

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00270

In the matter between:

TEMPTATION FASHION CC t/a TEMPTATIONS
OLIVIA NDAHAFKA KANYEMBA-USIKU

1ST APPLICANT

2ND APPLICANT

and

SANNAMIB INVESTMENTS (PTY) LTD

RESPONDENT

Neutral Citation: *Temptation Fashion CC t/a Temptation v Sannamib Investments (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2020/00270) [2022] NAHCMD 165 (01 April 2022).

CORAM: MASUKU J

Heard: 07 March 2022

Delivered: 01 April 2022

Flynote: Civil Practice – Motion Proceedings – Mootness – The principle of mootness is discussed – A case is moot and therefore not justiciable if it no longer presents an existing and live controversy – The court is to avoid giving advisory opinions on abstract propositions of law.

Summary: The parties were involved in numerous proceedings brought by the applicants before different judges with the aim of obtaining an order of court authorising the first applicant to return to the premises leased from the respondent and to trade thereon. This is after the magistrate's court gave judgment in favour of the respondent for payment of monies due to it and ejectment of the first applicant from the premises consequent to breach of material terms rental agreement by the applicants. The first applicant fell into rental arrears and municipal charges in the amount of N\$ 502,830.04. The respondent obtained judgement from the magistrate court in the amount claimed and issued a warrant of execution. Certain goods, which were on the premises, were attached and the first applicant was ejected from the premises. Devastated by the above, the applicants approached the High Court with an urgent application to stay the proceedings pending finalisation of the main matter and to have possession of the premises and continue trading thereat. The respondent opposed the application, which was struck from the roll for lack of urgency. Thereafter, the respondents sold the goods, which were attached. The matter was then reinstated on the roll and set down for hearing on the merits. The respondent raised the issue of mootness, in that in view of the magistrate court's order; the dismissal of the application for stay of a sale in execution; the ejectment of the first applicant from the premises and the sale of the goods which were attached in execution, the matter no longer raised a live controversy for the court to determine.

Held: That it has always been a fundamental feature of our judicial system that the courts decide disputes between parties before them; they do not pronounce on abstract questions of law where there is no live dispute to be resolved.

Held that: Where the dispute is, for one reason, or another no longer live, or has dissipated and thus rendered moot and therefore academic, courts should and ought not to decide those issues as they become of academic interest only.

Held further that: there can be no need, at this late hour, to issue an interdict regarding the respondent not availing the premises, when there is an extant ejectment order and the goods being sold already in execution. Clearly, this renders the application moved by the applicants moot.

Held that: The principle of mootness resonates with the ethos of judicial case management in that the court is a busy institution and must use judicial time and resources to determine the real issues in dispute and on their merits.

Held further that: The orders sought by the applicants have been overtaken by events and no longer present a live controversy that should require the court to employ its machinery to resolve them in the circumstances.

ORDER

1. The Applicants' application is dismissed for mootness.
2. The Applicants are ordered to pay the costs of the Respondent, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] The main question submitted for determination by this court, is whether or not the proceedings lodged by the applicants in this matter have not, by reason of events that will be enumerated in this judgment, become moot.

[2] Mr. Muhongo for the respondent, argued that the proceedings have been rendered moot because of an order of court that will be referred to. Mrs. Usiku, the second applicant, on the other hand, argued contrariwise. The question who between the two protagonists lies ensconced in the warm arms of the law will be determined as the judgment unfolds.

The parties and their representation

[3] The first applicant is Temptations Fashion CC t/a Temptations, a close corporation duly incorporated in terms of the close corporation laws of this country. The second applicant is Mrs. Olivia Ndahafa Kanyemba-Usiku. An adult female and sole member of the first applicant. Both applicants' addresses are based in Windhoek.

[4] The respondent is Sannamib Investment (Pty) Ltd, a company with limited liability, duly incorporated in terms of the company laws of this country. Its address is also in Windhoek.

[5] I will refer to the applicants as such, save where a particular applicant is to be identified. In that event, I will refer to the said applicant as they appear in the papers. The respondent, will be referred to as such.

[6] Mrs. Usiku, the second applicant appeared on behalf of the applicants, whereas Mr. Muhongo appeared on behalf of the respondent.

Relief sought

[7] The applicants approached this court on urgency. They sought an order compelling the respondent to, with immediate effect, avail the premises described as Sanlam Centre, Shop No.22, 145 Independence Avenue, Windhoek, ('the premises'), to the applicant (presumably the first applicant), for purposes of trading therein, pending the court's decision in the main case. The applicants further sought an order for restoration of the status *quo ante* with immediate effect.

[8] This was not all. The applicants further sought an order interdicting the respondent from any further unlawful interference with the premises and one setting aside a notice of auction placed at the premises. A further order sought was the authorisation of the deputy-sheriff to perform such acts as are necessary, together with an order for disbursements if the application is opposed.

[9] Needless to say, the application was opposed by the respondent, which as it was entitled, filed answering affidavits opposing the relief sought on the merits. In addition, the respondent raised the issue that the application is not urgent as the applicants failed to comply with the mandatory requirements of rule 73. It sought an adverse order as to costs against the applicants.

Background

[10] It is fair to say that the parties in this matter have been at each other's throats for a considerable period of time. In this time, the applicants have launched numerous applications against the respondent and which have inevitably served before no less than four judges of this court.

[11] Central to the dispute are the premises described earlier in the judgment. It would seem that the applicant was a lessee of the respondent in relation to the said premises. In this connection, a written lease agreement dated 7 February 2018, was signed by the parties. The respondent approached the Magistrate's Court seeking payment of arrear rentals and municipal charges against the applicants in the amount of N\$ 502,830.04. The amount was in relation to lease of the premises in question.

[12] The respondent obtained judgment from the Magistrate's Court in the amount claimed and a warrant of execution was issued by the Magistrate's Court around April and May 2019. As a result, certain goods, which were found at the premises, were laid under attachment. The applicants' sought an order entitling them, pending the determination of the main matter, to have possession of the premises, which was vehemently opposed by the respondent. It is unnecessary to engage further in the background at this stage.

[13] On 24 August 2020, the matter served before Angula DJP, who in his wisdom, struck the matter from the roll for want of compliance with rule 73(4) of this court's rules. He ordered the applicants to pay the costs occasioned thereby, being of one instructing and one instructed legal practitioner.

[14] On 9 September 2020, the applicants brought another application for the reinstatement of the matter (it having been struck from the roll by Angula DJP). The application was reinstated and referred to case management. As fate would have it, the matter was allocated to me. Due to Covid 19 restrictions and lockdown, the matter was postponed on a few occasions until it was placed on my case management roll on 5 August 2021 for 21 August 2021.

[15] A case management report was filed and it was made an order of court on 19 August 2021. Further papers needed to be filed and the matter was postponed to 23 September 2021. The matter was eventually postponed to 7 March 2022 for hearing before me.

[16] It was at that hearing that Mr. Muhongo for the respondent raised the issue of mootness. It was argued in this regard that the first applicant was ejected from the premises by an order of the Magistrate's Court and that furthermore, the first applicant's goods were sold in execution as a result of a dismissal of their application for stay.

[17] In response, Mrs. Usiku argued that Mr. Muhongo was confused as to the correct case for the reason that the applicants had launched several applications. The present application, she contended, has not been rendered moot by any other order that was issued by the court. She accordingly moved the court to dismiss the preliminary point and to proceed to hear the matter on the merits.

Determination

[18] Before dealing with the issue in question, it is necessary that I should point out that care should be taken not to consider this particular application, as Mrs. Usiku urged the court to do. What cannot be denied is that the applicants launched, as earlier stated, a multiplicity of applications, which when stripped to the bare bones, were geared to ensure that the relief sought in this application is not imperilled in any manner, shape or form.

[19] The destination, the applicants wished to reach, regardless of the nature and number of the case, was for the first applicant to be authorised by an order of court to return to the premises and to trade thereon. The other primary order sought was the setting aside of the notice of sale, which was subsequently issued by the deputy sheriff, advertising the sale of the first applicant's good which were lain under attachment at the premises in question.

[20] In their indefatigable spirit, the applicants launched an application under case number MD-CIV-MOT-GEN-2021/00329, which like most of the applications, was brought on an urgent basis. The principal relief sought by the applicants in that matter was the stay of a sale in execution, which was slated for 18 August 2021. The applicants approached the court on 17 August 2021 seeking the stay on an urgent basis.

[21] This application was struck from the roll for want of compliance with rule 73(4) (a) and (b) of the court's rules. The applicants were further ordered to pay the respondent's costs. On 18 August 2021 the reasons for the order were handed down via a judgment in terms of PD 61 dated 16 September 2021.

[22] The effect of this order striking the application for stay from the roll, is effectively that the sale in execution proceeded on the date scheduled. In recognition of that fact, the respondents filed a return of service dated 15 September 2021. It reflects that the goods, which were attached, were sold in execution on 18 August 2021, for an amount of N\$202,362.37. Furthermore, it is common cause that the first applicant was ejected per the order of the Magistrate's Court from the premises.

[23] The question is whether, in view of what has been recounted above, the respondent is correct in law that the matter has been rendered moot. What is the principle of mootness? What does it entail? In what cases does it apply?

[24] Mr. Muhongo referred the court to the judgment of *Mwoombola v Simaata*¹ where the court cited the case of *National Coalition of Gays and Lesbian Equality and*

¹ *Mwoombola v Simaata* (HC-MD-CIV-MOT-REV-2017/00020 [2020] NALCMD 2 (23 January 2020)).

*Others v Minister of Home Affairs*² where the Constitutional Court of South Africa stated the following, regarding mootness:

‘A case is moot and therefore not justiciable if it no longer presents an existing and live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’

[25] The court further referred to the pertinent remarks of Plewman JA in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers*,³ where the learned Judge of Appeal cited with approval the words that fell from the lips of Lord Bridge of Harwich in *Ainsbury v Millington* where the Law Lord said:

‘It has always been a fundamental feature of our judicial system that the Courts decide disputes between parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.’

[26] It is my understanding that the quotations above, correctly reflect the law of Namibia as well. Courts are extremely busy institutions, which are, according to the ethos of judicial case management, supposed to deal with concrete matters in dispute and on their real merits.

[27] Where the dispute is, for one reason, or another no longer live, or has been dissipated and thus rendered moot and therefore academic, it would be irresponsible of our courts to use the scarce commodities of judicial time and resources to pronounce on what are clearly abstract questions of law in respect of which whatever dispute had been there does not meaningfully exist to require the court’s judicial machinery to be engaged.

[28] It does seem to me that the issue of mootness blows the applicant’s case to smithereens. Although she rightly argues that there is nothing in the current matter that points to mootness, what cannot, however be done, is for the court to close its eyes to other cases that have a bearing on the instant one, as I have demonstrated above.

² *National Coalition of Gays and Lesbian Equality and Others v Minister of Home Affairs* 2002 (2) SA 1 (CC)

³ *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA872 (SCA), para 9.

[29] It is now plain that with the property in question that had been laid under attachment having been sold in execution and the first applicant having been ejected from the premises, the relief sought by the applicant in the instant matter is purely academic and would, in the end, amount to a waste of judicial resources and an unnecessary running up of costs in this matter.

[30] How would the order availing the premises to the first applicant assist when there is a valid and binding ejection order that has not been set aside? Equally, there can be no need, at this late hour, to issue an interdict regarding the respondent not availing the premises, when there is an extant ejection order. Clearly, this renders the application moved by the applicants moot. The orders sought by the applicants have been overtaken by events and no longer present a live controversy that the court should employ its machinery to resolving in the circumstances.

[31] In closing, it would be appropriate to reiterate the legal position as stated in *Legal Aid South Africa v Magidiwana and Others*⁴ where the Supreme Court of Appeal stated in imperative terms that, 'Courts should and ought not to decide issues of academic interest only. That much is trite.' See also *Radio Pretoria v Chairman, ICASA*⁵

Conclusion

[32] In the premises, I am of the considered view that the respondent is eminently correct in its point of law *in limine*. This application has been rendered moot by the events described above, including the orders of court that have been issued in related matters involving the same parties and which have a decisive bearing on the relief sought in this matter.

⁴ *Legal Aid South Africa v Magidiwana and Others* 2014 (4) AllSA 570 (SCA), para 2.

⁵ *Radio Pretoria v Chairman ICASA* 2005 (1) SA 47 (SCA).

[33] This finding, in the circumstances, obviates the need to consider the applicants' application on the merits. The result is that the matter is at an end and the applicants cannot succeed in obtaining the relief they seek in the instant matter.

Costs

[34] The principles applicable to costs do not, on account of their being notorious, require much elaboration. The ordinary approach is that costs follow the event. The applicants have, in view of the conclusion above, been rendered unsuccessful in their application. They are, accordingly obliged to reimburse the respondent for its costs incurred in opposing these proceedings.

Order

[35] In view of all the issues discussed above, together with the conclusions reached on the germane questions of law arising, it appears that the proper order to issue in the premises is the following:

1. The Applicants' application is dismissed for mootness.
2. The Applicants are ordered to pay the costs of the Respondent, jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANTS: O.N. Kanyemba-Usiku, in Person

RESPONDENT: T. Muhongo

Instructed by: Etzold-Duvenhage