

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING *ITO* P.D. 61

HC-MD-CIV-MOT-GEN-2020/00241

In the matter between:

**SALAMIS ISLAND INVESTMENTS (PTY) LTD**

**APPLICANT**

and

**PENDA EXPRESS TRADING CC**

**1<sup>ST</sup> RESPONDENT**

**DEPUTY SHERIFF: DISTRICT OF TSUMEB**

**2<sup>ND</sup> RESPONDENT**

**Neutral Citation:** *Salamis Island Investments (Pty) Ltd v Penda Express Trading CC* (HC-MD-CIV-MOT-GEN-2020/00241) [2020] NAHCMD 331 (5 August 2020)

**Heard on:** 4 August 2020

**Delivered on:** 5 August 2020

---

**RULING**

---

**MASUKU J:**

Introduction

[1] This is an application brought by the applicant, Salamis Island Investments (Pty) Ltd, against Penda Express Trading CC and the Deputy

Sheriff for the Tsumeb District. The application is essentially for the rescission and setting aside of a judgment entered by this court on 20 September 2019.

[2] The application is in two parts. Part A is an urgent application for the staying of a sale in execution of the applicant's property, scheduled for 6 August 2020, as advertised in the Namibian Newspaper dated 15 July 2020. Part B is the substantive application for the rescission of the default judgment granted by this court on 20 September 2020, as aforesaid.

### Opposition

[3] The first respondent, filed an affidavit in opposition to the granting of the application. The court, at the present moment, is concerned with the relief sought in Part A, namely, the staying of the sale in execution. In regard to the latter application, Mr. Ipumbu for the first respondent raised two points of law *in limine*, namely that the application is not urgent and that if it is found to be, the urgency is of the applicant's own making. He contended that the court should, for that reason alone, not come to the applicant's aid.

[4] The second point raised relates to the issue of the authority of the applicant to bring this application. In this regard, it was submitted that the current proceedings are not properly authorised and that the court should not grant the application therefor. It is necessary, in this regard, to first deal with the issue of authority because if it is upheld, there may be no need to deal with the question of urgency. It is therefor an issue that must be dealt with anterior.

### *Authority*

[5] Mr. Ipumbu argued that the present application has been launched without a resolution emanating from the applicant's Board of Directors and that the said application is therefor unauthorised and should be dismissed. I am of the considered view, as submitted by Mr. Mhata for the applicant, that this argument cannot be upheld.

[6] I say so for the reason that the deponent to the application alleged in the papers that he was authorised to launch the proceedings and to also depose to the affidavits necessary for that purpose. When the respondent challenged the authority, the applicant then annexed the resolution in reply, a practice that is permissible in terms of our law.

[7] The court was, on the applicant's behalf, referred to *J B Cooling and Refrigeration v Dean Jacques Willemse t/a Windhoek Armature Winding*.<sup>1</sup> In that case, Uetele J cited with approval the law as adumbrated in *Purity Manganese (Pty) Ltd v Otjozondu Mining (Pty) Ltd*<sup>2</sup> where Damaseb JP stated the applicable principles in the following language:

‘It is now trite that the applicant need do no more in the founding affidavit than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority.’

[8] I am of the view that the challenge mounted by the respondents in this matter, is a weak and vacillating one. The applicant made the necessary allegation in its founding affidavit, regarding the authority to launch these proceedings. Once this issue was raised in the answering affidavit, the applicant then attached the resolution to its replying affidavit. That, in my view should serve to quell any suspicion, reasonable, or otherwise that some other imposter than the applicant, is the spirit behind the launching of this application. This point of law is thus dismissed.

### *Urgency*

[9] In his spirited argument, Mr. Ipumbu dug deeply into the history of the matter and submitted that any urgency that may be touted to be present at this juncture, is of the applicant's own creation. In this regard, he argued that

---

<sup>1</sup> (A 76/2015) [2016] NAHCMD 8 (20 January 2016).

<sup>2</sup> 2011 (1) NR 298 (HC).

the court should refuse to come to the applicant's aid because of its disregard of the rules of court.

[10] In this particular regard, it was argued that the applicant was properly served with the combined summons and later, with an amended combined summons but it did not at any stage, find it fit to approach this court to set aside the process at that point. To make matters worse, argued Mr. Ipumbu, the applicant's property was attached in execution by virtue of a writ dated 25 November 2019, but it still did not bring any proceedings notwithstanding the attachment. The conclusion is inescapable, he submitted, that the applicant rested on its laurels and should not be heard to cry foul now that the sale in execution is imminent.

[11] Mr. Mhata, for the applicant, in counter-argument, submitted that the applicant only got to know of the impending sale in the issue of the Namibian Newspaper dated 15 July 2020 and that this is the event that constitutes a trigger for the urgency alleged at this point. He pointed out that the applicant stood to lose its tools of trade worth more than N\$ 2 million.

[12] Rule 73(3) requires an applicant, in an urgent application to explicitly aver the circumstances that render the matter urgent and reasons why the applicant alleges it cannot be afforded substantial redress at a hearing in due course. I am of the view that both these requirements have been met by the applicant in the present case.

[13] The argument by Mr. Ipumbu, although understandable, loses sight of the fact that there is a connection, a very close one at that, between the date of the sale in execution as advertised and the bringing of the application on urgency. This, in my view, suffices regarding the twin elements required by rule 73(3), in particular.

[14] Questions may of course be asked as to why the applicant did not move earlier but there can be no question that there was an impending doom that ignited the applicant's response and this answers fully to the

requirements of rule 73(3). I am also of the considered view that the sale of the applicant's tools of trade, as alleged, meet the requirement of the applicant having no alternative relief at a hearing in due course.

#### Interim interdict

[15] The requirements of an interim interdict are trite. An applicant should allege and show that it has a *prima facie* right although open to some doubt; that there is a well-grounded apprehension that irreparable harm will eventuate if interim relief is not granted; that the balance of convenience favours the applicant and that it has no alternative remedy open to it than the grant of the interim interdict.<sup>3</sup> The applicant has made all the necessary allegations in its papers in this regard.

[16] I am satisfied that the applicant does have a *prima facie* right although open to some doubt. In this regard, the applicant alleges that the default judgment was erroneously sought and granted by the court without following the requirements of rule 45 and rule 15(5) and (6). I need not, in proceedings like these, come to a firm or conclusive view that the applicant is correct. These are issues that the court can properly deal with in Part B of the application.

[17] I am also satisfied that the applicant has alleged and shown that he it has met the rest of the requirements of an interim interdict stated above, in the present case. I am of the view that the interests of justice favour the granting of the stay and allowing the parties to ventilate Part B of the application. If it so happens that the applicant is eventually unable to persuade the court of the sustainability of its case in terms of rule 103, then the court would be at large to dismiss the application. In that event, the default judgment would stand and be enforced accordingly.

[18] The converse, in which case the sale would be allowed, could result in injustice if the applicant eventually satisfies the court that the default judgment

---

<sup>3</sup> L F Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267.

was erroneously sought or granted because by that time, the sale of its property would have taken place to its eternal detriment. The alternative relief, namely suing for damages would not be adequate and would be of cold comfort to the applicant considering the time it would take the matter to be finalised. At that point, the applicant could, by the end of the matter, also considering the costs of litigation, be faced with financial ruin as it would be unable to make money to sustain its business in the interim, in view of the sale of its tools of trade.

### Costs

[19] The applicant took the view that the defence of this matter, was ill-advised on the respondent's part. It was submitted that the respondent was unreasonable in opposing the application, thus necessitating the granting of costs against the respondent on a punitive scale.

[20] I am of the considered view that a case has not been made for the granting of the costs on a punitive scale, considering all the nuances of the case and the lengthy period when the applicant remained inactive after the numerous events Mr. Ipumbu referred to. I am of the view that it is appropriate, in the circumstances, to reserve the question of costs until the determination of the application for rescission. It would be at that stage that the waters would have sufficiently cleared for an advised order of costs, if appropriate, to be issued, if at all.

### Order

[21] Having regard to what is stated above, the following order is accordingly issued:

1. The Applicant's non-compliance with the forms, service and time limits prescribed by the Rules of this Court, is hereby condoned and the matter is heard as an urgent application as envisaged by Rule 73 of this Court's Rules.

2. The sale in execution, issued pursuant to a writ of execution dated 25 November 2019, under Case No. HC-MD-CIV-CON-2018/04111 as advertised in the Namibian Newspaper dated 15 July 2020 and scheduled to take place on 6 August 2020, is stayed, pending the outcome of the Applicant's application for rescission of the judgment by default dated 20 September 2019.
3. Part A of the application is removed from the roll and is regarded as finalised.
4. The costs of the application in Part A are reserved for determination together with costs for Part B.
5. The parties are directed to file a joint case management report on or before 21 August 2020.
6. Part B is postponed to 3 September 2020 at 08:30 for a case management conference.

---

T.S. Masuku  
Judge

## APPEARANCES:

APPLICANT: N. Mhata  
Of Sisa Namandje & Co. Inc.  
Windhoek

RESPONDENT: T. Ipumbu  
Of Titus Ipumbu Legal Practitioners  
Windhoek