



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1912/2013

In the matter between:

STANDARD BANK NAMIBIA LIMITED**APPLICANT/PLAINTIFF**

and

RONALD MOSEMENTLA SOMAEB**RESPONDENT/DEFENDENT**

Neutral citation: *Standard Bank Namibia Limited v Somaeb* (I 1912/2013) [2014] NAHCMD 98 (26 March 2014)

Coram: CHEDA J

Heard: 12 March 2014

Delivered: 26 March 2014

Flynote: The owner of the immovable property is entitled to proceed against a possessor of his/her property. - A party who elects to proceed under the common law principle of *rei vindicatio* is entitled to repossess its property provided that it proves that, it is the owner and that defendant is in possession of it. – In rare circumstances the court will bend backwards to allow a lay person to file his/her papers out of time as long as there is no prejudice to the other party – Defendant in a summary judgment is not allowed to introduce new matters other than through a proper application - An order of court should be obeyed even if the affected party is not happy with it.

The Deputy Sherriff in executing an order of the court does so as an officer of the court and is accordingly not carrying out an administrative function as he does so as an officer of the court – Defendant failed to prove a *bona fide* defence – Application for summary judgment is granted with costs.

Summary: Applicant sued respondent who defended the matter. Applicant had the immovable property already transferred to itself. Application for a *rei vindication* was made. Applicant proved that the property was registered under its name and respondent was refusing to give vacant possession. Respondent sought to introduce a new matter in an unprocedural manner. Respondent argued that the Deputy Sheriff acted unlawfully as he was acting in an administrative capacity.

ORDER

- 1) The application for summary judgment succeeds;
 - 2) Respondent be and is hereby ordered to pay costs of this application and such costs shall be for one instructing and one instructed counsel.
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JUDGMENT

CHEDA J [1] This is an application for summary judgment..

[2] The background of this application is that plaintiff is a registered financial institution and operating as such under the Banking Laws of Namibia[hereinafter referred to as “the bank”]. Respondent/defendant was a borrower from the said bank. Applicant issued out summons out of this court for defendant’s eviction and the said summons was duly served.

[3] Respondent/defendant entered an appearance to defend on the 12th of August 2013 and served it on applicant on the same day.

[4] Applicant applied for summary judgment which is opposed. The opposition for the said summary judgment was initially set down for the 13 September 2013. On that day respondent served applicant with a notice of opposition and the matter was then set down for hearing on the 4th of March 2014.

[5] On the date of the hearing, respondent applied for a postponement in order to prepare his documents as he alleged that he wanted more time to prepare his heads of argument in light of the fact that he had only been served with applicant's heads of argument on the 28th of February 2014.

[6] There is no requirement that respondent should file heads of argument in this type of application. However, bearing in mind that applicant is a lay-person and a self-actor, I exercised my judicial discretion and postponed the matter to 12 March 2014, despite applicant's vigorous opposition to such a postponement.

[7] Applicant seeks the return of possession and ejection of the respondent from Erf 4785 (a portion of Erf 8446, Katutura, Ext 15, Windhoek, Republic of Namibia) [hereinafter referred to as "the property"]. Applicant seeks to regain possession of its immovable property on the basis of the principle of *rei vindicatio*. A litigant relying on this common law principle is entitled to repossess its property provided that it fulfills certain requirements, namely that:

- 1) he is the owner and;
- 2) that defendant is in possession of it;

[8] In that instance applicant/plaintiff will be entitled to an order for ejection unless respondent/defendant is able to prove that he is entitled to a continued possession/occupation of the said property, see *Chetty v Naidoo*¹. It was also stated in Chetty's case that the owner may claim his property, wherever found and from whomsoever is holding it. It therefore, stands to reason that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner, eg. a right of retention or a contractual right.

¹ Chetty v Naidoo 1974/4 SA 13 (A).

[9] In instituting a *rei vindicatio*, applicant only needs to allege and prove that he is the owner and that the defendant is holding the property. The onus then shifts to the defendant/respondent to allege and prove any right to continue to hold the property against the owner, see *Jeena v Minister of Lands*² and *Dreyer and another v AXZS industries (Pty) Ltd*³.

[10] Applicant has proved that it is the owner of the property as evidenced by the Title Deed, copy of which is filed of record. It is common cause that respondent is in possession of the property and despite demand is refusing to vacate it.

[11] One of the rights that arise out of ownership is the right to possession. Ownership consists in the right to recover lost possession. It logically follows that *prima facie* proof that applicant is the owner and that respondent is in possession of the property entitles applicant to an order for ejectment. The vindication by the owner is against the possessor and is so harsh that it does not matter whether the possessor is a *bona fide* or *mala fide* possessor or occupier and the owner need not compensate the possessor for its value, even where the latter has acquired it for consideration (*ex cause onerosa*), see Silberberg and Schoemans's Law of Property 5th ed. - Badenhorst.

Respondent opposes this application on the grounds that:

- a) the judgment obtained by applicant is a nullity;
- b) applicant enriched itself without justification; and
- c) that the Deputy Sherriff disregarded the provision of the delegated legislation more specifically rule 46 of the Rules of the High Court.

[12] In essence respondent has now sought to challenge the sale and the functions of the Deputy Sheriff of the High Court in executing the order emanating from the summary judgment. The Deputy Sheriff is not an administrative official, but, a court official who executes a court order.

² *Jeena v Minister of Lands* 1952 (2) SA 380

³ *Dreyer and another v Axzs industries (Pty) Ltd* 2006 (5) SA 548

[13] Therefore, if he does not execute the order he is held to be in contempt of that order. Respondent is unrepresented and appears to be a lay person, it is for that reason that I allowed the postponement of this application from the 4th of March 2014 to the 12th of March 2014 in order to allow him to present his case according to his best ability. The sale of this property took place in November 2012 and transfer took place in April 2013, but, to date, respondent has not taken steps to set the sale aside, as is expected of a disgruntled litigant. It has been the practice of this court to bend a little bit backwards in order to accommodate genuine lay persons as justice is for all citizens of this country.

These points were raised *in limine* by respondent. In fact they actually turned out to be his arguments on the merits.

[14] Advocate Van Vuuren in response argued that applicant should not be allowed to introduce new matters at this juncture through an affidavit, I agree with his submissions. He further argued that the Deputy Sherriff's function is not an administrative function, but, a judicial one. I also agree with this submission.

[15] Respondent is not permitted by law to introduce a new matter at this juncture. If he is not happy with the sale of the property for whatever, reason, his best cause of action is an application to set the sale aside, see *Todd v First Rand Bank Ltd and others*⁴ and *Mbanderu Traditional Authority and another v Kahuure and others*⁵. As it is, there is an order of the court. It is trite that an order of the court remains in force until it is set aside by a competent court. Whoever, is offended by that order is bound by it.

The judgment remains in force until it is set aside, see *Hamutenya v Hamutenya*⁶ and *Bezuidenhout v Patensie Sitrus Beherend BPK*⁷ where Froneman, J. stated:

"An order of a court of law stands until set aside by court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) (SA 490 (W) at 494 A-C. A person may even be banned from approaching the court until he or she has obeyed an order of court

⁴ *Todd v First Rand Bank Ltd and others* (2013) (3) ALL SA 500 (SCA)

⁵ *Mbanderu Traditional Authority and another v Kahuure and others* 2008 (1) NR 55 (SC)

⁶ *Hamutenya v Hamutenya* 2005 NR 76 at 78

⁷ *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 E at 229 B-D

that has not been properly set aside (Hudkinson v Hudkinson (1952) 2 ALL ER 567 (CA); Byliefeldt v Redparth 1982 (1) SA 702 (A) at 714.”

[16] It was, therefore, wrong in law for respondent to seek to attack the sale in the manner he did as there is no legal basis for this procedure. This goes against these courts' well established procedure for such relief. Respondent should have mounted a separate application for that kind of relief.

[17] Summary Judgment is a drastic method of debt collection as once it is granted it entitles plaintiff final relief without a trial, thereby closing the doors of the court against the defendant, see *Erasmus Superior Court Practice B1-206*. It is for that reason that these courts require strict compliance with the rules pertaining to that procedure. On that score these courts will not grant Summary Judgment where plaintiff has not made a clear case against defendant and has not complied with the rules of court.

[18] In order for defendant/respondent to succeed in resisting summary judgment, he/she should show that he/she has a *bona fide* defence. In establishing a *bona fide* defence, he must at least disclose sufficient particularity to enable the court to judge that the opposing affidavit discloses a *bona fide* defence, see *Maharaj v Baclays National Bank Ltd*⁸ and *District Bank Ltd v Hoosain*⁹.

[19] Respondent does not have to prove his defence to the same extent as that of applicant on opposed application. He must depose to facts which, if accepted as the truth or which can be proved at the trial with admissible evidence, discloses a defence, see *Estate Potgieter v Elliot*¹⁰ and *Sheptone v Sheptone*¹¹.

⁸ *Maharaj v Baclays National Bank Ltd* 1976 (1) SA 418 at 426 C-D

⁹ *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 547 G

¹⁰ *Estate Potgieter v Elliot* 1948 (1) SA 1084 (C) 1087

¹¹ *Sheptone v Sheptone* 1974 (2) SA 462 (N) 466

[20] Respondent has failed to prove a *bona fide* defence in this matter. All he did was to introduce new matters without leave of the court. On the basis of this, respondent has not raised any defence in order to successfully resist this application for summary judgment. In other words, he has not raised a *bona fide* defence. Respondent is required to set out his opposing papers on material facts upon which the defence is based. The court cannot rely on speculation.

[21] I agree with Advocate Van Vuuren that applicant has made out a case for itself in the circumstances.

In the result the following order is made:

- 1) The application for summary judgment succeeds;
- 2) Respondent be and is hereby ordered to pay costs of this application and such costs shall be for one instructing and one instructed counsel.

M Cheda
Judge

APPEARANCES

APPLICANT: Advocate Van Vuuren
Instructed by Behrens & Pfeiffer
Windhoek

DEFENDANT: In Person