

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: A 114/2013

In the matter between:

ALBERTUS GAMSEB

FIRST APPLICANT

ANASTASIA GAMSEB

SECOND APPLICANT

HAROLD ABSALOM GAMSEB

THIRD APPLICANT

and

MUNICIPAL COUNCIL OF THE MUNICIPALITY

FIRST RESPONDENT

OF OUTJO

MESSENGER OF COURT FOR THE DISTRICT

OF OUTJO

SECOND RESPONDENT

Neutral citation: *Gamseb v Municipal Council of the Municipality of Outjo* (A 114/2013) [2013] NAHCMD 194 (11 July 2013)

Coram: SHIVUTE, J

Heard: 29 April, 18 June and 27 June 2013

Delivered: 11 July 2013

ORDER

In the result the following order is made:

1. The rule nisi issued on 29 April 2013 by this Court is confirmed.
2. No order as to costs is made.

JUDGMENT

SHIVUTE J:

[1] Following application brought on notice of motion by the applicants, the court made the following order on 29 April 2013.

'1. That the non-compliance with the forms and service provided by the Rules of Court is condoned and the application is heard on an urgent basis as envisaged by Rule 6 (12) of the Rules of the Court.

2. That a Rule Nisi is hereby issued calling upon the Respondents and any interested part, if any, to show cause on the 18 June 2013 at 10h00 why an order in the following terms should not be made final.

2.1 Ordering and directing that any and all execution under Outjo case No.: 26/2012, scheduled to take place on 30 April 2013 at 09h00 be stayed until the finalisation of the rescission application in the said case;

2.2 Interdicting and restraining the Messenger of Court for the district of Outjo to execute under warrant of execution under Outjo Case No.: 26/2012, until the finalisation of the rescission application in this matter;

2.3 Ordering and directing the legal practitioner of record for the Outjo Municipal Council in Case No.: 26/2012, to provide the legal practitioner for the applicants with all and any pleadings, documents and newspaper clippings in this matter within 24 hours from date of this order;

3. The order in terms of subparagraph 2.1, 2.2 and 2.3 shall serve as an interim interdict with immediate effect pending the return date which is 18 June 2013 at 10h00.

4. That the first respondent pays the costs of this application'.

[2] The urgent application was heard unopposed. It was brought principally to stay the sale in execution of the judgment granted in favour of the first respondent. On 17 June 2013, the respondents filed opposing papers in which the first respondent stated that it did not have objection to the confirmation of prayer 2 of the rule nisi. It, however, opposed the relief sought in relation to costs. In its opposing affidavit, first respondent avers that on 24 May 2013 the third applicant filed an application for rescission in the Outjo Magistrates Court under Case No 26/2012 and that first and second applicants caused interpleader proceedings to be instituted in the same court in respect of the same case.

[3] Counsel for the first respondent argued that although the applicants were successful parties in the application, they should be deprived of the costs because the urgent application was brought unnecessarily. Counsel contended that the Messenger of the Court for the Outjo District indicated to the applicants' legal practitioners on 26 April 2013 that the sale in execution scheduled for 30 April 2013 would not proceed. Moreover, the applicants should have brought application for rescission of judgment or cause interpleader proceedings to be instituted in the Magistrate's Court.

[4] The first applicant who deposed to the founding affidavit alleged that the third applicant who was the defendant in the proceedings in Magistrate's Court was not served with any process of the court and was thus unaware of the action against him until he was alerted on 24 April 2013 to the warrant of execution and notice of sale in execution.

[5] First applicant alleged that his legal representative repeatedly sought to obtain copies of the pleadings from the legal practitioners of the first respondent by writing letters to which she has had no reply and that the legal practitioner was generally uncooperative. He advised instead that copies of pleadings should be obtained from the Clerk of the Court. The Clerk of the Court was not helpful either since she was able to produce only the front page of the summons minus the page containing the particulars of claim. The legal practitioner for the first respondent in his defence

stated that he refused to cooperate because the applicants' legal practitioner was not civil in her approach. This allegation was denied by the applicants' legal practitioner.

[6] It was also alleged that the applicants' legal practitioner had requested the Messenger of the Court to issue interpleader proceedings but that the legal practitioner was informed by the Messenger of the Court that interpleader proceedings were not an option due to the inability of the personnel at the Outjo Magistrate's Court to deal with such proceedings. The Messenger of the Court on affidavit denied that he ever told the legal practitioner such a thing. He went on to say that he had told the legal practitioner that he only required an affidavit of the alleged owner of the cattle that were due to be sold on public auction for him to issue interpleader proceedings. Such affidavit was not produced. On the basis of this averment by the Messenger of the Court and on the basis of the allegation that the third applicant was not served with any court process in the Magistrate's Court, so it appears, counsel for the respondents submitted that the applicants were 'dishonest' and should therefore not be entitled to any costs and should in fact pay the first respondent's costs.

[7] Counsel for Applicants on the other hand argued that a special costs order against the first respondent should be made, because of the persistent refusal to reply to the letters and to assist the applicants in any way. Counsel argued that the lack of cooperation caused the applicants to bring this application. She furthermore contended that first respondent was vexatious and frivolous in its actions by refusing or ignoring the applicants' several requests to provide copies of relevant pleadings in the possession of the first respondent's lawyers. Therefore, so she argued, the first respondent should be ordered to pay the applicants' costs on attorney and client scale. On the argument that the Messenger of the Court had undertaken not to proceed with the auction, counsel for the applicants argued that such undertaking was not in writing and that such undertaking in any event only has a bearing on interpleader proceedings and not on the stay of sale in execution. Only the legal practitioner for the first respondent could issue an instruction for sale in execution.

[8] As a general rule, costs are awarded to a successful party in order to indemnify him or her for the expense to which he or she has been put through, having been unjustly compelled either to initiate or to defend litigation. The award of costs is a

matter entirely within the discretion of the Court. Such discretion should be exercised judicially. As a general principle, a successful party is entitled to costs. A successful party may, however, in certain circumstances be deprived of his or her costs. These are trite principles and it is not necessary to cite authorities. Counsel referred me to these and I have had regard to them in arriving at the conclusion I have arrived at in this judgment.

[9] Applying the law to the facts of this application, the application was moved because the applicants wanted to be provided with copies of the pleadings in the Magistrate's Court. They say they did not have any because none was served on them. But the first respondent has produced a return of service that shows that the third applicant, who as I said before was the only defendant in the action instituted by the first respondent in the Magistrate's Court, was personally served with the summons on 15 November 2012 'at his residential address being Erf No. 593, Orwetoveni, Otjiwarongo'. It would appear therefore that the summons was served on the third applicant, contrary to his assertion in this application. Instead of filing an urgent application in this Court, the applicants could have easily made an affidavit as requested by the Messenger of the Court and the latter would have caused interpleader summons to issue. In my opinion, this process could have stayed execution until such time that ownership of the property that was due to be sold in a sale in execution has been determined. This was an avenue available to them which was not utilised. The applicants could have also applied for rescission of judgment. In these circumstances, even though the applicants were successful in their application, they should be deprived of their costs.

[10] It remains to decide whether the first respondent should be awarded the costs of the application. It will be remembered that the applicants' legal practitioner wrote letters requesting to be provided with the documents in possession of the legal representative of the first respondent. The requests were ignored for the reason that the requesting legal practitioner was not friendly in her approach. This is not a good reason to refuse to cooperate in the circumstances where there were no legal impediments to cooperate. In these circumstances, I have come to the conclusion that this is a proper case where it would be fair and just not to make an order as to costs.

[11] The following order is accordingly made:

3. The rule nisi issued on 29 April 2013 by this Court is confirmed.
4. No order as to costs is made.

N N Shivute
Judge

APPEARANCES

APPLICANTS : Ms Petherbridge
Petherbridge Law Chambers

RESPONDENTS : Mr Small
JC Van Wyk Attorneys