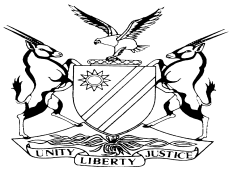

SUMMARY **REPORTABLE**

CASE NO.: A 128/2009

WERNER PETRUS vs. JASON NGHIDINUA AND ANOTHER

PARKER, J

2009 April 29

Practice - Applications and motions – Urgent application – Court affirming principle that application, urgent or otherwise, not appropriate where there are bona fide, substantial and material disputes of facts.

Practice - Applications and motions – Application proceedings where action proceedings have already been instituted to deal with the same disputes of facts – Court finding that application cannot be allowed where grant of order would have the effect of setting aside default judgment in the absence of rescission application – Court dismissing application with costs.

Held, On the facts, it is not a proper case in which to send parties to trial where default judgment granted in action proceedings subsists and is valid.

REPORTABLE

CASE NO.: A 128/09

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WERNER PETRUS **APPLICANT**

and

JASON NGHIDINUA **1ST RESPONDENT**

JOHN PULESTON **2ND RESPONDENT**

CORAM: PARKER, J

Heard on: 2009 April 16, 20, 21

Delivered on: 2009 April 29

JUDGMENT:

PARKER, J.: [1] In this matter, application is made by the applicant on urgent basis in which he has prayed for relief in the following terms:

2.1 Ordering the Respondents to fully restore possession and occupation of the farm Ekango Litoka, at Omangeti to the Applicant, and returning his livestock to the farm and other goods taken out of the farm on 03 April 2009 by the Respondents;

2.2 Interdicting and restraining the first and second Respondents from interfering with the Applicant's peaceful occupation of and farming at the farm Ekango Litoka;

2.3 Pending the finalization of this application no steps shall be taken to deny the applicant, his family and his livestock peaceful occupation of the farm Ekango Litoka;

3. That orders sought and granted under paragraphs 2.1; 2.2 and 2.3 serve as interim relief with immediate effect;

4. Costs of suit to be paid by any of the Respondents opposing this application;

5. Grants further and/or alternative relief.

6. ……

[2] The applicant, represented by Mr Namandje, filed the Notice of Motion on 14 April 2009, and gave notice that the application would be made at 09H00 on 16 April 2009 (or "as soon thereafter"). The Notice of Motion was served on the first respondent's legal practitioners at 14H27 on 14 April 2009. The applicant's legal practitioners are aware that the first respondent resides in one of the northern regions of the country. The upshot of this is that the applicant gave the first respondent less than 24 hours during which the first respondent

would give instructions telephonically to his legal practitioners who are based in Windhoek for the legal practitioners to prepare opposing affidavit and any confirmatory affidavit thereto, get those affidavits settled by the deponents, file the papers in the Court and serve them on the applicant's legal practitioners - all before 09H00 on 16 April 2009. In my opinion, to expect the first respondent to do all that in less than 24 hours is, on the facts of the case as will become apparent shortly, to deny the first respondent his constitutional right to fair trial guaranteed to him by the Namibian Constitution (See *Hewat Beukes t/a M C Bouers and Others v Lüderitz Town Council and Others* Case No.: A 388/2009 (Unreported).)

[3] For the aforegoing reasons, Ms Angula, counsel for the first respondent, applied for a postponement of the hearing of the application in order to afford the first respondent the opportunity to file opposing papers. I granted Ms Angula's application; and I think the applicant ought to be mulcted in costs for the postponement, because the postponement was brought about by the applicant's unacceptable conduct described above.

[4] I pass to consider the main issues. On the facts of the case, should the Court grant the relief sought in para (1) of the Notice of Motion and hear the application on urgent basis? Ms Angula argued on a preliminary point that the grounds for urgency relied on by the applicant have been contrived by the applicant and the urgency is self-created. Besides, this preliminary point, Ms Angula pressed on the Court to dismiss the application because there are disputes of facts which cannot be resolved on the papers in application proceedings. Mr Namandje argues contrariwise: he says as follows: the applicant is not seeking a final order but a *rule nisi*; and on the return date, the Court can revisit the order and discharge it. With respect, I cannot

accept that argument. If there are, indeed, disputes of facts, which cannot be resolved on the papers, it matters not whether the Court attempts to resolve them at the *rule nisi* stage or at the return date stage.

[5] For a good reason which I shall demonstrate in due course. I shall deal with the issue of disputes of facts first, because it would dispose of the urgency issue, too.

[6] In *Hendrik Christian v Metropolitan Life Retirement Annuity Fund and Others* Case No.: A 376/2008 (Unreported) at pp 6-7 I considered the different ways whereby a litigant desirous of obtaining judicial relief can proceed to the Court, and I stated as follows:

> A litigant desirous of obtaining judicial relief can proceed to the Court in one of the two different ways. The litigant can issue an appropriate summons with particulars of claim in which its case is set out and the defendant will have to file a plea to reply to the allegations in the particulars of claim. The plaintiff can but rarely does replicate to the plea. In any event the matter will then be set down for trial and both sides will call witnesses to give oral evidence, if so advised. The witnesses are cross-examined and their credibility is assessed by the Court. If documents are relied on, the makers of the documents may be brought to Court to give evidence on them. By so doing, the credibility of not only the witnesses but also the documents is assessed; and what is more, the probative value of the documents is also assessed in the process. The other procedure is by way of notice of motion and affidavits. There can be no cross-examination of affidavits and, therefore, an assessment of credibility of witnesses is hardly possible. Consequently the procedure by way of summons is the only correct procedure where there is a genuine, material and substantial dispute of fact. In this regard, a principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he or she nevertheless proceeds by way of motion he or she runs the risk of having

his or her case being dismissed with costs. (*Mineworkers Union of Namibia v Rössing Uranium Limited* 1991 NR 299; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A))

[7] In the present case, the applicant has opted to approach the Court by Notice of Motion and affidavits. But from the papers I find that there is a substantial and genuine dispute of facts on the material aspects which go to the root of the *lis* between the applicant and the first respondent. For example, the 2nd respondent has stated in his supplementary affidavit thus: 'I state categorically that I evicted the applicant from farm Onyaivale and not from farm Ekango Litoka.' The second respondent goes on to state in the affidavit that he was able to determine that the farm in respect of which he executed the eviction order granted by this Court on 24 October 2008 in action proceedings instituted by the first respondent (I shall return to the eviction order in due course.) because, *inter alia*, the applicant's wife 'did not mention that we (i.e. the first respondent and his assistant) were at the wrong farm' and also 'none of the people who were present at the eviction stated that the eviction is being carried out at the wrong farm or that we (i.e. the second respondent and his assistant) were at the wrong farm.' But how would the wife of the applicant and 'the people who were present at the eviction' tell the second respondent that he was carrying out the eviction in respect of the 'wrong farm' when, from the papers, it is not clear whether there is only one farm involved and one may call it either 'Onyaivale' or 'Ekango Litoka', depending on whether one is standing behind, so to speak, the applicant or the first respondent or whether farm 'Onyaivale' and farm 'Ekango Litoka' are two different farms situated in different land areas.

[8] In this regard, take, for example, the contents of para 34.3 of the first respondent's opposing affidavit that was filed with the Court on 16 April 2009: 'The farm presently occupied by the applicant is one and the same farm I allege to be Onyaivale whilst applicant considers the same farm to be Ekango Litoka.'

[9] The sum total of the aforegoing is that there is not one grain of doubt in my mind that there are genuine and substantial disputes of facts on the material aspects on the papers. Accordingly, the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) is not of assistance on the facts of this case. I am also alive to the proposition that:

> It is equally undesirable to accept disputes of fact at their face value, because if that were done an applicant could be frustrated by the raising of fictitious issues of fact by a respondent. Accordingly, a Court should in every case critically examine the alleged issues of fact in order to determine whether in truth there is a dispute of fact that cannot be satisfactorily determined without the aid of oral evidence.

(*Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) at 336C-E, cited with approval in *Erastus Tjiundikua Kahuure and Others v Mbanderu Traditional Authority and Others* Case No.: (P) A 114/2006 (Unreported))

[10] With respect, I fail to see what assistance the applicant can derive from *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141, referred to me by Mr Namandje. I cannot see how by merely looking at the papers in the instant case, this Court is able to decide that the probabilities do not favour the first respondent and that reasonable prospects exist that oral

evidence would tip the balance in favour of the applicant. What I am rather certain about, as I have mentioned previously, is that the first respondent's papers raise bona fide or genuine disputes of facts on material aspects that go to root of the matter and the first respondent's denial of the applicant's averments are not far-fetched or untenable (See *Ripoll-Dausa* supra.) and so, therefore, I hold that the issues dividing the applicant and the first respondent cannot be resolved on affidavits; and for that reason, I have come to the inexorable and reasonable conclusion that I should exercise my discretion in favour of refusing to hear the application on urgent basis or at all.

[11] But that is not all. The first respondent has stated in his opposing affidavit that it was because, in his view, the disputes of facts could not be resolved on affidavits, and that was why he instituted summons in action proceedings. As I mentioned previously, in the action proceedings, this Court granted a default judgment in which it granted an order on 24 October 2008 (the 24 October 2008 order) where it was ordered that:

> (1) The defendant be evicted from farm Onyaivale situated in the Omangeti area, Oshikoto region; and
>
> (2) Costs of suit.

[12] The 24 October 2008 order still subsists and it is valid; but the applicant has decided not to apply for a rescission of the default judgment that was granted in his absence in which that order was made. He has rather taken the route of making an application on notice of motion. In my opinion, if the application were granted, it would have the irrefragable effect of

setting aside the 24 October 2008 order in the absence of a rescission order; and that, this Court should not and cannot do. In this regard, in response to a question by me as to what effect the relief the applicant has prayed for in the present application would have on the 24 October 2008 order, Mr Namandje said that the present application is in respect of farm Ekango Litoka. That, with respect, is a disingenuous response by all account; just as the present application on notice of motion is a disingenuous attempt by the applicant to skirt around the aforementioned eviction order granted in action proceedings in a default judgment. I say so because whether the applicant was evicted from farm Onyaivale or farm Ekango Litoka and whether farm Onyaivale and farm Ekango Litoka is one and the same farm constitute genuine, substantial and material disputes of facts which divide the applicant and the first respondent. And it was for that reason that the first respondent instituted action proceedings in order for the Court to resolve the dispute in trial, as aforesaid. Furthermore, in pursuit of this chicanery, the applicant did not even disclose in the present application the summons that was served on him on 4 September 2008 and which generated the default judgment given by the Court on 24 October 2008, as I have mentioned previously.

[13] Besides, in March 2009, the applicant's wife was warned to vacate the premises, failing which the eviction would take place on 3 April 2009. No action was taken by the applicant. The applicant decided to wait until 3 April 2009 to be evicted and then rush to the Court with the present application which he now prays the Court to hear on urgent basis.

[14] In reality, from the aforegoing reasons and conclusions I find that what the applicant now requests the Court to do is for the Court to disregard the default judgment granted by this

same Court, which, as I have mentioned previously, is valid and still exists, even if the applicant's request is dressed in the cloak of interim interdict. If I were to grant the applicant, I would be setting a dangerous precedent in that I would be telling litigants that they are at liberty to simply disregard default judgments and institute application proceedings to resolve disputes decided by the default judgments. On this point, I accept Ms Angula's submission thereanent. For the aforegoing reasons, too, I have come to the conclusion that I should exercise my discretion in favour of refusing to hear the application on urgent basis or at all.

[15] For the aforegoing reasons and conclusions therefor, I hold that this is not a proper case where the Court may order the parties to go to trial. There are already instituted action proceedings on the same disputes in which a valid default judgment exists, as I have said more than once. The views I have expressed and the reasons therefor logically dispose of the issue of urgency because, as I have mentioned more than once, for the reasons given, this Court cannot hear the application on urgent basis or at all. It follows that the application falls to be dismissed with costs.

[16] In the result, the order of this Court is that the application is dismissed with costs, including costs occasioned by the postponement of the matter on 16 April 2009.

PARKER, J

ON BEHALF OF THE APPLICANT: **Mr Sisa Namandje**

Instructed by: **Sisa Namandje & Company**

ON BEHALF OF 1ST RESPONDENT **Ms E M Angula**

Instructed by: **LorentzAngula Inc.**