

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: Rouco Auto Manufacturers (Pty) Ltd // Erf Two Four Walvis Bay CC	Case No: I 2112/2013
	Division of Court: High Court
Heard before: Honourable Mr Justice Angula, Deputy Judge-President	Date of hearing: 14 February 2018
	Delivered on: 8 March 2018
Neutral citation: <i>Rouco Auto Manufacturers (Pty) Ltd v Erf Two Four Walvis Bay CC</i> (I 2112/2013) [2018] NAHCMD 69 (8 March 2018)	
Result on merits: Merits not considered.	
The order: Having heard Mr Barnard , counsel for the applicant, and Mr Metcalfe , counsel for the respondent, and having read the documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none"> 1. Condonation is granted to the respondent for the late filing of the notice to oppose. 2. The applicant’s application for an order declaring the immovable property being a certain Erf No. 244, situated in the Municipality of Walvis Bay, Registration Division “F”, Erongo Region is struck from the roll for non-compliance with Rule 108(2)(b). 3. The applicant is ordered to pay the costs of the application. 	
Reasons for orders: <ol style="list-style-type: none"> 1. <u>No personal service of the application on the judgment debtor.</u> <p style="margin-left: 40px;">The judgment debtor in the present matter is a Close Corporation, thus a body corporate, therefore rule 108(2)(a) with regard to personal service does not apply to it. The rule applies only to individual</p>	

judgment debtors. The immovable property in question is not of being be a primary home of the judgment debtor within the meaning of the rule. Personal service is therefore not required. Therefore the judgment debtor point of opposition in this regard cannot be sustained.

2. Non service of the application on the person occupying the immovable property.

2.1 Rule 108(2) provides that if the property sought to be declared executable is leased to a third party as a home, the court may not declare the property executable unless the execution creditor has caused a the notice in terms of rule 108(2)(a) to be served personally on any lessee of the property so sought to be declared executable.

2.2 It is not in dispute that the judgment debtor, which is the registered owner of the immovable sought to be declared executable, is 100 percent owned by Mr Knowledge Katti; that his mother is residing in the property, as her home, which she occupies, on a rent-free basis. It is further common cause that Form 24 notice was not served on Ms Katti. What is in dispute is that Mr Katti's mother is not or can, in law, be said to be a lessee and was therefore necessary to serves her with the notice of application as per rule 108(2)(b).

2.3 It was contended on behalf of the judgment debtor, relying on Grotius 3.19 56 'that rent besides being payable in money may consists in other things which can be measured, counted or paid'. Professor Kerr in his book: *The Law of Sale and Lease* at page 179 discusses the matter and referred to the *Rubin v Botha* 1911 AD 569. In that matter it was submitted that. A tenant at will under the Roman Dutch law may be so by contract or without contract. If there is a contract he is a *bona fide possessor* or a *bona fide occupier*, it does not matter which. Kerr went on to say: In it respondent purported to lease to the appellant and his partner a piece of land for a period of ten years. No money was pass but the purported lessee was to erect a dwelling house, stable and fowl-run for which no compensation was claimable and the end of the lease. In the court a quo Smith J said the following:

'In my opinion the plaintiff is not a *bona fide* possessor, but is a tenant at will . . . I do.

I do not think that the plaintiff can be regards otherwise than a tenant merely because he was under no obligation to pay rent [in money], but intended that the buildings he erected should become the property of the lessor at the expiration of 10 years and so to compensate the latter for use and occupation of the land on which the building were erected.'

2.4 On the basis of foregoing authorities it would appear to me that Ms Katti would qualify as a tenant

at will or '*lessee at will*' if one may call her as such, for the purpose rule 108(2)(b) depending on the considerations, other than money, agreed between her and Mr Katti, as *quid-pro-quo*, for her occupying the house.

2.5 The other reason why as an occupier, Ms Katti was entitled to be served with the application, was as explained by the court Futeni Collections (Pty) Ltd v De Duine (Pty) Ltd 2015 (3) NR 829 (HC) at para 41 the notice should be given to the occupier for her or him to provide reasons within 10 days on receipt of the notice as to why the property should not be declared executable. If the occupier is not served with the notice he or she might not be able to bring the application to declare the property executable to the notice of the owner so that the latter can take the necessary action and for the occupier to make the necessary arrangements to find alternative accommodation.

3. Costs

The court could not find the reason why the normal rule, namely costs follow the result, should not apply. The applicant had been unsuccessful. It must pay the respondent costs.

Judge's signature:	Note to the parties:
Counsel:	
Applicant(s)	Respondent
Mr Barnard instructed by Van der Merwe-Greeff Andima Inc.	Mr Metcalfe correspondent of Louis Karsten Legal Practitioners