REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 65/2012

In the matter between:

RACHEL MAANO NDESHIHAFELA KALIPI **APPLICANT**
and

SIMON HENDRIK HOCHOBEB **1ST RESPONDENT**
EVA HOXOBES **2ND RESPONDENT**

Neutral citation: *Kalipi v Hochobeb* (A 65/2012) [2013] NAHCMD 142 (30 May 2013)

Coram: GEIER J

Heard: **04 April 2013**
Delivered: **30 May 2013**

Flynote: Vindication - *Actio rei vindicatio* - the applicant had proved that she was the registered owner of the property in question from which she sought the eviction of the respondents, who admittedly remained in unlawful occupation thereof - in such circumstances it became incumbent on the respondents to allege and establish their right to continue to occupy and hold the property against the owner – in this regard respondents raising various defences -

Constitutional defence - Constitutional practice – High Court – respondents sought to attack the constitutional validity of a default judgment granted by clerk of the magistrate’s court and the subsequent execution process as a result of which applicant obtained title to the property from which she now sought the respondents eviction – no basis for constitutional challenge of the Magistrate’s Court Act 1944 and Rules however laid in the papers - parties, seeking to challenge the constitutionality of legislation however need to set out a proper basis therefore in their founding papers – in which the constitutional provisions relied upon should be identified - a basis should then also be set out then as to how the to be impugned legislation infringes the constitutional right in question - this would include the placing of evidence before the court where required - the placing of all relevant information is necessary in order to warn the other party of the case it will have to meet, so as to allow it the opportunity to present facts or material and legal argument to meet that case - respondents’ constitutional challenge not satisfying these requirements –

Constitutional defence - Constitutional practice – High Court – also lay persons not absolved from the duty - when raising a constitutional challenge - to properly specify the constitutional provisions relied upon and to place evidence in support of their challenge before the court – respondents also failing in this regard -

Constitutional defence - Constitutional practice – High Court – Non- Joinder - where the constitutionality of legislation is challenged it is normally also considered appropriate to cite the Government, in the person of the Attorney- General or the relevant ministry or statutory agency charged with the administration of the legislation in question – respondents also failing to join necessary parties – court not upholding constitutional defence also for that reason -

Jurisdiction — High Court — Inherent jurisdiction — High Court has an inherent jurisdiction to also stay civil proceedings pending the outcome of other civil proceedings - in this regard the court has a discretion, which must be sparingly

exercised on strong grounds, with great caution and in exceptional circumstances - discretion is a judicial discretion of the Court to be exercised inter alia with due regard to the parties’ conflicting rights and interests and the incidence of convenience and prejudice - this power is exercised by the court to prevent an abuse of its process in the form of vexatious litigation - and if an action is already pending between the same parties on the same cause of action -

Jurisdiction — High Court — Inherent jurisdiction - in so far as the courts have assumed an equitable discretion to grant a stay of proceedings - courts would exercise any such discretion in the recognition that the courts do not just simply administer a system of equity in the abstract, as distinct from a system of law, and that also in Namibia - when considering the 'equities’ of a case, in the broad sense - the courts will always be desirous to administer ‘equity’ in accordance with the principles of the Roman-Dutch law – and in accordance with Namibian law - and if the courts cannot do so, in accordance with those principles, they cannot do so at all.

Summary: Applicant had purchased Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia, at a sale in execution pursuant to a default judgment which had been granted in the Magistrate’s Court, held at Windhoek, under case no 7041/2007, between the National Housing Enterprise (plaintiff) and the first respondent (defendant). The property was subsequently registered in the applicant’s name. The respondents were the previous registered owners of the property in question - which they continued to occupy - and refused to vacate. The only defence squarely raised by respondents on the papers was a defence of *lis pendens*. In heads of argument and orally from the bar respondents also raising a constitutional defence that the default judgement as a result of which their property had been sold at a sale in execution was invalid because the judgment – which had been granted in terms of the Magistrate’s Court Act and Rules was unconstitutional – respondents also urging court to stay current application.

Held: Applicant had made out a case on the *actio rei vindicatio.* In such circumstances it became incumbent on the respondent’s to allege and establish their

right to continue to occupy and hold Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, against the owner.

Held: As respondents had not pleaded their constitutional challenge as is required and having failed to join the necessary parties, constitutional challenge had to fail on the papers on those grounds.

Held: As respondents had failed to prove the elements of the defence of lis pendens - defence not upheld and the discretion to stay the present application - which comes into play, if the requirements of *lis pendens* have been established – did not come into play.

Held: In so far as the court had an inherent jurisdiction to grant a stay of the present application – such discretion should not be exercised in favour of respondents on the facts of the matter – application granted with costs.

ORDER

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1. The Deputy Sheriff is authorised to evict the respondents and all persons claiming through them, their goods and possessions from and out of all occupation and possession whatsoever of Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia, to the end that the applicant herein may peaceably enter into and possess Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia.

2. The Deputy Sheriff is hereby authorised to remove the locks from the doors and gates of Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia, if necessary, in order to execute the eviction order.

3. Costs of the application.

4. The alleged conduct of Mr August Maletzky in this matter is to be referred to the Law Society of Namibia for further investigation.

JUDGMENT

GEIER J:

[1] From the papers exchanged between the parties it appears that the dispute between them encompasses a narrow ambit.

[2] The applicant had purchased Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia, at a sale in execution, pursuant to a default judgment, which had been granted in the Magistrate's Court, held at Windhoek, under case no 7041/2007, between the National Housing Enterprise (plaintiff) and the first respondent (defendant). The property was registered on 08 March 2012 in the applicant's name. She holds title by virtue of Deed of Transfer T 955/2012.

[3] The respondents were the previous registered owners of the property in question - which they continue to occupy - and refuse to vacate.

[4] For purposes of obtaining transfer the applicant had to clear the outstanding municipal account - obviously incurred by the respondents - in respect of rates and taxes, water and electricity with the City of Windhoek - in an amount of N$20 948.70.

[5] A bond B1171/2012 was registered over the property in the amount of N$490 000.00 in favour of Standard Bank Namibia. In this regard the applicant continues to have obligations towards the said bank.

[6] The applicant has also entered into an agreement with the City of Windhoek in terms of which she must renovate, fix and extend the property to conform with a certain building plan, by the 6th of June 2012. Because of the respondents' refusal to vacate the property, applicant will not be able to comply with the obligations imposed on her by the said agreement.

[7] It is in such premises that the applicant seeks an order for the eviction of the respondent's and all persons claiming through them from Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek. The applicant also seeks ancillary relief in terms if which the deputy sheriff would be authorised to remove all locks from the doors and gates in order to execute the sought eviction order.

[8] In their answering affidavits, the respondents merely raised an *in limine* defence, namely that of *lis pendens,* in that they submitted that :

(a) … there is already a pending Case No. A 27/2012 in the high court on the constitutionality of the Registrar of the High Court granting default judgments.

(b) It is common cause in fact that our prpoperty Erf 3726 of Otjomuise, on this strength of the default judgment granted by the Registrar of the High Court was sold at auction.

(c) This matter was postponed sine die on 20 April 2012.

(d) Resultantly the matter is *lis pendens.*

It is respectfully submitted that if the judgment on which the applicant relies is unconstitutional, it follows automatically that all proceedings based on such judgment is null and void and of no force or effect inclusive the Sale in Execution held on 7 July 2011 at which the applicant purchased the property in question.

Wherefore the Applicant's application stands to be dismissed and/or alternative be stayed until the court pronounced itself on the constitutionality of the Registrar granting judgments.'

[9] In reply the applicant countered and pointed out:

(a) 'that neither of the respondents are a party to case no. A 27/2012 and that accordingly there exists no case where either of the parties are a party to an existing matter with the same cause of action; and

(b) that the underlying default judgment was granted in the magistrate's court held at Windhoek under case No 7041/2007; and

(c) that the warrant of execution and the sale in execution was done in terms of the Magistrate's Court Act and Regulations; and

(d) that the terms of the existing law were complied with;

(e) that the referred to pending case - case A 27/2012 - which challenges the constitutionality of evictions of persons from a property - has not yet been granted - and remains pending - seeing it was postponed *sine die;* and that

(f) the defence of *lis pendens* should therefore be rejected.'

THE APPLICANT"S ARGUMENTS

[10] During the hearing of this matter Mrs de Jager, who appeared on behalf of the applicant, made it clear that she was not going to argue the constitutionality or unconstitutionality of the judgment granted in the magistrate's court. Her client's case was based on the *actio rei vindicatio*. She submitted that it was clear from the founding papers that the applicant is the owner of the property since she is the registered owner. It was further clear from the papers that, at the date of the institution of the application, respondents were residing unlawfully at the property in question. It was pointed out that the answering affidavit did not deal with the merits of the case at all and that the respondents' only defence was one of *lis pendens*, that the default judgment granted was null and void and therefore of no effect and that all proceedings flowing therefrom should be set aside. She pointed out further that the applicant's property was not sold at an auction pursuant to a default judgment granted by the Registrar of the High Court, as it was sold pursuant to a judgment granted against the 1st respondent in the Magistrate's Court of Windhoek, that neither of the respondents were a party to High Court case no A 27/2012 and where not involved in that application. Accordingly the cause of action in that application and the present matter was not the same. She submitted with reference to the case

of *Jacobson and Another vs Machado*[1] that the respondents have not satisfied the requirements for a defence of *lis pendens*. She refined her argument by submitting that the relief sought in case A 27/2012 was totally distinguishable from the present matter in which the applicant sought an eviction order. This could be established with reference to the notice of motion in case no A 27/2012 from which it appeared that the parties and the relief was different in nature if compared with the present matter.

[11] She also referred the court to the case of *Vlasiu v President of the Republic of Namibia and Others*[2] where the court held that a court nevertheless retains a discretion whether or not to allow court proceedings - whether in the form of action or application - to continue - in the circumstances where the grounds for *lis pendens* had been established. She referred to p336 of the judgment where the learned judge in that matter stated further:

> 'Even where the grounds for a plea of lis pendens are established, a Court has a discretion whether or not to allow a Court proceeding, whether in the form of an action or application, to continue.
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> The present application is by applicant against the second respondent, ie the Minister of Health and Social Services.
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> The application relied on by the second respondent in this application is one by the Government of the Republic of Namibia against Vlasiu, the present applicant. The parties in the two applications are therefore not the same.
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> In the present application the applicant, Vlasiu, claims relief against the Minister, cited as the second respondent.
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> In the former application, the present applicant is the respondent and the Government claims relief.
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> To allow the present application to be stayed until the first one is decided, will place the present applicant at the mercy of the applicant in the first application. It seems to me that such a situation must be distinguished from one where the same applicant/plaintiff instituted proceedings pending in a Court and subsequently institutes proceedings based on the same cause of action and/or subject-matter' …

[1] 1992 NR 159 HC
[2] 1994 NR 332 LC

and continued to submit with reference thereto that although a similar cause of action was the subject-matter of the presently pending High Court case the relief claimed still differed greatly. Should the applicant in the present application be compelled to await the outcome of the ejectment application, she will be severely prejudiced, inter alia because the requirements, for a successful plea of lis pendens, had not been established'.

[12] She added that, in any event, the order, on which the sale in execution had been based, had not been challenged, and that it should therefore stand until set aside.

[13] With reference to the alternative relief for a stay as sought by respondents Mrs de Jager argued with reference to the *Samicor Diamond Mining Ltd v Hercules*[3] and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* [4] cases that the requirements for stay, pending the finalisation of the other case, had also not been addressed at all.

THE RESPONDENTS ARGUMENTS

[14] In their written heads of arguments the respondents firstly submitted that it was open to them to raise any legal contention on the facts as they appeared from the affidavits. They then referred to Chapter 9 of the Namibian Constitution and Article 78(1) which provides that judicial power is vested to the courts of Namibia and that it was only the court that can exercise judicial power through the judiciary which staffs them. The clerk of the magistrate court was however not such an official and the default judgment and the subsequent execution process, which was governed by the Magistrate's Court Act and Rules, were subject to the provisions of the Constitution. Consequently and when the clerk of the court granted judgment and issued the warrant of execution the subsequent sale in execution, which was founded upon such judgment, was a nullity in law with no force and effect.

[3] 2010 (1) NR 304 (HC)
[4] 1977 (3) SA 534 (A)

[15] As, so it was submitted, ' … the respondents had made out a case for the unconstitutionality of the Clerk of Court in the granting of default judgment which was void and a nullity in law, the applicant's claim of ownership, based on such a void judgment and consequent sale, was therefore without legal efficacy' as 'applicant cannot claim ownership on nothing …'.

[16] In regard to the plea of *lis pendens* it was submitted that case A 27/2012 was still pending, that the cause of action in that case was the same and that the presently pending litigation between the applicant and the respondents, in the form of an intervention application, was based on the same cause of action and in respect of the same subject matter. As there was thus litigation between the respondent's and applicant in the form of an intervention application based on the same cause of action and in respect of the same subject matter the special plea should be upheld and the applicant's case be dismissed with punitive costs.

THE APPLICANT'S CASE ON THE *ACTIO REI VINDICATIO*

[17] Given the undisputed facts of this matter[5] it is clear that the applicant has made out a case on the *actio rei vindicatio*[6], as it is uncontested that the applicant is the registered owner of the property in question from which she seeks the eviction of the respondents, who admittedly remain in unlawful occupation thereof.

[18] In such circumstances it became incumbent on the respondents to allege and establish their right to continue to occupy and hold Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, against the owner.[7]

[5] It must be kept in mind that the respondent's failed to respond to the merits of the applicant's case

[6] See for instance : *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 81 – 82, *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) at 995I - 996D; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C; *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 297E; *Sorvaag v Pettersen and Others* 1954 (3) SA 636 (C) at 639G and 641B and *Shingenge v Hamunyela* 2004 NR 1 (HC) at p 3

[7] *Shingenge v Hamunyela* at p 3

HAVE THE RESPONDENT'S SHOWN AN ENTITLEMENT TO HOLD THE PROPERTY AGAINST THE OWNER

THE CONSTITUTIONAL DEFENCE

[19] From a reading of the answering papers it becomes clear that absolutely no grounds, on which the alleged unconstitutionality of the underlying judgment has been based, have been set out. No basis for the attack on the alleged unconstitutionality of the Magistrate's Court Act 1944 and Rules was thus laid in the papers.

[20] This court has however on a number of occasions stated clearly that parties, seeking to challenge the constitutionality of legislation, need to set out a proper basis therefore in their founding papers. The constitutional provisions relied upon should be identified, a basis should then also be set out then as to how the to be impugned legislation infringes the constitutional right in question, this would include the placing of evidence before the court where required.[8]

[21] The courts have stressed that the placing of all relevant information is necessary in order to warn the other party of the case it will have to meet, so as to allow it the opportunity to present facts or material and legal argument to meet that case.[9]

[22] It is without question that the respondents' constitutional challenge comes woefully short in all these respects.

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[8] See : *Zaahl and Others v Swabou Bank Limited and Others* (Case No A 35/2006) delivered on 23 November 2006 - reported at http://www.saflii.org/na/cases/NAHC/2006/16.html - following *Prince v President, Care Law Society and Others* 2001 (2) SA 388 (CC) at paragraphs [22] – [28], *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC) in paragraphs [24] and 25], *Phillips and Others v The National Director of the Public Prosecutions* 2006 (1) SACR 78 (CC) at paragraph [43] *Lameck v President of Namibia* 2012(1) NR 255 (HC) at par [58], p 271 and the authorities referred to in footnote 21, *Shalli v Attorney-General* case POCA 9/2011 delivered on 16 January 2013 reported at http://www.saflii.org/na/cases/NAHCMD/2013/5.html at para [6]

[9] *Lameck and Another vs President of the Republic of Namibia & Others* 2012(1) NR 255 HC at paragraph [58] cited with approval in *Shalli v Prosecutor-General* at [7]

[23] What compounds these material shortcomings is that none of the necessary parties have been cited in this application.

[24] Where the constitutionality of legislation is challenged it is normally also considered appropriate to cite the Government, in the person of the Attorney-General or the relevant ministry or statutory agency charged with the administration of the legislation in question[10], such as the Minister of Justice or the Registrar of Deeds in this instance, all of whom were not cited in this case.

[25] I take into account this regard that the respondents are not represented. It however became clear during the hearing that the respondents sought the 'legal' assistance of one August Maletzky in this matter. Mr Maletzky is not an admitted legal practitioner. Nevertheless he drafted the relevant answering and supporting affidavits on behalf of the respondents. In addition, Mr Maletzky also drafted the heads of argument filed on behalf of the respondents in this regard.[11]

[26] This court has however held that even lay persons are not absolved from the duty, when raising a constitutional challenge, to properly specify the constitutional provisions relied upon and to place evidence in support of their challenge before the court.[12] It emerges thus that also this factor cannot avail the respondents. Unfortunately they have elected to place their trust – in a case of grave importance to them – in the hands of an unqualified person and must accordingly stand or fall with the shortcomings of such services. Whether or not they, in turn, have a right of recourse against Mr Maletzky, in such premises, is of course for them to consider.

[27] It will have become clear from the above that the mere submission in the answering papers to the effect that:

> ' … It is respectfully submitted that if the judgement on which the applicant relies is unconstitutional it follows automatically that all proceedings based on such judgement is null

[10] *Kaunozondunge NO and Others, Kavendjaa* v 2005 NR 450 (HC) at 465, see also *Majiedt and Others, Minister of Home Affairs* v 2007 (2) NR 475 (SC) at paras [7] to [11]

[11] Although not relevant for determination of this matter it is to be noted that, according to respondents, the respondent's heads of argument were filed late due to Mr Maletzky holding them back until such time that the respondents had paid him for the drafting of the said heads of argument.

[12] *Zaahl and Others v Swabou Bank Limited and Others at* [29]

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and void and of no force or effect inclusive the Sale in Execution held on 7 July 2011 at which the applicant purchased the property in dispute'.

is insufficient to effectively mount the constitutional challenge reflected in the respondents' heads of argument. This challenge can accordingly not be upheld.

THE DILATORY DEFENCES

LIS PENDENS

[28] In their answering papers the respondents mainly confined themselves to the defence of *lis pendens*.

[29] With reference to the requirements of this defence it is furthermore clear that the submission made on behalf of the applicant in this regard have to be upheld.

[30] It is beyond doubt that the respondents were unable to prove the elements of the defence[13] raised by them i.e:

a) that there was presently litigation pending between the same parties in this and another case - in this regard it is clear that the applicants are not a party to the proceedings which are presently pending in case no A 27/2012;[14] or

b) that such proceedings are based on the same cause of action – and in respect of the same subject and matter – no evidence was tendered in this regard save for the allegations quoted in paragraph [8] above.

[31] In such circumstances, where the requirements of the special defence have not been met, the discretion to stay the present application – which would have

[13] See for instance : *Jacobson and Another v Machado* 1992 NR 159 (HC) at 162 - 163

[14] It is to be noted in this regard that in the heads of argument, allegedly drawn by Mr Maletzky, reference is made to an intervention application of the respondents in Case A 27/2012, which is allegedly still pending – and therefore has probably not yet been granted - a copy of which he intended to annex to his heads - but which was not annexed. Curiously this intervention application was never mentioned, nor relied on, in the answering affidavit allegedly also drawn by him. It was also not produced during the hearing.

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come into play, if the requirements of *lis pendens* would have been established – does also not come into play.[15]

[32] Even if one accepts for the moment that the respondents have launched an intervention application in case A 27/2012 – in respect of which they have, through the omission of Mr Maletzky, failed to place any evidence before the court - and even if one accepts that such application might be granted, on some future date, I would, due to the defective way in which their case has been pleaded and due to the total lack of information before me, hesitate to exercise any discretion in favour of the respondents, as this would place the present application not only 'at the mercy of the progress or lack thereof in case A27/2012', but also at the mercy of the progress or lack thereof of any intervention application. The special plea of *lis alibi pendens* is accordingly not upheld.

INTERIM STAY OF THIS APPLICATION

[33] In so far as the respondents have implored the court from the bar, and without notice, to stay this case pending the outcome of case A27/2012, Mrs de Jager was quick to point out that, also in this regard, no case had been made out. She made this submission with reference to the decisions of *Samicor Diamond Mining Ltd v Hercules* 2010 (1) NR 304 (HC) and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), as mentioned above.

[34] She submitted further that the respondents had not brought any substantive application for a stay of the present application – outside and separate from the parameters of the intended stay to be achieved through the reliance on the special plea of *lis pendens* – but given the requirements set for such relief, as set by the relied upon cases - the respondents had simply failed to address them altogether.

[35] On closer analysis of this argument it however emerges that the cases relied on by Mrs de Jager are not in point as they relate to the court's power to stay the

[15] *Vlasiu v President of the Republic of Namibia and Others* at 336

execution of its judgments pending an appeal.[16] This is clearly not such a case where the respondents seek a stay of one civil application pending the outcome of another.

[36] Unfortunately, and in such circumstances, the court was not provided with any authority on the point by either party.

THE COURT'S INHERENT JURISDICTION TO STAY CIVIL PROCEEDINGS

[37] It would however appear that the High Court does have an inherent jurisdiction to stay the hearing of a civil action or application, pending another[17].

[38] The initial focus of the applicable case law pertaining to the stay of proceedings seems to have been to prevent vexatious litigation,[18] or was applied in instances where civil actions have been stayed, pending the outcome of criminal prosecution.[19]

[39] It seems that this inherent power has also been exercised in certain more well-known instances, such as, for example, where the actions between the parties were *lis pendens*, or where there were previous costs unpaid, or in instances where parties had agreed in writing to submit their disputes to arbitration[20].

[40] In the *Fisheries Development Corporation* case Nicholas J held that:

'It is well established that the Court has an inherent right to prevent the abuse of its process in the form of frivolous or vexatious litigation (*Western Assurance Co v Caldwell's*

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[16] See: *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd at 545* and *Samicor Diamond Mining Ltd v Hercules* at[30] to [37]

[17] *Western Assurance Co Appellant v Caldwell's Trustee Respondent* 1918 AD 262 at p 273 to 275, *Hudson Appellant v Hudson and Another Respondents* 1927 AD 259 at p 267, *Fisheries Development Corporation of SA LTD v Jorgensen and Another; Fisheries Development Corporation of SA LTD v AWJ Investments (Pty)Ltd and Others* 1979 (3) SA 1331 (W) at p 1338 F to G, *Spier Properties (Pty) Ltd and Another v Chairman, Wine and Spirit Board, and Others* 1999 (3) SA 832 (C) at p 840 E to F *Clipsal Australia (Pty) Ltd and Others v GAP Distributors and Others* 2010 (2) SA 289 (SCA) at p 298 B to C

[18] *Western Assurance Co v Caldwell's Trustee op.cit* at p 272 and p 274

[19] *Western Assurance Co v Caldwell's Trustee op.cit* at p 275

[20] See generally : Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at p 248

Trustee 1918 AD 262 at 271; *Corderoy v Union Government* 1918 AD 512 at 517). And, when the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse (*Hudson v Hudson and Another* 1927 AD 259 at 268). This power, however, is one which must be exercised with very great caution, and only in a clear case (ibid). The reason is that the Courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action. (See the *Western Assurance Co* case at 273.)'[21]

[41] In *Southern Metropolitan Substructure v Thompson and Others* [22] where a temporary stay was considered in the context of an application for eviction and were a review application was also pending between the parties, Pretorius AJ said the following:

"It is for the respondents to establish a case for the stay of the eviction application. Counsel for the applicant argued that the respondents must show 'strong grounds' in order to justify a stay and that a Court would order a stay only in 'exceptional circumstances'. Reference was made to Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 273-4 and to Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 267.

In *Township Management Consultants (Ply) Ltd v Simmons* 1991 (3) SA 56 (W) the respondent sought a stay of civil proceedings pending the outcome of related criminal proceedings. Schabort J held (at 460E) that: '*(T)he relief which the respondent is seeking is a matter vesting in the judicial discretion of this Court to be exercised inter alia with due regard to the parties' conflicting rights and interests and the incidence of convenience and prejudice*.'[23] …

… What the respondents seek in this case is not a stay of proceedings as was considered in *Western Assurance Co v Caldwell's Trustee*, but what amounts to a postponement [24] … '.

[42] The judgment of Nicholas J in the *Fisheries Development Corporation of SA Ltd* case was endorsed by the Cape Provincial Division in *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board, and Others*[25] where Davis J stated:

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[21] at p1338
[22] 1997 (2) SA 799 WLD
[23] *Southern Metropolitan Substructure v Thompson and Others at 804J –805B*
[24] *Southern Metropolitan Substructure v Thompson and Others at 805F*
[25] 1999 (3) SA 382 CPD

'As appears from the judgment of Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1340, a stay can be granted by the Court in the exercise of its inherent discretion to avoid injustice and inequality but in this enquiry Courts do not act on abstract ideas of justice and equity. They must act on principle. Accordingly, where there is such an application for a stay on the grounds of prejudice, such prejudice and harm must not be 'problematical, hypothetical and speculative' (at 1341).[26]

[43] After an analysis of the underlying disputes pertaining to the case before him, Davis J concluded:

'For these reasons I consider that the disputes, while linked, are sufficiently separate in law to justify a conclusion that the review of the first respondent's decision should not require a stay until such time as the remaining litigation has been resolved. The application to review Board Notice 80 of 1996 involves a separate enquiry and affects different rights to those pertaining to the trade marks. That one right might affect another is in the very nature of rights but this does not mean that the enquiry relating to the review cannot and should not be separately conducted.'[27]

[44] The South African Supreme Court of Appeal, while considering the High Court's discretion to stay contempt proceedings in *Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others*[28], per Streicher ADP, dealt with the question as follows:

'[16] As stated above, Joffe J held that he had a discretion to stay the contempt application if he considered it to be in the interest of justice to do so. In this regard he relied on cases dealing with the stay of proceedings pending the payment of costs incurred in substantially similar previous proceedings between substantially the same parties (see *Western Cape Housing Development Board and Another v Parker and Another* 2005 (1) SA 462 (C) ([2006] 3 All SA 84) at 465I - 466C; and Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 4 ed (1997) at 254 - 61).

[17] It is clear that a court does have the power to stay civil proceedings in certain circumstances, eg to prevent an abuse of the process of the court (see *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517) and if an action is already pending between the same parties on the same cause of action (see Herbstein & Van Winsen op cit at 245). However, Joffe J did not quote any authority to the effect that a court has a general discretion to stay proceedings whenever it considers it to be in the interests of justice to do so.

[26] *Spier Properties (Pty) Ltd and Another v Chairman, Wine and Spirit Board, and Others at 840 E-F*
[27] *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board* at p 840 J to 841 A
[28] at p 297 to 298 paras [16] to[19]

[18] In *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd and Another* 1999 (4) SA 1039 (T) at 1048H - I Van Dijkhorst J accepted that he had a discretion to stay an application for an interdict restraining the respondents from infringing a registered trademark pending an application in terms of s 14 of the Trade Marks Act 194 of 1993 on the basis of honest, concurrent use and/or other special circumstances. He added that at best for the respondents it was a discretion that had to be exercised sparingly and in exceptional circumstances. But Van Dijkhorst J apparently based his acceptance of a discretion to do so on the authority of *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1340D - 1341A in which it was merely assumed that a court had jurisdiction to stay civil proceedings on equitable grounds. In that case, dealing with a request that an action should be stayed in the exercise of the court's 'inherent discretion to avoid injustice and inequity' Nicholas J said at 1340B - D:

'The Courts do not however act on abstract ideas of justice and equity. They must act on principle. Cf the *Western Assurance Co* case supra at 275. And see the remarks of Innes CJ in *Kent v Transvaalsche Bank* 1907 TS 765 at 773 - 774: H

> ‘(The appellant) also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the insolvency law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.'

Nicholas J then proceeded to deal with the application on the assumption that the court had the power to grant a stay of the proceedings on equitable grounds and concluded that 'even if it had the power to do so' a case had not been made out for such a stay.[29]

[19] As I shall presently indicate, I am of the view that if the court below did have a discretion, on equitable grounds, to stay the contempt application, the exercise of that discretion in favour of the respondents was not justified and should be set aside. I shall, therefore, likewise assume that the court below had such a discretion. I shall furthermore assume in favour of the respondents that the discretion is a discretion in the strict or narrow sense, ie a discretion with which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself.[30]’

[29] At 1341A

[30] *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) ([2009] 1 All SA 133) para 13

[45] To sum up : it appears from these cases that all the learned judges, who had occasion to deal with this issue, accepted:

a) that the High Court has an inherent jurisdiction to also stay civil proceedings pending the outcome of other civil proceedings;

b) that this power is to be exercised by the court to prevent an abuse of its process in the form of vexatious litigation; and if an action is already pending between the same parties on the same cause of action;

c) that in this regard the court has a judicial discretion, which must be sparingly exercised on strong grounds, with great caution and in exceptional circumstances.

[46] In so far as the courts have assumed an equitable discretion, I hesitate to make that same assumption in the absence of considered argument on that aspect. On the other hand I have no doubt that also our courts would exercise any such discretion in the recognition that also the courts in Namibia do not just simply administer a system of equity in the abstract, as distinct from a system of law, and that also in this country, when considering the 'equities' of a case, in the broad sense, the courts will always be desirous to administer 'equity' in accordance with the principles of the Roman-Dutch law – and I might add – in accordance with Namibian law - and if the courts cannot do so, in accordance with those principles, they cannot do so at all.

[47] It has also emerged from the above I cannot just simply come to the assistance of the respondents on equitable grounds alone. Their prayer from the bar will have to be determined with reference to the applicable legal principles - in terms of which I have to exercise any discretion on the facts and circumstances before me - and not in the abstract.

[48] If one then reverts to the facts and circumstances of this case it appears that any such discretion must be exercised in this instance with reference to the following factors:

a) the respondents main defence, the special plea of *lis alibi pendens* was not upheld – in this regard it was not shown that there was already an action/application pending between the same parties based on the same cause of action; the respondents also failed to show that their case was sufficiently linked to case A 27/2012; or that their case should not be separately conducted until such time that the litigation under case A 27/2012 had been resolved;

b) no case - never mind a strong case - nor one with exceptional circumstances - for a stay has been made out on the papers or from the bar – in this regard it is taken into account that no substantive application for a stay had been made - and that no effective constitutional challenge had been mounted in the papers – and - that the special plea of *lis pendens* was not upheld; regard is also had to the failure of the respondents to prove any intervention application in case A 27/2012 or that same was, or is likely to be granted;

c) on the other hand, the applicant has made out a case on the *actio rei vindicatio*, whereas the respondents have failed to establish their right to continue to occupy and hold Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, against the owner;

d) there is nothing before the court, which indicates that the applicant is abusing the court's process or that her application was frivolous or vexatious;

e) there are no exceptional circumstances before the court, which indicate that the doors of the court should be closed to the applicant.

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[49] These facts and circumstances then reveal that the respondents were not able to show the strong grounds and exceptional circumstances required for the relief sought.

[50] It is then also with these factors in mind that I am driven to the conclusion that they do not, cumulatively, militate towards the granting of the prayed for stay or that I should exercise my discretion in favour of the respondents.

COSTS

[51] The applicant continues to seek a special costs order on the attorney and client scale, such costs to include the costs of one instructed- and one instructing counsel. Such order was sought mainly on the basis that the respondents had not really made out any defence on the papers and that their opposition of this application was frivolous and had caused the applicant unnecessary costs.

[52] In the circumstances of this matter however, and where the respondents were fighting to remain in occupation - of what they still consider their residence - and where they turned - in their desperation – ill-advisedly - to Mr Maletzky – and where with professional assistance they might have been more successful and effective in warding off their eviction – at least on a temporary basis - I do not consider that these are circumstances, which show, that a special costs order is warranted.

[53] I also do not consider the complexity of this matter such, so as to warrant a costs order which should include the costs of one instructed- and one instructing counsel.

[54] I accordingly decline to grant the special costs order sought by the applicant.

[55] In premises I do however grant the following relief:

a) The Deputy Sheriff is authorised to evict the respondents and all persons claiming through them, their goods and possessions from and out of all occupation and possession whatsoever of Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia, to the end that the applicant herein may peaceably enter into and possess Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia.

b) The Deputy Sheriff is hereby authorised to remove the locks from the doors and gates of Erf No 3726 (a portion of Erf 2815), Boston Street, Otjomuise, Windhoek, Republic of Namibia, if necessary, in order to execute the eviction order.

c) Costs of the application.

d) The alleged conduct of Mr August Maletzky in this matter is to be referred to the Law Society of Namibia for further investigation.

H GEIER

Judge

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APPEARANCES

APPLICANT:	B de Jager Instructed by Du Toit & Associates, Windhoek.
RESPONDENTS:	In person