REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 55/2013

In the matter between:

PATRICK INKONO **APPLICANT**

and

THE COUNCIL OF THE MUNICIPALITY OF WINDHOEK **RESPONDENT**

Neutral citation: *Patrick Inkono v The Council of the Municipality of Windhoek* (A 55/2013) [2013] NAHCMD 140 (28 May 2013)

Coram: Schimming-Chase, AJ
Heard: 7 March 2013
Delivered: 28 May 2013

Flynote: Practice – Applications and motions – Urgent applications – Requirement of Rule 6(12)(b) of Uniform Rules of Court that applicant must show that he or she cannot be afforded substantial redress at hearing in due course – Case to be made out in founding affidavit.

Practice – Applications and motions – In terms of Rule 6(5)(e) the court may in its discretion permit the filing of further affidavits. Respondent delivered a supplementary affidavit after the matter was heard. It was simply placed on court file without leave of the court. Supplementary affidavit accordingly not

considered.

Summary: When an applicant approaches the court in application proceedings on an urgent basis, the applicant is required to show good cause why the time periods provided for in Rule 6(5) should be abridged and why the applicant cannot be afforded substantial redress at a hearing in due course. The applicant should make out a case of clear urgency in the founding papers. The applicant's alleged urgency was related to a notice by the respondent that eviction proceedings would be commenced against him should he not vacate certain immovable property. It was clear on the papers that the applicant had not be served with any process dealing with the institution of any eviction proceedings either in the High Court or the Magistrate's Court. The applicant approached the court on 24 hour's notice for certain relief that was clearly premature as well as for an order interdicting the respondent from evicting the applicant. The applicant had not made out a case for urgency in the founding papers. Application accordingly dismissed with costs.

The respondent delivered a supplementary affidavit after the court reserved judgment seeking to place additional matters in evidence. Rule 6(5)(e) establishes clearly that the filing of further affidavits in applications is only permitted with the indulgence of the court. The supplementary affidavit was simply delivered and placed on the court file without leave of the court. No application was made for leave to place additional facts before court. Supplementary affidavit accordingly ignored.

ORDER

The application is dismissed with costs.

JUDGMENT

SCHIMMING-CHASE, AJ

[1] This is an urgent application launched by the applicant, Patrick Inkono, in the form a rule *nisi* for the following relief:

> "(a) interdicting the respondent / any other person from cancelling a valid sale agreement between the applicant and the respondent;
>
> (b) interdicting the respondent from transferring Erf 3395 Okuryangava, Katutura, Windhoek to the alleged heirs of the deceased or any other person except the applicant; and
>
> (c) interdicting the respondent from evicting the applicant from Erf 3395 Okuryangava, Katutura, Windhoek."

[2] The applicant also sought an order directed the respondent to transfer ownership of Erf 3395, Okuryangava, Katutura, Windhoek ("the property"), into his name. There was no prayer in the notice of motion requesting that the interdictory relief sought be immediately granted pending the return date of the rule *nisi*. This application was launched on 4 March 2013 and set down for hearing on 7 March 2013. It was served on the respondent on 5 March 2013 at 15h50. The respondent was accordingly provided one day to oppose this application.

[3] As is evident, the background to this application relates to the sale of the property. It appears from the founding papers that the respondent sold the property to the late Paulus Nghishiti on 30 October 2005. Mr Nghishiti passed away on 21 June 2009 and one Gabriel Ndakolute was appointed as executor to his estate. Transfer of the property was not registered in the name of the deceased.

[4] The estate fell in arrears with certain payments and the respondent initially placed the property on auction. However before the auction took place

Mr Ndakolute approached one Absalom Kaboy Tobias and a deed of sale was concluded between the respondent as the seller, Mr Ndakolute as the original purchaser and Mr Tobias as the proposed purchaser. This agreement was concluded on or about 20 January 2011.

[5] On the same date, Mr Tobias then sold the property to the applicant. On 4 February 2011 Messrs Ndakolute and Tobias settled the outstanding balance owing on the property. On 5 May 2011 a formal deed of sale of the property was concluded between the respondent as seller, Mr Tobias as original purchaser and the applicant as proposed purchaser. On 26 May 2011 the respondent addressed a letter to the applicant confirming that he had been substituted as the purchaser of the property.

[6] I point out that the property was not registered into the names of any of the above purchasers. Sections 14(1)(a) and (b) of the Deeds Registries Act, 47 of 1937 provide the following:

> "14 Deeds to follow sequence of their relative causes
>
> (1) Save as otherwise provided in this Act or in any other law or as directed by the court-
>
> (a) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;
>
> (b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land or of such real right: ..."

Section 14(1)(b) contains certain provisos which are not applicable in this matter.

[7] On or about 24 September 2012 and to the applicant's surprise, he received a letter from the Department of Planning, Urbanisation and Environment at the respondent informing that the sale of the property to him was in the process of being cancelled. The applicant's legal practitioner of record then addressed various correspondence to the respondent. This correspondence was merely attached to the founding papers. No reference was made to what portion of the correspondence the applicant wished to draw the respondent's attention to or what portion(s) were relevant for purposes of adjudicating this matter. I am constrained to reiterate the principles set out in Port Nolloth Municipliaty v Xhalisa; Luwalala v Port Nolloth Municipality[1] that the annexures to an affidavit are not an integral part of it, and an applicant cannot justify its case by relying on facts which emerge from annexures to the founding affidavit but which have not been alleged in the affidavit and to which the attention of the respondent has not been specifically directed. The principles relating to the contents of affidavits were generally set out in Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa[2] as follows:

> "It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."

[8] It was also held in that case[3] that it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions

---

[1] 1999 (3) SA 98 (C) at 111B-I.

[2] 1999 (2) SA 279 (T) at 323F.

[3] At 324F-G.

thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.[4]

[9] The contents of the correspondence was dealt with in argument by Mr Ipumbu, appearing for the applicant, and related mainly to the respondent's allegedly unlawful cancellation of the agreement of sale of the property, coupled with allegations that the respondent had not complied with a dispute resolution clause contained in the agreement. I do not propose to deal with these facts in view of the order I make. Mr Ipumbu however submitted that the respondent never responded to this correspondence but instead addressed a final eviction notice to the applicant on 26 February 2013. In this eviction notice the following was stated:

> "RE: FINAL EVICTION NOTICE – ERF 3395 OKURYANGAVA
>
> Reference is made to previous communication regarding erf 3395 Okuryangava. Reference is further made to our letter dated 24 September 2012 whereby you were informed that the sale of Erf 3395 Okuryangava to you will be cancelled and that the City will transfer the said property to the rightful heirs of the deceased, further reference is made to the letter dated 25 October 2012 of which you were given until 25 November 2012 to vacate the property of which you did not do.
>
> You are herewith kindly given a final notice to vacate the property not later than 10 March 2013.
>
> Should you fail to obey this final notice, further action will be taken."
> (emphasis supplied)

[10] This, according to applicant, gave rise to the urgency of this application as a result of which the respondent was given one day's notice to oppose the urgent relief sought. The respondent opposed the matter and only raised a

---

[4] Approved in Otjozondu Mining (Pty) Ltd v Minister of Mines and Energy and Another 2007 (2) NR 469 (HC) at para [11].

point *in limine* of lack of urgency.

[11] Mr Tjombe appearing for the respondent, submitted that the matter was not urgent and that nothing in the communications of the respondent to the applicant or his legal practitioners suggest that the respondent would take any unlawful or extrajudicial action to effect the eviction of the applicant from the property. Furthermore, the allegations in the answering affidavit on this issue was to the effect that any action to be taken by the respondent to evict the applicant would be way of summons or application proceedings, and the applicant could, if so advised, defend or oppose such proceedings. Mr Tjombe further submitted that our law clearly provides the applicant an opportunity to participate in such proceedings either by defending an action for eviction or by opposing an application for eviction, either the Magistrate's Court or the High Court.

[12] Mr Tjombe also submitted that the order sought in terms of prayer 2(b) of the notice of motion, namely interdicting the respondent from transferring the property to the heirs of the deceased was premature and thus there could be no urgency therein.

[13] I agree with Mr Tjombe's submissions on the lack of urgency of the application. I find that on the papers, the applicant has failed to show good cause why the time periods provided in Rule 6(5) should be abridged and why he cannot be afforded substantial redress at a hearing in due course. It is clear that the applicant was not served with an eviction order but a notice indicating that further action would be taken should he not vacate the property by a certain date. He was simply given notice that eviction proceedings would commence. The applicant cannot jump the queue on 24 hour's notice without there being any pending threat of eviction, irrespective of whether or not the applicant has a right to reside in the property or not. Before the court considers the merits of the application the applicant must make out a case for urgency and this was not done.[5]

---

[5] Mweb Namibia (Pty) Ltd v Telecom Namibia and Others 2012 (1) NR 331 (HC); Salt and

[14] In light of the above the application is dismissed with costs. Although Mr Tjombe submitted that this was a case which warranted a special costs order the applicant will be sufficiently mulcted with a party party costs order for proceeding with this ill-conceived application.

[15] What remains is to deal shortly with an issue regarding the filing of a further supplementary affidavit by the respondent on 11 March 2013 after the court had reserved judgment, as well as correspondence in response from the legal practitioner of the applicant. The supplementary affidavit was filed with the Registrar after it was delivered to the applicant, and then placed on the court file without leave of the court. In this regard it should be noted that Rule 6(5)(e) establishes clearly that the filing of further affidavits in application proceedings is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion where there is good reason for doing so. I am in respectful agreement with the approach adopted in James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons N.O.[6] as follows:

> "It is in the interests of the administration of justice that the wellknown and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received."[7]

Another v Smith 1990 NR 87 (HC).

[6] 1963 (4) SA 656 (A) at 660D-H.

[7] Approved in O'Linn v Minster of Agriculture, Water and Forestry and Others 2008 (2) NR 792

[16] I would have expected in light of the above authority an application for leave for the court to receive these further sets of affidavit. Considering the move towards a case management based system, even an approach in chambers by the parties would have considered. However, none was forthcoming. In light of the above, I exercise my discretion against the receiving of the further supplementary affidavit and have not had regard thereto.

[17] In light of the foregoing I make the following order:

The application is dismissed with costs.

_____

EM Schimming-Chase

Acting Judge

(HC) at para [30] and in Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 161 (SCA) at para [11]-[12].

APPEARANCES

APPLICANT	Mr Ipumbu Of Titus Ipumbu Legal Practitioners, Windhoek
RESPONDENT	Mr Tjombe Of Tjombe-Elago Law Firm Inc, Windhoek