REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: I 2625/2012

In the matter between:

1.1.1.1.	**GERT HENDRIK BEUKES**
	1st PLAINTIFF
VIRGINA BEUKES	**2nd PLAINTIFF**
and	
SIEGFRIED BROCKERHOFF	**1st DEFENDANT**
PRISCILLA HENDRINA BROCKERHOFF	**2nd DEFENDANT**

Neutral citation: *Beukes v Brockerhoff* (I 2625/2012 [2013] NAHMD 54 (19 February 2013)

Coram: Schimming-Chase, AJ
Heard: 19 February 2013
Delivered: 27 February 2013

Flynote: Practice – Summary judgment – Application for ejectment of defendants from certain immovable property in terms of Rule 32(1)(d). Default of appearance – Defendants failing to appear at hearing of application for summary judgment despite receiving notice of application for trial date and notice of set down duly delivered at the address nominated in defendants' notice

of intention to defend – Application heard in defendants' absence.

Summary: Plaintiffs applied for ejection of the defendants from certain immovable property in terms of Rule 32(1)(d). It was common cause between the parties that the plaintiffs were the registered owners of the property. Defendants raised a counterclaim in their opposing papers for monies they alleged to be due, owing and payable to them by plaintiffs but did not lay any basis in law why they should continue to reside on the property pending finalisation of their counterclaim. Summary judgment accordingly granted.

ORDER

(a) Summary judgment is granted in favour of the plaintiffs.

(b) The defendants are evicted from Farm Goabeb No 63 in the Usakos District.

(c) The defendants are order to pay the costs of the application for summary judgment, such costs to include the costs of one instructing and one instructed counsel.

REASONS

SCHIMMING-CHASE, AJ

(b) This is an application for summary judgment in terms of Rule 32(1)(d) of the Rules of court for the eviction of the defendants from Farm Goabeb No 63, Usakos District ("the property").

(c) The defendants failed to appear at the hearing of this application. They also failed to file any heads of argument. A formal notice of set down of the

application was delivered to the defendants at the address which they nominated in their notice of intention to defend for service of process, notices and documents in connection with the action instituted by the plaintiffs.

(d) Instead, I was addressed at the outset by Mr August Maletzky who indicated that he did not appear in the summary judgment application but wished to make submissions in relation to an application to intervene which he launched in the action proceedings between the plaintiffs and defendants on 9 October 2012. Neither the notice of set down nor the application for a trial date indicate that an application for leave to intervene would be argued before me.

(e) The notice of application for summary judgment was served on the defendants on 27 September 2012, and delivered on 28 September 2012 at the address nominated by the defendants for service of process, notices and documents. According to the notice of application for a trial date, the defendants were called upon by the plaintiffs' counsel to meet at the office of the Registrar on 5 December 2012 at 09h00 for the purposes of obtaining a trial date for the hearing <u>of the summary judgment application</u> (emphasis supplied). This application for a trial date was similarly served and signed for on behalf of the defendants at the address nominated by the defendants. Mr Maletzky confirmed that the nominated address, namely c/o African Labour and Human Rights Centre, 2nd Floor, Suite 206 is his own business address.

(f) Subsequent to the notice of application for a trial date, the plaintiffs similarly delivered to the defendants a notice of set down for hearing of the application on 5 December 2012. It is clear *ex facie* the above notices and in particular the notice of application for a trial date that only the application for summary judgment was set down for hearing.

(g)

(h) Mr Maletzky was unable to give the court a proper explanation as to why, after the notices were delivered to his business address, he did not attend at the Registrar's office to ensure that his application for intervention was set down. All he stated was that he would be prejudiced if his application to intervene was not

heard. He further stated from the Bar that he had specifically informed the defendants to attend at court for the hearing of the summary judgment application.

(i) I find it strange that Mr Maletzky would appear to argue his application to intervene without arranging for it to be set down for hearing, or even filing heads of argument for that matter, and further that he would claim that he is prejudiced when as a regular participant in court proceedings he failed to make any attempt to follow the Rules of Court. Mr Maletzky clearly failed to consider the prejudice to his opponents who had only appeared to argue the summary judgment application, or the prejudice to the court in having to hear a matter not formally set down for hearing without the benefits of heads of argument. An added factor is that the notices were served at his office and he did nothing to further his claim for relief. In the result this court declined to hear the application for intervention after which Mr Maletzky excused himself with the permission of the court.

(j)

(k) As regards the summary judgment application, the failure of the defendants to appear despite notice having been properly delivered at their nominated business address was at their own peril, considering that Mr Maletzky indicated that he had advised the applicants to attend. As a result, I proceeded to hear the application for summary judgment.

(l) In their opposing affidavit resisting summary judgment the defendants alleged *inter alia* that they had a *bona fide* defence to the claim for ejectment, that they have a valid counterclaim against defendants for occupational rental in respect of the property from December 2011 to June 2012 and that the plaintiffs failed to pay occupational rental in respect of the foregoing period and caused the conveyancing attorneys of record to deduct unrelated fees from the balance which was due and payable to the defendants, <u>evidence of which would be adduced at the hearing</u> (emphasis supplied). In this regard the defendants confirmed that the plaintiffs concluded a sales agreement to buy the property from them as set out in the particulars of claim during December 2012, and that the property was eventually transferred into the plaintiffs' names.

(m) The defendants' issue as set out in the answering papers is that the plaintiffs failed to secure the N$3 million as per the sales agreement as a result of which the plaintiffs had to pay occupational rental to the defendants. It was specifically alleged that the defendants were willing to vacate the farm upon payment of the aforegoing "debits" which were made in favour of the defendants together with occupational rental from December 2011 to June 2012.

(n) The defendants also raised a point *in limine* and alleged that the legal practitioners of record for the plaintiffs acted in blatant conflict of interest as they did the conveyancing and transfer of the property and "profited from the defendants' unlawful deductions made at the instance of the plaintiffs from the balance which was due to the defendants" and by so doing "compromised their positions as unbiased officers of law". They further stated that the summary judgment is misplaced because the total set of facts upon which the application for summary judgment is predicated is not liquid and thus not capable of speedy determination. I deal with these points *in limine* below.

(o) As regards the first point *in limine* Mr Maasdorp, counsel for the defendants, relied on Keys and Another v Boulter and Others 1971(1) All ER 289 and 294 where Lord Denning dealt with the question whether the existence of a conflict of interest affected the authority of a solicitor to enter appearance for a client in the following manner:

> "Then I must with the final point which was put thus by counsel for the plaintiffs: 'Well, in any event there was such a conflict of interest apparent at the time Shaen, Roscoe & Bracewell entered this appearance that they were in breach of duty and indeed in breach of duty to the court, for which they should be penalised in this way, that they ought to pay all the cost of what has happened because they ought never to have undertaken it because of the conflict of interest.' It seems to me there is a short answer to that. The only question for us is whether the appearance was authorised or not by the trustees. The question of conflict of interest is a matter between the solicitor and the client himself. It does not affect the authority of a solicitor."

(p)

(q) I was also referred to the concurring judgment in that case in which Phillimore LJ stated that:

> "I agree with Lord Denning MR that, despite all the warnings from the opposition, Shaen, Roscoe & Bracewell were entitled to form their own judgment whether at the time they entered that appearance there was any conflict of interest between their respective clients. It is now conceded that there is a complete conflict. It is now conceded not merely that there is a conflict of interest which would prevent them acting for both these defendants, but also a conflict of interest which would prevent WH Thompson acting for SOGAT. There are all these other actions going on. As I see it, this was a perfectly proper appearance. It was properly authorised by the trustees, but the time has now come when the trustees must instruct fresh solicitors who can truly said to be quite independent. ….."

(r) I am in respectful agreement with the findings of the civil division of the English Court of Appeal in the above case. It is clear that a special power of attorney was filed by the legal practitioners of the plaintiffs. Whether or not a conflict of interest existed which I do not propose to deal with at this stage relying on the Keys decision, the only question for me to determine, is whether the appearance in the action was authorised or not by the plaintiffs. It was so authorised *ex facie* the special power of attorney, and accordingly the first point *in limine* fails.

(s) As regards the second point *in limine*, to the effect that the total facts on which the summary judgment application is predicated is not liquid and not capable of a speedy determination, it was submitted by Mr Maasdorp that it is in fact the defendants' suggestion, and not the application for summary judgment that is misplaced, as it is irrelevant in law whether the facts are liquid or capable of speedy determination, because what matters for the purposes of Rule 32(1)(d), is the nature of the claim. In this matter it is a claim for eviction which is synonymous with ejectment and which is a specifically permissible claim in terms of Rule 32(1)(d). Mr Maasdorp further submitted that the claim arises in circumstances where the defendants do not dispute the plaintiffs' title to the property and do not present any facts to support a defence on the basis of

any recognised ground entitling the defendants to remain on the plaintiffs' property. I am in agreement with the submissions made by counsel on behalf of the plaintiff and this point *in limine* also fails and falls to be dismissed.

(t) The question to be determined therefore is whether or not the defendants have a *bona fide* defence to the applicant's application for summary judgment in light of the averments contained in the opposing affidavit. It was submitted by Mr Maasdorp that the summary judgment application for eviction is the consequence of the defendants' refusal to vacate the property.

(u) As regards the counterclaims it is clear that the defendants do not dispute the plaintiffs' title. The defendants further do not raise any other lawful entitlement to occupy the property. Instead the defendants raised monetary counterclaims for alleged unpaid occupational rental for December 2011 to June 2012 and for unlawful debits made by the plaintiffs from the purchase price due to the defendants. The defendants in this regard did not state the extent of the counterclaims and only alleged that "the actual quantum of the defendant claim shall with leave of this Honourable Court be availed at the trial." It is important to note that the defendants themselves confirmed their willingness to vacate the farm upon payment of the foregoing debits which were made in favour of the defendants together with occupational rental.

(v) There are two aspects which are important to note with regard to the above averment contained in the opposing affidavit. The defendants failed to specify the extent of the alleged counterclaim which the learned author Erasmus[1] indicated is fatal to the defendants' opposition, especially as they did not explain their failure to specify the extent of the counterclaims at all. Secondly, even if the counterclaims were properly raised for purposes of

[1] HJ Erasmus, Superior Court Practice at B1-226 and the authorities collected there, where the learned author stated that where the plaintiff claims the delivery of specific movable property which at all times was his own property (although handed over to defendant in terms of a contract since cancelled) and the defendant has no legal right to retain the property, the mere fact that the defendant has an unliquidated counterclaim for damages against the plaintiff affords him no defence to an application for summary judgment. In my view the same principle applies to the facts of this case even though immovable property is involved.

Rule 32(3), it does not affect the plaintiffs' entitlement to an eviction order taking into consideration that the defendants do not dispute the plaintiffs' title and further do not raise any lawful entitlement to occupy the property.

(w)

(x) In this regard, it is trite that the defendants may rely on an intended counterclaim in an unliquidated amount which exceeds the plaintiffs' claim as a defence in summary judgment proceedings. Thus, set off would operate. But, this is not the case in this matter.

(y) Mr Maasdorp also relied on Spilhaus & Co Ltd v Coreejees. [2] In this case the plaintiff alleged that it sold and delivered to the defendant irrigation equipment for the sum of R2,696.00 and as the defendant failed to meet the repayment terms, the plaintiff had cancelled the agreement. The plaintiff claimed return of the equipment and damages of R1,196.00 constituting the difference between the contract price and the present market value of the equipment. The plaintiff sought summary judgment for, amongst others, the return of the equipment. The defendant opposed the summary judgment application on the basis that the plaintiff's failure to deliver the equipment on time resulted in the defendant suffering consequential damages of R9,000.00. Watermeyer, J [3] held as follows concerning this defence:

> "In the present case the defendant has no legal defence to the plaintiff's claim for return of the equipment. The ownership of the equipment is still vested in the plaintiff and the defendant has no right to retain possession of it. Even if defendant were to succeed in his counterclaim judgment thereon would in no way extinguish plaintiff's claim for the return of the equipment. Defendant's request that judgment should be delayed could only be justified on some broad equitable principle that it might be unfair to order the defendant to return the equipment to plaintiff until such time as judgment has been given on the counterclaim. The defendant will in any event have to return the equipment, and short of its being attached in execution of any judgment which the defendant might obtain the equipment could in no way furnish security for payment of the defendant's counterclaim. In the circumstances, and in the

[2] 1966(1) All SA 448 (C).

[3] At p 449.

> absence of any authority on the point, it seems to me that the fact that the defendant had a counterclaim for damages is not a 'defence' to plaintiff's action on claim (b) [for return of equipment] within the meaning of sub-rule (3)(b) of Rule 32."

(z) It was submitted by counsel for the plaintiff that the learned judge's reasoning in Spilhaus is equally applicable to this matter dealing with eviction, and that absent a legal basis for remaining on what is undisputedly the plaintiffs' property, the eventual success of the defendant's counterclaim would not in any way legitimise the their stay on the plaintiffs' property or extinguish the plaintiffs' claim for their eviction. This counterclaim is therefore not a defence to the plaintiffs' claim for eviction within the meaning of Rule 32(3)(b).

(aa) I am in agreement with the submission made by counsel for the plaintiffs. The claim for summary judgment relates to an eviction of the defendants from property which the defendants admit is lawfully owned by the plaintiffs and was properly transferred to the plaintiffs. There appears to be no *bona fide* defence in terms of which ownership of the property is challenged, nor is any legal basis for their continued residence on the property raised on the papers. The defendants are of course totally within their rights to continue with their counterclaim against the other claims of the plaintiffs or to institute a claim for payment of the monies that they allege is due, owing and payable to them by the plaintiffs.

(bb) The court's attention was also drawn to the consideration that in terms of Rule 32(5), it does not follow automatically that this court must grant summary judgment if the defendants did not satisfy it that they have a *bona fide* defence to the claim or furnish satisfactory security. This court accordingly still has a discretion.

(cc) An instance where the court may consider exercising this discretion, is where there is some factual basis or belief on the papers which will enable the court to say that there is some reasonable possibility that something will emerge

at the trial that will allow the defendants to establish a defence. [4]

(dd) I have considered whether there is any reasonable possibility that something will emerge at the trial that will allow the defendants to establish a defence to the plaintiffs' claim for eviction in terms of Rule 32(1)(d) read with Rule 32(3)(b). There is unfortunately nothing on the papers before Court to support such a belief simply because title to the property is not disputed and because the defendants have not raised any legal contention or basis for remaining on what is undisputedly the plaintiffs' property. In this regard I again find that the court in all the circumstances has not been satisfied that there is a *bona fide* defence to the eviction claim.

(ee) Counsel for the plaintiffs further pointed out further instance where the court could exercise a discretion against the plaintiffs on the papers before it, namely if a reasonable possibility exists that an injustice may be done if summary judgment is granted. [5]

(ff) Counsel for the plaintiffs submitted that this court may have been justified in exercising its discretion on this basis if, for example, on the papers before it the court is satisfied that it was dealing with impecunious litigants who stood to lose their primary residence and were forthright and candid in attempting to disclose their defence. There is nothing in the opposing affidavit in terms of which the defendants alleged that they were impecunious litigants who stood to lose their primary residence and although I cannot say that they were not forthright, they did not disclose a proper defence to the eviction application based on their own averments. In light of the above I again find myself exercising my discretion against the defendants.

(gg) In light of the foregoing the application for summary judgment was granted in accordance with the order dated 19 February 2012.

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[4] Agra Co-op Ltd v Aussenkehr Farms (Pty) Ltd 1996 NR 208 (HC) at 212 D-E.

[5] Breytenbach v Fiat SA (Edms) Bpk 1976(2) SA 226 at 229H.

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EM SCHIMMING-CHASE

Acting Judge

APPEARANCES

PLAINTIFFS	Adv RL Maasdorp Instructed by Du Pisani Legal Practitioners
DEFENDANTS:	No appearance