CASE NUMBER: (P) I 1841 / 2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MENASON MARENGA **1ST APPLICANT**

REBEKKA MARENGA **2ND APPLICANT**

and

MARTHA MBAEVA TJIKARI **RESPONDENT**

CORAM: **SCHICKERLING A.J.**

Heard on: 21 October 2011

Delivered on: 21 October 2011

JUDGMENT

SCHICKERLING, A.J:

[1] This is an application for summary judgment in terms whereof the Applicants pray for an order in the following terms:

'1. Ejecting the Defendant and her family from Erf 66/11 Trougout Handura Street (Ext. 4) Windhoek;

2. Costs of suit;

3. Further and/or alternative relief."

[2] The application was duly served on the Respondent on 15 August 2011 and set down for hearing on the 2 September 2011 at 10h00.

[3] The Respondent opposes the application and duly filed an affidavit resisting summary judgment on 1 September 2011.

[4] On 2 September 2011 I postponed the matter to today for argument and laid down time limits for the filing of Heads of Arguments. Plaintiffs duly served and filed Heads of Argument and so did the Respondent.

[5] I am satisfied that the papers before me is in all respects in order.

GENERAL PRINCIPLES UNDERPINNING SUMMARY JUDGMENT PROCEEDINGS:

[6] It is trite that summary judgment is an extraordinary remedy which should be granted only if there is no doubt that the Plaintiff has an unanswerable case. *(Nathan, Barnard & Brink; Uniform Rules of Court, 3rd Ed; at p. 1190, subrule (1).* Before proceeding I deem it necessary to briefly summarize some general principles underlying summary judgment proceedings.

[7] *(i) The resolution of a summary judgment does not entail the resolution of the entire action.* This simply means that the only issue of relevance is the *bona fides* of the Defendant's notice of intention to defend, in the sense of his entitlement to defend. All a defendant is required to do is to set out facts, (i.e. not conclusions of fact or argumentative matter) which if found by a trial court to be correct would constitute a defense. I shall later return to this requirement.

[8] *(ii) The adjudication of a summary judgment does not include a decision on factual disputes. (See: Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd, 1959 (3) SA 362 (W) at 367 C; Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd, 1973 (3) SA 575 (R) at 578A)*

[9] *(iii) Because summary judgment is an extraordinary remedy it should be granted only if there is no doubt that the Plaintiff has an unanswerable case. (Nathan, Barnard & Brink, Uniform Rules of Court, 3rd Ed; at 190 Subrule 1)*

[10] *(iv) In determining a summary judgment application the court is restricted to the manner in which the Plaintiff has presented its case.* It is trite that a court must insist on strict compliance with the Rule by a Plaintiff. To this extent a Plaintiff is bound by the manner in which it has presented its case and a court will not entertain an application for summary judgment moved on technically incorrect papers. *(Western Bank Beperk v De Beer, 1975 (3) SA 772 (T); Credcor Bank v Thompson, 1975 (3) SA 916; Visser v De La Ray, 1980 (3) SA 147 (T)*

[11] (*v) Conversely, the court is not at all bound by the manner in which a Defendant presents his case.* This simply means that a Defendant is not subject to same strict considerations applicable to a Plaintiff. If the opposing affidavit discloses a triable issue the Defendant must be granted leave to defend the action. It is wrong to give any consideration to the probabilities of the defense as raised being successful at a trial. Summary judgment must be refused if the Defendant discloses facts which, accepting the truth thereof, or if proved at a trial, will constitute a defense. (*Lombard v van der Westhuizen, 1953 (4) SA 84 (C) at 88A and 88 F – H; Caltex Oil (SA) v Webb, 1965 (2) SA 914 (N) at 916 G; Arend v Astra Furnishers (Pty) Ltd, 1974 (1) SA 298 (C) at 303H – 304A)*

[12] *(iv) It is permissible for the Defendant to attack the validity of the application on any proper ground.* This simply means that a Defendant is not limited to the procedures provided for in Rule 32(3). The Defendant may for example base his defense on the excipiability or an irregularity or any other valid defense without having to record same in the affidavit and it is open to the respondent to attack the application on any aspect including, for example, the admissibility of the evidence tendered in the verifying affidavit. *(Raphael & Co v Standard Produce Co (Pty) Ltd 1951 (4) SA 244 (C); Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* supra; *Jagger & Co Ltd v Mohamed, 1956 (2) SA 736 (C) at 738C-D; Spice Works and Butchery requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd, 1959 (2) SA 198 (W) at 200A-C; Arend supra at 413 B; Cape Business Bureau (Pty) Ltd v Van Wyk, 1981 (4) SA 433 (C) at 439 C-)*

[13] *(vi) Summary judgment must be refused in the face of any doubt whether or not to grant it.* This rule is founded on the consideration that an erroneous finding in summary judgment proceedings has more drastic consequences for a Defendant than for the Plaintiff. Any error against the Plaintiff has far less consequences for the Plaintiff because he may ultimately at the trial obtain relief and if applicable interest and costs. The cumbersome process and costs inherent in an appeal for a Defendant goes without saying. It has repeatedly been stated in this regard that even though the success for the Defendant appears unlikely from the opposing affidavit, leave ought to be granted unless he (i.e. the Defendant) presents a hopeless case. (*Visser v Incorporated general Insurances LTD, 1994 (1) SA 472 (T) at 479B; Investec Bank Limited V Steynberg [1991] All SA 259 (C) at 265B-E; Tesven CC and Another v South African Bank of Athens, 2000 (1) SA 268 (SCA) at 277H; Smith Kruger Incorporated v Benvenuti Tiles Ltd [1999] 2 All SA 242 (C) at 249B – D; First National Bank of South Africa Limited v Myburgh & Another, 2002)4) SA 176 (C) at 184F-J; Soil Fumigation Service Lowveld CC v Chemfit Technical Products (Pty) Ltd.)*

[14] *(vii)* The court however always retains a residual discretion to refuse an application for summary judgment.

RULE 32(3)(b):

[15] Rule 32(3)(b) of the Rules of Court provides as follows:

> *"(3) Upon the hearing of an application for summary judgment the defendant may-*
>
> *(a) give security…; or*
>
> *(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or herself or of any other person who can swear positively to the fact that he or she has a bona fide defense to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defense and the material facts relied upon therefore."*

[16] What the rule contemplates is this; *"only facts which the court may take into account may be alleged; secondary evidence as to documents is inadmissible…" (Standard Merchant Bank Limited v Rowe, 1982 (4) SA 671 (W) at 676-7); "the defense must be placed before court on affidavit and not merely orally from the bar…" (Stofberg v Lochner, 1946 OPD 333); "a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defense which, if proved at the trial, would constitute a good defense to the action…" (Barclays Western Bank Limited v Bill Jonker Factory Services (Pty) td, 1980 (1) SA 929 (SE) at 933); "…needlessly vague, bold and sketchy* (allegations) *will constitute material for the court to consider in relation to the question of bona fides…" (Van Eeden v Sasol Pensioenfonds,*

1975 (2) SA 167 (O) at 178; Edwards v Menezes, 1973 (1) SA 299 (NC) at 304; Herb Deyers (Pty) Ltd v Mahomed11965 (1) SA 31 (T) at 32; Chambers v Jonker, 1952 (4) SA (C) at 638; Neuhoff v York Timbers Limited 1981 (4) SA 666 (T); Standard Merchant Bank Ltd v Rowe, 1982 (4) SA 671 (W) at 678; Joubert, Owens, Van Niekerk Ing. v Breytenbach, 1986 (2) SA 357 (T) at 361-2); "...the nature and grounds of his defense and…a defense which is bona fide and good in law."(Maharaj v Barclays National Bank Limited (supra) at 426)

[17] I do not understand a single one of the authorities to which I have referred above as suggesting that it is sufficient for a Defendant to merely identify, as opposed to establishing, on admissible evidence, and by this I mean, facts, not bold unsupported conclusions of fact or argumentative matter.

THE PLAINTIFF'S CASE:

[18] The Plaintiffs' case as pleaded is founded upon the *rei vindicatio* and the Plaintiffs in essence allege that (i) they are the registered owner of the certain Erf No. 66/11 Trougout Handura Street (Extension 4), Windhoek ("the immovable property") registered in their names by virtue of Deed of Transfer No. T 1051 / 2010 annexed to their papers as annexure "A"; (ii) The Defendant and her family are in unlawful occupation of the property; and (iii) Demand notwithstanding the Defendant and her family fail to vacate the immovable property.

[19] That Plaintiffs are the registered owners of the property in question and that the Defendant is in possession of the property on date hereof is not disputed by the Defendant and that is common cause on the papers before me.

DEFENDANT'S DEFENSE:

[20] The Defendant's defense to the Plaintiffs' action as stated in her affidavit resisting summary judgment can be summarized as follows: (i) she is the

daughter of the late Mrs. Adelheid Kahee. Adelheid Kahee in turn is the mother of the late Muzire Ndjoze (the late brother of the Defendant) who was married in community of property to Cecile Ndjoze; (ii) The late Muzire Ndjoze in the meantime became deceased; (iii) After the death of the late Muzire Ndjoze the executrix of the deceased estate sold the property in question to the Plaintiffs; (iv) this sale is being contested by the Defendant's mother, Mrs. Adelheid Kahee in an application filed in this court under case No. 164/2010, which case is pending before the High Court; (v) Adelheid in the meantime also died and she die intestate; (vi) Defendant, as the biological child of the late Adelheid Kahee is entitled to inherit from her once the issue of the immovable property is determined.

[21] The "issue of the immovable property" is alleged by the Defendant in the following terms: (i) The Defendant's late brother, Muzire Ndjoze who was married to Cecile Ndjoze, knew that the house did not belong to him and his aforesaid wife; (ii) It was wrong for Mrs. Cecile Ndjoze, to transfer the house into her name, and then sell it to the Plaintiffs; (iii) The decision of this issue is linked to the estate of Defendant's late mother which is still the subject of case No. 164/2010; to grant the application for summary judgment will cause great inconvenience to the Defendant and other family members occupying the property inn question.

[22] Mr. Mbaeva for the Respondent argues that the Defendants' defense in essence is one of *lis alibi pendens.*

[23] In his heads of argument he records that in order to succeed with a defense of *lis alibi pendens* the party wishing to raise a *lis pendens* bears the onus to allege and prove that: (i) there is litigation pending; (ii) the other proceedings must be pending between the same parties or their privies; (iii) the pending proceedings must be based on the same cause of action; and (iv) the pending proceedings must be in respect of the same

subject matter. *(Amler's Precedents of Pleadings).* Counsel for both parties are *ad idem* on these requirements

[24] Advocate Van der Merwe for the applicant argues that this defense cannot succeed at all more particularly in that; the affidavit resisting summary judgment must be self contained; the statement in paragraph 9 of the affidavit resisting summary judgment: *"It was wrong for Mrs. Cecile Ndjoze, to transfer the house into her name and then to ultimately sell the house to the Plaintiffs"* is not borne out by Deed of Transfer No. T 1051/2010, which is common cause, at all; the deed of transfer *prima facie* proves that the late Mr. Salomo Zuvee Ndjoze and Cecile Tjiho were the joint registered owners of the property in question and they in fact sold to the Plaintiffs the property in question; the names alluded to by the Defendant in her affidavit resisting summary judgment do correspond with the names in Title Deed No. T 1051/2010 at all; the defense of *lis alibi pendens* is not expressly raised in the affidavit resisting summary judgment at all; the affidavit hints at such defense without saying so expressly; the affidavit resisting summary judgment merely refers to case No. 164/2010 without in any manner whatsoever indicating what that case was all about; whilst reference is made to agreements in the affidavit resisting summary judgment no such agreements are annexed at all; to that extent, so she argues, the affidavit as whole does not comply with the requirements of rule 32(3)(b); she argues in the alternative that even if accepted that this court may have regard to the proceedings filed under case number A 164/2010 in this court, the parties in that case are Mrs. Adelheid Kahee and the Plaintiffs; Respondent is not a party to those proceedings.

[25] Mr. Mbaeva on the other hand argues that there are various ways of placing evidence before court; one of those is by way of a plea; prior to the application for summary judgment a special plea embodying the defense of *lis alibi pendens* was served and filed by Respondent; he expected same would be finalised prior to this application for summary judgment

and it was his intention to during the hearing of such special plea lead *viva voce* evidence. This did not happen as the application for summary judgment in the meantime intervened and hence, so he argues, he is now entitled to lead viva voce evidence and so he applied for the leave that the special plea be heard first and that Respondent be granted leave to lead evidence on the special plea.

[26] In answer to this application, Advocate Van der Merwe submits that; whilst it is permissible to also have regard to further particulars provided by a Plaintiff before an application for summary judgment is lodged, there is no authority for the proposition that once an affidavit resisting summary judgment has been filed, same can be supplemented by *viva voce* evidence; it is not provided for by the rules at all; and, so she argues, such an approach will defeat the very object and purpose of summary judgment proceedings and it cannot be acceded to.

[27] Mr. Mbaeva submitted in reply that when an application for summary is filed the Plaintiff must inform the Defendant that he has no defense to the claim; the Defendant in turn stated that she has a defense and the matter is unique and allowance should be made for such evidence to be lead. I do not agree. I also am unable to find any authority for the proposition as held out by Mr. Mbaeva and I agree with the submission by Advocate van der Merwe that such approach will defeat subvert the very essence of the Rule 32 and dismissed the application. I accordingly dismissed the application for leave to lead oral evidence to supplement the affidavit.

[28] It is apparent at the outset that no factual basis whatsoever is laid for the allegation: *"It was wrong for Mrs. Cecile Ndjoze, to transfer the house into her name and then to ultimately sell the house to the Plaintiffs."*

[29] As regards the second requirement for a defense of *lis alibi pendens*, Mr. Mbaeva submitted that there is authority that a party who is not a party to

the same proceedings can raise the defense of lis pendens in the current proceedings. For this submission he relies on *Cook v Muller, 1973 (2) SA 240 (N) p. 240.* On that authority he concedes however submits that even though the Defendant is not a party to case number 164/2010 she would nonetheless be entitled to raise the defense of *lis pendens* in this matter. A perusal of the authority however reveals that it is certainly no authority for the proposition as held out by Mr. Mbaeva to this court at all. First of all, it dealt with an exception; secondly it confirmed that in an exception it was not sufficient to merely state that the Plaintiff's particulars of claim are excipiable. It rather seems to be against the Defendant. That case furthermore was concerned with two cases between the same parties in two different courts.

[30] In *Chetty v Naidoo,* 1974 (3) SA 13 (A) at 20A Jansen A. R stated as follows:

> *"The incidence of the burden of proof is a matter of substantive law. (Tregea and Another v Goddart and Another, 1939 AD 16 at p. 32), and in the present type of case it must be governed, primarily, by the concept of ownership. It may be difficult to define dominium comprehensively (cf Johannesburg Municipal Council v Rand Townships Registrar and Others, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in Munsami v Gengemma, 1954 (4) SA 468 (N) at pp. 470H – 471E) that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whoever is holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner. (cf Jeena v Minister of Lands, 1955 (2) SA 280 AD at pp. 382E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified.*

(Krugersdorp Town Council v Fortuin, 1965 (2) SA 335 (T)"

[31] It was stated thus by Holmes A.R in *Oakland Nominees (Pty) Ltd v Gelria Mining and Investments Co (Pty) Ltd, 1976 (1) SA 441 (A):*

> *"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless of course, the possessor has some enforceable right against the owner. Consistently with this, it as been authoritatively laid down that by this Court that an owner is estopped from asserting his rights to his property only-*
>
> *(i) where the person who acquired the property did so because, by the culpa of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or*
>
> *(ii) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the exception doli. (see Grosvenor Motors Potchefstroom Ltd v Douglas, 1956 (3) SA 420 (A.D.); Johadien v Stanley Porter (Paarl) (Pty) Ltd, 1970 (1) SA 394 (A.D.) at p. 409)…*
>
> *As to (a) supra it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements-*
>
> *(i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it…*
>
> *(ii) The representation must have been made negligently in the circumstances;*
>
> *(iii) The representation must have been relied upon by the person raising the estoppel.*
>
> *(iv) Such person's reliance upon the representation must be the cause of his acting to his detriment…"*

[32] I have already indicated that of crucial importance in summary judgment proceedings is the comprehensive disclosure of the material facts upon which the defense is based. This is particularly so as the evaluation of the Defendant's opposing affidavit frequently entails not a consideration of what the Defendant has said, but of what he did not say.

[33] A perusal of the Respondent's answering affidavit reveals that it does not remotely begin to establish any right of for possession as contemplated by the above cases.

[34] The alleged *lis alibi* pendens is also alleged in extremely vague terms. I have indicated above that the affidavit as whole fails to disclose all the parties to the other proceedings; it fails to disclose the cause of action in that application; the parties to the deed of transfer in the current action differ from those mentioned by the Defendant.

[35] It is trite that where all the formalities of transfer had been complied with and accepted by the Registrar of Deeds, and where transfer had been registered by him in the deeds registry, a formally valid transfer had occurred. (*Knysna Hotel CC v Coetzee NO 1998 (2) SA 743 (SCA) at 754 B/C–E)* The transfer of the immovable property in question has not been set aside by an order of court. The transfer of the immovable property to plaintiffs are therefore valid and will remain valid until set aside by an order of court.

[36] The fact that plaintiffs' ownership in and to the immovable property is being challenged in another matter by another person or executrix of a deceased estate is no defense in this matter at all. In any event the Defendant has failed to attach any documentary proof of the proceedings in High Court case number (A) 164/2010 at all.

[37] In my view the Defendant fails to establish that the parties in the current matter and those in case no. A 164/2010 is the same or that the cause of action and the relief prayed for is the same. If one limits oneself to the affidavit resisting summary judgment, it is not stated who the parties in case no. 164/2010 are; the only facts to be found about case no. 164/2010 is to be found on page 19, para 3. As for the rest the court is not informed as to who the Respondents in that case are. If one accepts that this court may have regard to case no. A 164/2010 there is only one person in that matter who is a party in the current proceedings; that is Menason Marenga. It is in my view apparent that the Defendant was not a party in case no. A 164/2010 at all.

[34] Finally in paragraph 10 of the affidavit resisting summary judgment, Defendant states the following:

> *"I have to add here that I am not the only person or child who is entitled to remain on the property and/or to inherit from my late mother., but that there are other children of my late mother who live on the property and are equally entitled to remain in the property, being Floyd Kahee, Constancia Kahee and Rachel Kahee"*

[35] This also constitutes a conclusion of fact for which no factual basis is laid at all. The basis on which the property in question is alleged (by necessary implication) to constitute an asset in the estate late Adelheid Kahee capable of being inherited is plainly never disclosed at all.

[36] In *Mngadi NO v Ntuli, 1981 (3) SA 478 (D & K) Page R at 485A stated as follows:*

> *"It is settled law that a bona fide possessor cannot by virtue of that fact alone withhold the possession of the property from the owner thereof (see eg. Silberberg The*

Law of Property at 103) No. additional factors such as a right of retention, a contractual right to possession or an estoppel which would entitle the second and third defendants to retain possession of the property have been raised in the present case. Under the circumstances I am of the view that the applicant's rights must prevail and that she is entitled to the relief sought, despite the manifest hardships which will probably result to the second and third defendants from the grant of the order."

[37] I am of the view that the same applies in point to the Respondent in this matter.

[38] I should mention in conclusion that during argument I particularly raised the following proposition with Mr. Mbaeva: If I was to accept for a moment that I may have regard to the application filed under case No. A 164//2010, as he has invited me to do, T1631/1993 annexed to that application by Adelheid Kahee as annexure "B", it confirms that the said Salomo Zuvee Ndjoze obtained transfer from the City of Windhoek, he conceded that there was no way in which it can be contended that Adelheid Kahee was ever the true owner of the property in question.

[39] I am of the view that Defendant's affidavit as a whole is an elegy of vague bold unsubstantiated conclusions of fact, argumentative matter and it plainly fails to establish any bona fide defense to the Plaintiff's claim at all.

In the result the following order is made:

1. Summary judgment is granted in favour of the Applicants;

2. The Defendant and all those family members occupying Erf 66/11 Trougot Handura Street, Katutura (Extension 4), Windhoek ("the Property") is hereby evicted from the property;

3. The Defendant is ordered to pay the Plaintiffs' costs of the action including the costs of this application, such costs to include one instructing and one instructed counsel.

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SCHICKERLING A.J.

ON BEHALF OF THE 1ST & 2ND APPLICANT Ms B Van Der Merwe (Adv).
INSTRUCTED BY **Van der Merwe-Greeff Inc**

ON BEHALF OF THE RESPONDENT Mr. Mbaeva
INSTRUCTED BY **Mbaeva & Associates**