

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

INT-HC-OTH-2023/00376

Case No: HC-MD-CIV-ACT-CON-2023/01021

In the matter between:

GOBABIS PROPERTY INVESTMENT CC

APPLICANT

and

JORRY ZEBBY KAURIVI

RESPONDENT

Neutral Citation: *Gobabis Property Investment CC v Kaurivi* (HC-MD-CIV-ACT-CON-2023/01021) [2023] NAHCMD 3 (16 January 2024)

Coram: MASUKU J

Heard: 21 November 2023

Delivered: 16 January 2024

Flynote: Civil Procedure – Interlocutory application for ejectment of respondent, pending determination of main claim between the parties – Circumstances in which a *jus retentionis* may be defeated by owner of property – Considerations taken into account by court in allowing the defeat of a lien by the owner of the property.

Summary: The applicant and the respondent entered into a written agreement in terms of which the applicant undertook to sell landed property on which a house was to be constructed for the respondent on the property. The respondent was required to furnish a deposit among other conditions. The agreement was subsequently cancelled by the applicant. The respondent launched action proceedings claiming a refund of the deposit, together with damages allegedly suffered as a result of the cancellation of the contract by the applicant. In the interregnum, the applicant refunded the respondent and moved an application to evict the respondent from the property, on the payment of sufficient security, pending the finalisation of the claim for damages. The respondent opposed the application, claiming that the relief sought by the applicant is inappropriate and that the applicant should have filed a counter-claim in the action proceedings. The respondent further alleged that his family resides on the property in question and it would therefore be improper to evict him while the main action remains pending.

Held: That even in circumstances where a right of retention of property is asserted in good faith, the court has the power to order delivery of the property to the owner against the furnishing by the owner of adequate security.

Held that: In exercising its discretion in that regard, the court will have regard to what is equitable in all the circumstances of the case, bearing in mind that the owner should not be unreasonably left out of his or her property and that the owner must not be given possession if the intention is to delay the claim for recovery of expenses.

Held further that: In the instant case, the applicant had paid the amount claimed in relation to the first claim and had offered to pay security for the second claim ie the damages claim pending before this court. The court held that the security offered by the applicant in respect to the second claim, was not sufficient in that the amount offered as security, did not take into account

the amount of interest and costs of suit. An order taking those amounts into account was thus issued.

Held: That it appears in all the circumstances of the case that the retention of the property, considering that the agreement had been cancelled, could be defeated by the provision of adequate security by the applicant.

Held that: The court is not tied to the nature and amount of security offered by an applicant in these matters. It has the discretion to order a nature or form of security that it considers adequate in the circumstances of the case. This is so even if the amount ordered by the court is in excess of what the applicant had offered as security.

The application was granted, with the court making further orders to ensure that the amount offered by the applicant as security, is adequate in the circumstances.

ORDER

1. The applicant must within seven (7) days from the issuance of this order, file an affidavit suggesting an adequate bond of security that takes into account interest on the amount of N\$428 178,74, and costs of the action, the latter of which shall be agreed by the parties, failing which, shall be determined by the Registrar of this Court.
2. The applicant must, under cover of the affidavit mentioned in paragraph 1 above, also provide a bond of security in the amount suggested in para 1 above, duly issued by a reputable registered financial institution in Namibia, for the court's consideration.
3. The matter is postponed to **8 February 2024 at 08h30** for further directions.

4. The parties are at large to file a joint status report, properly motivated, in which they seek an extension of the time periods mentioned in paragraphs 1 to 3 above on or before **6 February 2024** and which report shall be duly considered by the court and an appropriate order issued.
5. The question of costs is reserved for determination once the order stated above has been duly complied with.

RULING

MASUKU J:

Introduction

[1] This is an unusual but not unprecedented application. It is unusual because the applicant, *pendent lite*, (pending on-going litigation), seeks an order evicting the respondent from certain premises in circumstances where the respondent claims a lien over the said premises.

[2] The question that confronts the court presently, is whether it is appropriate for the court to issue the eviction order against the respondent, in circumstances where the respondent has lodged a civil action against the applicant and as stated above, the respondent claims a lien over the property from which his eviction is sought.

The parties

[3] The applicant is Gobabis Property Investment CC, a close corporation, with limited liability, incorporated in terms of the relevant provisions of the laws of Namibia. Its physical address is at Erf 1623, Range Street, Pioneerspark Windhoek, Republic of Namibia. The respondent, on the other hand, is Mr Jorry Zebby Kaurivi, an adult male Namibian, residing in Windhoek.

[4] The applicant is represented by Mr Phatela, whereas the respondent is represented by Mr Boonzaier. The court records its appreciation to both counsel for their industry and assistance dutifully rendered to the court. That the court does not uphold the case of one of the parties is not a reflection of the lack of dedication or industry on the part of the counsel concerned.

Background

[5] The genesis of this application can be traced to an agreement of sale between the parties. It was in respect of property described as Erf 2230, located on a development described as Portion 41 of the Town lands of Gobabis, Omaheke Region. In terms of the agreement, the applicant was to sell and the respondent was to purchase property mentioned immediately above from the applicant and which property was located in a development mentioned above.

[6] For reasons that are immaterial to the present matter, it would appear that the parties did not see eye to eye, resulting in the agreement of sale being terminated by the applicant. Certain disputes between the parties, culminated in an action instituted by the respondent against the applicant.¹

[7] The respondent claims that the agreement was unlawfully terminated by the applicant whereas he had complied with all the material terms of the agreement. He accordingly prays that the court grants him payment in the amount of N\$510 000, and N\$428 178, 74, respectively. The first amount represents the purchase price allegedly paid by the respondent to the applicant and the latter amount is damages allegedly sustained by the respondent as a result of the applicant's alleged unlawful cancellation of the agreement in question.

[8] It is common cause that the said action is defended by the applicant and remains under case management by this court. What the applicant seeks,

¹ *Kaurivi v Gobabis Property Investment* CC HC-MD-CIV-ACT-CON-2023/01021

in this application, as foreshadowed above, is the eviction of the respondent from the premises in question, pending the final determination of the dispute relating to the monetary claim by the respondent. This order for eviction, as far as the applicant is concerned, is sought against the applicant providing adequate security to the respondent for the amount of the judgment and incidentals sought, stated in the preceding paragraph.

The applicant's case

[9] The applicant states that it is the lawful owner of the property in question which is occupied by the respondent who has refused to vacate same, despite requests to do so. It is the applicant's case that it has tendered to provide suitable security to the respondent, which is equivalent to the claim he has lodged but the respondent will not budge. It is the applicant's case that the amount sought in the first claim, ie N\$510 000, has already been paid by it to the respondent, leaving the amount of N\$428 178, 74, the amount in dispute between the parties in relation to damages allegedly suffered by the respondent.

[10] The applicant submits that to the extent that the respondent may be correct that it has and enjoys a lien over the property, in view of the remaining unresolved dispute between the parties, it is in law permitted to defeat the said lien by providing security to the respondent. It is the applicant's case that the respondent's claim is exaggerated, as all the respondent is entitled to, are improvements he has effected on the property in question and no more.

[11] The applicant claims that it is a property developer and requires access to the premises for purposes of selling the property. It is the applicant's case that it wishes to complete the construction on the property and to sell same to willing buyers, which it cannot do if the respondent continues to exercise the lien he claims. The applicant further states that should the respondent remain on the premises and his claim is eventually dismissed, the respondent will not be financially able to pay to the applicant what will be due to it in terms of the judgment in the action.

[12] Furthermore, according to the applicant, the balance of convenience favours it in that the contract has been cancelled and the respondent will not be out of pocket should his claim succeed because the applicant has offered security that is acceptable to the court.

The respondent's case

[13] The respondent's case is a horse of a completely different colour. Firstly, the respondent raised issues of non-compliance with some court orders that was not persisted with at the hearing. The main contention advanced by the respondent is that it is inappropriate for the court to grant the present application for the reason that there is the pending action between the same parties.

[14] It is the respondent's assertion that the applicant should have filed the order of eviction as a counterclaim in the proceedings presently pending between the parties. For that reason, further contends the respondent, there is no need for the court to grant the applicant leave to file a bond of security in the circumstances. The respondent also states that the applicant's behaviour, in lodging this application, is reflective of it being vexatious such that the application should without more, be dismissed with costs not capped under rule 32(11).

[15] In dealing with the merits and contentions of the applicant, the respondent contends that the applicant has not provided the respondent with the bond of security mentioned in the application. As such, the applicant's application is doomed to fail. The respondent further states that should this application be granted, his family will be negatively affected as they live on the property in question and will be rendered homeless by the eviction order. Furthermore, the bond of security will not offer the respondent the necessary comfort of purchasing a home for his family that the judgment would at the end of the civil action.

[16] The respondent further persists with denying that the agreement in question, was terminated by the parties. It is his case that the agreement was breached by the respondent, hence the pending action between the parties, in which the respondent claims damages for the repudiation of the agreement by the applicant. Significantly, the respondent also states that, 'I admit that the applicant is the owner of the Erf 2230 and that I tendered its return to the applicant against the payment of the claimed amount in terms of my particulars of claim attached as "GP12" to the applicant's founding affidavit.'²

[17] The respondent further denies that the applicant has been denied access to the property in question. It is his case that the lawful operation of the lien is in his favour and entitles him to hold the property over pending the finalisation of the main action. He contends further that the bond of security provides cold comfort to him for the reason that it will leave him out of pocket in the amount of N\$428 178,74. Whilst accepting the legal principle that the owner of property may defeat the lien by furnishing adequate security, that is however subject to the court's discretion and convenience, he retorts.

[18] Having briefly enumerated the parties' main contentions, I will briefly advert to counsel's respective submissions tendered at the hearing. I do so presently.

[19] Mr Phatela, for the applicant, submitted that there are two facts which are notorious and unchallenged. First, that the agreement between the parties, has been terminated and that the respondent has accepted the termination. It was his case that there is, in the circumstances, no justification for the respondent to hold on to the property. He submitted further that a lien is, in terms of the law, used as a shield but not as a sword, yet the respondent is by his actions, doing exactly the opposite.

² Para 28 of the respondent's answering affidavit.

[20] Second, Mr Phatela argued that there is no dispute that the first claim, has been paid in its entirety by the applicant to the respondent. This amount relates to the refund claimed by the respondent in his particulars of claim. All that the court is required to deal with, is the security in relation to the second claim. It was his case that the respondent is alleging that he resides on the property, yet his particulars of claim reflect an address different from that he alleges in this application.

[21] He argued that when proper regard is had to the papers filed of record, it is clear that the respondent is holding over the property to the applicant's detriment in the sense that all municipal bills in relation to the property, are settled by the applicant as the owner of the property and not by the respondent, who claims to exercise a lien. All in all, he submitted that this is a proper case in which the court can exercise its discretion and grant the relief sought as the nature and form of security offered by the applicant, is sufficient, all the relevant factors, mentioned above, taken into account.

[22] Should the court be of the considered opinion that the security offered by the applicant is not adequate, it was Mr Phatela's submission that the court is at large to order security that it finds sufficient in the circumstances. The court, he urged, should not dismiss the application only on grounds that the security proposed to be furnished is not sufficient, without ordering the applicant to provide what the court considers as sufficient in the instant case.

[23] Mr Boonzaier's argument, was a different kettle of fish. It was his opening submission that the applicant had oversimplified the matter, departing from its seriousness and the implications it has for the respondent and his family. It was his submission that the dispute between the parties has been brought before the court in an action that is pending before court. That being the case, there is no reason why the court should, at this stage, and in these proceedings, attempt to resolve disputes between the parties that are factual in nature.

[24] It was his further argument that the issue of eviction, which the applicant seeks in these proceedings, should have been sought as a counterclaim in the action proceedings. This would have had the advantage that the court could hear the parties *in pari passu*, (at the same time and in the same proceedings), so to speak, thus avoiding piecemeal litigation over what are essentially related matters.

[25] It was his submission that although he agrees that the court exercises a discretion in these matters, it should decline to do so in this particular case when regard is had to the dispute of fact, which is properly suited for determination in the action proceedings already underway. He argued further that eviction is final in nature, if granted and where there is a dispute, the version of the respondent should prevail, in line with the *Plascon Evans* rule³.

[26] Mr Boonzaier further submitted that the respondent's version that he has completed the construction on the property himself adds a further dimension to the eviction and if the eviction order is granted, the respondent may be left licking his wounds and would have no suitable remedy in terms of which he can recover whatever he will have spent on completing the construction work on the property.

Determination

[27] The applicable law to the issue of security in such matters, was neatly stated in *Zeda Financing (Pty) Ltd v Du Toit t/a Amco Diensstasie*,⁴ where Wright J adumbrated the applicable law in the following terms:

'The generally accepted view of our Courts is set out by Tindall J in the following passage from the judgment in *Spitz v Kesting* 1923 WLD 45 at 49:

“. . . Even where the claim in respect of which the *jus retentionis* is asserted in good faith, the Court has the power to order delivery to the owner against adequate security. Each case will depend on its particular facts and the Court, in exercising its

³ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁴ *Zeda Financing (Pty) Ltd v Du Toit t/a Amco Diensstasie* 1992 (4) SA 157 (OPD).

discretion, will have regard to what is equitable under all the circumstances, bearing in mind that the owner should not be left out of his property unreasonably and on the other hand should not be given possession if his object is, after getting possession, to delay the claimant's recovery of expenses.'

[28] In the *Spitz* matter, referred to above, Tindall, J stated the following at p 49, quoting as he did from the works of Voet and Van Leeuwen, as quoted by Mason J in *Ford v Reed Bros*⁵:

'The owner can obtain his property upon giving security according to the discretion of the Court, which is to see that the owner is not kept unreasonably out of his property nor the claimant for expenses harassed by prolonged and unnecessary litigation. And as GREGOROWSKI, J stated that according to the authorities "the thing held as a lien can be released by giving security for the claim for which it is detained, and this course will especially be directed by the judge when it is a matter of complicated accounts which it would take time to unravel, so as not to keep the owner out of his property.'"

[29] Stripped to the bare bones, it would seem to me that the principles that can be discerned from the above authorities are the following:

- (1) that where a person has a right of retention of property, or a lien over the said property, and that property has been held in good faith, the court has power to order delivery of the property held under the lien;
- (2) the court will do so against provision by the owner, of sufficient security;
- (3) in ordering the release of the property, notwithstanding the existence of a lien, the court exercises a discretion. This relief, is granted not as a matter of right, but as a matter of discretion;⁶
- (4) in exercising its discretion, the court will take into account what is equitable in all the circumstances of the particular case, bearing in mind that the owner should not be unreasonably kept out of possession or enjoyment of his or her property. Further, the court

⁵ *Ford v Reed Bros* 1922 TPD 266.

⁶ *Astralita Estates (Pty) Ltd v Rix* 1984 (1) SA 500 (C).

should not allow abuse of its discretion in cases where the owner's intention in getting the property, is to delay the claimant's claim or recovery of expenses expended on the property by the holder of the lien.

[30] I now turn to deal with the requirements as set out immediately above. First, the question is whether the applicant has provided good or sufficient security in this matter. In this connection, it is clear, from what was stated earlier, that the first claim has been paid by the applicant. The amount, which is still subject to adjudication, is N\$428 178, 74. In its notice of motion, the applicant has stated its readiness to provide a bond of security, to be provided by a registered financial institution in Namibia, in the amount stated immediately above. It is intended that the said amount will be used as security for the improvement lien relied upon by the respondent in his second claim in the action referred to earlier.

[31] I am not satisfied that the bond sought by the applicant in the present case is sufficient, having regard to the principal claim and incidental relief sought. To this end, I must mention that Mr Phatela submitted that the applicant is open to furnishing a bond in an amount that the court may, taking all the matters into account, deem appropriate and sufficient.

[32] It is clear that the respondent, for his part, claims interest on the aforesaid amount and costs, should he be successful in his claim. The amount of security undertaken to be furnished by the applicant in its papers, does not pass of as sufficient for that reason, in my view. That does not however, amount to the application having to fail therefor. The court has a discretion, having regard to all the circumstances, to order the applicant, in such a case, to furnish what it considers as sufficient security, which may be above that which the applicant has tendered in its parochial view. I will deal with this issue at the end of the ruling.

[33] Second, the court, in issuing an order for security against the release of the property, exercises a discretion. In this connection, it must be pointed out that the applicant does not approach the court for an order as a matter of right. Everything depends on the exercise of the court's discretion, taking into account all the relevant factors in the case at hand.

[34] One of the main considerations, is that the court must consider what is equitable in all the circumstances. In the instant case, the contract has been cancelled by the parties and the fact of the applicant's ownership of the property is not placed in question. In the cases quoted above, one of the prime considerations is that the applicant should not be kept out of its property unreasonably.

[35] I am accordingly of the considered view that in the instant case, the balance of convenience, if I may call it that, favours the applicant. First, the applicant states and this is not controverted, that it is primarily engaged in the business of developing property for sale. It is how the relationship with the respondent was established. Its lamentation that it is being kept out of the property and is in the meantime incurring charges by the relevant municipality, in my considered view, should count in its favour.

[36] The respondent has claimed in its papers that if the eviction is sanctioned by the court, he will be rendered homeless together with his family. What must, however, be considered in this connection, is that in his particulars of claim, the respondent provided a residential address that is different from that where the property in question is situate. This discrepancy, is not explained by the respondent. He is not offering to pay any rental in the meantime, considering that the ownership of the property by the applicant, is not disputed.

[37] It should be pertinently observed in this particular connection that the respondent does not, anywhere in his papers, make an offer to pay rental for the property while the outstanding dispute awaits determination. Such an offer would, in my considered opinion conduce to the court considering his

contention that that his family would be rendered homeless if the order sought was to be granted without further ado in a positive light. The court would possibly grant the order in the respondent's favour, resting in the comfort that the applicant's right to the property, on the one hand, and the occupation or exercise of a lien over the property by the respondent, is not to the utter detriment of the applicant in all the circumstances of the case.

[38] I am of the considered view that in the present circumstances, the balance of convenience favours the applicant as I detect some inconsistency in the respondent's case. Even if the respondent was to be rendered homeless in the circumstances, which does not appear to be the actual case when regard is had to the averrals in the particulars of claim, I am of the considered opinion that this is not a rule 108 application, where the court is expected to exercise judicial oversight in matters which specifically involve debtors and creditors, especially banks in cases of home loans. This is a commercial dispute, where the evidence shows that the applicant is the owner of the property in question and the only reason that the respondent may legally hold on to the property, is the claim he has lodged against the applicant for the amount stated earlier.

[39] It is now clear that the applicant has offered to provide a bond of security that is by and large sufficient, taking into account what has been stated earlier in the court's view. This is to cater for the respondent's pending action, should it succeed in the future. The fact that the respondent would, if the application fails, be in occupation of the property at no cost to it, whereas it would enjoy the benefits of occupation, appears to be a high watermark of injustice to the applicant, considering that the municipal charges are borne by the applicant in the interregnum, when the applicant does not in fact enjoy beneficial use or possession of the property in question.

[40] Having considered the applicant's position, as stated above, I do not get the distinct impression that the applicant's intention in moving this application, is to oust the respondent from possession of the property for the

mala fide purpose of delaying the finalisation of the action, to the respondent's detriment. In point of fact, with the advent of judicial case management, the pace and conduct of litigation, is no longer in the wallets of legal practitioners or their clients, so to speak. The court has the ultimate control, if not grip, of the pace of litigation. Any nefarious tendencies picked up by the court on the applicant's part, to delay the finalisation of the trial, to the respondent's prejudice, will be instantly rebuffed with the necessary rebuke and condign punishment, if necessary.

[41] I am accordingly satisfied that having regard to all the foregoing, this matter presents itself as an appropriate one in which the court should exercise its discretion in the applicant's favour and grant the application as prayed. The only issue, which I have expressed reservations about, relates to the fact that the amount of security offered by the applicant does not include interest and costs of the action, should the respondent's claim eventually succeed. This is however, not a train smash, as the court is ably endowed with the panoply of powers in its arsenal, to order what it considers to be sufficient security, taking all the circumstances of the case. This, Mr Phatela, as previously stated, accepts without equivocation.

Conclusion

[42] Having due regard for all the considerations canvassed above, and in the light of the authorities cited and discussed above, I am of the considered opinion that this is a proper case in which the court should exercise its discretion in the applicant's favour. This is subject to the court, having expressed its misgivings regarding the amount of the security tendered, stipulating a higher amount, to ensure that the respondent's interests are adequately catered for, considering that it otherwise has a lien exercisable at law.

Directions

[43] In view of the findings above, I consider, as I hereby do, ordering the applicant to file a further affidavit, in which it tenders an amount of security that takes into account interest on the amount claimed as well as the costs of the action. The said affidavit must be filed within a period of seven (7) days from the date of this order. Upon receipt of the said affidavit, the court will, if satisfied, then issue a final order in the applicant's favour.

[44] The affidavit must be accompanied by a bond of security issued by a financial institution of the applicant's choice, which will be subject to the court's approval, in line of course, with the directions made in para [42] above.

Order

[45] In principle, the applicant's application should succeed. The applicant is, in the premises, accordingly ordered to do the following:

6. The applicant must within seven (7) days from the issuance of this order, file an affidavit suggesting an adequate bond of security that takes into account interest on the amount of N\$428 178,74, and costs of the action, the latter of which shall be agreed by the parties, failing which, shall be determined by the Registrar of this Court.
7. The applicant must, under cover of the affidavit mentioned in paragraph 1 above, also provide a bond of security in the amount suggested in para 1 above, duly issued by a reputable registered financial institution in Namibia, for the court's consideration.
8. The matter is postponed to **8 February 2024** at **08h30** for further directions.
9. The parties are at large to file a joint status report, properly motivated, in which they seek an extension of the time periods mentioned in paragraphs 1 to 3 above on or before **6 February**

2024 and which report shall be duly considered by the court and an appropriate order issued.

10. The question of costs is reserved for determination once the order stated above has been duly complied with.

T S MASUKU

Judge

APPEARANCES

APPLICANT: T Phatela
Instructed by Katjaerua Incorporated, Windhoek

RESPONDENT: M Boonzaier
Instructed by: Engling, Stritter & Partners, Windhoek