Case No.: A. 340/2000

IN THE HIGH COURT OF NAMIBIA

In the application of:

TRANSNAMIB HOLDINGS LIMITED APPLICANT

and

JOHAN VENTER RESPONDENT

CORAM: LEVY, AJ

Heard on: 2000-11-15

Delivered on: 2000-11-17

JUDGMENT

LEVY, AJ: This application is brought to Court as a matter of urgency.

Mr P J v L Henning S.C and with him Mr J A N Stryom appear for the applicant and Mr R Heathcote is acting for respondent.

The applicant alleges in its founding affidavit that it is a parastatal company and the registered

owner of certain immovable property known as Phillip Troskie Building. Applicant alleges further that respondent is in possession of this building and lets rooms therein to a very large number of students. All these allegations are not denied or disputed. Applicant alleges that on 31st May 1999 respondent purported to conclude a lease with a company known as TransNamib Limited (copy whereof marked "B" is annexed to its affidavit) but as from 1st April 1999 this company was no longer in existence. The aforegoing is common cause. Respondent contends that it is entitled to a rectification of the lease by substituting TransNamib Properties (Pty) Ltd for the non-existing company. Applicant does not deny that this is applicant's contention. The validity of the contention is disputed. It is common cause that in terms of annexure "B", the rental payable by respondent would have been N$60 000-00 per month and that this has not been paid.

In its Notice of Motion applicant prayed for the following orders:

> "1. That the Honourable Court shall, in terms of Rule 6(12)(a) of the Rules of this Honourable Court dispense with the time limits provided for in those rules and deal with this matter as one of urgency.
>
> 2. Ejecting the respondent from the Phillip Troskie Building situated at Erf 842, Windhoek, as well as from house number 65 situated on Erf 1209, Windhoek ("the premises").
>
> 3. In the alternative to paragraph 2, declaring the occupation of the premises by the respondent to be unlawful.
>
> 4. Ordering the respondent to pay the costs of this application.
>
> 5. Granting further and/or alternative relief."

But during the hearing Mr Henning amended those prayers to ask for a rule nisi returnable on 27th

November 2000, granting applicant the same relief.

Mr Heathcote argued four points *in limine.* Those were:

1. That the application was not urgent.
2. That the students occupying rooms in the building should have been joined as co-respondents.
3. That there was a pending *lis* between the parties.
4. That applicant should not have come to court by way of Notice of Motion as to its knowledge, there was a dispute of material facts which could not be decided on motion.

I deal with the question of non-joinder first because a certain admission in Mr Heathcote's Heads of Argument goes to the root of the dispute between the parties. In paragraph 14 of his heads he says:

> "The Respondent in this matter, is not holding the property through or under the Applicant."

He therefore admits that there is no *vinculum juris* between respondent and applicant and therefore between the subtenants and applicant.

It is common cause furthermore that the students are sub-tenants of respondent.

Furthermore as students there is no degree of permanence in their tenure.

It appears from two judgments in the appellate division of the Supreme Court of South Africa that in ejectment proceedings an applicant need not join sub-tenants. This is indeed our law particularly in a vindicatory action where the lessor of the sub-tenants is "not holding the property through or under the applicant, who is the owner".

Sheshe v Vereeniging Municipality 1951(3) SA 661 (A) at 667 A-B

Ntai & Others v Vereeniging Town Council & Another 1953(4) SA 579 (A) at 589 G-H

See also *Cooper, 'Landlord and Tenant'* 2nd Ed p 374.

1 therefore dismiss Mr Heathcote's contention that the sub-tenants should have been joined in these proceedings.

The main thrust of Mr Heathcote's argument was that the applicant should not have come to Court as a matter of urgency as the dispute between the parties had been raging for over a year.

In support of his argument he quoted *Luna Meubelvervaardigers v Makin & Another* 1977(4) SA 135 W, *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992(3) SA 500 W and *Salt & Another* v *Smith* 1991(2) SA 186 Nm.

The essential differences between those cases and the instant case is that in the present case the evidence supported by photographs is that the misuse of the premises by the students and the fdth and dirt in the premises makes these premises look like the Augean stables which Hercules was required to clean as one of his labours. In addition photographs show handles off doors and even

u damaged fire extinguisher on the floor. Mr Heathcote argues that these photographs were taken at a time that the cleaner was not on duty. It is unfair to blame a cleaner for the condition of the rooms and passages which are being let for people to live and study therein. A cleaner cannot he expected to repair broken doors and tiles.

An applicant is entitled to preserve its property from treatment of this nature.

Furthermore, the owner is not receiving one cent for property which has an agreed rental valuation of N$60 000-00 per month.

The aforegoing makes this an urgent application and in the circumstances of this case, applicant would not "have been afforded redress at a hearing in due course". If applicant had come to Court in the prescribed way, it would have involved considerable lapse of time. It's property would have deteriorated further and the financial loss would have increased and the prospects of recovering financial compensation appears to be remote. Investigations into respondent's financial position indicate that there is no immovable property registered in his name and the business of "The Little Sex Shop" which he once conducted is no longer functioning. Mr Heathcote points out that the applicant has delayed four to five months during which time he has not done anything and that the urgency is "self-contrived". The fact that a creditor delays in suing his debtor is not a justification for the debtor's failure to fulfil its obligations. In this case, the applicant only had knowledge of the condition of the building when an inspection thereof took place and the photographs were taken.

I point out that at no stage did Mr Heathcote complain about the "shortage of time" for filing affidavits and for preparing argument. The affidavits filed were full and detailed and Mr Heathcote's argument could not have been improved upon.

This is indeed an urgent matter and recourse to Rule 6(12)(a) was fully justified. Mr Heathcote's objection in respect of lack of urgency is dismissed.

Mr Heathcote's third objection *in limine* was that of *lis pendens.*

It is true that more than a year ago applicant instituted action against respondent for ejectment and that an application for summary judgment in that matter was dismissed. However, that matter was based on contract and this application is a vindicatory action. The ghastly condition of the premises, the filth and destruction of doors of rooms used for human habitation was not in issue. This was only recently discovered.

The present *lis* is certainly not the same one of which Mr Heathcote complains.

Cf. *Herbstein & Van Winsen, "The Civil Practice of the Supreme Court of South Africa'* 4th Ed. 249.

Mr Heathcote's fourth objection *in limine* was that there are many factual disputes which cannot be decided on affidavit.

First of all it is not every dispute of fact raised by a respondent on the affidavits which prevents

immediate adjudication. The dispute must be material to the issue.

Room Hire Co (Pty) LtdvJeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T)

The disputes referred to by Mr Heathcote in no way deal with or affect applicant's vindicatory action. Respondent does not dispute applicant's ownership of the immovable property or that he is in possession thereof. In fact, respondent concedes in his Heads of Argument (paragraph 14) that he "is not holding the property through or under the applicant". There is therefore no dispute on material issues.

Applicant relies on its common law right to eject respondent and on certain cases in support thereof, the classical case being *Krugersdorp Town Council v Fortuin* 1965(2) SA 335.

The fact that an applicant sets out the history of the case in his affidavit does not necessarily detract from his vindicatory action.

cf. *Sorvaag v Pettersen & Others* 1954(3) SA 636 (C)

Mr Henning quoted *Chetty* v *Naidoo* 1974(3) SA 13 (A) the head-note whereof reads as follows:

> "Although a plaintiff who claims possession by virtue of his ownership, must *ex facie* his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity of this proof falls away if the defendant does not invoke the right conceded by the plaintiff but denies that it existed. Then the concession becomes mere surplusage as it no longer bears upon the real issues then revealed. If, however, the defendant relies on the right conceded by plaintiff, the latter must prove its termination. This is so, not only if the concession is made in the statement of claim, but at any stage."

The applicant was in the circumstances entitled to an order vindicating his property. I am not prepared to grant an order or express an opinion in respect of prayer 3 as this was not properly argued.

The order of the Court therefore is:

1. That the applicant's failure to comply with the Rules of Court in respect of time limits in motion proceedings is condoned and the matter is heard on an urgent basis.

2. That a *rule nisi* do hereby issue calling upon the respondent to show cause, if any, on Monday 27th November 2000, why:

   (i) he should not be ejected forthwith from the Phillip Troskie Building situated on Erf 842, Windhoek and from house number 65 situate on Erf 1209, Windhoek.

   (ii) in the event of respondent or anyone holding under him failing to vacate the premises when called on so to do, the Deputy Sheriff shall not physically remove such person or persons with their belongings from the aforesaid premises.

   (iii) he should not pay the costs of these proceedings which shall include the costs of two instructed counsel and one instructing counsel.

For the applicant: **Advocate P.J.vL. Henning S.C. and with him**

Advocate J.A.N. Strydom

Instructed by: **Messrs Ellis & Partners**

For the respondent: **Advocate R. Heathcote**

Instructed by: **Messrs van Vuuren & Partners**