



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 287/2013

In the matter between:

ZAAPI MUNGENDJE

APPLICANT

and

EMMANUEL NGUNOVANDU

FIRST RESPONDENT

INSPECTOR GENERAL OF NAMIBIA POLICE

SECOND RESPONDENT

Neutral citation: *Mungendje v Ngunovandu and another* (A 287-2013) [2013]
NAHCMD 360 (29 November 2013)

Coram: UNENGU AJ

Heard: 29 August; 17 October 2013

Delivered: 29 November 2013

Flynote: Practice – Applications and motions – Urgent application – Rule *nisi* granted – On extended date, the rule confirmed.

Summary: By way of notice of motion, the applicant came to Court on urgent basis seeking certain and ancillary relief. The application was granted on 29 August 2013 as the respondents did not oppose it. However, on extended return date of the rule, first respondent opposed the confirmation of rule but after hearing arguments from

counsel of first respondent and the applicant, the Court confirmed the rule *nisi* as prayed for in prayers 2.1, 2.2, 2.3, 2.4 and 2.5 of the notice of motion.

ORDER

In the result, I make the following order:

‘1. The *rule nisi* is confirmed as prayed for in prayers 2.1, 2.2, 2.3, 2.4 and 2.5 of the Notice of Motion.

2. The costs in prayer 2.5 of the Notice of Motion to include the costs of one instructing and one instructed counsel.

JUDGMENT

UNENGU AJ:

[1] The applicant, Mr Zaapi Mungendje, on an urgent basis, applied for and was granted the following relief on 29 August 2013:

‘1. That the non-compliance with the forms and service provided for by the Rules of the above Court as envisaged by Rule 6(12) of the Rules of Court is hereby condoned and the application is heard on an urgent basis.

2. That a *rule nisi* is hereby issued, calling upon the first respondent and any interested party, if any, to show cause, if any, on 1 October 2013 at 9h00, why an order in the following terms should not be made final:

2.1 Ordering and directing the first respondent to forthwith restore to the applicant the undisturbed and peaceful possession, Erf 4956, situated in the District of Katutura, Windhoek, Republic of Namibia pending the final determination of this application by the above Court.

2.2 Ordering and directing the first respondent to forthwith vacate together with all his possession all his immovable he has brought to Erf 4956, situated in the District of Katutura, Windhoek, Republic of Namibia pending the final determination of this application by the above Court.

2.3 Ordering the first respondents to refrain in any manner whatsoever from interfering with the applicant's peaceful and undisturbed possession of Erf 4956, situated in the District of Katutura, Windhoek, Republic of Namibia.

2.4 Ordering the second respondent to remove the first respondent from Erf 4956, situated in the District of Katutura, Windhoek, Republic of Namibia in event that the first respondent does not willfully vacate the aforesaid Erf as ordered by this Court.

2.5 That the first respondent pays the applicant's costs of the application on a scale as between attorney and client.

3. That prayers 2.1, 2.2, 2.3 and 2.4 shall operate as an interim interdict with immediate effect, pending the return date, 1 October 2013 at 10h00.'

[2] The facts of the matter are briefly as follows. The applicant is the registered owner of a house situated on Erf 4956 in Katutura, Windhoek. But, the house is still occupied by the first respondent.

[3] In January 2012, the applicant instituted legal proceedings in the Magistrate's Court, wherein he sought, amongst others, an eviction order against the first respondent and another from his house at Erf 4956 in Katutura.

[4] The magistrate on 17 February 2012 granted him the eviction order by default against the first respondent and his friend. A warrant of ejection was also issued the same day and as a result thereof, the first respondent and his friend were ejected from the house at Erf 4956 by the Messenger of Court during March 2012. Thereafter, locks to the gates of the erf and doors to the house were changed and replaced with new locks by the applicant together with the Messenger of Court.

[5] The next day, after the first respondent and his friend were evicted from the house, the applicant and a cousin went back to the house for the cousin to occupy the house, in the meantime, but found the first respondent and his friend back in the house in defiance of the order granted against them by the magistrate.

[6] The applicant, in view of what happened, sought assistance from the Messenger of Court to remove the first respondent and his friend from the house, but was not. The Messenger of Court told him that he had discharged his obligation already when he evicted the first respondent and his friend from the house the previous day.

[7] On 22 February 2013 he approached the Magistrate's Court through his legal practitioner for an order of contempt of court in terms of common law, but the court dismissed his application on the ground that the Magistrate's Court is a creature of statute, it does not have inherent jurisdiction like the High Court to hear the application.

[8] That being the case, the applicant felt that he was without relief to protect him against the first respondent and his friend and decided to approach the High Court on an urgent basis for the relief indicated above.

[9] As indicated above, the applicant, on 29 August 2013, was granted the relief sought in the Notice of Motion in the form of a *rule nisi* with a return date of 1 October 2013, at 9h00.

[10] I must, however, mention that Rudolph Ndukireepo, who was the first respondent in the proceedings before the Magistrate's Court, is not a party to this application. I gather from the founding affidavit of the applicant that he (Rudolph Ndukireepo) has died. Therefore, the second respondent in this application is the Inspector-General of the Namibian Police who is cited solely for the purpose of removing the first respondent from the house at Erf 4956 in Katutura, if the applicant is successful.

[11] The first respondent opted to oppose the confirmation of the application on the grounds, amongst others, that the application is not urgent because the

applicant, in his founding affidavit, did not set out explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. Secondly, that the application is not urgent because a similar application was brought to this Court on 5 April 2013 but was subsequently withdrawn. These issues were raised in the answering affidavit by the first respondent as points *in limine*.

[12] Further, in paragraph 3.4 of his answering affidavit, the first respondent states that he did not oppose the application initially on 29 August 2013 because he did not have the funds to instruct lawyers but was of the view that this application would not have been granted had the court's attention been drawn to the glaring discrepancies and deficiencies therein.

[13] Unfortunately, it is too late for the first respondent. The issue of urgency or otherwise was dealt with on 29 August 2013, when this Court condoned the non-compliance with the forms and service provided for by the Rules of this Court in Rule 6(12) and allowed the application to be heard on an urgent basis. Therefore, the points *in limine* raised by the first respondent at this stage of the proceedings are outdated, irrelevant and as such will not be considered. In any event, the Court is *functus officio* in respect of paragraph 1 of the order of Thursday, 29 August 2013.

[14] I shall now consider the issue of whether or not the Court should confirm or discharge the rule *nisi* on this return date.

[15] Both counsel, Mr Phatela for the applicant and Mr Rukoro for the respondents, prepared and filed written heads of argument which they supplemented with oral submissions.

[16] Counsel also referred the Court to various case laws as authorities to support their submissions.

[17] As already pointed out above and as it is evident from the evidence contained in the founding affidavit of the applicant, it is not in dispute between the parties that the applicant had obtained an ejectment order in the Magistrate's Court for the district of Windhoek, in case no 304/203 against the first respondent and another who has died, to be ejected from a house situated at Erf 4956, Katutura in Windhoek.

[18] Further, it is not in dispute that the order was executed by the Messenger of Court of the district of Windhoek on 17 February 2013 when the first respondent and his colleague were ejected from the house whereafter other locks were placed on the gate of the premises as well as to the entrance of the house. However, in defiance of the magistrate's order, the first respondent and his friend returned to the house, a day after their eviction and since then, the first respondent is refusing to vacate the house.

[19] The conduct of the first respondent, in my view, is not only calculated to bring the administration of justice in general into contempt, but also intended with impunity to impede and obstruct or otherwise interfere with the due course of justice.

[20] It has been argued in this Court by counsel of the first respondent, among many others, that this matter has already been dealt with at the level of the Magistrate's Court, therefore, the only way, the High Court could get involved, is by way of an appeal or application for review.

[21] Counsel further argued that the applicant elected to start proceedings afresh or *de novo* in the High Court after failing to get her relief in the Magistrate's Court which is an abuse of the process and requested this Court to dismiss the application and to discharge the *rule nisi*.

[22] I disagree with counsel. His argument is without substance. The relief sought and granted in the Magistrate's Court is an order for ejectment against the first

respondent and his friend. In this Court, by way of Notice of Motion, not by action proceedings as she did in the Magistrate's Court, the applicant is seeking a different relief which she had set out in paragraphs 2.1, 2.2, 2.3, 2.4 and 2.5 of the Notice of Motion. The relief the applicant is seeking before this Court was created by a new circumstance, namely the defiance of the Magistrate's Court order by the first respondent when he returned to the house he was evicted from. That cannot be regarded as an abuse of process.

[23] One should remember and take into account that the applicant first approached the Magistrate's Court to hold the first respondent into contempt – the court dismissed her application. She also approached the Police for assistance but not assisted even though the first respondent could have been charged with criminal offences of trespass and malicious damage to property.

[24] The other submission of counsel for the first respondent with regard the deed of sale of the house concluded between the applicant, as the buyer and the seller of the house due to alleged non-compliance with the formalities in respect of contracts of sale of Land Act 71 of 1969, are irrelevant for the purposes of this application, therefore, rejected. If the first respondent disagreed with order of ejectment by the Magistrate's Court, he had a right to either apply for the rescission of the default judgment or appealed the judgment. This, the first respondent did not do, instead he decided to violate the judgment and an order of a court.

[25] Consequently, when regard is had to the facts in the founding affidavit to the effect that the applicant is the registered owner of that house at Erf 4956, Katutura in Windhoek coupled with the fact that he has been granted a default judgment for the ejectment of the first respondent, still in force, and the authorities referred to by counsel for the applicant, I am satisfied that the applicant on a balance of probabilities, established a right of ownership to the house, which right this Court must protect against the first respondent. Therefore, the rule *nisi* should be confirmed.

[26] In the result, I make the following order:

1. The *rule nisi* is confirmed as prayed for in prayers 2.1, 2.2, 2.3, 2.4 and 2.5 of the Notice of Motion.

2. The costs in prayer 2.5 of the Notice of Motion to include the costs of one instructing and one instructed counsel.

PE Unengu
Acting

APPEARANCE:

For applicant:

Mr TC Phatela

Instructed by Tjituri Law Chambers

For respondents:

Mr S Rukoro

Instructed by Dr Weder, Kauta & Hoveka Inc