

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: I 1772/2013

In the matter between:

MASILO JOSHUA HOCHOBEB

PLAINTIFF

and

MAUREEN DUNN

DEFENDANT

Neutral citation: *Hochobeb v Dunn* (I 1772/2013) [2017] NAHCMD 150 (7 June 2018)

Coram: Unengu, AJ

Heard: 16 May 2018

Delivered: 7 June 2018

Flynote: Civil Practice – Eviction order – Plaintiff suing defendant to be evicted from his house – Defendant claiming conflict of interest by plaintiff as defence.

Summary: The plaintiff has sued the defendant and asked the court to evict her from his house he bought in a sale of execution. Court held that the plaintiff persuaded it on a balance of probabilities that he was entitled to the relief sought and granted judgment in his favour with costs.

ORDER

The defendant and all her dependants are evicted from the property: Erf 117, Ichaboe Street, Rocky Crest, Windhoek, Republic of Namibia, with costs.

JUDGMENT

UNENGU, AJ:

[1] On 21 July 2017, the plaintiff, Mr Masilo Joshua Silvan Hochobeb of number 21 Kastrell Street, Hochland Park, Windhoek issued combined summons against the defendant Maureen Dunn residing at Erf 117 Rocky Crest, Ichaboe Street, Windhoek and prayed for judgment against the defendant in the terms:

- '(a) Evicting the defendant from his premises;
- (b) Costs of suit; and
- (c) Further or alternative relief.'

[2] In the amended particulars of claim, the plaintiff claimed that he was the lawful owner of Erf 117, Rocky Crest, Windhoek, comprising of 510 (five hundred and ten) square metres of which the defendant was the previous owner but was subsequently sold on auction to him on 3 October 2012 which premises defendant was in unlawful occupation and that despite demands from him, the defendant has failed to vacate the premises.

[3] On her part, the defendant pleaded to the particulars of claim, amongst others, that the plaintiff as the credit manager of the Agricultural Bank of Namibia, bought the premises on auction *mala fide*, that the plaintiff did not acquire ownership of the erf by lawful means but because of his position of credit manager of the bank, that the plaintiff had an added advantage prejudicing her.

[4] The defendant further pleaded that after default judgment against her was obtained, the plaintiff misrepresented to her that she could continue to service her account with the bank which she did. According to her, the plaintiff as the credit manager of the bank who was dealing with her loan account, knew that she was servicing the loan account but still proceeded to facilitate the sale of the property in execution and acquired ownership thereof.

[5] The case was thereafter docket allocated to different judges for purpose of case management. In the meantime, the legal practitioner for the defendant withdrew forcing her to act in person.

[6] The background facts of the matter are not complex in nature but straight forward, in my view, and can be summarised as follows:

6.1 The defendant and her ex-husband took out a loan in the amount of N\$50,000-00 with the Agricultural Bank of Namibia to buy livestock. Meanwhile, the bank registered a mortgage bond over the house of the defendant and ex-husband as security for the loan.

6.2 The bank subsequently sued the defendant for the loan amount as the defendant defaulted with payments of the loan money owing to it. A default judgment was granted against the defendant for her failure to service the loan.

6.3 Eventually, the bank claimed the security, which is the house in question and was sold on auction to the highest bidder. The plaintiff was the highest bidder and bought the house situated on Erf number 117, Rocky Crest, Windhoek on auction which took place on 3 October 2012 for the sum of N\$530 000-00 and then a transfer into his name was registered on 15 April 2013.

6.4 As the defendant is refusing and resisting to vacate the property, the plaintiff in these proceedings has approached the court with a claim to evict the defendant from his premises with costs of suit.

[7] On her part, the defendant has defended the action and pleaded that the plaintiff as the credit manager of the Agricultural Bank, did not obtain ownership of the property lawfully, that the plaintiff made certain misrepresentations to her and as such came to court with dirty hands. As a consequence, therefore, and in view of other irregularities and the fraudulent conduct of the plaintiff, the defendant prayed for an order to stay the action pending the outcome of an application for rescission of the default judgment which she intends to institute or to dismiss the action with costs.

[8] Ms Nambinga of AngulaCo Incorporated represented the plaintiff during the trial, while the defendant acted in person. It is apposite to note at this stage that it is a pity that the defendant lost all her legal representatives who assisted her in the matter due to own remiss. This situation haunts her because she struggled in cross examination by Ms Nambinga, counsel for the plaintiff and in her own cross examination of the plaintiff.

[9] Both the plaintiff and the defendant read their pre-prepared witness statements into the record as their evidence-in-chief. In essence their testimony is a rehearse of the pleadings. As pointed out above, the defendant failed to cross-examine the plaintiff on issues of importance to put across her defense. The only questions, repeatedly asked by her, were that the plaintiff obtained ownership of the property through unlawful means because he was an employee of the Agricultural Bank and that he knew the state of her (defendant) account. According to her, plaintiff being an employee of the Agricultural Bank at the time, should not have participated in the sale of execution of the property.

[10] Meanwhile, Ms Nambinga on behalf of the plaintiff, destroyed her evidence in cross-examination so much so that at some stage, the court had to wait longer periods for an answer from her. It was apparent from her answers in cross-examination by counsel for the plaintiff that the defendant was determined in her

quest to frustrate the plaintiff by refusing to vacate from the house he had bought in the sale of execution.

[11] On her part though, Ms Nambinga did not despair but vigorously cross-examined the defendant further and lectured her on what she was supposed to do if she were not happy with the summary judgment obtained against her by the Agricultural Bank of Namibia which she failed to do.

[12] Ms Nambinga also filed a well-researched written heads of argument supported by legal principles and case law. In paragraph 8 of her written heads counsel referred to various cases from different jurisdictions which are of persuasive value to the resolution of the dispute in the matter.

[13] Ms Nambinga during oral submissions referred the court to a judgment of the Supreme Court of Namibia, the matter of *Balzer v Vries*¹. The facts in the *Balzer vs Vries* matter *supra* are almost similar to the facts in the present matter, except that in this matter before me, a summary judgment was granted in favour of the Agricultural Bank which caused the property then belonged to the defendant and her ex-husband to be sold in execution to the plaintiff, whereas in the *Balzer v Vries* matter, a default judgment was obtained against the appellant, as well as an eviction order which the appellant failed to obey.

[14] After discussing the background facts of the matter, Smuts, JA with Mainga, AJ and O'Regan, AJA concurring, in conclusion said the following:

'(33) A default judgment was granted against the appellant as long ago as 2009. The property was sold in execution pursuant to that judgment in early 2010. Despite the sale and transfer to the first respondent (and the subsequent purchasers), the appellant has remained in occupation of the property without any lawful basis to do so and in the face of a court order evicting her from the property. Conduct of this nature cannot be condoned by this court. Effect must be given to orders of court until or unless they are set aside. The appellant has acted with defiance with regard to an order of the High Court and has

¹ (SA 2-2014) [2015] NASC (17 March 2015).

frustrated the due process of the law and thus undermined the rule of law upon which the Constitution is premised.'

[15] I cannot agree more with the sentiments expressed in the judgment above. Even though the defendant in the present matter did not defy an eviction court order, but has remained in occupation of the property of the plaintiff without any lawful basis after she was requested to move out by the plaintiff, similarly, her conduct cannot be condoned by this court.

[16] The defendant did not file written heads of argument although she told the court that she did so. I did not receive anything in writing from the defendant to be considered as written heads of argument. However, despite that she did not file heads, the court allowed her to submit orally, which she did. In her oral submission the defendant simply accused the plaintiff of being dishonest in his dealings with her as a client of the bank, stressed that plaintiff was conflicted, therefore, must not have participated in the purchasing of the house.

[17] Therefore, and for reasons stated above in the judgment, I conclude that the plaintiff has managed to persuade the court on a balance of probabilities to grant him the relief sought in the claim.

[18] Accordingly the following order is made:

The defendant and all her dependants are evicted from the property, Erf 117, Ichaboe Street, Rocky Crest, Windhoek, Republic of Namibia, with costs.

E P UNENGU
Acting Judge

APPEARANCES

APPLICANT: S Nambinga
of AngulaCo., Windhoek

RESPONDANT: In person