REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: A 99/2013

In the matter between:

BV INVESTMENTS 264 CC	**1ST APPLICANT**
FREDRICH WILLY SCHROEDER	**2ND APPLICANT**

and

FNB NAMIBIA HOLDINGS LTD	**1ST RESPONDENT**
ALLGEMEINE ZEITUNG	**2ND RESPONDENT**
ERWIN LEUSCHNER	**3RD RESPONDENT**
DEPUTY SHERIFF	**4TH RESPONDENT**
MINISTRY OF TRADE AND INDUSTRY: REGISTRAR OF COMPANIES AND CLOSE CORPORATIONS	**5TH RESPONDENT**
REGISTRAR OF DEEDS	**6TH RESPONDENT**

Neutral citation: *BV Investments 264 CC v FNB Namibia Holdings Ltd* (A 99/2013) [2013] NAHCMD 130 (17 April 2013)

Coram: GEIER J
Heard: **16 April 2013**
Delivered: **17 April 2013**

Flynote: **Applications and motions** - Urgent application – For leave to bring an urgent application for a stay in execution of the applicants' home – applicants had been interdicted from instituting further proceedings against first respondent - the

sale in execution, which the applicants had intend to stop, had however already occurred, at the time that the application for leave was heard – court holding that it clearly and obviously served no purpose to grant the applicant's leave to bring any such application after the fact and to grant to the applicants the indulgences sought, in circumstances, which would render the bringing of the intended application futile, as the to be interdicted event, was already overtaken by events. In the circumstances the court's discretion to grant the relief sought could not, and should not, be exercised in favour of the applicants – application accordingly refused.

Constitutional law - Urgent application – For leave to bring an urgent application for a stay in execution of the applicants' home – applicants had been interdicted from instituting further proceedings against first respondent – applicants' relying on Articles 25(2) and 12(1) of the Constitution – court holding that in circumstances of the case- where the to be interdicted event, was already overtaken by events - no infringement of Articles 25(2) or 12(1) would occur if the application were to be refused and any such refusal would also not, in such circumstances, deny the applicants access to justice – application accordingly dismissed with costs.

Summary: See flynote above.

ORDER

The application is dismissed with costs.

RULING

GEIER J:

[1] The 2nd applicant, and all who purport to act on his behalf, were interdicted by court order, dated 5 April 2013, issued in Case Number I 471/2010 from launching and or instituting and or issuing and or pursuing any further actions and or applications against the 1st respondent for an indefinite period of time alternatively until such time that the presently pending matter between the parties under case number I 471/2010 has been finalised, unless granted leave by this court to do so.

[2] The first and or second applicant's house was apparently due to be sold at a sale in execution set for 12h00 on 16 April 2013.

[3] The applicants apparently attempted to bring an urgent application at 09h00 in the morning of the 16th of April 2013, to stop the said sale in execution.

[4] Although this was not set out on the papers it seems that the applicants were advised that, in order to bring such application, they would first have to obtain leave from the court to do so, hence the present application.

[5] The founding papers filed in support of this application briefly indicate that a writ of execution, to sell on auction, the house of second applicant, was issued. No date on which such writ was applied for or when it came to the applicant's notice was supplied.

[6] No other details were supplied relevant to the execution process.

[7] Reference was then made to the referred to interdict and that the applicants desired to obtain the requisite leave.

[8] In support of their quest to obtain such leave, reliance was placed on Articles 25(2) and 12(1) of the Namibian Constitution.

[9] The second applicant, who appeared in person, on behalf of both applicants, underscored the applicants' reliance thereon in oral argument and, in essence, he

submitted that these rights would be infringed should leave to bring the intended urgent application not be granted.

[10] Mr Schickerling who appeared on behalf of the first respondent, who opposed the application, submitted, in the main, that the applicants' application was so defective that no relief could be granted on it.

[11] More particularly, he pointed out that the Notice of Motion contained no prayer for the main relief sought, save for the requisite prayer, standard to urgent applications, and in terms of which the court's indulgence was sought for the non-compliance with the normally applicable rules and forms and the prayer that the matter be heard as an urgent one.

[12] Mr Schickerling also pointed out that Rule 61(2)(b) had not been complied with in the sense that the circumstances, which rendered the matter urgent, had not been set out explicitly nor had the reasons, why the applicants could not be afforded substantial redress at a hearing in due course been set out therein.

[13] He submitted that no *prima facie* case had been made out and - as the applicant had to stand or fall by his founding papers - which were lacking in these respects - the application would have to be dismissed with costs.

[14] During argument the court enquired from the second applicant whether he intended to amend the Notice of Motion in order to counter Mr Schickerling's first argument as any such amendment would not be prejudicial, in circumstances, where it was clear what the purpose of the application was, and which had been expressly stated in the founding papers.

[15] On the application of the second applicant the notice of motion was then amended through the insertion therein of a further prayer - to be numbered 2 - to the effect that the applicants be granted leave to bring an urgent application to stop the sale in execution of the second applicant's house situated at Erf 152 Hochland Park.

[16] It appeared further that Mr Schickerling's other points were well taken, as upon closer analyses of the founding papers, it indeed appeared that the grounds for urgency had not been explicitly set out, as is required by the Rule. I was not convinced however, that in the circumstances of where a party seeks access to the courts in order to interdict a sale in execution, timeously and properly, he should allow such sale in execution to proceed and seek readdress at a hearing in due course.

[17] Mr Schickerling however, importantly and crucially informed the court from the bar, no answering papers having been filed, that the sale in execution had already taken place. It is to be noted in this regard that this application was only heard in the afternoon of 16 April 2013 at about 15h00. The court also inquired from the second applicant whether he wanted an opportunity to verify this information, which invitation the second applicant declined.

[18] I might add that it was disclosed during further argument, which occurred at the resumption of this hearing, on 17 April 2013, that the second applicant indeed was able to verify that the said sale in execution had taken place, in fact he even submitted from the bar that the sale and execution had commenced 10 minutes after the time set for the sale.

[19] At the close of argument, on 16 April 2013, the second applicant however then raised the issue of the 1st respondent's *locus standi* and demanded proof of authorisation for the opposition by first respondent to his application.

[20] In such circumstances the court postponed the matter to the following day to allow the 1st respondent to file the necessary resolutions and power of attorney.

[21] This was duly done and it emerged that the 1st respondent had thus duly and properly authorised its legal practitioners to oppose the applicants' application.

[22] During argument on 17 April 2013, the second applicant then also properly and correctly informed the court that he considered the filed power of attorney, the resolution and accompanying certificates, in compliance with the requirements set by the rules of court and, accordingly, he no longer persisted with this point as he was satisfied that the opposition to this application was duly authorised.

[23] Also the applicants filed a further document on 17 April 2013. It was addressed to Van der Merwe- Greeff Incorporated and it is stated:

> 'Applicants refer yourself to paragraph 8 of the Affidavit at Barend Jacob Van Der Merwe dated 19 October 2011, in the matter PI 471/2010. Not to waste the Honourable Court's precious time applicants request yourself to cancel the sale of 16 April 2013 as first Respondent sold the property without a Court Order in its favour',
>
> Dated at Windhoek on this 17th day of April 2013.
>
> Fredrich Willy Schroeder
> And to: The Register of High Court.'

[24] It appears that the contents of this document was no longer relevant to the adjudication of this application which is only a precursor to the bringing of the intended urgent application for substantive relief relating to the sale in execution which had already occurred.

[25] What is however relevant and which determines the outcome of the present application is the fact that the sale in execution, which the applicants intend to stop, had already occurred, at the time that this application was heard yesterday, on 16 April 2013, in the afternoon.

[26] It clearly and obviously serves no purpose to grant the applicant's leave to bring any such application after the fact and to grant to the applicants the indulgences sought, in circumstances, which would render the bringing of the

intended application futile, as the to be interdicted event, was already overtaken by events.

[27] In such circumstances no infringement of Articles 25(2) or 12(1) would occur if this application were to be refused and any such refusal would also not, in such circumstances, deny the applicants access to justice.

[28] In the circumstances I consider that the court's discretion to grant the relief sought cannot, and should not, be exercised in favour of the applicants.

[29] On behalf of the first respondent a special cost order was also sought.

[30] It has however emerged that when the applicants tried to bring an urgent application prior to the sale in execution they were apparently advised that they would firstly have to bring an application for the requisite leave. This the applicants did, obviously under severe time constraints, and as the facts of this matter show, they were ultimately not able to lodge and serve their further application in time.

[31] Although the parties continuously endeavoured to go outside the papers and although I recognise that also this application is preceded by a history between the parties, which seems to have culminated in the court order of 5 April 2013, which resulted in the referred to interdict of the second applicant to launch further proceedings, without leave, it does not appear from that order that the applicants were in fact declared to be vexatious litigants. One may want to infer this from the type of order that was granted, but I am not prepared to accept this without further ado.

[32] In any event I have no doubt that most courts will have sympathy and, in the normal course of events, will grant a party leave to try and prevent, or try to interdict the sale of such a party's home.

[33] And, in any event, I cannot in the circumstances of this case find that the applicants' attempt to obtain leave, for purposes of interdicting the said sale in execution, is vexatious, or that there are any circumstances which warrant an extra ordinary costs order.

[34] Mr Schickerling has also requested that the court award the costs of one instructed and one instructing counsel. In my view however, the complexity of this matter is not such that it warrants a cost order on that scale.

[35] In the result the application is dismissed with costs.

H GEIER
Judge

APPEARANCES

APPLICANTS: In Person

1st RESPONDENT: J Schickerling
Instructed by Van der Merwe-Greeff Inc.,
Windhoek