

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON OPPOSITION TO RULE 108 APPLICATION

Case no: HC-MD-CIV-ACT-CON-2016/02493

In the matter between:

MILKA MARTHA ARNOLDINE MUNGUNDA

APPLICANT/PLAINTIFF

and

MARION ANGELIKA BARTH

RESPONDENT/DEFENDANT

Neutral Citation: *Mungunda v Barth* (HC-MD-CIV-ACT-CON-2016/02493) [2018]
NAHCMD 66 (14 March 2018)

CORAM: PRINSLOO J

Heard: 28 February 2018

Delivered: 14 March 2018

Reasons: 23 March 2018

ORDER

1. The property known as the Remainder of Farm Frischgewaagd No. 289, Registration Division "K" measuring: 2720,8233 Hectares held by Deed of Transfer No. T411/2000 is declared as specially executable.
2. Costs of suit.
3. Matter is removed from the roll.

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PRINSLOO J:

Introduction

[1] The court had to determine an application for rescission of a rule 108 order. The plaintiff obtained default judgment against the defendant on 16 October 2016. The writ of execution was issued on 18 November 2017 but a *nulla bona* return was provided by the Deputy Sheriff.

[2] The plaintiff proceeded with the rule 108 application, which has since become opposed, bringing us to this ruling. Parties were called upon to argue the matter, however, and unfortunately it may be added, only the plaintiff was ready to argue the matter. Counsel acting on behalf of the Defendant indicated that there is no objection

that the bare dominium, which his client held, is sold however he foresaw difficulty in securing a willing buyer as the relevant property is encumbered with a usufruct.

Submissions by the plaintiff

[3] The plaintiff holds the position that the defendant merely opposed the rule 108 application for purposes of delaying the application and buying time while awaiting another source of income to be paid in order to settle the debt owed to the plaintiff. The plaintiff refers to the answering affidavit of the defendant under para 4 where she clearly states that:

'I am expecting a substantial sum from South Africa within the next days and hopefully be able to settle the debt to the Plaintiff/Applicant before 6th December 2017'

[4] In the answering affidavit of the defendant she conceded to owing the plaintiff as per the agreement entered into between the parties. The defendant therefor does not disputes that she owes the plaintiff.

[5] The defendant has on numerous occasions offered to settle the debt owed, and the plaintiff submitted that the defendant was using this as a delay tactic ensuring that the plaintiff takes no further steps in satisfying its judgment against the defendant.

The rule 108 application

[6] Service of the Rule 108 (2) (a) notice was effected on the defendant on 30th May 2017 and she hereafter gave her reasons as to why the property should not be declared specially executable. The defendant submitted that it is her belief that no person would be prepared to make an offer for a bare dominium ownership of a farm where there is a lifelong usufruct registered in the name of her father.

[7] For all intents and purposes the application before me is undefended.

[8] The plaintiff submitted that the grounds for opposing the rule 108 application does not fall within the criteria that this court must consider in terms of Rule 108(2) as the immovable property to be executed is neither:-

(a) a primary residence; nor

(b) is it leased to a third party as home.

[9] In the premises, the plaintiff submits that the remainder of Farm Frischgewaagd No. 289 measuring 2720,8233 is suitable to be sold in execution of the Judgment Debt.

Discussion

[10] Upon application to declare property specially executable, the onus is on the execution debtor to make the court aware of the status of the property or the third party, who may be residing therein. More specifically the execution creditor has a duty to bring to the personal attention of the execution debtor or the third party residing in his or her house of the application for the said declaration and it would be for the latter to bring the status of the property in question to the court before it makes an appropriate order regarding the declaration sought.¹ The notice must be served by an independent person in the form of the deputy sheriff.

[11] The Form 24 Notice inviting the Defendant to show cause within 10 days from the date of service of this application why the immovable property should not be declared specially executable was served on the Defendant on 23rd May 2017.

¹ *Futeni Collections (Pty) Ltd v De Duine* (I 3044-2014) [2015] NAHCMD 119 (27 May 2015) at para 28.

[12] A notice in terms of Rule 108(2) was served on the father of the Defendant (the usufructuary) on 14 February 2018.

[13] In spite of personal service the current application was not opposed by usufructuary.

[14] There can be no issue that the bare dominium that is held by the defendant can be sold in execution. Even if the bare dominium is sold it would not affect the rights of the usufructuary. Should the dominium be sold it will be transferred subject to the personal servitude (usufruct).

[15] In most instances this will not be ideal to the purchaser, as the newly acquired ownership is not unencumbered. This means that a third party has rights of use and enjoyment to the property, even to the exclusion of the new owner.

[16] In conclusion, the right of the usufructuary is therefore not equivalent to that of a lessee. The matter *in casu* does not fall within the criteria the Court considers in terms of Rule 108(2).

[17] In the premises, the remainder of Farm Frischgewaagd No. 289 measuring 2720,8233 is indeed suitable to be sold in execution of the Judgment Debt (subject to the usufruct of Mr. Peter Kellner).

Does the defendant have other means of settling the debt?

[18] Reference was again made in court of funds that are due to be transferred in favor of the defendant but same has not come to fruition and there is nothing in support of the contentions of the legal practitioner action on behalf of the defendant. Therefore there appears to exist no other reasonable way in which the Respondent can settle the Judgment debt.

[19] Without any submissions made to the contrary, this court orders as follows:

1. The property known as the Remainder of Farm Frischgewaagd No. 289, Registration Division "K" measuring: 2720,8233 Hectares held by Deed of Transfer No. T411/2000 is declared as specially executable.
2. Costs of suit.
3. Matter is removed from the roll.

JS Prinsloo
Judge

APPEARANCES:

APPLICANT:

C J T Harases

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RESPONDENT:

F Brandt

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