



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
IN THE HIGH COURT OF NAMIBIA**

PRACTICE DIRECTIVE 61

Case Title: JAYANTA MOODLEY vs CALVIN MAHOSHI	Case No: HC-MD-CIV-ACT-CON-2022/01500 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 14 September 2022 Date of Reason: 10 October 2022
Neutral citation: <i>Moodley v Mahoshi</i> (HC-MD-CIV-ACT-CON-2022/01500) [2022] NAHCMD 543 (10 October 2022)	
Results on merits: Merits considered	
Reasons for orders:	
<p>[1] On 14 September 2022, after having heard the arguments in this matter, I made the following order: 'Summary Judgment is granted in the following terms:</p> <ol style="list-style-type: none">Ejectment of the Defendant from the property situated at Erf 1599, Berker Street, Klein Windhoek, Windhoek, Namibia.Cost of suit. Such costs to include the costs of one instructing and one instructed	

counsel.

Matter is removed from the roll: Case Finalized.'

[2] What follows hereunder are the reasons for the above order.

The parties

[3] The parties are Jayanta Moodley, a major female person residing in Windhoek as the plaintiff and Calvin Mahoshi, a major male residing at 1599 Berker Street, Klein Windhoek as the Defendant. I will refer to the parties as they are in the main action.

Background

[4] The plaintiff is the registered owner of Erf 1599, Berker Street, Klein Windhoek and subsequent to the purchase and transfer of the property in the plaintiff's name. The plaintiff is claiming that the defendant is in unlawful occupation of the said property and seeks to evict the defendant from the said property.

[5] The plaintiff resultantly issued summons against the defendant, who in turn defended the matter. The plaintiff launched an application for summary judgment as the plaintiff is of the view that the respondent has no bona fide defence to the plaintiff's claim.

[6] In terms of the case plan dated 15 July 2022, the parties were directed to comply with the following procedural steps:

- a) Report in terms of rule 32(10) must be filed on or before 25th day of July 2022;
- b) Application for Summary Judgment must be filed on or before 03 day of August 2022;
- c) Answering Affidavit / Set Security: Summary Judgment must be filed on or before 12 day of August 2022.

[7] In his answering papers, the defendant raises a point in limine in that he alleges that the plaintiff did not comply with rule 32(9) and (10).

Opposition to the summary judgment application

[8] The defendant is opposing the application for summary judgment on the following basis:

a) He and his business partner, the late Mr Pretorius sold immovable property at Erf 1599, Klein Windhoek to the Plaintiff and her husband, Mr Moodley.

b) The defendant and Mr Pretorius held equal members' interest in a close corporation, PM One Investments CC.

c) That the sum for which the property was sold was NA\$ 3 880 000 and the payment would be made up out of:

i. The settlement of the arrears on the home loan account of Mr Pretorius in the amount of NA\$ 380 000.

ii. Payment of N\$ 2 000 000,

iii. The balance of N\$ 1 500 000 would be secure by a property belonging to the plaintiff and her husband, which the defendant was supposed to sell on their behalf for N\$ 1 500 000.

d) That a loan agreement was drafted by a local legal practitioner's firm and setting out the terms of the repayment of the N\$ 1 500 000. This loan agreement was signed by Mr Pretorius and the defendant. The plaintiff and her husband was supposed to sign the loan agreement and leave the original title deed of their property and the keys to the property with the office of the legal practitioners. Instead Mr Moodley, the plaintiff's late husband dropped off a copy of the title deed on the property and failed to sign the loan agreement.

e) In a subsequent document, Mr Pretorius and Mr Moodley agreed that the outstanding balance of the sale of the immovable property would be directly payable to the defendant.

f) The defendant maintains that there was suspensive conditions in the sales agreement that the property could not be transferred to the purchaser before the tenant at the time was evicted. The defendant alleges that the transfer of the property took place without the permission of the seller(s) and is in breach of the agreement.

g) That the defendant had power of attorney to deal with the affairs of Mr Pretorius.

h) That the defendant decided to occupy the house on 1 June 2021 until such time that the plaintiff and her husband settles the remaining balance of N\$1,500,000

Arguments advanced

On behalf of the Plaintiff

[9] First and foremost, Mr Van Zyl argued that it is an undisputed fact that the plaintiff is the lawful owner of the property in question. This property was duly registered in the name of the plaintiff on 10 July 2019. The plaintiff and Mr Pretorius entered into an agreement of sale in respect of the property for the amount of N\$2,000,000 and on the defendant's own version this amount was paid as the defendant attached proof of the payment to the conveyancing attorneys. There can therefore not be an outstanding amount of N\$1,500,000 in respect of the immovable property.

[10] Mr Van Zyl further contended that in terms of clause 11 of the said agreement, it is clear that the written contract is the sole memorial of the agreement between the parties and also contains a non-variation clause.

[11] Mr Van Zyl argues that the parole evidence rule excludes all evidence which contradicts the terms of the said agreement.

[12] Mr Van Zyl submitted that on that premise it excludes all the evidence that the defendant attempted to produce in his answering affidavit.

[13] Mr Van Zyl further submitted that the defendant has no standing in this matter and has no lawful justification for his occupation of the property and that the defendant actually committed an act of spoliation when he moved into the property.

On behalf of the defendant

[14] Ms Ndamanomhata argued on behalf of the defendant that there is a serious dispute of

fact between the parties and that that is illustrated by means of all the agreements attached to the answering affidavit.

[15] Ms Ndamanomhata contended that there is a substantial amount of money due to the defendant and that the defendant is of the view that the sales agreement should be revisited as there was a breached of the said agreement by the plaintiff. Ms Ndamanomhata also indicates that the defendant intends to take issue with the terms of the agreement of sale of the immovable property but concedes that the immovable property was transferred into the name of the plaintiff and that the plaintiff was not a party to all the further agreements attached to the answering papers of the defendant.

Legal principles

[16] In terms of rule 60(b) of the High Court Rules the respondent must satisfy the court that there exists a bona fide defence to the action and the affidavit must disclose fully the nature and grounds of the defence and the material facts relied on. Rule 60(5) further requires an affidavit resisting summary judgment to satisfy the court that the defendant 'has a bona fide defence to the action and the affidavit . . . must disclose fully the nature and grounds of the defence and the material facts relied on.'

[17] The above has been interpreted by this court to mean that the Rules of Court require a respondent to disclose fully the nature and grounds of the defence and the material facts relied upon. This means a sufficiently full disclosure of the material facts to persuade the Court hearing the application for summary judgment that, if the respondent's allegations are proved at a trial, it will constitute a defence to the applicant's claim.

[18] In the current instance it is not clear where the defendant fits into the scheme of things. Despite the averments by the defendant that he was part owner of a company (which turns out to be a close corporation) the juristic entity was not the owner of the immovable property in question. That much is clear from the citation of the parties on the agreement of sale of the immovable property. The late Mr Pretorius was clearly the owner of the house and which gainsay the defendant's reference to 'we' and 'our'. The defendant had no part in the agreement between Mr Pretorius and the plaintiff at all.

[19] The defendant, in his answering affidavit and heads of argument, continuously refers to the fact that 'they' entered into an agreement and 'they' signed an agreement, with reference to the purported loan agreement and the agreement regarding an outstanding sum of money as a result of the sale of the house. In all the instances the defendant signed as a witness, and not as a party to the so-called agreements attached to the answering affidavit.

[20] The defendant seems to labour under the idea that as a result of a power of attorney, signed by Mr Pretorius on 5 December 2020 and 25 January 2021 respectively, some ownership was transferred to him.

[21] He went as far as to state in his heads of argument that he 'is still the owner of the immovable property and he is still in possession of the immovable property until the buyer pays the remaining balance as per agreement/contract'. This is patently untrue as he is not, neither has he ever been the owner of the said property.

[22] The defendant relies on an agreement between Mr Pretorius and Mr Moodley regarding an outstanding amount payable to him by Mr Moodley and counsel seems to argue that the plaintiff and Mr Moodley is liable. That might be so in respect of Mr Moodley but the plaintiff and Mr Moodley is married out of community of property and terms of the agreement between Mr Pretorius and the plaintiff has been complied with and the agreed payment was fulfilled. Whatever side agreements were entered into with Mr Moodley is not relevant for the current proceedings. The bottom line is that the plaintiff is the lawful and registered owner of the immovable property and has the right of enjoyment of the said property.

[23] The defendant took the law into his own hands when he moved into the property in an attempt to force the hand of the plaintiff to make payment in his favor as a result of an agreement that she was no party to. I am in full agreement with plaintiff's counsel that the defendant's purported defence in respect of his occupation of the property is neither bona fide nor good in law

[24] The defendant can institute action against Mr Moodley should he wishes to do so on the strength of the agreement between Mr Pretorius and Mr Moodley on 21 July 2019 regarding the undefined amount that must be paid over to the defendant. That is, however, a problem for another day and need not be decided in the current matter.

[25] I am of the view that the defendant cannot resist the summary judgment application of the plaintiff as a result of the agreement between Mr Pretorius and Mr Moodley.

[26] Lastly, on the issue of the defendant's complaint that there was no due compliance with rule 32(9) of the Rules of Court. From the papers before me it is clear that there was a telephonic discussion of the issues wherein it was made clear that the defendant does not intend to vacate the property in question. A report in terms of rule 32(10) was filed and I am satisfied that there was sufficient compliance with rule 32(9) and (10) process and that the complaint by the defendant in this regard is without any merit.

Judge's signature	Note to the parties:
Prinsloo Judge	Not applicable.
Counsel:	
Applicant/Respondent	Respondent/Appellant
C Van Zyl On instruction of Van der Merwe-Greeff Andima Inc.	N Ndamanomhata of Kadhila Amoomo Legal Practitioners