

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-MOT-REV-2022/00062

In the matter between:

**MICHELLE IKUME SILILO**

**APPLICANT**

and

**STANDARD BANK NAMIBIA LIMITED**

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

**THE DEPUTY SHERIFF OF SWAKOPMUND**

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

**THE REGISTRAR OF DEEDS**

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

**GEORGE ROMENA ZAAHL**

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

**Neutral citation:** *Sililo v Standard Bank Namibia Limited* (HC-MD-CIV-MOT-REV-2022/00062) [2023] NAHCMD 667 (19 October 2023)

**Coram:** RAKOW J

**Heard:** 19 June 2023

**Delivered:** 19 October 2023

**Flynote:** Applications – Immovable property declared specially executable in terms of rule 108(1)(b) – Sheriff of Swakopmund conducted a public auction and sold the property – Purchaser did not make the payment of the 10 per cent deposit of the

purchase price on the date of sale – Points in limine – *Locus standi* of the applicant  
The relief sought is not competent under rule 76 – The point in limine raised regarding the reviewability of the conduct of the deputy-sheriff under rule 76(1) is upheld.

**Summary:** The applicant is the registered owner of immovable property situated at Erf 1181 Tamariskia Extension 3, Swakopmund. The first respondent has a mortgage bond registered over the property in respect of a loan that was advanced to the applicant. In the course of 2019 the first respondent instituted legal proceedings against the applicant for the recovery of default payments on the said loan amount and on 19 March 2021 the first respondent obtained an order declaring the immovable property specially executable in terms of rule 108(1)(b) of the rules of the court under case number HC-MD-CIV-ACT-CON-2019/02638.

Subsequently, the second defendant, the deputy sheriff of Swakopmund conducted a public auction on 26 October 2021 and sold the property. The notice of sale of the execution was published in the Government Gazette of 8 October 2021 and this notice contained some conditions of sale. These conditions of sale substantially conforms with the conditions of sale as required by form 26 of the Rules of the High Court.

On 1 February 2022 the legal practitioner for the applicant verified that the property was still registered in the applicant's name. It further transpired that the purchaser did not make the payment of the 10 per cent deposit of the purchase price on the date of sale, as it transpired from the statement furnished to the deputy sheriff of payments to the deputy sheriff by Standard Bank. The first respondent only paid over the amount of N\$49 047.50 and not the 10 per cent deposit which would have been N\$85 000.

In terms of clause 8 of the conditions of sale, if the purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by a judge summarily or a report of the deputy sheriff after notice to the purchaser. The present sale was however not so cancelled. In the meantime, the property has however been

transferred to the fourth respondent. Only the first and second respondents opposed the application.

*Held that:* although the court found the conduct of the deputy-sheriff not reviewable under s 76(1) of the rules of court, the applicant will find herself in a similar position as set out in the *Bell Rae* matter.

The point in limine raised regarding the reviewability of the conduct of the deputy-sheriff under rule 76(1) is upheld.

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### **ORDER**

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The point in limine raised regarding the reviewability of the conduct of the deputy-sheriff under rule 76(1) is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

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### **JUDGMENT**

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RAKOW J:

#### Introduction

[1] The applicant in the current review matter before court is Michelle Ikume Sililo, an adult female residing at 27 Scultetus Street Vineta, Swakopmund. The first respondent is Standard Bank Namibia Limited, a registered commercial bank and public company duly incorporated and with its principal place of business situated at Standard Bank Head Office, Chasie Street in Windhoek. The second respondent is the deputy sheriff of Swakopmund, an official duly appointed as such in terms of s 30 of the High Court Act 19 of 1990 and conducting his business from 43 Moses Garoeb Street, Walvis Bay.

[2] The third respondent is the Registrar of Deeds, duly appointed as such in terms of s 2 of the Deeds Registries Act 47 of 1937, with his principal place of business being at the Office of the Registrar of Deeds, 178 Robert Mugabe Avenue, Windhoek. The fourth respondent is George Romena Zaahl, an adult male person residing at Erf 1181 Tamariskia, Extension no 3, Swakomund. The fourth respondent is the purported purchaser of the property at the heart of this application.

### Background

[3] The applicant is the registered owner of immovable property situated at Erf 1181 Tamariskia Extension 3, Swakopmund. The first respondent has a mortgage bond registered over the property in respect of a loan that was advanced to the applicant. During the course of 2019, the first respondent instituted legal proceedings against the applicant for the recovery of default payments on the said loan amount and on 19 March 2021 the first respondent obtained an order declaring the immovable property specially executable in terms of rule 108(1)(b) of the rules of the court under case number HC-MD-CIV-ACT-CON-2019/02638.

[4] Subsequently, the second defendant, the deputy sheriff of Swakopmund conducted a public auction on 26 October 2021 and sold the property. The notice of sale of the execution was published in the Government Gazette of 8 October 2021 and this notice contained some conditions of sale. These conditions of sale substantially conforms to the conditions of sale as required by form 26 of the Rules of the High Court.

[5] On 1 February 2022 the legal practitioner for the applicant verified that the property was still registered in the applicant's name. It further transpired that the purchaser did not make the payment of 10 per cent deposit of the purchase price on the date of sale as it transpired from the statement furnished to the deputy sheriff of payments by Standard Bank. The first respondent only paid over the amount of N\$49 047.50 and not the 10 per cent deposit which would have been N\$85 000.

[6] The purchaser further did not make payment of the balance of the purchase price or furnish a bank or building society guarantee to the deputy sheriff within 14

days after the date of sale as contemplated in the conditions of sale and that explained why the property was not yet registered in his name on 1 February 2022. According to an email correspondence received from Standard Bank by the applicant, she was informed that the sale is indeed still in process and that there might have been a miscommunication between the conveyancing division and the collections division of the relevant firm. There was apparently one requirement still outstanding. It transpired that the one requirement still outstanding was the fact that the purchaser did not make the payment of 10 per cent at the date of the auction and therefore did not comply with the conditions of the sale.

[7] In terms of clause 8 of the conditions of sale, if the purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by a judge summarily or by a report of the deputy sheriff after notice to the purchaser. The present sale was however not so cancelled. In the meantime, the property has been transferred to the fourth respondent.

[8] The first respondent provided a timeline for the matter:

10 February 2020:	Judgment granted
19 March 2021:	Property declared executable
28 October 2021:	Sale in Execution
11 November 2021:	Transferring attorneys receive conditions of sale
24 November 2021:	Purchaser's home loan finally approved
16 December 2021:	Transferring attorneys close
20 January 2022:	Instruction from financier to register mortgage bond
8 February 2022:	Transferring attorneys received signed transfer documents and compliance certificate
10 February 2022:	Guarantee for the purchase price issued
14 February 2022:	Receipt issued for payment of transfer duty

18 February 2022:	Clearance figures requested
22 February 2022:	Clearance certificates issued
24 February 2022:	Bond cancellation instructions requested
28 February 2022:	Purchasers pay interest in terms of clause 7 of conditions
10 March 2022:	Interest paid by purchasers
17 March 2022:	Transaction on prep at deeds office. Purchasers paid further interest. Purchasers paid clearance amounts
18 March 2022:	Registration of transfer

[9] Only the first and second respondents opposed the application.

#### Relief sought

[10] The following relief is being sought by the applicant:

‘1. An order reviewing the sale by judicial auction of the immovable property situated at Erf 1181, Tamariskia, Extension No. 3, Swakopmund, Namibia, and setting aside the sale of the said immovable property by the deputy sheriff for the district of Swakopmund to the fourth respondent.

2. In the alternative to the aforementioned prayer, an order compelling the deputy sheriff for the district of Swakopmund to submit a report to the Honourable Court as contemplated in Rule 110(10) of the Rules of this Honourable Court within twenty (20) days of an order in terms hereof.

3. Setting aside the registration of the immovable property situated at Erf 1181, Tamariskia, Extension No. 3, Swakopmund, Namibia into the name of the fourth respondent, and declaring the said registration unlawful, invalid and of no force or effect.

4. Directing the Registrar of Deeds to effect the necessary endorsements on the title deed in respect of the immovable property situated at Erf 1181, Tamariskia, Extension No. 3, Swakopmund, Namibia to cancel the registration of the transfer of the said immovable

property situated into the name of the fourth respondent and reflecting the registration thereof in the name of the applicant.

5. Ordering the first respondent to pay the costs of this application, jointly and severally, the one paying the other to be absolved, with such further respondents electing to oppose this application.

6. Further and or alternative relief.'

### Points in limine

#### *Locus standi of the applicant*

[11] Standard Bank raised two points *in limine*, the first being that the applicant has no *locus standi* to challenge aspects emanating from the conditions of sale, mainly because she is not a party to the conditions of sale. In paragraph 8 of the Standard Bank's answering affidavit, the deponent says:

'8. The execution debtor is not a party to the contract of sale concluded between the deputy-sheriff and the execution purchaser. (It was concluded between the deputy-sheriff and the purchaser to the exclusion of the debtor). Insofar as the execution debtor may contend that she has a direct and substantial interest in considering or evaluating whether the sale was conducted in accordance with the requirements of the law, such interest, if it even exists, is not sufficient.'

#### *The relief sought is not competent under rule 76*

[12] Rule 76 reads as follows:

' All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, and administrative body or administrative official are, unless a law otherwise provides by way of application directed and delivered by the party seeking to review such decision of proceedings to the magistrate or the presiding officer of court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.'

[13] The argument presented by the first respondent is that rule 76 only provides for four categories of judicial review, being that of an inferior court, a tribunal, an administrative body and an administrative official and the deputy sheriff is neither of these.

#### Arguments by the parties

[14] In respect of the points *in limine*, it was argued by the applicant that the fact that the property was attached by the deputy sheriff did not leave her without any property. She remained the owner of the property until it was transferred with the deputy sheriff only the custodian of the process to get it transferred. On that basis alone, the applicant has a direct and substantial interest in the process of the sale in execution of the judgment.

[15] Regarding the second point *in limine*, the reviewability of the actions of the deputy sheriff, the applicant argued, it is indeed an administrative action which was performed by the deputy-sheriff when he decided not to cancel the sale for the failure of the buyer to provide the required deposit. It was further argued that each case must be decided on its own merits regarding whether it is an administrative action or not which was performed.

[16] For the respondent, it was argued that the execution debtor is not a party to the contract of sale concluded between the deputy-sheriff and the purchaser. Insofar as the debtor may contend that she has a direct and substantial interest in considering or evaluating whether the sale was conducted in accordance with the requirements of the law, such interest if it even exists, is not sufficient. The interest that must be shown needs to be direct and substantial interest in the subject matter and in the outcome of the application.<sup>1</sup>

[17] Regarding the second point *in limine*, it was argued that the applicant is clearly not reviewing the decision or proceedings of an inferior court or tribunal and therefore to meet the review requirements under s 76(1) must be reviewing the decision or proceedings of an administrative body or official. The question, therefore, is whether

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<sup>1</sup> *Namibian Marine Phosphate (Pty) Ltd v Minister of Environment and Tourism & Others* 2019 (1) NR 90 (HC).



the deputy-sheriff is an administrative body or administrative officer and for the respondents it was argued that the answer is no.

[18] The court was referred to *New Era Investments (Pty) Ltd v Roads Authority and Others*<sup>2</sup> which explains that there are basically four types of reviews. These are explained as follows:

‘In our law, broadly speaking, there are four distinct categories of judicial review. The first type of review relates to irregularities and illegalities in the proceedings before a lower court (category 1 review). Section 20 of the High Court Act 16 of 1990 contemplates precisely this type of review. The second category is meant to control proceedings before tribunals (and inferior courts) (category 2 review). The third category is meant to control acts of administrative bodies and administrative officials (category 3 review). The fourth (and last) category comprises reviews provided by legislation (category 4 review). The present is a category 3 review therefore art 18 of the Namibian Constitution applies. The art 18 principles embrace the common-law principles. They also broaden its ambit to include, for instance, the concept of reasonableness as a ground for review.’

[19] It was argued that the review sought in these proceedings does not meet any of these four categories.

#### Points *in limine* – legal considerations

[20] In *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others*<sup>3</sup>, para [45] and [46]:

‘[45] An attachment brings about a *pignus judiciale* which does not affect the judgment debtor’s dominium in the attached property but merely places it in the hands or under the custody of the sheriff.

[46] It is clear from the above that until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor’s ownership therein remains undisturbed as does his or her right, qua owner, to the use thereof.’

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<sup>2</sup> *New Era Investments (Pty) Ltd v Roads Authority and Others* 2014 (2) NR 596 (HC).

<sup>3</sup> *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* [2003] 3 ALL SA 690.

[21] In *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court*<sup>4</sup> the following was commented in the context of an insolvent estate, but nonetheless equally applicable in the instant matter:

‘An arrest effected on property in execution of a judgment creates a *pignus praetorium* or so to speak more correctly, a *pignus giudiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgment debtor, so that in the event of the debtor’s insolvency, the curator of the latter’s estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent’s estate. But, although the effect of a *pignus giudiciale* is that the control of the property arrested in execution passes from judgment debtor, and therefore on his insolvency supervening does not come under the administration of the curator of the insolvent estate, the dominium remains in the debtor, who can, up to the last moment before actual sale, redeem his attached property: that is to say, the property subject to the *pignus giudiciale*, for while the *pignus* lasts he remains the owner of the pledge (*dominus pignoris*, Dig 20.5.12: Cod 4.24.9.).’

[22] From the authorities, it is clear that the ownership remain vested in the original owner until such time as the transfer to the new purchaser is registered. This position is supported in Namibia by Justice Geier in *Katjiuanjo v Willemse*<sup>5</sup>:

‘[21] In terms of the cited case law, no such direct right is afforded to the purchaser of an immovable property pursuant to a sale in execution prior to transfer. This is not surprising given the underlying legal position – which I have accepted as correct – and which is to the effect that ‘until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor’s ownership therein remains undisturbed as does his or her right, qua owner, to the use thereof. Only the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor’s right to the use and ownership thereof - the impact of the transfer on such property will however depend on the identity of the occupant and the legal basis of his or her occupation.’

### *The reviewability of the conduct of the deputy sheriff*

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<sup>4</sup> *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court* 1997 (1) SA 764 (D).

<sup>5</sup> *Katjiuanjo v Willemse* (I 3464/2011) [2012] NAHCMD 5 (26 September 2012).

[23] On the question of the reviewability of the conduct of the deputy sheriff, reference is made to the Supreme Court judgment of *Mbanderu Traditional Authority and Another v Kahuure*<sup>6</sup>, where Mtambanengwe AJA commented as follows:

‘The starting point in determining whether or not an action performed by a body is administrative, and, therefore, reviewable, is to identify the body concerned. In most review cases no problem arises in this regard. The South African Constitutional Court in the SARFU matter was correct, however, to caution that ‘difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purpose of s 33 of the South African Constitution (art 18 of the Namibian Constitution) and that this can best be done on a case by case basis. In substance, the provisions of art 18 of the Namibian Constitution are similar to those of s 33 of the South African Constitution.’

[24] It was said in the South African Constitutional Court judgment of *President of the Republic of South Africa v South African Rugby Football Union*<sup>7</sup>:

‘[141] In s 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*<sup>8</sup>, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’

[25] By virtue of s 32(1) and (4) of the High Court Act certain acts of the deputy Sheriff are reviewable. Section 32(1) and (4) reads as follows:

‘(1) The sheriff or the deputy-sheriff concerned or his or her assistant shall execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the High Court directed to the sheriff...’

And

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<sup>6</sup> *Mbanderu Traditional Authority and Another v Kahuure and Others* 2008 (1) NR 55 (SC).

<sup>7</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).

<sup>8</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458).

'(4) A refusal by such sheriff or any deputy-sheriff to perform any act which he or she is by law empowered to perform, shall be subject to review by the High Court on application ex parte or on notice, as the circumstances may require.'

[26] However, this section is only applicable where the deputy-sheriff refuse to perform any act which he or she is supposed to perform as empowered by law. In this instance, the deputy-sheriff's conduct cannot be said to amount to a refusal to perform an act, as he merely did not see that the buying party complied with all the conditions of the sale and he allowed the transaction to proceed under such conditions.

[27] In *Todd v First Rand Bank Ltd and Others*<sup>9</sup> Bins-Ward J, said the following with regard to the nature of the actions of the deputy-sheriff when performing a sale in execution:

'[32] A sale in execution is part of the administrative process by which a judgment creditor can enforce a judgment given in its favour by a court. In effecting the sale the Sheriff exercises a public function in terms of legislation. In my view a sale in execution purportedly effected by the Sheriff has factual and legal consequences unless and until set aside by a competent court; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA

[33] Any impugment of a so-called judicial sale on grounds that the Sheriff has failed to comply with the applicable legislation is thus essentially a review of administrative action, and amenable to the courts wide discretion in such matters. That applications in this type of case are more often than not framed as applications for declaratory orders assisted by ancillary relief (cf. e.g. *Menqa and another v Markom and others* 2008 (2) SA 120 (SCA)), and not in a form consonant with the procedure in terms of rule 53, does not detract from this characterization (see *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A)).'

[28] Prinsloo J in her judgement in *Hanus Properties and Consultants CC v The Deputy Sheriff for the District of Swakopmund*<sup>10</sup> then pointed out that the above matter went on appeal and the appeal court said the following:

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<sup>9</sup> *Todd v First Rand Bank Ltd* (497/11) [2013] ZASCA 61(14 May 2013).

<sup>10</sup> *Hanus Properties and Consultants CC v The Deputy Sheriff for the District of Swakopmund* (HC-MD-CIV-MOT-REV-2022/00359) [2023] 646 (13 October 2023).

[23] There is one final matter that requires mention. The high court characterised the Deputy Sheriff's action as administrative in nature and said that the rules for judicial review were pertinent. That is not so. A sale in execution is a procedure executed by an official of the court in terms of the Uniform Rules of Court. It is not an administrative action and is not subject to review as such. If the official fails to comply with the rules, and the non-compliance does go to the root of the matter, the sale in execution (or any other court process similarly affected) will be invalid. Review proceedings are not required to set it aside. So too, the invalid act does not stand and have legal consequences until it is set aside.'

[29] As a result it is clear that the conduct of the deputy-sheriff in this matter is not reviewable under rule 76(1) of the Court rules as it is not an administrative action.

#### Remarks on the main part of the application

[30] For clarity's sake, I would like to shortly deal with the crux of the complaint against the deputy-sheriff, in that he did not cancel the sale after the non-compliance to the conditions of sale which was published with regard to this sale. I wish to repeat what was said in *Bell Rae v Sheriff of the High Court Kempton Park South*<sup>11</sup>:

'The applicant has a number of obstacles in his path in succeeding in his review:-

12.1 The prejudice which he claims to have suffered as a result of the Sheriff's failure to insist on proper compliance with the conditions of sale is that this potentially precludes him from achieving a better price for the property in accordance with the sale agreement concluded with Mr Tshilongwane and Ms Tholo. For this he relies upon the Help U Save provision in the Memorandum of Agreement which he signed on 1 October 2011. But even if I could find that an agreement had been concluded (which I am unable to do) the very terms of this agreement are destructive of his contention of prejudice. The agreement provides that the applicant is required to continue paying a specified amount towards his monthly mortgage loan repayment (which there is no evidence that he did) and that he grants ABSA a power of attorney to sell the property if he has not fully complied with the provisions of that agreement. In other words, no expectation, express or implied, is created in this document that the applicant is himself entitled to market and sell the property.

12.2 Insofar as a delay in the payment of the balance of the purchase price may have occurred which in turn could lead to the delay in transfer of the property, then clause 5.1(b) of the conditions of sale adequately protects the applicant by making the purchaser liable for

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<sup>11</sup> *Bell Rae v Sheriff of the High Court Kempton Park South* 2014 JDR 1607 (GJ).

interest at the rate applicable in the mortgage bond, thereby effectively freezing and securing the judgment debtor's financial position to prevent prejudice to him.

12.3 Neither Rule 46(11) nor clause 10.1 of the conditions of sale obliges the Sheriff to cancel the sale in the event of non-compliance with any conditions; both the Rule and the condition are expressed permissively, and I can find no injunction requiring the Sheriff to cancel. In *Standard Bank of South Africa v Ndlovu*<sup>12</sup> Sutherland J dealt with an election by the Sheriff to effect a cancellation in terms of an identical clause 5.1 as follows:-

“A purchaser only has those rights that are to be found within the four corners of the sale agreement. If the guarantees are late, even though the purchaser may be blameless, there is no juridical basis on which to challenge the right of election vested in the sheriff in clause 5.1 of the sale agreement to effect a cancellation. In an ordinary contract a provision vesting a right to cancel upon the happening or no-happening of a specified event by a stipulated date is not susceptible to challenge. The election is not a breach of contract. The mantle of judicial supervision over a sale in execution and its cancellation does not create more or better rights for the defaulting purchaser.”

In my view the converse also applies; if the Sheriff has a right to condone non-compliance with conditions of sale, which I am satisfied he has, then his discretion is not open to challenge. Much less so by an execution debtor such as the applicant, who on the authority of *Sithole* (supra), has only a passive role in the execution process.’

[31] It is the view of the court that although the court found the conduct of the deputy-sheriff not reviewable under s 76(1) of the rules of court, the applicant will find herself in a similar position as set out in the *Bell Rae* matter should she wish to peruse this matter further.

[32] In the result, I make the following order:

The point *in limine* raised regarding the reviewability of the conduct of the deputy-sheriff under rule 76(1) is upheld with costs, such costs to include the costs of one instructing and one instructed counsel.

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<sup>12</sup> *Standard Bank of South Africa v Ndlovu* 2012 JDR 0525.

APPEARANCES

APPLICANT: N Tjombe  
Of Tjombe–Elago Inc, Windhoek

FIRST RESPONDENT: Y Campbell (with E Yssel)  
Instructed by Engling, Stritter & Partners, Windhoek