REPUBLIC OF NAMIBIA NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

JUDGMENT

Case no: I 396/2009

In the matter between

NARCISSUS LOUIS JANUARIE **APPLICANT**

And

REGISTRAR OF THE HIGH COURT **1ST RESPONDENT**
DEPUTY SHERIFF – REHOBOTH **2ND RESPONDENT**
REGISTRAR OF DEEDS – REHOBOTH **3RD RESPONDENT**

Neutral citation: Januarie v Registrar of High Court & others (I 396/2009) [2013] NAHCMD 276 (8 October 2013)

Coram: **Smuts, J**

Heard on: 30 September 2013

Delivered on: 8 October 2013

Flynote:

REASONS

SMUTS, J

[1] The applicant brought this application for review against the Registrar of the High Court, cited as first respondent (the Registrar), the Deputy-Sheriff, Rehoboth as the

second respondent and the Registrar of Deeds, Rehoboth as the third respondent. The applicant, who has conducted this litigation in person, seeks the following relief:

> ‘1. Condoning any non-compliance with the Rules of the Honourable Court insofar as it may be necessary.
> 2. Setting aside decision of the first respondent to declare applicant’s property situated at Erf No. 3, Block A, Rehoboth executable.
> 3. Setting aside the writ of execution issued on the strength of the above decision in par. 2, by the first respondent and the sale in execution.
> 4. Setting aside the decision of the second respondent to sell Erf No. 3, Block A, Rehoboth by public auction.
> 5. Setting aside the decision of the second respondent to effect registration of transfer of Erf No. 3, Block A, Rehoboth on 1 November 2012.
> 6. Setting aside the decision of the third respondent to execute registration of transfer of Erf No. 3, Block A, Rehoboth to certain Mr. Du Plessis on 1 November 2012.
> 7. Correcting by restoring (the) *status quo ante* which existed before the registration of transfer of Erf No. 3, Block A, Rehoboth on 1 November 2012, with immediate effect.
> 8. Further and/or alternative relief.’

[2] This application is opposed by the first and second respondents who have each filed an answering affidavit. These respondents, as well as the applicant, have referred to the history which has preceded this application. It is of some relevance and significance to this application.

[3] The main thrust of this application is this attack upon the Registrar’s decision to declare certain immovable property which belonged to the applicant (the property) as executable. This happened in the course of a judgment granted by default at the instance of Nedbank Namibia Limited (Nedbank). Nedbank’s claims against the applicant were in respect of two loan agreements in the sums of N$88 733.61 and N$736 340.33 each secured by first and second mortgage bonds over the property in question. Nedbank’s action against the applicant was not defended. Nedbank thereafter

applied for judgment by default which was granted by the Registrar on 19 May 2009 in those amounts. A further order was made, declaring the property as executable.

[4] After judgment by default was granted, a writ was issued on 22 July 2009. After some considerable time thereafter, the applicant brought an application to rescind the judgment and to stay a sale in execution due to take place on 8 March 2012. This rescission application was served on 23 February 2012 and set down for 2 March 2012. It was subsequently heard on 20 March 2012 and was dismissed with costs by Ueitele AJ (as he then was) on that date.

[5] The applicant noted an appeal against the judgment of Ueitele AJ on 22 March 2012. But the appeal subsequently lapsed by virtue of the failure to file a record of proceedings.

[6] Given the lapsing of the appeal, Nedbank subsequently sought to proceed with a sale in execution. It was set for 27 September 2012. The applicant then brought an interlocutory application as one of urgency and set it down for 25 September 2012. It was served on Nedbank on the previous day. In this application, the applicant applied to stay the sale in execution. This interlocutory application was opposed by Nedbank. Given the short service upon it, Nedbank sought time to file an answering affidavit. The interlocutory application was postponed to 14h15 on 25 September 2012 for that purpose. The applicant only received the answering affidavit at noon on that day. That occurred after an indication had been given that it would be served by 10h30. He asked that it should not be received as a consequence. This was declined and the matter was however postponed to the next morning, 26 September 2012, to enable the applicant to consider the answering affidavit. More time was sought by the applicant on the following morning and at the resumption of the hearing at 12h00 on 26 September 2012, a full replying affidavit was filed by the applicant.

[7] During argument in that interlocutory application on 26 September 2012, it soon emerged that the applicant had been aware of the pending sale for some time as well as the fact that the Registrar's office had taken the view that the appeal had lapsed which was accepted by the applicant in the course of his argument. This meant that the suspension of the judgment appealed against by him would no longer arise and that Nedbank would be entitled to proceed with execution in the absence of an order to the contrary effect.

[8] The applicant however was unable explain why he had taken until the very eve of the sale in execution to bring the interlocutory application. After the conclusion of argument on 26 September 2012, this court declined to hear the application as one of urgency, finding that any urgency had been self created or self induced. The interlocutory application was then struck from the roll with costs.

[9] The sale in execution thereafter proceeded and a certain Mr M. Du Plessis purchased the property at that sale. I understand from the applicant's founding affidavit in this application that the Registrar of Deeds, Rehoboth proceeded to execute registration of the transfer of the property to Mr Du Plessis on 1 November 2012 and that transfer to that effect has thus taken place.

[10] The applicant then brought this application for review, seeking to set aside the original decision of the Registrar to declare the property executable and seeking the further and ancillary relief set out in paragraphs 3, 4, 5, 6 and 7 of the notice of motion quoted above, namely setting aside the writ and the purported decision of the Deputy-Sheriff to sell the property by public auction and to proceed with transfer and to set aside the 'decision' of the Registrar of Deeds to execute registration of transfer. The applicant also sought the restoration of the *status quo ante* prior to 1 November 2012.

[11] The basis upon which the applicant seeks to review the decision to declare the property executable and to challenge the other conduct referred to in the notice of motion is a contention that it is unconstitutional and invalid for the Registrar to have

made such an order – declaring the immovable property executable. Significantly, the applicant does not challenge the other portions of the default judgment in which he is directed to make payment of the two claims in respect of the two loans in respect of which the property was provided as security in the form of the two mortgage bonds. As was pointed out by Mr Phatela with reference to the applicant would not appear to have contest this liability in respect of those loans (although he did briefly take issue with finance and interest charges in his rescission application). In this application he confines himself to challenge constitutionality of the Registrar declaring the property executable. The further relief sought in the notice of motion would appear to be consequential upon succeeding with the objection to the constitutionality of the Registrar declaring the property executable.

[12] In the founding affidavit, the applicant also seeks condonation for any delay in bringing it. In support of the application for condonation, the applicant states that he only acquired knowledge of the default judgment during February 2012 and thereafter launched his rescission application, set down in March 2012 and already referred to. The affidavit in support of the rescission application is attached to this application. In it, the applicant raised the constitutionality of the Registrar to grant default judgment against him. The applicant further stated that he is a lay litigant, lacking knowledge and experience in law and procedure and mostly relying upon his own research and preparation.

[13] In the first respondent's answering affidavit, the preliminary point is taken that there was an unreasonable and undue delay in bringing the application. The first respondent points out that the default judgment was granted on 19 May 2009 and points out that the applicant does not explain details of the circumstances which would render the considerable delay reasonable, apart from stating that he only became aware of the default judgment in February 2012. It is contended that the failure to do so would result in the application being dismissed.

[14] The second respondent also raises the preliminary point of the failure to have brought the application within reasonable time. But two further preliminary points are also raised. The point of non-joinder is taken. The second respondent points out that Nedbank and Mr. Du Plessis both have a direct and substantial interest in the outcome of the application for review and points out that neither was joined. The submission is made that their non-joinder is fatal to the application.

[15] A further preliminary point taken by the second respondent is that the court is *functus officio* on the main relief sought. He referred to the court file and the previous applications launched by the applicant, including the rescission application in which the rescission of the judgment was sought on the grounds that it was unconstitutional for the Registrar to have granted the default judgment in question, including the order that the property be declared executable. The applicant sought to appeal against that order. The Registrar also opposed the application on its merits.

[16] In the heads of argument prepared on behalf the Registrar, the point is also taken that the Registrar's decision is not reviewable in as much as it is deemed to be a judgment of the court. The submission is made that the order is judicial, and not administrative and therefore not reviewable.

[17] Mr. Boonzaier, who appeared for the first respondent also developed the unreasonable or undue delay point in his heads of argument. He cited the leading case of *Disposable Medical Products Pty Ltd v The Tender Board of Namibia and Others*[1] and referred to several cases which had followed it. Mr. Boonzaier also provided further argument on the merits.

[18] The applicant also filed heads of argument, albeit out of time. In his heads of argument, bearing the date of hearing, the applicant contended that the decision to declare his immovable property executable was a judicial act which could only be exercised by the courts under Article 78 of the Constitution and not by the Registrar,

[1]1997 NR 129 (HC) at 132.

who he says is a civil servant and employee of the executive branch of government. He argued with reference to authority that the decision was a nullity. He also contended with reference to English authority that, as a nullity, it would not be subject to prescription and the principle of *res judicata*.

[19] The second respondent developed the points raised in the answering affidavit in heads of argument which were prepared by Mr. Phatela who represented the second respondent in arguing the matter.

[20] When the application became opposed, it was referred to case management and on 14 August 2013, it was set down for hearing on 30 September 2013. Despite being *dominus litus* in this application, the applicant did not appear at case management hearing on 14 August 2013. The court order setting the matter down for hearing on 30 September 2013 was served on him by the Deputy-Sheriff. As I have indicated, the applicant was however aware of the date of hearing and filed heads of argument even though they were filed late. Those heads referred to the date of hearing.

[21] On Wednesday 25 September 2013, the court file was requisitioned by the applicant presumably for the purpose of preparing an index and paginating the papers. But an index was not prepared. Nor were the papers paginated. Instead on Friday 27 September 2013, a handwritten memorandum on government stationary was placed on the court file. It was addressed ‘to whom it may concern’. The heading was Januarie Narcissus. It stated the following;

> ‘Hereby certified that the above named is under our care since 22/09/2013, date of admission at Windhoek Central Hospital, for reason of his medical condition, and he will be kept until he complete (sic) his treatment. Kind regards.’

There then followed a signature and a name inscribed which is not legible. But what is legible is the prefix ‘dr’. On this memorandum and over the signature is the stamp of the Ministry of Health and Social Services, the Windhoek Central Hospital, dated 27 September 2013. This memorandum was not accompanied by any affidavit or application for postponement. As is clear from the memorandum itself, it does not

specify the nature of the medical condition. Nor does it state the duration of treatment. What it does however state is that the applicant was admitted to the hospital on 22 September 2013. Given the fact that the file was requisitioned from my chambers in the name of the applicant on 25 September 2013, I enquired from both my secretary and from my research assistant if they had seen who had requisitioned the file. My research assistant, Ms Kemanya Amkongo, stated that she did not see who had requisitioned the file but had during that week, namely starting on 23 September 2013, seen the applicant in town on two occasions.

[22] When the matter was called, the applicant was absent. His name was then called in the foyer. He did not appear. When this occurred, I then referred to the requisition form on the file in the applicant's name and placed that on record. I then called Ms Amkongo to give evidence and place on record what she had informed me prior to the commencement of the proceedings. This she did. She also stated that she would easily recognise the applicant as she had been in court when he had argued one matter and on another occasion when he had attended to court.

[23] Given the fact that there was no application for postponement and no admissible evidence which would form the basis for one, I proceeded to hear the matter and argument advanced by Mr. Boonzaier on behalf of the first respondent and Mr. Phatela on behalf of the second respondent. It was incumbent upon the applicant to bring an application for postponement should he have sought one and when doing so to provide admissible evidence in support of it. There was only a short memorandum placed on the court file. It did not state what the condition referred to in it was and its prognosis. It merely represented that the applicant had been admitted to hospital on 22 September 2013. After having carefully considered the heads of argument and the papers in the matter and hearing the further argument, I made an order dismissing the application with costs, to include one instructed and one instructing counsel where engaged, and that the costs would be on a legal practitioner and client scale. What follows are my reasons for doing so.

[24] It is abundantly clear that Nedbank and Mr. Du Plessis have a direct and substantial interest in the relief sought by the applicant. They were not joined. The point was squarely taken in the second respondent's answering affidavit filed on 15 February 2013. Despite this, the applicant took no steps to join them.

[25] Nedbank Namibia was after all the judgment creditor and had obtained the order sought to be set aside. Mr. Du Plessis was the purchaser of the property. It had been registered in his name. Plainly both of these parties had a very real substantial and direct interest in the relief sought in this application. The applicant had notice of the point of non-joinder on 15 February 2013. But despite this did not join them.

[26] On this basis alone, and in the exercise of my discretion, I would and do dismiss the application with costs.

[27] There are further reasons why the application would fall to be dismissed.

[28] As was contended by Mr Phatela, this court has already dealt with the fundamental issue raised in this application when the applicant applied on the same basis for rescission of the judgment and the order. The basis upon which rescission was sought was that it was unconstitutional for the Registrar to have made that order. That is the basis upon which the applicant has in this application sought to set aside the very same order.

[29] This court dismissed the rescission application on 20 March 2012. The applicant noted an appeal against that dismissal. Not only would this court appear to be *functus officio* in relation to that issue, the decision having been made by Ueitele, AJ in the rescission application, but it would also appear to be *res judicata,* given the fact that final judgment had been given between the same parties in respect of the same thing on the same ground. The fact that an appeal had been noted is of course no answer to

a plea of *res judicata* which is essentially the point taken by the second respondent in raising a *functus officio*.[2]

[30] There is also further reason why the application would fall to be dismissed. It concerns the point taken on behalf of the second respondent that the order declaring the property as executable does not constitute administrative action for the purpose of a review and is thus not susceptible to review proceedings in the High Court. As was argued by Mr. Boonzaier with reference to authority,[3] the order itself is judicial in nature and deemed to be a judgment of this court. As an order of this court, that it would not therefore be susceptible to review in an application to this court. For this reason as well, the application would fall to be dismissed.

[31] There is a yet further reason why the application would in my view be dismissed without even turning to the merits. That is on the basis of the point taken by both respondents opposing the application that it had not been brought within a reasonable time and that there had been undue delaying in doing so.

[32] In applying the *Disposable Medical Products* matter, it is clear to me that the delay in this matter caused prejudice to the other parties which had not even been cited. The other important principle referred to in that matter would also apply, namely that there should be finality in proceedings. The applicant in this application failed to adequately explain his delay in bringing the review application. It would follow that it also would fall to be dismissed on this ground as well.

[33] Given the fact that the application would in my view be dismissed on one or more of these preliminary grounds, it is not necessary for me to canvass the further issues raised by it, including whether the conduct referred to in paragraphs 3 to 6 of the notice of motion constitutes decision making and administrative action susceptible to review.

[2]See *Liley v Johannesburg Turf Club and Another* 1983 (4) SA 548 (W) at 552 and the authority collected there by Goldstone, J (as he then was).
[3]*Bloemfontein Board Nominees v Benbrook* 1996 (1) SA 631 (O); Albeit with reference to a differently worded rule in South Africa. The wording of the rule in the rules of this court reinforce the approach set out, given the fact that rescission is sought instead of a “reconsideration”, as appears in the South African rule.

[34] As for the question of costs, the second respondent has sought a special order as to costs in the answering affidavit. Mr. Phatela argued that the application constituted an abuse of process in the circumstances given the fact that the point upon which this application is based had already been raised and decided in the rescission application. I am persuaded that his submission is sound in all the circumstances of this matter and given its history. I am not however persuaded that an order on the scale requested, namely the attorney and own client should be given. But I am persuaded that an order on the scale of attorney and client would be appropriate in the exercise of my discretion. I accordingly granted an order on that scale and also to also to include the costs one instructing and one instructed counsel, where engaged.

[35] These are the reasons for the order I gave on 30 September 2013.

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DF Smuts
Judge

APPEARANCE

FOR THE APPLICANT:	Non appearance
FOR THE 1ST RESPONDENT:	Mr Boonzaier
Instructed by:	Government Attorney
FOR THE 2ND RESPONDENT:	Mr Phatela
Instructed by:	Dr Weder, Kauta & Hoveka Inc.