

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No. HC-MD-CIV-MOT-GEN 2017/00143

GLENDAMARTHA HISKIA

FIRST APPLICANT

**URBAN SPACE INVESTMENTS NUMBER
THIRTY TWO CC**

SECOND APPLICANT

and

BODY CORPORATE OF URBAN SPACE

FIRST RESPONDENT

ISAK MEKONDJO NAHUM

SECOND RESPONDENT

MESSENGER OF COURT

THIRD RESPONDENT

VAN DER MERWE-GREEFF AND DIMA INC.

FOURTH RESPONDENT

REGISTRAR OF DEEDS

FIFTH RESPONDENT

STANDARD BANK OF NAMIBIA LTD

SIXTH RESPONDENT

CHAIRPERSON OF THE RULES BOARD

SEVENTH RESPONDENT

MINISTER OF JUSTICE

EIGHT RESPONDENT

ATTORNEY GENERAL

NINTH RESPONDENT

Neutral Citation: *Hiskia v Body Corporate of Urban Space* (HC-MD-CIV-MOT-GEN 2017/00143) [2018] NAHCMD 279 (31 August 2018)

CORAM UEITELE J
HEARD: 5 October 2017
DELIVERED: 31 August 2018
REASONS: 11 September 2018

Flynote: *Practice* — Service — Purpose of — Notice of nature and contents of process — Irregular service — Effect depending on nature of proceedings and extent of irregularity.

Execution - Sale in execution – of immovable property - For debt - Constitutionality of procedure - Failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1)(a) of Magistrates' Courts Act 32 of 1944 declared unconstitutional and invalid.

Summary: The first applicant, through the second applicant, was the registered owner of a Sectional Title Unit consisting of Section No. 32 and 105 as more fully described on Sectional Plan No. 80/2006 in a building known as Urban Space. The building is situated on Erf 3775, Nelson Mandela Avenue, Klein Windhoek.

The Body Corporate which managed the Urban Space building, being the first respondent, obtained judgment by default under case number 2369/2015 against the close corporation in an amount of N\$ 27 854-14, plus interest at the rate of 20% on that amount in respect of arrear levies and penalties for Unit 32. The judgement remained unsatisfied and Unit 32 was attached pursuant to a warrant of execution issued on 13 August 2015 and sold in execution to one, Isak Mekondjo Nahum, the second respondent for an amount of N\$ 750 000.

The applicants instituted this proceedings seeking amongst other reliefs an order setting aside; default judgment granted, under case number 2396/15, by the Clerk of the Civil Court, Magistrates' Court for the District of Windhoek on 24 June 2015, the re-issue on 13 August 2015 of the Warrant of Execution in Case Number 2396/15 (*Body Corporate of Urban Space v Urban Space Investments Number*

Thirty Two CC) by the Clerk of the Civil Court of the Magistrates' Court Windhoek and setting aside the attachment and sale in execution on 9 February 2017 of the immovable property consisting of Unit 32. The applicants furthermore sought an order declaring s 66 of the Magistrates' Courts Act, 1944¹ invalid in as far as it authorizes the sale in execution of immovable property if sufficient moveable property to satisfy a judgment or order of a Magistrates' Court is not found, declaring Rule 12 of the Rules of the Magistrates' Courts (the Rules) invalid in so far as it authorizes the Clerk of the Magistrates' Court to grant judgment by default, declaring Rule 43 of the Rules invalid in so far as it authorizes the issue of a warrant of execution against immovable property without the supervision of a Magistrate and not in the same manner as prescribed by Rule 108 of the Rules of the High Court of Namibia.

Held that the service of the summons, commencing action under case number 2396/15 in the Magistrates' Court was invalid because neither Rule 9(3)(e) nor s 25 of the Close Corporation, Act, 1988 permits service of a process or document by affixing the document or process to a door at the registered office of the close corporation.

Held further that although the extent of the powers and responsibilities of the High Court and the Magistrates' Court differ, there is a common thread running through the exercise of the powers and the responsibility of the courts and that thread is that the Courts are independent and must administer justice subject to and in accordance with the Constitution which is the Supreme Law of the Country and that litigants before both the Superior Courts and the Lower Courts must enjoy the same Constitutional protection.

Held further that the difference that crops up in the process of debt recovery in the High Court and in the Magistrates' Court creates a differentiation between litigants in the High Court and litigants in the Magistrates' Court. And that such differentiation is not reasonable and rationally connected to the purpose for which the Magistrates' Court was created.

¹ Magistrates' Courts Act, 1944 (Act 32 of 1944).

Held furthermore that s 66(1)(a) of the Magistrates' Court Act, 1944, Rules 36 and 43 of the Magistrates' Court Rules in so far as they permit the sale in execution of immovable property without judicial oversight offend Article 10(1) of the Constitution.

ORDER

1. Rule 12(1)(a) of the Magistrates' Court Rules, is declared unconstitutional.
2. Section 66(1)(a) of the Magistrates' Court Act, 1944, Rules 36 and 43 of the Magistrates' Court Rules are declared unconstitutional. These provisions will however remain in force until 31 August 2019, on condition that legislation correcting the defects (identified in this judgment) is properly passed and *gazetted* on or before 31 August 2019.
3. The default judgment granted, under case number 2396/15, by the Clerk of the Civil Court, Magistrates' Court for the District of Windhoek on 24 June 2015, is set aside.
4. The writ of execution, the attachment and the sale in execution of:

CERTAIN: SECTION 105 (UNIT 32 and UNIT 105) AS SHOWN AND MORE FULLY DESCRIBED ON SECTIONAL PLAN NO. 80/2006 IN THE BUILDING OR BUILDINGS KNOWN AS URBAN SPACE.

SITUATE: IN THE MUNICIPALITY OF WINDHEOK REGISTRATION DIVISION "K" KHOMAS REGION. AND AN UNDIVIDED SHARE IN THE COMMON PROPERTY IN THE LAND AND BUILDING OR BUILDINGS AS SHOWN AND MORE FULLY DESCRIBED IN SECTIONAL PLAN NO. 80/2006 APPORTIONED TO THE SAID SECTION IN ACCORDANCE WITH THE PARTICIPATION QUOTA

OF THE SAID SECTION SPECIFIED IN A SCHEDULE ENDORSED ON THE SAID SECTIONAL PLAN.

HELD BY: CERTIFICATE OF REGISTERED SECTIONAL TITLE NO.80/2006 (32) & (105).

is set aside.

5. There is no order as to costs.

6 The Registrar of this Court must bring this judgement to the attention of the Attorney General, The Minister of Justice, and the Chairperson of the Magistrates' Commission.

JUDGMENT

UEITELE J:

Introduction

[1] Glenda Martha Hiskia, the first applicant,² is the sole member of a close corporation known as Urban Space Investments Number Thirty Two CC registration number CC/2005/2338.³ The close corporation is the registered owner of a certain Sectional Title Unit, a Unit consisting of Section No. 32 and 105 as more fully described on Sectional Plan No. 80/2006 in a building known as Urban Space.⁴ The building is situated on Erf 3775, Nelson Mandela Avenue, Klein Windhoek.

[2] On 24 June 2015 the Body Corporate which is managing Urban Space building, the first respondent⁵ under case number 2369/2015 (in the Magistrates'

² I will, in this judgment, refer to the first applicant as Hiskia.

³ I will, in this judgment, refer to second applicant as the close corporation.

⁴ I will, in this judgment, refer to the Sectional Title Unit consisting of Section No. 32 and 105 as Unit 32.

⁵ I will in this judgment refer to first respondent as the Body Corporate.

Court for the District of Windhoek), obtained judgment by default against the close corporation in an amount of N\$ 27 854-14, plus interest at the rate of 20% on that amount in respect of arrear levies and penalties for Unit 32. The judgement remained unsatisfied and Unit 32 was attached pursuant to a warrant of execution issued on 13 August 2015 and sold in execution to one, Isak Mekondjo Nahum, the second respondent,⁶ on 9 February 2017 for an amount of N\$ 750 000.

[3] The Messenger of the Court for the District of Windhoek, the third respondent in this application,⁷ has not as yet transferred ownership in Unit 32 to Nahum.

[4] Hiskia and the close corporation, on 28 March 2017, under Case No HC-MD-CIV-MOT-GEN-2017/00110 instituted an urgent application in which they, in addition to the Body Corporate the judgment creditor who took steps to sell Unit 32 in execution, cited Nahum the purchaser of Unit 32, the Messenger of Court, Van Der Merwe-Greeff Andima Inc (fourth respondent) and the Registrar of Deeds, (fifth respondent), as parties.

[5] In their application Hiskia and the close corporation sought an interim order interdicting the respondents from continuing with the sale in execution and the transfer of Unit 32 pending the outcome of two applications which they intended to lodge. The applications they intended to ledge were:

(a) A rescission application in the Magistrates' Court for the district of Windhoek, to set aside the default judgment and subsequent attachment and sale in execution of the property under Case No.2396/2015; and

(b) An application in the High Court of Namibia declaring various rules of the Magistrates' Court Rules and s 66 of the Magistrates' Court Act, 1944 as unconstitutional and invalid, due to the lack of judicial oversight over sales in execution against immovable property of judgment debtors, and further ancillary relief.

⁶ I will in this judgment refer to the second respondent as Nahum.

⁷ I will in this judgment refer to the third respondent as the Messenger.

[6] None of the respondents opposed the urgent application. The urgent application was set down for hearing on 31 March 2017. I, after hearing arguments, made an order in the following terms:

'1 That applicant's non-compliance with the Rules of this Court is condoned and this matter is heard as an urgent one as envisaged by Rule 73 of this Court's rules.

2. The respondents are interdicted from proceeding with the sale in execution and the transfer of the following immovable property namely:

CERTAIN: SECTION 105 (UNIT 32 and UNIT 105) AS SHOWN AND MORE FULLY DESCRIBED ON SECTIONAL PLAN NO. 80/2006 IN THIE BUILDING OR BUILDINGS KNOWN AS URBAN SPACE.

SITUATE: IN THE MUNICIPALITY OF WINDHOEK REGISTRATION DIVISION "K" KHOMAS REGION. AND AN UNDIVIDED SHARE IN THE COMMON PROPERTY IN THE LAND AND BUILDING OR BUILDINGS AS SHOWN AND MORE FULLY DESCRIBED IN SECTIONAL PLAN NO. 80/2006 APPORTIONED TO THE SAID SECTION IN ACCORDANCE WITH THE PARTICIPATION QUOTA OF THE SAID SECTION SPECIFIED IN A SCHEDULE ENDORSED ON THE SAID SECTIONAL PLAN.

HELD BY: CERTIFICATE OF REGISTERED SECTIONAL TITLE NO.80/2006 (32) & (105)

pending the outcome of:

- (i) An application for the rescission of a judgement granted in the Magistrate's Court for the District of Windhoek, under Case No.2396/2015; and
- (ii) An application, under case number HC-MD-CIV-MOT-GEN 2017/00143, in the High Court of Namibia for declaration of various rules of the Magistrate's Court Rules and sections of the Magistrate's Court Act No. 32 of 1944 as unconstitutional and invalid.

3. The matter is deemed finalized and removed from the roll.’

[7] On 3 May 2017 Hiskia and the close corporation filed an application under case number HC-MD-CIV-MOT-GEN 2017/00143 (In this application they added Standard Bank Namibia, as sixth respondent, Chairperson of the Rules Board as the seventh respondent, the Minister of Justice as the eighth respondent, and the Attorney General as the ninth respondent) in terms of which they, amongst other orders, seek orders; declaring s 66 of the Magistrates’ Courts Act, 1944⁸ invalid in as far as it authorizes the sale in execution of immovable property if there is not found sufficient moveable property to satisfy a judgment or order of a Magistrate’s Court without resort to a court, declaring rule 12 of the Rules of the Magistrates’ Courts (the Rules) invalid in so far as it authorizes the Clerk of the Magistrate’s Court to grant judgment by default, declaring rule 43 of the Rules invalid in so far as it authorizes the issue of a warrant of execution against immovable property without the supervision of a Magistrate and not in the same manner as prescribed by rule 108 of the Rules of the High Court of Namibia, setting aside the re-issue on 13 August 2015 of the Warrant of Execution in Case Number 2396/15 (*Body Corporate of Urban Space v Urban Space Investments Number Thirty Two CC*) by the Clerk of the Civil Court of the Magistrates’ Court Windhoek and setting aside the attachment and sale in execution on 9 February 2017 of the immovable property consisting of Unit 32.

[8] The Body Corporate, Nahum and Van Der Merwe-Greeff Andima Inc, the Chairperson of the Rules Board and the Minister of Justice (the respondents) gave respective notices of their intention to oppose the application under case number HC-MD-CIV-MOT-GEN 2017/00143. These respondents later withdrew their opposition to the application. I am thus, in this matter, called upon to determine the constitutionality of; s 66 of the Magistrates’ Court Act, 1944, Rules 12 and 43 of the Magistrates’ Court Rules and to consider the validity of the default judgment

⁸ Magistrates’ Courts Act, 1944 (Act 32 of 1944).

granted by the Clerk of the Court during June 2015 and the sale in execution of Unit 32 during February 2017.

Factual Background⁹

[9] Hiskia is a Namibian national who is employed as a Security Consultant by the United Nations' Mission in Liberia. In terms of her contract of employment, she is required to live in Liberia for eight consecutive weeks at a time, whereafter she returns to Namibia and resides in Namibia for approximately two weeks. On 18 January 2010, Hiskia bought 100 percent member's interest in the close corporation. As I have indicated above, the close corporation is the registered owner of Unit 32. Unit 32 has, since 2010 when Hiskia bought the member's interest in the close corporation, served as her primary residence until 28 December 2016.

[10] From January 2010 until about 2014, Hiskia has been paying approximately N\$ 2 500 in monthly levies to the Body Corporate. Hiskia alleges that during 2014 she raised numerous complaints with the manager of the Body Corporate, one, Hendrik Bamm, relating to services not being delivered by the Body Corporate. She states that due to the general non-performance by the Body Corporate of its obligations over an extended period, she decided to withhold her payment in respect of the levies.

[11] On 10 March 2015, the law firm Van der Merwe-Greeff Andima Incorporated, acting on the instructions of the Body Corporate sent a letter of demand to Hiskia's email address in which letter they demanded payment of the amount of N\$ 44 707-57. Hiskia alleges that she did not receive that letter of demand.

[12] When no response was forthcoming from Hiskia, Van der Merwe-Greeff Andima Incorporated, on 9 April 2015, similarly acting on the instructions of the Body Corporate, issued summons out of the Magistrate's Court for the District of Windhoek against the close corporation only. In the summons, the Body

⁹ I have discerned the facts which I have set under this part from the affidavit of Hiskia.

Corporate claimed an amount of N\$ 24 813-39 and N\$ 2 240-78 in respect of arrear levies. The Messenger in his return of service indicates that he, on 27 April 2015, in terms of Rule 9(3)(d) of the Magistrates' Court Rules, served the summons on the close corporation by affixing the summons to the principal door at 32 Fritsche Street, Pionierspark, Windhoek because no other manner of service was possible after a diligent search.

[13] On 27 May 2015 the Body Corporate, (through its legal practitioners Van der Merwe Greeff Inc) applied, in terms of Rule 12, for default judgment. On 24 June 2015, the Clerk of the Civil Court, Magistrates' Court for the District of Windhoek¹⁰ granted judgment by default in the amount of N\$ 27 854-14 and a warrant for execution authorising the Messenger of Court to raise an amount of N\$ 27 854-14 against the property of the close corporation and to pay the amount so raised to the Body Corporate.

[14] On 6 July 2015 the Messenger filed, with the Clerk of Court, a *nulla bona* return. In the return of service the Messenger reported that on 3 July 2015 at 14:00 he, 'after a diligent search' at 32 Fritsche Street, Pionierspark, Windhoek, could not 'locate sufficient movable assets of the execution debtor on the premises to satisfy the warrant of execution or portion thereof. Neither could he locate the named execution debtor, Urban Space Investment Property Thirty Two CC, to demand payment to satisfy the warrant of execution.' On 13 August 2015 the Clerk of Court re-issued a Warrant of Execution for an amount of N\$ 28 006-52. In the re – issued Warrant of Execution there are notes under note 3 where it is recorded that 'the only immovable property under which this warrant may be executed' is Unit 32.

[15] On 27 January 2016 the Messenger of Court gave notice of attachment of Unit 32. On 23 February 2016 the Messenger of Court reported¹¹ that he, on 22 February 2016, served a 'Warrant-Execution Fixed Property' on TAXCONNECT CC, 32 Fritsche Street, Windhoek by 'affixing a copy' of the 'Warrant-Execution

¹⁰ I will, in this judgment, for ease of reference refer to the Clerk of the Civil Court, Magistrates' Court for the District of Windhoek as the Clerk of Court.

¹¹ The report was contained in a Return of Service a copy of that Return of Service was attached to Hiskia and the close corporation's application under Case No HC-MD-CIV-MOT-GEN-2017/00110 as annexure GMH11A.

Fixed Property' to the principal door at 32 Fritsche Street, Windhoek. No other service was possible after performing a diligent search. On 22 November 2016 the Messenger of Court filed a return of service in which he reported that on 17 October 2016 at 09H35 there was nobody, on 20 October 2016 at 17H28, there was nobody and on 22 November 2016 at 09H35 there was nobody.¹²

[16] On 03 February 2017 the Messenger of Court filed a return of service in which he reported that on 20 January 2017 he served a 'Notice of Sale in Execution' by 'affixing a copy' of the 'Notice of Sale in Execution' to the principal door at the following address: Unit 32, Erf 3775, Fritsche Street, Klein Windhoek.¹³ On 9 February 2017 the Messenger of the Court sold Unit 32 at an auction.

[17] I have indicated above that Hiskia is employed in Liberia. On 28 December 2016, Hiskia moved out of Unit 32 because she had purchased a property that suited her and her family's needs better. Unit 32 remained vacant afterwards and her intention was to let the property. On 2 January 2017, she returned to Liberia and while in Liberia, she instructed a cousin of hers one, Alma Ulamba ("Alma"), to get a contractor to inspect Unit 32 and furnish her with a quote to renovate the property. Hiskia left a key of the Unit (Unit 32) with Alma. On 27 January 2017, Alma attended to the property and she thereafter forwarded a quote to Hiskia. After receipt of the quote, and in light of the fact that the quote was expensive, Hiskia decided to rather approach an estate agent who could attend to both the renovation and the rental of the property.

[18] In the meantime, Hiskia requested Alma to attend to the premises to remove a washing machine which Hiskia had left in the property for onward delivery to Swakopmund. On 30 January 2017, Alma attended to the property, but could not gain access to the property. She reported to Hiskia that she was unable to open the door as the key did not fit into the lock. Hiskia states that she suspected that the

¹² The report was contained in a Return of Service a copy of that Return of Service was attached to Hiskia and the close corporation's application under Case No HC-MD-CIV-MOT-GEN-2017/00110 as annexure GMH11B.

¹³ The return of service was attached to Hiskia and the close corporation's application under Case No HC-MD-CIV-MOT-GEN-2017/00110 as annexure "GMH11C".

key was faulty. Hiskia requested her (Alma) to gain access to Unit 32 through a bedroom window which Hiskia knew could not close. Alma reported that she could not enter through the window as it appeared that it was repaired. Hiskia became very suspicious and decided to return to Namibia to establish the status of the property.

[19] On 12 March 2017, Hiskia returned to Namibia. On 13 March 2017, Hiskia instructed an estate agent to secure possible tenants. She furthermore instructed Elliot Hiskia (Elliot) to remove the defective lock and replace it with a new lock. On 17 March 2017, Alma and Elliot attended to the property to gain access to it. It transpired that there were people in the property. Alma informed Hiskia that there were people residing in Unit 32 and that she should rather attend to Unit 32 herself. Hiskia attended to the property and discovered that her lock was removed and a new lock was installed on the outside door of Unit 32 and it was clear that there were people residing in the Unit.

[20] Hiskia confronted the people in the property and they informed her that they were renting the property from the owner of the property, Nahum. The people residing in the property contacted Nahum to come to the property. Hiskia instructed Elliot to change the lock of the outside door to Unit 32 while they were waiting for Nahum to arrive. Nahum arrived at Unit 32 at approximately 14h30. Upon his arrival at Unit 32, Nahum informed Hiskia that he purchased the property at an auction. Nahum and Hiskia entered into a heated debate and they were unable to amicably resolve the matter. Hiskia, after Elliot had changed the locks, locked the Unit, gave her telephone number to Nahum and they arranged to meet at the Klein Windhoek Police Station. Nahum accused Hiskia of breaking into his property, while Hiskia was adamant that she was the owner of the property. Nahum thereafter sent documentary pictures to Hiskia on her mobile telephone as proof that he purchased Unit 32 at an auction.

[21] At around 19h00 on 17 March 2017, Hiskia received a telephone call from a police officer who was stationed at the Klein Windhoek Police Station and that

officer informed her that a case of housebreaking was registered against her by Nahum and his tenants. Hiskia went to the police station and gave the police officer her version of the situation. The police officer realised that the events were of a civil nature and that they could not be handled by the police. Hiskia thereafter suggested to Nahum and the police officers that the best way to resolve the matter would be for each party to contact his or her respective legal representatives to take the case forward. On the same evening of 17 March 2017 people occupying Unit 32 removed their personal belongings from Unit 32 and they agreed that they would remove the remainder of their belongings by Sunday 19 March 2017 at 13h00. The goods were removed on Sunday, as agreed.

[22] After the debacle that occurred since 17 March 2017, Hiskia approached her legal practitioner of record and after consultation they agreed to launch an application for the rescission of the default judgement granted in the Magistrates' Court for the District of Windhoek, under Case No.2396/2015; and also to launch an urgent application, interdicting the transfer of Unit 32 into the name of Nahum pending the outcome of the rescission application and an application to declare s 66 of the Magistrates' Court Act, 1944 invalid in as far as it authorizes the sale in execution of immovable property if there is not found sufficient moveable property to satisfy a judgment or order of a Magistrates' Court without resort to a court and also to declare rule 12 of the Rules of the Magistrates' Courts (the Rules) invalid in so far as it authorizes the Clerk of the Magistrates' Court to grant judgment by default and also declaring rule 43 of the Rules invalid in so far as it authorizes the issue of a warrant of execution against immovable property without the supervision of a Magistrate.

[23] I indicated above that Hiskia and the close corporation launched an urgent application on 28 March 2017 under Case No HC-MD-CIV-MOT-GEN-2017/00110 which was set down for hearing on 31 March 2017. On that day, after hearing arguments, I made the order as I quoted above in paragraph 6. After I made the Order on 31 March 2017 and after Hiskia and the close corporation launched the application under case number HC-MD-CIV-MOT-GEN 2017/00143, the parties

agreed that they will not pursue the application for the rescission of the default judgment in the Magistrates' Court. I furthermore indicated that the respondents did not oppose the application under case number HC-MD-CIV-MOT-GEN 2017/00143. I thus did not have the benefit of arguments in favour of the constitutionality of s 66, rule 12 and rule 43.

Hiskia and the close corporation's challenge of s 66 of the Magistrates' Court Act, 1944, rule 12 and rule 43 of the Magistrates' Court Rules.

[24] Hiskia says that throughout these lengthy proceedings, she was in the dark as to what was happening because both the summons and warrants of execution process was not properly served on the close corporation. She further contends that she, as an interested person was not joined as a party to the proceedings. For these reasons, she contends that both the default judgment and the sale in execution must be set aside. Mr. Coleman, who appeared for Hiskia and the close corporation also argued that there were certain technical flaws in the proceedings against his clients which entitle him to ask the Court to set those proceedings aside.

[25] Hiskia furthermore contends that in contrast to the High Court Rules, where rule 15(3) provides that the court must grant default judgments, the Magistrates' Court Rules, in rule 12(1)(a), authorizes the Clerk of the court to grant a judgment by default and rules 43(1) and (2) (a) without more, authorize the issue of a warrant of execution against immovable property without any judicial supervision. She proceeded and argued that in the case of the High Court, rule 108 was enacted to ensure judicial oversight over the sale of immovable property for a judgment debt in order to protect the rights of affected persons. It requires immovable property to be declared executable by the court before the registrar can issue a writ of execution.

[26] Hiskia continues to argue that in addition to the judicial oversight provided for under rule 108 of the High Court Rules, rule 108(2) imposes a duty on the judgment creditor to notify, in person, the execution debtor and a lessee of any immovable property of an application to declare an immovable property, which is a

primary home, executable and to also afford the execution debtor or the lessee an opportunity to make representations to Court why the immovable property must not be declared executable.

[27] Section 66(1) of the Magistrates' Court Act, 1944 authorises the sale in execution of an immovable property if no sufficient movable property is found. This clearly undermines the protection in rule 108(1) (b) of the High Court Rules, Hiskia contends. She thus argues that the differences in the operation of the Magistrates Court Rules and the High Court Rules amounts to a violation of her right to equal protection of the law as provided for under Article 10 of the Namibian Constitution.

[28] I find it convenient to, before I deal with the contentions by Hiskia, first discuss briefly the procedure by which a debt is recovered in the Magistrates' courts.

Procedures to recover debts in the Magistrates' Court

[29] Rule 5(1) of the Magistrates' Court Rules amongst other matters, provides that the process of the court for commencing an action is by summons calling upon the defendant to enter an appearance to defend the action within a time stated in the summons after service of the summons upon defendant and to answer to the claim of the plaintiff and warning the defendant of the consequences of failure to do so.

[30] Rule 9(1) of the Magistrates' Court Rules amongst other matters, provides that the process of the court must, be served upon the person affected thereby by delivery of a copy of the process; to the person personally or to his duly authorised agent; at his residence or place of business to some person apparently not less than 16 years of age and apparently residing or employed there. In the case of a body corporate the process must be served at the body corporate's local office or principal place of business within the area of jurisdiction of the court concerned to a responsible employee thereof or in any other manner specially provided by law.

[31] If the defendant fails to enter an appearance to defend, the plaintiff is entitled to lodge with the clerk of the court a request for default judgment.¹⁴ After this request has been lodged, and where the claim is for a liquidated debt, the clerk of the court, as opposed to a magistrate, enters judgment in favour of the plaintiff.¹⁵

[32] Rule 36 deals with the process in execution, which occurs when the judgment in the plaintiff's favour has not been satisfied.¹⁶ The process of execution starts with a warrant prepared by the judgment creditor's legal practitioners and which is issued and signed by the clerk of the court and addressed to the Sheriff.¹⁷ The process does not need to involve the courts at all in circumstances where the original judgment was entered by consent or default but, if this is not the case, the process in execution may only be issued with leave of the court, which is sought at the same time as the granting of the judgment.¹⁸

[33] Therefore, if the judgment is entered by default because of, for example, the non-appearance of the defendant and where the debt is for a liquidated amount, the entire process occurs without any oversight by judicial officers. If judgment is not entered by default and is granted after a hearing, court oversight occurs only at that initial hearing because rule 36(7) provides for the application which initiates the process of execution to occur simultaneously with the granting of judgment and not at a later date.

¹⁴ See Rule 12(1)(a) of the Magistrates' Courts Rules which reads as follows:
'If a defendant has failed to enter appearance to defend within the time limited therefor by the summons or before the lodgment of the request hereinafter mentioned, and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request, in duplicate, together with the original summons and the return of service, for judgment against such defendant for -
(i) any sum not exceeding the sum claimed in the summons or for other relief so claimed;
(ii) the costs of the action; and
(iii) interest at the rate specified in the summons to the date of payment or, if no rate is specified, at the rate prescribed under s 1(2) of the Prescribed Rate of Interest Act 55 of 1975.'

¹⁵ See Rule 12(1)(c). See Rule 12(4) for the position where the claim is not for a liquidated amount.

¹⁶ See Rule 36(2).

¹⁷ See Rule 36(1).

¹⁸ See Rule 36(7).

[34] Section 66(1)(a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The Sheriff calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist, the Sheriff issues a *nulla bona* return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables are found, the clerk of the court is obliged to issue a warrant of execution against the immovable property.¹⁹ It is for him or her to decide whether, in the light of the sheriff's *nulla bona* return, insufficient movables exist to satisfy the judgment. Once he or she is satisfied of this fact, it follows that the debtor's immovable property will be declared executable and sold in execution.

The service of the summons in this matter

[35] The applicants argue that the service of the summons and the writ of execution were defective, thus entitling this Court to set aside the default judgement granted by the Clerk of court. They furthermore rely on the right of equality before the law under Article 10(1) of the Constitution. They argue that in terms of that Article, they are entitled to the same protection that rule 15 (3) and rule 108 of the High Court Rules provide to litigants in the High Court.

[36] One of the issues that I must determine in this case is whether the service of the summons on the close corporation was proper service. It is to that question that I now turn.

[37] In *Standard Bank Namibia Ltd and Others v Maletzky and Others*²⁰ the Supreme Court held that it is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them. In *Knouws NO v Josea and Another*,²¹ this Court, per Damaseb JP, had to consider the adequacy of service of a *rule nisi* in sequestration proceedings. Damaseb JP found on the

¹⁹ Rule 43 deals with execution against immovable property.

²⁰ *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) at para 17.

²¹ *Knouws NO v Josea and Another* 2007 (2) NR 792 (HC).

record before him that the respondent (Mr Josea), the sequestration of whose estate was sought, had not been served with a copy of the *rule nisi* and the founding papers and he held that the proceedings were accordingly void. Damaseb JP said:

'Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding that has taken place without service is a nullity and it is not competent for a court to condone it.'²²

[38] In *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*,²³ the case concerned the question whether the Disciplinary Committee for Legal Practitioners had been properly served with the application. The Disciplinary Committee had originally entered an appearance to defend but then withdrew its opposition to the application. Counsel for another respondent argued as a point in *limine* that service on the Disciplinary Committee had been defective because it had been effected on the Office of the Government Attorney, when service should have been on the chairperson of the committee. This Court per Smuts J (as he then was) held that the rule in the *Knouws* matter should be confined to the facts of that case. He said:

'16 I have considered the *Knouws* matter referred to by him. It would seem to me to be distinguishable by reason of the fact that the matter was an application concerning the status of a party. The rule requires personal service in such an event. In that matter, there was no service and a *rule nisi* was granted on an *ex parte* basis. All that was then served was the *rule nisi*, and not the full application. The *rule nisi* itself was not even personally served on the first respondent. The court then discharged the rule even though the respondents were represented. The holding in that case is in my view to be confined to the facts of that case and does not find application to this matter.

17 The present circumstances are different and distinguishable. There was service on the Government Attorney in respect of a committee whose secretary is an employee of the

²² At para 23.

²³ *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* 2013 (1) NR 245 (HC).

Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the committee. The fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import).²⁴

[39] After it considered the matters of *Knouwds NO v Josea and Another* and *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* the Supreme Court said:²⁵

‘The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice. The substantive principle upon which the rules of service are based is that a person is entitled to know the case being brought against him or her and the rules governing service of process have been carefully formulated to achieve this purpose and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind.’

[40] In my view, the critical question in this case is whether the purpose of service was attained by the manner of service chosen on behalf of the Body Corporate. In the summons²⁶ commencing the action in the Magistrates’ Court under case number 2396/15, the Body Corporate alleges that the registered office of the close corporation is Taxconnect CC, 32 Fritsche Street, Pionierspark, Windhoek, and the Messenger’s return of service reads:²⁷

‘SUMMONS COMMENCING ACTION ORDINARY

²⁴ *Ibid* at paras 16-17. I have omitted the square brackets in the quote simply to avoid confusion with the numbering in this judgement.

²⁵ In the matter of *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) at para 21.

²⁶ A copy of the summons was attached as Annexure “GMH 5” to Hiskia’s supporting affidavit.

²⁷ A copy of the return of service was attached as Annexure “GMH 6” to Hiskia’s supporting affidavit.

On 27 April 2015, at 16:57 the above process was dealt with as follows by G.B. ESSOP:

RETURN OF SERVICE:

AFFIXING:

BY AFFIXING A COPY OF THE ABOVE MENTIONED DOCUMENTS AT THE REGISTERED (RULE 9(3)d ADDRESS.

BY PROPER SERVICE OF A COPY OF THE PROCESS TO THE PRINCIPLE DOOR. NO OTHER SERVICE WAS POSSIBLE AFTER DILIGENT SEARCH.'

[41] Rule 9(3)(d) of the Magistrates' Court rules, does not authorize service of a court process on a defendant at its registered office. It authorises service on the *domicilium citandi* where a defendant has chosen one. The rule that governs service of a court process on a body corporate is rule 9(3)(e). That rule reads as follows:

'(3) All process shall, subject to the provisions of this rule, be served upon the person affected thereby by delivery of a copy thereof in one of the following manners:

(a) ...

(e) in the case of a body corporate at its local office or principal place of business within the area of jurisdiction of the court concerned to a responsible employee thereof or in any other manner specially provided by law...

Provided that where such service has been effected in the manner prescribed by paragraphs (b), (c), (e) or (g), the messenger shall indicate in the return of service of the process the name of the person to whom it has been delivered and the capacity in which such person stands in relation to the person, body corporate or institution affected by the process and where such service has been effected in the manner prescribed by paragraphs (b), (c) or (f), the court or clerk of the court, as the case may be, may, if there is reason to doubt whether the process served has come to the actual knowledge of the

person to be served, and in the absence of satisfactory evidence, treat such service as invalid.'

[42] The service of the summons was not effected at the close corporation's local office or principal place of business nor was the summons delivered to a person who has any relationship with the close corporation. It thus follows that the summons were not served in accordance with rule 9(3)(e). But that is not the end of the matter because rule 9(3)(e) provides for the summons to be served in any other manner specially provided by law. Provision for service is made in another law namely the Close Corporation Act, 1988. Section 25 of the Close Corporations Act, 1988 reads:

'25 Postal address and registered office

(1) Every corporation shall have in the territory a postal address and an office to which, subject to subsection (2), all communications and notices to the corporation may be addressed.

(2) Any-

(a) notice, order, communication or other document which is in terms of this Act required or permitted to be served upon any corporation or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by certified or registered post to the registered office or postal address, of the corporation; and

(b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.'

[43] Section 25 of the Close Corporation Act, 1988 does in my view, permit the service of process, and by analogy, summons by delivering the summons to a responsible employee at the registered office of the Close Corporation. Baker,

Erasmus, Farlam²⁸ opine that the word 'deliver' in rule 9 bears its ordinary meaning namely 'to hand over'. I am thus of the further view that neither rule 9(3)(e) nor s 25 of the Close Corporation, Act, 1988 permits service of process or document by affixing the document or process to a door at the registered office of the close corporation. My view is based on the fact that both the rule 9(3)(e) and s 25 of the Close Corporation Act, 1988 requires the process or document to be delivered (handed over) to a responsible employee of the close corporation at the local office, place of business or registered office of the close corporation. The service of the summons under case number 2396/15 by affixing the summons 'at the registered address' of the close corporation was therefore defective and invalid.

[44] Having concluded that the service of the summons was defective and invalid, it follows that the resultant judgment by default; the writ of execution and attachment and sale in execution of Unit 32 was equally invalid and stands to be set aside. My finding also makes it unnecessary to consider whether it was necessary for the Body Corporate to join Hiskia as a defendant to the action.

The Constitutionality of s 66 of the Magistrates' Court Act, 1944, rules 12 (1), 36 and 43 of the Magistrates' Court Rules

[45] In addition to challenging the validity of the default judgment on the basis of defective service, the applicants also challenged the constitutionality of s 66(1)(a) of the Magistrates' Court Act, 1944; rules 36 and 43 of the Magistrates' Court Rules in so far as these statutory provisions authorize the sale in execution of immovable property if there is sufficient moveable property found to satisfy a judgment or order of a Magistrates' Court without resort to a court. The applicants also challenge the constitutionality of rule 12(1) which authorises a clerk of Court to, upon default of entrance to defend an action instituted by a plaintiff, grant judgment by default against a defendant.

²⁸ Baker P WE, Erasmus H J and Farlam I G; *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa*: 7th ed vol 1 (Juta, Wetton, 1979) at 60.

[46] It is settled law that in an action hinging upon a challenge of unconstitutionality of any enactment, the burden rests upon him or her who raises the challenge to show that the enactment is unconstitutional.²⁹ This is because, said Justice Chomba,³⁰ there is always a presumption in favour of the constitutionality of an enactment and the burden lies upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

[47] Mr Coleman who appeared for the applicants argued that s 66(1)(a) of the Magistrates' Court Act, 1944 authorises the execution against immovable property merely on the basis of a *nulla bona* return by the Messenger of court. This differs from the stipulations of rule 108(1) of the Rules of the High Court, which require a *nulla bona* return and an application to court by the judgment creditor to declare the property specially executable. In addition, argued Mr Coleman, rule 108(2) of the Rules of the High Court adds further protection for the owner or occupier for whom the immovable property is a primary home. It requires personal service on such person and an enquiry by the court. There is no comparable provision anywhere in the Magistrates' Court Act, 1944 or the rules of the Magistrates' Courts.

[48] Mr Coleman proceeded to argue that rules 12(1)(c) and (2)(a) of the Rules of the Magistrates' Courts specifically authorize the clerk of the court to enter judgment by default of appearance or plea. This is directly at variance with rule 15(3) of the Rules of the High Court. He accordingly argued that, s 66(1)(a) of the Magistrates' Court Act, 1944 and rules 12(1)(c) and (2)(a) breach Articles 10 and 12 of the Namibian Constitution. In fact the entire s 66 should be brought in line with the regime created by rule 108 of the Rules of the High Court, he argued.

[49] The question is then whether the differentiation in treatment of litigants in the Magistrates' Court and the High Court of Namibia infringes the Constitution and more particularly Article 10 (1) of the Constitution, which provides that 'All persons shall be equal before the law' and 12(1)(a) which provides that:

²⁹ *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2011 (2) NR 670 (SC).

³⁰ *Ibid* at para 11.

'(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[50] Article 10, and more particularly sub-article (1), was, on no less than ten occasions since 1990,³¹ the subject of interpretation by this Court and the Supreme Court. On all the occasions that the sub article was the subject of interpretation by this Court and the Supreme Court have followed the approach adopted in the matter of *Mwellie v Minister of Works, Transport and Communication and Another*³² where the Court set out the approach to the Article as follows:

'Article 10(1) ... is not absolute but ... it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of "*intelligible differentia*" and allows provision therefor'.³³

[51] In the matter of *Müller v President of the Republic of Namibia and Another*³⁴ Strydom CJ, quoting from the South African case of *Prinsloo v Van der Linde and Another* said:³⁵

'Article 10(1) requires the Court to give content to the words 'equal before the law' so as to give effect to the general acceptance that

³¹ See *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmHC); *Muller v President of the Republic of Namibia and Another* 1999 NR 190 (SC); *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC); *Mwilima and All Other Accused, Government of the Republic of Namibia and Others v In The Caprivi Treason Trial* 2002 NR 235 (SC); *Beukes & Another v Botha & Others*, an unreported judgment of the High Court of Namibia Case No. (P) I 111/2004; *Hamwaama & Others v Attorney-General*, An unreported judgment of the High Court of Namibia, Case No. A 176/2007 (delivered on 31 July 2007. *Minister of Home Affairs v Majiedt and Others* 2007 (2) NR 475 (SC) *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC) *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2011 (2) NR 670 (SC)

³² 1995 (9) BCLR 1118 (NmHC).

³³ At 1132E – H.

³⁴ 1999 NR 190 (SC).

³⁵ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at paras [24] – [26].

“... in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality, and freedom ... In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. ... Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.

... The approach of our Courts towards art 10 of the Constitution should then be as follows:
 (a) Article 10(1), the questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose ...’

[52] I am of the view that in order to determine whether the applicants have discharged the *onus* resting on them, the following questions arise and deserve to be resolved. These are —

(a) Whether or not the litigants before the High Court and the Magistrates’ Court ought to be treated as equals;

(b) Whether, if the litigants ought to be treated as equals, s 66 of the Magistrates’ Court Act, 1944, rules 12 (1), 36 and 43 of the Magistrates’ Court Rules offer litigants in a Magistrates’ Court the same protection that the High Court Act and the Rules of the High Court offer to litigants in the High Court, particularly litigants whose immovable property is at the risk of being sold in execution; and

(c) If s 66 of the Magistrates’ Court Act, 1944, rules 12 (1), 36 and 43 of the Magistrates’ Court Rules do not offer the same protection a differentiation in treatment has been created, and whether such differentiation can be said to be

reasonable and rationally connected to the object of the Magistrates' Court Act, 1944, rules 12 (1), 36 and 43 of the Magistrates' Court Rules.

[53] In attempting to answer these questions, I will start by considering the first question posed above by itself. I find it appropriate to, when dealing with the first question, ascertain the purpose for which both the High Court and the Magistrates' Court were established. Article 78 of the Constitution stipulates that the judicial power of Namibia vests in the Courts of Namibia, which shall consist of: (a) a Supreme Court of Namibia; (b) a High Court of Namibia; (c) Lower Courts of Namibia. That article in sub-article (2) ordains that the Courts shall be independent and subject only to this Constitution and the law.

[54] It is therefore clear that the Courts (including the Magistrates' Court) were established to exercise the judicial power of Namibia. It is so that the extent of the powers and responsibilities of the High Court and the Magistrates' Court differ, but there is a common thread running through the exercise of the powers and the responsibility of the Courts and that thread is that the Courts are independent and must administer justice subject to and in accordance with the Constitution which is the Supreme Law of the Country. It thus follows that litigants before both the Superior Courts and the Lower Courts must enjoy the same Constitutional protection. I have thus come to the conclusion that litigants who appear before the superior courts are equal to litigants who appear before lower courts.

[55] The procedures for the recovery of a debt in the High Court and in the Lower Courts are similar. In terms of the procedures in both the High Court and the Magistrates' Court, a party wishing to recover a debt commences his or her action by issuing summons calling upon the defendant to enter an appearance to defend the action within a time stated in the summons after service of the summons upon defendant and to answer the claim of the plaintiff. The difference in procedure crops in when the defendant fails to enter a notice to defend the action instituted by a plaintiff. In the High Court the plaintiff sets the matter down for hearing on the unopposed Motion Court Roll and the application for default judgment is considered by a judge in Court or in Chambers, whereas in the case of a Magistrates' Court

the application or request for a default judgment is directed to a Clerk of Court, who is not a judicial officer imbued with authority to exercise judicial power. This, in my view, creates a differentiation between litigants in the High Court and litigants in the Magistrates' Court.

[56] The question that crops up is whether this differentiation is reasonable and rationally connected to the purpose for which the Magistrates' Court was created. I think not. I cannot find any justifiable reason why a clerk of Court, who is not a judicial officer, must exercise judicial power. Moreover, the Constitution vests the judicial power of Namibia in courts which are presided over (in the case of Superior Courts by a Judge and in the case of lower Courts by Magistrates or other judicial officers). I therefore find that rule 12(1)(a) of the Magistrates' Court Rules offends not only Articles 10(1) and 12(1)(a) of the Constitution but also Article 79(1) of the Constitution.

[57] The next difference in procedure (in the High Court and the Magistrates' Court occurs in the process of execution of a judgment or order of Court. It must be recalled that during the year 2014 the High Court Amendment Act³⁶ was promulgated so as to amend the High Court Act, 1990, to, amongst other powers, give powers to the Judge President to make rules to regulate the execution of immovable property where such property is the primary home of the judgment debtor.

[58] The Judge President in 2014 introduced (by enacting rule 108) the procedures for the execution of immovable property. In a nutshell, that rule prohibits the Registrar from issuing a warrant of execution against immovable property unless there is produced to him or her of a *nulla bona* return in respect of the moveable assets of a judgment debtor. In addition, the Rule provides an opportunity for a judgment debtor to satisfy the Court why less drastic steps other than a sale of the immovable property cannot be employed to recover the debt. The

³⁶ The High Court Amendment Act, 2013 (Act No. 12 of 2013).

rationale behind the introduction of rule 108 was set out in the following terms in the case of *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd*³⁷ where Masuku J said:

'33 The process included in rule 108 has probably been influenced to some degree by jurisprudence which has emerged in the Republic of South Africa, where courts have taken it upon themselves to provide 'judicial oversight' over the declaration of property specially executable. From a reading of the cases in South Africa, it would seem that the motivation for the judicial oversight was the need to comply with the Constitution of South Africa, which protects the right of everyone to adequate housing ...

34 Namibia, unlike South Africa, does not have what are normally referred to as socio-economic rights, such as adequate housing, health care, food, water and social security enshrined and protected in the Constitution. It is however, apparent that the issue of people losing their homes following unpaid debts became a source of concern in this country and this would, in my view, explain the reason for the introduction of judicial oversight in respect of declarations of immovable property especially executable in the rules. The rule was promulgated to balance two interests. The first was to regulate the sale of property in execution when the property in question was a home. The second was to ensure that the giving of credit by financial institutions remained effectual and was not rendered unserviceable. It is however plain that this was done primarily in order to protect home owners or third parties residing in homes from unbridled loss of homes by declarations of executability of landed property by orders of court and over which the courts simply had no control regarding application from the panoply available, of other remedies less drastic than the sale of a home.'

[59] The revision of the procedure in the High Court did not filter down to the lower courts. In the case of the Magistrates' Court, s 66(1)(a) of the Magistrates' Court Act, 1944 authorises the sale in execution of immovable property without any judicial oversight by a magistrate or other judicial officer. The differentiation in respect of litigants who find themselves before a Magistrates' Court and the High Court is in my view not reasonable nor rationally connected to the purpose for which the Magistrates' Court was created. I am therefore of the firm view that s 66(1)(a) of the Magistrates Court Act, 1944, rules 36 and 43 of the Magistrates' Court Rules in so far as they permit the sale in execution of immovable property

³⁷ *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC) at paras 33-34.

without judicial oversight offend Article 10(1) of the Constitution. There is thus the need to align s 66(1)(a) of the Magistrates Court Act, 1944, rules 36 and 43 of the Magistrates' Court Rules with the procedures set out in rule 108 of the High Court Rules.

Remedy

[60] I have held further that rule 12(1)(a) of the Magistrates' Court Rules offends not only Articles 10(1) and 12(1)(a) of the Constitution but also Article 79(1) of the Constitution. I have further held that s 66(1)(a) of the Magistrates' Court Act, 1944, rules 36 and 43 of the Magistrates' Court Rules in so far as they permit the sale in execution of immovable property without judicial oversight constitute a violation of s 10(1). I now turn to the appropriate remedy.

[61] The real problem in this case is to devise an order that is just and equitable in all the circumstances. To keep a manifestly discriminatory law on the statute books is to maintain discrimination. On the other hand, to abolish it with immediate effect without making practical alternative arrangements is to provoke confusion and risk injustice. It is common cause that transactions already completed under rule 12(1)(a) of the Magistrates' Court Rules, s 66(1)(a) of the Magistrates' Court Act, 1944, rules 36 and 43 of the Magistrates' Court Rules must not be disturbed.

[62] I am of the view that in the case of rule 12(1)(a) the appropriate remedy is to declare that rule invalid. In respect of s 66(1)(a) of the Magistrates' Court Act, 1944, rules 36 and 43 of the Magistrates' Court Rules an appropriate remedy would be the provision of judicial oversight over the execution process. At present, judicial oversight occurs only at the first stage in the debt recovery process, when the creditor seeks judgment against the debtor. In fact, where a creditor institutes an action against a debtor who does not enter an appearance to defend, and where the claim is for a liquidated amount, the creditor may obtain default judgment from the clerk of the court, without any judicial intervention at all let alone judicial oversight. From the time judgment is obtained, with or without a hearing before a magistrate, the entire process from attempted execution against movables until the

final stage of the sale in execution against the immovable property of the debtor is administered by various officers of the court and the Sheriff.

[63] The applicants contended that an appropriate remedy would be to harmonize the Magistrates' Court Act, 1944 and the Rules of the Magistrates' Court with the process followed in the High Court, namely that once insufficient movable property to satisfy the debt has been found, a judgment creditor must approach a court to request execution against the immovable property of the judgment debtor. It would then be for the court to order execution and only if the circumstances of the case make it appropriate. It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution.

[64] Article 25 of the Constitution distinguishes between two situations. Firstly in regard to legislation by the Namibian Parliament, which abolishes or abridges any of the fundamental rights or freedoms set out in chapter 3, that legislation or action shall be invalid. The Court is however given the discretion, in an appropriate case, to afford Parliament the opportunity, to correct any defect in such law or action. Where the Court grants Parliament such opportunity the impugned law or action shall be deemed to be valid until such time that it is corrected or on the expiry of the time limit set by the Court, whichever is the shorter.³⁸

[65] I am of the view that a period of twelve months would be appropriate to enable Parliament and the Rules Board (as defined in the Magistrates' Court Act, 1944) to review the whole field of execution of immovable property in Magistrates' Courts in a manner that is harmonious with the process followed in the High Court and which would fully respect the rights entrenched in the Constitution.

Order

[66] I therefore make the following order:

³⁸ See Article 25(1) of The Namibian Constitution.

1 Rule 12(1)(a) of the Magistrates' Court Rules, is declared unconstitutional.

2 Section 66(1)(a) of the Magistrates' Court Act, 1944, Rules 36 and 43 of the Magistrates' Court Rules are declared unconstitutional. These provisions will however remain in force until 31 August 2019, on condition that legislation correcting the defects (identified in this judgment) is properly passed and *gazetted* on or before 31 August 2019

3 The default judgment granted, under case number 2396/15, by the Clerk of the Civil Court, Magistrates Court for the District of Windhoek on 24 June 2015, is set aside.

4 The writ of execution, the attachment and the sale in execution of:

CERTAIN: SECTION 105 (UNIT 32 and UNIT 105) AS SHOWN AND MORE FULLY DESCRIBED ON SECTIONAL PLAN NO. 80/2006 IN THE BUILDING OR BUILDINGS KNOWN AS URBAN SPACE.

SITUATE: IN THE MUNICIPALITY OF WINDHEOK REGISTRATION DIVISION "K" KHOMAS REGION. AND AN UNDIVIDED SHARE IN THE COMMON PROPERTY IN THE LAND AND BUILDING OR BUILDINGS AS SHOWN AND MORE FULLY DESCRIBED IN SECTIONAL PLAN NO. 80/2006 APPORTIONED TO THE SAID SECTION IN ACCORDANCE WITH THE PARTICIPATION QUOTA OF THE SAID SECTION SPECIFIED IN A SCHEDULE ENDORSED ON THE SAID SECTIONAL PLAN.

HELD BY: CERTIFICATE OF REGISTERED SECTIONAL TITLE NO.80/2006 (32) & (105).

is set aside.

5 There is no as to costs.

6 The Registrar of this Court must bring this judgement to the attention of the Attorney General, The Minister of Justice, and the Chairperson of the Magistrates Commission.

SFI Ueitele
Judge

APPEARANCES:

Applicants:

G Coleman
instructed by AngulaCo Inc, Windhoek

First to ninth respondents:

No appearance