



REPORTABLE

CASE NO: SA 20/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANDRE HARRIS

APPELLANT

and

OLD MUTUAL LIFE ASSURANCE

COMPANY (NAMIBIA) LTD

DEPUTY-SHERIFF OF WINDHOEK

H HENDRICKS INVESTMENT CC

OLD MUTUAL HOLDINGS (NAMIBIA) (PTY) LTD

ETZOLD-DUVENHAGE

FIRST NATIONAL BANK OF NAMIBIA LIMITED

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

Coram: SHIVUTE CJ, DAMASEB DCJ and UEITELE AJA

Heard: 26 June 2023

Delivered: 28 July 2023

Summary: On 22 November 2012 and at Windhoek, Hendricks CC (the third respondent) and Old Mutual Life (first respondent) entered into a written loan

agreement in terms of which Old Mutual Life agreed to loan and advance monies to Hendricks CC on the terms and conditions contained in a written loan agreement signed between the two parties.

Alleging that Hendricks CC was in breach of the deed of hypothecation, in that it was in arrears with the payment of the instalments as agreed to in the written loan agreement, Old Mutual Life on 10 June 2016 commenced proceedings in the High Court against Hendricks CC, in terms of which it claimed payment in the amount of N\$6 372 939,84. In addition to the payment that it sought, Old Mutual Life also sought an order declaring the immovable property which Hendricks CC provided as security for the monies that were lent to it, to be declared executable. Hendricks CC did not defend Old Mutual Life's claim and as a result the High Court, on 22 September 2016, granted default judgment against Hendricks CC. In addition to the order to pay Old Mutual Life, the High Court declared the immovable property which Hendricks CC provided as security for the monies that were lent to it, executable.

Subsequent to the High Court having granted default judgment against Hendricks CC and the registrar of the High Court having issued a writ of execution, the deputy-sheriff (second respondent) attached the property and scheduled a sale in execution by public auction for 11 September 2018. The sale in execution took place as scheduled on 11 September 2018. The events leading to the sale in execution and the events that occurred on 11 September 2018 shortly before the sale in execution, are what led to this appeal.

Old Mutual Life, on 13 December 2018, launched proceedings out of the High Court in terms of which it sought an order setting aside the sale in execution of the property. Old Mutual Life based the relief it sought on its contention that there were multiple non-compliances with the rules of the High Court (particularly rules 109 and 110) pertaining to the sale in execution of the property. Mr Harris (the appellant and the highest bidder, whose final bid was N\$4 600 000) opposed Old Mutual Life's application. The High Court identified two issues that it was required to determine, namely, whether rule 110(4) of the Rules of the High Court was

peremptory and if it was, whether non-compliance would result in the setting aside of the sale in execution. The High Court on 26 February 2021 answered both questions in the affirmative and granted the order sought by Old Mutual Life and set aside the sale in execution. Mr Harris is aggrieved by the judgment and orders of the High Court and hence this appeal.

Held that, a mortgage bond is an instrument hypothecating landed property to secure an existing debt or a future debt or both existing and future and that it is registered in the Deeds Office so that the world should have knowledge of the fact that there is a charge against the mortgagor's property; the object is not to notify the world that the mortgagor owes the mortgagee a specific sum of money.

Held that, the registration of the mortgage bond in favour of FNB was to create certain real rights in respect of the mortgaged property, ie the right to restrain the alienation of the property without its consent. The argument that FNB was not a mortgagee in respect of the property at the time that the property was sold in execution, is thus rejected.

Held further that, the meaning of words is, to a significant extent, determined by the context in which they are uttered.

Held further that, rule 110(4) is couched in peremptory terms. Non-compliance with the directions set out in rule 110(4) will result in nullity of the act performed contrary to the directions set out in that subrule.

Held further that, where more than one meaning is possible, each possibility must be weighed in light of the context and circumstances in which the rule was enacted; and that a sensible meaning must be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

The appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner

APPEAL JUDGMENT

UEITELE AJA (SHIVUTE CJ and DAMASEB DCJ concurring):

Introduction

[1] The appellant in this appeal is Mr Andre Harris. There are six respondents cited in the appeal, the first respondent being Old Mutual Life Assurance Company (Namibia) Ltd; the second respondent is the deputy-sheriff for the District of Windhoek; the third respondent is H Hendricks Investment CC; the fourth respondent is Old Mutual Holdings (Namibia) (Pty) Ltd; the fifth respondent is Etzold-Duvenhage and the sixth respondent is the First National Bank of Namibia Limited. Of the six respondents, only Old Mutual Life Assurance Company (Namibia) Ltd opposed the appeal.

[2] I will, in this judgment and for the sake of convenience, refer to the appellant as Mr Harris, the first respondent as Old Mutual Life, the second respondent as the deputy-sheriff, the third respondent as Hendricks CC, the fourth respondent as Old Mutual Holdings, the fifth respondent as Etzold-Duvenhage and the sixth respondent as FNB.

[3] On 22 November 2012 and at Windhoek, Hendricks CC and Old Mutual Life entered into a written loan agreement in terms of which Old Mutual Life agreed to loan and advance monies to Hendricks CC on the terms and conditions contained in a written loan agreement signed between the two parties.

[4] Alleging that Hendricks CC was in breach of the deed of hypothecation, in that it was in arrears with the payment of the instalments as agreed to in the written loan agreement, Old Mutual Life on 10 June 2016 commenced proceedings in the High Court against Hendricks CC, in terms of which it claimed payment in the amount of N\$6 372 939,84. In addition to the payment that it sought, Old Mutual Life also sought an order declaring the immovable property which Hendricks CC provided as security for the monies that were lent to it, to be declared executable.

[5] Hendricks CC did not defend Old Mutual Life's claim and as a result the High Court, on 22 September 2016, granted default judgment against Hendricks CC in terms of which the High Court ordered Hendricks CC to pay Old Mutual Life the amount of N\$6 372 939,84 plus interest at the overdraft rate per *annum* at which Nedbank Namibia Ltd lends on unsecured overdraft, less one per cent, calculated daily and compounded monthly in arrears as from 1 June 2016 to date of payment.

[6] In addition to the order to pay Old Mutual Life, the High Court declared the following immovable property ('the property') executable, namely:

CERTAIN: Erf No 3444 (A Portion of Consolidated Erf No 441)

Windhoek

SITUATE: In the Municipality of Windhoek, Registration Division

"K"

Khomas Region

MEASURING: 1348 (One Three Four Eight) square metres

HELD: By Deed of Transfer No. T4334/2004

[7] Subsequent to the grant of a default judgment by the High Court against Hendricks CC and the issuance of a writ of execution by that court's registrar, the deputy-sheriff attached the property and scheduled a sale in execution by public auction for 11 September 2018.

[8] The sale in execution took place as scheduled on 11 September 2018. The events leading to the sale in execution and the events that occurred on 11 September 2018 shortly before the sale in execution, are what has led to this appeal. Those events are:

- (a) Upon attaching the property, the Deputy-sheriff informed the mortgagees in respect of the property, except FNB, about the attachment and the intended sale in execution of the property.
- (b) On a date which the Deputy-sheriff has not disclosed, he received instructions from Etzold-Duvenhage (who, at that time, were the legal practitioners acting on behalf of Old Mutual Life) to sell the property in execution by way of a public auction.
- (c) The instructions to sell the property were accompanied by the 'Conditions of Sale in Execution of Immovable Property'. In the

conditions of sale, the plaintiff/judgment creditor was erroneously described as 'Old Mutual Holdings (Pty) Ltd'.

- (d) On 11 September 2018 at around 10h00, shortly before the public auction commenced, two representatives of Old Mutual Life approached the deputy-sheriff and enquired from him whether the property would be sold with a reserve price or not. The exact content of the reply by the deputy-sheriff is in dispute, but the representatives of Old Mutual Life allege that after the deputy-sheriff confirmed that the sale in execution would take place without a reserve price, they objected to the sale and requested that the sale in execution be cancelled. The representatives of Old Mutual Life further allege that the deputy-sheriff indicated that he would not cancel the sale in execution, but to accommodate Old Mutual Life he would, at the commencement of the auction, announce that the sale will be subject to the acceptance of the highest bid by Old Mutual Life. The representatives further allege that the Deputy-Sheriff did, as he indicated he would do, announce at the commencement of the auction that the sale will be subject to acceptance of the highest bid by Old Mutual Life.
- (e) The highest bidder was Mr Andre Harris, whose final bid was N\$4 600 000. On the same date (ie 11 September 2018) Etzold-Duvenhage addressed a letter to the deputy-sheriff informing him that Old Mutual Life would not accept any bid which is less than what

it was owed, namely N\$6 430 934,48. Mr Harris on the other hand, insisted that the sale in execution was conducted without a reserve price and demanded that the property be registered in his name and that ownership be transferred to him.

The High Court

[9] When Old Mutual Life and Mr Harris could not resolve their dispute, Old Mutual Life, on 13 December 2018, launched proceedings out of the High Court by notice of motion, in terms of which it sought an order setting aside the sale in execution of the property. Old Mutual Life based the relief it sought on its contention that there were multiple non-compliances with the rules of the High Court (particularly rules 109 and 110) pertaining to the sale in execution of the property. Mr Harris opposed Old Mutual Life's application.

[10] The High Court identified two issues for determination, namely whether rule 110(4) was peremptory and if it was, whether non-compliance therewith would result in the setting aside of the sale in execution. The High Court on 26 February 2021 answered both questions in the affirmative and set aside the sale in execution. The court *a quo*, after setting out the legal framework governing sales of immovable properties in execution, amongst others, said:

[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 directory requirements are.

[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 used in conjunction with the word “may”. One may well consider that if the word “must” when used in the Rules means “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 preferrent 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 preferrent creditors they have certain rights such as the determination of a reasonable reserve price as envisaged in Rule 109(6).

[22] In considering 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] . . . 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 find out *ex post facto* that a property over which they have rights had been sold.’

[11] Mr Harris is aggrieved by the judgment, hence he has lodged this appeal against the entire judgment and orders of the High Court.

The appeal

[12] The grounds of appeal are, in summary, the following.

[13] The court *a quo* failed to consider that the relief sought by Old Mutual Life constituted a review and that as such, it was obliged to exercise a discretion taking into account all relevant legal and factual circumstances, including the question of prejudice suffered by any party, even if there were non-compliances with applicable rules.

[14] The court *a quo* further failed to adopt a flexible approach to the proper construction of rules 109 and 110 and the consequences, if any, flowing from any non-compliance with those rules.

[15] The court *a quo* should, on the basis of correspondence between Etzold-Duvenhage and Mr Harris' then legal practitioners, have found that Old Mutual Life had acquiesced and agreed that the property be transferred to Mr Harris despite the alleged non-compliance with the relevant rules.

[16] The court *a quo* further erred by not finding that, despite the fact that rules 109 and 110 were peremptory, there were, on the facts of this matter, substantial compliances with the rules, the purpose of which would not be defeated if the relief sought by Old Mutual Life was refused.

[17] Mr Harris further contended that the court *a quo* failed to give sufficient consideration to the affidavit of Mr Taswald Theo July, an authorised

representative of FNB, who confirmed that the debt underlying the mortgage bond registered over the property was extinguished by its payment and that FNB was therefore no longer a preferrent creditor.

[18] Mr Harris furthermore asserted that the court *a quo* erred in not adopting a proper approach to factual disputes in motion proceedings as set out in *Plascon Evans Paints Ltd v Van Riebeeck paints (Pty) Ltd*.¹ This, the court, allegedly did by not accepting the evidence of the Deputy-sheriff that Old Mutual Life's representatives at the sale in execution did no more than express their dissatisfaction that the property was sold to the highest bidder without a reserve price.

Submissions on appeal

Submissions on behalf of Mr Harris

[19] The main thrust of the submissions made on behalf of Mr Harris is that the court *a quo* erroneously found as a fact, that at the time of the sale in execution, FNB was a bondholder. In arriving at that finding, it erred in failing to consider the affidavit filed on behalf of FNB. Mr Fitzgerald SC who appeared for Mr Harris argued that, had the court *a quo* properly analysed the facts contained in the founding affidavit read with the affidavit deposed to on behalf of FNB, the court should have found that FNB no longer enjoyed any substantive rights in respect of the property.

¹ *Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[20] Counsel argued that the mortgage bond which was registered in favour of FNB was registered in 2014, whereas the mortgage bond registered in favour of Old Mutual Life was registered in 2013. In counsel's submission, because the mortgage bond in favour of FNB was registered subsequent to the mortgage bond registered in favour of Old Mutual Life, rule 109(6) was not of application.

[21] Counsel contended that even if the court *a quo* was correct in finding that a mortgage bond was registered in favour of FNB, it erred by not finding that the mortgage bond had, at the time of the sale in execution, been fully paid though not yet cancelled, and further by failing to set aside the sale in execution, particularly in view of FNB's position that it had no interest in the property and was not prejudiced by its sale.

[22] Counsel argued furthermore that had the court *a quo* considered various correspondence that took place between October and November 2018 regarding the dispute, it should have found that Etzold-Duvenhage, who were acting as agents for Old Mutual Life, expressly communicated to Mr Harris that the sale in execution had not been cancelled. He further submitted that the *court a quo*'s finding that the sale in execution was cancelled prior to the sale taking place was erroneous because a genuine dispute of fact existed as regards that issue.

Submissions on behalf of Old Mutual Life

[23] Ms Van der Westhuizen who appeared for Old Mutual Life, in essence, argued that the starting point in determining whether or not the court *a quo* was correct in holding that rule 110(4) of the rules of court is peremptory and that non-

compliance with that rule invalidates sale in execution, is to first determine what the purpose of the rule in question is.

[24] She argued furthermore that the aim of the rules relating to the sale of immovable property in execution is to safeguard the rights of various parties and to strictly regulate a process that dispossesses a judgment debtor of his or her property. She contended that apart from a due process, the rules further principally, seek to ensure proper prior publication and notification, with an emphasis on 'prior'.

[25] Counsel argued that prior publication and notification, in turn, serve two very important purposes. First, it ensures that a *genus* of right holders who may be affected by the sale in execution must exercise their rights prior to the sale in execution and that they can, after the sale in execution, be bound by the doctrine of notice. Second, it serves to attract as many bidders as possible in order to obtain the highest possible price.

[26] Counsel thus argued that in view of the purposes of rules 109 and 110, which rules are couched in peremptory terms, non-compliance therewith visits the sale in execution with invalidity and entitles Old Mutual Life to have the sale set aside. According to counsel, the test is objective. It cannot be, as Mr Harris appears to suggest, that if a particular set of facts is more favourable, non-compliance may be excused but in other circumstances, non-compliance will be fatal. Either non-compliance with the rules visits the sale in execution with invalidity or it does not, so she argued.

Discussion

[27] The judgment of the *court a quo*, in paras 10 to 16, correctly sets out the legal framework governing sales in execution. The legal framework is briefly this. Rules 109 and 110 are contained in part 11 of the rules which deals with Post-Trial or Post-Hearing matters. Rule 109(1) provides that a writ of execution must contain a full description of the nature and situation including the address of the property and must be accompanied by sufficiently detailed information to enable the deputy-sheriff to trace the property.

[28] 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 or other officer charged with the registration of that property is situated must make the attachment on a writ on Form 25.²

[29] 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.³

[30] Subrule 109(6)(a) provides that an immovable property which is subject to a claim preferent to that of the execution creditor may not be sold in execution unless – the execution creditor has caused notice in writing of the intended sale to be served by registered post on the preferent creditor, if the preferent creditor's

² Rule 109(2).

³ Rule 109(5).

address is known; and if the property is rateable, on the regional council or local authority council in whose area the property is situated calling on either or all of them to stipulate within 10 days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve. The subrule further requires the judgement creditor to provide proof to the deputy-sheriff that the preferent creditor or the regional council or local authority council concerned has so stipulated or agreed that the property may be sold without a reserve price.

[31] In the alternative to the above, subrule 109(6)(b) provides that the sale may only take place if the deputy-sheriff is satisfied that it is impossible to notify any preferent creditor in terms of the rule of the proposed sale, or if the preferent creditor or the regional council or local authority council, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve.

[32] 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. Rule 110(4) provides that the deputy-sheriff must, not less than ten 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.

[33] It is against the backdrop of what rules 109 and 110 require, that I commence this discussion with the argument by counsel for Mr Harris that

because the mortgage bond in favour of FNB was fully paid, at the time of the sale in execution, FNB was at that stage no longer a mortgagee or creditor and the court *a quo* thus erred by not considering this aspect.

[34] According to Silberberg and Schoeman's *The Law of Property*,⁴ the term 'mortgage' is used in two senses. The learned authors state in this regard that:

'As a generic term it covers every form of hypothecation of property and in this sense it includes every real right which one person has in and over another person's property for the purposes of securing the payment of a debt or generally the performance of an obligation. In a more restricted sense the expression 'mortgage' signifies a special security over immovable property as opposed to a 'pledge' which denotes a special security over movable property. As a general rule, mortgages and pledges have their origin in an agreement between the parties, i.e. the creditor and the debtor.

. . . The significance of mortgages, pledges, liens and all other forms of hypothecation lies in the fact that they provide the creditor with a "real security" for the payment of his claim; for, if the debtor is unable to raise the necessary funds to pay the debt which is thus secured, the creditor is entitled to demand that the property, i.e. the thing which is the subject-matter of his security, be sold and that the proceeds of such a sale are used for the satisfaction of his claim.'

[35] Section 102 of the Deeds Registries Act 47 of 1937 defines a mortgage bond as a 'bond attested by the specially hypothecating immovable property'. Section 53 of the Deeds Registries Act, amplifies this definition by stating that:

'53 (1) Save as provided in any other law the registrar shall not attest any mortgage bond which purports to bind movable property or which contains the

⁴ P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed at 357-358.

clause, commonly known as the general clause, purporting to bind generally all the immovable or movable property of the debtor or both and shall not register any notarial bond which purports to bind immovable property.’

[36] From the above it can thus be stated that a mortgage bond is an instrument hypothecating landed property to secure an existing debt or a future debt or both existing and future debts.⁵ Where a bond is intended to secure an existing debt, it is inevitable that the amount of such debt must be acknowledged in the bond and it is also essential that the maximum amount of future debts secured by the bond must be indicated.

[37] In *Lief NO v Dettmann*⁶ the then Appellate Division of the Supreme Court of South Africa held that:

‘The bond is registered in the Deeds Office so that the world should have knowledge of the fact that there is a charge against the mortgagor’s property; the object is not to notify the world that the mortgagor owes the mortgagee a specific sum of money. Creditors of the mortgagee cannot rely on the acknowledgment of indebtedness in the bond as correctly reflecting the debt owed to the mortgagee by the mortgagor at any particular time subsequent to registration. The only real rights in favour of the mortgagee created by the registration of the bond are rights in respect of the mortgaged property, e.g. the right to restrain its alienation and the right to claim a preference in respect of its proceeds on insolvency of the mortgagor.’

[38] In his affidavit filed in the court *a quo* the deputy-sheriff indicated that when he conducted an electronic search at the Deeds Office he did not pick up the fact that FNB’s bond was endorsed on the Title Deed of the property. Section 13(1) of

⁵ See s 50(2) of Deeds Registries Act 47 of 1937.

⁶ *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259C-E.

the Deeds Registries Act provides that deeds executed or attested by a registrar⁷ shall be deemed to be registered upon the affixing of the registrar's signature thereto. It follows that on the basis of the deeming clause in s 13(1) of the Deeds Registries Act, the fact that the Registrar of Deeds has failed to endorse a title deed of a property that the property in question is mortgage that failure does not invalidate the mortgage bond.⁸

[39] I thus find that, the argument advanced on behalf of Mr Harris as regards the status of FNB at the time of the sale of the property in execution, cannot be accepted as correct for the simple reason that at that time when the property was sold in execution, FNB had a valid mortgage bond registered in its favour over the property, and FNB was thus a mortgagee in respect of that property. The fact that Hendricks CC had fully repaid its loan to FNB and FNB was not a creditor of Hendricks CC, is of no moment because the object of registering a mortgage bond is not to notify the world that Hendricks CC owes FNB a specific sum of money.

[40] The registration of the mortgage bond in favour of FNB was to create certain real rights in respect of the mortgaged property, ie the right to restrain the alienation of the property without its consent. I, accordingly, reject the argument that FNB was not a mortgagee in respect of the property at the time that the property was sold in execution.

⁷ Section 102 of the Deeds Registries Act 47 of 1937, defines registrar as meaning a registrar of deeds appointed under this Act, and, when used in relation to any deeds registry means the registrar in charge of that deeds registry; and when used in relation to a document means the registrar in charge of the deeds registry wherein that document is registered or registrable or intended to be used or filed.

⁸ Also see *Standard Bank van Suid-Afrika Bpk v Breitenbach en andere* 1977 (1) SA 151 (T).

[41] Having found that FNB was a mortgagee in respect of the property at the time the property was sold in execution, I turn to the finding by the court *a quo* that non-compliance with rule 110(4) invalidates the sale in execution. Rule 110(4) provides that:

‘(4) The deputy-sheriff must, not less than 10 days before the date of the sale, forward by registered post a copy of the notice of sale referred to in subrule (2)(a) to every execution creditor who has caused the immovable property to be attached and to every mortgagee of the property whose address is known.’

[42] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*⁹ it was held that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

⁹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) para 18.

[43] Justice O'Regan, who authored the above judgment, further reasoned that what is clear is that courts have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the document appears ambiguous. She continued to state that, that approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered.

[44] The context in which rule 110(4) appears is the following: Article 1(1) of the Namibian Constitution establishes the Republic of Namibia as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, *the rule of law and justice for all*. Article 5 enjoins the Executive, Legislature and Judiciary and all organs of the Government and its agencies and where applicable to them, by all natural and legal persons in Namibia, to respect and uphold the fundamental rights and freedoms enshrined in the Constitution. Article 16 grants to all persons the right to acquire, own and dispose of all forms of immovable and movable property.

[45] A further context under which the rules were enacted is provided by the rules. Rule 3(1) provides that the rules were enacted for the conduct of proceedings in court and for giving effect to the provisions of Art 12(1) of the Namibian Constitution. Rule 3(5) urges legal practitioners and litigants to comply with the rules and all practice directions issued under the rules, and failure to do so may attract sanctions.

[46] In light of what I regard as the context in which the rules were enacted, I now turn to the purpose of the rules. What cannot be disputed is that proceedings in execution are inroads upon the constitutional rights and property of the individual. I therefore agree with counsel for Old Mutual Life that rules 109 and 110 were conceived in the interests of the judgment debtor and the judgment creditor. Disobedience of the directions set by the rules may cause a debtor to be despoiled without a corresponding reduction of his or her liabilities and satisfaction of his or her creditors and not in accordance with the command of the law.

[47] In light of the context and purpose for which rules 109 and 110 were enacted, I proceed to inquire what remedy is, in the contemplation of the drafters of rule 110(4), available to a judgment debtor in circumstances such as these where it is not disputed that a mortgagee was not notified by the deputy-sheriff of the notice of sale in execution. In the first place, rule 110(4) is couched in peremptory terms. It provides that '*[t]he deputy-sheriff must . . . forward by registered post a copy of the notice of sale . . . to every mortgagee of the property whose address is known*'.

[48] In *Messenger of the Magistrate's Court, Durban v Pillay*¹⁰ the court held that if a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity. The court further referred to *Maxwell on Interpretation of Statutes*,¹¹ who argued that:

¹⁰ *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A).

¹¹ G F L Bridgman *Maxwell on Interpretation of Statutes* 7 ed (2009) at p316.

'Where powers are . . . granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the . . . authority conferred, and it is therefore probable that such was the intention of the Legislature.'

[49] Another reason that persuades me to the conclusion that non-compliance with the directions set out in rule 110(4) will result in nullity of the act performed contrary to the directions set out in that subrule, is the guidance by this Court in *Total Namibia* that, where more than one meaning is possible, each possibility must be weighed in light of the context and circumstances in which the rule was enacted; and that a sensible meaning must be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. I have no doubt that an interpretation that the injunction contained in subrule 110(4) is merely directory and may or may not be complied with, undermines the protection afforded to mortgagees. That interpretation must therefore be avoided.

[50] The suggestion by counsel for Mr Harris in argument that the court *a quo* should have had regard to the affidavit deposed to on behalf of FNB, misses the point that the conduct of the Deputy Sherriff must be judged prospectively and not *ex post facto* or after the occurrence of the events. I thus have no doubt that the court *a quo* was correct when it concluded that rules 109 and 110, insofar as they relate to bondholders or local or regional authorities, were drafted to ensure adequate protection of their rights as a pre-emptive measure. I therefore find no fault with the conclusion of the court *a quo* that non-compliance with rule 110(4)

will defeat the object and intention of the Rules of Court and will lead to a nullity in the case of non-compliance.

[51] Having concluded that the court *a quo* was correct in its conclusion that non-compliance with rule 110(4) results in a nullity, I do not find it necessary to deal with the other grounds of appeal or arguments raised at the hearing of the appeal.

Costs

[52] There is no reason to depart from the general rule that costs must follow the result. Mr Harris must therefore pay the first respondent's costs both in this Court and in the *court a quo*.

Order

[53] In the result, the following order is made:

- (a) The appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

UEITELE AJA

SHIVUTE CJ

DAMASEB DCJ

APPEARANCES

APPELLANT: M J Fitzgerald SC (with him T Chibwana)

Instructed by Koep & Partners

FIRST RESPONDENT:

C Van Der Westhuizen

Instructed by Dr Weder, Kauta & Hoveka

SECOND TO SIXTH RESPONDENTS: No appearance