to vacate, ordering the Deputy-Sheriff to remove the respondents from the property.

[2] The applicant is the registered owner of the property. The applicant acquired the property after default judgment and a warrant of execution was granted against the first respondent in his capacity as surety in a close corporation, for debts owed by that corporation. Pursuant to the warrant of execution the property was put up for sale in execution on 3 November 2009, and the applicant, being the highest bidder at the auction, and having complied with the conditions of the sale in execution of the property, purchased the property, which was subsequently transferred and registered in the applicant’s name on 1 April 2011. The respondents remained in occupation of the property and have to date refused to vacate the property.

[3] I pause to mention that after the sale in execution but prior to the registration of the property in the applicant’s name, the respondents launched an urgent application before this Court seeking to set aside the default judgment

granted, together with the sale in execution of the property. That application was brought under a different case number and neither party placed the documents in that application before me. The applicant in this application stated in the founding papers that the urgent application was struck from the roll on 1 November 2010 on the basis that the respondents in this matter (the applicants in the urgent application) failed to file heads of argument. I was advised from the Bar that that application was not re-instituted by the respondents. It goes without saying that accordingly the basis of the applicant's ownership of the property and the means by which the applicant obtained ownership remain unchallenged.

[4] Ms Visser who appeared for the applicant, submitted that an applicant who institutes action to recover his or her property, is required to prove no more than that he or she is the owner of the property and that the respondents are in possession of the property. It is trite that the onus rests upon the respondents to establish any right to retain possession of the property where the owner does not go beyond alleging ownership and possession by another ¹.

[5] The respondents deposed to opposing papers wherein they sought to revisit the issue of the legality of the default judgment obtained against the first respondent and the ensuing execution process which resulted in the respondents losing their property. Mr Naibab, in advancing his argument in person, contended on the basis of the opposing affidavit that the same cause of action between the same parties was the subject-matter of litigation pending before the Supreme

¹ Jeena v The Minister of Lands, 1955 (2) SA 380 (AD); Chetty v Naidoo, 1974 (3) SA 13 (AD), 18H

Court. As I understood Mr Naibab in the Supreme Court it would be contended that the granting of default judgment resulting in the sale of the immovable property which was the home of the debtor constituted a violation of the judgment debtor's constitutional right to housing.

[6] It might well be that such litigation is pending before the Supreme Court. However, there is no such challenge in these proceedings. As I have already mentioned, the respondents sought to set aside the default judgment granted in this matter and the subsequent sale in execution, but that application was struck from the roll. Thereafter the respondents did not take the matter further. The attempt by the respondents to subject the determination of the relief in these proceedings to challenges brought by other parties in a different Court, is wholly misplaced. This simply cannot constitute a defence to the relief sought in this application.

[7] The opposing affidavit filed by the respondents amounts to no more than a bald denial of the allegations contained in the founding papers. Nowhere in the opposing papers do the respondents positively assert a right to possess the property and to continue to occupy it. They also do not deny that the applicant is the registered owner, nor that they are currently in possession of the property.

[8] In the circumstances, I am satisfied that the applicant has made out a case for the relief sought in these proceedings.

[9] In the circumstances, I make the following order:

1. The first and second respondents, as well as all other persons residing and/or occupying with their permission and/or through them, Erf No. 4549, Kroon Road, Khomasdal, Windhoek, are evicted from the said property.
2. In the event of any of the respondents and/or the persons referred to hereinbefore refusing to vacate the said property after the issue and service of this order, the Deputy-Sheriff of this Court is authorized and directed to remove the respondents, as well as all other persons residing and/or occupying, with the respondents' permission and/or through them, from the said property.
3. The respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:

Adv. I Visser

Instructed by Kirsten & Co. Incorporated

ON BEHALF OF THE RESPONDENTS

Mr Frans Naibab (in person)