



CASE NO.: LC 136/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SENIOR REAL ESTATE CC

1ST APPLICANT

GOLF TRADING CC

2ND APPLICANT

vs

AMANDA TSOEU

1ST RESPONDENT

**THE MESSENGER OF THE COURT
FOR THE DISTRICT OF WINDHOEK
BANK WINDHOEK**

2ND RESPONDENT

3RD RESPONDENT

**THE MAGISTRATE FOR THE DISTRICT
OF WINDHOEK**

4TH RESPONDENT

HEWAT BEUKES

5TH RESPONDENT

CORAM: MILLER, AJ

Heard on: 14 November 2011

Delivered on: 16 November 2011

JUDGMENT

MILLER, AJ: [1] On 21 January 2008, the first respondent obtained a judgment by default against the first applicant in the District Labour Court in the sum of N\$96, 600.00.

[2] Since that date the first applicant and the first respondent have been embroiled in litigation either, at the instance of the first applicant have the judgment rescinded or at the instance of the first respondent to have the judgment enforced. The end is not yet in sight by all accounts.

[3] The proceedings before me concern the validity or otherwise of an order issued by the District Labour Court in Windhoek in terms of Section 72 of the Magistrate's Court Act, Act 32 of 1984. It is not in issue before me that the District Labour Court is entitled in appropriate circumstances to issue an order in terms of Section 72. The order issued reads as follows:

GARNISHEE ORDER – SECTION 72 OF THE MAGISTRATE'S COURTS ACT

It is ordered:

1. That the said debt be attached;
2. That the garnishee pay to the judgment creditor's representative the balance in the account so much of the debt as may be sufficient to satisfy a judgment or order obtained against the judgment debtor by the judgment creditor in the District Labour Court at WINDHOEK on the 21st day of January 2008 for the amount of **N\$96,000.00 together with interest of 20% per annum from the date of judgment** (on which judgment or order the amount of **N\$96,000.00 with the said interest** (remains due and unpaid) and the costs of the

proceedings of attachment as well as the Messenger's fees alternatively to offset the balance against the judgment.

[4] Following the issue of the order, the Messenger of the Court for the district of Windhoek, the second respondent, attached the sum of N\$76 900.00 standing to the credit of the second respondent in its current account at the Windhoek Branch of Bank Windhoek, cited herein as the third respondent. The third respondent in fact paid out that sum to the second respondent.

[5] This prompted the applicants to approach this Court on an urgent basis claiming the following relief:

1. Dispensing with the forms and service and compliance with the time limits prescribed by the Rules of this Honourable Court as far as may be necessary, and condoning applicants' failure to comply therewith and directing that this matter be heard as one of urgency as envisaged in Rule 6(23) of the Rules;
2. Ordering and directing the first to fifth respondent to refrain from in any way executing a garnishee order dated 7 November 2011 issued under case number DLC 474/2007;
3. Ordering and directing the first, second, fourth and fifth Respondents to reimburse the second applicant to the tune of N\$76 900.00 within 24 hours from date of this order, jointly and severally the one to pay the other to be absolved;
4. Ordering, directing and declaring the garnishee order dated 7 November 2011 to be of no force or effect;

5. Cost against respondents 1, 2, 4 and 5 jointly and severally, the one to pay the other to be absolved on an attorney client scale;

[6] After I permitted certain amendments to the Notice of Motion the relief claimed against the Magistrate, who was cited as the fourth respondent fell away. The applicants persisted with the claim for relief against the remaining respondents.

[7] In my view the issue raised can be disposed of within a narrow compass. I consider that it was wholly inappropriate to utilize the provisions of Section 72. The reason for that is that on the facts of this matter certain jurisdictional facts are absent. The relevant position of Section 72 read as follows:

Attachment of Debts:

“(1) The court may on ex parte application brought by the judgment creditor...order the attachment of any debt at present or in future owing or accruing to a judgment debtor by or from any other person (excluding the State), residing, carrying on business or employed in the district, to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other magistrate's court, and may make an order (hereinafter called a garnishee order) against such person (hereinafter called the garnishee) to pay to the judgment creditor or his attorney at the address of the judgment creditor or his attorney, as much of the debt

as may be sufficient to satisfy the judgment and costs, and may enforce such garnishee order as if it were a judgment of the court".

[8] It is apparent that Section 72 contemplates the situation where a judgment creditor becomes aware that a third person or persons owe the judgment debtor a debt. In these circumstances the judgment creditor is entitled in terms of Section 72 to an order that the debt be attached and paid to the judgment creditor instead of the judgment debtor.

[9] On the papers before me, it is plain that the second applicant does not owe the first applicant any debt. Consequently the provisions of Section 72 find no application in the instant case, and the order made in terms thereof falls to be set aside.

[10] I turn to deal with the applicant's claim against the third respondent. I agree with Mr. Schickerling, who appeared for the third respondent that the applicant's claim against the third respondent is misplaced. The third respondent did no more than comply with an order issued by the district labour court. It was not entitled to refuse to comply with the order.

[11] There is some uncertainty as to whether the monies attached are still being retained by the second respondent or whether it was paid over to the first respondent. This necessitates that I should grant relief in an amended form.

[12] I consequently make the following orders:

1. An order dispensing with the forms and service and compliance with the time limits prescribed by the Rules of this Honourable Court as far may be necessary, and condoning applicants' failure to comply therewith and directing that this matter be heard as one of urgency as envisaged in Rule 6(23) of the Rules;
2. Ordering the second respondent to repay the sum of N\$79, 600.00, attached by him to the second applicant alternatively;
3. In the event that the second respondent no longer retains the amount of N\$79.600.00, the first respondent is ordered to pay that amount to the second applicant.
4. There shall be no order as to costs.

MILLER AJ

ON BEHALF OF THE APPLICANTS:

Instructed by:

Ms. Petherbridge

Petherbridge Law Chambers

ON BEHALF OF 1ST RESPONDENT:

In person

ON BEHALF OF THE 3RD RESPONDENT:

Instructed by:

Mr. Schickerling

Dr. Weder, Kauta & Hoveka

ON BEHALF OF THE 4TH RESPONDENT:

Instructed by:

Ms. Koita

Government Attorney