Not Reportable

CASE NO. I 2483/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETRUS SHAMBO **Applicant/Defendant**
t/a KING KAULUMA CEMENT AND RED BRICKS

and

NAMCHI TEXTILES INTERPRISES CC **First Respondent/Plaintiff**

DEPUTY SHERIFF (ONDANGWA) **Second Respondent/Plaintiff**

***CORAM*:** **PARKER J**

Heard on: 2011 March 24

Delivered (reasons) on: 2011 April 4

JUDGMENT:

PARKER J:

[1] In the application brought on notice of motion and praying that it be heard on urgent basis, the applicant ('defendant' in the main action under Case No. I 2483/2010), represented by Mr Denk, has prayed for additional relief in the following terms:

1. Condoning the non-compliance with the forms and service provided for by the Rules of Court and hearing this application as one of urgency as contemplated by Rule 6 (12);

2. Setting aside the Writ of Execution issued on 14 January 2011;

3. Setting aside the default judgment granted in favour of the respondent/plaintiff (hereafter "the respondent") against the applicant by the registrar of the Honourable Court on 10 January 2011 under case number I 2483/2010;

4. Granting the applicant leave to defend the action instituted by the respondent under case number I 2483/2010 and to file his plea within such time and upon such conditions as the Court may deem fit;

5. Costs of the application insofar as the respondent defends same;

6. Further and/or alternative relief.

[2] Thus, in the present application, the applicant prays for the setting aside of the default judgment granted by the registrar on 10 January 2011 and for the setting aside of the Writ of Execution thereof issued by the Court on 14 January 2011.

[3] The first respondent ('plaintiff' in the said main action), represented by Mr Haifidi, has moved to reject the application.

[4] I shall now proceed to deal with the point of urgency. In brief, for the applicant, the reason why the application should be heard on urgent basis is primarily because execution of judgment of the Court, as aforesaid is imminent and if the matter was not heard on urgent basis, the purpose of the application to set aside the default judgment would be defeated. On his part, Mr Haifidi argued that

sale in execution of the default judgment was not imminent. In support of his submission, counsel placed before the Court evidence from the bar supported by an Interpleader filled with the Court by a Second Judgment Debtor in another case, sc. Case No. (P) I 2318/2010, to show that sale in execution would only take place after the result of the Interpleader. But as was brought to the Court's attention, the Interpleader did not concern the main action, i.e. Case No. I 2483/10. Accordingly, I am satisfied that a case has been made out for the hearing of this application as a matter of urgency.

[5] I proceed to deal with the merits. The only basis for the present application which I see on the papers is that Petrus Shambo says the following. It is wrong for the first respondent to institute action and take default judgment against Petrus Shambo when in truth, according to Petrus Shambo, Petrus Shambo is not a member of King Kauluma Cement and Bricks Close Corporation. That being the case, according to Petrus Shambo, Petrus Shambo cannot be held accountable for any dealings that the first respondent had with King Kauluma Cement and Bricks Close Corporation. According to Petrus Shambo, there is an entity registered in terms of the Close Corporation Act, 1998, as King Kauluma Cement and Bricks Close Corporation and Petrus Shambo is not a member of the Close Corporation. Petrus Shambo's contention, which Mr Denk took up in refrain with great verve and gusto in counsel's submission, does not even begin to get off the starting blocks. The applicant's contention and Mr Denk's submission do not have a wraith of substance and merit. They are, with respect, completely baseless.

[6] It is clear on the Combined Summons that the first respondent knows whom it entered into a contract with, that is, whom it had 'dealings' with – the subject matter of the action the first respondent instituted: it is Petrus Shambo t/a King

Kauluma Cement and Red Bricks. Thus, the Combined Summons shows abundantly clear that the defendant in the action is Petrus Shambo t/a King Kauluma Cement and Red Bricks. I can see no substance at all in what counsel submits in an attempt to remove the difficulty placed in the applicant's way. In this regard, I accept Mr Haifidi's argument that the first respondent has brought action against Petrus Shambo, in his personal capacity, t/a King Kauluma Cement and Red Bricks. If there is King Kauluma Cement and Bricks Close Corporation or even King Kauluma Cement and Bricks Company (Pty) Ltd; what has that got to do with the first respondent who has brought action, and obtained default judgment, against Petrus Shambo, a natural person? The first respondent does not, and should not, care tuppence – in my view.

[7] Indeed, in these proceedings this Court is not interested in any artificial person bearing the name King Kauluma Cement and Bricks Close Corporation.

[8] What is more; as I have said more than once, the action is instituted, and default judgment obtained, against a natural person, namely, Petrus Shambo t/a King Kauluma Cement and *Red* Bricks. (Italicized for emphasis) Even on the applicant's own papers, the Amended Founding Statement of the Close Corporation says 'King Kauluma Cement and Bricks Close Corporation'. The word '*Red*' is not even part of the name of the Close Corporation behind which the applicant now wishes to hide in order to escape the consequences of the default judgment. In sum, I find that there is no mis-joinder or non-joinder of parties in the action. The applicant's contention in that behalf in the application has not a grain of merit.

[9] From the aforegoing, the applicant's contention and Mr Denk's submission in support thereof do not hold good and valid at all. In my view, the application is singularly lacking of merit. In this regard, I hasten to add that if the first respondent had prayed for costs on the scale as between legal practitioner and client and the point had been argued, I would have considered exercising my discretion in favour of ordering such scale of costs. The first respondent has been put into unnecessary trouble and expense by the initiation of a frivolous, vexatious, unjustifiable and abortive application based on disingenuousness. (See *Willem Adrian van Rhyn N.O. v Namibia Motor Sports Federation and Others* (Case No. A 36/2006 (Unreported) at pp 21-22.)

[10] After hearing the application, I dismissed the application with costs. I said then that reasons for so adjudging would follow. These are the reasons.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT/DEFENDANT: Adv. A Denk

Instructed by: Van der Merwe-Greeff Inc.

COUNSEL ON BEHALF OF THE FIRST RESPONDENT/DEFENDANT: Mr Haifidi

Instructed by: Shikongo Law Chambers