REPUBLIC OF NAMIBIA UNREPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 06/2014

In the matter between:

CALISTA ANNA BALZER **APPLICANT**

and

JACOMINA VRIES **FIRST RESPONDENT**
THE REGISTRAR **SECOND RESPONDENT**
THE DEPUTY-SHERIFF WINDHOEK **THIRD RESPONDENT**

Neutral citation: *Balzer v Vries* (A 06/2014) [2014] NAHCMD 32 (4 February 2014)

Coram: PARKER AJ
Heard: **24 January 2014**
Delivered: **24 January 2014**
Reasons: **4 February 2014**

Flynote: Practice – Applications and motions – Application to order second and third respondents not carry out ejectment of applicant from property – Ejectment ordered by the court – Court held that barring well-known exceptions to the rule (respecting rescission application) the court cannot correct, alter or supplement its judgment or order – Court held further that the court has no power to set aside its own judgments or orders, barring a case of a rescission of judgment or order of the court.

Summary: Practice – Applications and motions – Applicant sought an order to stop ejectment of applicant from property she occupied unlawfully – Court found that the court had ordered, among other things, ejectment of the applicant from that property – In that behalf, court concluded that the order is cogent proof that the applicant is not in 'undisturbed' possession and occupation of the property – Court concluded that any ejectment of the applicant from the property in implementation of a Writ of Execution issued to enforce the order was not an 'unlawful' or 'criminal' abuse of power of the sheriff or deputy sheriff – Court refused to grant the relief sought on the basis that to grant the relief would amount to the court setting its own orders at naught which would be derogation of the administration of justice – Consequently, the court dismissed the application with costs.

JUDGMENT

PARKER AJ:

[1] The applicant, who represents herself, has brought an urgent application on notice of motion and has prayed for the relief in terms of the notice of motion. The first respondent, represented by Mr Grobler, has moved to reject the application; so has the second respondent, represented by Mr Bonzaaier. The third respondent has not taken any step in the matter, and so, I take it that he agrees to abide by the decision.

[2] In her founding affidavit the applicant sets out what she considers to be 'legal grounds on which I bring this application'. It is important to note that in a Notice of Abandonment filed by counsel of the first respondent (plaintiff in the action under case No. I 1239/2011) abandoned the default judgment granted in the first respondent's favour against the applicant (defendant in that action) and offered to pay wasted costs in respect of the applicant applying for rescission of judgment.

[3] I have considered these legal points against the evidence contained in the affidavits. Mr Grobler argued that the matter was not urgent and the urgency was self-created. Upon the authority of *Salt and Another v Smith* 1990 NR 87 I would

accept Mr Grobler's argument, but I decided to hear the matter in order to get it out of way seeing that – as will become apparent in due course – the matter has become long drawn out, much to the grave prejudice to the first respondent.

[4] After hearing the application I made the following order:

> '1. The application is dismissed with costs, on the scale as between party and party. The order granted by the court on 26 April 2013 must be implemented.
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> 2. Reasons shall be given on or before 4 February 2014.'

These are the reasons:

[5] The basis of the present urgent application is that the applicant seeks to evade execution of an order granted by the court on 26 April 2013, per Unengu AJ, read with the order of the court granted on 27 September 2013, per Cheda J ('the Unengu AJ order and Cheda J order'), wherefore a Writ of Execution was issued on 2 May 2013. The applicant has continued to occupy the property in question, ie Erf 2977 Papawer Street, Khomasdal (see the Unengu AJ order and Cheda J order) unlawfully since 16 February 2010 and refuses to vacate the property, much to the grave prejudice to the first respondent, as aforesaid.

[6] It is, therefore, as clear as day that the first respondent is, in opposing the present application, not seeking to enforce the order granted by the registrar: she is seeking to enforce the Unengu AJ order (read with the Cheda J order). It must be remembered that the Unengu AJ order was granted when the applicant was represented by counsel.

[7] It goes without saying that the present urgent applicant turns on an extremely short and narrow compass, and it is this: Has the court got the power to set aside its own judgments or orders outside the narrow and exceptional circumstances of a rescission application? In this regard, I should emphasize the point that in the present proceedings, this court is not concerned with any other applications or appeals. Furthermore, the exceptional circumstances are not present in the instant urgent application.

[8] It is trite that only a court of competent jurisdiction can set aside a judgment or order of the court. (See *Hendrik Christian t/a Hope Financial Services and Others v LorentzAngula Inc and Others* Case No. A 244/2007 (Unreported).) As to this rule of law I had the following to say in *Hamutenya v Shipanga* (A 204/2012) [2013] NAHCMD 164 (13 June 2013) (Unreported), para 7:

> '[7] In this regard, it has been said that –
>
> > "a judge of the High Court may not sit in judgment over a decision of another High Court judge on essentially the same facts and issues between the same litigants. Nor can the High Court review its own decision under those circumstances. Subject to a few well-known exceptions to the rule, the court is functus officio once it has pronounced its order in the matter and cannot correct, alter or supplement it. One of the recognized exceptions to this principle is in the case of a rescission of a judgment. The power to rescind one's own judgment is an exception to this rule. And the grounds of rescission are very narrowly specified. Outside of these grounds, an aggrieved litigant must challenge any irregularity in the proceedings which gave rise to the order by way of appeal or, if this court has assumed review jurisdiction in the matter, by way of review to the Supreme Court under s 16 of the Supreme Court Act 15 of 1990."
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> (See *Mukapuli v SWABOU Investment* 2013 (1) NR 238 (SC) at 241A-D, per Ngcobo AJA who wrote the unanimous judgment of the court.)"

[9] The 'well-known exceptions' are not present in the present urgent application, as aforesaid. Thus, on the authorities, this court has not one jot or title of authority to grant any order that has the effect of disturbing the aforementioned orders of the court. If it granted the relief sought by the applicant, the court would be setting its own orders at naught, and that would be derogation of due administration of justice. (See *Ben Aluendo Enghali and Another v Erastus Lineekela Nghishoono* Case No. A 195/2007 (Unreported).) The Unengu AJ order is cogent proof that the applicant is not in 'undisturbed' possession and occupation of the property in question. Furthermore, any ejectment of the applicant from the property in question in implementation of a Writ of Execution issued to enforce the Unengu AJ order, read with the Cheda J order, is not unlawful; neither is it 'unlawful and criminal abuse of

her position' for the registrar (the sheriff of Namibia) to instruct a deputy sheriff to carry out his or her statutory duty to enforce an order of the court.

[10] For all these reasons, I made the order set out previously in para 4.

C Parker

Acting Judge

APPEARANCES

APPLICANT	:	In Person
FIRST AND THIRD RESPONDENT	:	Z J Grobler Of Grobler & Co., Windhoek
SECOND RESPONDENT	:	M G Bonzaaier Of Government Attorney, Windhoek