

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: A217/2015

In the matter between:

WOLFGANG HANS FISCHER

APPLICANT

and

HENNING ASMUS SEELNBINDER

1ST

RESPONDENT

FISCHER SEELNBINDER ASSOCIATES CC

2ND

RESPONDENT

THE SHERIFF

3RD

RESPONDENT

Neutral citation: *Fischer v Seelenbinder* (A217/2015) [2019] NAHCMD 211 (14 June 2019)

Coram: MILLER AJ

Heard: 13 June 2019

Delivered: 14 June 2019

Released on: 26 June 2019

Flynote: Urgent application – Set aside writ of execution – And all steps taken pursuant thereto be set aside – Rule nisi interdicting sheriff and first respondent from

taking any steps giving any effect to the writ in place – Interdict same from facilitating any sale in execution of applicant's assets Court to grant relief if applicant establishes prima facie case, irreparable harm if relief not granted and balance of convenience favours applicant – Relief granted – First respondent to pay cost on scale of application on scale between party and party, including cost of instructed and one instructing counsel.

Summary: Applicant applied for urgent interdict to set aside a writ of execution to be declared invalid and of no force and effect and be set aside. Also that the sheriff and first respondent be interdicted from taking any steps giving effect to the writ in place. And that such respondents interdicted from to facilitating any sale in execution of the applicant's assets. Held that court will grant interim relief to applicant if it has been established that applicant has a prima facie case, fear of irreparable harm if relief is not granted and balance of convenience favours the applicant. Interim relief granted. First respondent ordered to pay cost of application on the scale as between party and party, including cost of one instructed and one instructing counsel.

ORDER

1. The forms and time periods prescribed by the rules of court are dispensed with and this application is heard as one of urgency.
2. A rule nisi is called on the respondent to show cause on a day to be determined by this Honourable Court why the following order should not be granted: In this regard I will convene a status hearing on 19 June 2019 at 10H00 in order to set time limits for the filing of further papers and to get the matter ripe for trial.
 - 2.1 The writ of execution issued at the behest of the first respondent, should not be declared invalid and of no force and effect, and be set aside;
 - 2.2 All steps taken by the sheriff pursuant to such writ, including the attachment and removal of any property of the applicant, are declared invalid and of no force and effect, and be set aside.
3. Pending the final determination of the proceedings contemplated in order 2 above:
 - 3.1 The first respondent and the sheriff are interdicted from taking any further

steps for purposes of giving effect to such writ.

3.2 Without derogating from generality of the order in prayer 3.1 above, the sheriff is interdicted from:

3.2.1 attaching and or/ removing any further assets of the applicant;

3.2.3 conducting or facilitating any sale in execution involving any assets of the applicant.

4. Directing the first respondent to pay the cost of this application on the scale as between party and party, such costs to include those of one instructed and one instructing counsel.

JUDGMENT

MILLER AJ

[1] In this matter the applicant seeks the following orders:

1. 1 The forms and time periods prescribed by the Rules of Court to be dispensed with and this application to be heard as one of urgency.

1.2 A rule nisi is issued calling upon the respondent to show cause if any on a date to be determined by this Honourable Court on Thursday 13 June 2019 why an order should not be granted in the following terms:

1.2.1 The writ of execution issued at the behest of first respondent, a copy of which is attached to the supporting affidavit of Wolfgang Hans Fischer as W2 is declared to be invalid under no force and effect and is set aside.

1.2.2 All steps taken by the sheriff, I suppose that should be the deputy, any property of the applicant are declared to be invalid and of no force and effect and thus set aside.

1.3. Pending the finalisation of the proceedings contemplated by prayer 2 above it is

ordered that:

1.3.1 The operation of the writ contemplated by prayer 2.1 above and of the attachment and removal of the assets of the applicant already effected is suspended.

1.3.2 The sheriff is ordered to return, forthwith return whatever assets have already been attached and or removed from the position of the applicant to the applicant.

1.3.3 The first respondent and the sheriff are interdicted from taking any further steps for purposes of giving effect to such writ.

1.3.4 Without derogating from the generality of the order impress 3.2 and 3.3 above the Sheriff is interdicted from:

1.3.4.1. attaching and or removing any further assets of the applicant.

1.3.4.2 conducting and facilitating any save in execution involving any of the assets of the applicant.

[2] At the commencement of the proceedings Mr Heathcote SC assisted by Mr Jacobs appeared for the respondent and Mr Barnard appeared for the applicant. Mr. Heathcote raised two points in limine. They were firstly that the application lacked urgency and secondly that insofar as prayer 3 is concerned there has been no compliance with the provisions of Rule 32(9) of the Rules of this Court.

[3] I heard arguments on the points in limine from counsel. The submissions made eventually evolved into the merits and particularly the order sought in paragraph 3. As far as prayer 2 is concerned I had before me the supporting affidavits filed by the applicant. As is evident from prayer 2 the final determination of whether the writ of execution should be set aside hangs in the balance, I was not asked to nor will I express any conclusive view on that score. The matter is best left for determination once the respondent has had the opportunity to respond to the issue and the Court hearing the matter having had the benefit of counsel's submissions once the matter is ripe for hearing.

[3] Prayer 3, essentially seeks interim relief in the form of an interdict pendent lite pending the final determination of the issues raised in prayer 2. The Court will grant interim relief to an applicant for relief if that applicant establishes that:

(a) he has a prima facie right;

(b) a well-grounded fear of irreparable harm if the interim relief is not granted

and the ultimate relief is eventually granted and

(c) the balance of convenience favours the applicant.

[4] The applicant has to show that he has at least a prima facie right though it may be open to some doubt. As I had already indicated that at the time of the hearing of this matter, I had before me only the founding papers filed by the applicant. At the center of the dispute between the parties is the extent if at all whether there has been compliance with the order issued by Ueitele J. in November 2017 in case A 217/2005.

[5] In particular the dispute evolves around the determination of the value of the close corporation and the value of the respondent's loan account. I am satisfied that insofar as the applicant alleged that there has not been compliance with the relevant part of that order a prima facie case is made out which requires a response from the respondent in due course. It follows that subject to the issues of urgency and the requirements of Rule 32(9) I should consider whether or not to grant interim relief in my discretion. As far as urgency is concerned it appears from the papers that on 4 and 5 June 2019 the deputy sheriff attached some assets of the applicant. Applicant's legal practitioners then advised the respondent's legal practitioners that an application to set aside the writ was being prepared and sought an undertaking that no further attachments were to be made pending the determination of that dispute.

[6] According to the applicant's legal representatives that request was acceded to. Despite that undertaking a further attempt was made on 11 June 2019 to also attach the applicant's remaining vehicle and household effects. What that attempt involves is not explained. The applicant's legal representatives once more approached the legal representatives of the respondents. The following is stated and I quote from paragraph 22 of the affidavit of the applicant:

'when my legal practitioner again contacted the legal practitioner of Seelenbinder with the request that the process of attachment and removal be held in abeyance pending the urgent launching and finalization of my application, the request was met with a blunt refusal to accede thereto coupled with a similarly blunt indication that the instructions of Seelenbinder are to proceed with the attachment and removal of my remaining vehicle as well as my furniture and household effects'.

The applicant states that if the attachment were to proceed as contemplated it would have an adverse and detrimental effect both on his professional work as well as his personal circumstances, hence the need for urgent relief.

[7] On the facts before me the balance of convenience favours the applicant more so in light of the fact that the applicant is no longer persisting with the relief claimed in prayer 2.3 which relates to the assets attached on the 4th and 5th of June 2019. The assets already attached will therefore as a consequence remain in the custody of the deputy sheriff and will be capable of being realised in a sale of execution should the writ be upheld. Conversely if the attachment and sale with further assets were to proceed the effect thereof will have serious consequences and cause irreparable harm to the applicant if ultimately the writ is set aside.

[8] As far as Rule 32(9) is concerned it requires litigants to seek an amicable solution prior to the institution of interlocutory proceedings. There are no formalities and each case must be decided on its own facts. It is apparent that the applicant's legal practitioners attempted to come to an agreement with those of the respondent to diffuse the situation at least for the time being. Despite assurances further steps were taken by the respondent whose stance at present seems to be that the attachments and sales in execution must proceed.

[9] In all the circumstances I am satisfied that there has been an attempt in compliance with Rule 32(9) to reach an amicable solution which was not successful hence the need to approach this Court.

[10] I will accordingly issue the following orders.

1. The forms and time periods prescribed by the rules of court are dispensed with and this application is heard as one of urgency.
2. A rule nisi is called on the respondent to show cause on a day to be determined

by this Honourable Court why the following order should not be granted: In this regard I will convene a status hearing on 19 June 2019 at 10H00 in order to set time limits for the filing of further papers and to get the matter ripe for trial.

2.1 The writ of execution issued at the behest of the first respondent, should not be declared invalid and of no force and effect, and be set aside;

2.2 All steps taken by the sheriff pursuant to such writ, including the attachment

and removal of any property of the applicant, are declared invalid and of no force and effect, and be set aside.

3. Pending the final determination of the proceedings contemplated in order 2 above:

3.1 The first respondent and the sheriff are interdicted from taking any further steps for purposes of giving effect to such writ.

3.2 Without derogating from generality of the order in prayer 3.1 above, the sheriff is interdicted from:

3.2.1 attaching and or/ removing any further assets of the applicant;

3.2.3 conducting or facilitating any sale in execution involving any assets of the applicant.

4. Directing the first respondent to pay the cost of this application on the scale as

between party and party, such costs to include those of one instructed and one

instructing counsel.

K MILLER
Acting Judge

PEARANCES

APPLICANT:

W H PFEIFER
BEHRENS & PFEIFER, WINDHOEK

1ST RESPONDENT:

B J VAN DER MERWE
VAN DER MERWE & GREEF, WINDHOEK