



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2513/2014

In the matter between

**ACASIA RESORTS (PTY) LTD**

**PLAINTIFF**

And

**ALFRED STEFHANUS DAX**

**DEFENDANT**

*Neutral citation: Acasia Resorts (Pty) Ltd v Dax (I 2513/2014) [2014]  
NAHCMD 248 (22 August 2014)*

**Coram:** Smuts, J

**Heard:** 13 August 2014

**Delivered:** 22 August 2014

**Flynote:** Application for summary judgment for ejectment of the defendant from agricultural land. Several preliminary points and defences raised in the answering affidavit. During argument only one preliminary point was persisted with, namely non-joinder of a party. This was found to be without substance. The two defences on the merits which were argued were also found to be singularly

unconvincing and without merit. Summary judgment granted.

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### ORDER

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1. There will be summary judgment with costs, against the defendant, for his ejectment in respect of the following land:
  - 1.1 The remainder of the farm Sandputz No. 50 situate in Registration Division M measure 2485,974 hectares (Area 1 on 'POC2');
  - 1.2 Certain portion of the farm Sandputz No. 50 situate in Registration Division M measure 374, 026 hectares (Area 2 on 'POC2');
  - 1.3 Certain portion 31 of the farm Rehoboth Dorpsgrond No. 302 situate in Registration Division M measuring 1518, 397 hectares (Area 3 of 'POC2');
  - 1.4 Certain portion of the farm Rehoboth Dorpsgrond NO. 302 situate in Registration Division M measuring 2023,995 hectares (Area 4 on 'POC2').
- 2 The plaintiff's costs in question are to include the costs of one instructing and two instructed counsel.

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### JUDGMENT

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SMUTS, J

- (a) This is an opposed summary judgment application in which the plaintiff seeks the ejectment of the defendant from certain agricultural land.

### Pleadings

(b) The plaintiff's claim, set out in the particulars of claim, is based upon a written lease agreement in terms of which the plaintiff leases certain agricultural land from the Government of Namibia represented in the lease agreement by the Minister of Agriculture, Water and Rural Development. In terms of the lease, four portions of agricultural land are leased to the plaintiff. The portions are described in the lease agreement and are identified on the map attached to the particulars of claim. The plaintiff further alleges that it took possession of the leased land in 1995 and developed it in terms of a master plan also attached to the particulars of claim. That master plan involves the development of the land as a resort with a range of facilities around the Oanab Dam.

(c)

(d) The plaintiff alleges that it is still in occupation of the land and that the defendant occupies a portion of that land, measuring some 4060 hectares known as camp number WK. The plaintiff alleges that the defendant occupies this land in terms of a lease agreement which the defendant entered into with the Rehoboth Town Council in November 2010. The plaintiff alleges that camp number WK is within the leased land and that the defendant, despite demand, refuses to vacate it.

(e) After the defendant entered an appearance to defend, the plaintiff applied for summary judgment. In the defendant's opposing affidavit, a number of defences are set out. These include both preliminary points as well as defences directed at the merits of the plaintiff's claim.

(f) When the matter was argued, Mr Corbett SC, who together with Mr Phatela, appeared for the defendant, jettisoned all but one of the preliminary points and several of the defences raised in the answering affidavit, focusing on three issues. I propose only to deal with those three defences argued by counsel as the other preliminary points and defences raised in the answering affidavit are without substance. The three remaining issues are the status of the plaintiff's lease and in particular the description of the leased land, the non-joinder of the Rehoboth Town Council and thirdly the issue of acquisitive prescription.

(g) **Non-joinder of the Rehoboth Town Council**

(h) The only preliminary point persisted with is one of non-joinder of the Rehoboth Town Council. This point is formulated in the following way:

‘In addition, the applicant is – or must be – fully aware that the respondent concluded a lease agreement with the Rehoboth Town Council pertaining to the land from which the applicant seeks the Honourable Court to eject the respondent. It is, *inter alia*, in terms of that lease agreement that the respondent asserts its right of occupation. The applicant has, despite having the aforesaid knowledge, failed and/or neglected to join the Rehoboth Town Council as a party to this proceedings.’ (sic)

(i) Mr Corbett submitted that any judgment in this matter would have implications for the Rehoboth Town Council and that it should have been joined as a consequence. If the plaintiff’s claim was a good one, it would mean that its rental income would come to an end.

(j) Mr Frank SC, who together with Mr Maasdorp, appeared for the plaintiff, countered that the only interest raised was a financial interest. He further pointed out that the Rehoboth Town Council by virtue of the prior proceedings referred to by the defendant, would know of these proceedings and could have applied to intervene. Mr Frank correctly referred to the test being that the defendant would need to show that the Town Council had a legal interest (and not a mere financial interest) which could be prejudicially affected by the judgment of the court.<sup>1</sup> As has been held, a defendant’s right to object that others should have been joined is very limited, particularly in the context of the ejection of a tenant.<sup>2</sup>

(k) Mr Frank also correctly contended that the Town Council, if joined to vindicate its rights, would not traverse the same subject matter to be considered

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<sup>1</sup>*United Watch and Diamond Co. and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415 followed by the full court in *Kery McNamara Architects Inc. and Others v Minister of Works, Transport and Communication and Another* 2000 NR 1 (HC).

<sup>2</sup>*Sheshe v Vereeniging Municipality* 1951 (3) SA 661 (A) at 666-667.

in this action.<sup>3</sup> He also correctly pointed out that ownership of the land would not of its own give rise to any legal interest in an action brought by a lessee with a real right over leased land where that lessee seeks to enforce that right against an occupier who does so contrary to the lessee's real right under the lease. The Town Council's ownership of the land would be unaffected by the outcome of this action. It thus has no legal interest which could be prejudiced by the outcome of the action. The defence of non-joinder of the Rehoboth Town Council is accordingly without merit.

### **Whether defendant's occupation is within the leased area**

(l) Much of Mr Corbett's argument focused upon the description of the leased premises in the plaintiff's lease agreement. The defendant disputed in the answering affidavit that the area from which the plaintiff seeks to eject the defendant forms part of the leased area under the plaintiff's lease agreement with the Government. The defendant specifically contends that the portion of land from which the applicant is seeking to remove him does not appear in clause 2 of the lease agreement. The point is taken that in clause 2.1.4 of the lease agreement, the farm land described as a portion of the Rehoboth Town Land Number 302 measuring 2023, 995 hectares, is designated as area number 4 on an attached plan. It is clear that the numeral 4 has been changed and inserted by hand in clause 2.1.4 in describing the designated area. It would seem that it replaced the numeral 5. The defendant disputes the validity and authenticity of this change and contends that it was fraudulent and that the plaintiff has not established that he (the defendant) occupies land covered by the lease agreement.

(m)

(n) Mr Corbett developed this point further in argument. He submitted that the plaintiff has an onus to establish that the defendant occupies land which is the subject matter of its lease agreement. He submitted that there was some doubt as to this with reference to the handwritten change to clause 2.1.4 of the lease agreement and the attached diagram and that the plaintiff was not able to establish that the defendant occupied an area of land which was the subject of

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<sup>3</sup>*Wistyn Enterprises v Levi Strauss & Co. and Another* 1986 (4) SA 796 (T) at 801 H-I.

the lease agreement. Mr Corbett emphasised the drastic nature of summary judgment as a remedy and argued that if the court were to have any doubt as far as this aspect was concerned, then the defendant should be permitted the opportunity to defend the action so that it can proceed to trial for the determination of this as well as the other defence on the merits, namely as acquisitive prescription, raised on the papers and which the defendant persisted with.

(o)

(p) Mr Frank referred to the obligation upon the defendant in proceedings of this nature to fully set out his defence and to do so in a manner which is not inherently and seriously unconvincing, needlessly bald, vague or sketchy.<sup>4</sup>

(q)

(r) Mr Frank correctly points out that the dispute raised by the defendant concerning the issue of the occupation of land within the leased area is premised upon the handwritten change to clause 2.1.4 from the typed 5 to 4 which was changed by hand. Mr Frank referred to other passages of defendant's answering affidavit which contradict the dispute sought to be raised in this regard. In another segment of the defendant's opposing affidavit, the defendant refers to the lease which he has with the Rehoboth Town Council, attached to the particulars of claim. In that context he states (as quoted above):

' . . . the applicant is – or must be – fully aware that the respondent concluded a lease agreement pertaining to the land from which the applicant seeks to . . . eject the respondent.'

(s) He further states 'it is important to also state that the plaintiff is fully aware that the lease agreement which I also rely on for my occupation of the land which forms the subject matter of this dispute, was granted to me by the Rehoboth Town Council. . . '

(t) It thus becomes clear that the defendant does not in essence dispute his occupation of land which forms part of the leased premises to the plaintiff but rather seeks to dispute the authenticity of the handwritten change to the contract.

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<sup>4</sup>*Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228 B-E.*

(u) As Mr Frank pointed out with reference to the map attached to the particulars of claim, it becomes evident that the typed 5 was changed by hand to 4 as there is not an area 5 on the map which would appear to form part of the leased area. There is a small shaded area designated as number 5 and it is indicated to measure 52,8 hectares in extent. There is in the top right hand corner a reference to area 5 being 52.8 hectares. But this would not appear to form part of the lease agreement. On the other hand, the portion designated as area 4, forms part of the Rehoboth Town No. 302, which is consistent with clause 2.1.4. Area 4 is also a large portion which would be consistent with the area of measurement referred to in clause 2.1.4 of over 2000 ha. It would thus seem to be a typographical error which was corrected by hand on the lease agreement. The defendant on the other hand however contends, without raising any facts to support this contention, that the handwritten change amounts to a fraudulent change to the agreement.

(v)

(w) In order to meet the requirement of raising a *bona fide* defence to the action, the defendant would be required in his affidavit to fully disclose the nature and grounds of his defence and the material facts relied upon for his defence. No facts – material or otherwise – are raised in support of the claim that the lease had been fraudulently changed. It is incumbent upon the defendant to raise facts in support of the defence he raises, namely in disputing that the area he leased falls within the lease area.<sup>5</sup> On the contrary, no hard facts are raised to support this claim of fraud. On the contrary, it would appear to be a rectification of typographical error.

(x) Not only does the defendant not raise material facts to support his claim of fraud, but his contestation of the land which he occupies as being within the leased area is contradicted and is internally inconsistent with the one of his other defences, namely that he occupied the area pursuant to the lease agreement with the Rehoboth Town Council. These internal inconsistencies, when viewed with the failure to set out any material facts for the claim of a fraudulent change to the agreement adversely reflect upon the *bona fide* nature of the defence

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<sup>5</sup>*Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 (W) at 220C – 221G.

raised by the defendant. This defence is inherently and seriously unconvincing and thus does not meet the requisite of Rule 60 to defeat a claim for summary judgment.

### **Acquisitive prescription**

(y)

(z) Another defence raised by Mr Corbett in argument was that of acquisitive prescription. The defendant had in his opposing affidavit referred to this defence and had stated that he had lived on the land for a period exceeding 30 years. He further contended that he enjoyed quiet and undisturbed possession of the land 'flowing from various agreements that I had with the appropriate authorities, some of which predate Namibia's independence.'

(aa)

(bb) Despite Mr Corbett's valiant efforts, this defence does not get out of the starting blocks on the defendant's own version. A requisite for acquisitive prescription is that there must be possession *nec vi, nec clam, nec precario* for a period of 30 years. That possession must be adverse to the true owner and not be by virtue of some contract or legal relationship such as lease or *precarium* because that would recognise the ownership of another party. The defendant's own statement that he possessed the land pursuant to agreements he had 'with the appropriate authorities' entirely belies any claim to acquisitive prescription and certainly within the context of fully setting out defence and the material facts to support it. This defence is likewise singularly and fatally unconvincing.

(cc) It follows that the defences raised by the defendant in his opposition to summary judgment are without merit and are not sufficient to stave off the plaintiff's application to summary judgment.

### **Discretion**

(dd) Mr Corbett urged the court to exercise its discretion against the granting of summary judgment, given the drastic consequences of that remedy. Mr Frank referred me to *First National Bank of SWA v Graap*<sup>6</sup> where Strydom, J (as he

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<sup>6</sup>1990 NR 9 (HC) at 13-14.



then was) followed earlier authority<sup>7</sup> to the effect that it would be inappropriate to permit 'speculation and conjecture as to the nature and grounds of a defence to constitute a substitute for real information as to these matters.' Like the defendant in *Graap*, the defendant in this matter has not in his opposition raised facts upon which the court can exercise a discretion in his favour.

### **Costs**

(ee) As to costs, both parties were represented in these proceedings by two instructed counsel. A costs order should reflect that.

### **Conclusion**

(ff) In the result, I make the following order:

1. There will be summary judgment, with costs, against the defendant, for his ejectment in respect of the following land:
  - 1.1 The remainder of the farm Sandputz No. 50 situate in Registration Division M measure 2485,974 hectares (Area 1 on 'POC2');
  - 1.2 Certain portion of the farm Sandputz No. 50 situate in Registration Division M measure 374, 026 hectares (Area 2 on 'POC2');
  - 1.3 Certain portion 31 of the farm Rehoboth Dorpsgrond No. 302 situate in Registration Division M measuring 1518, 397 hectares (Area 3 of 'POC2');
  - 1.4 Certain portion of the farm Rehoboth Dorpsgrond NO. 302 situate in Registration Division M measuring 2023,995 hectares (Area 4 on 'POC2').
2. The plaintiff's costs in question are to include the costs of one instructing and two instructed counsel.

(gg)

(hh)

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<sup>7</sup>*Gilinsky v Superb Launderes Dry Cleaners* 1978 (3) SA 807 (C) at 811.

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DF Smuts

Judge

APPEARANCE

PLAINTIFF: T. Frank SC (with him R. L. Maasdorp)  
Instructed by LorentzAngula Inc.

DEFENDANT: A. W. Corbett SC (with him T. C. Phatela)  
Instructed by Shikongo Law Chambers