A. 146/92 1992/09/04

EMIL APPOLUS VERSUS ANDREAS ZAK SHIPANGA AND ONE OTHER

Frank J

EXECUTION OF ORDER PENDING APPEAL - Appeal against order sought - abandonment of original relief sought - effect of notice of appeal - discretionary remedy - prospects of success where execution of order makes appeal illusory. Urgent Application - original application clearly urgent - answered by counter-application - application then withdrawn - counter-application remains urgent Recusal Judge giving order which is sought to be executed not prohibited from hearing later application.

C/K

IN THE HIGH COURT OF NAMIBIA

In the matter between

EMIL APPOLUS **APPLICANT**

versus

ANDREAS ZAK SHIPANGA **FIRST RESPONDENT**

THE DEPUTY SHERIFF OF WINDHOEK **SECOND RESPONDENT**

CORAM: FRANK, J.

Heard on: 1992.09.02,04
Delivered on: 1992.09.04

JUDGMENT

FRANK, J.: In this matter there is an application that the execution of an order by myself made on the 28th August 1992 ordering a sale in execution to continue tomorrow be authorised to continue even though a notice of appeal has been filed against my order issued on Friday the 28th August 1992.

To avoid confusion in this matter I refer to Mr Emil Appolus as the Applicant and to Mr Andreas Zak Shipanga as the First Respondent in this application.

It is apposite briefly to state the history of this application as the affidavits in support of the original application launched on Friday the 28th August 1992 is incorporated into the papers of this application by the Applicant.

On Friday the 28th August 1992 the Applicant obtained an

order postponing a sale in execution to be held on the 29th August for one week on an urgent basis. The one week postponement was at the request of counsel who appeared for the Applicant. Despite the fact that the Applicant obtained the order that he requested an appeal against this order was noted. Applicant now says on affidavit as his
representative did not contact him before seeking the order, he cannot be said to have waived his rights to appeal. In my view, that is not correct. The Applicant abandoned the relief sought in the notice of motion and asked for the week postponement and whether his counsel did so mistakenly is neither here nor there.

See: Gcayiya v Minister of Police, 1973(1) SA 130 (A) 135 E-G;
S.A. Yster en Staal Industriele Korporasie Beperk v Van der Merwe. 1984(3) 706 at 714 I - 715 B; Florence v Florence, 1948(3) SA 71 (N) at 73; Joseph v Joseph. 1951(3) SA 776 (N); Ex Parte Nel. 1957(1) SA 216 B at 218 - 219.

Although the question as to whether the Applicant abandoned his original relief at the hearing on the 28th August 1992 is something the Appeal Court will have to consider I mention it here as it seemed have caused some confusion in this application.

The Applicant launched an application seeking that the sale in execution, that I have already referred to, which was postponed to the 5th September 1992, i.e. tomorrow, be stayed pending the outcome of the appeal. After this application was served on the First Respondent, the First

Respondent launched a counter application asking that the sale in action not be stayed but be executed, as I have already stated. Applicant, after the launching of the counter application by the First Respondent then withdrew his application because according to his counsel the sale would automatically be stayed by the noting of the appeal. I am not sure that the Applicant is correct. The effect of the notice of appeal would be that no results can flow from the order granted which would place the parties in a position different from that which they enjoyed immediately before the order was granted.

See: Alexander v Jokl & Others, 1948(3) SA 269 (WLD) at 278.

This would mean that there would be no court order interfering with the sale and that the sale would have to go ahead. The difficulty that does arise in a matter like this is, of course, that the date on which the sale had to go ahead had already expired. Be that as it may, seeing that it is clear that the Applicant in essence wants the sale stayed and that is why he is opposing the relief sought by the First Respondent and the First Respondent wants to execute on the order granted and the issues have been dealt with on the papers before me and also to avoid possible further applications in this matter between the parties, I intend dealing with the matter. I know that, as far as the onus is concerned, that an Applicant must make out a case for the relief sought, but, in my view, the question of onus is not in any way decisive in the application before me, as

I will deal with the facts later, which indicate that the facts that I am going to rely upon to come to my decision is basically common cause between the parties.

For reasons that will become apparent later I deal with this application as if it was brought after attachment and advertising in full compliance with the rules of Court. The granting or not of an order allowing the sale to proceed is in my discretion, as was stated in Rood v Wallach, as quoted in Herbstein and Van Winsen. The Civil Practice of the Superior Court in South Africa. 3rd ed. at page 721:

> "In considering in each particular matter what real and substantial justice requires, the court may take into account all the circumstances surrounding the case. And among other things it would be justified, I think, in taking into consideration the special circumstances of the parties. Cases may occur in which it would be extremely hard on the losing party to order him to pay the amount of the judgment before appealing; but there may be other cases in which it would be equally hard that the successful party should not receive payment of the amount awarded, because an appeal has been noted. The court should be chary of taking the circumstances of the party into account, but it may in some cases consider them....."

Before I proceed I wish to state that, in my view, it would be wrong to assess the Applicant's prospects of success in a matter such as the present one and that is so, because, the whole object of the appeal would be completely defeated if execution proceeds.

See: Wood N.O. v Edwards & Another, 1966(3) SA 443 (R) at 446.

I must state that I do not wish to consider the prospects of success at this stage despite being urged to do so by counsel for the Applicant who says it is relevant, at least in the sense of deciding whether the appeal is vexatious or frivolous.

As already stated I proceed to assess the application on the basis that a proper warrant of attachment and proper advertisement as far as the sale was concerned was issued and published. If this was so, what would the Court's attitude have been towards the Applicant's application that he be afforded until December to pay the outstanding debt.

It is clear from the papers before Court that a judgment was granted against the Applicant during 1989 and that the judgment debt that is now sought to be recovered at the sale is pursuant to that order. It is also further common cause that the Applicant, on two occasions, made offers to the attorney acting on behalf of the First Respondent to repay the judgment debt in instalments. In both those instances the Applicant reneged on his undertaking although it is fair to say that in the second case there was a counter offer made which the Applicant just ignored.

The Applicant in his affidavit now before Court explains that in the first instance where an offer was made he was under the impression that he had prospects to repay the

amount but that the prospects did not materialise and he therefore did not do anything else. He does not say that he approached the attorneys again and told them about his problems. As far as the second occasion is concerned he states that he made an offer of R600, which was not accepted. A counter offer of R700 was made and he therefore also decided that nothing could be done about it. Once again he did not contact the attorneys of the First Respondent to indicate that it was impossible for him to come up with the R700 but that he stood with his offer of R600.

The Applicant now in his papers state that since the beginning of this year he is being entitled to an income of R6 000 per month, but because of his various other debts he could not utilise this money to pay the First Respondent. This he does without giving any detail as to what his other commitments are supposed to be and he just makes the allegation, as I have just stated. He furthermore stated in his application that he was a 50% shareholder in a company which has, according to him, unencumbered assets to the tune of R490 000 of which approximately R200 000, according to him, is cash on hand. In his application now he says he cannot raise a loan from anyone and also not from the company because the R200 000 in cash will be needed as operating expenses. He does not give any details nor does he give any reasons as to why the company of which he is such a big shareholder is not able to raise the money now owing to assist him nor as to why he could not make a better offer or cannot make a better offer than the one he made to the First Respondent. In fact he says that because of his

track record in the past he is not credit-worthy and he is unable to raise money from any institution, whatsoever. With such a track record and with the facts I mentioned above, in my view, it is clear that the First Respondent was entitled to react to the offer he made them the way he reacted.

Having come to that conclusion I wish to state once again that even had all the requirements of the rule been complied with - the non-compliance which he now intends taking on appeal - he would not have been able to raise the money, because on his own version he will only be able to pay in December. Even in this application he persists in that version. The reasons that he advances for only being able to pay in December I find unacceptable. I would not in my discretion, even had all the rules been complied with, had given him the opportunity to effect payment as he asked.

It seems to me that the prejudice he complains about of is the fact that he will lose a valuable asset if his 50% share is sold because firstly, the share would not fetch the market value thereof and secondly, it will be potentially damaging to him as far as his future income earning potential is concerned.

As far as the fact that the share will not realise its full value is concerned, I wish to state that if the sale is properly advertised and if what the Applicant told the Court is correct, I have no doubt that he should be able to raise a substantial amount from the sale of the share. As far as

his future potential loss is concerned, I am very dubious about this as his co-shareholder in his urgent application launched in this matter stated that the concession that the company had apparently could be withdrawn at the whim of the Applicant. He states in paragraph 5, that is the co-shareholder, Mr Japhet Shapama Hellao, states the following:

> "If the share certificate of the Applicant is sold and the Applicant withdraws the fish concession from the company BLUE RIBBON FISHING (PTY) LTD, the said company will not be able to do business anymore and will result in irreparable loss for me".

It is thus not clear from the Applicant's papers whether he will indeed suffer this loss as it seems that he would be able to withhold or to keep the concession apart from the assets of the company and the purchaser of the share would not as such become entitled to the benefits of the concession. The fact that he would perhaps be prejudiced in the sense that the shares would be undervalued at the sale by the prospective purchasers is, in my view, in the circumstances of this case not a factor to be considered and indeed as was stated in Sharp v Grobler. 18 CTR, 485 where a stay was sought on the understanding that if the property were realised at a later date, there would be a rise in the property market and where the court per Maasdorp, J. said:

> "No creditor is bound to wait until a fair value can be obtained by administering the estate carefully. He is entitled to obtain his execution at once".

In the circumstances of this case where the Applicant has

not made out any acceptable reasons as to why he should be afforded the opportunity to pay off his indebtedness in the way he wishes to pay it off which, in my view, is a totally unreasonable taking into account his financial position, I cannot but dismiss any stay in the execution of the order.

As I have stated the above conclusion I have reached on the basis that there was no defects in the writ of attachment or in the advertisement issued pursuant to the writ of attachment.

From the founding papers, however, it is clear that on those papers at least the writ of attachment was not dealt with in terms of the rules and this is one of the matters which the Applicant tends taking on appeal. The question, however, in my view, is whether the Applicant would have suffered any prejudice had the rule be complied with because if the rule had been complied with, he would have been forced to make payment. As I have already indicated, there is no indication that he would have been in a position to pay had the rule been complied with.

It appears from the papers before me that the postponement of the sale from the 29th August to the 5th September, which was ordered by me, appears not to have been done in the correct fashion. An attorney who filed an affidavit on behalf of the Applicant states that he attended the auction on the 29th August and that it was not publicly announced at that auction that the sale was being postponed for one week. Mr Grobler says that this is at least potentially

prejudicial to the Applicant and the Applicant himself also says so in his affidavit.

I agree with the submission by Mr Grobler. It is clear that the Applicant will only be dealt with fairly if all potential purchasers are made aware of the fact that the share is being sold at a public auction and I do, therefore, intend making an order that the sale proceed but I further intend framing the order in such a way as to protect the interests of the Applicant and even a possible interest of his co-shareholder, Mr. Hellao, in the company if that is possible.

Had the warrant of attachment been effected properly the Applicant would have had been given notice of the attachment, which according to the founding papers in the original application, he was not given and the advertisement for the sale in execution would not have proceeded until at least 15 days after the writ of attachment. I intend taking this into account in the ultimate order I propose making. I also take into account that the Appellant, on his own version, obtained knowledge of the intended sale in execution on the 22nd August 1992. In essence what I intend doing is to give him all the time that he would have received had the writ of attachment been executed properly running from the 22nd August 1992, which is the date that he received knowledge of the intended sale of the share certificate. In that way there can be no prejudice whatsoever to him in that he will have all the opportunity he would have had, had the writ of attachment and the sale

been effected properly in accordance with the rules and, as I have already said, if he had then brought an application for the stay on the same grounds that he now brings I would have, in my discretion for the reasons I have already mentioned, refused it.

Before I come to my proposed order, I wish to deal with certain other matters which were raised during the course of the application. Mr Smuts took the point that the

Applicant's notice of appeal was a nullity and that he did not comply with the rules. Whether a notice of appeal is a nullity is normally the prerogative of the Appeal Court to decide and furthermore, in the circumstances of this case where the Applicant has a right of appeal and he is still well within time to amend his notice without getting anybody's leave, should he feel it is defective, I am not prepared to decide this matter on such a technical aspect as to whether the notice of appeal by the Applicant is defective or not.

Right at the beginning of this application Mr Grobler, on behalf of the Applicant, asked me to recuse myself from this application because, according to him, that would amount to this Court sitting on appeal on its own judgment. I refused to recuse myself as I could not find any reason as to why I could not hear the matter. It was not a question of sitting on appeal on my own judgment. As far as the prospects of success might have become an issue, it often becomes an issue when leave to appeal is granted or is sought, and in any event the considerations in an application such as is

before Court at this stage is completely different from the considerations that were before the Court at the time the original application was heard.

I wish, however, to state in passing, as already indicated at the beginning of this judgment where I dealt with the abandonment or not of the appeal, that I am of the view that the Applicant's changes of success is slim indeed and if I were of the view that his prospects of success was indeed good, I would have considered that as a factor in his favour. However, as I have already said, the fact that I am of the view that his changes of success are slim, is not taken into account as a factor against him in so far as this judgment is concerned.

The only other issue which remains is that another point in limine taken on behalf of the Applicant was that the First Respondent did not make out a case for the matter to be heard on an urgent basis, as provided for in the rules of court. The Applicant initiated this application and it was clearly urgent when he initiated it because at that stage he was still under the impression that if he did not get an order the sale would proceed tomorrow. The First Respondent was entitled to respond to that application as he did, and was also entitled to bring a counter application as the rules provide for it and the fact that the Applicant then withdraws his application which was definitely an urgent matter does not suddenly remove the feet from under the First Respondent in his counter application. Had the Applicant proceeded with his application it would clearly

have been apposite to deal with the counter application at the same time as it dealt with the same issue and it would obviously be totally inapposite to deal with the two applications piecemeal because notionally the one is urgent and the other one is not urgent. It is so that there is no express allegations that the matter is urgent and of the prejudice that would be suffered if the matter is not dealt with urgently and there is case law which says that one must set this out in one's affidavit. It should not be left to implication and deduction for the Court, but there is also a case, the name of which I unfortunately cannot recall, where it was held that where it is clear from the facts in the matter and not by way of implication or deduction that the matter is an urgent one, that the Court should proceed on an urgent basis. The Court should not get bogged down in technicalities and not hear the matter as an urgent one where the facts before Court indicates that it is an urgent matter and in this case this was exactly such a matter.

I therefore make the following order:

That the sale in this matter is postponed to the 19th September 1992 and that it is ordered that the sale shall again be published in the necessary newspapers as required by the rules of court to take place on the 19th September this year and that the notice of appeal lodged by the Applicant in this matter shall not have the effect of staying the sale on the 19th September this year. I may just in passing mention that this does not necessarily mean

that the way is not open for the Applicant in this matter, should he feel that he can come up with a reasonable offer, to approach the Court on the basis of the Rules of Court or that the parties cannot settle this matter, because the sale has been postponed. Should that happen, the necessary effect of such agreement or such further application will have to be considered prior to the sale.

I now deal with the costs of this matter:

The Applicant, as already indicated, launched an application which he withdrew. The Respondents' launched a counter application which, as is clear from the above order, have has been partially successful. Seeing that the Applicant has withdrawn his original application the costs relating to the original application, namely the notice of motion and the affidavits annexed thereto must be borne by the Applicant.

As far as the counter application is concerned it has been substantially successful and the costs, therefore, must also be borne by the Applicant.

In the result the application by the First Respondent is granted with costs as amended and the costs of the application launched by the Applicant and which he withdrew, shall also be borne by the Applicant.

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