



**HIGH COURT OF NAMIBIA MAIN DIVISION
HELD AT WINDHOEK**

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/04548

In the matter between:

ROMAN CATHOLIC CHURCH

APPLICANT

and

PHILLEPUS VALOMBOLENI THOMAS

1ST RESPONDENT

NETCARE INVESTMENT CC

2ND RESPONDENT

ESTER NAANGO CHARJEN NDEENDELAGO ROBERT

3RD RESPONDENT

Neutral citation: *Roman Catholic Church v Phillepus Valomboleni Thomas & 2 Others*(HC-MD-CIV-ACT-CON-2017/04548) [2019] NAHCMD 104 (12 April 2019)

Coram: UEITELE J

Heard: 14 March 2019

Delivered: 12 April 2019

Flynote: *Practice* - In a Rule 108 application, the property sought to be declared specially executable must belong to the execution debtor and an execution creditor cannot seek relief in terms of this rule against a property that is not owned by the execution debtor or is the property of a third party.

Practice – In a Rule 108 application, the execution debtor must submit a reason that is legally acceptable in order to avoid the property being declared specially executable.

Summary: First and second respondents are indebted to the applicant in the amount of N\$8 370 442-32 in terms of a default judgment granted against first and second respondents on the 16th of May 2018 by this Court. Applicant approached this Court for an order in terms of Rule 108 to have two properties declared specially executable. First, second and third respondents filed notices to oppose the relief sought by the applicant.

Held that the notion that a debtor's property should be available to satisfy its debts is universally accepted. The court further indicated that execution does not occur arbitrarily. It takes place only after a court has by its judgment confirmed the existence of the obligation and authorised enforcement of compliance with it.

Held further that it is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells must start ringing.

Held furthermore that if there are no other proportionate means to attain the same end, execution may not be avoided.

ORDER

1. The following immovable property namely:

CERTAIN	Remainder of Erf 102 Goreangab
SITUATED	In the Municipality of Windhoek, Registration Division "K", Khomas Region,
MEASURING	495 (Four Nine Five) square meters.

HELD BY Deed of Transfer No. T 6021/2016

is declared specially executable.

2. The application to declare the following immovable property namely:

CERTAIN Erf 6293 (a portion of Erf No. 1512), Khomasdal (Extension No. 14)

SITUATED In the Municipality of Windhoek,
Registration Division "K",
Khomas Region,

MEASURING 392 (Three Nine Two) square meters.

HELD BY Deed of Transfer No. T 5265/2017

specially executable is refused and is dismissed.

3 The first and second respondents must, jointly and severally the one paying the other to be absolved, pay the applicant and the third respondent's costs in respect of the Rule 108 application. The costs are on the scale as between legal practitioner and own client.

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

JUDGMENT

UEITELE J:

Introduction

[1] This is an application under Rule 108 of this Court's rules to declare certain immovable properties specially executable. The applicant is the Roman Catholic Church, trading as the Roman Catholic Hospital. I will, in this judgment for ease of reference, refer to the applicant as the 'Hospital'.

[2] The first respondent is Phillepus Valomboleni Thomas, who was, until 30 June 2017 employed by the Hospital as a finance Clerk (I will, in this judgment for ease of reference, refer to the first respondent as 'Thomas'). The second respondent is Netcare Investment CC, a close corporation registered in accordance with the laws of Namibia and of which Thomas is the sole member. (I will, in this judgment for ease of reference, refer to the second respondent as the 'close corporation').

[3] The third respondent is Ester Naango Charjen Ndeendelago Robert, who is the former spouse of Thomas. I do not intend any disrespect to Ms Robert, but I will simply for convenience and ease of reference refer to her in this judgment as 'Ester'.

[4] I find it appropriate to, for best understanding of the issues that are involved in this matter, give a brief factual background of what gave rise to the Hospital approaching this Court and applying to have the immovable properties, which I will in the course of this judgment refer to, declared specially executable.

Factual Background

[5] Thomas commenced his employment as finance clerk with the Hospital on the 20th of June 2012. On 28 June 2014 he married Ester at Ongwediva. Because Ongwediva is situated north of the red line the marriage between Thomas and Ester did, in terms of Proclamation 15 of 1928, not have the consequences of a marriage in community of property.

[6] During the course of his employment with the Hospital, more particularly during the period May 2016 until May 2017, Thomas on his own admission and using the close corporation as conduit, defrauded the Hospital of N\$8 370 442-32. When Thomas' fraudulent activities were detected his employment with the Hospital was terminated on 30 June 2017.

[7] On the 17th of October 2017, Thomas acknowledged that he is indebted to the Hospital in the amount of N\$7 800 240-53. He on the same day (that is on 17 October 2017) undertook to:

- (a) repay to the Hospital the amount of N\$1 000 000 not later than 10 days from the day that he acknowledged his indebtedness to the Hospital;
- (b) repay to the Hospital another 75% of the amount that he defrauded the Hospital of, namely the amount of N\$5 100 180-40 not later than one month from the day that he acknowledged his indebtedness to the Hospital; and
- (c) repay to the Hospital the remaining 25% of the amount that he defrauded the Hospital of, namely the amount of N\$1 700 060-13 during November 2017.

[8] After Thomas had acknowledged his indebtedness to the Hospital, the Hospital discovered that the actual amount of which it was defrauded was N\$8 370 442-32. When nothing came of Thomas' promise and undertaking to repay the moneys that he had 'stolen' from the Hospital, the Hospital on 29 November 2017 commenced proceedings by issuing summons out of this Court first seeking to rectify the acknowledgment that Thomas signed to reflect the amount it was defrauded of as N\$8 370 442-32 and also seeking repayment of that amount from both Thomas and the close corporation.

[9] On 12 December 2017 Thomas and the close corporation indicated that they will defend the Hospital's claim. During February 2018 Thomas commenced proceedings in this Court in terms of which he sought the dissolution of his marriage to Ester. Ester did not oppose the action by Thomas and on 23 July 2018 this Court dissolved the marriage between Thomas and Ester. One of the ancillary relief granted by the Court when it dissolved the marriage between Thomas and Ester was an Order that 'the defendant [i.e. Ester] be and is hereby awarded full ownership, possession and liability of the immovable property located at Erf 6923 Madawas Street, Khomasdal, Windhoek'.

[10] By 10 May 2018 Thomas had still not made good his promise to pay the amount he 'stole' from the Hospital nor had he and the close corporation filed their plea to the Hospital's claim. The Hospital accordingly set the matter down for default judgment and on 16 May 2018 this Court granted an order rectifying the acknowledgement of debt that was signed by Thomas and also ordered Thomas and the close corporation to, jointly and severally, the one paying the other to be absolved, pay to the Hospital the amount of N\$8 370 442-32 plus interest on that amount at the rate of 15.5% per annum calculated from date of judgment to date of final payment. Thomas and the close corporation were furthermore ordered to pay the Hospital's costs of suit, including the costs of one instructing counsel and one instructed counsel.

[11] On 18 May 2018 the Hospital commenced execution proceedings against Thomas and the close corporation. On 30 July 2018 the Deputy Sherriff for the District of Windhoek rendered a *nulla bona* return in which he certified that he could not locate sufficient movable properties of Thomas and the close corporation to satisfy the judgment.

[12] It is after the Hospital was informed that Thomas and the close corporation do not have sufficient movable properties to satisfy the judgment that the Hospital instituted proceedings in terms of Rule 108 (that is, an application to declare immovable properties specially executable). The immovable properties that the Hospital sought to declare specially executable are:

- | | | |
|-----|------------------|--|
| (a) | CERTAIN | Erf 6293 (a portion of Erf No. 1512), Khomasdal (Extension No. 14) |
| | SITUATED | in the Municipality of Windhoek,
Registration Division "K",
Khomas Region, |
| | MEASURING | 392 (Three Nine Two) square meters. |
| | HELD BY | Deed of Transfer No. T 5265/2017. |

I will, in this judgment, for convenience and ease of reference refer to this property as 'the Khomasdal property'; and

(b)	CERTAIN	Remainder of Erf 102 Goreangab
	SITUATED	In the Municipality of Windhoek, Registration Division "K", Khomas Region,
	MEASURING	495 (Four Nine Five) square meters.
	HELD BY	Deed of Transfer No. T 6021/2016.

I will, in this judgment, for convenience and ease of reference refer to this property as 'the Goreangab property'.

[13] For some reasons not explained by the Hospital, the Hospital included Ester in its Rule 108 application. The Rule 108 application was served on Ester and Thomas personally on 6 August 2018, and on the close corporation also on 06 August 2018.

[14] The Hospital's application in terms of Rule 108 was set down for hearing on the first motion Court roll of 19 October 2018. When the matter was called on that day Ester, Thomas and the close corporation all had indicated that they will oppose the application. I accordingly removed the matter from the first motion Court roll and placed it on my case management roll. On 19 January 2019 I granted Ester leave to intervene as interested party, because the Deed of Transfer in respect of the Khomasdal property indicated Ester as a joint owner of that property. It is to the application to declare both the Khomasdal and Goreangab properties specially executable that I now turn.

The Rule 108 Application in respect of the Khomasdal and Goreangab properties.

[15] I have indicated above that the Deed of Transfer, which was annexed to the application, in respect of the Khomasdal property indicates that that property is jointly owned by Thomas and Ester while the Deed of Transfer in respect of the Goreangab property simply indicates Thomas as sole owner of that property. I will accordingly first consider the application to declare the Goreangab property specially executable.

[16] It is now common knowledge that the deputy sheriff for the District of Windhoek indicated that Thomas did not have sufficient movable assets to satisfy the judgment granted in favour of the Hospital. It is for that reason that the Hospital did, as it is entitled to do, move to attach the Goreangab property and to seek an order from this Court to declare that property specially executable.

[17] Rule 108 has been the subject of interpretation by this Court on more than one occasion. Rule 108(2) in summary provides that if the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as home the court may not declare that property to be specially executable unless the execution creditor has by means of personal service effected by the deputy-sheriff given notice on Form 24 to the execution debtor or any lessee of the property so sought to be declared executable, that application will be made to the court for an order declaring the property executable and calling on the execution debtor to provide reasons to the Court why such an order must not be granted.

[18] Paragraph (c) of Rule 108(2) grants powers to the Court to, after considering all the relevant circumstances with specific reference to less drastic measures than a sale in execution of the primary home under attachment, which measures may include attachment of an alternative immovable property to the immovable property serving as the primary home of the execution debtor or any third party making claim thereto, declare the property executable. I will proceed to consider the basis on which Thomas implores this Court not to declare the Goreangab property specially executable.

[19] Thomas opposes the Hospital's application on the grounds that; the Hospital's application to declare the Goreangab property specially executable amounts to an abuse of the process of Court and is made in bad faith. His second ground is that Ester was granted primary custody of their three minor children subject to his reasonable access. He proceeds to submit that he houses his three minor children on occasions at the Goreangab property which is his primary home. He contends that if the Court were to declare that property specially executable, he will have no shelter and neither will his minor children have shelter.

[20] His third ground of opposing the application to declare the Goreangab property specially executable is that he addressed correspondence to the Hospital on two occasions, proposing a reasonable repayment arrangement towards full and final settlement of his indebtedness to the Hospital. He contends that the proposal that he

made to the Hospital in settlement is a highly viable alternative to executing the immovable property and amounts to a less drastic measure than a sale in execution of his primary home. He thus concludes that on the basis of the proposal that he made to the Hospital it is unnecessary to declare the Goreangab property specially executable in satisfaction of the judgment debt.

[21] The question that I must thus resolve is whether Thomas and the close corporation have satisfied this Court that there are less drastic measures than a sale in execution. I now proceed to deal with that question.

Can the Court declare the Goreangab property specially executable?

[22] Before I deal with the question as to whether or not the Goreangab property can be declared specially executable I make following remark. Justice Binns-Ward is reported as having said:

“[9] There is a public interest in the exigibility of judgments sounding in money. That creditors should obtain the authorisation of a court to exact payment from their debtors is a fundamental aspect of the rule of law. The alternative would be the chaos and lawlessness of a regime of self-help, in which the most vulnerable in society would be the most exposed to abuse. A court regulated system of debt recovery must be effective, however, if it is to command respect. There would be no point in creditors having to obtain judgments for the purposes of exacting recovery from their debtors if there was no law in place to lend force to the judgments and provide for their execution. The rules of court governing execution against a judgment debtor’s property afford such law.

[10] The notion that a debtor’s property should be available to satisfy its debts is universally accepted. Execution does not occur arbitrarily. It takes place only after a court has by its judgment confirmed the existence of the obligation and authorised enforcement of compliance with it. Thereafter, a number of prescribed procedures have to be complied with before execution of the judgment is actually carried out ...”¹

[23] In the case of *Gundwana v Steko Development CC & Others*² Justice Froneman said that it must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life said the learned Judge. He continued and

¹ In an unreported judgment of the High Court of South Africa (Western Cape Division, Cape Town) of *Baretzky and Another v Standard Bank Of South Africa Limited and Others* Case No. 13668/2016 delivered on 17 February 2016.

² 2011 (3) SA 608 (CC).

said that it is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells must start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided. With these remarks I now return to consider whether Thomas has succeeded to persuade the Court not to declare the Goreangab property specially executable.

[24] Rule 108(2) enjoins a court to consider all the circumstances before it makes an order to declare an immovable property executable or not executable. Justice Mokgoro in the South African case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*³ warned that it would be unwise to set out all the circumstances that would be relevant to consider when considering whether or not to declare immovable property executable, but nonetheless gave some guidance.

[25] The learned judge mentioned the following factors as guiding factors; Whether the procedure prescribed by the Rules have been complied with. Whether there are other reasonable ways in which the debt can be paid. Whether ordering of a sale in execution would be grossly disproportionate to other means of satisfying the judgement. Another factor of great importance will be the circumstances in which the debt arose. The learned Judge furthermore remarked that the question whether or not the judgement creditor is abusing the Court process and is acting in bad faith is equally relevant. A final consideration will be the availability of alternatives which might allow for the recovery of the debt but do not require the sale in execution of the debtor's home.

[26] There is no doubt in my mind that in this matter, the Hospital fully complied with the procedural safeguards available to Thomas. Thomas alleges that the Hospital in seeking an order to declare the Goreangab property executable abuses the Court process and acts in bad faith. I regard this contention by Thomas as nothing but 'sloganeering'. Thomas does not set up any primary facts from which the Court can deduce that the Hospital is acting in bad faith or abusing the process of court. I fail to see how someone who was defrauded of more than N\$8 000 000 acts in bad faith or abuses the court process when they seek to recover the money that it lost.

³ 2005 (2) SA 140 (CC).

[27] Thomas alleges that he has proposed a reasonable repayment arrangement towards full and final settlement of the debt and the Hospital dismissed that settlement offer without making any significant attempt towards realistic settlement of the debt given the prevailing economic conditions nor attempting to engage meaningfully with regards to the settlement proposal. What Thomas forgets is the fact that during October 2017 he undertook to make certain payments to the Hospital. Nothing came off those undertakings nor did he or does he now give any explanation as to why he has up to the date of hearing this matter, which is some eighteen months later, not honoured his undertaking to repay the Hospital.

[28] The genuineness of Thomas's proposal to satisfy the judgement is thrown into doubt when one considers the allegations made by the Hospital which allegations Thomas did not deny, and I am thus bound to accept those allegations as true. The allegations are that Thomas was the registered owner of an immovable property, being Erf 1722 Kuisebmond, on 7 November 2016. He sold that property during November 2017 but never disclosed that fact to the Hospital nor did he pay a single cent from the proceeds of that sale to the Hospital. During the year 2018 Thomas again sold another immovable property being Erf 3044 (a portion of Erf 2898) Otjomuise Extension No. 2 that he had purchased in the year 2016 for an amount of N\$950 000, without also disclosing that fact to the Hospital. The Hospital managed to intercept an amount of N\$375 000-00 from the proceeds of that sale.

[29] Thomas attached copies of the letters containing the repayment proposals that he made to the Hospital to his affidavit in which he seeks to persuade this Court not to declare the Goreangab property specially executable. In his settlement proposal he offers to pay an amount of N\$ 200 000 in cash and the balance of the debt in monthly instalments of N\$10 000. If the Hospital was to accept that proposal, it will take Thomas not less than 800 months to repay just the capital amount excluding interest. Can one seriously argue that the settlement proposal is reasonable and viable? In my view not. Why must the Hospital wait for 800 months to recover its money which Thomas stole in a period of twelve months?

[30] The circumstances under which the debt was incurred are telling. Thomas did not incur the debt lawfully, he was driven by nothing but greed to defraud and steal the money from the Hospital. I furthermore have no doubt that the Goreangab property

was purchased with the ill-gotten proceeds from the Hospital. In my view no Court in this land will allow a person to keep an advantage he has obtained by fraud. Fraud unravels everything. I am thus of the view that it is Thomas who abuses the process of this Court and wants this Court to assist him to retain his ill-gotten property. As I said no Court in this land will do that.

[31] For these reasons that I have set out in the preceding paragraphs I declare the Goreangab property specially executable. I now turn to the Khomasdal Property.

Can the Court declare the Khomasdal property specially executable?

[32] I have indicated in the introductory part of this judgment that Thomas married Ester in Ongwediva during June 2014. The Hospital admits that Ester is not personally indebted to it, but basis its move to attach the Khomasdal property on its contention that Thomas has clearly set out to alienate all immovable property in his name since November 2017. The Hospital contends that Thomas' move to alienate his immovable property culminated in him instituting divorce proceedings against Ester and eventually succeeded in obtaining a divorce order and also securing an order for the ownership of the Khomasdal property to be transferred to Ester.

[33] The Hospital further basis its move to attach the Khomasdal property on the allegation it makes namely that the Khomasdal property was purchased on 16 August 2017 for N\$1 690 000, and a mortgage bond in the amount of N\$411 000 was registered against the title deed of that property. The Hospital thus contend that, it would seem that the difference of N\$1 279 000-00 was paid in cash, and it could only logically have been from the proceeds of Thomas' fraudulent activities.

[34] Ester opposes the application to declare the Khomasdal property specially executable on the ground that she and Thomas purchased the property together in 2017 and they were joint co-owners of the property. She submits that at the time of purchase, she obtained housing subsidy from her employer to enable her to purchase the property. She furthermore contends that after Thomas filed for divorce she was awarded sole ownership of the Khomasdal property and that she is now the sole owner of the property.

[35] Ester further contends that apart from the fact that she is currently the sole owner of the Khomasdal property, that property is her primary home and she is accommodating her three children as well as her brother in said property. She will have no alternative accommodation for herself and for the children if the property is to be declared specially executable.

[36] In the matter of *Reid and Another v Godart and Another*⁴ De Villiers JA remarked that:

'... the word "execution" means, as it seems to me, "carrying out" of or "giving effect", to the judgment, in the manner provided by law; for example, by specific performance, by sequestration, by the passing of transfer, by issue of letters of administration, by ejectment from premises, or by a levy under a writ of execution.'

[37] From the evidence placed before me it is apparent that there is no judgement of this Court against Ester. It thus follows that if there is no judgment against Ester there is no judgement against Ester that must be carried out or given effect to. If there is no judgement against Ester there is no basis in law on which to execute against the property of Ester. Secondly, despite the suspicious manner and the conditions under which the Khomasdal property was acquired and Thomas's portion of the undivided share in the Khomasdal property was alienated, that property is currently the property of Ester and not that of Thomas or the close corporation. There is furthermore no basis in fact or in law that has been advanced why this Court must execute against property that does not belong the judgment debtor, in this instance Thomas.

[38] For the reasons set out in the preceding paragraphs I refuse to declare the Khomasdal property specially executable.

Costs

[39] What is left to be determined in this matter is the question of costs. The normal rule is that the granting of costs is in the discretion of the Court and that the costs

⁴ 1938 AD 511.

must follow the course. No reasons have been advanced to me why I must not follow the general a rule.

[40] I have indicated above that the respondents attributed malice and abuse of the Court process to the Hospital. I have found that all of these allegations are not substantiated by any evidence. I have found that it is indeed Thomas who abused the process of Court and who is purposefully frustrating and obstructing the Hospital from recovering the moneys that it has lost. I am further of the view that Thomas' opposition of the Rule 108 application is frivolous and vexatious.

[41] The unsupported allegations of abuse of process and of engaging in vexatious activities directed at the Hospital in my view constitute an abuse and warrant censure. They are to be discouraged by appropriate costs orders when this form of abuse occurs. As a mark of disapproval of the unsubstantiated allegations and dishonesty levelled by Thomas against the Hospital and the frivolous and reckless litigation conducted by Thomas, the aforesaid conduct must be discouraged and in my view warrant a special order as to costs.

[42] For the avoidance of any doubt I make the following Order:

1. The following immovable property namely:

CERTAIN	Remainder of Erf 102 Goreangab
SITUATED	In the Municipality of Windhoek, Registration Division "K", Khomas Region,
MEASURING	495 (Four Nine Five) square meters.
HELD BY	Deed of Transfer No. T 6021/2016

is declared specially executable.

2. The application to declare the following immovable property namely:

CERTAIN	Erf 6293 (a portion of Erf No. 1512), Khomasdal (Extension No. 14)
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SITUATED In the Municipality of Windhoek,
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is refused and is dismissed.

3. The first and second respondents must, jointly and severally the one paying the other to be absolved, pay the applicant and the third respondent's costs in respect of the Rule 108 application. The costs are on the scale as between legal practitioner and own client.

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

S Ueitele
Judge

APPEARANCES**APPLICANT:**

Werner Boesak
Instructed by EnsAfrica (Incorporated
as LorentzAngula Inc), Windhoek

1ST & 2ND RESPONDENTS:

Practitioners

Kadhila Amoomo of
Of Kadhila Amoomo Legal

3RD RESPONDENT:

Appolos Shimakeleni
Of Appolos Shimakeleni Lawyers