



CASE NO. A 79/2001
CASE NO. A 320/2000
CASE NO. A 344/2002

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HANS JOACHIM GLAWE

APPLICANT

Versus

RUTH KLOTZCH

FIRST RESPONDENT

ESME KLOTZSCH

SECOND RESPONDENT

**THE ACTING DEPUTY-SHERIFF FOR
THE DISTRICT OF WINDHOEK**

THIRD RESPONDENT

PAUL WILLY KLOTZSCH

FOURTH RESPONDENT

and in the matter between:

RUTH KLOTZSCH

APPLICANT

Versus

HANS-JOACHIM GLAWE

FIRST RESPONDENT

PAUL WILLY KLOTZSCH

SECOND RESPONDENT

and in the matter between:

HANS-JOACHIM GLAWE

APPLICANT

Versus

RUTH KLOTZSCH

FIRST RESPONDENT

THE ACTING DEPUTY-SHERIFF FOR

THE DISTRICT OF WINDHOEK

SECOND RESPONDENT

ANDREAS VAATZ

THIRD RESPONDENT

CORAM: MARITZ, J.

Heard on: 2004-05-18

Delivered on: 2008-10-31

JUDGMENT

MARITZ, J.: [1] Although the parties to and the relief being sought in each of the three applications before the Court are different, they are so interlaced by the facts underlying them that they have been set down for simultaneous hearing and may be disposed of conveniently in one judgment. Their concurrent hearing has been allowed for reasons of expedience and should not be understood to detract from their substantive nature. In addition to the overarching facts, there are others which are unique to some of them and distinguish the one from the

others. Barring a consolidation, further procedural or substantive steps to be taken by the litigants in any of them – and I expect there will be – must be taken with reference to the specific application to which they relate.

[2] Given the number of litigants involved in the various applications, the differing capacities in which they have been cited therein and the fact that some of them share the same surname, I intend no disrespect or familiarity when I refer hereunder to the applicant in case no. A 79/2001 (previously referred to under the number of earlier action proceedings as I 722/1998) as “Glawe” and to the first to fourth respondents therein as “Ruth” (Klotsch), “Esme” (Klotsch), the deputy sheriff and “Willy” (Klotsch) respectively. Ruth is the applicant for interdictory relief in case no. A 320/2000 against Glawe and Willy. Finally, in case no. A 344/2002, Glawe is the applicant and Ruth, the deputy sheriff and “Vaatz” (Ruth’s lawyer) are cited as first to third respondents.

[3] The evolution of the disputes which have given rise to these applications may be better understood by a summary of their factual context. At the centre thereof stands the home of the Klotsch family (the “Suiderhof-property”). It was acquired by Willy a few years after he, his wife Ruth, their daughter Esme and two other children had emigrated

from Germany and settled in Namibia during 1968. The Suiderhof-property, registered in Willy's name during 1971, served as the family's common home until their marriage broke down in 1987 and Willy took up residence elsewhere. According to Ruth, Willy agreed at the time that she and the children could stay on in the house. She has been living on and maintaining the property ever since. The relationship between the two deteriorated further with time and Ruth eventually instituted an action for divorce in 1989. In August 1993 she obtained an order compelling Willy to disclose all his assets and properties wherever situated. Willy, who had relocated his hunting business to Botswana in the mean time, failed to comply. Instead, he informed Ruth later that month that he intended to sell the Suiderhof-property. In response, she obtained a rule *nisi* and urgent *interim* interdict during September 1993 prohibiting him to do so. Willy thereupon registered a first mortgage bond over the Suiderhof-property in favour of a local bank and unbeknown to Ruth, in the months that followed borrowed heavily from the bank against the security thereof. On the return day of the rule *nisi* in August 1994, an undertaking by Willy not to "sell and/or further encumber" the Suiderhof-property pending the outcome of the divorce action was made an order of Court.

[4] This set the stage for Glawe, a friend and hunting associate of Willy, to enter the fray. He claims that the bank foreclosed on the bond, obtained judgment by default against Willy and was in the process of executing the judgment against the Suiderhof-property when he agreed to come to Willy's rescue. The upshot of it was that less than six months after his undertaking not to sell or further encumber the Suiderhof-property had been made an order of Court, Willy sold it to Glawe for N\$180 000 – being the approximate equivalent of Willy's indebtedness to the bank. Within a few months after the registration of transfer into his name, Glawe instituted action to evict Ruth from the Suiderhof-property.

[5] Ruth, who had been ignorant of the sale, immediately instituted action against Glawe and Willy to set the sale aside and cause the property to be retransferred into Willy's name. The action succeeded in part: In May 1998, the Court set the agreement of sale aside and declared it null and void; ordered Glawe to pay the costs of suit but, in the absence of a tender by either Ruth or Willy to repay the purchase price, declined to order that the property be retransferred to Willy. Ruth had the costs against Glawe taxed in the amount of N14 283.58 during September 1999 and, in December 1999, issued a warrant for execution against Glawe on the basis of the taxing master's *allocatur*.

[6] Unbeknown to her, Glawe retransferred the Suiderhof-property to Willy and instituted action against him for repayment of the purchase price and *mora* interest during June 1999. Although Willy entered appearance to defend the action in October 1999, he withdrew his defence a few days later and that opened the way for Glawe to obtain judgement by default against Willy in January 2000. Ruth only learned of the judgment when the Suiderhof-property was attached by the deputy sheriff and notice was given in September 2000 for it to be sold in execution on 31 October 2000. She immediately consulted her lawyer, Vaatz, who enquired from Glawe's lawyer (Diekmann) whether he would be prepared to hold over the sale in execution pending steps to be taken to protect Ruth's interests. When Diekmann declined, Ruth, acting on the warrant of execution issued against Glawe in December 1999, caused the deputy sheriff to attach Glawe's right, title and interest in and to the default judgement against Willy at the offices of Diekmann on 16 October 2000. To that end the deputy sheriff took custody of the original judgment and the warrant of execution issued under it.

[7] Apprehensive that the attachment would not prevent the sale in execution, Ruth also caused Vaatz to write a letter to Diekmann on 25 October 2000 informing him that she intended to apply for an order to

set aside the default judgment obtained by Glawe against Willy on the same grounds of collusion on which she had relied previously to set aside the agreement of sale of the Suiderhof-property. Moreover, she threatened, that unless Glawe agreed to suspend the sale of the property in execution pending the institution of such action, she would apply to Court on a basis of urgency for relief to that effect. When no such undertaking was given, she launched the urgent application against Glawe and Willy under Case No. 320/2000 the next day. Service of this application (to which I shall refer to as the “first application”) was effected on and accepted by Glawe’s lawyer, Diekmann. Service thereof on Willy was attempted at the offices of PF Koep & Co, the legal practitioners who had previously acted on behalf of Willy. They denied that they had a mandate to accept service on his behalf and informed the Registrar that he was in Botswana and that they had no means to communicate with him. Shortly after service, Diekmann agreed on behalf of Glawe to cancel the sale in execution pending the contemplated action and Vaatz agreed to remove the application from the roll, which, according to Ruth was subsequently done.

[8] What she failed to do was to institute the action she had threatened Glawe and Willy with. Instead, she gave notice that the attached

incorporeal rights of Glawe in his default judgment against Willy would be sold in execution on 20 December 2000. Notwithstanding some expressed reservations about the regularity and date of the sale, the deputy sheriff auctioned and sold the incorporeal rights for a nominal amount to Esme. She was the only bidder. As it were, the sale in execution was attended only by Vaatz, Ruth and Esme. Diekmann learned about the sale shortly afterwards and, on behalf of Glawe, immediately protested the validity thereof in a telefax forwarded on the same day to the deputy sheriff. He recorded that Glawe had not been given notice of the attachment of his incorporeal rights as required by Rule 45(8)(c)(i); that the sale was therefore a nullity; that he had instructions to apply to Court for a declarator to that effect and that, should the deputy sheriff give effect to the purported sale in the mean time, Glawe would hold her liable for damages. As a result, the deputy sheriff declined to cede the incorporeal rights to Esme pending the outcome of the intended application. On 22 March 2001, Glawe brought an application (initially referred to as Case No. I 722/1998 but, according to Vaatz, subsequently numbered A79/2001 by the Registrar) against Ruth, Esme, the deputy sheriff and Willy to declare the sale in execution null and void and to set it aside. This application, to which I shall refer to as the “second application”, is opposed by Ruth and Esme.

[9] While the second application was pending, Vaatz obtained a fresh writ against Glawe during November 2002 and instructed the deputy sheriff to attach Glawe's right, title and interest "in the action A79/2001" in satisfaction of the same debt which had been the cause of the earlier attachment of Glawe's incorporeal rights in the default judgment against Willy. The deputy sheriff attempted to execute the warrant but was apparently unable to do so because of some initial uncertainty that the case referred to by number "A79/2001" was indeed that of the second application. Concerned that, amongst others, the object of the intended attachment was to frustrate adjudication of the second application, Glawe brought an urgent application under case number A 344/2002 against Ruth, the deputy sheriff and Vaatz to interdict the attachment and to set the writ or any attachment thereunder aside (the "third application"). Although the application was opposed, this Court (*per* Mainga J) granted a rule *nisi* and *interim* interdict to that effect on 13 December 2002. The return date of the rule has since been extended and the application has been set down for hearing with the others. In what follows, I shall dispose of the applications *seriatim*.

[10] The principal purpose of the first application was to interdict the sale of the Suiderhof-property in execution on 31 October 2000 "or any

date thereafter, pending the finalisation of an action to be instituted by (Ruth) against (Glawe) and (Willy) to set aside and/or rescind the judgement that was obtained by (Glawe) against (Willy) in case number I 1609/2000 on 28 January 2000". Attempted service of the application on Willy's former legal representatives was rejected by them and no subsequent attempt was made to serve it on him in terms of the Rules of Court. It appears from the affidavits subsequently filed and included by reference that, in anticipation of the action to be instituted, the sale was cancelled and the application removed from the roll by agreement between the legal representatives of Ruth and Glawe. The notice of motion and founding papers, it seems, was subsequently uplifted from the registrar's office and nothing further was done to prosecute or oppose it until, on 24 March 2003, Glawe suddenly filed a notice to oppose the application and an answering affidavit in which he incorporated by reference affidavits filed in the second application. In it he reasons that the first application "has become vexatious, by reason of (Ruth's) non-pursuit thereof, and falls to be set aside on such grounds". He also submits that Ruth had failed to show a bona fide defence to the judgment which she intended to assail in the further proceedings contemplated by her and, by reason of her subsequent failure to institute the contemplated action, she abused the process of Court for purposes of creating a respite during which she and Vaatz could facilitate

and finalise the sale in execution of his right, title and interest in the default judgment against Willy. The answering affidavit concludes with a prayer that the application be dismissed with costs on the scale as between attorney and client.

[11] Ruth did not file an affidavit in reply to these allegations and submissions but her counsel, Mr Heathcote, argues that the application was not proceeded with at the time in terms of an agreement between the parties and, in any event, given the time which has elapsed since, the application has become stale. Although Mr Barnard submitted in his heads of argument on behalf of Glawe that the first application should be adjudicated and disposed of, he agreed at the hearing that the application should not have been enrolled.

[12] I agree that the first application should be struck from the roll and would have done so even if counsel would have adopted a different attitude: Service of the application has not been effected on Willy and, being a party with a direct and substantial interest in the outcome of the application, it cannot be adjudicated on until he had been accorded an opportunity to be heard; the first application was not proceeded with at

the time because of an agreement between the legal representatives of the remaining parties and, although the agreement was concluded in contemplation of an action to be instituted to set the default judgment against Willy aside, no time limits for the institution thereof was set and the need to do so was (at least for the time being) overtaken by the subsequent sale in execution of Glawe's right, title and interest in the default judgement; there is no application for condonation for the late filing of the notice to oppose and the answering affidavit and finally, given the duty of litigants to proceed with applications within a reasonable time even if they are not opposed, this Court would have disallowed Ruth after more than 2½ years of inactivity to proceed on a clearly stale notice of motion¹. Had it not been for Glawe's initiatives in 2003 to flog a dead horse, nothing further would have come of the first application. Glawe's enthusiastic 2003-attempt to resurrect it with the sole purpose of knocking it down was both unnecessary and, ultimately, abortive. I understood the parties that, to facilitate its removal from the roll, the application should be considered as withdrawn and each party should be ordered to pay his or her own costs. I agree that an order

¹ Although motion proceedings do not automatically become invalid as a result of non-prosecution within a reasonable time, the Court in the exercise of its discretion and to prevent an abuse of its proceedings will refuse to grant the relief prayed for if, in its view, the application has become stale (Compare: *Commercial Bank of SA v Schreiner*, 1929 SWA 38; *Bernstein v Bernstein*, 1948 (2) SA 205 (W); *Morgan-Smith v Electro Vroomen (Pty) Ltd en 'n Ander NO*, 1977 (2) SA191 (O) at 194 and *Rigby Engineering v Rockboring & Drilling (Pty) Ltd*, 1981 (1) SA 328 (O)).

striking the first application from the roll combined with the suggested cost order will finally put it to rest.

[13] I now turn to the second application. The prayers relating to costs aside, Glawe is seeking an order in the following terms against Ruth, Esme, the acting deputy sheriff and Willy:

“Declaring null and void and setting aside the sale in execution held by (the deputy sheriff) at the instance of (Ruth) at Windhoek on 20 December 2000 consequent upon an execution levied in terms of a judgment delivered in the above Honourable Court on 13 May 1998 under case number I 722/98 and in terms of which sale in execution:

1.1 the right, title and interest of (Glawe) in a judgment obtained by (Glawe) against (Willy) under case number I 1609/2000 was sold in execution;

1.2 (Esme) purchased the aforesaid right, title and interest of the (Glawe) as set out in paragraph 1.1 *supra*, at the said sale in execution...”

[14] In support of his contention that the sale was null and void, Glawe advanced primarily two grounds in his founding papers: (a) No notice of the attachment of his right, title and interest in the default judgement against Willy – and, for that matter, in the writ of execution subsequently issued - had been given to either Willy or him as is required by rule 45(8)(c)(i)(aa) of the High Court rules and that (b) Ruth had waived her right to attach and sell Glawe’s right title and interest in the judgement

and writ. In response, Ruth and Esme (being the only respondents to oppose the application), admit that the deputy sheriff failed to give Willy notice in writing of the attachment but countered in their answering affidavits that Willy was not an “interested party” entitled in terms of the sub-rule to notice; that he was not in Namibia at the time; that his whereabouts were unknown and that it was impossible and, therefore, unnecessary to give him the required notice. In argument, Mr Heathcote also pointed out on their behalf that Willy did not join the second application; that he did not even say that he had not been unaware of the attachment and sale in execution; that he did not allege or suffer any prejudice as a consequence of the failure and that, inasmuch as it was essentially Willy’s estate which had an interest in the property, Ruth, as a representative of the estate, had been aware of the attachment.

[15] Before I deal with their response to the other grounds of invalidity advanced by Glawe, it is expedient to consider their response to the admitted failure of the deputy sheriff to notify Willy as required by rule 45(8)(c)(i)(aa). Rule 45 prescribes the procedures to be followed in execution of the High Court’s judgments and, amongst others, deals specifically with the attachment of movables and incorporeals in satisfaction thereof. The fact that incorporeal property or rights are by

their nature intangible does not diminish their status as “property” in the legal sense or detract from the legal premise that they are regarded “as a class of things”² – it only demands that, because of their unique character, their attachment fall to be treated distinctively by the Rules of Court. Sub-rule (8) has been designed to do so and does it in the following terms:

“(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:

- (a) Where the property or right to be attached is a lease or a bill of exchange, promissory note, bond or other security for the payment of money
- (b) Where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person
- (c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,
 - (i) the attachment shall only be complete when
 - (aa) notice of the attachment has been given in writing by the deputy sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered, and
 - (bb) the deputy sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he or she has been unable, despite diligent search, to obtain possession of the writing or document;

² See: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*, 2005 (2) SA 46 (SCA) at 53E-F

(ii) the deputy sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.”

[16] The ultimate purpose of an attachment under rule 45(8) is the sale of the incorporeal property or rights in execution to satisfy a judgement entered against the owner thereof. The definitive effect of such a sale and the subsequent cession of the rights is to terminate the judgment debtor’s proprietary rights therein and to vest them in another person. The attachment, taken a first step in the process of judicial execution, has significant ramifications for both the owner of the incorporeal property or rights and the person to whom those rights relate to. As Van Den Heever JA observed in *Messenger of the Magistrate's Court, Durban v Pillay*:³

“Proceedings in execution are inroads upon the rights and property of the individual in which the messenger carries out his duties sub hasta, 'met den sterken arm'. As is pointed out in Maxwell, *Interpretation of Statutes*, 7th ed., p. 316:

'Where powers are . . . granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the . . . authority conferred, and it is therefore probable that such was the intention of the Legislature.’”

³ 1952 (3) SA 678 (A) at 683 D-E.

[17] Moreover, given the incorporeal nature thereof, it is equally important that the document or other written instrument evidencing ownership thereof be attached to inhibit further negotiation thereof pending the sale in execution. It is therefore not surprising that paragraph (c) of the sub-rule dealing with notice to interested parties and the manner in which such property or rights must be attached is cast in peremptory terms. Paragraph (c) of the sub-rule demands satisfaction of two threshold requirements for an attachment of incorporeal property or rights referred to therein to be perfected: (i) notice of the attachment must be given in writing by the deputy sheriff to all interested parties (and to the registrar of deeds if the asset consists of incorporeal immovable property or a right therein) and (ii) the deputy sheriff must take possession of the writing or document evidencing the ownership of the property or right (or shall have certified that he or she has been unable, despite a diligent search, to obtain possession of the writing or document).

[18] The peremptory formulation of an identical provision of the Rules of Court in South Africa persuaded Margo J to hold:⁴ “I cannot see how the attachment of an incorporeal could be complete within the requirements

⁴ In *Iscor Pension Fund v Jerling and Others*, 1978 (3) SA 858 (T) at 864A.

of the Rule without notice to those who have real rights in the property.” Kirk-Cohen J, when dealing with the failure of the deputy sheriff to find and attach the necessary documents evidencing the incorporeal right in *Badenhorst v Balju, Pretoria Sentraal, en Andere*, 1998 (4) SA 132 (T), stated the position even stronger: The sub-rule is peremptory to the extent that, if its prescriptions are not complied with, the attempted attachment would be a nullity⁵. I do not agree, with respect, that non-compliance with the peremptory provisions of Rule 45(8)(c)(i) would result in the attachment being a nullity – it would, in my view, simply remain incomplete until the provisions of (aa) and (bb) have been complied with. However, if the deputy sheriff were to proceed with a sale in execution notwithstanding an uncompleted attachment, it would constitute a reviewable irregularity in the execution proceedings and a ground to interdict or invalidate the judicial sale. In the absence of a completed - and therefore lawful – attachment, the Court held in the *Badenhorst*-case that the subsequent sale in execution was a nullity.⁶

[19] It is common cause that the right, title and interest of Glawe in the default judgment against Willy constitute “incorporeal property” which is

⁵ At 139J: “Dit is gebiedend tot die mate dat, indien daar nie voldoen is aan enige voorskrif nie, die gepoogde beslaglegging nietig is.”

capable of attachment under Rule 45(8)⁷ and that the deputy sheriff purported to attach it in terms of the sub-rule at the instance of Ruth. In her answering affidavit she denies, however, that Willy was an "interested party" entitled to notice as required by paragraph (c) thereof. The denial is, in my view, without legal substance. Inasmuch as the attachment and subsequent sale in execution and cession of the Glawe's incorporeal right would substitute the cessionary as the person entitled to receive payment from Willy in satisfaction of the judgment debt, Willy is undoubtedly an "interested party" in the attachment and further negotiation of the right. A reading of paragraphs (a) and (b) of the sub-rule bears out the principle that, before the attachment will be perfected, it is not to only the owner of the incorporeal property or right (whether it be a lessor, mortgagor, pledgor, seller or holder of a bill of exchange or security) which must be notified, but also the person to whom the attached right relates to (such as the lessee, mortgagee, pledgee, purchaser or person liable on the bill of exchange or security). To his credit, Mr Heathcote did not pursue Ruth's denial in argument. I understood him to concede that Willy was an "interested party" as contemplated in the sub-rule.

⁶ At 141F-G: "Die Balju het nie eers gepoog om ingevolge Hofreël 45 op te tree nie; dus was daar geen wettige beslaglegging nie. Dit volg dat die geregtelike verkoping nietig was."

⁷ Compare: *Mahabeer v Rajpathi*, 1961 (4) SA 269 (N) at 271 and *Marais v Aldridge and Others*, 1976 (1) SA 746 (T) at 750A-C.

[20] Given the peremptory wording of the sub-rule, I find Ruth's contention that, because Willy was not in Namibia and his whereabouts were unknown at the time, it was “impossible” for the deputy sheriff to give Willy notice of the attachment, both factually overstated and legally unpersuasive. Whilst the law does not generally sanction a person for failing to comply with an obligation when, through no fault of him or her, it is impossible to do so,⁸ this is clearly not a case where the notion of “impossibility” arises. The mere fact that the whereabouts of a person is not known to a litigant is no justification to ignore the peremptory provisions of the rule and is not an excuse for doing nothing at all. And, whilst I accept that the legal duty to give the requisite notice of attachment is one which the sub-rule imposes on the deputy sheriff, the judgment creditor has the duty to facilitate the discharge of the obligation by providing the deputy sheriff with sufficient information to allow for effective communication of the notice. The deputy sheriff is not a tracing agent for litigants. He or she executes “all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and

⁸ Although the maxim of *lex non cogit ad impossibilia* is really one of the law of contract, has general application (c.f. *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health And Another*, 2005 (3) SA 238 (SCA) at 258F-G). For the policy considerations underlying the maxim, compare *Montsisi v Minister van Polisie*, 1984 (1) SA 619 (A) at 634E - 635A and for some of the cases where the principle has been recognized and, in

processes of the High Court”⁹ and, in doing so, acts on the information provided by the party at whose instance the process was issued.

[21] Ruth knew full well that Willy had a longstanding relationship with one Ms Kasimir who was resident at a known address in Windhoek. When in Namibia, Willy often resided at that address. These facts were also known to Vaatz who, on occasion, insisted to the company the deputy sheriff to that address to conduct a more comprehensive search for attachable assets belonging to Willy. It is also common cause that Willy was conducting a professional hunting business in a neighbouring state. In these circumstances reasonable measures which, in all likelihood, would have effectively communicated the deputy sheriff’s attachment to him could have been suggested and it would have been prudent of Ruth to approach the Court for directions to the deputy sheriff in that regard. Applications for substituted service when the whereabouts of another litigant is not known, is commonplace before this Court and, in addition, it frequently gives directions to bring orders and notices to the attention of persons affected by them – such as in urgent

some instances, applied, see: *Barkhuizen v Napier*, 2007 (5) SA 323 (CC) at 346D and *Strauss v Road Accident Fund*, 2006 (1) SA 70 (T) at 74E-I.

⁹ Section 32(1) of the High Court Act, 1990

or *ex parte* applications.¹⁰ There is no reason - and none has been advanced - why this could not have been done in this instance. Instead, the peremptory requirement of the sub-rule was simply glossed over and nothing at all was done to bring the attachment to Willy's notice prior to the sale in execution.

[22] I am also not persuaded by Mr Heathcote's speculative argument that Willy's failure to file an affidavit saying that he had not been aware of the attachment or sale in execution somehow justifies the inference that he had such knowledge. On the contrary, inasmuch as Glawe relies in part for the relief prayed for on the deputy sheriff's failure to notify Willy of the attachment, Willy's failure to oppose the application rather suggests that he does not take issue with the grounds relied on and the relief prayed for by Glawe. In any event, it is common cause that Willy has not been notified as required by Rule 45(8)(c) and, if Ruth knew that he had acquired knowledge of the attachment from another source, one would have expected her to mention it in her answering affidavit.

¹⁰ Compare, for example, *Clegg v Priestley*, 1985 (3) SA 950 W at 954H where Le Grange J said: "Any difficulty of this nature could have been met by an application for a rule nisi, coupled with a temporary interdict pending a final decision of the application and directions as to service on Clegg."

[23] In further developing this line of argument, he also submits that, given Willy's failure to join or support Glawe for the relief prayed for in the second application, the deputy sheriff's failure to comply with an obligation which she had in terms of the sub-rule towards Willy cannot avail Glawe in moving the relief prayed for. I have already pointed out that both Glawe and Willy are "interested parties" as contemplated in the sub-rule because of the judgment debtor/creditor relationship between them. Any act intended to affect or bring about the termination of that relationship, by necessity involves their respective reciprocal rights, duties and obligations. Both of them, therefore, have an interest that the attachment and subsequent judicial negotiation of the right by auction and cession should accord with the demands of law and procedure. Paragraph (c) of the sub-rule provides in peremptory language that "the attachment (of the incorporeal property or right) shall only be complete when", amongst others, "notice of the attachment has been given to all interested parties". Glawe was therefore at liberty to rely on the omission to give Willy notice for his contention that the attachment was imperfect and that the subsequent sale in execution was invalid.

[24] As a second substantive ground for the invalidity of the sale execution, Glawe also relies on the failure of the deputy sheriff to give

him written notice of the attachment as contemplated by rule 45(c)(i)(aa). It is common cause that he was not personally notified of the attachment by the deputy sheriff. Strictly speaking, the sub-rule was therefore also not complied with as far as Glawe was concerned.

[25] Referring to *Marais v Aldridge and Others, supra* at 752A, Mr Heatchote submits that there has been substantial compliance with the sub-rule. I must immediately note that I have no quarrel with the finding of Melamet J in the cited case that an incorporeal right may be attached under a writ of execution wherever it may be found.¹¹ What troubles me, with respect (and it does not appear from the judgement that this aspect was fully argued), is his finding that the incorporeal property may be attached in the hands of a third party (at 750G) – in that case, the judgement in the hands of the first respondent’s attorneys.

[26] The difficulty I have is (to borrow the words of Harms JA in *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*¹²) that “(i)ntangibles by their very nature cannot have a physical locality. They do not attach to the objects to which they relate”. Although it is the right of the creditor

¹¹ P 750E-F of the judgment.

¹² 2000(4) SA 746 (SCA) at 753F-G.

and not the obligation of the debtor which constitutes attachable property, Harms JA points out that in South Africa the Courts have followed the view of Grotius¹³ that “the situs of an incorporeal right is where the debtor ...resides”¹⁴- in this case, where Willy resides. I pause here to point out that the position in Namibia is somewhat different: the full bench of this Court in *Bourgwells Ltd v Shepavolov and Others*, 1999 NR 410 (HC) at 421E-422D followed the reasoning in the full bench judgment of the Court *a quo* in the *Snow Delta*-case¹⁵ that “in attributing a situs to incorporeal property, the general principle adopted by the law is that an incorporeal is situated where it can be dealt with effectively” and although, under normal circumstances it will be where the “debtor is, or where he resides, or where he is domiciled, or where he is an incola”, “if the right can be enforced as effectively at some other place, it may equally be deemed to exist there.” In South Africa, this approach was overturned by the Supreme Court of Appeal subsequently to the *Bourgwells*-judgement and, in my respectful view, on good grounds. However, in the absence of a finding that the full bench of this Court was clearly wrong in *Bourgwells*'s-case (and I do not deem it necessary for

¹³ *Consultation* Part 3 No 151

¹⁴ *Union Government v Fisher's Executrix*, 1921 TPD 328; *Randfontein Estates Gold Mining Co Ltd v Custodian of Enemy Property*, 1923 AD 576 at 581; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd*, 1990 (2) SA 906 (A) and *Nahrungsmittel GmbH v C Otto*, 1993 (1) SA 639 (A) at 647F - 649C.

¹⁵ Reported in 1998 (3) SA 636 (C).

purposes of this case to examine whether it was), I am bound by that judgment.

[27] Whatever the correct approach may be, it is clear from the reasoning in these cases and those referred to in them that an intangible asset by its nature does not have a physical presence and that the presence at a particular place of a document or written instrument evidencing its existence is not by itself definitive of what in law is deemed to be its *situs*. By taking possession of the Court order evidencing the default judgment, the deputy sheriff does not *ipso facto* also attach the judgment creditor's right, title and interest in that judgment – he or she simply complies with the requirement of Rule 45(8)(c)(i)(bb), which is but one of the requirements to complete the attachment. Mere possession by the deputy sheriff of the document or writing evidencing the default judgment does not preclude a *bona fide* cession of the right, title and interest therein by a judgment creditor – hence the second requirement in rule 45(8)(c)(i)(aa): that all the parties be notified in writing of the attachment.

[28] In assessing whether there had been substantial compliance with the sub-rule, the deputy sheriff's act of taking possession of the court order evidencing the default judgment which Glawe had obtained against Willy (and the warrant of execution issued on the strength thereof) must not only be considered in the legal context which I have referred to, but also with reference to the peculiar facts of this case. Her action constituted only one of the steps which had to be taken to perfect the attachment and the effect thereof was not significantly different than it would have been had she taken possession of a share certificate, promissory note, bill of exchange or other bearer document in the hands of any third party: It did not dispose of the need to give notice of the attachment to all interested parties. It may be reasoned that one would normally expect any legal practitioner, broker, banker or any other third party holding a document evidencing his or her principal's incorporeal property or right to inform the owner thereof should the deputy sheriff attach it. The expectation that it would be done, however, does not mean that there is an obligation to do so and, even less, disposes of the deputy sheriff's obligation to do so. The agent may therefore be entitled to reason that he or she need not inform the owner of the attachment because the deputy sheriff will in any event do so. If, however, it is shown that the agent has informed the principal, it will be an important factual

consideration in assessing whether or not there had been substantial compliance with the sub-rule.

[29] It is common cause that Glawe's lawyer, Diekmann, had instructions to institute legal action against Willy and to take such further action as might have been required to recover the amount Glawe had paid for the property under the subsequently annulled deed of sale. It was towards the fulfilment of that mandate that he obtained and held the court order evidencing the default judgment and the writ of execution issued on the strength thereof. Whereas one would normally have expected Diekmann to inform Glawe that the deputy sheriff had taken possession of those documents under rule 45(8)(c)(i)(bb), it is either common cause or cannot be denied that he had not done so. Diekmann says that he did not do so because, shortly after the "attachment", Vaatz had indicated to him that Ruth intended to institute a legal action to set the default judgment aside on grounds of fraudulent collusion between Glawe and Willy. In addition, he reasons, he was entitled to adopt the attitude that "the attachment did not absolve the deputy sheriff to – in addition to the attachment – in writing give notice to (Glawe) in terms of the peremptory provisions of rule 45(8)(c)(i)(aa)." Whatever criticism may be levelled at Diekmann for adopting such a robust attitude, the Court

must, on the facts before it, accept that Glawe was not aware of the “attachment” at any time prior to the sale in execution and that Diekmann had no mandate to safeguard his interests in the judicial sale of his (Glawe’s) right, title and interest in the default judgment. I am therefore of the view that there had also not been substantial compliance with paragraph (c)(i)(aa) of the sub-rule as far as Glawe was concerned.

[30] To the extent that Melamet J held in the circumstances of the *Marias*-case¹⁶ that notice to the attorney might constitute substantial compliance with the sub-rule, the circumstances of this case justifies its distinction. I must point out that the application to set aside the attachment and sale in execution in the *Marais*-case was not refused because the Court held that there had been substantial compliance with the sub-rule but because the court granted condonation for the non-compliance in the absence of prejudice. As a remedy of last resort, Ruth also somewhat belatedly applied for condonation for the deputy sheriff’s non-compliance with the sub-rule in respect of Willy and, if the Court were to find that there was not substantial compliance as far as Glawe was concerned, also in respect of him. To that end, she relies on affidavits filed in the main application. The application was delivered to

¹⁶ *Supra*, at 752B-C

Glawe's legal representative but no attempt was made to serve it on Willy.

[31] The application for condonation is opposed by Glawe. Mr Barnard, appearing on his behalf, strenuously argues that, the facts do not merit condonation; that in the absence of written notice in terms of the sub-rule, the attachment was incomplete and that any sale in execution which followed upon it was a nullity; that the nullity arose at the moment when the sale execution was completed; that the Court cannot condone a nullity¹⁷ and that an *ex post facto* condonation of the irregularities that tainted the attachment cannot give any validity to the purported sale.

[32] I do not intend to dwell on the application for condonation at length. Even if I were to assume in favour of Ruth and Esme that this Court may condone a non-compliance with peremptory provisions of its Rules,¹⁸ I do not find good cause to do so. I have already remarked adversely on the failure of Ruth and her lawyer to seek guidance from the Court on how the deputy sheriff should notify Willy of the attachment. Although

¹⁷ Relying on *Minister of Prisons v Jonqilanqa*, 1985(3) SA 117 (A) at 123B and 123H and *Molebatsi v Federated Timbers (Pty) Ltd*, 1996 (3) SA 92 (B) at 95D and 96G.

Glawe's residential address in Germany was well known to Vaatz, he did not provide the deputy sheriff with those particulars on behalf of his client. Instead, when the deputy sheriff expressed hesitation to go ahead with the sale in execution without notification to Glawe personally, both he and another legal practitioner in his office – one Duvenhage – maintained that the attachment at Diekmann's office constituted adequate compliance with the notice-requirement in the sub-rule. Moreover, Duvenhage does not specifically deny that the deputy sheriff informed her that notice of attachment had not been given to all interested parties and that the sale in execution could not be held. The information notwithstanding, Duvenhage did not bother to enquire whether notice had been given to Willy. There are also substantial disputes between them about other aspects of the conversation, in particular on whether Duvenhage said that "everybody" was aware of the attachment; that she could not see any reason why the sale in execution could not be held and whether the deputy sheriff expressed reservations about the date for the auction set only 5 days before Christmas when many would have left Windhoek for the summer holidays.

¹⁸ Compare: *Chopra v Sparks Cinemas (Pty) Ltd*, 1973(2) SA 352 D at 357 D

[33] Whilst being mindful of the Stellenvale-approach in reading the affidavits as a whole,¹⁹ I am left with the distinct impression that the steps leading up to the sale of Glawe's right, title and interest in the default judgment were rather rushed and somewhat hushed. In essence, the application does not seek condonation of a *bona fide* procedural oversight as much as it attempts to enlist the Court's assistance to patch up the procedural corners cut in reckless haste to gain an advantage on an adversary. This, the Court will not condone. The disregard of its rules predictably resulted in Glawe's incorporeal property, which on the face thereof was worth well over N\$150 000, being sold for a mere pittance. The prejudice suffered as a consequence is obvious and the application for condonation must therefore fail.

[34] Without notice to Willy and Glawe, the attachment was – and remained – incomplete. As a result the subsequent proceedings taken in the execution of the writ were irregular and the judicial sale was a

¹⁹ As expounded in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*, 1957 (4) SA 234 (C) and later expanded and qualified in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A) and *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere*, 1982 (3) SA 893 (A) at 923G - 924D and followed in many cases within this jurisdiction: Compare *Mostert v Minister of Justice*, 2003 NR 11 (SC) at 21G - I; *National Union of Namibian Workers v Naholo*, 2006 (2) NR 659 (HC); *Kavendjaa v Kaunozondunge NO and Others*, 2005 NR 450 (HC); *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (SC) at 180 (1995 (1) SA 51 (NmHC) at 56I-57B); *Mineworkers Union of Namibia v Rössing Uranium Ltd*, 1991 NR 299 (HC) at 302D to name a few.

nullity²⁰. In arriving at this conclusion, I am mindful that the common law “regarded sales *sub hasta* as sacrosanct”²¹. For that reason Spoelstra J emphasised in *Brummer v Gorfil Brothers Investments (Pty) Ltd*²² that, if property or rights have been acquired by a purchaser at a judicial sale in good faith in the course of a completed execution procedure, Courts may only interfere on evidence establishing a reviewable irregularity in the process which resulted in prejudice to the debtor, such as when the process was not carried out in accordance with the provisions applicable thereto. However, if steps in the process of execution have been taken but have not been completed, such as when proprietary rights have not as yet been vested in the purchaser by cession, the Court may interfere therewith in appropriate cases in the interests of justice²³. *In casu*, it is common cause that, due to Diekmann’s protests on behalf of Glawe when he, by pure coincidence, became aware of the sale in execution earlier that day on the steps of this Court, the Deputy Sheriff declined to cede the incorporeal rights sold to Esme. Although it has been contended – not without force, I should add – that Esme was not a purchaser in good faith, I do not find it necessary to make any findings in that regard. It suffices for purposes of making a declaration regarding

²⁰ Compare: *Badenhorst v Balju, Pretoria Sentraal, en Andere*, , supra, at 141G.

²¹ Per Van Den Heever JA in *Messenger of the Magistrate's Court, Durban v Pillay*, supra, at 683G

²² 1997 (2) SA 411 (T)

²³ At 413I-414J

the validity of the sale in execution that the sale has not been perfected by the cession of the purchased incorporeal rights and, in that sense, has not been acquired by Esme. The Court is therefore at liberty, in the interests of justice, to impeach the sale. Moreover, even if it were to be accepted that Esme had acquired the right, I would still have set the sale aside due to the reviewable procedural irregularity regarding the peremptory notice-requirement contained in the sub-rule.

[35] The result of these findings makes it unnecessary to deal at length with the second ground on which Glawe attacks the validity of the sale in execution in his founding papers, i.e. that of waiver. Mr Barnard submits that when Ruth, relying on grounds of alleged fraudulent collusion, applied for an order to set aside the default judgement and writ of execution obtained by Glawe against Willy, she waived her right to execute upon the same judgement. The stated intention to set aside a judgement and writ, he goes on to say, cannot be reconciled or cannot co-exist with an intention to enforce such judgement and writ. Having made the election to set aside the judgment, she knowingly waived her right to execute against it. The election to pursue or enforce a particular right or remedy in preference to another existing alternative but inconsistent right or remedy may be regarded as a waiver if the

inconsistency between them is such that, “if you avail yourself of one, it is not possible or competent for you to pursue another.”²⁴ But, whilst an election may in principle sometimes be regarded as a waiver,²⁵ there is a factual presumption that a person is not likely deemed to have abandoned his or her rights or remedies. Therefore, the party relying on a waiver bears the burden to establish on a balance of probabilities that “when the alleged waiver took place, the (other) had full knowledge of the right which he decided to abandon; that (he) either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect...”.²⁶

[36] I am not satisfied that Glawe discharged that burden. If any election was made between the remedies available to her, it must be borne in mind that Ruth had instructed the deputy sheriff to attach Glawe’s right in and to the default judgement against Willy before she instructed Vaatz

²⁴ C.f. *Xenopoulos and Another v Standard Bank of SA Ltd and Another*, 2001 (3) SA 498 (W) at 508A

²⁵ Compare: *Moyce v Estate Taylor*, 1948 (3) SA 822 (A) at 829 and *Polliack v Polliack*, 1988 (4) SA 161 (W) at 163E).

²⁶ See: *Oppermann v President of the Professional Hunting Association of Namibia*, 2000 NR 238 (SC) at 246. This passage was quoted with approval in *Mostert v The Minister of Justice*, 2003 NR 11 (SC) at 20A and *Kiggundu and Others v Roads Authority and Others*, 2007 (1) NR 175 (LC) at 188G. Compare also: *Laws v Rutherford*, 1924 AD 261 at 263; *Borstlap v Spangenberg en Andere*, 1974 (3) SA 695 (A) at 704H; *Netlon Ltd and Another v Pacnet (Pty) Ltd*, 1977 (3) SA 840 (A) at 873; *Hepner v Roodepoort-Maraiburg Town Council*, 1962 (4) SA 772 (A) at 778D - G; *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd*, 1983 (3) SA 619 (A) at 634 and *Grobbelaar and*

to launch the application to set aside the judgment. Therefore, if an election was made, it is not the one contended for by Glawe in support of the second application.

[37] I am also not persuaded that the election to pursue the one remedy is by necessary inference an abandonment of the other. Whatever Ruth might have thought about the validity of the proceedings resulting in the default judgment against Willy, she had to deal with the reality that, until set aside, the default judgment was *de jure* valid and enforceable. If the first application (i.e. to set the default judgment aside) would have been unsuccessful, would it have meant that she could no longer have exercised her right to attach and execute against Glawe's right, title and interest in the judgement to obtain satisfaction of his debt to her? I think not. The converse equally illustrates the point. If the attachment were to be set aside, does it mean that she may no longer contend that the default judgment must be set aside on grounds of fraudulent collusion? Given my conclusion on the merits of this objection to the validity of the sale in execution, I do not intend to disregard the merits of Mr Heathcote's submission that, even if it may be said that there was a waiver, it does not constitute a reviewable irregularity in the execution

proceedings which detracts from the validity of the sale in execution²⁷ and the right which Esme would otherwise have had to demand cession of the right she had purchased.

[38] In a document filed as a replying affidavit, Glawe raised three further grounds on which he is seeking to assail the validity of the sale in execution. They are the following: No notice of attachment of Glawe's incorporeal right as reflected by the order for default judgement and the writ to execute against the Suiderhof-property was given to the Registrar of Deeds as envisaged by Rule 45(a)(c)(i)(aa); the writ of execution issued on behalf of Ruth related to "movable" goods and no incorporeal immovable property could be attached thereunder and, lastly, that the attachment and sale in execution amounted to an abuse of the process of court. In addition, a further affidavit was filed more than two years later in which Glawe raised yet a further ground, this time based on the doctrine of set-off which he says operated between the amount of the costs order held by Ruth against him and half the purchase price which she, in her capacity as co-owner in equal undivided shares of the

262.

²⁷ Compare: *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere*, supra at 413I--414B.

Suiderhof-property, became liable to pay to him on re-transfer of the property to Willy.

[39] Given my findings regarding the irregularities which invalidate the sale in execution, it is not necessary to deal with these additional points to assess the merits of the second application. Some of them are so clearly without merit that they may be dismissed out of hand; others are opportunistic at best but all of them are new grounds not advanced in the founding papers. Mr Heathcote correctly pointed out that this Court held in *Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (SWA) Ltd and Another Intervening)*²⁸ that -

“(i)t is trite law that, generally speaking, an applicant must make out his case in his founding papers and that such papers are a combination of pleadings and evidence. Furthermore an applicant cannot merely set out a skeleton case in the founding papers and then fortify this in reply. If scant material is furnished in the founding papers the applicant runs the risk of his application being dismissed and should not complain if this is done as it was up to him to put more facts to the Court if he could. The Court may in its discretion allow deviations from the normal procedures but it must be borne in mind that the normal procedures developed as they did because they would almost invariably be consonant with the best interests of the administration of justice.”

²⁸ 1994 NR 11 (HC) at 15I-16B. See also: *Coin Security Namibia (Pty) Ltd v Jacobs and Another*, 1996 NR 279 (HC); *Bayat v Hansa*, 1955 (3) SA 547 (N) at 553C-E; *Director of Hospital Services v Mistry*, 1979 (1) SA 626 (A); *SA Railways Recreation Club and Another v Gordonian Liquor Licensing Board*, 1953 (3) SA 256 (C) at 260 and *Pountas' Trustee v Lahanas*, 1924 WLD 67 at 68.

[40] But, as Ogilvie Thompson JA pointed out in *James Brown and Hamer (Pty) Ltd v Simmons, N.O.*²⁹, the general principle do not require that it “must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted”. One set of circumstances where the Courts have allowed reliance on a fresh ground in reply was referred to by Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*³⁰ where he said the following:

“In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.”

[41] It is exactly on this exception to the rule on which Glawe relies for the further grounds advanced by him in reply. I must confess, however, that I find his reliance on “new” facts disclosed by Ruth, Esme and Vaatz in their answering and supporting affidavits rather overstated. Whether

²⁹ 1963 (4) SA 656 (AD) at 660

the subject matter of the attachment was immovable incorporeal property or a right in such property which necessitated notice to the Registrar of Deeds in addition to notice to all interested parties under the sub-rule must have been apparent to Glawe from the outset. So too, were the terms of the writ of execution from which it could have been ascertained whether it was limited in scope to “movable” goods or not. The facts on which Glawe relies in his replying “affidavit” for the allegation of an “abuse of process” were also substantially known at the time he launched the application.

[42] Finally – and probably because he realised that the fresh grounds could only be raised to the procedural prejudice of Ruth and Esme - Glawe sought to ameliorate it by extending an invitation to them to file further affidavits. The principle that more than three sets of affidavits may only be filed with leave of the Court ³¹ and then only under “special circumstances” ³² or when the Court considers it advisable³³ aside, the invitation and the fresh grounds were contained in a document which purported to be – but clearly was not – an affidavit. Executed before a notary in Germany, it was not sworn to or affirmed before a

³⁰ 1976 (2) SA 701 (D) at 704H-705D

³¹ *Piechaczek v Piechazek*, 1921 SWA 51

³² C.f. *Stark NO v Fisher NO*, 1935 SWA 44 at 45

³³ *Rieseberg v Rieseberg* 1926 WLD 59

Commissioner of Oaths as contemplated under the *Justices of the Peace and Commissioners of Oaths Act*, No. 16 of 1963, or, for that matter, authenticated as required under rule 63. It simply “did not pass muster”³⁴ at the time and although Glawe sought to rectify the obvious defect by filing another affidavit two years later (again without leave of the Court or any application for condonation), Ruth and Esme were well within their rights to challenge its status and the weight, if any, to be accorded to its contents. They have not acted upon the invitation to respond to the new grounds advanced in further affidavits and, given the absence of any good cause shown why the new grounds were not raised as part of Glawe’s case in his founding affidavit; the dubious status of the document purporting to advance those grounds; the belated attempt to address the admissibility of that document and the absence of any application for condonation in that regard, their attitude was well justified. Although an application for condonation was moved rather belatedly in reply from the bar by Mr Barnard, I find it so unpersuasive and, if granted at such late stage, clearly prejudicial to Ruth and Esme that it falls to be dismissed out of hand. It is also for these reasons that, in the exercise of my discretion, I decline to entertain the new grounds advanced in Glawe’s replying “affidavit”.

³⁴ To use the language of this Court in the unreported judgment in *Ukrainian-Cyprus Insurance Company “Captain” and Another v Namack International (Pty) Ltd*, Case No. A247/96, dd. 27 January 1997.

[43] Notice of a further ground to impeach the sale in execution was given in an affidavit filed more than two years after the third set of affidavits had been filed of record, i.e. that Glawe's indebtedness to Ruth was extinguished by operation of the doctrine of set-off prior to the sale in execution. In the affidavit, Diekmann advanced a number of facts, circumstances and arguments on behalf of Glawe in an attempt to sustain the contention that Ruth became indebted to Glawe upon retransfer of the Suiderhof-property to Willy. The basis of the alleged indebtedness is that Ruth had conceded in earlier litigation between the parties that she was "co-owner" of the Suiderhof-property and, as such, became liable upon the retransfer of the property to repay Glawe half the amount which he had paid for it before the Court impugned the sale. To this, Vaatz filed an affidavit on behalf of Ruth in which he pointed out that it had always been Ruth's case that she and Willy had been married without ante-nuptial contract; that under German law such a marriage is out of community of property but that upon dissolution the accrual system will apply and that, although the property of the one spouse does not become that of the other during the marriage, neither spouse may dispose of a major asset without the approval of the other. Inasmuch as the minutes of the pre-trial conference in earlier litigation recorded that "the house in question was the only major asset in the joint estate", it

does not correctly reflect the legal position on the prevailing matrimonial property regime between the parties.

[44] I do not intend to grapple with this nettle in these proceedings. Suffice it to say that, by virtue of the numerous marriages solemnised in Germany being dissolved by this Court, it may almost take judicial notice of the matrimonial property regime applying to such marriages concluded without ante-nuptial contracts and that an ill-advised or careless statement by a lawyer in other proceedings cannot preclude this Court in making a finding on what is essentially a question of law to be determined after having had regard to the evidence of legal experts on German law. If it has any merits, the point is one which should have been raised in Glawe's founding affidavit and, having raised it so late in the proceedings, it has not been adequately dealt with – if need be by oral evidence. I have little doubt that it will again feature in the litany of litigation between the parties and it best be left for examination on such an occasion.

[45] Before I deal with the issue of costs in the second application, I must briefly comment on the order proposed by Glawe's counsel in the second application. He boldly suggests that the Court should set aside

both the attachment and the sale in execution. The relief contained in the Notice of Motion, however, seeks only to impugn the sale in execution. No amendment thereof has been sought. In any event, I am not persuaded that a case has been made out to set aside the attachment. Until the Deputy Sheriff has given notice of the attachment to all interested parties, it will remain incomplete but it does not follow, without more, that it is invalid.

[46] On the issue of costs, Vaatz submitted on behalf of Ruth and Esme that the omission to give notice to interested parties should be laid at the door of the deputy sheriff and that she should be liable for the costs occasioned by the second application. Whilst Ruth may well have good grounds to oppose payment to the Deputy Sheriff of any costs and disbursements for holding the sale in execution, the latter is not, in my view liable for the costs of the application. Even if I were to ignore the influence exerted by Ruth's lawyers on the Deputy Sheriff to hold the sale in execution, I cannot disregard the fact that the Deputy Sheriff realised her error and appreciated the legal consequences thereof when, shortly after the sale, she received the letter from Glawe's lawyer protesting the validity of the sale. The second application was necessitated not by the unwillingness of the Deputy Sheriff to make amends but by the steadfast

- and ultimately unsound - attitude adopted by Vaatz on behalf of his clients that the notice requirement of the sub-rule had been satisfied. As it were, the Deputy Sheriff filed an affidavit in support of Glawe's cause even though she was cited as a respondent. Glawe sought an order of costs against her only in the event of her opposition. She did not oppose the application and I do not find any other reason why she should be mulcted in the costs occasioned by Ruth and Esme's resistance.

[47] Although not prayed for in the Notice of Motion, Glawe's counsel urged the Court to order Vaatz to pay the costs of the application, jointly and severally with Ruth, on a scale as between attorney and own client and for him to do so *de bonis propriis*. Mr Barnard submits that Ruth is an impecunious lay person who had no effective input in the decisions underpinning the conduct of Vaatz and that she bears very little blame for the acrimonious taint given to the proceedings by Vaatz's conduct. In support, Mr Barnard cites a number of passages from the affidavits filed by or on behalf of Ruth which, he says, reflects attacks devoid of all *bona fides* and sincerity. In conjunction with the various other scurrilous and scandalous allegations made against the various attorneys involved in these proceedings, they constitute a vexatious vendetta against attorneys Koep and Diekmann, and against Glawe, Willy and the Deputy Sheriff of

unprecedented extremes, he submits. The submission is not without force, but, considering the contents of the affidavits filed on behalf of Glawe, one is left with the uncomfortable impression that the pot is calling the kettle black.

[48] The manner in which points have been raised, pressed and opposed by the two instructing counsel on either side exemplifies an unfortunate characteristic in this litigation. It is apparent from the affidavits filed, the language used, the incriminations and recriminations hurled to and fro and the manner in which the issues have been treated that those council have not represented their clients and conducted their affairs at arms-length. Almost invariably, the undercurrents in matrimonial disputes run deeper and stronger than may appear on the surface of the pleadings which define them. But, the restrained and somewhat formal language employed in pleadings lifts the, mostly acrimonious, discourse from an emotive to a legal level and serves to extract and dispassionately define the issues to be adjudicated according to law in a just and fair manner. In this process, the professional and intellectual contributions of legal practitioners as officers of the Court are invaluable in the search for and ultimate attainment of justice. If, however, legal practitioners fail to keep their clients' interests at arms-length and, instead, allow themselves to be swept along by their clients' causes and prejudices, their involvement

is more likely to become personal rather than to remain professional. Instead of moderating their clients' emotions and expectations by sober guidance and advice, they aggravate them; rather than isolating and defining the true issues, they compound them and rather than applying the rules of practice and procedure to serve justice, they are sometimes misused or even abused to bring about a different result.

[49] The manner in which both instructing counsel have involved themselves in the second application and language used in the drafting of some of the affidavits therein have already drawn adverse judicial comment from the Supreme Court³⁵ and I need not compound the expressed disapproval by reference to the affidavits in other applications. Suffice it to say that the Court expects more of its officers.

[50] Although the granting of a punitive costs order as a mark of the Court's disapproval of a legal practitioner's conduct in a case is clearly a matter falling within the discretion of the presiding Judge,³⁶ it is an extraordinary measure and should not be made without good reason. In my view, it would be manifestly unfair in circumstances where the

³⁵ *Vaatz and Another v Klotsch and Others*, unreported judgment of the Supreme Court dd. 11 October 2002 in case no. SA26/2001 at 22 and 25

³⁶ See: *Sentrachem Ltd v Prinsloo*, 1997 (2) SA 1 (A) at 22B - C and 24D - E

conduct of both instructing counsel have fallen equally short of the standard expected by the Court to censure only one with a punitive costs order and not the other. Moreover, Ruth's dire financial position is not reason to mulct her legal representative in costs. One cannot even begin to appreciate the chilling effect the incorporation of such a principle may have on the ventilation and enforcement of otherwise legitimate claims. The extent of Ruth's input during consultations in the strategies employed in the second application is privileged and hardly a matter which can be pressed beyond the realms of speculation. I am therefore not persuaded that it is appropriate in the circumstances of this application to grant an order of costs against Vaatz whether *de bonis propriis* or at all. I must caution, however, that instructing counsel should not try the Court's patience on this point in future litigation. The Court cannot and will not allow the conduct of its officers to bring the administration of justice in disrepute by the intemperate conduct of their clients' cases.

[51] The absence of any practical difference between an order of costs on a scale "as between attorney and own client" and one "as between

attorney and client” aside,³⁷ Glawe is seeking the former and, in support, relies on the same passages from the affidavits earlier referred to in addition to allegations of an abuse of process and ulterior motives. I have already commented on the passages referred to and, whilst I appreciate that an abuse of process or ulterior motive will clearly justify a punitive costs order³⁸, I have already denied leave to raise it as a new point in reply and, given the judgement of the majority in *Brummer v Gorfil Bros Investments (Pty) Ltd*, 1999 (3) SA 389 (SCA), in any event do not think that it has been established on the papers.

[52] I am, in the exercise of my discretion, of the view that costs on a scale as between party and party should follow the result of the second application but that it must be adjusted with the following and my concluding remarks on costs later in this judgement in mind: Much of the replying affidavit, heads of argument and arguments in Court have been devoted to the new grounds raised by Glawe in his “affidavit” filed of record in the second application and in the affidavit subsequently filed by him on the issue of set-off. For the reasons given earlier in this judgment, I have declined to allow those grounds to be raised at such a

³⁷ For a discussion compare: *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*, 2004 (1) SA 123 (W) at 165F-I and the judgements referred to therein.

late stage in the proceedings. Having raised those grounds, they had to be dealt with in argument and, in addition, the one on set-off was dealt with by Ruth in further affidavits filed and necessitated an application to condone the late filing of such further affidavits – all of which resulted in an unnecessary escalation of costs occasioned by Glawe. In addition, the replying “affidavit” contains a number of lengthy quotations from other affidavits which was unnecessary and falls to be discouraged. I propose to do so in the order of costs to be made.

[53] Moreover, given the apparent failure of Glawe to depose to the replying affidavit before a Commissioner of Oaths and his belated attempt to rectify the irregularity, he necessitated an application for the striking out thereof. The latter application was part of the notice of application to apply for condonation for the deputy sheriff’s failure to comply with the sub-rule and no affidavits were filed in support thereof. Given the attempt to rectify the omission, the application to strike out the whole affidavit was not pursued in argument but its initiation was well justified. For this reason, I deem it equitable not to make any order of

³⁸ Compare for instance: *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others*, 2000 (1) SA 1180 (W) and *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)*, 1998 (3) SA 281 (T) at 300F-I.

costs against Ruth and Esme in respect of the failed application for condonation.

[54] There was also an application by Ruth for the striking out of certain phrases from the supporting affidavit of the Deputy Sheriff filed in reply which was referred to but not really pressed in argument. I am satisfied that, given the basis laid in the supporting affidavit of the deputy sheriff filed as part of the founding papers and the answer thereto that the response which Ruth is seeking to strike out was justified in reply.

[55] Finally, I turn to the third application. Subsequently to Ruth's attempt to attach Glawe's right, title and interest in and to the second application, Glawe brought the third application on a basis of urgency to set aside the writ issued for that purpose and to interdict the attachment or any subsequent attempt to do so. Although opposed, my brother Mainga entertained the application as one of urgency and issued a rule *nisi* calling on Ruth, the Deputy Sheriff and Vaatz to show cause on the return date why an order should not be made in the following terms:

“(a) Setting aside the writ of attachment and the purported attachment effected pursuant thereto on 20 November 2002 on behalf of (Ruth) in Case No. I 722/98, of the “right, title and interest which (Glawe) has in the action A 79/2001”, alternatively declaring such purported attachment or any partial completion thereof, to have been null and void and of no force or effect;

(b) Interdicting and restraining (Ruth) from further attaching or attempting so to do, the right, title and interest of (Glawe) in the proceedings under cases no. A79/2001, and/or the motion proceedings under case no. I 722/1998;

(c) Granting to (Glawe) such further and/or alternative relief as this Court may deem fit;

(d) Ordering (Ruth) and (Vaatz) to pay the costs of this application jointly and severally.”

[56] In addition, the Court ordered and directed that, pending the finalisation of the application, paragraphs (a) and (b) of the Rule Nisi would operate as an interim interdict.

[57] I hasten to point out that at issue in the third application is not Ruth’s entitlement to attach Glawe’s right title and interest in the default judgment which he had obtained against Willy for purposes of acquiring it indirectly through an allied third party at a sale in execution. It is not intended to prevent the judicial sale of the Suiderhof-property in which Ruth was resident or to preserve a major asset which she says must be taken into consideration upon the dissolution of her marriage to Willy.

Although not on all fours with the facts in the Brummer-case³⁹, I would have held that, in pursuing that avenue in the second application, Ruth's intention was neither objectionable nor improper and that, for as long as the default judgment stood, the subject matter of the attachment had a value in excess of N\$180 000.00. In the Brummer-case the majority of the Court held that the acquisition at a procedurally proper sale in execution of the plaintiff's incorporeal right in an action against the defendant by a third party ally to the defendant with the ultimate intention to bring about a termination of the action which the defendant regarded as vexatious, does not constitute an abuse of the Court's process resulting in the invalidity of the sale. The majority of the Court held that the mere application of a particular Court procedure for a purpose other than that for which it was primarily intended was typical, but not complete proof, of *mala fides*. In order to prove *mala fides* a further inference that an improper result was intended was needed. The application of a Court procedure for a purpose other than what it was primarily intended for was a characteristic, rather than a definition, of *mala fides*⁴⁰. A defendant who used a statutory procedure (i.e the attachment and sale on the open market of a claim) to bring to an end an

³⁹ *Supra* - as summarised in the judgment of the Supreme Court of Appeal of South Africa at 398C-I.

⁴⁰ At 414I-J as translated in the head note at 392G-H

action against him which he regarded as vexatious did not have an objectionable or improper intention⁴¹.

[58] The position in the third application is different. Ruth sought to attach Glawe's right in the application brought to invalidate the judicial sale of his incorporeal property on account of a reviewable irregularity. In essence, what he is seeking in the second application is for this Court to uphold its own rules and procedures and to prevent the alienation of his incorporeal property in the course of a judicial process which does not conform to the law. He does not challenge the principle that a vested right may be attached and alienated in execution of a court's judgment but only that it may be done without due process. Mr Barnard forcefully submits that Glawe's right, title and interest in the second application cannot be attached because it does not have any commercial value; because it is personal to him and cannot be transferred to a third party and because the result would be *contra bonos mores*.

[59] I agree with his submission that it will be *contra bonos mores* to allow the attachment of Glawe's right and, in the result, frustrate its

⁴¹ At 417G-H as translated in the head note at 393D

enforcement. The Rules of Court have been designed to serve the interests of fairness and justice in all matters bearing on the discharge of the Courts' constitutional functions and obligations. Every member of the public is equally subject to the Courts' rules of procedure and, as a necessary corollary, equally entitled to the protection accorded to them by the obligation of others to comply with those provisions. Except where the Courts allow or condone non-compliance with their rules in appropriate instances, interested persons have the right to seek the Courts' protection against those who thwart or disregard the rules for their own benefit and the prejudice of others. To deny an execution debtor the right to seek due compliance with the prescribed execution procedures of Court (as a precondition to the judicial alienation of his or her property or rights) will bring the administration of justice into disrepute. If it were to be allowed, an execution creditor may make it practically impossible for the execution debtor to seek the Court's protection against arbitrary dispossession of property under the guise of execution proceedings. It would allow for the deprivation of an execution debtor's property not "subject to" the provisions of the law but notwithstanding them. It so strikingly derogates from the Rule of Law-principle upon which our society has elected to constitutionally organise

itself⁴² that it would clearly be *contra bonos mores* to allow such a state of affairs.

[60] Moreover, the right of one party to require of another due compliance with the rules and processes of Court does not have any commercial value. Hence, they are not subject to attachment and cannot be sold in execution. They fall within the general category of rights mentioned by Nestad J in *Soja (Pty) Ltd v Tucker's Land and Development Corp (Pty) Ltd*, 1981 (2) SA 407 (W) at 410A-B. After brief reference to the criterion laid down in *Nkwana v Hirsch*, 1956 (2) SA 219 (T) that only vested rights or interests which a debtor is himself able to sell or dispose of for value is capable of being attached and of being sold in execution for the benefit of a judgment creditor, the learned Judge concluded:

“It follows from this that many so-called rights would not be capable of attachment, namely the "right" to make a will; the "right" not to be assaulted; the "right" to freedom of speech. Having no pecuniary value, they are not things or res in the eyes of the law (Hahlo and Kahn, *The SA Legal System and its Background* at 77.)”

⁴² C.f. the principles upon which the Republic of Namibia has been founded in Art 1(1) of the Constitution: “The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.”

[61] Finally, the right not to be deprived of one's property in execution proceedings without due compliance with the process prescribed by the Rules of Court is so personal that it cannot be ceded to or enforced by another. It can only be exercised by the person in whom the right vests and by no other. I find some support for this view in the judgment of Bristowe J in *McPhee v McPhee*⁴³. After approving the quoted conclusion of Nestad J in the Soja-judgment, the learned Judge noted that "some rights are so personal that they can never be transferred to anyone else" and, by example referred to the prohibition against the cession of maintenance orders and the attachment of by one spouse of the other's right, title and interest in divorce action against him or her in order to enforce a claim for maintenance⁴⁴. To illustrate the point one may also rhetorically ask, as Bristowe J did in *McPhee's* case⁴⁵, "(s)uppose the sale which is impugned ...were to be upheld what could (the third party purchaser) do with the 'right' which he then acquired" at the sale in execution?".

[62] The purpose of execution proceedings relating to judgements sounding in money and costs orders is to obtain payment of the

⁴³ 1989 (2) SA 765 (N)

⁴⁴ At 768C-F

⁴⁵ At 768G-I

judgment debt or costs.⁴⁶ Given the personal nature of Glawe's right, title and interest in the second application and the absence of any commercial value attaching to it, execution could not be levied against it to satisfy Glawe's debt to Ruth. Mr Barnard argues that such a finding results in the inevitable conclusion that the intended attachment was not instructed to obtain payment of the debt but rather to put an end to the second application. That, he submits, evidences an underlying ulterior motive and justifies the conclusion that Ruth abused the process of the Court in an attempt to prevent him from ventilating the irregularities in the execution process which resulted in the judicial sale of his right title and interest in the default judgment against Willy. Whilst there is no "all-encompassing definition of the concept of 'abuse of process,'" the Court will look at the circumstances of each case⁴⁷ to determine whether a litigant has attempted "to use for ulterior purposes machinery devised for the better administration of justice"⁴⁸ and draw on its inherent powers to prevent the abuse.

[63] It is not suggested by Ruth that the second application was vexatious. What motivated the instructions of the deputy sheriff to attach

⁴⁶ See *Whitfield v Van Aarde*, 1993(1) SA 332 (E) at 339H

⁴⁷ Per Mahomed CJ in *Beinash v Wixley*, 1997 (3) SA 721 (SCA) at 734F - G

⁴⁸ Per De Villiers JA in *Hudson v Hudson and Another*, 1927 AD 259 at 268:

Glawe's right in that application is to be found in the answering affidavit filed by Vaatz in opposition to the third application. In it, he refers to the fact that the costs payable by Glawe had been outstanding for a long period of time and says, that in the absence of any other assets in Namibia, "(t)he only thing my client can attach in order to get payment of the admitted judgement debt for the costs, is to attach *whatever legal proceedings the applicant brings in Namibia* in order thereby to urge him to first pay the costs that have been awarded to (Ruth)..." and to sell it in execution. The suggestion is clear: irrespective of the merits of litigation brought by Glawe and the character or nature of the right that he may seek to litigate, his rights and interests therein will be attached to frustrate prosecution of the litigation as a means to put pressure on him to pay what he is owing to Ruth.

[64] The abuse of the Court's process is apparent: Even if Glawe were to seek the Court's protection against a serious infringement of his fundamental right to liberty, Ruth would cause the attachment of his right in such proceedings and thereby frustrate the judicial extension of protection to Glawe as a means to compel the payment of the rather modest debt. If this were to be allowed, it would have the potential of depriving all judgment debtors from seeking effective protection of the

Courts in all – even unrelated – matters. I am therefore satisfied that the issuing of the writ of execution and the purported or attempted attachment of Glawe’s right, title and interest in the second application constitutes an abuse of process.

[65] Vaatz have been joined as a respondent in the third application because an order of costs *de bonis propriis* is being sought against him. A number of reasons similar to those I have already dealt with in connection with the second application have been advanced in support. In addition, it is suggested that, given the adverse comments made by the Supreme Court, he has shown himself to be “impervious to adverse judicial comment” by continuing to represent Ruth in the third application and the conduct which Glawe is seeking to impugn. A number of further allegations seeking to substantiate an order against Vaatz have also been made in the founding affidavit by Diekmann (who brought the third application on behalf of Glawe) which, in essence suggest that Vaatz had made common cause with Ruth.

[66] I have dealt earlier in the judgment with a number of similar allegations and, for the reasons given, declined to make an order of costs

against Vaatz. To the extent that they overlap, I do not intend to traverse them again. Vaatz might have advised Ruth incorrectly concerning the attachment, but that is no reason in itself to hold him personally liable for the costs occasioned by the lost cause. Moreover, the Supreme Court did not hold that Vaatz was barred from acting on behalf of Ruth. And whereas I accept that Ruth is a pensioner, it does not mean that Glawe cannot recover any costs from her. In fact, one of her assets is Glawe's debt to her. The recoverability of costs from the losing litigant is in any event no reason to hold her legal representative liable.

[67] Given her precarious financial situation and his belief in the fairness of her cause against Willy and (later) Glawe, Vaatz apparently agreed to represent Ruth without debiting fees. I find it commendable that legal practitioners sometimes step up to their social responsibility to represent the poor and disadvantaged in – what they consider to be – just causes, provided of course, that a professional attitude in litigating those causes is being maintained. Whatever criticism might have been levelled against his conduct in the first two applications and the tone of affidavits filed therein, I am not persuaded that the issuing and attempted execution of the writ referred to in the third application justifies an order of costs against Vaatz.

In the result the following orders are made –

1. in Case No. I 320/2000:

(a) The application is struck from the roll;

(b) each party is ordered to pay his or her costs in the application.

2. in Case No. A79/2001 (initially brought under Case No. I 722/98):

(a) The sale in execution held by third respondent at the instance of first respondent at Windhoek on 20 December 2000 (consequent upon an execution levied in terms of a judgment of this Court given on 13 May 1998 under Case No. I 722/98 and in terms of which the right, title and interest of the applicant in a judgment obtained by him against fourth respondent under Case No. I 1609/2000 was sold in execution and the second respondent purchased it) is declared null and void;

(b) the first respondent is ordered to pay the costs of the application excluding -

(i) two-thirds of the costs relating to the drafting of the applicant's replying affidavit and

(ii) the costs relating to the drafting of Diekmann's affidavit on set-off dated 29th September 2003 and the costs attendant to the perusal or drafting of all other affidavits relating to that issue;

(c) the applications for condonation of the deputy sheriff's non-compliance with the notice-requirement of rule 45(8)(c)(i)(aa) and to strike out certain parts of the deputy sheriff's supporting affidavit filed in reply are dismissed but no order as to costs is made in respect of those applications; and

3. in Case No. A 344/2002:

(a) The writ of attachment to attach the "right, title and interest which Applicant has in the action A 79/2001" and any partial or purported attachment effected pursuant thereto on 20 November

2002 on behalf of First Respondent are declared null and void and of no force or effect;

(b) the First Respondent is interdicted from attaching the right, title and interest of Applicant in the proceedings under Case No. A79/2001;

(c) the First Respondent is ordered to pay the costs of the application;

(d) paragraph 2 (d) of the rule *nisi* issued on 13 December 2002 is discharged with costs only in so far as it relates to the Third Respondent.

MARITZ, J.

ON BEHALF OF the applicant in
Case No.'s A79/2001 and
A344/2002 and the first
respondent in Case No. 320/2000:

Adv. T. Barnard

Instructed in Case No.'s 320/2000
and A79/2001 by:
and in Case No. A344/2002 by:

Diekmann Associates

Van Vuuren & Partners

ON BEHALF OF the first and
second respondent in Case No. A
79/2001; the first and third
respondents in Case No.
A344/2002 and the applicant in
Case No. 320/2000:

Adv. R Heathcote

Instructed by:

A Vaatz and Partners