



REPORTABLE

CASE NO: SCR 2/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**ROBERT KAMUZU MBUMBO
LUCIA MAKUNDA KASINDI**

**First Applicant
Second Applicant**

and

**JULIA OPEIPAWA AMADHILA
KAUNA NDILULA
THE REGISTRAR OF DEEDS**

**First Respondent
Second Respondent
Third Respondent**

Coram: SHIVUTE CJ, MAINGA JA and FRANK AJA

Heard: 30 June 2022; 13 July 2022

Delivered: 23 August 2022

Summary: This is a review application pursuant to s 16 of the Supreme Court Act 15 of 1990 (the Act) in respect of two court orders dated 7 June 2019 and 6 December 2019 by the High Court relating to a dispute adjudicated upon between the parties. The facts are as follows: On 9 August 2013, the first applicant (Mr Mbumbo) and first respondent (Ms Amadhila) entered into an acknowledgement of

debt in which Mr Mbumbo undertook to pay N\$100 000 on or before 10 September 2013 to Ms Amadhila.

On 5 December 2013, Ms Amadhila obtained a default judgment against Mr Mbumbo for N\$100 000 plus *mora* interest and costs. Mr Mbumbo failed to make payment of the judgment debt and Ms Amadhila took steps to execute the judgment. In response to the writ of execution in respect of Mr Mbumbo's immovable property, discussions with regards to payment of the judgment debt took place. As per his promise, Mr Mbumbo made some payments, but he later failed to make further payments. Ms Amadhila approached the court *a quo* to have erf 484, Rundu (the property) and erf 774, Windhoek, declared executable pursuant to rule 108 of the Rules of the High Court (erf 774, Windhoek is not relevant to this application). Before the property could be declared executable, Ms Amadhila and Mr Mbumbo entered into a settlement agreement (compromise) in which it was agreed that: (1) the outstanding amount of N\$70 000 had to be paid off in certain predetermined payments; (2) the amount in respect of interest payable, and (3) the dates for the payment of these amounts. This compromise was made an order of court on 6 April 2018. Mr Mbumbo failed to comply with his payment obligations which resulted in Ms Amadhila launching an application to have the property declared executable.

On 7 June 2019, the court *a quo* declared the property executable. When the deputy sheriff attempted to attach the property, he encountered the second applicant, Ms Kasindi (she is Mr Mbumbo's mother). Ms Kasindi informed the deputy sheriff that she is the owner of the property and she resides there. A search at the deeds registry revealed Ms Kasindi to be the registered owner of the property. In April 2010, the Rundu Town Council (the Town Council) and Ms Kasindi entered into a sale agreement, in terms whereof the Town Council sold the property to her. Prior to the transfer of the property in her name, she entered into an agreement with Mr Mbumbo that he could use the property as 'collateral specifically for a First National Bank (FNB) business loan and the bond shall be cancelled immediately after this purpose'. The property was transferred to Mr Mbumbo on the understanding that when the loan

had been repaid to FNB, the property would be transferred back from Mr Mbumbo to Ms Kasindi. Subsequent to the compromise between Mr Mbumbo and Ms Amadhila, and on 1 May 2018, Mr Mbumbo donated the property to Ms Kasindi which property was then transferred to Ms Kasindi on 3 August 2018 when it was registered in her name. This led Ms Amadhila to file an application in the High Court to cancel the donation of the property to Ms Kasindi and directing the Registrar of Deeds to transfer the property to Mr Mbumbo and an order ratifying the previous decision of 7 June 2019 to declare the property executable. The court *a quo* on 6 December 2019 granted the orders as sought.

On review, the issue in the context of the 7 June 2019 court order declaring erf 484, Rundu, executable is whether the granting resulted from an irregularity in the proceedings in view of the fact that no judgment had been granted based on the compromise; that Ms Kasindi, who was the registered owner of the property was not cited as a party to the proceedings and hence did not participate in the proceedings. The issue arising in the context of the court order of 6 December 2019 is whether the order amounted to a mistake of law *per se* or to a mistake of law which resulted in an irregularity in the proceedings so that it can be said that either Mr Mbumbo or Ms Kasindi did not receive a fair trial, and on the fact that the conduct of Mr Mbumbo alone was considered relevant for the property of Ms Kasindi to be ordered to be transferred to Mr Mbumbo so that execution could be levied against this property.

The applicants failed to file their heads of argument timeously (ie in terms of rule 17 of the Rules of the Supreme Court (the rules)). Three days prior to the hearing of the application (ie 30 June 2022), applicants filed a condonation and reinstatement application on 24 June 2022, in which they indicated that their heads of argument would be filed on Monday 27 June 2022 (ie two days prior to the hearing). Respondents applied for a postponement so as to oppose the condonation and reinstatement application, to file their answering affidavit and to supplement their heads of argument. The applicants opposed the application for postponement. The application was postponed to 13 July 2022 with directives to the parties to file their

further affidavits and supplementary heads of argument. It should be mentioned that, during the course of the proceedings, both in the court *a quo* and in this court, Mr Mbumbo, on a number of occasions failed to comply with time periods stipulated either in the relevant rules or included in the directives issued by the relevant judge. His non-compliances stemmed from the fact that he struggled to finance the litigation he was involved in which resulted in some of his legal practitioners withdrawing when they were not placed in funds. These non-compliances were all subsequently condoned.

Held that, the explanation for the failure to file the heads of argument timeously is satisfactory. Despite the previous non-compliances, the condonation and reinstatement application for non-compliance with rule 17 is probably the one that is the least prejudicial to the respondents as it only delayed the final hearing of the matter by about two weeks. The only prejudice to the respondents in the instant case is the wasted costs occasioned by the postponement of the initial hearing which can be addressed by an appropriate costs order.

Held that, with regards to prospects of success, it must be borne in mind that in order for the applicant to bring a review application pursuant to s 16 of the Act, leave had to be obtained from a judge of this court to launch the application. Leave would not have been granted had prospects of success not been present in the application seeking leave to launch the review application.

Held that, legal issues arising in this application were eminently arguable and hence the applicants have established prospects of success as far as the application is concerned. In the result, the condonation and reinstatement application succeeds and the review application is reinstated.

Held that, clause 5.7 of the compromise makes it clear that the compromise constitutes a novation of any claims that might have existed prior to the compromise.

Held that, the doctrine of *res litigiosa* which provides that a property which is the subject of litigation may be claimed from a third party who acquires such property at a time that the doctrine was applicable which is after service of the summons in a claim *in rem* and after *litis contestatio* (close of pleadings) in a claim *in personam* on which Ms Amadhila relies, does not find application on the facts in this matter.

Held that, by the time the High Court granted an application to declare the property executable without giving any judgment based on the compromise on 7 June 2019, Mr Mbumbo was not the owner of the property. Ms Kasindi was the owner of the property. She was not a party to the compromise nor cited as a party in the application and as *res litigiosa* was not applicable there was no basis to declare her property executable in respect of any debt owing to Ms Amadhila by Mr Mbumbo. The High Court was incorrectly informed that Mr Mbumbo was the owner of the property hence the order it made.

With regard to the donation of the property, Ms Amadhila's attack is premised on the conduct of Mr Mbumbo, who it is alleged acted with the intent to 'evade the execution' against the property that he knew would feature when executing the judgment, that he acted contrary to the compromise by transferring the property and that in the result he 'fraudulently and maliciously' donated the property. It is then concluded that the donation was 'unlawful and made with the utmost *mala fide* with the intention to evade the execution and this renders the donation *void ab initio*'.

Held that, it is accepted on the facts that Mr Mbumbo's intent with the donation and the transfer to Ms Kasindi was to frustrate Ms Amadhila's right to execute against the property in respect of her claim. The legal conclusion reached by the court *a quo* by setting aside the transfer of the property by Mr Mbumbo to Ms Kasindi is however not correct.

Held that, Ms Kasindi's personal right to enforce the donation was replaced with a real right to the property upon the transfer to her. Ms Amadhila has no basis to assail

the real right of Ms Kasindi. Real rights generally prevail against personal rights (even if it is prior in time) where they are in competition with each other as in the present case.

Held that, based on the order of 6 December 2019, the court *a quo* was faced with an attack on a donation which was sought to be set aside so that the status *quo ante* the donation could be restored. No procedural irregularities in the run up to this application is apparent from the record nor were any alleged. The court *a quo* knew what was in issue and simply had to apply the facts to the law. In doing so it got the law wrong by not having regard to the role of Ms Kasindi in the transfer of the property to her and by solely focusing on the conduct of Mr Mbumbo. There is no question of the court *a quo* misconceiving the nature of the inquiry or its duties in connection therewith.

Held that, this court cannot interfere with the decision of the court *a quo* in respect of the order to re-transfer the property from Ms Kasindi to Mr Mbumbo. This was a matter for an appeal and not for a review pursuant to s 16 of the Supreme Court Act 15 of 1990 which applies only to irregularities in the proceedings.

It thus follows that the court order of the High Court dated 7 June 2019 is reviewed and set aside and the same applies to prayer 5 of the court order of 6 December 2019 which in essence ratified the court order of 7 June 2019.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and MAINGA JA concurring):

Introduction

[1] The applicants were granted leave by this court to bring a review application pursuant to s 16 of the Supreme Court Act 15 of 1990 (the Act) in respect of two court

orders by the High Court relating to a dispute that it adjudicated upon between the applicants and, in essence, the first respondent. Second respondent as the holder of a general power of attorney from the first respondent who resides in the United Kingdom features in her capacity as such in the mentioned dispute and hence her citation in the matter. Third respondent features as relief was sought for an immovable property registered in the name of the second applicant to be transferred to the first applicant and as the third respondent would have to effect this in the deeds registry, he was cited as a party *a quo*. Third respondent did not participate in the proceedings and thus abided the court order whereas the second respondent did participate but in her capacity as agent of first respondent and as a witness in the furtherance of the case of the first respondent. The disputes in the matter are thus essentially between the applicants and the first respondent.

[2] For convenience sake I shall refer to the parties by their surnames save for the third respondent whom I shall refer to as 'the registrar'.

[3] Ms Amadhila obtained judgment by default against Mr Mbumbo on 5 December 2013 for N\$100 000 plus *mora* interest and costs. As payment by Mr Mbumbo of the judgment debt was not forthcoming she took steps to execute the judgment.

[4] In response to a writ of execution in respect of the immovable property of Mr Mbumbo, certain discussions as to payment of the judgment debt took place and certain promised payments by Mr Mbumbo took place but when further promised

payments from Mr Mbumbo did not materialise an approach was made to the High Court to declare erf 484, Rundu (the property) and erf 774, Windhoek, executable pursuant to rule 108 of the Rules of the High Court. Erf 774, Windhoek is not relevant to this application and I do not deal with it any further.

[5] However, prior to the property being declared executable, Ms Amadhila and Mr Mbumbo entered into a settlement agreement (compromise) in terms whereof it was agreed that the amount outstanding to Ms Amadhila amounted to N\$70 000 which had to be paid off in certain predetermined payments and in addition, an amount in respect of interest payable was also agreed to and the dates for the payment of these amounts were also stipulated in the compromise. This compromise was made an order of court.

[6] When Mr Mbumbo did not comply with his payment obligations pursuant to the compromise, Ms Amadhila launched an application to have the property declared executable.

[7] On 7 June 2019 the High Court declared erf 484, Rundu executable. When the deputy sheriff attempted to attach the property he encountered Ms Kasindi (the mother of Mr Mbumbo) at the property where she informed him that is where she resided as it was her property. A search at the deeds registry then revealed that she was the registered owner of the property.

[8] The issue that arises in the context of the court order of 7 June 2019 declaring erf 484, Rundu, executable is whether the granting thereof resulted from an irregularity in the proceedings in view of the fact that no judgment had been granted based on the compromise, and Ms Kasindi who was the registered owner of the property was not cited as a party to the proceedings and hence did not participate in the proceedings.

[9] On discovering that the property had been transferred to Ms Kasindi about a year prior to the court order of 7 June 2019, namely on 3 August 2018 in terms of a deed of donation from Mr Mbumbo to Ms Kasindi, Ms Amadhila brought an application to set the donation aside and transfer the property back to Mr Mbumbo. This application was granted per court order dated 6 December 2019 in the High Court.

[10] The issue that arises in the context of the order of 6 December 2019 is whether the granting thereof was the result of an irregularity in the proceedings in view of the fact that there still was no judgment granted based on the compromise, and on the basis that the conduct of Mr Mbumbo alone was considered relevant for the property of Ms Kasindi to be ordered to be transferred to Mr Mbumbo so that execution could be levied against this property.

[11] The applicants were granted leave to launch an application seeking a review of the aforesaid two decisions with specific reference to the issues that arose in the above context which I shall deal with in more detail below.

Hearing of 30 June 2022

[12] The application was initially set down for hearing on 30 June 2022. When the matter was set down the parties were informed that rule 17(1), (2) and (3) of the Rules of the Supreme Court would apply to the filing of heads of argument.¹ This meant that applicants had to file their heads of argument at least 21 days prior to the hearing and the respondents at least ten days prior to such date.

[13] The applicants did not file their heads of argument timeously. The respondents however, without the benefits of the heads of argument from the applicants, did file their heads timeously.

[14] The applicants, three court days prior to the hearing, filed a condonation and reinstatement application with regard to the late filing of their heads of argument. This was on a Friday. In this condonation application it was indicated that the applicants' heads of argument would be filed the following Monday, ie two days prior to the hearing. The heads were then filed on the Monday as indicated in the condonation application.

[15] The inevitable then followed, namely the respondents applied for a postponement of the hearing so as to oppose the condonation application; and file an answering affidavit in response thereto and to supplement their heads of argument to address some of the issues raised in the heads of argument belatedly filed on behalf

¹ See provisions of rule 18 of the rules of this court.

of the applicants. The respondents sought no order as to costs in respect of this postponement application unless it was opposed.

[16] Surprisingly, the applicants opposed the postponement application. This was done on the basis, as I understood it, that the issues in the matter had crystallised to such an extent that there was no need for a postponement. This approach was obviously unreasonable. Whatever the issue or issues on the merits, respondents were entitled to oppose the condonation application and had to be given an opportunity to answer to the condonation application. Secondly, the respondents were entitled to revisit their heads of argument so as to alter it to address issues raised by the applicants which were not initially traversed as they could not anticipate them. This, after all, is the reason why the applicants' heads of argument had to be filed before those of the respondents.

[17] In the result, the matter was postponed to 13 July 2022 with directives as to the filing of further affidavits and supplementary heads of argument. The question of costs stood over and I shall deal with it later in this judgment.

Condonation application

[18] Mr Mbumbo in the course of the proceedings in the High Court and in this court on a number of occasions failed to comply with time periods stipulated either in the relevant rules or included in the directives issued by the relevant judge.

[19] The non-compliances were all subsequently condoned and stemmed basically from the fact that he struggled to finance the litigation he was involved in. Thus, some of his legal practitioners withdrew when they were not placed in funds.

[20] What the position of Ms Kasindi was is not separately spelled out and expressly dealt with in the papers filed with this court and does not appear from the record. It however appears that as her son, Mr Mbumbo, is the person who spoke on her behalf and also acted for her in dealing with the legal practitioners engaged for the purposes of this dispute with Ms Amadhila, she thus appears to have left the matter in his hands.

[21] Be that as it may, a legal practitioner came on record for the applicants for the purposes of the review and remained so until after the pleadings had closed and the notice of set down had been forwarded to her which occurred in February 2022.

[22] Mr Mbumbo accepted that she would attend to the matter and would see to it that heads of argument would be filed on behalf of the applicants. He attempted to contact her around 14 May 2022 to check whether everything was in order but could not reach her at the contact number he had. He then called another legal practitioner to seek her contact details. He was advised to contact her on facebook which he did on 16 May 2022. She responded by forwarding him a new contact number on the same day.

[23] He contacted her two days later on 18 May 2022 whereupon she informed him that she ceased practising and took up new employment and that he must instruct a new legal representative to represent the applicants. She never informed him prior to this date that she was withdrawing from the matter. From the record it is also clear that she did not withdraw as the legal representative of record in this court until at some later stage as will become apparent from what is stated below.

[24] Mr Mbumbo thus had the unenviable task to obtain and instruct a new legal practitioner fairly shortly before the hearing in this matter. For this purpose he travelled to Windhoek from the Kavango region on Saturday 21 May 2022. On 24 May 2022 he approached a legal practitioner who consulted with him and took all the documents for perusal only to inform him on 13 June 2022 that he would not be able to assist due to the short notice and because certain time periods in respect of the application had already expired.

[25] Mr Mbumbo then managed to arrange an appointment through a legal practitioner in Rundu with an instructed legal practitioner in Windhoek for 21 June 2022. This instructed legal practitioner informed him that the application had lapsed as the heads of argument had not been filed and that a condonation application inclusive of an application for reinstatement would have to be brought. Through this legal representative, it also came about that his erstwhile legal representative withdrew as legal practitioner of record on 22 June 2022 and his new legal practitioner came on record.

[26] It was in the above circumstances that the condonation and reinstatement application was launched on 24 June 2022 and the heads of argument filed on 27 June 2022.

[27] The deponent on behalf of the respondents took issue with the conduct of Mr Mbumbo. She refers to three previous applications for condonation and she states that Mr Mbumbo's behaviour 'portrays an utmost lax behaviour and provides lame excuses'. This has been the trend throughout this matter resulting in the constant changes in legal practitioners. Criticism is also expressed for the failure to file an affidavit from the previous legal practitioner to explain why the applicants' heads of argument were not filed timeously nor does he mention whether he placed the previous legal practitioner in funds and whether he consulted her subsequent to the notice of set down.

[28] Because prospects of success is also a factor to consider in the determination of the condonation and reinstatement application, further aspects related to the *bona fides* or otherwise of Mr Mbumbo and the merits of the application are also addressed in the answering affidavit. I deal with these aspects below when considering the prospects of success.

[29] It is correct that previous condonation applications for non-compliance with the directives from this court were brought by Mr Mbumbo. They were however granted evidencing sufficient explanation for those non-compliances. As already alluded to, these non-compliances were probably as the result of Mr Mbumbo struggling to place

his legal representatives in funds. His continuous struggles in this regard is evidence of a strong desire to persist with the application despite the financial hardships rather than evidence of 'an utmost lax behaviour'.

[30] In fact, the condonation now sought is probably the one that is the least prejudicial to the respondents as it only delayed the final hearing of the matter by about two weeks. The only prejudice to the respondents in the instant case is the wasted costs occasioned by the postponement of the initial hearing which can be addressed by an appropriate costs order. Furthermore, I am of the view that the explanation for the failure to file the heads of argument timeously is satisfactory. Unless the erstwhile legal representative expressly requested something from him why did he have to constantly communicate with her? The papers had been finalised and it was only the heads of argument and the presentation thereof that still had to be done. In respect of both these activities the input of Mr Mbumbo was not necessary. In fact Mr Mbumbo attempted to contact his erstwhile legal representative in May 2022 when it still would have been possible for his input should it have been required, so the criticism based on failure to communicate with his legal representative is without merit.

[31] The fact of the matter is that Mr Mbumbo's legal representative left him in the lurch by simply closing her practice without informing him or this court that she would no longer act for him. From the time this came to his notice, he acted with the necessary alacrity to get the application back on track. In these circumstances, I am

of the view that a sufficient or acceptable explanation has been given by Mr Mbumbo for the failure to file the heads of argument on behalf of the applicants timeously.

[32] When it comes to consideration of the prospects of success it must be borne in mind that as this is a review application pursuant to s 16 of the Act, leave had to be obtained from a judge of this court to launch this application.² Such leave would not have been granted had prospects of success not been present in that application seeking leave to launch this application. I appreciate that it is only now with the finalisation of the review application that all the relevant facts may be at hand and that this issue should be revisited. The point however is whether the answering affidavit in the review application is of such a nature to disturb the initial view in respect of prospects of success which, obviously was only a *prima facie* view.

[33] As will become apparent below, the current matter revolves around legal consequences to be drawn from certain established facts and these legal aspects are such that it cannot be stated that their resolution would inexorably be to the detriment of the applicants. In other words, the legal issues arising are eminently arguable and hence the applicants have established prospects of success as far as the application is concerned.

[34] In the result, the condonation application succeeds and the review application is reinstated.

² *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SC).

Factual backdrop

[35] During April 2010 the Rundu Town Council (the Town Council) and Ms Kasindi entered into an agreement of sale in terms whereof the Town Council sold the property to Ms Kasindi. This followed on a policy of the Town Council that persons who occupied properties as tenants, or more correctly, as holders of Permission to Occupy would be given preference when it came to the sale of property by the Town Council. Prior to the transfer of the property to Ms Kasindi, she agreed with Mr Mbumbo that he could use the property as 'collateral specifically for the First National Bank (FNB) business loan and the bond shall be cancelled immediately after this purpose'. As a result, the property was transferred to Mr Mbumbo by the Town Council. Instead of a bond being registered in favour of FNB over the property of Ms Kasindi, the property was transferred to Mr Mbumbo on the understanding that when the loan had been repaid to FNB the property would be transferred back from Mr Mbumbo to Ms Kasindi. Why this process was decided on was not explained.

[36] During November 2013 Ms Amadhila issued summons against Mr Mbumbo for N\$100 000 based on an acknowledgement of debt signed by the latter during August 2013. A judgment by default was granted against Mr Mbumbo in respect of the claim dated 5 December 2013. This judgment was for N\$100 000 plus interest at the rate of 20 per cent per annum from 11 September 2013 plus costs of suit in the amount of N\$1505,05.

[37] Subsequent to the judgment, steps were taken to execute the judgment and this led to communications between the parties and, Mr Mbumbo made certain

undertakings as to payment so as to avoid execution. This prolonged the process and during 2016 FNB had been repaid its business loan but the judgment debt owing to Ms Amadhila had not yet been settled. During 2017 when certain undertakings to make payments by Mr Mbumbo to Ms Amadhila were not forthcoming and a further agreement could not be reached, an application was brought in terms of rule 108 of the Rules of the High Court to declare the property executable. This application caused Mr Mbumbo to make certain payments and led to the compromise between the parties which was made an order of court on 6 April 2018.

[38] In terms of this compromise entered into during March 2018 it was agreed that the full outstanding amount due to Ms Amadhila amounted to N\$70 000 which Mr Mbumbo agreed to pay in instalments at certain specified predetermined dates and if he did not comply with the compromise 'the full outstanding amount' would become due and payable and Ms Amadhila would be entitled to 'immediately apply for the issue of a writ of execution against the movable and immovable property of (Mr Mbumbo) in terms of rule 108(1)(b) of the High Court Rules without any further notice to him'.

[39] Subsequent to the compromise and on 1 May 2018 Mr Mbumbo donated the property to Ms Kasindi which property was then transferred to Ms Kasindi on 3 August 2018 when the property was registered in her name.

[40] When Mr Mbumbo did not adhere to the payment terms stipulated in the compromise, steps were taken to execute which were unsuccessful and which culminated in a *nulla bona* return in respect of movable properties of Mr Mbumbo. A

court order was thus sought by Ms Amadhila to declare the property executable pursuant to rule 108 of the High Court Rules. This was done on an *ex parte* basis in view of the clause in the compromise quoted above relating to execution without further notice to him. On 7 June 2019 such order was granted.

[41] When the deputy sheriff went to serve the writ of execution of the property he encountered Ms Kasindi at the property and she informed him that it was her property. This led to an investigation as to the owner of the property and in this manner it came to the knowledge of Ms Amadhila that the property had indeed been transferred and registered in the name of Ms Kasindi on 3 August 2018.

[42] The discovery that the property had been transferred to Ms Kasindi who was as a result the registered owner thereof led to a further application in the High Court in which Ms Amadhila sought the cancellation of the donation of the property to Ms Kasindi and directing the registrar to transfer the property to Mr Mbumbo from Ms Kasindi and an order essentially ratifying the previous decision of 7 June 2019 to declare the property executable. The High Court on 6 December 2019 granted the order as sought.

[43] It should be mentioned that in respect of the application that led to the court order of 6 December 2019, Ms Kasindi and the registrar were cited as parties in addition to Mr Mbumbo and that this application was served on the applicants in the normal fashion.

[44] In respect of the application to, in essence, transfer the property back to Mr Mbumbo so that it can be available for execution, the following is alleged:

- '8.1 It is imperative to highlight to this Honorable court that the purported donation of the said property from the First Respondent to his mother (Second Respondent) took place while the execution process was still underway, and it was done merely to evade the execution of Erf NO: 484.
- 8.2 The First Respondent knew very well that the property he was donating is a subject of a pending litigation in respect of which an application for execution of the aforesaid property was pending before court.
- 8.3 The First Respondent was well aware of the fact that he entered into a settlement agreement to pay an amount per month and if he defaults his property would be attached and sold to settle the debt.
- 8.4 In terms of the settlement agreement, the applicant could in terms of clause 5.6 of the settlement agreement apply to this Honorable Court for an order declaring the said property executable.
- 8.5 The First Respondent thus knowingly and intentionally donated the property to his mother to evade the execution of the property.
- 8.6 It is thus clear that the transfer/donation of the property from the First Respondent to the Second Respondent was done with the utmost malafide and with the sole intention to evade the execution of the aforesaid property.'

[45] In terms of the law a submission is made in the application as follows:

'Furthermore, it is trite law that a property in respect of which of any suit or proceeding is pending and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to

the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.'

Irregularity in respect of the manner in which the property was dealt with?

[46] As is evident from what is stated above, Ms Kasindi became the owner of the property on 3 August 2018 and the question that arises is whether the High Court could deal with this property when it made the order on 7 June 2019 (declaring the property executable) and the court order of 6 December 2019 (setting the donation aside and ordering the transfer of the property from Ms Kasindi to Mr Mbumbo to give effect to the court order of 7 June 2019).

[47] The compromise records that Mr Mbumbo is to pay Ms Amadhila, in 'full and final settlement of the disputes between them' the amount of N\$70 000 in certain predetermined instalments. Clause 5.6 of this compromise is the clause already referred to above which provides for the full outstanding amount to become due on breach of the compromise and entitling Ms Amadhila to execute against the property of Mr Mbumbo (both movable and immovable) without further notice to him. Clause 5.7 of the compromise makes it clear that this compromise constitutes a novation of any claims that might have existed prior to the compromise. It reads as follows:

'5.7 No party shall have any claim of whatsoever nature against the other party except for the fulfilment of any or all rights available to such party arising from the terms of this agreement. The Parties hereby record that by signing this agreement they have settled each and every claim, which either of them might

have had against the other one in full and final settlement save for damages to the premises if any.’

[48] The said compromise was made an order of court on 6 April 2018. The result of the compromise however was that a line had to be drawn through the proceedings prior to the agreement. This is because the judgment, which reinforced Ms Amadhila’s rights under the acknowledgement of debt and in fact replaced her right of action with a right to execute had been novated by the compromise which did not reserve her rights under the judgment.³

‘A settlement agreement has the same effect as *res judicata*, and accordingly it excludes an action on the original cause of action, except where the settlement expressly or by clear implication provides that, on non-compliance with the provisions thereof, a party can fall back upon his original right of action.’⁴

The general result of a compromise is that on breach of such agreement, an action must be brought on such breach as the original claim is no longer justiciable.⁵

[49] This meant that Ms Amadhila had to obtain judgment anew against Mr Mbumbo based on the compromise and that she could not rely on the judgment of December 2013 to seek execution. I point out that rule 97(6) of the High Court specifically provides for the situation Ms Amadhila found herself in. This rule provides as follows:

³ *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 309A, 310C and 310H. See also *Swadif (Pty) Ltd v Dyke, NO* 1978 (1) SA 928 (A) at 942B-F.

⁴ *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 661G and 669H-670A and see also *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & others* 1978 (1) SA 914 (A) at 922C-E.

⁵ *Brachvogel v Boschrand Citrus Co Ltd* 1923 (WLD) 222, *Van Zyl v Niemann* above fn 4 and *Nagar v Nagar* 1982 (2) SA 263 (ZH).

'A party to a settlement which has been reduced to writing and signed by the parties or their legal practitioners but which has not been carried out may, unless those proceedings have been withdrawn, apply for judgment in terms of the settlement on at least five days' notice to all interested parties.'

[50] The process to enforce a judgment is execution.⁶ Without a judgment there can be no execution. This is so because it is necessary prior to execution to establish the liability of the person or entity in respect of whom or which execution will be sought. This liability is determined by judgment of a competent court.⁷

[51] Ms Amadhila relying on the compromise that was made an order of court obtained the order declaring the property executable on 7 June 2019. No action or application was instituted based on the compromise thus no judgment based on such compromise was obtained. Thus on her own determination and with reliance on clause 5.6 of the compromise the order declaring the property executable was obtained. To allow Ms Amadhila to become a judge on the merits of the compromise to which she was a party and to move for execution on the basis of the now novated judgment of December 2013 was clearly an irregular proceeding.

[52] On behalf of Ms Amadhila it is averred that the property was directly in issue and thus could not be transferred or otherwise be dealt with by Mr Mbumbo. I assume this was a reference to the doctrine of *res litigiosa* which is to the effect that property

⁶ *September & another v Nedcor Bank Ltd & another* 2005 (1) SA 500 (C) at 503-504.

⁷ *Bredenkamp v Comax Wholesalers (Pty) Ltd & others* 1965 (2) SA 876 (C) at 879B and 881C-D; see also *Ras en andere v Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T) at 510D-F; *Chapman v Chapman & another* 1977 (4) SA 142 (E) at 143A-B and *Van Dyk v Du Toit en 'n ander* 1993 (2) SA 781 (O) at 782J-783A.

which is the subject of litigation may be claimed from a third party who acquired such property at a time that the doctrine was applicable which is after service of the summons in a claim *in rem* and after *litis contestatio* (close of pleadings) in a claim *in personam*.⁸

[53] The problem in this regard for Ms Amadhila is that the doctrine does not find application on the facts of the matter. The property was not the subject matter of the litigation in the original claim which was simply a money claim and also not on the claim based on the compromise which was likewise a money claim. The fact that the property of Mr Mbumbo (both movable and immovable) would potentially become relevant in the execution stage is of no moment as the property itself was not the subject matter of the litigation. The property only comes into play so as to attempt to enforce the money judgment. The reliance on *res litigiosa* was thus misplaced.

[54] It follows from what is stated above that by the time the High Court granted an application to declare the property executable without giving any judgment based on the compromise on 7 June 2019, Mr Mbumbo was not the owner of the property. Ms Kasindi was the owner of the property. She was not a party to this compromise nor cited as a party in the application and as *res litigiosa* was not applicable there was no basis to declare her property executable in respect of any debt owing to Ms Amadhila by Mr Mbumbo. It seems that the High Court was incorrectly informed that Mr Mbumbo was the owner of the property and hence the order.

⁸ *Rostock CC & another v Van Biljon* 2011 (2) NR 751 (HC).

[55] In the application to the High Court to order the transfer of the property from Ms Kasindi to Mr Mbumbo and to confirm the court order of 7 June 2019, it was realised that some basis had to be laid for the property of Ms Kasindi to be declared executable in respect of a debt due by Mr Mbumbo. Thus an attack is launched against the donation between Mr Mbumbo and Ms Kasindi and an order is sought to compel the reversal of the transfer based on the donation.

[56] The basis for this attack is set out in paragraph 8 of the founding affidavit to the application that culminated in the court order of 6 December 2019. As is evident from the contents of paragraph 8 of the founding affidavit as quoted above, the attack is premised on the conduct of Mr Mbumbo who it is alleged acted with the intent to 'evade the execution' against the property, that he knew the property would feature when executing the judgment, that he acted contrary to the compromise by transferring the property and that in the result he 'fraudulently and maliciously' donated the property. It is then concluded the donation was 'unlawful and made with the utmost *mala fide* with the intention to evade the execution and this renders the donation *void ab initio*'. I should also point out that no execution process was 'still underway' or 'pending' when the donation was made and these allegations were incorrect.

[57] I have no quarrel, on the facts of this matter, to accept that Mr Mbumbo's intention with the donation and the transfer to Ms Kasindi was to frustrate Ms Amadhila's right to execute against the property in respect of her claim. The legal conclusion however that Mr Mbumbo's intention and conduct must lead to the transfer

to Ms Kasindi, being set aside is not correct. This is because her personal right to enforce the donation was replaced with a real right to the property upon transfer to her. This fact is ignored by the legal practitioner for Ms Amadhila who has cited a number of cases where conflicting personal rights were in issue. These cases are no authority for the proposition that a personal right can trump a real right or qualify such right nor was the court referred to authority to the effect that a person who is not a party to an agreement (ie deed of donation) can set such agreement aside where it has been discharged by performance on the basis that it amounts to fraud on such person when no allegations are made that the recipient of the donation at least had knowledge of the competing prior personal right of the aggrieved person.

[58] In *Van Niekerk v Fortuin*⁹ the son of the judgment debtor had entered into a deed of donation with his father in respect of certain property prior to the judgment debt accruing and hence opposed an application declaring the property of his father executable. It was held that this prior right of the son did not deprive the judgment creditor from having the property declared executable. From the judgment it is quite clear that 'had the son acted a little more promptly transfer would have passed to him' and his title would have been a sufficient defence in the application.

[59] In *Dream Supreme Properties 11CC v Nedcor Bank Ltd & others*¹⁰ the Supreme Court of Appeal in South Africa upheld the attachment of property by a judgment creditor who had knowledge of a prior sale of such property in circumstances where the property had not yet been transferred to the purchaser. In

⁹ *Van Niekerk v Fortuin* 1913 CPD 457.

¹⁰ *Dream Supreme Properties 11CC v Nedcor Bank Ltd & others* 2007 (4) SA 380 (SCA).

other words, the purchaser had a personal right to seek the transfer of the property and not a real right in the property as the transfer had not yet taken place. The judgment concludes as follows:

[14] . . . “My conclusion is that such creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such debtor to the ownership or possession of such property which right arose prior to the attachment of even the judgment creditor’s cause of action and of which the judgment creditor had notice when the attachment was made.”¹¹

[60] In the heads of argument filed on behalf of Ms Amadhila, it is submitted that a *pignus judicale* was established in respect of the property and hence a real right was established in respect of the property. It is simply stated that the attachment of the property led to this result. It is not necessary for the purpose of this judgment to go into the nature of a *res judicale* save for stating that whatever its nature prior real rights enjoy priority in respect of such property.¹² This right or pledge is established upon attachment of the property and it follows that such attachment must be established. On the facts of this matter the property was never attached, lawfully or otherwise. An application to declare the property executable was launched for the first time during 24 January 2018. Nothing came of this as the matter was settled prior to such order being granted. The next court order in this regard was on 7 June 2019 when the property no longer belonged to Mr Mbumbo. This order did not lead to the attachment of the property, as the deputy sheriff reported that the property did not

¹¹ My underlining. Also see *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) at 641G-H.

¹² *Andrews v Knight Brothers & Gibson* 1996 EDC 241, *Schoeman, NO v Aberdeen Trading Co (Pty) Ltd* 1955 (1) SA 100 (C) at 106, *Ex Parte Saltmarsh* 1913 TPD 710 and *Menzies Motor Co (Pty) Ltd v Turkstra* 1955 (3) SA 408 (T).

belong to Mr Mbumbo. This led to the further application to transfer the property to Mr Mbumbo and whereas the High Court granted this application and even 'ratified' the decision of 7 June 2019. There is no suggestion that the property had in fact been attached as a result. Presumably the deputy sheriff is waiting for the property to be re-transferred to Mr Mbumbo so that he can attach it.

[61] It would of course be open to a party in the position of Ms Amadhila to advance a case against Ms Kasindi based on the doctrine of notice. Thus, if Ms Kasindi knew that Mr Mbumbo had contractually bound himself to keep the property available for the purpose of execution in respect of Ms Amadhila's claim then the property would have been acquired subject to the personal rights of Ms Amadhila. Although this principle has been developed in the context of double sales, I accept for the purpose of this appeal that it will also apply to a case such as the present. It must be borne in mind that once knowledge of the prior personal right is established, fraud is presumptively accepted.¹³

[62] The first problem facing Ms Amadhila in this context is that there is simply no allegation that Ms Kasindi had knowledge of her contractual right to execute against the property. All the allegations of dishonesty and fraud are made against Mr Mbumbo. The second problem facing Ms Amadhila is that there is no express agreement that the property would not be disposed of pending the performance of his obligations in terms of the compromise. This being so, there was no basis to assail the real right of Ms Kasindi. Real rights generally prevail against personal rights (even

¹³ *Dream Supreme Properties 11CC v Nedcor Bank Ltd & others* para 22. See also *Tiger-Eye Investments (Pty) Ltd & another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C).

if it is prior in time) where they are in competition with each other as in the present case.¹⁴

Unclean hands

[63] The legal representative of Ms Amadhila submits that the conduct of Mr Mbumbo was such that the doctrine of unclean hands should prevent him from seeking the relief that is sought in this application.

[64] The question in this matter does not revolve around the conduct of Mr Mbumbo as pointed out above however bad it may have been. It revolves around the conduct of Ms Kasindi, and as pointed out above, nothing untoward whatsoever is alleged in respect of her conduct.

[65] I have my doubts about the *locus standi* of Mr Mbumbo to bring this application seeing that he is not the owner of the property nor does he allege any interest in the property. In essence, he is a witness in the application brought by his mother to avoid having her property sold for his debt. His lack of *locus standi* was however not raised and I refrain from dealing with it.

[66] The point however is that to deprive him from being a party to the application based on the unclean hands doctrine would serve no purpose as his alleged

¹⁴ *Reynders* at 641G-H.

untoward conduct cannot be attributed to Ms Kasindi and hence the application will need to be considered on the basis of the evidence including that of Mr Mbumbo even if only on the basis of him being a witness. There is no basis on which this court should not have regard to his evidence relating to the facts relevant to this matter, which is mostly undisputed in support of the application of Ms Kasindi.

[67] Lastly in this regard, I am of the view that this application revolves mostly around the application of the law, and in doing so taking account of the effect of dishonest, fraudulent or deceitful conduct, it would not be appropriate to prevent Mr Mbumbo from participating in these proceedings. If the relief sought is to be enforced based on the provisions of the law and despite the untoward conduct of a party, such party should be able to enforce such right.

Court order of 6 December 2019: Irregularity in the proceedings?

[68] As is evident from *S v Bushebi*¹⁵ a mistake of law is not *per se* an irregularity. Where such mistake however leads to a party being denied the right to a fair trial this results in an irregularity in the proceedings. Thus, in *Goldfields Investment Ltd & another v City Council of Johannesburg & another*¹⁶ Schreiner J states the position in relation to a mistake in law as follows:

‘But if the mistake leads to the Court’s not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its

¹⁵ *S v Bushebi* 1998 NR 239 (SC) at 241F-G and 241I-242A.

¹⁶ *Goldfields Investment Ltd & another v City Council of Johannesburg & another* 1938 TPD 551.

duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.¹⁷

[69] In respect of the order of the court *a quo* given on 6 December 2019 and relating to the transfer of the property from Ms Kasindi to Mr Mbumbo, the question thus arises whether this order amounted to a mistake of law *per se*, or to a mistake of law which resulted in an irregularity in the proceedings so that it can be said that either Mr Mbumbo or Ms Kasindi did not receive a fair trial. If it is the former then this court does not have the power to intervene and if the latter it does.¹⁸

[70] The court *a quo* was faced with an attack on a donation which was sought to be set aside so that the status *quo ante* the donation could be restored. No procedural irregularities in the run up to this application is apparent from the record nor were any alleged. The court *a quo* knew what was in issue and simply had to apply the facts to the law. In doing so, it got the law wrong by not having regard to the role of Ms Kasindi in the transfer of the property to her, and by solely focusing on the conduct of Mr Mbumbo. There is no question of the court *a quo* misconceiving the nature of the inquiry or its duties in connection therewith.

[71] In the result, I regret to say, this court cannot interfere with the decision of the court *a quo* in respect of the order to re-transfer the property from Ms Kasindi to Mr Mbumbo. This was a matter for an appeal and not for a review pursuant to s 16 of the Act which applies only to irregularities in the proceedings.

¹⁷ *Ibid* at 560-561.

¹⁸ *S v Bushebi* at 242E-G and *Schroeder & another v Solomon & 48 others* para 11.

Conclusion

[72] It follows of what is stated above that the court order of the High Court dated 7 June 2019 was irregularly granted and the same applies to prayer 5 of the court order of 6 December 2019 which in essence ratified the court order of 7 June 2019.

[73] It further follows that the court order of the High Court dated 6 December 2019 insofar as it orders the re-transfer of the property from Ms Kasindi to Mr Mbumbo cannot be set aside on the basis of an irregularity in the proceedings.

[74] In respect of the costs, the applicants who unreasonably opposed the application for postponement on 30 June are to pay the wasted costs occasioned by that postponement. In respect of the application itself, the application was partly successful and partly unsuccessful in more or less equal measure and in my view an equitable order would be one that each party is to bear its own costs.

Order

[75] In the result, I make the following order:

- (a) The court order of the High Court dated 7 June 2019 is herewith reviewed and set aside.
- (b) Paragraph 5 of the court order of the High Court dated 6 December 2019 is herewith reviewed and set aside.

- (c) The applicants are to pay the wasted costs occasioned by the postponement of the matter on 30 June 2022.

(d) Each party to bear its own costs in respect of the review application.

FRANK AJA

SHIVUTE CJ

MAINGA JA

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APPLICANTS:

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