CASE NO.: (P) I 2302/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MALAKIA LUKAS NAKUUMBA **PLAINTIFF**

and

TAEUBER & CORSSEN SWA (PTY) LTD **DEFENDANT**

CORUM: NDAUENDAPO, J

Heard on: 24 February 2009

Delivered on: 21 May 2012

JUDGMENT:

NDAUENDAPO, J:

[1] The Plaintiff instituted an action for payment in the amount of N$108000.00 for arrear rental against the defendant.

The Plaintiff, Malakia Lukas Nakuumba and the defendant Taeuber & Corssen SWA (Pty) Ltd entered into a lease agreement whereby the plaintiff let to the defendant a property known as part a of a building on Erf 258 Oshakati west, the lease period was for 3 years from 1 July 2003 to 30 June 2006 at an amount of N$9000.00 per month..

[2] At the expiry of the lease agreement, it was extended on a month to month basis at a monthly rental of N$9000.00. From the 30 June 2006 the defendant remained in occupation of the premises and it failed to pay the monthly rental for the months of July 2006 to July 2007.

[3] The defendant pleaded that it paid the rental for the months of July 2006 to July 2007 which payments had been made to the deputy sheriff of Windhoek as defendant was legally obliged to do so pursuant to a warrant of execution granted against the plaintiff in favour of Matador Enterprises (PTY) Ltd in case No I 1684/9, in terms of which the rental payment cheques were attached.

[4] Mr Nakuumba testified that he is a businessman and the owner of the rented property. He testified that the lessee should have paid him N$9000.0 per month from July 2006. He demanded payment, but he did not receive it.

He also testified that he did not receive the warrant of execution in case no (T) 1684/9 which was issued against him in favour of Matador Enterprises (Pty) Ltd. He also testified that nobody came to him to demand payment in respect of case ns (T) 1684/9. He also testified that he did not receive any summons in that case. That was the case for the plaintiff.

Defendant's case

[5] Mr Van Staden testified that he was employed by the defendant as its financial director. He testified that payment to the plaintiff (rent) was effected by electronic transfer to Onesi Drankwinkel bank account. The rent for July 2006- to July 2007 was paid to the deputy Sheriff as a result of a warrant of execution and a garnishee order in case no: (T) 1684/9 served on them.

It was put to the witness in cross examination that the summons and the warrant of execution in case no (T) 1684/9 was not served on the plaintiff and he did not trade as Oshakati supermarket. The witness testified that he had no knowledge about that.

[6] The next witness was Mrs Esterhyzen the deputy sheriff (for the district of Windhoek). She testified that she received a letter from P.F Koep and Co dated 4 November 2005.

The letter is addressed to the Deputy Sheriff Windhoek and it states:

"Dear Sir

RE: National Cold Storage//Malakia T/A Oshakati Supermarket case no 1947/2000.

Attached please find a warrant of execution in duplicate for service at the offices of Taeunber & Corssen SWA (Pty) Ltd 11 Ruhr Street, Northern Industrial Area, Windhoek.

We had a telephonic conversation with Mr Gerhad Van Staden, the financial director to Taeuber & Corssen, who confirmed that they were paying from time to time monies by electronic transfers over to Mr Malakia with regards to a certain building that Taeuber & Corssen SWA Pty Ltd is renting from Malakia.

Please proceed to attach such monies soonest and furnish us with your return of service."

Based on that letter, she issued a garnishee order and a warrant of execution. She testified that if it was rent, then only one garnishee order was needed. She proceeded to the address provided in the letter and attached the cheques due to plaintiff and the monies were paid over to PF Koep & Co. That was the case for the defendant.

[7] Mr Namandje submitted that the garnishee order was not submitted in court (on which the attachment was based). Mr Namandje further submitted, correctly in my view, that in terms of Rule 45 (12) that there should be notice and demand for payment from the judgment debtor before attachment. The real issue before this Court is whether there was a valid attachment in terms of Rule 45 (3) procedures.

[8] Rule 45 (3) provides that wherever by any process of the court the deputy sheriff is commanded to levy and raise any sum of money upon the goods of any person, he or she shall forthwith himself or herself or by his or her assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached, and there

(a) Demand satisfaction of the writ and failing satisfaction

(b) Demand that so much movable and disposable property be pointed out as he or she may deem sufficient to satisfy the said warrant and failing such pointing out.

(c) Search for such property. .

In Reichenber V Deputy Sheriff Johannesburg. In Re Reicheuberg V Joel Melamed & Hurwitz and others (1992 (2) 381 WLC *the court held that from the above the deputy sheriff must in the first instance demand*

satisfaction of the writ the writ is issued in respect of a claim for a sum of money due to the execution creditor. If demand is not satisfied, then the deputy sheriff is empowered to attaché movable and disposable property to satisfy the warrant.

Rule 45 (3) requires a demand to be made. It may be the judgment debtor to whom the demand is made, but in terms of the second proviso it could be someone else, I am satisfied there must be a demand.'

[9] Ms Da Silva submitted that in terms of Rule 45 (12) no demand is needed for satisfaction of payment. It prevents the judgment debtor to dispose of his assets.

Rule 45 (12) provides that.

'12 (a) whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment creditor, attach same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him or her to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may upon any such payment, give a receipt to the garnishee which shall be discharged *pro tanto*, of the debt attached.

I disagree with the submission by Ms Da Silva that no demand is needed for satisfaction of payment. In my view Rule 45 (3) is peremptory. The use of the word 'shall' in rule 45 (3) shows that the procedures set out in Rule 45 (3) must first be exhausted and only after the debt remains unpaid, can Rule 45 (12) (a) be invoked.

In casu, there is no evidence that demand was made for the satisfaction of the debt from the judgment debtor (the plaintiff in this case)

In the result, I make the following order.

1. The attachment of plaintiff 's rental payment cheques by the deputy sheriff pursuant to a warrant of execution granted against the plaintiff in favour of Matodor Enterprises (Pty) Ltd in case no. (T) 1684/9 is invalid and is set aside.

2. Defendant is ordered to pay the Pl

aintiff an amount of N$108 000.00 in arrear rental.

3. Interest on the aforesaid amount at the rate of 20% per annum a *tempore morae,* until date of final payment.

4. Costs of suit.

_____

NDAUENDAPO, J

ON BEHALF OF PLAINTIFF: **SISA NAMANDJE**

INSTRUCTED BY: **NAMANDJE & CO**

ON BEHALF OF DEFENDANT: **DA SILVA**

INSTRUCTED BY: **KOEP & PARTNERS**