REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00235

In the matter between:

GERT HENDRIK BEUKES	**FIRST APPLICANT**
VIRGINIA BEUKES	**SECOND APPLICANT**

and

FIRST NATIONAL BANK LIMITED	**FIRST RESPONDENT**
DEPUTY SHERIFF FOR THE DISTRICT OF SWAKOPMUND	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS	**THIRD RESPONDENT**
FREDERICK JOHANNES MOUTON	**FOURTH RESPONDENT**

Neutral citation: *Beukes v First National Bank Limited* (HC-MD-CIV-MOT-GEN-2017/00235) [2018] NAHCMD 94 (13 April 2018)

Coram: ANGULA DJP

Heard: **3 April 2018**

Delivered: **13 April 2018**

Flynote: Execution – Valuation of the immovable property – Valuation certificate by a valuator not tendered under oath, not admissible evidence to prove the value of a property – Law of Evidence – Rule 110(9) – Sworn valuation only to be tendered in the absence of regional or municipal valuation.

Summary: In an application to set aside the sale in execution of the applicants' immovable property, the applicants alleged that the property was sold less than 53.84 per cent of the valuation by a valuator and contrary to the provisions of rule 110(9) of the rules of the this court. Rule 110(9) stipulates that if a primary home of a person is being sold in execution, the highest bid must not be less than 75 per cent of the regional or local authority council or land valuation of the property; and in the absence of a regional or local authority council or land valuation, not be less than 75 per cent of a sworn valuation.

In order to prove their case, the applicants tendered in evidence a valuation certificate compiled by a person claiming to be a sworn valuator. The certificate was simply attached to the founding affidavit by the applicants. No confirmatory or report by the said valuator was filed.

Held that the valuation certificate constituted inadmissible evidence, in that it was a bald statement by the valuator, not made under oath and did not contain facts upon which the conclusion of the value of the property was based.

Held further that even if the certificate was admissible, on a proper interpretation of rule, the sworn valuation certificate should be an act of last resort and not the first port of call; that the sworn valuation can only be tendered in the absence of valuation by the regional or local authority. Accordingly the application was dismissed with costs.

ORDER

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1. The application is dismissed with costs such costs to include costs of one instructed and one instructing counsel.

2. The matter is considered finalised and is removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] The applicants seek an order setting aside a sale in execution of an immovable property, being a dwelling house situated at Erf No. 2745, Extension 1 Swakopmund ('the property'). The property was sold to the fourth respondent on 26 May 2016 at an auction conducted by the second respondent, the Deputy Sheriff for the district of Swakopmund. The property was sold in satisfaction of a judgment debt owed by the applicants to First National Bank, the first respondent (hereinafter referred to as 'FNB').

Factual Background

[2] The following facts are common cause between the parties: The applicants are married in community of property and are the registered co-owners of the property. FNB holds a number of mortgage bonds over the property. During July 2009, FNB obtained a default judgment against the applicants for payment in the sum of N$526 289.84. In the same proceedings, the property was declared specially executable. Subsequent thereto, a writ of execution was issued and the property was attached for sale in execution.

[3] Between the years 2010 to 2016 a number of sales in execution were cancelled following repayment agreements reached between the applicants and FNB. Eventually the property was sold to the fourth respondent for the sum of N$1 028 520 at the sale in execution held on 29 May 2017. It is that sale in execution the applicants, in the present application, seek an order to have set aside.

The applicants' case

[4] It is the applicants' case that subsequent to the default judgment being granted, they made a number of payments and have settled the arrears. The applicants therefore contend that the writ of execution by which the property was attached and sold in execution was in respect of debt and arrears of bond payment which had already been settled and therefore the attachment and the sale in execution of the property was unlawful.

[5] The applicants further point out that the property was sold for the sum of N$1 200 000, whereas it was valued at N$2 228 520 as at 14 June 2014. In support of this allegation the applicants attached a valuation report to their founding affidavit.

[6] The applicants contend that prior to the property being sold in execution, the Constitutional position with regard to the sale of property which constitutes a primary home has changed materially. The result of this change is that the respondent was required to have approached the court to have the property declared specially executable; that this was not done.

[7] Finally the applicants contend that the property was sold for an amount of N$1 028 000 which is far less than what it is worth and for that reason the applicants seek an order to declare the sale of the property to the fourth respondent invalid.

The first respondent's case

[8] The first respondent's case is briefly that the payment of the arrears did not extinguish the judgment debt and therefore the allegation by the applicants that the debt had been settled is not correct. Furthermore, in terms of rule 112(3) of the rules of this court, once a writ of execution has been issued, it remains in force and may at any time be executed without being renewed until the judgment has been satisfied in full.

[9] Finally, the first respondent points out that in so far as the applicants attempt to rely on the so-called new Constitutional dispensation with reference to the

provisions of rule 108 of the rules of his court, same came into effect on 16 April 2014 and have no retroactive effect. It is accordingly argued that the applicants cannot benefit thereunder.

Issue for determination

[10] Initially there were two issues raised by the applicants for determination. The first issue was whether the provisions of rule 108 of the rules of this court were applicable. At the hearing of the application, counsel for the applicants wisely, in my view abandoned the point. The remaining issue for determination is whether the sale in execution to the fourth respondent should be set aside due to the fact that the property was sold for a lower amount than the amount reflected in the certificate of valuation in respect of the property, issued by a valuator one Mr van Rensburg.

[11] At the centre of the remaining issue is the interpretation of the provisions of Rule 110(9) of the Rules of this court which read as follows:

'(9) The sale of property in execution must, subject to rule 109(6), be without reserve and be on the conditions stipulated under subrules (6) and (7) and the property must be sold to the highest bidder, except that if a primary home of a person is being sold in execution, the highest bid must –

(a) not be less than 75 per cent of the regional or local authority council or land valuation of the property; and

(b) in the absence of a regional or local authority council or land valuation, not be less than 75 per cent of a sworn valuation.'

[12] Ms Petherbridge who appeared for the applicants contended her heads of argument that the property has been sold at the auction for a price which was 53.84 per cent less of the sworn valuator's valuation of the property. Counsel submitted that this is a clear contravention of Rule 110(9). For this reason, it was submitted that, the sale in execution should not be allowed to stand and that the transfer of the property into the name of the fifth respondent should equally not be allowed.

[13] Mr Barnard for the first respondent submitted in his heads of argument, the provisions of rule 110(9) are premised on a municipal valuation or a sworn valuation of the immovable property being provided. Counsel pointed out that in the present matter, the applicants rely on a valuation certificated by Mr van Rensburg; that no confirmatory affidavit has been filed by Mr van Rensburg in support of his certificate and therefore the certificate is not a sworn valuation. Counsel further submitted that the certificate amounted to an opinion and is inadmissible as the author is not qualified before court and the basis upon which the opinion has been arrived at has not been disclosed.

[14] To buttress his submission, Counsel referred the court to *Ex parte Matthysen et uxor (First Rand Bank Ltd intervening)*[1]. In that matter the applicants like in this matter, were also married in community of property. They had applied for the surrender of the joint estate. The issue was whether the surrender of the estate would be to the advantage of the creditors. In support of the application, the applicants obtained two valuations by a property valuator, who assessed the value of the immovable property at R85 000 and the value of the movable property at R9 400. The valuator filed a report and an affidavit in respect of the evaluations of the properties. First Rand intervened and opposed the application. It transpired that First Rand has obtained an attachment of the immovable property and had the property sold at a public auction. It was sold to a third party for R16 000. At the time of hearing of the application, transfer of the property into the name of the purchaser had not yet taken place. First Rand then tendered evidence of its own valuator which showed that the applicants' immovable property would probably only fetch R25 000 on insolvency auction.

[15] Upon evaluation of the evidence, the court found that the applicants' valuator had compiled a report which was not based on her personal knowledge; that she had prepared her report using information given to her by other unspecified persons. Furthermore, that there was no indication that she had visited the property and inspected it for the purpose of her valuation. The court rejected the applicants' valuator's report, holding that such a valuation was a bald statement which was not supported by any facts or reasons; and that standing on its own, the report proved nothing.

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[1] 2003 (2) SA 308 (T) at 311 312F.

[16] In arriving at this conclusion, the court had regard to a number of judgments dealing with valuation of immovable properties as well as the proper approach to be adopted in assessing the evidence of expert witnesses. The court had regard to the following decided cases, which in my view are equally applicable to the facts of the present matter with regard to the purpose of furnishing valuation report. At page 311 to 312 J to F the court quoted with approval the following passages from the *Nell* and *Coopers* judgments respectively:

'In *Nell v Lubbe* 1999 (3) SA 109 (W) at 111D - G Leveson J stated the position as follows:

"The purpose of furnishing a sworn valuation is therefore to establish the price that is likely to be realised from the sale of the property on what is called a forced sale so that it can be determined that there will be a free residue available for creditors and advantage to creditors is thereby established. A practice has therefore grown up in this Division (I cannot speak for others) whereby a sworn valuation is furnished by an expert witness, usually, as in the present case, an estate agent. He expresses an opinion with respect to the price that the property will fetch. Normally the opinion of a witness is not receivable in evidence. But the opinion of an expert witness is admissible whenever, by virtue of the special skill and knowledge he possesses in his particular sphere of activity, he is better qualified to draw inferences from the proved facts than the Judge himself. A Court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it. But the Court is not a rubber stamp for acceptance of the expert's opinion. Testimony must be placed before the Court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based. *S v Gouws* 1967 (4) SA 527 (E); *S v Govender and Another* 1968 (3) SA 14 (N). The Court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped." (Emphasis added).

In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371G – H Wessels JA emphasised the necessity for the facts to be established and the reasons to be disclosed in the following passage:

"As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can

only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert." '

[17] I proceed to apply the foregoing principles to the facts of the present matter. It is common cause that Mr van Rensburg did not file an affidavit. Furthermore, there is no evidence to show that he is registered as a professional valuator, or how many years he has been practising as a valuator, or what methodology he adopted to compile his certificate and on what facts he based his conclusion to determine the value of the property. Standing on its own, the valuation certificate is a worthless piece of paper.

[18] My finding is therefore that the valuation certificate upon which the applicants sought to rely for the value of the property is inadmissible as it is not tendered under oath and constitutes a bald statement. In the circumstances, the court cannot accept the contents of the valuation certificate tendered by the applicants as evidence for purposes of establishing the value of the property.

[19] I next move to consider the provisions of rule 110(9). This I do because in my view, even if the valuation certificated was admissible, on proper interpretation of rule 110(9), it was competent, on the facts of the present matter, for the applicants to simply submit a valuator's certificate as a matter of right. Mr Barnard, correctly in my view, submitted that on proper reading of Rule 110 a party can only rely on sworn valuation report in the absence a regional or local authority council or land valuation evaluation. In other words, a valuation report is the last resort and not a first port of call to tender in evidence in order to prove that a property has not been sold for less than 75 per cent of the regional or local authority council or land valuation of the property. No evidence was led by the applicants, why for instance, a municipal valuation for the town of Swakopmund, in which the property is situated, could not be obtained and tendered in evidence. I think it is fair to assume that such a valuation would be readily available to the owner of the property, from the municipal authority.

[20] In the circumstances, I have arrived at the conclusion, which is inexorable, that the applicants have failed to prove that the property was sold at a lower value than that prescribed by Rule 110(9).

[21] In the result I make the following order:

1. The application is dismissed with costs, such costs to include costs of one instructed and one instructing counsel.

2. The matter is considered finalised and is removed from the roll.

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H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	M PETHERBRIDGE of Petherbridge Legal Practitioners, Windhoek
FIRST RESPONDENT:	P BARNARD instructed by Du Pisani Legal Practitioners, Windhoek