NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No LC 136/2011

In the matter between:

AMANDA TSOEU **APPLICANT**

and

SENIOR REAL ESTATE CC **FIRST RESPONDENT**

GOLF TRADING CC **SECOND RESPONDENT**

THE MESSENGER FOR THE COURT

OF THE DISTRICT OF WINDHOEK **THIRD RESPONDENT**

THE REGISTRAR OF THE HIGH COURT **FOURTH RESPONDENT**

Neutral citation: *Tsoeu v Senior Real Estate CC* (LC 136-2011) [2014] NALCMD 49 (8 December 2014)

Coram: VAN NIEKERK J

Heard: 26 June 2012

Delivered: 8 December 2014

Flynote: **Practice** - Application in terms of rule 6(22) of 1992 Labour Court rules to set aside writ of execution – Writ arising from matter in which certain parties were cited – In current application different parties cited and no proceedings pending between parties in this Court – Substantive application in terms of rule 6(1) – (5) should have been brought .

Practice – Various allegations of fraudulent and improper conduct made against Deputy Sheriff in affidavits upon which reliance is placed for relief sought – Deputy Sheriff not party to proceedings – Deputy Sheriff should have been joined.

ORDER

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1. The main application and the application for leave to file a supplementary affidavit are struck from the roll.

2. There shall be no order as to costs.

JUDGMENT

VAN NIEKERK J:

[1] The applicant and the first and second respondents were previously engaged in litigation in this Court under this case number in an urgent application in which the first and second respondents were the applicants. The urgent application arose from a garnishee order incorrectly made by the District Labour Court of Windhoek. The current applicant was the first respondent. The other respondents were the third respondent in the current application as second respondent, Bank Windhoek (third respondent), the Magistrate for the district of Windhoek (fourth respondent) and Mr Hewat Beukes (fifth respondent).

[2] On 16 November 2011, Miller AJ granted judgment in favour of the first and second respondents as the applicants in that application and ordered, *inter alia*, as follows:

> "2. Ordering the second respondent to repay the sum of N$79, 600.00, attached by him to the second applicant alternatively;
>
> 3. In the event that the second respondent no longer retains the amount of N$79, 600.00, the first respondent is ordered to pay that amount to the second applicant.
>
> 4. There shall be no order as to costs."

[3] Arising from this order the first and second respondents caused a writ of execution to be issued on 18 November 2011 to the Deputy-Sheriff of this Court for the district of Windhoek as a result of which a certain vehicle was attached, but as I understand it, not sold in execution as interpleader proceedings ensued at some stage.

[4] On 31 January 2012 the applicant filed an urgent application in this Court to have the writ dated 18 November 2011 set aside. On 3 February 2012 the application was struck from the roll for lack of urgency. The application was not enrolled again.

[5] On 9 February 2012 the applicant filed an application in terms of rule 6(22) of the 1992 Labour Court rules for the setting aside of the writ of execution dated 18 November 2011. The applicant gave notice that the matter would be heard on 17 February 2012. On this date, Ueitele AJ, as he then was, ordered the matter postponed to a date to be arranged with the Registrar of this Court. Such dates were never arranged.

[6] On 10 February 2012 the first and second respondents before me caused a fresh writ of execution to be issued by the fourth respondent to the Deputy-Sheriff. The writ of 18 November 2011 was cancelled on 13 February 2012.

[7] On 22 February 2012 the applicant withdrew the applications filed on 31 January 2012 and 9 February 2012. On the same date the applicant filed a fresh application in terms of rule 6(22), supported by affidavits, for the setting aside of the writ of 10 February 2012. In this application the applicant cited the same respondents as in the current application. However, it seems that application was not called because the fourth respondent's staff by mistake had not enrolled it.

[8] On 2 March 2012 the applicant caused a fresh notice of application in terms of rule 6(22) to be served on the respondents in which the same relief is claimed. This is the current application before me. In the notice the applicant gave notice that the matter would be heard on 16 March 2012 and explained the error that occurred regarding the failed enrolment on 2 March 2012. The applicant did not attach any affidavits to this notice, but gave notice to the respondents as follows:

> "**TAKE FURTHER NOTICE** that the Respondent's (*sic*) already has (*sic*) the founding affidavit of the applicant with all the annexure (*sic*) in their possession together with the confirmatory affidavit's (*sic*) that was duly served on them on the 22nd February 2012."

[9] Only the first and second respondents oppose this application, as indeed they have done in respect of all the earlier applications. On 16 March 2012 the matter ("hereinafter the main application") was postponed to 10 April 2012 on which date it was postponed to a date to be arranged with the Registrar, where after it was eventually set down for hearing together with an application by the applicant for leave to file a supplementary affidavit, which the first and second respondents also oppose.

[10] Mrs *Petherbridge* raised several points on behalf of the first and second respondents. On the view I take of the matter, it is not necessary to deal with all of them or with the merits of the two applications before me.

[11] Counsel pointed out that rule 6(22) requires such affidavits as the case requires to be attached to the notice of application in terms of form 5 and submitted that there was not compliance with respect to the main application. I accept that this is, strictly speaking, the case. However, it is clear that what the applicant actually did was to request enrolment of the same application which was mistakenly not enrolled on 2 March 2012, but that she went about it in a way which is not strictly in accordance with the rules. In view thereof that she is a layperson and that there was no prejudice, I do not think this mistake is necessarily fatal.

[12] In my view a more fundamental problem is, firstly, that the main application to set aside the writ is being brought in terms of rule 6(22) of the 1992 Labour Court rules as an interlocutory application or as an application incidental to pending proceedings. There are no pending proceedings in this Court between the parties cited. The parties in the first application brought before Miller AJ are also not the parties cited in the current application. In the circumstances the application is not interlocutory. In my view a substantive and separate application in terms of rule 6(1) – (5) of the 1992 Labour Court rules was required.

[13] Secondly, the applicant's papers are replete with references to the Deputy-Sheriff of this Court and various allegations of fraud and improper conduct are made against this officer. The relief is claimed partly on the basis of these allegations. The Deputy Sheriff clearly has a real and substantial interest in the matter, but he is not a party to the proceedings. He should have been joined.

[14] Counsel for the first and second respondents further submitted that the application should in any event be stayed on the basis of *lis pendens* pending the adjudication of the application which was set down for 17 February 2012 and postponed to a date to be arranged with the Registrar. This submission is based thereon that the application postponed on 17 February 2012 was withdrawn contrary to the provisions of rule 42(1)(a) of the High Court rules which, it was submitted, are to be applied in this matter. Even assuming that this rule is to be applied, it seems to me that the current application and the "withdrawn" application are not on all fours. The relief claimed is different. In the earlier application the applicant seeks the setting aside of the writ of 18 November 2011, whereas the current application is aimed at the writ of 10 February 2012. As such the further submission by the first and second respondents cannot be upheld.

[15] However, in light of the earlier conclusions reached, there is no other option but to strike the main application and the application for leave to file the supplementary affidavit from the roll. As this is a labour matter and the first and second respondents have not moved for costs, I shall not order same.

____(Signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the applicant:	In person
For the first and second respondents:	Mrs M C Petherbridge
	of Petherbridge Law Chambers