CASE NO.: SA 12/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

A.J. NEKWAYA APPELLANT
t/a CHECKERS WHOLESALE & SUPERMARKET

And

YOUNUS CACHALIA t/a YOUNUS CACHALIA 1ST RESPONDENT
WHOLESALERS

THE DEPUTY SHERIFF FOR OSHAKATI 2ND RESPONDENT

CORAM: O'Linn, A.J.A., Chomba, A.J.A. *et* Manyarara, A.J.A.

HEARD ON: 04/04/2002

DELIVERED ON: 18/03/2003

APPEAL JUDGMENT

CHOMBA, A.J.A.: The parties hereto, namely Mr. A.J. Nekwaya, trading as Checkers Wholesale and Supermarket on the one hand, and Younus Cachalia, trading as Younus Cachalia Wholesalers appearing jointly with the Deputy Sheriff for Oshakati, on the other, are respectively the appellant and first and second Respondents in this court. In the court *a quo* the appellant was the applicant, while the remaining two were,

as in this court, the respondents. For convenience's sake I shall refer to them all by the designations they bore in the court *a quo*.

By a notice of motion dated 11th October 2000 the applicant instituted civil proceedings in the High Court by which he prayed for the following reliefs :

1. An order declaring that the matter is one of urgency and authorizing that the matter not be placed on the ordinary motion roll and dispensing with the ordinary rules of court in terms of Rule 6(12).
2. Ordering that the sale in execution advertised for the 18th of October 2000 at 12.00 be cancelled and the goods attached be released from attachment, alternatively that the sale is suspended pending the final outcome of these proceedings.
3. Ordering the Respondent not to use the warrant of execution issued in this matter to extract further funds from Applicant, or to instruct the Deputy Sheriff to make a further attachment of Applicants property.
4. Ordering the Respondent to pay the costs of this application.
5. Further and/or alternative relief as the above honourable court may deem fit.

6. That a rule nisi do issue calling upon the Respondent to show cause on the 20th of November 2000 why any order as set out in Paragraph 2, 3 and 4 should not be granted and made final.

7. That the relief sought in Prayer 2 operates as an interim injunction pending the finalisation of the relief claimed in Paragraph 2, 3 and 4 above.

The short facts on which this appeal is predicated are the following. The first respondent was, in a judgment obtained in the High Court (Strydom, J.P. as he then was) on 10th June 1996, awarded N $136,218.18 for goods sold and delivered to the applicant. He was at the same time awarded " interest *a tempore morae* and costs." Owing to problems which the applicant experienced in paying off the judgment debt ensuing from the said award a writ of execution was issued against him. That writ was exhibited as an annexure to the applicant's affidavit in support of the motion. As it will be necessary for me to make observations on the content of the writ later in this judgment, I hereby reproduce it as hereunder.

"In the matter between :

YOUNUS CACHALIA

t/a YOUNUS CACHALIA WHOLESALES Plaintiff

and

ANDREAS JOESPH JOHANNES

t/a CHECKERS WHOLESALE & SUPERMARKET Defendant

WRIT OF EXECUTION

TO THE DEPUTY SHEFIFF : TSUMEB

YOU ARE HEREBY directed to attach and take into execution the movable goods of defendant, ANDREAS JOSEPH/JOHANNES t/a CHECKERS WHOLESALE & SUPERMARKET, at ONESHILA, OSHAKATI, NAMIBIA and of the same to cause to be realized by public auction:

1. The sum of N$136,218.18;
2. Interest thereon at per cent per annum a *tempore morae;*
3. Plus further costs still to be taxed and charges of the said plaintiff which he recovered by judgment of this court on 10th June 1996 in the above named case, and also all other costs and charges of the plaintiff in the said case to be hereafter duly taxed according to Law, besides all your costs thereby incurred.

FURTHER to pay to the said plaintiff or his attorneys the sum or sums due to him with costs as abovementioned and for your so doing this shall be your warrant.

AND return you this writ with what you have done thereupon.

Dated at WINDHOEK on this the 21 day of January, 1997.

REGISTRAR
HIGH COURT
WINDHOEK

C.J. HINRICHSEN
Legal Practitioner for Plaintiff
C/o LORENTZ & BONE
12th and 13th Floor
Frans Indongo Gardens
Bulow Street
WINDHOEK
HO5.94”

The applicant made a number of payments towards the liquidation of the said judgment debt. The payments were exacted by the second respondent in his capacity as Deputy Sheriff of Oshakati District where the applicant carried on a Wholesale and Supermarket business. The first respondent, being unhappy with the erratic payments which were

being made by the applicant, in due course issued out of the court *a quo* a notice of attachment in execution. In consequence of the latter, a number of goods were seized and these were inventoried and appeared in an annexure to the said notice of attachment. After that a sale of the said goods was advertised to take place on the 18th of October 2000. According to the second respondent's affidavit sworn on the 16th of October 2000, the first respondent was one of fifteen judgment creditors who were to participate as beneficiaries in the proceeds of the sale. There was a sharp disagreement on whether or not the judgment debt had been completely liquidated by the time of the publication of the advertisement of the sale, with the applicant contending that he had overpaid the entire debt including interest, except for costs which had not at that time been taxed. The first respondent's stand was that there was still a balance outstanding and hence the need for him to participate as a beneficiary in the sale.

The matter came before Silungwe, J., on 16th October 2000 and it is evident that it was fully argued, but regrettably the record of appeal does not contain a text of the submissions made by the counsel who represented the parties. In his judgment delivered on 17th October 2000 the learned trial judge first recognized the issues raised by the notice of motion as exactly those hereinbefore set out. However, after summarizing the arguments made by counsel he made determinations

only on two of the issues aforesaid. On the issue whether or not the application was properly made on an urgent basis he held that it was properly so made. The second determination was that the first respondent would be prejudiced if he was excluded from participating in the sale. In the event, the learned judge rejected the prayer to have the advertised sale cancelled or suspended. In consequence of the judgment, the learned judge then ordered the parties to bear their own costs. However according to an explanatory note made by the Registrar of the High Court and appearing on page 9 of the record of appeal, the judge *a quo* on the day following the delivery of the judgment, amended the costs order and stated the following :

> " ..... I decline to award the cost on the scale asked by Mr. Dicks - who in the *court a quo* represented the respondent -, and instead the respondent will be entitled to ordinary costs."

This amendment in fact appears as an appendage to the judgment though it is not dated.

The applicant was dissatisfied with the whole judgment and he entered a notice of appeal against it on the following grounds :

1. The Court erred in not ordering that the Sale in Execution as advertised in respect of this matter, for the 18th of October 2000, 12.00 noon, be cancelled and the attached goods be released from attachment, alternatively that the sale be suspended, pending the final outcome of the application proceedings.
2. The Court erred in not ordering the Respondents not to use the Warrant issued in this matter to extract further funds from the Applicant or to instruct the Deputy Sheriff to make further attachments of the Applicant's property.
3. The Court erred in ordering the costs of the application to be paid by the Applicant.
4. The Court specifically erred in amending its own costs order, which originally was that each party pays its own costs, into one to read that the Applicant pays the costs.
5. The Court erred in not finding that the Applicant had made out a *prima facie* case to the effect that he had paid the amount to which the First Respondent was entitled, in terms of its Warrant, and had in fact overpaid such amount by N$122,298.00, alternatively, (if one takes into account the claim for additional interest which First Respondent claims to have been omitted from Appellant's schedule of payments (Annexure B)), an amount of N$76,875.21.

6. The Court overlooked that in order to disprove the *prima facie* case made out by Appellant, the Respondent would have to prove that he was still entitled to money and was still entitled to participate in the Sale in Execution, in terms of its Warrant, and if so, by how much. That figure should have been available to the Respondent since it should have advised the Deputy Sheriff precisely to how much it was still entitled under its Warrant.

The relief prayed for in the appeal is that this court should " reverse the order of the *court a quo* and to grant an order in terms of paragraphs 2, 3 and 4 of the notice of motion. (The other aspects of the motion no longer being relevant to these proceedings) with costs.".

Arguments in this Court

The applicant and respondents were ably represented respectively by Mr. Heathcote and Mr. Dicks.

One legal issue raised for the first time by Mr. Heathcote in this appeal related to the question whether the writ of execution upon

which the second respondent exacted payments had included enough information as to the interest exigible and incidental to the judgment debt. Mr. Dicks however wondered whether it was competent to raise an issue which had not been raised in the court below. Mr. Heathcote retorted by praying in his aid paragraph 368 of the Lawsa, Volume 3(1). According to that authority the practice of raising issues on appeal which were not raised at the trial is sanctionable provided that such issues were covered by the printed evidence as it appears in the record of appeal. I shall deal with this issue straight away.

In this jurisdiction there is no substantive rule of law requiring an appellant to state beforehand what grounds he relies on in entering an appeal against the judgment of the trial court. The requirement is merely to state whether the appeal is against the whole or part only of the judgment. This comes out clearly in rule 5 of the Supreme Court Rules which is captioned " Procedure on Appeal." Perusal of all the 16 subrules under this Rule shows no requirement from appellants to file grounds of appeal. In some other jurisdictions not only is the appellant required to spell out his grounds of appeal but he is also not allowed at the hearing of an appeal to raise issues extraneous to the grounds of appeal. The common sense reason for the injunction against new issues is that such practice takes the other side by surprise since he is entitled to know from the papers served on him

before the hearing date what issues he has to meet at the trial or hearing. Therefore the raising of fresh issues at the appeal hearing is held to be prejudicial and therefore not allowed, unless, of course. leave to raise such issues is first obtained and normally in such a case the other side would be allowed an adjournment in order to prepare an answer to the new issues. However on the strength of paragraph 368 of volume 3(1) of Lawsa, I shall and do accept that in this jurisdiction it is competent for a party to an appeal to raise new issues which were not raised in the lower court, provided that they are covered in the printed evidence in the record of appeal..

I shall consequently now deal with Mr. Heathcote's complaint that the writ of execution (already reproduced hereinbefore) did not specify the rate of exigible interest. In this connection it is useful to go back to the founding summons upon which judgment was awarded in the first respondent's favour on 10th June 1996, as earlier noted. In it interest was claimed at 20% per annum from the date of service of the writ of summons to the date of payment of the judgment debt. In the writ of execution issued out at the instance of the first respondent as judgment creditor, it was stated, as regards interest, simply " interest thereon at percent per annum *a tempore morae*." It will be observed that in this regard the reference to interest was purportedly in

conformity with the order made by Strydom, J.P. on 10th June 1996 (see above).

In the heads of arguments filed on behalf of the appellant it is stated at paragraphs 7 and 8 to the effect that the actual interest exigible ought to have been explicitly specified. It was contended that the statement " interests thereon at percent per annum *a tempore morae*" was incomprehensible. It was further stated that a party "should stand or fall by his writ of execution" (paragraph 8). Therefore in as much as the first respondent failed to specify the interest, his writ of execution was bad, the argument went on.

It suffices to state that on behalf of the first respondent it was submitted that the phrase "*a tempore morae*" implied interest at the rate of 20% from the date of the summons to the date of payment.

The genesis of the phrase " *a temporae morae*" is the Rate of Interest Prescribed by Act No. 55 of 1975: AG105 of 1985. That statute specified such interest at 20% for the period running from the service of the founding writ to the date of payment. See also the case of BORTON AND A V PENINSULA CONSTRUCTION (PTY) LTD 1959 (4) SA 366 (CPD). Evidently this statutory instrument is of South African origin but for political and historical reasons it was applied in Namibia

during the period before independence since Namibia was then a dependency of South Africa. Article 140 of the constitution provides as hereunder :

> " 140 (1). Subject to the provisions of this constitution, all laws which were in force immediately before independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent court."

Neither of the two contingencies spelt out by Article 140(1), upon continuation of which pre-independence legislation depends, has occurred. Therefore I find that the said 1985 statutory promulgation relating to interest *a tempore morae* is still part of the law of Namibia. I specifically hold that the statement in the writ of execution cannot be faulted merely by reason that it failed to specifically state the rate of interest. What was omitted from it was amply ameliorated by the reference to "*a tempore morae*." The argument on this point therefore fails.

The next argument was in regard to the costs orders made by the judge a quo. The original order made on 17th October 2000 was that each side should bear its own costs. The following day, with no

explanation at all, this was changed to an order that the respondent (evidently meaning the first respondent) should be entitled to ordinary costs.

It was argued by Mr. Heathcote on the appellant's behalf that the second day's amendment of the costs order was illegal. This argument was conceded by Mr. Dicks for the respondents.

It is trite law that a trial judge becomes *functus officio* once he/she has delivered and signed a judgment or order. He/she has no jurisdiction *ex mero motu* to amend or review that order thereafter. As it was held in the case of BRIGHT V SELLAR (1904) I KB6 a trial judge cannot correct a mistake of his own if the order as drawn up correctly expresses his intention at the time.

The foregoing notwithstanding, I am of the view that the original order requiring each party to bear its own costs cannot stand. It was wrong in law. The general rule is that costs follow the event. To depart from the general rule, the court must show that special circumstances exist to justify a variation from the general rule. In this case no such circumstances were cited. I would therefore quash the original order. The axe I have used to strike down the original order will not spare the substituted or amended order of 18th October. The judge had no

jurisdiction to make it. The reasons for saying this have already been stated.

The issue on whether or not the judge *a quo* was wrong not to cancel or suspend the sale of the attached goods of the appellant has also been a bone of controversy in this appeal. However in my view, to raise dust on it would be no better than flogging a dead horse. The sale did take place as advertised and therefore nothing can be done at this stage to cancel or suspend that sale. If ever there was need to say anything on this issue, seeing that the appellant has made reference to cases such as SANTAM LTD V NORMAN AND ANOTHER 1996 (3) SA 502, it is this. In Santam it was held that a court had a judicial discretion to grant a stay of execution where real and substantial justice required such a stay where an injustice would otherwise have been done. The present case can easily be distinguished from Santam. Here there were more stakeholders in the advertised sale in execution than the first respondent alone. It would not have availed the appellant much even if the first respondent/judgment creditor was excluded. The sale would still have gone ahead as regards the other creditors since the notice of motion instituted by the appellant affected only the first respondent. In my considered opinion it would have been the height of injustice to have cancelled or suspended that sale in the circumstances prevailing.

I think that the high point and gravamen of this appeal lies in the issue whether or not a writ of execution, once executed, can be acted upon subsequently if upon first execution the judgment debt is not fully exacted. It was Mr. Heathcote's contention that once a writ of execution has been executed and the judgment debt is only partly paid, that writ cannot be reissued for use on a subsequent occasion. According to him such writ becomes dead and cannot be resurrected. To sustain that argument he cited some South African cases such as GERBER V STOLZE AND OTHERS 1951(2) TPD 166 and SONIA LTD V LINTON 1927 TPD 76. In my view we do not need to go to South Africa to seek a solution to this issue as there is adequate material at home here in Namibia to enable the court arrive at a solution. This is to be found in Rule 45 (12)(g) of the High Court Rules which states

> " Payment of the amount due under and in respect of any writ and all the costs and the like, incidental thereto, shall entitle the person paying to a withdrawal thereof." The interpretation which I attach to this rule may be tabulated as follows :

1. As the person paying the amount in the writ of execution (the judgment debtor) is entitled to a withdrawal of the writ only after he has paid in full the amount endorsed thereon,

all costs (assuming these costs have been taxed) and other amounts incidental to the judgment debt (such as interest), by necessary implication if those amounts are not fully liquidated then the entitlement to withdrawal of the writ does not exist.

2. Since the judgment debtor's entitlement is one of withdrawal upon complete payment, ergo the writ is presumed under the law to survive a partial execution.
3. As the writ lives on after partial execution, it is capable of being reissued for subsequent execution.

There was a half hearted further submission made to the effect that before subsequent execution of the writ there was need on the first respondent's part to apply for re-issue of the same. This was a tacit concession running counter to the earlier submission that after the first partial execution a writ becomes invalid and of no further use. Unfortunately there was no evidence, or even a submission in the *court a quo*, on this point. Any decision one way or the other would be pure speculation, which this court cannot entertain.

Lastly there was an argument as to whether the appellant had fully paid all that was owing on the judgment debt. According to the

judgment of Justice Silungwe the appellant's claim in the *court a quo* was that " the total amount has been paid several times over in thousands of dollars." However as Silungwe, J, stated, the task before him was not to determine whether or not the judgment debt had been paid. The notice of motion before him asked for specific reliefs. These reliefs, barring the one granted to the appellant relating the need to abridge the procedure in instituting the notice of motion on the ground of urgency, were :

" 2. Ordering that the sale in execution advertised for the 18th of October 2000 at 12.00 be cancelled and the goods attached be released from attachment, alternatively that the sale is suspended pending the final outcome of these proceedings.

3 Ordering the respondent not to use the warrant of execution issued in this matter to extract further funds from applicant, or to instruct the Deputy Sheriff to make a further attachment of applicant's property.

4. Ordering the respondent to pay the costs of this application.

7. That the relief sought in Prayer 2 operate as an interim interdict

pending the finalisation of the relief claimed in 2, 3 and 4 above."

Quite clearly none of these related to the question of what level, if any, of indebtedness still subsisted on the judgment debt. Those reliefs were to have been delved into on 20th November 2000, the return date of the notice of motion. I would therefore agree with Silungwe J, that the issues before him did not include one calling on the court to determine whether or not the judgment debt had been paid.

In the final analysis this appeal cannot succeed and it is therefore dismissed. In consequence I hereby make the following orders :

1. The appeal is dismissed
2. The order made by the *court a quo* on the 18th of October, amending the earlier order relating to costs is quashed.
3. In as much as the *court a quo* lacked jurisdiction to make a new order on the 18th October, that order is also quashed as being null and void.
4. This court orders that the costs of the hearing in the *court a quo* shall follow the event. Therefore those costs are awarded to the first respondent.
5. The costs of this appeal are also awarded to the first respondent.
6. The costs in 4 and 5 above are to be taxed in default of agreement.

CHOMBA, A.J.A.

I agree

O'LINN, A.J.A

I agree

MANYARARA, A.J.A.

COUNSEL ON BEHALF OF APPELLANT : MR. R. HEATHCOTE
INSTRUCTED BY : A. VAATZ and PARTNERS

COUNSEL ON BEHALF OF RESPONDENTS : MR. G. DICKS
INSTRUCTED BY : LORENTZ and BONE