



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00435

In the matter between:

RENALDO COETZEE

APPLICANT

and

JAYANTA MOODLEY

1st RESPONDENT

THE DEPUTY SHERIFF

2nd RESPONDENT

Neutral citation: *Coetzee v Moodley* (HC-MD-CIV-MOT-GEN-2020/00435)
[2020] NAHCMD 596 (17 November 2020)

Coram: Schimming-Chase AJ

Heard: 12 November 2020

Delivered: 17 November 2020

Reasons: 18 November 2020

Flynote: Practice – Applications and motions – Urgent application –
Urgency self-created through inaction– Application struck from the roll with costs

Summary: Applicant brought an urgent application for interim interdictory relief, pending finalisation of an action to be instituted by the applicant against the first respondent – Prior to the application, summary judgment was obtained by the first respondent against the applicant. The applicant noted an appeal but the appeal lapsed. The relief sought to be instituted against the first respondent in this application based on the same issues (raised by the applicant in his affidavit resisting summary judgment) determined against the applicant in the summary judgment application. On the date of initial eviction, applicant concluded an agreement with the first respondent's husband, alleging that the judgment to evict the applicant had been novated and extinguished by agreement. Inaction until date of eviction was taken into consideration. The effect was self- created urgency. Apparent from the agreement that the first respondent did not abandon her rights in the judgment against the applicant. Furthermore, applicant had not fully complied with his obligations in terms of the agreement.

ORDER

The application is struck from the roll with costs for lack of urgency.

REASONS

SCHIMMING-CHASE AJ

[1] Below are the reasons for the order made in this matter on 17 November 2020.

[2] This application was launched on an urgent basis for interim interdictory relief, pending finalisation of an action to be instituted by the applicant against

the first respondent.

[3] The applicant seeks an order interdicting and restraining the first respondent from transferring, hypothecating, encumbering or otherwise dealing with certain immovable property known as Erf 1599 (a Portion of Erf No 119) Klein Windhoek (“the property”), pending finalisation of an action to be instituted (within 30 days) against *inter alia* the first respondent for cancellation of the transfer of the property to the first respondent, which transfer took place on or before 10 July 2019.

[4] The applicant also sought an order interdicting and restraining the respondents from executing a warrant of ejectment issued under case number HC-MD-CIV-ACT-OTH-2019/03901.

[5] Mr Ravenscroft-Jones appeared for the applicant, and Mr Narib for the respondent.

[6] Mr Narib raised *in limine* that the application was not urgent, and that the urgency in this application was self-created, not warranting a jump in the queue. Additionally, and in any event, he submitted that the applicant had not shown on his own papers, compliance with the agreement he sought to enforce as part of this urgent application, to resist eviction. Mr Jones submitted that the matter was indeed urgent, such urgency having arisen only on 30 October 2020, after the first respondent breached an agreement not to eject him from the property, should he fulfil certain conditions, which conditions he submitted, were substantially fulfilled.

[7] At all material times and since July 2014, the applicant resided on the property with members of his family.

[8] As mentioned above, the first respondent is the owner of the immovable property, which property was duly transferred to her on 10 July 2019.

[9] The applicant’s case and basis for relief is based on the allegation that

he is the true owner of this property, and that the property was effectively fraudulently transferred by his erstwhile business partner, Bernardus Theodorus Pretorius, to the first respondent. The final relief sought in this matter is an action by the applicant against the first respondent for cancellation of the transfer of the property to the first respondent. It is common cause that this relief would ultimately include registration of the property into the applicant's name.

[10] The founding papers in this application set out the facts giving rise to the urgent application. For purposes of determining urgency, it is well established that this court assumes that the case as pleaded by the applicant is a good one.¹

[11] The applicant's case against the first respondent is in essence that he was at all material times the true owner of the property. The property was initially part of a settlement agreement between the applicant and his ex-wife dated June 2014, and the property was later registered in the name of his ex-wife as his nominee. This is confirmed by the applicant's ex-wife.

[12] During this time, the applicant conducted business with Mr Pretorius as partners, and he and Mr Pretorius orally agreed during early 2016 to transfer the property into the name of Mr Pretorius for a nominal sale value. The agreement was that Mr Pretorius would not actually pay for the property, and that it would *inter partes* remain the applicant's property. Mr Pretorius would raise funds, which would in turn be the financial contribution of the applicant to the partnership between him and Mr Pretorius.

[13] This partnership agreement would be undertaken by way of Mr Pretorius applying for and securing a mortgage bond over the property with Bank Windhoek. Furthermore, an additional N\$500,000 would be used to renovate and improve the property. The agreement was that the property would be

¹ Nakanyala v Inspector-General Namibia and Others 2012 (1) NR 200 (HC) at par [25] and the authorities collected at footnote 2; Usakos Town Council v Jantze and Others 2016 (1) NR 240 (HC) at par [23]

transferred into the name of the applicant when the opportunity presented itself and when the mortgage bond was settled.

[14] Mr Pretorius purchased the property through the bank. Subsequently an amount of N\$2 million was transferred to the account of the Renaldo Coetzee Family Trust after registration of the property in the name of Mr Pretorius. In turn, the applicant transferred N\$1,38 million back to Mr Pretorius, this amount being the applicant's contribution to the partnership. To assist Mr Pretorius in acquiring a loan for the property, a lease agreement was concluded between the applicant and Mr Pretorius, in terms of which the applicant would pay N\$22 000 per month rental.

[15] Contrary to the agreement, Mr Pretorius did not utilise the money for the partnership, and used it personally instead.

[16] It is alleged that Mr Pretorius later fell in arrears with the mortgage payments, and concluded a settlement agreement with the bank, in terms of which he undertook to sell the property. The property was eventually sold to the first respondent. Transfer was registered in the first respondent's name in July 2019. The applicant alleges that there was collusion between Mr Pretorius and the first respondent, because at the time that the settlement agreement was signed, the first respondent as well as Mr Pretorius were aware of the applicant's claim to ownership of the property.

[17] On 30 August 2019, the first respondent instituted action against the applicant for an order of ejectment, on the basis that he was not the lawful owner of, and therefore without lawful title to be on the property.²

[18] An application for summary judgment was launched and vehemently resisted by the applicant. The factual basis of the applicant's resistance to the summary judgment application and the facts averred in support of the relief sought in this application are essentially the same, but for the allegations giving rise to urgency, which are dealt with below.

² As alleged in the particulars of claim.

[19] This court granted summary judgment in favour of the first respondent on 21 April 2020, and the first respondent obtained an order ejecting the applicant on this date.

[20] The applicant avers that his legal practitioner noted an appeal against the order granting summary judgment. What he then says is that:

'Unfortunately due to my failure to file the appeal record and unforeseen circumstances, the appeal process has lapsed. I submit that it is not necessary to deal with this aspect in more detail, as will appear more fully hereafter.'

[21] On 21 May 2020, a warrant of ejectment was issued against the applicant, but according to the applicant, the first respondent only instructed the second respondent to execute the warrant on 15 September 2020, and also in the first week of October 2020. This is when the second respondent advised the applicant that he was in possession of a warrant of ejectment, and had been instructed to evict the applicant and his family from the property.

[22] On 8 October 2020, the second respondent proceeded to evict the applicant from the property. As his legal practitioner was on leave, the applicant took it upon himself to try to resolve the matter himself by approaching the first respondent at her place of employment. She refused to speak to the applicant and referred him to her legal practitioners. Her legal practitioner was in consultation, but after obtaining the assistance of the said practitioner's secretary, he managed to conclude an agreement in terms of which the first respondent would cancel the warrant of ejectment, and permit the applicant to remain on the property, upon fulfilment by the applicant of the following conditions:

- (a) apologise to the first respondent for approaching her at her place of employment about the warrant of ejectment;
- (b) immediately pays the outstanding amount due to the City of

Windhoek;

(c) paid a deposit of N\$25 000 in respect of his monthly occupation of the property;

(d) paid a monthly rental of N\$25 000;

(e) continued to pay the monthly municipal account to the City of Windhoek.

[23] The applicant agreed and complied with *inter alia* conditions (a), (b) and (c) on 8 October 2020. He was also informed that the warrant of ejectment had been cancelled.

[24] It is the applicant's submission that in making the payments and apologising to the first respondent, the judgment of this court (to evict him from the property) had been novated and extinguished and substituted by the agreement that he may remain in occupation of the property on condition that the applicant pays the monthly rental and other amounts agreed upon. It is also on those grounds, submitted the applicant, that he seeks to say the warrant and his eviction from the property.

[25] However, on 28 October 2020 a notice of eviction was received by the applicant with instructions to vacate the property by 2 November 2020. In response, the applicant on 29 October 2020, addressed correspondence to the first respondent's legal practitioners, reiterating the terms of the agreement.

[26] In a response from the first respondent's legal practitioners, dated 30 October 2020, the applicant was informed that the existence of the agreement was disputed and that eviction would proceed. This, according to the applicant, precipitated the urgent relief sought, launched on 2 November 2020 for hearing on 12 November 2020.

[27] Taking the above facts into consideration, the court must determine

whether the application is indeed urgent.

[28] It is apparent from the applicant's founding papers that the dispute between the parties as regards the applicant's rights to ownership of the property arose already during April 2020 when summary judgment was granted by this court. That judgment remains in place there being no express term or allegation that the order granting summary judgment had been abandoned.

[29] Although this was submitted to be irrelevant to the determination of urgency, the court cannot ignore (for the purposes of determining urgency), in these particular circumstances, that to date, no attempt was made by the applicant to prosecute the appeal against the order granting summary judgment and the resultant eviction. The applicant is entirely silent on this, reliance being placed on an alleged agreement made on 8 October 2020 whilst in the process of being evicted. More noteworthy, is that the applicant seeks, through the final relief sought in this application, to institute action against the first respondent and Mr Pretorius on essentially the same facts presented in the affidavit resisting summary judgment, for which the court found against him.

[30] The applicant failed since then to prosecute his appeal. He allowed it to lapse, knowing full well that he and his family could be evicted at any time. Furthermore, nothing was done between 15 and 28 September 2020 on the papers, either. But on 8 October 2020, whilst being evicted, the applicant sought and managed to find a resolution to stave off the eviction. There is no explanation for the failure to prosecute the appeal (given the applicant's grounds), or even an attempt to revive it.

[31] Moreover, the court does not view this agreement as an abandonment of the first respondent's rights in the judgment and order of this court's order dated 21 April 2020. In this regard, a cancellation of a warrant of ejection does not automatically amount to an abandonment of the judgment in the first respondent's favour. It is simply a cancellation of the warrant sought. There is also no express term in the agreement to the effect that the first respondent abandoned her right to judgment.

[32] Additionally, the applicant has not tendered under oath payment of rental for November 2020, or payment of any municipal account, which he would have to do to comply with the terms of the agreement he alleges exist. Even if the first respondent refused same, the tender must have been made.

[33] The foregoing facts leads the court to draw an inference that the applicant seeks to circumvent his loss in the summary judgment without following an appeal process by relying on the conclusion of a belated agreement to avoid the consequences of an eviction. The applicant's conduct since institution of the action against him is found to be wanting.

[34] In light of the foregoing the court finds that the applicant created his own urgency due to inaction. Even if the date of 30 October 2020 is the date on which urgency is to be calculated on the applicant's papers, the court finds this to be an artificial argument, the applicant is in any event also not in good standing with the agreement he alleges to exist.

[35] In light of the foregoing the court finds that the urgency is self-created and the following order is made:

1. The application is struck from the roll with costs for lack of urgency.

EM SCHIMMING-CHASE
Acting Judge

APPEARANCES:

APPLICANT

JP Ravenscroft-Jones
Instructed by Erasmus & Associates
Windhoek

FIRST RESPONDENT

G Narib
Sisa Namandje & Co Inc
Windhoek