REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2018/00454

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY (NAMIBIA) LTD	**APPLICANT**

and

DEPUTY SHERIFF OF WINDHOEK	**1ST RESPONDENT**
ANDRE HARRIS	**2ND RESPONDENT**
H. HENDRICKS INVESTMENT CC	**3RD RESPONDENT**
OLD MUTUAL HOLDINGS (NAMIBIA) (PTY) LTD	**4TH RESPONDENT**
ETZOLD-DUVENHAGE	**5TH RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA LIMITED	**6TH RESPONDENT**

Neutral Citation*: Old Mutual Life Assurance Company (Namibia) Ltd vs Deputy Sheriff of Windhoek* (HC-MD-CIV-MOT-REV-2018/00454) [2021] NAHCMD 88 (26 February 2021)

CORAM: MILLER AJ
Heard: **28 January 2021**
Delivered: **26 February 2021**

Flynote: Practice – Execution of immovable property – Requirements for rule 109 and 110 to be complied with – Language used in the said rules, whether same indicating to be peremptory or not.

Summary: The present matter involved an immovable property that was attached by the first respondent on the instructions of the applicant, to which a sale thereof in execution was held on 11 September 2018. What brought rise to the application before me was an ostensible factual dispute particularly concerning the discussion between the first respondent and two representatives of the applicant immediately prior to the sale in execution proceedings.

Held – A perusal of Rules 109 and 110 will show that the words “must” and “may” are used interchangeably. That is in itself a strong indication of what the drafter of the Rules considered to be mandatory requirements and what directory requirements are.

Held – It follows that an immovable may only be sold, in these circumstances, without a reserve price if the preferred creditor or local authority failed to stipulate a reasonable reserve price or in circumstances where the deputy-sheriff is satisfied that it is impossible to notify any preferred creditor.

Held – In considering the not merely the words used but the context of particularly Rules 109 and 110, it is apparent that some provision is made to protect the rights of bond holders and local or regional authorities. When considered in context I conclude that the word “must” where it appears imposes a mandatory obligation on the Deputy-Sheriff or the judgment creditor as the case may be.

Held – Rules 109 and 110 insofar as they relate to bond holders or local or regional authorities were drafted to ensure adequate protection of their rights as a pre-emptive measure. Fundamental to this is the fact that they must as a first step be notified that the property is to be sold in execution. Non-compliance will defeat the object and intention of the Rules and will lead to a nullity in the case of non-compliance. Bond holders must be notified in advance, to enable them to exercise the rights offered to them. It is not intended that they should found out *ex post facto* that a property over which they have rights had been sold.

ORDER

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1. I grant prayer 1 of the Notice of Motion.

2. The second respondent is ordered to pay the applicant's costs, which costs will include the costs of one instructing- and one instructed counsel.

RULING

MILLER AJ:

[1] The applicant seeks the following orders:

'1.1 That the sale in execution by the first respondent of Erf No. 3444 (a portion of consolidated Erf No. 441), 85 Frans Indongo Street, Windhoek ("the immovable property") by public auction on 11 September 2018 in pursuance of a judgment in the matter under case number I 1890/16 be set aside.

1.2 That those respondents opposing this application shall pay the cost of this application jointly and severally, which costs are to include the costs of one instructing and one instructed counsel.'

[2] As matters turned out the second respondent opposes the application.

[3] It is common cause that the third respondent was indebted to the applicant, which indebtedness was secured by the passing of a first mortgage bond over the property forming the subject of this matter.

[4] Pursuant to a default on the part of the third respondent, the applicant instituted action in this court against the third respondent under case I 1890/2016, in which the applicant claimed payment in the sum of N$6, 372, 938.84 together with some ancillary relief.

[5] On 22 September 2016, the applicant obtained judgment against the third respondent for payment of the amount I mentioned together with the ancillary relief.

[6] The immovable was attached by the first respondent on the instructions of the applicant and a sale thereof in execution was held on 11 September 2018.

[7] Eventually the property was sold to the second respondent for the sum of N$4, 600, 000.00.

[8] There remains on the papers some ostensible factual dispute particularly concerning the discussion between the first respondent and two representatives of the applicant immediately prior to the sale in execution proceedings. I will return to this aspect of the case in due course.

[9] The requirements for want of a better word, relating to the sale in execution of immovable property are those to be found in Rule 109 of the Rules of the High Court. It

is also necessary to have regard to Rule 110 insofar as Rule 110 determines the procedure to be adopted for the sale of the property.

[10] As a first step Rule 109(1) provides that the writ of execution must contain a full description of the nature and situation including the address of the property and must be accompanied (where necessary I suppose) other detail to enable it to be traced.

[11] The attachment must made on Form 25 must be made by the deputy-sheriff of the district in which the property is situated or the deputy-sheriff of the district in which the Office of the Registrar of Deeds is situated.

[12] Upon receipt of a written instruction from the execution creditor to proceed with the sale, the deputy-sheriff must ascertain and record what bonds or other encumbrances are registered against the property together with the names and addresses of the persons in whose favour those bonds or encumbrances are so registered and must notify the execution creditor accordingly. That, by way of summary is what is required by Rule 109(5).

[13] The reason for the Rule 109(5) is essentially to give effect to, where necessary to Rule 109(6). It enables the judgment creditor to know in advance there may exist a claim preferent to that of the execution creditor, a regional council authority or local authority if the property is rateable. In that event, the judgment creditor must notify the preferred creditor or the local or regional authority of the intended sale. This is done by way of registered post. The notice must call on the preferred creditor or local or regional authority to state within 10 days a reasonable reserve price or to agree on writing to a sale without reserve.

[14] It follows that an immovable may only be sold, in these circumstances, without a reserve price if the preferred creditor or local authority failed to stipulate a reasonable reserve price or in circumstances where the deputy-sheriff is satisfied that it is impossible to notify any preferred creditor.

[15] Rule 110(1) obliges the deputy-sheriff to appoint a day or place for the sale being a day not less than one month after the attachment was made. Rules 110(2) and (3) relate to the manner in which the notice of the sale must be published.

[16] Rule 110(4) provides that the deputy-sheriff must not less than 10 days prior to the sale, forward by registered post a copy of notice of sale to every execution creditor who caused the immovable property to be attached and to every mortgagee of the property whose address is known. It will be remembered that Rule 109(5) requires that the Deputy-Sheriff is to ascertain the names and addresses of inter alia bond holders at an earlier stage in process.

[17] It is against the backdrop of what Rules 109 and 110 require, that I turn to the facts relevant to this case.

[18] At the time the sale in execution look place, the sixth respondent was the holder of a secured continuing second bond registered in its favour over the property concerned. It was not notified of the intended sale of the property as at the face of it, is as required by Rule 110(4). Two issues fall for determination. They are:

(a) Whether the provisions of Rule 110(4) are peremptory and;

(b) If they are, whether non-compliance results in setting aside the sale in execution.

[19] A perusal of Rules 109 and 110 will show that the words "must" and "may" are used interchangeably. That is in itself a strong indication of what the drafter of the Rules considered to be mandatory requirements and what are directory requirements.[1]

[20] The mere use of the word "must" is not per se an indication that the provision is peremptory. It is more likely to be peremptory where, as I indicated, the word "must" is

[1] *Messenger of the Magistrate's Court, Durban v Pillay* 1952(3) SA 678 to 683 (A).

used in conjunction with the word may. One may well consider that if the word “must” when used in the Rules mean “may”, what does the word “may” then mean?

[21] The sale in execution of immovable property potentially affects real rights of persons other than the judgment creditor, such as persons or entities in whose favour bonds are registered over the property to be sold. The claims of some of them may be preferent to that of the execution creditor. They may well not be aware that the property is to be sold in execution. In the case of possible preferent creditors they have certain rights such as the determination of a reasonable reserve price is envisaged in Rule 109(6).

[22] In considering the not merely the words used but the context of particularly Rules 109 and 110, it is apparent that some provision is made to protect the rights of bond holders and local or regional authorities. When considered in context I conclude that the word “must” where it appears imposes a mandatory obligation on the Deputy-Sheriff or the judgment creditor as the case may be.

[23] In *Volsclenk v Volsclenk*[2] the passage on page 490 read, that:

> ‘I am not aware of any decision laying down a general rule, that all provisions with respect to time are necessarily obligatory and that failure to comply therewith results in nullifying all acts done pursuant thereto. The real intention of the legislature should in all cases be enquired into . . . the reasons ascertained why the legislature should have . . . to . . . a nullity.’[3]

Rules 109 and 110 insofar as they relate to bond holders or local or regional authorities were drafted to ensure adequate protection of their rights as a pre-emptive measure. Fundamental to this is the fact that they must as a first step be notified that the property is to be sold in execution. Non-compliance will defeat the object and intention of the Rules and will lead to a nullity in the case of non-compliance. Bond holders must be

[2] *Volsclenk v Volsclenk* 1947 TPD 486.
[3] (See also: Rally for Democracy and Progress and Others 2010(2) NR 487 SC;)

notified in advance, to enable them to exercise the rights offered to them. It is not intended that they should find out *ex post facto* that a property over which they have rights had been sold.

[22] It is not disputed that the sixth respondent was not advised of the intended sale in execution. The stance adopted by the sixth respondent is that the debt secured by the bond had been paid. That may well be so. That fact does not mean that they should not have received the required notice. Had the sixth respondent been notified, it was up to the sixth respondent to determine what its position would **be** should the property be sold. If it had no further interest in the matter, it would not likely seek to intervene. It can only exercise this option once it is notified. The fact that the sixth respondent established *ex post facto* facts that the debt has been repaid does not assist the matter in any sense.

[23] It follows that the applicant is entitled to the relief it seeks for these reasons.

[24] There remains the further issue concerning what transpired between the representatives of the applicant and the first respondent immediately prior to the sale proceedings.

[25] What is to be determined is whether or not a factual dispute insofar as it exists can be resolved on the papers, these being motion proceedings.

[26] At the heart of it lies the allegation that the applicant's representatives instructed the first respondent to cancel the sale. The response of the first respondent is equivocal. He states merely that the representatives of the applicant expressed their dissatisfaction. As such it does not raise a real and concrete dispute. The second respondent's denial that such an instruction was given is a bold denial. He does not say that he was present during the discussion or was privy in one way or another to what was being discussed. I conclude that the first respondent was instructed to cancel the

sale. It matters not that the applicant's representatives believed, erroneously as it turned out, that the property should only be sold against a reserve price.

[27] The fact remains that the applicant, through its representatives, had unequivocally instructed the first respondent not to proceed with the sale in execution. The first respondent was obliged to give effect to the instruction. It was not open to first respondent to suggest alternative solutions and to proceed to sell the property.

[28] In those circumstances the sale became irregular and has to be set aside.

[29] Having reached these conclusions it is not necessary in the circumstances to deal with the other issues raised by the applicant.

[30] I will therefore make the following order:

1. I grant prayer 1 of the Notice of Motion.

2. The second respondent is ordered to pay the applicant's costs, which costs will include the costs of one instructing- and one instructed counsel.

K MILLER

Acting Judge

APPEARANCES:

APPLICANT:	C E van der Westhuizen Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
2nd RESPONDENT:	T Chibwana Instructed by AngulaCo. Inc., Windhoek