

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO. HC-MD-CIV-MOT-GEN-2017/00443**

In the matter between:

**RONALD SOMAEB**

**APPLICANT**

and

**STANDARD BANK (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**DEPUTY SHERIFF**

**2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF DEEDS**

**3<sup>RD</sup> RESPONDENT**

**REGISTRAR OF THE HIGH COURT**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Somaeb v Standard Bank (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2017/00443) [2018] NAHCMD 406 (14 December 2018)

**CORAM:** MASUKU J

**Heard :** 6 November 2018

**Delivered:** 14 December 2018

**Flynote:** Civil procedure – application for cancellation of a transfer of immovable property – misjoinder - undue delay in launching proceedings – *res judicata*.

**Summary:** The applicant brought an application seeking the setting aside of the transfer of a certain erf from the 1<sup>st</sup> respondent and registering same to in his name. He alleged that the sale of the property, which had been transferred to him had been marred with irregularities and fraudulent activities by the Deputy-Sheriff.

*Held* – that the applicant was guilty of misjoinder, as he had cited an entity referred to as “Standard Bank (Pty) Ltd as the first respondent, yet such an entity does not exist and no judgment can be enforced against it.

*Held further* – that the applicant had taken an inordinate period of time to launch the proceedings and that the interest in finality of proceedings operated to his detriment as he had been aware of the claim but did nothing about it for a long time, notwithstanding court judgments commenting about the need to him to act.

*Held* – that the matter had been previously settled by decisions of the court and the applicant did not have the right to reignite those dead embers of the case.

*Held further* – that the inference to be drawn from the applicant’s conduct was that he was harassing the 1<sup>st</sup> respondent with the persistent litigation he was pursuing against it.

The application was dismissed with costs.

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**ORDER**

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1. The application for the cancellation of the transfer of Erf. 4785, Friedrich Maherero Street, Katutura, Windhoek and the registration of

the property into the name of the applicant, together with the ancillary relief sought in the Notice of Motion dated 6 December 2017, is dismissed.

2. The applicant is ordered to pay the costs of the First Respondent, consequent upon the employment of one instructing and one instructed Counsel on the scale between attorney and client.
3. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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MASUKU J:

### Introduction

[1] This is an opposed motion in which the applicant, Mr. Ronald Somaeb, a Namibian male adult, who acts in person, and is resident at Friedrich Maherero Street, on Erf. 4785, Katutura, has approached this court seeking the following relief:

‘1. Cancelling the transfer of immovable property situated at Friedrich Maherero Street, Erf. 4785, Katutura, Windhoek, in the name of the first respondent.

2. Directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to reverse the transfer of immovable property situated at Fredrich Maherero Street, Erf 4785, Katutura, Windhoek in the name of the applicant.

3. Ordering that the second respondent has made a false return of public auction in relation to the immovable property situated at Friedrich Maherero Street, Erf. 4785, Katutura, Windhoek.

4. Directing the respondents to pay the actual expense of the applicant only in the event the respondents opposing this application.

5. Granting the applicant such further and/or alternative relief as the above Honourable Court may deem fit.'

[2] It would appear that only the 1<sup>st</sup> respondent, and I will return to this issue later, has filed opposition to the relief sought by the applicant. I should mention, however, that the 2<sup>nd</sup> respondent, the Deputy Sheriff of Windhoek, has filed an affidavit confirming the averments made by the deponent to the 2<sup>nd</sup> respondent's affidavit and also places in issue the allegations made against him by the applicant. I shall turn to these as necessary, in due course.

### Background

[3] The applicant, in his founding affidavit, claims that he purchased the property fully described above in the notice of motion on 27 November 2007. The purchase was financed by the 1<sup>st</sup> respondent. On 22 July 2010, the 1<sup>st</sup> respondent obtained a judgment by default against the applicant and also obtained an order, granted by the Registrar of this Court, the 4<sup>th</sup> respondent, declaring the property in question to be specially executable.

[4] A notice of sale of the property, which was to be sold by public auction, was scheduled for 13 November 2012. The applicant alleges that no person attended the said auction, save himself, Mr. Edwardt Xoagub, Motwuanaga Simeon, the Deputy Sheriff and an official from the 1<sup>st</sup> respondent. The applicant deposes further that a warrant of his ejection from the property was subsequently issued in June 2013.

[5] Significantly, the applicant makes serious allegations against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, namely that they obtained the property fraudulently in that they submitted false transfer papers for the transferring of the property from the applicant's name and that they alleged that the property was purchased at a public auction when no such public auction took place. He alleges further that the said default judgment was defective because it was issued not by a Judge of this court but by the Registrar of this court. It is, he

therefor claims, null and void. These allegations are vehemently denied by the respondents, including the Deputy Sheriff, to whom fraud is also imputed.

[6] In his papers, the applicant punches large holes, which in his submissions, render the sale liable to be set aside. I will not, however, traverse these allegations at this juncture. I adopt this position for the reason that in their opposing papers and during the hearing of the matter, 1<sup>st</sup> respondent raised a number of points of law *in limine*, which if upheld, have the potential to have a dispositive effect on the entire application.

#### Points of law *in limine*

[7] The 1<sup>st</sup> respondent raised a number of points of law *in limine*, including that of misjoinder; unreasonable delay in launching this application; *res judicata* and *functus officio* and prescription, to mention but a few. I will presently deal with these points of law or those of them that I may deem desirable to consider in the present circumstances.

#### *Misjoinder*

[8] The first point of attack by the 1<sup>st</sup> respondent, was that there is a serious case of misjoinder in this matter. This is alleged to be so for the reason that, so the 1<sup>st</sup> respondent states, the Bank that was engaged in the loan to the applicant and which eventually obtained default judgment and a warrant of eviction against the applicant has not been cited in these proceedings.

[9] The 1<sup>st</sup> respondent's complaint is predicated on the premise that in his application, the applicant has not cited the correct respondent Bank, namely, Standard Bank Namibia Limited. The applicant cited an entity he referred to as "Standard Bank (Pty) Ltd". It is the 1<sup>st</sup> respondent's case that there is thus a serious case of misjoinder, which was brought to the applicant's attention in the answering affidavit but the applicant chose, for reasons unknown, to move ahead with the papers as they are.

[10] In argument, Mr. Somaeb was like a sheep led to the shearers. He simply had no answer to the applicant's point of law, which is, in my considered opinion good. As matters stand, it appears to me that the applicant may have had to issue a fresh application as there was no way of curing this defect in view of the fact that even if he had been successful, it would have been impossible to enforce the order against a non-existent entity. Most certainly, it would not be enforced against the 1<sup>st</sup> respondent, as it is not a party cited by the applicant in this matter. This point is, in my considered opinion good and must be upheld.

### *Res judicata*

[11] Another point raised by the 1<sup>st</sup> respondent is that this matter has been settled and finalised by previous judgments of this and the Supreme Court. In this regard, the 1<sup>st</sup> respondent attached two judgments by this court and the Supreme Court between the parties. In this court,<sup>1</sup> the 1<sup>st</sup> respondent sought an order for the ejection of the applicant from the premises in question. After service of the combined summons, the applicant entered an appearance to defend, resulting in the 1<sup>st</sup> respondent filing an application for summary judgment.

[12] The applicant filed an affidavit resisting summary judgment and the matter was eventually set down for hearing. The court found that the applicant had no legal basis for occupying the property and it proceeded to grant summary judgment against the applicant. As he is entitled to, he appealed to the Supreme Court in *Ronald Mosementla Somaeb v Standard Bank Namibia Ltd.*<sup>2</sup>

[13] Shorn of all the frills, the Supreme Court upheld the judgment of this court and held that the applicant had no right at law to continue to occupy the property in question. The application for his ejection was therefor upheld. It

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<sup>1</sup> *Standard Bank Namibia Limited v Ronald Mosementla Somaeb* Case No. I 1912/2013, per Cheda J.

<sup>2</sup> Case No. SA26/2014, delivered by the Hon. Chief Justice on 27 February 2017.

is clear in both judgments that the applicant raised the issue of the invalidity of the sale in execution.

[14] In the matter before Cheda J in this court, the following is recorded at para [15] of the cyclostyled judgment attached to the 1<sup>st</sup> respondent's affidavit:<sup>3</sup>

'Respondent is not permitted by law to introduce a new matter at this juncture. If he is not happy with the sale of the property for whatever reason, his best cause of action is an application to set the sale aside. . . As it is, there is an order of the court. It is trite that an order of the court remains in force until it is set aside by a competent court. Whoever, is offended by that order is bound by it.'

[15] As intimated earlier, the Supreme Court upheld Cheda J's judgment in its entirety. At para [61] of the Supreme Court judgment, the learned Chief Justice, writing for the majority of the court reasoned as follows regarding the issue now serving before this court:

'If the respondent had sincerely believed that the deputy sheriff had acted unfairly and unprofessionally he should have, as soon as he had been served with the summons, in which an order for his ejection was sought, launched an application to have the sale of execution (*sic*) set aside as well as the transfer of the property into the name of the respondent. He failed to do so and there is no explanation for this failure.' (Emphasis added).

[16] What becomes evident from the excerpts quoted above, is that the applicant was advised long ago that there was no merit to his defence of the ejection from the premises. He was informed that he should have, as soon as he was served with the summons, made an application to set aside the sale in execution and the transfer of the property into the 1<sup>st</sup> respondent's name.

[17] In this regard, it is therefor clear that the 1<sup>st</sup> respondent's case that this matter was finally decided and settled makes sense. From the Supreme Court

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<sup>3</sup> Annexure 'NWC 6.' to the 1<sup>st</sup> respondents answering affidavit.

judgment, it is clear that the applicant should have brought an application in the form of the relief he now seeks sometime in 2013. He did not do so and did not proffer an explanation to the Supreme Court for not having done so. Both courts made it clear that he had to set aside the sale but which he did not do until the present proceedings, instituted more than 3 years after this court's summary judgment application and some 10 months after the Supreme Court judgment. Although he may have been late, he never heeded the sentiments expressed in both judgments in good time.

[18] In *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading CC*,<sup>4</sup> this court dealt with the plea *alibi pendens* and *res judicata*. In doing so, the court placed reliance on *Evins Shield Insurance Co Ltd*,<sup>5</sup> where Corbett J.A. said:

'The object of this principle (*res judicata*) is to prevent repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions . . . The principle of *res judicata*, taken together with the "once and for all" rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him. . . The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment that is the end of the matter.'

[19] I am of the view that the actions of the applicant, in the context of this matter, falls neatly within the four corners of the remarks by the learned Judge above. It seems nothing less than an attempt to wear down the 1<sup>st</sup> respondent with endless litigation by suing in instalments what appears to be cases arising from the same facts and in respect of which the cause of action arose more than five years ago. The court should not allow its processes to be employed to achieve such results, with the embers of litigation being blown to life indefinitely. There must come a time when a case must come to an end and this should be it in this matter. See *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*.<sup>6</sup>

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<sup>4</sup> 2016 (2) NR 468 (HC) at 497.

<sup>5</sup> 1980 (2) SA 814 (A) at 836G-836A.

<sup>6</sup> 2012 (2) NR 671 (SC) at para 21.



*Inordinate delay*

[20] This leads me to the next point raised by the 1<sup>st</sup> respondent, namely of the inordinate delay by the applicant in bringing the present proceedings. I have, in the immediately preceding paragraph counted the months that it took the applicant to bring these proceedings. This, it must be mentioned, is from the time the judgments were issued. The time he should have raised the complaint was immediately after the sale in execution took place and when the transfer was effected. From the applicant's averments, the first step should have taken place in 2013. The applicant took some four years to bring the said proceedings.

[21] By any standards, even the most benevolent, a period of four years is inordinately long. Parties and the public at large, have an interest in the finality of legal proceedings. In this regard, the courts, which use public resources, must be occupied by genuine disputes that come to an end and not those that are revived and kept on life support indefinitely, to the detriment of the public purse and the victorious party.

[22] Where a party is dissatisfied with any order or judgment of the court, it must challenge same at the earliest possible time and not wait for the 'injustice' the party perceives, to crystallise and for the other parties to be lulled into thinking and accepting that the *status quo* remains, namely, that the result of the judgment stands.

[23] A party who decides to rest on his or her laurels and not to challenge a decision they are unhappy about, shoot themselves in the foot as they may be refused the right to re-open their complaint by the sheer passage of time as legal certainty is a high priority in such matters. Parties have a right to certainty as to their conduct and resumption of normal life. They should not be dragged in and out of court indefinitely at the whim of the losing party.

[24] It is important, in this regard, to have regard to the provisions of s. 33 (3) of the High Court Act,<sup>7</sup> which state that: 'No proceedings shall be brought for anything done or omitted to be done in the execution of his or her office by the sheriff or any deputy-sheriff or his or her assistant in the execution of this or her office unless commenced within six months after the act was committed or the omission occurred'.

[25] The applicant has taken a lot longer and although it may not help him, he has not, even this time around (as he had not before the Supreme Court) proffered any explanation. Even if he had, it would have been very difficult for the court to condone a delay so unconscionable, considering the legislative period stipulated and the time the applicant took to launch this application, even after comments by both this and the Supreme Court as adverted to earlier. As a matter of note, there does not seem to be any powers reposed by the Legislature in this court, to extend this period or to condone non-compliance therewith.

### Conclusion

[26] In view of the conclusions to which I have arrived on this matter, I am of the considered view that the points raised by the 1<sup>st</sup> respondent that I have traversed in this judgment are insuperable and the applicant simply has no answer to them. In the premises I will not consider the balance of the points and hold the view that this is a proper case in which the application launched by the applicant must be dismissed with costs, as I hereby do.

### Costs

[27] The 1<sup>st</sup> respondent, in its opposing affidavit, has alleged in para 71 that the applicant is abusing the processes of this court and that for those reasons, this is a proper case in which the applicant should be mulcted with costs on the punitive scale. The applicant did not file a response to this allegation. In this regard therefor, the allegations made by the 1<sup>st</sup> respondent as to the

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<sup>7</sup> Act No. 16 of 1990.

frivolous and abusive nature of the application, remain unchallenged and have not been gainsaid.

[28] In any event, it is apparent from my treatment of the main features of the case, including its history and the points of law successfully raised by the 1<sup>st</sup> respondent, that the 1<sup>st</sup> respondent's contention is fully justified. This, accordingly brings this case within the realms of the unusual cases where the court must show its disapproval of the applicant's conduct by decreeing costs on a punitive scale, as I hereby do.

### Order

[29] Having regard to the discussion and the conclusions reached above, I am of the considered view that the following order is appropriate in this matter:

1. The application for the cancellation of the transfer of Erf. 4785, Friedrich Maherero Street, Katutura, Windhoek and the registration of the property into the name of the applicant, together with the ancillary relief sought in the Notice of Motion dated 6 December 2017, is dismissed.
2. The applicant is ordered to pay the costs of the First Respondent, consequent upon the employment of one instructing and one instructed Counsel on the scale between attorney and client.
3. The matter is removed from the roll and is regarded as finalised.

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TS Masuku  
Judge

## APPEARANCES

APPLICANT: In person

RESPONDENTS: A Van Vuuren  
instructed by Behrens & Pfeiffer, Windhoek