

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 2508/2012

In the matter between:

THEOPHILUS MOFUKA

APPLICANT

and

BANK WINDHOEK LIMITED

1ST RESPONDENT

DEPUTY-SHERIFF (WINDHOEK)

2ND RESPONDENT

Neutral Citation: *Mofuka vs Bank Windhoek Limited* (I 2508/2012) [2019] NAHCMD 200 (20 June 2019)

CORAM: MASUKU J

Heard: 13 June 2019

Delivered: 20 June 2019

Flynote: Civil Procedure – Urgent Applications – Stay in Execution of immovable property – Rules 3 (6); 108 and 110 (3) couched in peremptory terms – Strict compliance required - Effect of non-compliance therewith – Debatement of account – who is entitled to.

Summary: Applicant launched an urgent application to stay the sale in execution of his immovable property and first respondent opposed the application. The sale in execution was advertised in the Namibian newspaper on 31 May 2019. The notice of sale indicated that the property would be sold on 13 June 2019 at 10h00 am at an auction without reserve.

The first respondent raised a point in *limine* to the effect that the application brought on the basis of urgency, by the applicant, is not at all urgent and that any urgency that may be said to exist arising therefrom, is a result of the applicant's culpable remissness and/or delay in timeously bringing this application and that the application be dismissed on this basis alone. The applicant seeking an order in terms of which respondent provides him with a debatement of his account. Applicant further arguing that respondent did not comply with rule 108 (1) (a) and 110 (3) and also that in the circumstances, the provisions of rule 3 (6) and 138 are applicable.

Held that: Condonation is granted to the applicant for its non-compliance with the rules to the extent required in rule 73(4), for this matter to be heard as one of urgency.

Held further that: The first respondent has not been prejudiced in that it was able to enter its opposition and additionally filed its answering affidavit albeit under stringent conditions.

Held that: On the facts before this court, the applicant has not established his entitlement to a full and proper accounting and debatement of payments made by him in that he failed to establish that; a fiduciary relationship existed between the parties; that there was a contractual agreement between the parties or that a statutory provision created such an obligation to deliver and debate an account.

Held further that: Although the proceedings in question commenced under the old rules, because the matter is proceeding after the new dispensation has taken root, any further proceeding in execution must be done following the provisions in terms of the new rules.

Held that: The first respondent must comply with rule 108 (1) (a) of this court's rules prior to proceeding to execute against the applicant's primary residence.

Held further that: The purpose of rule 110 (3) is to disseminate knowledge of the intended sale in execution to as wide an audience as possible and therefore that there was indeed non-compliance with rule 110 (3).

The court consequently granting the order save for the order for debatement and not making a costs order

ORDER

1. The application's non-compliance with the forms and service prescribed by the Rules of this Court is hereby condoned and the matter is heard as one of urgency in terms of the provisions of Rule 73(4) and is accordingly heard as one of urgency.

2. The sale in execution in respect of:

Certain Erf No. 2056, Klein Windhoek (Extension No. 3)

Situated: In the Municipality of Windhoek, Registration Division "K",
Khomas Region

Measuring: 1384 (One Three Eight Four) Square Metres

Held by: Under Deed of transfer No. T 2758/1995

Is stayed pending:

- (a) the First Respondent's correction of a Writ of Execution dated 20 February 2019, issued by the Registrar of this Honourable Court;
- (b) The First Respondent's compliance with the provisions of Rule 108 (1) (a) and 110 (3).

3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Serving before court is an urgent application seeking to stay the sale in execution of immovable property that shall be described fully in the succeeding paragraphs of this judgment. The application, it must be stated, is opposed both as to the urgency alleged application and on the merits.

The parties

[2] The applicant is Mr. Theophilus Mofuka, a male adult farmer, who resides at 27 Lenie Street, Ludwigsdorf, Windhoek.

[3] The first respondent is Bank Windhoek Namibia, a financial institution duly registered and with corporate legal personality. It has its place of business situated at Second Floor Ashirwald Building, Windhoek. This litigant, has, as it is entitled to, opposed the application in its entirety.

[4] The second respondent is the Deputy-Sheriff for the district of Windhoek. His office is the one that was charged with conducting the sale in question. He has not opposed the application, it must be mentioned

Relief sought

[5] The applicant seeks an order in the following terms;

1. 'An order in terms whereof the applicant's non-compliance with the forms and service as provided for by the rules of this honourable court is condoned and that this matter is heard as one of urgency.

2. An order in terms whereof the sale in execution in respect of:

Certain : Erf No. 2056, Klein Windhoek (extension No 3)

Situated: In the municipality of Windhoek, registration division "K",
Khomas Region

Measuring: 1384 (one three eight four) square metres

Held by: Under deed of transfer No T 2758/1995

is stayed, pending,

3. the First Respondent's full and proper accounting and debatement of the monies paid by the applicant in satisfaction of the default judgement obtained by the first respondent against the applicant on 28 September 2012 under case number: I 2508/2012
4. The First Respondent's correction of a writ of execution dated 20 February 2019, issued by the registrar of this honourable court; and
5. The First Respondent's compliance with the Rules of this Court 108 (1) (a) and 110 (3)

Background

[6] The facts on which this application are based are largely common cause and they acuminate to this: On or about 10 September 2012, the first respondent served a combined summons issued against the applicant and his wife Mrs. Anna Mofuka. The combined summons was not defended and as a result, the first respondent obtained a default judgment on 28 September 2012 against the first applicant in the sum of N\$ 4 433 543.99, plus compound interest, calculated daily and capitalized monthly thereon, from 13 July 2012 to the date of final payment and N\$ 100 864.23 plus compound interest calculated daily and capitalized monthly from 13 July 2012 to date of final payment.

[7] The court, additionally, granted an order declaring the following property executable, Erf 2056, Klein Windhoek (Extension 3), situated in the Municipality of Windhoek REGISTRATION Division "K", Khomas Region, measuring 1384 square metres, held by Deed of Transfer No T 2758/1995, ('the property').

[8] Thereafter, a writ of execution against the applicant's immovable property was issued on 5 October 2012. On 8 April 2016, a notice of sale in execution was issued in respect of the property. The applicant thereafter instituted an urgent application in this court under case number A180/2016, essentially seeking to stay the sale in execution. The urgent application was granted on 9 June 2016 per an order of Uietele J. This order granted in his favour, was set aside by the Supreme Court by way of a judgment delivered on 3 April 2018 which judgment referred the matter back to this court for hearing on the merits. The applicant, after the judgment by the Supreme Court, withdrew the urgent application he had instituted.

[9] On 12 February 2019, the first respondent issued out a writ of execution against the applicant's movable property. On 6 May 2019 the second respondent served a notice of sale in execution in respect of the property. Thereafter the applicant instructed legal practitioners who despatched a letter dated 13 May 2019 requesting a reconciliation of the financial records. On 16 May 2019 the first respondent's legal practitioners responded to the letter of 13 May 2019 and indicated that the applicant should proceed to institute legal action, if so advised, as the reconciliation of records would not take place as requested by the applicant's legal practitioners.

[10] On an unspecified date, but after 16 May 2019, the applicant was advised to engage the services of an accountant to carry out a reconciliation of the payments he had made to the first respondent. The applicant furnished the accountant with the requisite information for the purposes of the reconciliation process on 5 June 2019. On 6 June 2019 the accountant provided his reconciliation based on the information that had been availed to him by the applicant.

[11] The sale in execution was advertised in the Namibian newspaper on 31 May 2019. The notice of sale indicated that the property would be sold on 13 June 2019 at 10h00am at an auction without reserve. On 7 June 2019, the applicant's legal practitioners forwarded a draft founding affidavit under cover of a letter and requested a full and proper account by 10 June 2019, failing which an application for stay would be launched on an urgent basis. It would appear that there was no movement in that regard on the part of the first respondent. On 11 June 2019 the applicant launched the present application.

Urgency

[12] The first respondent raises a point in *limine* to the effect that the application brought on the basis of urgency, by the applicant, is not at all urgent and that any urgency that may be said to exist arising therefrom, is a result of the applicant's culpable remissness and/or delay in timeously bringing this application.

[13] In this regard, Ms. Campbell, for the first respondent, argued strenuously, summoning all the powers of persuasion at her command, that this is a matter as old as time. This, she argued. Is because the matter dates back to 2012 when this court issued the first order declaring the property in question specially executable. It was her submission that the applicant has dragged his feet from then and suddenly approaches this court on urgency without due or sufficient notice, taking into account the history of the matter.

[14] I agree with Ms. Campbell that the matter is relatively old and has to date not been concluded. What we cannot, however, close our eyes to, is that the trigger for this particular application, is 6 May 2019, the date on which the applicant's basis for urgency arose for this urgent application. On that date the second respondent served a writ of execution in respect of immovable property on the applicant. To avoid repetition I reiterate the facts I set out when addressing the background of this case above.

[15] In arguing that the matter is not urgent, the first respondent relied on the judgment of this court in *Bergmann vs Commercial Bank of Namibia*¹ for its contention. The court, in *Bergmann*, amongst other reasons, found that the respondent in that matter was prejudiced because the respondent could not file its notice of opposition and answering papers before the hearing of the urgent application. The court expressed itself as follows-

'Had the applicant so acted in this application, the matter could have been dealt with on a semi-urgency basis. The respondent would have had enough time to file a notice of opposition and answering affidavits. It could have been placed on the semi urgent opposed motion roll, the issues would have been properly ventilated, the parties would have had an opportunity to reconsider their respective positions and the Court could have had the benefit of considered argument before ruling on the matter. In this case, and because the application was only served earlier this morning on the first respondent, the Court had to allow an application of the respondent to adduce oral evidence in support of its opposition to the application - a time consuming procedure that would have been unnecessary had it not been for the applicant's dilatory conduct.'

[16] This court in *Jacks Trading C.C vs Minister of Finance and Another* 2013 (2) NR 480 (H.C) at paragraph 16 and 18 held that prejudice arising from the late institution of urgent proceedings would only arise where a party is unable to place factual matter before the court. In that matter as in the present matter the first respondent had raised urgency on grounds similar to those relied on by the first respondent in the present application. This court found in that matter that there was prejudice in the sense that the first respondent was unable to place its case before the court.

[17] I find that the first respondent in this matter has not been prejudiced in the sense and to the extent in *Bergmann*. This is so because although it may not had all the time required, the first respondent was able to enter its opposition and additionally filed its answering affidavit, although under stringent conditions it must be mentioned. It was thus able to place factual material before the court and this is the difference between the present matter

¹ ((P) A 336/2000) [2000] NAHC 25 (6 November 2000).

and *Bergmann (supra)*, relied on by the first respondent to oppose the application on the ground that the matter is not urgent.

[18] I must mention that, although this may be cold comfort, the first respondent was served with an advance draft copy of the application, although not *in pari materia* in every respect with the application as finally launched. In the circumstances, and taking into account all the pros and cons of this matter, and in exercise of my discretion, I hereby grant condonation to the applicant for its non-compliance with the rules to the extent required in rule 73(4), for this matter to be heard as one of urgency.

The debatement and full and proper accounting

[19] The first issue for consideration is whether the applicant is entitled to an order for the respondent to grant him a full and proper accounting and debatement of the monies he has paid to the first respondent in satisfaction of his debt.

[20] I hold the view that there is no general principle of law that when one party does not know how much he owes another, he can call upon the latter for debatement of the account. I am fortified in this view by the decision of the court *Rectifier and Communication Systems (Pty) Ltd v Harrison and Others*.²

[21] Furthermore, the South African Supreme Court of Appeal in *ABSA Bank Bpk v Janse Van Rensburg*³ at paragraph 15 of its judgment made it abundantly clear that, in order to obtain an order to debate an account, the person seeking such an order must establish that a fiduciary relationship existed between that person and the other party; or that there was a contractual agreement between the parties or lastly that a statutory provision created such an obligation to deliver and debate an account. I adopt this conclusion as sound and good law.

² 1981 (2) SA 283 (C) at 287-288B.

³ 2002 (3) SA 701 (SCA) para 15.

[22] I accordingly find that the applicant has not, in his papers, pleaded or laid a proper foundation for the order sought, particularly the exact nature of the relationship that obtains between himself and the first respondent to entitle him to seek the relief in question. I accordingly find and hold that on the facts before me, the applicant has not established his entitlement to a full and proper accounting and debatement of payments made by him. This order may not, in the circumstances, be granted.

The applicable rules

[23] The next issue to be considered is whether the applicant has a sound legal basis in terms of the rule 108 (1) (a) of the rules to seek a stay of the sale in execution, pending compliance by the applicant with rule 108 (1) (a) of this court's rules. The applicant, in argument also contended that there was non-compliance with rule 110 (3) of this court's rules. I will presently consider the rules alleged not to have been complied with and the effect thereof on the instant application.

[24] Rule 108 (1) (a) reads as follows:

'108. (1) The registrar may not issue a writ of execution against the immovable property of an execution debtor or of any other person unless -

- (a) a return has been made of any process which may have been issued against the movable property of the execution debtor from which it appears that the that execution debtor or person has insufficient movable property to satisfy the writ; and'

[25] In view of the fact that the present writ was issued on 5 October 2012, I am of the considered view that the provisions of rule 3 (6) and rule 138 apply. These provisions respectively read as follows:

'3(6) Proceedings instituted under the previous rules or practice directions are, from the date of coming into operation of these rules, governed by these rules

and the practice directions made under these rules unless otherwise directed by the court, a judge or the managing judge.’

‘138. Despite the repeal of the Rules of the High Court by these rules – (a) anything done under a provision of the repealed rules and which could have been done under a corresponding provision of these rules, is deemed to have been done under such corresponding provision of these rules.’

[26] From the rules quoted above, it is my considered opinion that although the proceedings in question commenced under the old rules, because the matter is proceeding after the new dispensation has taken root, any further proceeding in execution must be done following the new order. That much, is in my view, clear from rule 3(6) quoted above.

[27] Having established the applicable rules, I now turn to interpret the effect of rule 3 (6) as read with rule 138 on the procedure to be followed when selling an immovable property that is a primary home and such property is not mortgaged.

[28] It must be stated upfront that interpretation is about the court trying to ascertain the intention of the rule maker. This is achieved by, first, looking at the words used. If words employed are clear and unambiguous, then they must be given their ordinary grammatical meaning. In the present instance, I find that the words utilised by the rule maker are clear and unambiguous. Accordingly, no absurdity or hardship arises from attributing the ordinary, grammatical meaning of the words utilised by the rule maker. See *Torbitt v International University of Management*⁴.

[29] The Supreme Court addressed rule 108 in *Standard Bank Namibia vs Shipila and Others*⁵. It held that in terms of the common law, movables first have to be exhausted before recourse could be had to immovable property, except when the plaintiff has a hypothec or a pledge. The Court further held that rule 108(1) of the High Court rules, by providing in peremptory terms for

⁴ 2017 (2) NR 233 (SC).

⁵ 2018 (3) NR 849 (SC).

execution against movables first, reverses the sequence of execution and is in conflict with the common law in so far as it relates to the right to execute against hypothecated immovable properties. The Supreme Court only excluded the applicability of rule 108 in respect of immovable properties bonded in terms of mortgage bonds.

[30] The meaning and effect of rule 108 (1) (a) as read with rules 3 (6) and 138 is that the first respondent could not therefor properly proceed to execute against the applicant's primary home without complying with rule 108 (1) (a) of this court's rules, namely, execute against the applicant's movable property first, or obtain a *nulla bona* return if there are no movable assets. As a result, I hold that the first respondent must comply with rule 108 (1) (a) of this court's rules prior to proceeding to execute against the applicant's primary residence.

[31] I take further cognisance of the attempt by the first respondent to execute against the immovable property of the applicant. This attempt, it appears, was not successful because there were only two people who attended the sale in execution.

Rule 110 (3)

[32] The applicant further alleged that the first respondent advertised the property in the Namibian newspaper only on 31 May 2019 and did not comply with the provisions of rule 110 (3) of the Rules of this Court. The first respondent did not raise a genuine dispute on this point and relying on the *Plascon-Evans* rule, I find that indeed there was non-compliance with rule 110 (3) of the Rules of this Court. I quote the provision verbatim;

'(3) The deputy-sheriff must indicate two suitable newspapers circulating in the district in which the property is situated and require the execution creditor to –

(a) publish the notice referred to in subrule (2)(a) once in each of those newspapers not less than five days and not more than 10 days before the date appointed for the sale and in the Gazette not more than 14 days before the date appointed for the sale; and

(b) furnish the deputy-sheriff, not later than the day before the date of the sale, with one copy of each of those newspapers and with the number of the Gazette in which the notice is published.’

[33] Rule 110 (3) requires the Deputy Sheriff and in peremptory terms, it must be added, to indicate to an execution creditor two suitable newspapers circulating in the district in which the property sought to be sold in execution, is situated and after such indication, requires the first respondent to publish notices in those two newspapers and in the Government Gazette. In terms of rule 110 (3) (b) the first respondent had a duty to furnish the second respondent with the proof of the published notices. This has not been done in the instant case.

[34] I have already found that there was non-compliance by the first respondent with the provisions in that the notice was only published in one newspaper and not two newspapers. Additionally, the notice was not published in the Government Gazette. The proper approach to interpreting statutory provisions where there has been non-compliance with peremptory provisions was recently restated by the Supreme Court in *Metropolitan Bank of Zimbabwe and Another vs Bank of Namibia*⁶ [2018] NASC (23 October 2018) where the Court stated as follows;

‘The approach to ascertaining the consequences of non-compliance of provisions expressed in peremptory terms was recently addressed by this court in *Torbitt v International University of Management*⁷ where it was stated:

[35] The approach that a peremptory enactment must be obeyed exactly and that it is sufficient if a directory enactment is obeyed or fulfilled substantially has been described as rigid and inflexible and “that the modern approach manifests a tendency to incline towards flexibility.

After a thorough survey of authorities, this court concluded that the consequences of strict non-compliance would need to be determined with reference to the scope and

⁶ 2018 (4) NR 1115 (SC) para 65.

⁷ 2017 (2) NR 233 (SC).

object of the provision in question. In that matter the question arose as to whether delivery of an award by arbitrator outside a 30-day period prescribed by statute would result in the late award being a nullity. This court concluded that the statutory injunction to deliver awards within 30 days is aimed at addressing delays in issuing awards and that non-compliance would not result in an award being a nullity as that would undermine the statutory purpose. That approach also served to give the provision a sensible meaning taking into account the statutory purpose.'

[36] I now turn to address the purpose of rule 110 (3) of this court's rules. I hold the view that the purpose of the rule is to disseminate knowledge of the intended sale in execution to as wide an audience as possible. The object of that notice is to attract as many buyers as possible so that there are better chances that the price for the property to be auctioned shall be as high as possible as a result of the attendance of the auction by as wide an audience of potential buyers as possible.

[37] I hold the view that the requirement for wide publication of the notice of sale is peremptory in the case of an auction without reserve. The wide publication of the notice is the only safeguard available where a sale in execution is without reserve. It is common cause on the first respondent's papers that the sale in execution of the applicant's movable property did not proceed because only two persons attended the auction. I find that strict compliance is a safeguard provided by the rule to a person in the applicant's position.

[38] The non-compliance with rule 110 (3) of the rules is as a result prejudicial to an execution-debtor for reasons that have been traversed above. In the circumstances, I am of the considered view that the first respondent fails on this score as well.

Conclusion

[39] The test to be applied in determining whether a court should grant the relief sought by the applicant is the well-known test set out in *Setlogelo v Setlogelo*⁸, *Webster v Mitchell*⁹ and *Gool v Minister of Justice and Another*¹⁰, which test has been applied uniformly and consistently in this jurisdiction. I find that the applicant has met all the requisites of this test and on that basis, I am of the considered opinion that the application should be granted the prayers sought, save the one relating to the issue of debatement, which I have found that applicant has failed to satisfy on the papers.

Note

[40] It will be apparent that the applicant did not include the non-compliance with rule 108 as a basis in part, for the application for stay. That notwithstanding, the applicant made the necessary allegations in that regard in his founding papers and the issue was fully canvassed by the parties in argument. It is for that reason that the court is fortified in including the non-compliance with rule 108 as part of the reason for staying the execution in this matter.

Costs

[41] The ordinary approach to costs is that costs follow the result. In the present case I refrain from making an order of costs in favour of the applicant in this case for the reason that when one has full regard to the matter and the length this matter has remained interned in the belly of this court, it becomes plain that the applicant has for a long time removed his foot from the acceleration pedal until there is some action to move the matter forward on the first respondent's part. He appears to have been largely afflicted by inertia, if not paralysis, thus failing to show the requisite level of seriousness and urgency to put this matter to bed once and for all.

Order

⁸ 1914 AD 221.

⁹ 1948 (1) SA 682 (WLD).

¹⁰ 1955 (2) SA (CPD).

[42] Having regard to all the issues addressed above, I am of the considered view that the following order should be granted in this matter:

1. The application's non-compliance with the forms and service prescribed by the Rules of this Court is hereby condoned and the matter is heard as one of urgency in terms of the provisions of Rule 73(4) and is accordingly heard as one of urgency.

2. The sale in execution in respect of:

Certain Erf No. 2056, Klein Windhoek (Extension No. 3)

Situated: In the Municipality of Windhoek, Registration Division "K", Khomas Region

Measuring: 1384 (One Three Eight Four) Square Metres

Held by: Under Deed of transfer No. T 2758/1995

Is stayed pending:

(c) the First Respondent's correction of a Writ of Execution dated 20 February 2019, issued by the Registrar of this Honourable Court;

(d) The First Respondent's compliance with the provisions of Rule 108 (1) (a) and 110 (3).

3. There is no order as to costs.

4. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: Mr. T Muhongo

Instructed by: Kadhila Amoomo Legal Practitioners, Windhoek.

FIFTH RESPONDENT: Mrs Y Campbell

Instructed by: Dr Weder Kauta and Hoveka, Windhoek.