**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2017/00137

In the matter between:

**IMELDA KAKWIBU LISEHO** **APPLICANT**

and

**GALLEN MUNZILIKAZI LISEHO** **RESPONDENT**

**Neutral citation:** *Liseho v Liseho* (HC-MD-CIV-MOT-GEN-2017/00137) [2018] NAHCMD 82 (28 March 2018)

**Coram:** ANGULA DJP
**Heard**: **24 January 2018**
**Delivered**: **28 March 2018**

**Flynote:** Settlement agreement – Status of orders made pursuant to settlement agreement – Terms enforceable by court orders – Enforcement of a term of a divorce settlement agreement to sell a jointly-owned immovable property – Rule 108 not applicable.

**Summary:** The applicant and respondent entered into a settlement agreement in terms whereof they agreed that the respondent has the first option to purchase the applicant's half share following valuation of the immobile property by a valuator – Furthermore should the respondent fail to exercise his option or pay the applicant the

50 per cent of value of her half share within 30 days of the valuation and the remaining 50 per cent on the anniversary of the final divorce order failing which, the property shall be sold to a third party – The settlement agreement was incorporated in the final order of divorce on 3 December 2013.

The property was duly valuated during November/December 2014. During March 2015 the respondent informed the applicant that he was still interested in buying the applicant's half-share. Thereafter the respondent failed to buy the applicant's value of the half shares.

In view of the long period which went by since the property was valuated, the applicant applied, *inter alia*, for an order to have the property revalued and sold to a third party. The respondent opposed the application and raised two points *in limine*. First, that no founding affidavit was attached to the notice of motion. Second, the applicant is seeking execution of the property but failed to comply with the provisions of rule 108 of the rules of the court.

*Held*, that the record showed that a founding affidavit was filed together with the notices of motion. Furthermore, that the return of service showed that the notice of motion together with the founding affidavit were personally served on the respondent. Accordingly the point *in limine* was dismissed.

*Held further,* that the enforcement of the term of the settlement agreement to sell the immovable property did not amount to a sale in execution and therefore the provisions of rule 108 were not applicable. Consequently the point *in limine* was, similarly, dismissed.

---

**ORDER**

---

1. The respondent is directed to grant the valuator, Mr Pierewiet Wilders' access to Erf 324, Onyati Street, Okuryangava, Windhoek ('the property') in order to determine the market value of the property.

2. The respondent is further directed to grant all and/or any estate agent(s) appointed by the applicant access to the property in order to market and sell the property, upon furnishing written proof to the respondent of such appointment by the applicant.

3. The Deputy Sheriff for the District of Windhoek is directed and authorised to accompany Mr Pierewiet Wilders and all and/or any duly appointed estate agent(s) to the property and to assist them in gaining access thereto, if necessary, where the respondent fails and/or refuses to grant access.

4. Deputy Sheriff for the District of Windhoek is further directed and authorised to sign all documents necessary to sell and transfer the property to any willing and able third party buyer in accordance with the terms of the Settlement Agreement between the applicant and the respondent, which Settlement Agreement was made an Order of Court on 3 December 2013, where the respondent fails and/or refuses to do so within 21 (twenty one) days of being requested to do so.

5. The respondent is ordered to pay the applicant's costs occasioned by this application.

6. The matter is removed from the roll and is regarded as finalised.

---

**JUDGMENT**

---

ANGULA DJP:

Introduction

[1] I have before me an application in which the applicant seeks an order in the following terms:

‘1. Directing the respondent to grant the valuator, Mr. Pierewiet Wilders access to Erf 324 Onyati Street, Okuryangava, Windhoek in order to determine the market value of the property.

2. Directing the respondent to grant all and/or any estate agent(s) appointed by the applicant access to Erf 324 Onyati Street, Okuryangava, Windhoek in order to market and sell the property, upon furnishing written proof to the respondent of such appointment by the applicant.

3. Authorising the Deputy Sheriff for the District of Windhoek to accompany Mr. Pierewiet Wilders and all and/or any duly appointed estate agent(s) to Erf 324 Onyati Street, Okuryangava, Windhoek, and to assist them in gaining access thereto, if necessary, where the respondent fails and/or refuses to grant access.

4. Authorising the Deputy Sheriff for the District of Windhoek to sign all documents necessary to sell and transfer Erf 324 Onyati Street, Okuryangava, Windhoek to any willing and able third party buyer in accordance with the terms of the Settlement Agreement between the applicant and the respondent, which Settlement Agreement was made an Order of Court on 3 December 2013, where the respondent fails and/or refuses to do so within 21 (twenty one) days of being requested to do so.

5. Costs of this application.

6. Further and/or alternative relief.’

[2] The application is opposed by the respondent. He chose to rather raise two points in law *in limine*, and not to go into the merits of the issues upon which the application is based. Before I deal with points in law *in limine*, it is appropriate to give a brief background to the application.

Brief Background

[3] The applicant and the respondent were married at Windhoek on 29 December 1997 in community of property. The marriage between the parties was dissolved by an order of this court on 3 December 2013, whereby a final order of divorce was granted. A settlement agreement entered into by the applicant and the respondent concerning, *inter alia*, the division of their joint properties was, at their request,

incorporated in the final order of divorce and in the final dissolution order. It is not necessary to restate the all the terms of the settlement agreement but I will here below cite the clause in the settlement agreement by which the parties agreed on how the jointly-owned immovable property would be dealt with. The clause reads as follows:

‘2. DIVISION OF JOINT ESTATE

2.1 IMMOVABLE PROPERTY

2.1.1 It is recorded that the parties are co-owners of the immovable property situated at Erf 324, Onayati Street, Okuryangava, Windhoek, Republic of Namibia.

2.1.2 The parties agree that the Defendant has the first option to purchase the half share of the Plaintiff in the aforesaid property as follows:

2.1.2.1 The Parties agree to appoint Pierrewiet Wilders, a sworn appraiser, to evaluate the aforesaid property and he shall be so appointed within 5 (five) days of date of signature hereof. The parties shall use their best endeavours to secure the valuation within 15 (fifteen) days thereafter. The Defendant shall pay the costs of the valuation directly to Pierrewiet Wilders and shall further set off 50% of the said costs so paid from the amount payable to the Plaintiff as follows;

2.1.2.2 Within 30 (thirty) days from date of Final Order of Divorce the Defendant shall pay to the Plaintiff 50 per cent of the value of Plaintiff’s half share as per the valuation obtained; and

2.1.2.3 Upon the first anniversary of the granting of the Final Order of Divorce the Defendant shall pay to the Plaintiff the remaining 50 per cent of the value of Plaintiff’s half share as per the valuation obtained. Whereupon the

Defendant shall become the sole and exclusive owner of the aforesaid property.

2.1.3 In the event that the Defendant fails to exercise his first option to purchase as set out hereinabove, the aforesaid property shall be immediately sold to any willing and able 3rd party buyer and the net proceeds shall be divided equally between the parties, provided that any amount that has been paid to the Plaintiff by the Defendant in terms of exercising his first option to purchase as at date of sale shall be deducted from Plaintiff's half share of the nett proceeds of the sale and the Defendant shall be reimbursed with the said amount so paid.'

[4] It is the non-compliance with the provisions of that clause which is the subject-matter of this application.

Applicant's case

[5] It is the applicant's case that, the respondent has failed and refused to abide by the terms of the settlement agreement by failing to exercise his first option to purchase the applicant's half-share in the property. In this connection the applicant points out the agreed time period within which the respondent was to exercise his option has long expired. Moreover the respondent has failed to pay the value of the applicant's half share in the property to her and/or to co-operate in selling the property to a third party buyer.

[6] It is further the applicant's testimony that during 2014, she agreed to extend the time period in which the respondent may exercise his option to purchase the property, to November/December 2014. The applicant states further that the respondent was provided the contact detail of the sworn valuator Mr Pierewiet Wilders, so as to contact him and request the valuator perform the valuation of the property. Subsequent thereto on the applicant's inquiry, the applicant claimed that he could not get hold of the sworn valuator. Eventually the legal representative of the applicant made arrangements with the valuator to attend at the property to carry out the valuation.

[7] On 3 December 2014, two valuation reports, dated 11 September 2014 and 18 November 2014, respectively, were sent by Mr Wilders via email to the respondent's legal practitioners.

[8] It is further the applicants testimony that on or about January 2015 her legal representative addressed a letter to the respondent informing the respondent that he had failed to exercise his option and therefore the house should be sold as stipulated in the settlement agreement, namely to sell the property to a willing third party buyer. The respondent was informed that an estate agent had been appointed to market the property. The letter was delivered to the respondent by the deputy sheriff.

[9] Thereafter, during March 2015, the respondent, through the estate agent, informed the applicant that the he was still interested in buying the applicant's half share in the property.

[10] Finally the applicant points out that the respondent has not made any serious efforts to buy her half share in the property and that moreover, the value of the property must have increased since the last valuation was done in 2014. It for this reason that the applicant requires a new valuation to be carried out in order that a latest market value of the property, is determined.

[11] The respondent filed an answering affidavit and raised two points in law *in limine*, arguing that the applicant's application should fail as the points *in limine* are dipositive of the application. I next proceed to consider the points *in limine* in turn.

Points *in limine* considered

[12] The first point *in limine* is that the applicant failed to comply with the provisions of rule 65(1) and (3) of the Rules of this court.

[13] Rule 65(1) stipulates that every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for the relief sought. In this connection the respondent alleges that the applicant only filed a notice of motion unaccompanied by an affidavit. Furthermore sub-rule 65(3) stipulates the application must conclude with the form of order prayed and be verified

on oath by the applicant. In this connection the respondent contends that the applicant seeks various types of relief without same being verified on oath. Therefore, it is argued, the applicant has failed to comply with the peremptory provisions of the said sub-rules and the application is therefore defective and is liable to be struck from the roll with costs.

[14] In my judgment, this point in limine is not valid and is meritless. The electronic record on the E-justice system clearly shows that the application was filed on E-justice on 26 April 2017 by the legal practitioner for the applicant, Ms Lubbe, who filed a Notice of Motion, which at paragraph 6 reads: 'and that the accompanying affidavit of IMELDA KAKWIBU LISEHO, together with annexures, and confirmatory affidavit of DANIELLÉ LUBBE will be used in support thereof'. Moreover, a founding affidavit titled 'founding affidavit' was filed on the very same day the notice of motion was filed. It is evident and clear from the system that the notice of motion with the founding affidavit were filed on 26 April 2017, at 10h04 and 10h06 respectively.

[15] In addition the record further shows, from the return of service that the application papers were served on the respondent by the deputy sheriff on 2 May 2017. In this respect the return of service reads that 'a Notice of Motion together with the founding affidavit with annexures' were served personally on the respondent on that day.

[16] I should observe that with the advent of the new era of E-justice which reflects everything filed and the time when it was filed, it is no longer possible nor desirable to take chances like this. I will reserve my comments as to what might or might not have happened for this point to be taken and persisted with at the hearing, in the face of clear and objective evidence on the E-Justice record.

[17] My finding is therefore, that the application consisting of the notice of motion and a founding affidavit with annexures were duly filed and issued and were subsequently served on the respondent by the deputy-sheriff. The point *in limine* is dismissed. I deal next with second point *in limine*.

[18] The second point *in limine* raised by the respondent is that the applicant failed to comply with the provisions of Rule 108(1) and (2) of this court.

[19] Briefly rule 108(1) and (2) prohibits the registrar from issuing a writ of execution against immovable property of the execution debtor without proof by means of a *nulla bona* return against movable property which shows that the execution debtor has insufficient movable property to satisfy the writ. Furthermore, that such immovable property has, on application by the execution creditor been declared by the court specially executable.

[20] In this regard the respondent argues, if regard is had to relief claimed by the applicant, she is in essence asking that the immovable property at Erf 342, Onyati Street, Okuryangava to be executed and be sold in order to offset the debt the respondent incurred as a result of the order made by this court on 3 December 2013.

[21] The respondent points out in terms of the settlement reached by the parties, the applicant was to receive an amount equivalent to fifty percent of the valuation of the property; that the respondent was to pay the applicant on or before 13 December 2014. He concedes however that he has not done so due to other reasons. The respondent therefore agrees that the application has been prematurely initiated by the applicant.

[22] The respondent states that the property is his primary residence and that he resides therein together with his minor children. Based on those allegations the respondent submits that, before the property can be sold, the procedure followed must comply with the provisions of rule 108.

[23] The point *in limine*, is in my view, meritless. The applicant does not seek an order for the execution of the property. On the contrary she seeks enforcement of the terms of the settlement agreement which was freely and voluntarily entered into between the parties and was subsequently presented to the court to be incorporated in the final order of divorce.

[24] Counsel for the applicant correctly in my view, articulates the contractual position between the parties, in his heads of argument as follows 'Contractual consensus was reached between the applicant and the respondent as to the terms and conditions under which their co-owned immovable property shall be sold. They consented to and bound each other to the sale of their property to a third party. Rule 108 finds no application in such circumstances. What does find application is the maxim '*pacta sunt servanda'*.

[25] I agree with counsel for the applicant's submission that, rule 108 does not apply at all to the facts of this matter. The present case has to do with the immovable property of two parties who entered into a settlement agreement in terms of which the said immovable property of the parties is to be sold. The respondent, however has the first option to purchase the half share of the plaintiff in the aforesaid property and upon failure to do so, the property would be sold to any willing and able third party.

[26] An execution in terms of rule 108 is concerned with sale of the property in order to satisfy a judgment debt. There is no judgment debt in the present matter. Furthermore with the proceedings in terms of rule 108, the relationship between the parties is that of an execution creditor and execution debtor. The relationship between the parties in the present matter is that of contractants and co-owners of an immovable property. Finally the applicant does not seek an order to declare the property specially executable: to the contrary the applicant is merely seeking an enforcement of the terms of the settlement agreement.

[27] Mr du Pisani for the applicant referred court to the pronouncement by the court in *Wlotzkasbaken Home Owners Association v Erongo Regional Council*[1] where the court had occasion to deal with the application for the enforcement of a settlement agreement entered into between the parties. The court referred with approval to the pronouncement by Ngcobo J where the learned Judge of the Constitutional Court of South Africa observed the that 'public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken'.

[1] 2007 (2) 799 (HC) at 811 H to 812A.

[28] In my view, the foregoing observation applies with equal force to the facts of the present matter. It is unconscionable for the respondent to try to escape his contractual obligations he had freely and voluntarily undertaken and to frustrate the enforcement of contractual rights by the applicant by raising spurious points of law. The court cannot countenance such behaviour. It is unfair for the respondent to keep the applicant waiting since 2014 up to this date, more than three years, to receive her half share in the property to which she is entitled in terms agreed to by both parties.

[29] This court associates itself with the statement made by Froneman J, in *Thozamile Eric Magidimisi N.O v The Premier of Eastern Cape and Others*[2] in its introductory remark at para 1 of the judgment, where the learned judge aptly pointed out with regard to the importance of persons complying with court orders. He said: 'In a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private and the State alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that'.

[30] Our Republic's system is anchored on constitutional democracy. The non-compliance by the respondent with the terms of the settlement agreement, to which he freely and voluntarily agreed, and which further agreed to be made an order of court, is in my view, not an insignificant infraction: it violates the constitutional values of the rule of law and poses a threat to the constitutional order of this country if persons willy-nilly and for spurious reasons, fail to comply with court orders. Chaos will reign and people will start taking the law in their own hands. 'The reality is as stark as that' to borrow form the language of Froneman J.

[31] I have already expressed my view that the point *in limine* raised by the respondent is meritless. My finding is that: the provisions of rule 108 of the rules of this court, are not applicable where the enforcement of the terms of the settlement agreement to sell an immovable property is sought, for the reason that, such sale is not a sale in execution. The immovable property is not sought to be sold because the respondent failed to satisfy a judgment debt and in that he was found not to possess, realisable movable properties to satisfy the said judgment debt. On the contrary, the

[2] (2180/04, ECJ031/06) [2006] ZAECHC20 (25 April 2006).

order is sought to sell the immovable property in enforcement of the terms of the settlement agreement which was, by agreement between the applicant and the respondent, made an order of court.

[32] It follows thus, that the second point *in limine* cannot equally be sustained and is dismissed.

[33] In the result I make the following order:

1. The respondent is directed to grant the valuator, Mr Pierewiet Wilders' access to Erf 324, Onyati Street, Okuryangava, Windhoek ('the property') in order to determine the market value of the property.

2. The respondent is further directed to grant all and/or any estate agent(s) appointed by the applicant access to the property in order to market and sell the property, upon furnishing written proof to the respondent of such appointment by the applicant.

3. The Deputy Sheriff for the District of Windhoek is directed and authorised to accompany Mr Pierewiet Wilders and all and/or any duly appointed estate agent(s) to the property and to assist them in gaining access thereto, if necessary, where the respondent fails and/or refuses to grant access.

4. Deputy Sheriff for the District of Windhoek is further directed and authorised to sign all documents necessary to sell and transfer the property to any willing and able third party buyer in accordance with the terms of the Settlement Agreement between the applicant and the respondent, which Settlement Agreement was made an Order of Court on 3 December 2013, where the respondent fails and/or refuses to do so within 21 (twenty one) days of being requested to do so.

5. The respondent is ordered to pay the applicant's costs occasioned by this application.

6. The matter is removed from the roll and is regarded as finalised.

_____

H Angula

Deputy-Judge President

APPEARANCES

| | |
|---|---|
| APPLICANT: | L DU PISANI<br>of Du Pisani Legal Practitioners, Windhoek |
| RESPONDENT: | P MULUTI<br>of Muluti & Partners, Windhoek |