NOT REPORTABLE

CASE NO: A 130/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AUGUST MALETZKY	**1st APPLICANT**
WILMA EVELINE HOABES	**2nd APPLICANT**
SALMAAN DHAMEER JACOBS	**3rd APPLICANT**
ANNARINE JACOBS	**4th APPLICANT**
CALISTA ANNA BALZER	**5th APPLICANT**
RONNEY REINHOLD HANGULA	**6th APPLICANT**
SIEGFRIED BROCKERHOFF	**7th APPLICANT**
EVANGELINE EICHAB	**8th APPLICANT**
DORKA VICTORINE SHIKONGO	**9th APPLICANT**
EDUARD PAUL XOAGUB	**10th APPLICANT**
FRANCIS EVELINE XOAGUS	**11th APPLICANT**
ABRAHAM MAPELA PETRUS	**12th APPLICANT**
REMEO MOUTON	**13th APPLICANT**
ANTON HERMANN	**14th APPLICANT**

JOHANNES NEUAKA	**15th APPLICANT**
LISA RHODE	**16th APPLICANT**
FILEMON HOXOBEB	**17th APPLICANT**
FRANCOIS DARIES	**18th APPLICANT**
CHRELY STEVENS NANUSEB	**19th APPLICANT**
WENDY GLORIA NANUSES	**20th APPLICANT**
FRANS NAIBAB	**21st APPLICANT**

and

STANDARD BANK NAMIBIA LTD	**1st RESPONDENT**
NEDBANK NAMIBIA LTD	**2nd RESPONDENT**
HES SHIKONGO	**3rd RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA LTD	**4th RESPONDENT**
CITY OF WINDHOEK (WINDHOEK MUNICIPALITY)	**5th RESPONDENT**
SWABOU INVESTMENTS (PTY) LTD	**6th RESPONDENT**
VSV ENTERPRISES NUMBER SIXTY CC AND/OR NOMINEE JP VAN STADEN OR LJ VAN STADEN	**7th RESPONDENT**
ALEXANDER HOVEKA	**8th RESPONDENT**
HARTMUT GERHARD FOELSCHER	**9th RESPONDENT**
MINISTER OF JUSTICE	**10th RESPONDENT**
REGISTRAR OF THE HIGH COURT	**11th RESPONDENT**
REGISTRAR OF DEEDS	**12th RESPONDENT**
ATTORNEY-GENERAL	**13th RESPONDENT**
THE DEPUTY SHERIFF	**14th RESPONDENT**
VAN DER MERWE-GREEFF INC	**15th RESPONDENT**
BANK WINDHOEK LTD	**16th RESPONDENT**

SOUTH WEST AFRICAN BUILDING SOCIETY	**17th RESPONDENT**
RISTO SHIKULO	**18th RESPONDENT**
JULIA THANDU NEUAKA	**19th RESPONDENT**
GERARDT DE KLERK	**20th RESPONDENT**
SHARON DE KLERK	**21st RESPONDENT**
BANK OF NAMIBIA	**22nd RESPONDENT**
BOY TOBIAS VAN WYK	**23rd RESPONDENT**
MORVEN M LUSWENYO	**24th RESPONDENT**
BUILDERS WAREHOUSE (PTY) LTD	**25th RESPONDENT**

CORAM: **SCHIMMING-CHASE, AJ**

Heard on: 6 June 2011

Delivered on: 6 June 2011

JUDGMENT

SCHIMMING-CHASE, AJ

1. The 1st, 10th and 11th applicants launched an application on an urgent basis, seeking an interim interdict to prevent the 1st and 14th respondents from proceeding on 7 June 2011 with a sale in execution of certain immovable property situate at Erf 6667, Aaron Tjatindi Street, Katutura, Windhoek ("the property")

pending the determination and finalisation of an application launched by the applicants and 17 others against a total of 25 respondents, including the 1st and 14th respondents ("the main application"), for an order declaring it unconstitutional for the Registrar of the High Court to declare immovable property specifically executable when ordering default judgment under Rule 31(5) of the Rules of the High Court.

2. This application by the 1st, 10th and 11th applicants was launched on 6 June 2011, 1 day before the scheduled auction of the property. It was also set down for 16h30 on this date, due, it would appear, to the 1st applicant, Mr Maletzky, not being available between 09h00 and 16h00 as he is writing an examination. The certificate of urgency is also signed by Mr Maletzky. After hearing argument, this application was struck from the roll with costs. The reasons now follow.

3. At the outset of the hearing of this application, Mr Maletzky addressed this Court as a party on the basis that he is also a party in the main application, as the owner of the certain immovable property that was also declared specifically executable by the Registrar in terms of Rule 31(5). However, it is common cause that this application for interim relief only affects the 10th and 11th applicants as it is their property that is to be sold in execution on 7 June 2011. Mr Maletzky's property is not the

subject matter of a looming sale in execution to take place in less than 24 hours. He accordingly does not have *locus standi* in this interim application to address this Court. I accordingly ruled that I would only hear the 10th and 11th applicants who appeared in person.

4. The issue that this Court is called upon to decide at this point in the proceedings is whether or not the application should proceed as one of urgency. The point of urgency was raised *in limine* at the outset by Mr Maasdorp, acting on behalf of the first respondent. I exercised my discretion to hear this point.

5. In his founding affidavit 10th applicant, supported by his wife, the 11th applicant, stated in support of their grounds for urgency that they are *incola* of the Court, and that should the sale of the property continue on 7 June 2011 without the intervention of the Court they would incur irreparable damage which would not be able to be cured by an action for damages. They further state that the sale of the property is premised on a default judgment granted by the Registrar which the applicants in the main application contend is unconstitutional, and that the 10th and 11th applicants have paid a total of N$41,600.00 to the 1st respondent in a futile attempt to stop the sale of their immovable property. They also state that they did not create the urgency themselves but that the 1st respondent is simply

unreasonable as it seeks to sell the property which is the subject matter of the main application.

6. Mr Maasdorp argues that the urgency in this application is entirely self-created and accordingly does not comply with Rule 6(12)(b). Mr Maasdorp drew the Court's attention to a letter dated 11 May 2011 authored by the 1st applicant, Mr Maletzky and addressed to the legal practitioners of the 1st respondent. This letter is attached to the 10th applicant's founding papers in this application. It indicates *inter alia* that Mr Maletzky represents the 10th and 11th applicants, and that he was instructed by them to inform the 1st respondent that the default judgment granted against the 10th and 11th applicants is unconstitutional.

7. It is also stated in this letter that the first time that the 10th and 11th applicants obtained meaningful knowledge of the action instituted against them was on 30 November 2010, when the Court process was sent to them via facsimile, and that Mr Maletzky holds instructions to appoint counsel to approach the Court for rescission of the default judgment should the 1st respondent not abandon the default judgment.

8. It is common cause that no such application was ever brought. Mr Maasdorp also handed up a return of service by the Deputy

Sheriff showing that the notice of sale in execution of the property was served at the 10th and 11th applicants' residence on 12 May 2011.

9. The Court was also informed that this application was served on the 1st respondent on 6 June 2011 in a sealed envelope at approximately 12h00, and that accordingly the 1st respondent has not yet had an opportunity to consider and respond to the merits of this application in any event, due to the extremely short time period in which this application was set down.

10. Rule 6(12)(b) of the Rules of Court requires of an applicant in an urgent application to provide reasons why he or she cannot be afforded substantial redress at a hearing in due course. Mere lip service to the requirements of the Rule will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the normal procedure.

See: Salt and Another v Smith 1990 NR 87 (HC)

11. An unsatisfactory explanation may result in the Court declining to exercise its judicial discretion to condone the failure to comply with the Rules regarding forms and service and to hear the matter on an urgent basis, notwithstanding the apparent urgency of the application, especially in instances where there was culpable remissness or inaction on the part of the applicant.

See: Bergmann v Commercial Bank of Namibia Ltd and Another 2001 NR 48 (HC) at 49H-J

12. It is also important to note that when an application is brought on an urgent basis, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen. These procedures contemplated in the Rules are designed to bring about procedural fairness to both sides.

See: Bergmann v Commercial Bank of Namibia Ltd *supra* at 51H

13. Not only is this application set down for hearing at 16h30 on 6 June 2011 to stop a sale in execution taking place on 7 June 2011, it was also only served on the 1st respondent (at its mail room *ex facie* the papers) at approximately 12h00 on 6 June 2011, leaving the respondents approximately 4½ hours to prepare to oppose the application. To exacerbate matters, Mr Maletzky sought to have the matter set down after 16h00 as he was apparently busy writing exams between 09h00 and 16h00.

14. The applicants themselves concede that they were aware on 30 November 2010 of the default judgment against them, and that they were aware at the very latest on 12 May 2011 that their property would be sold in execution on 7 June 2011. The main

application for constitutional relief was instituted on 24 May 2011.

15. There is unfortunately no proper explanation whatsoever on the papers, why this application was brought on such extremely short notice, considering that Rule 6(12)(b) requires an applicant to explicitly set forth the circumstances which renders the matter urgent. Even when given an opportunity to add additional explanations for the time frame in which the application was set down which opportunity was provided to assist the 10th and 11th applicants as lay litigants, all they could say was that they had sought assistance from a number of legal practitioners in Windhoek, that they had made substantial payments to the 1st respondent and that no one from the 1st respondent was prepared to hear their attempts to settle their arrears.

16. It often happens that whilst execution procedures are underway, the litigating parties attempt to settle their disputes or make some arrangements regarding payment of the judgment debt in instalments. Unfortunately, the existence of such negotiations does not *ipso facto* stay the execution proceedings in the absence of an agreement.

See: Bergmann v Commercial Bank of Namibia Ltd *supra* at 50C

17. It is also important to note that the convenience of the Court is an important factor. The main application is particularly voluminous, and wide ranging constitutional relief is sought. It is not feasible to properly consider and determine the requirements for interim relief on such complex issues of law in a matter of hours, especially when the applicants on their own version could have launched this application on 12 May 2011 or even 24 May 2011, and enabled these questions to still be considered on an urgent basis, but within a time frame that enabled the respondents to prepare proper papers, and the Court to consider the merits.

See: Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and 4 Others, unreported Full Bench decision delivered on 31 July 2007 in case number A 91/2007

18. There is unfortunately no averment in the founding papers providing the Court with any reasonable explanation why this application was launched at such short notice in such a short period of time. There is no compliance with Rule 6(12)(a) whatsoever. I am of the view that the urgency in this application is entirely self-created by the culpable remissness on the part of the 10th and 11th applicants. In these circumstances, I decline to condone their non-compliance with the Rules of Court or to hear this application as one of urgency.

19. In the result the following order is made:

(a) The application is struck from the roll with costs.

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SCHIMMING-CHASE, AJ

ON BEHALF OF THE APPLICANTS In person

ON BEHALF OF 1st, 4th, 6th, AND 17th RESPONDENTS

Mr Maasdorp

Instructed by: Fisher, Quarmby & Pfeifer