



'Reportable'

SUMMARY

CASE NO.: A 150/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

Naftalie Nathanael Gaoseb and Another v Standard Bank of Namibia Limited and 5 Others

PARKER J

2011 August 12

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- Practice** - Judgment by default – Application for rescission of in terms of rule 44 (1) (a) of the Rules of Court – When granted – Relying on earlier authorities, Court concluding that judgment was not erroneously granted as no irregularities have been shown to have been committed in these proceedings and it was legally competent for the Court to have made the order – Court confirming earlier authorities that such judgment was granted not on the basis that the applicants (defendants) do not have a defence: it was granted on the basis that the applicants (defendants) have been notified of the plaintiff's claim as required by the Rules, that the applicants (defendants), not having given notice of an intention to defend, are not defending the matter and that the plaintiff is in terms of the Rules of Court entitled to the order sought and granted.
- Practice** - Service of process – Service effected by Assistant Deputy Sheriff by affixing copy of process on the main front gate of the *domicilium citandi et executandi* chosen by applicants – Court finding that that constitutes proper service in terms of rule 4 (1) (a) of the Rules of Court.

Held, that while 'deliver' (and its grammatical derivatives) may connote handing over the process to a person at the place of service, 'leave' (and its grammatical derivatives) connotes the opposite; otherwise the provision would be otiose if 'delivering' and 'leaving' were to carry the same meaning, particularly where the disjunctive 'or', whose grammatical object is to link alternatives, is used to link 'delivering' and 'leaving' in the said rule. Proper service is therefore effected – in the manner of 'leaving' – within the meaning of rule 44 (1) (a) (iv) when the assistant deputy sheriff, for good and bona fide reason, affixed a copy of the process to be served on the applicants on the main front gate of the *domicilium citandi et executandi*.

CASE NO.: A 150/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**NAFTALIE NATHANAEL GAOBEB
JANE GAOSSES****First Applicant
Second Applicant**

and

**STANDARD BANK NAMIBIA LIMITED
DEPUTY SHERIFF FOR THE
HIGH COURT OF NAMIBIA
REGISTRAR OF DEEDS
MINISTER OF JUSTICE
RALPH RICHERT MOUTON
HANNALIE DUVENHAGE****First Respondent
Second Respondent****Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent****CORAM: PARKER J**

Heard on: 2011 July 18

Delivered on: 2011 August 12

JUDGMENT

PARKER J: [1] The first applicant, who represents himself, and the second applicant, who represents herself, in May 2010, launched an application in which they seek the rescission of the default judgment granted by the Court against the applicant on 22 January 2010. They also seek the setting aside of the sale in execution held on 22 April 2010. The first respondent, represented by Mr Obbes,

has moved to reject the application. The other respondents have been cited because, in my view, they have interests in the outcome of the application. The applicants are married in community of property.

[2] The application is brought in terms of rule 44 (1) (a) of the Rules of Court and the applicants rely on the following three grounds, that is to say, (a) that the default judgment was (1) 'erroneously and improperly obtained on the basis of non-service of court processes on the applicants herein' (Ground 1), and (2) 'erroneously granted on the basis of exaggerated and untrue allegations of outstanding arrears on my (the first applicant's) home loan account at the time when the default judgment was sought against me (the first applicant)' (Ground 2), and (b) the 'resultant auctioning' of the immovable property in question is challenged on the basis of Article 16 of the Namibian Constitution as 'constituting improper infringement of my (the first applicant's) constitutional right to own immovable property' (Ground 3). It is to the interpretation and application of rule 44 (1) (a) of the Rules of Court that I now, therefore, direct the enquiry; and I shall apply my conclusions thereanent to the facts as I find them to exist.

[3] It goes without saying that rule 44 (1) (a), being a rule of the Court, is procedural in its scope and application; and in that case, it gives the Court a discretion in its application. And to the interpretation of rule 44 (1) (a); an order or judgment is 'erroneously granted' if there was an irregularity in the proceedings or if it was not competent for the Court to make the order or judgment, or if it was not legally competent for the Court to have made such order or to have given such judgment. (Erasmus, *Superior Court Practice* (2000): p B1-308A; and the cases there cited.)

[4] In the instant matter, it has not been shown that an irregularity was committed in the proceedings during which the default judgment was granted. Was it competent for the Court to have granted judgment by default? Relying on the authorities, the full-bench of the Court held in *Namib Building Society v Du Plessis* 1990 NR 161 at 163C-F; G that a mortgagee (the plaintiff) can as of right look to the mortgaged property to satisfy his or her claim, and if the plaintiff wants property mortgaged to him or her to be declared executable at once, he or she should claim it in the summons. In the instant case, the plaintiff did. The Court further held at 164G that the right to apply for writ of execution is a consequence of the judgment against the debtor (i.e. the applicants in these proceedings) and the 'presence or absence of a foreclosure clause ... makes no difference (at 164H).' In any event, in the instant case, it is a term of the mortgage bond (i.e. Clause 22.2 thereof) that upon a breach of the Bond, the Bank (the first respondent) may, inter alia, institute proceedings for the recovery of all amounts owing to the Bank and for an order declaring the mortgaged property executable. Furthermore, a judgment to which a party is procedurally entitled cannot be considered to have been erroneously granted by reason of facts of which the judge who granted the judgment, as he was entitled to do, was unaware (*Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 (SCA at 94. In the present application proceedings, the applicants allege facts of which the judge who granted the judgment by default was unaware. Furthermore, as was held in *Lodhi 2 Properties Investments CC* supra at 95D, where a plaintiff –

is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with,

does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. *The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.*

(Italicized for emphasis)

[5] From the foregoing, I conclude that it was competent for the Court to grant the judgment by default; and the judgment was granted not on the basis that the applicants (defendants) do not have a defence: it was granted on the basis that the applicants (defendants) have been notified of the plaintiff's claim as required by the Rules, that the applicants (defendants), not having given notice of an intention to defend, are not defending the matter and that the plaintiff is in terms of the Rules of Court entitled to the order sought and granted.

[6] The foregoing disposes of the applicants' Ground 2 and Ground 3, which I reject as baseless.

[7] From all this, it behoves me to proceed to the next level of the enquiry; and in that event, the only question that arises for determination is this: was there proper service of the combined summons in terms of the Rules? The applicants say there was 'non-service' (Ground 1); the first respondent maintains that there was proper service.

[8] The rule that has relevance in these proceedings is rule 44 (1) (a) (iv) which provides that service may be effected, 'if the person so to be served has

chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen.’ (Underlined and italicized for emphasis) On the papers filed of record, the evidence is clear, uncontroverted and incontrovertible that the applicants have chosen *domicilium citandi et executandi*. The mode of service allowable in terms of the aforementioned rule is by ‘delivering’ or ‘leaving’ a copy of the process to be served at the *domicilium citandi et executandi* chosen; in the instant proceedings by the applicants.

[9] In my opinion, while ‘deliver’ (and its grammatical derivatives) may connote handing over the process to a person at the place of service, ‘leave’ (and its grammatical derivatives) connotes the opposite; otherwise the provision would be otiose if ‘delivering’ and ‘leaving’ carry the same meaning, particularly where the disjunctive ‘or’ whose grammatical object is to link alternatives, is used to link ‘delivering’ and ‘leaving’ in the said rule. It follows that, in my opinion, proper service was effected – in the manner of ‘leaving’ – within the meaning of rule 44 (1) (a) (iv) when assistant deputy sheriff Fourie affixed a copy of the process to be served on the applicants on the main front gate of the *domicilium citandi et executandi*. And, *a fortiori*, Fourie explains – and I am satisfied with the explanation – why, he effected service of the process by ‘leaving’ a copy thereof at the main gate, as aforesaid. Fourie states that ‘the main gate to the premises was locked and access to the premises could not be gained. Nobody was seen on the premises who could accept service of the documents.’ (See Return of Service dated 10 November 20.) I am fortified in my conclusion by the high authority of Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa* 5th edn, Vol. 1, pp 351-352, and the cases there cited, that:

This subrule adopts the well-established practice according to which, if the defendant has chosen a place as a *domicilium citandi*, service there will be good even though the place is a vacant piece of land. Service at a chosen *domicilium citandi* will be good despite the fact that the defendant is known to be resident abroad or has abandoned the property. The same will apply even if it is impossible to find the defendant, a member of the household or any other person who can be regarded as representing the defendant.'

It follows that Ground 1, too, is rejected; it, too, is also baseless.

[10] In view of the determination I have made, I do not find it necessary to deal with the first respondent's application to strike out certain matters in the founding affidavit: the determination is unaffected by the matters sought to be struck out.

[11] The result is that in my judgment, the applicants have failed to make out a case for the relief sought in their notice of motion. I therefore refuse to exercise my discretion in favour of granting the relief. Whereupon; the application is dismissed with costs; such costs include costs attendant upon the employment of one instructing counsel and one instructed counsel.

PARKER J

COUNSEL ON BEHALF OF THE FIRST RESPONDENT:

Adv. D Obbes

Instructed by:

Etzold-Duvenhage

ON BEHALF OF FIRST APPLICANT:

In person

ON BEHALF OF SECOND APPLICANT:

In person