

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, WINDHOEK, MAIN DIVISION

JUDGMENT

CASE NO. I 2705/2015

In the matter between:

**GUNNAR JENSEN, ACTING IN HIS CAPACITY AS A
TRUSTEE OF THE GUNNAR JENSEN BUILDING
MATERIALS TRUST T/A PENNYPINCHERS
TIMBERCITY WINDHOEK**

PLAINTIFF

and

**AMSWOHL AND LGA CONSTRUCTION
JOINT VENTURE CC
GARETH RAY McNAB
DAVID MBAKO-KARINGOMBE**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Neutral Citation: *Jensen v Amswohl and LGA Construction* (I 2705/2015)
[2019] NAHCMD 129 (29 April 2019).

CORAM: MASUKU J

Heard: 30 November 2018.

Delivered: 29 April 2019.

Flynote: Rule 108 application – service thereof – personal service of application on spouse married in community of property mandatory – court may *mero motu* raise non-compliance with the provisions of section 7 of the Married Persons Equality Act – abdication of the court from its constitutional duty not an option – Rule 108 application not an interlocutory application and compliance with Rule 32 (9) and (10) therefore not necessary – application in terms of Rule 108 to be resorted to where all else has failed and where the amount owed is staggering.

Summary: The application before the court is an application in terms of Rule 108 wherein the applicant seeks to have a certain immovable property declared specially executable. The 2nd respondent is married in community of property, his spouse was not served with the process and there appears to have been non-compliance with the provisions of section 7 of the Married Persons Equality Act.

Held that: The 2nd respondent's wife has an interest in the property and must not be deprived of an opportunity to make her own representations.

Held further that: The court may *mero motu* raise non-compliance with the provisions of section 7 to avoid an abdication from its constitutional duty.

Held that: Granting the application would be tantamount to defeating the legislative solicitudes which birthed the provisions relating to judicial oversight of execution relating to immovable property and that rule 108 applications should not be invoked as a weapon of oppression and to induce fear in judgment debtors.

Held further that: In applying the rules of court, practitioners must ensure they derive the highest benefit that is in line with the objectives of judicial case management, such that the parties may invoke rule 32 (9) and (10) even if the matter is not strictly interlocutory. The object must be forging a way forward that is quick and cheap for the parties, rather than slavish avoidance of a rule that can assist the parties resolve their dispute cheaply and speedily.

Held that: Rule 108 application is not an interlocutory application and rule 32 (9) and (10) not applicable to it, save as discussed that parties may themselves utilise the benefits of rule 32 (9).

Held further that: the amount of N\$ 49.332.22 owed by the defendants does not warrant the granting of the application, which is serious and has debilitating consequences to the judgment creditor and others connected to him or her.

The application in terms of rule 108 was therefore dismissed with costs.

ORDER

1. The application for declaring the property described as Erf. 870 Hochland Park, Municipality of Windhoek, Registration K, is hereby refused.
2. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Preliminary comment

[1] This judgment has been delivered much later than the period prescribed in the Rules of Court. There are two primary reasons for the delay. First, it occurred to the court, after the parties had finalised argument and the court was already preparing judgment that there were additional issues upon which assistance was required from the legal practitioners who appeared. Second, I went on long leave at the beginning of the year until mid-April 2019.

The judgment is delivered much later than would have been the case and I accordingly record my apologies to the parties for the delay.

Introduction

[2] Presently serving before court is an application in terms of the provisions of rule 108 of this court's rules in which the applicant seeks an order declaring certain immovable property registered in the 2nd respondent's name specially executable.

[3] Needless to say, this application is opposed by the 2nd respondent on grounds that will be adverted to as the judgment unfolds. Suffice it to mention that some of the grounds of opposition raised by the respondents are points of law *in limine*. The respondents do also raise a defence on the merits, which will be considered in the event the court does not uphold the points of law raised *in limine* by the respondents.

Background

[4] By combined summons dated 17 August 2015, the plaintiff sued the defendants named above, jointly and severally for payment of an amount of N\$ 49 332.22 in respect of goods sold and delivered by the plaintiff to the 1st defendant. The 2nd and 3rd defendants were sued in their capacity as sureties and co-principal debtors with the 1st defendant.

[5] Despite being served with the summons in this matter, the defendants did not defend the suit, culminating in this court, on 1 October 2015, granting judgment in the amount claimed, with interest at the customary rate, in favour of the plaintiff against all the defendants. Costs were levied on the attorney and client scale.

[6] Thereafter, the execution processes commenced in earnest, eventually culminating in the provisions of rule 108 being invoked by the plaintiff. In particular, the plaintiff seeks that immovable property, described as Erf 870

Hochland Park in the Municipality of Windhoek, be declared specially executable. The defendants strongly object to the relief sought in that regard.

Bases for opposition

[7] As intimated in the preceding paragraphs, the respondents have raised defences, including points of law *in limine*. The latter include the non-compliance by the applicant with the provisions of rule 108(2) (a) and (b) in respect of service on the 2nd respondent's wife; the non-compliance with the provisions of rule 32(9) and (10). I intend to deal with these preliminary issues before I deal, if at all necessary, with the defence on the main issue.

Non-service on Mrs. McNab

[8] It appears to be common cause that the 2nd defendant is married in community of property and that he and his spouse are the joint owners of the property, which is earmarked for declaration as specially executable in this application. In this regard, it is argued, on behalf of the 2nd respondent that the non-service of the 2nd respondent's spouse and the fact that she did not consent to the 2nd respondent entering into the suretyship agreement makes the application bad for non-service of the application on Mrs. McNab, as an interested party in the proceedings.

[9] It cannot be doubted that the property in question is registered in the name of the 2nd respondent in this matter. It also appears, in that regard, that the 2nd respondent is married in community of property. S 7 of the Married Persons Equality Act states that a spouse married in community of property shall not, without the consent of the other, do certain acts, which for purposes of this case, include alienating, mortgaging or conferring any real right to immovable property forming part of the joint estate. It does not appear that these provisions were complied with but I will make no authoritative finding in that regard.

[10] All I can say is that with the possible applicability of the Act referred to above, it becomes clear that it was necessary to serve Mrs. McNab with the

application. This would have enabled her to raise whatever defences and privileges extended to her by the Act. The reason why I find that she was entitled to service follow below.

[11] Rule 108 (2) reads as follows:

'If the immovable property sought to be attached is the primary home of the debtor or is leased to a third party as home the court may not declare that property to be specially executable unless –

- (a) the execution creditor has by means of personal service effected by the deputy sheriff given notice on Form 24 to the execution creditor that the 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 should not be granted.
- (b) The execution creditor has caused the notice referred to in paragraph (a) to be served personally on any lessee of the property so sought to be declared executable: and
- (c) *'

[12] It is clear that the rule in question requires personal service of the application to have the property declared specially executable on the execution debtor. It is important in this regard to notice the metamorphosis that the rule giver gives by reference to the words used. The text no longer refers to a judgment debtor – but to an execution debtor, meaning that it is possible that the application for property to be declared specially executable, may affect persons other than the original judgment debtor. It is in that context that lessees are mentioned in rule 108 (2) (c) as entitled to personal service of the application for declaration of property specially executable.

[13] This then leads me to the conclusion that it is not only the original judgment debtors that are entitled by law to personal service. The term execution debtor may be wider than just the original judgment debtor. In this regard, a spouse of a judgment debtor may, if the parties are married in community of property, be entitled to personal service of the application as he or she clearly has an interest in the matter, probably more than a lessee, who

is also entitled to service in terms of the rule, may have in the property sought to be so declared.

[14] In this particular matter, it is clear that Mrs. McNab, the 2nd respondent's wife, who is, according to the papers, married to him in community of property, was not served with the application and this is fatal to the granting of the application to have the property declared specially executable. By so saying, I must not be understood to mean that the application should necessarily be dismissed therefor.

[15] It is clear that Mrs. McNab has an interest in the property as a spouse married in community of property and she must not be denied the opportunity to make her own representations, which may be separate and distinct from those of the 2nd respondent, as her position may be quite peculiar. It is not correct that she be tarred with the same brush as her husband or that personal service upon her husband should be regarded as good as service upon her as well.

[16] Service of the application on her would have other advantages as well. It could afford her a proper opportunity to invoke whatever defences she has, including the provisions of the Married Persons Equality Act. I say so recognising the argument raised on behalf of the applicant, namely that the court is not entitled to have raised the issue of the applicability of the said Act *mero motu*.

[17] In this regard, Ms. Campbell directed the attention of the court to the writings of Voet as quoted in *Director of Hospital Services v Mistry*¹, where the court stated that in civil proceedings, the court must decide matters on the issues or disputes raised by the parties and not further.

[18] This is very good authority in certain circumstances, this one explicitly excepted in my view. First, the court did not breach the notorious *Kauesa* principle in this matter. The court drew the parties' attention to the possible applicability of the Act and requested them to make representations.

¹ 1979 (1) SA 626 (A).

Secondly, the issue raised by the court is a question of law. It arises from a legislative enactment promulgated for good purposes and the court may not in good or any other conscience, for that matter, deliberately close its eyes to it and hide behind the façade that the matter was not raised by the parties. Abdication of responsibility should not be an option that must be associated with this court and no reason good enough has been proffered for the court to abdicate its constitutional duty in this regard.

The merits

[19] I must also mention that over and above the issues already adverted to in this judgment, I expressed certain reservations to the parties' representatives about the propriety of bringing the application especially in view of the amount sought to be satisfied by this extremely serious and devastating procedure. The amount owed, as one will have seen in the earlier paragraphs of this judgment, is only N\$ 49 332. 22.

[20] The question is whether the amount owed, being even less than N\$ 50 000, would justify the invocation of such a serious procedure, which carries in its bosom such final and debilitating consequences as loss of a place of abode? If the court were to grant the application in this case, would that not be tantamount to defeating the legislative solitudes, which birthed the provisions granting the court a measure of judicial oversight in the sale in execution of immovable property?

[21] I raised the issue with the parties during argument as I have said and it became apparent to me that not enough effort was expended to try and resolve the issue of indebtedness and to decide the proper relief to be applied in the panoply availed by the rules of court.

[22] Rule 108 must have appeared to be the knobkerrie that the applicant decided to employ, probably without considering all the pertinent issues. When I raised the issue of payment of the money in instalments, particularly considering that an innocent party, the 2nd respondent's wife, who does not appear to be involved in the business may lose the roof over her head without

any contributory action on her part, Ms. Campbell argued that the respondents did not make any offer in that regard. I would have expected more from the parties, particularly the officers of the court, who must assist the court in properly applying the judicial oversight mechanisms in such matters.

[23] I must caution parties and their legal representatives that although this provision is available to execution creditors, rule 108 should be resorted to in appropriate matters, where all else has failed and where the amount owed is from all accounts, staggering. It must not be invoked willy-nilly as a weapon of oppression and to induce fear in judgment debtors. It is a procedure to be invoked responsibly and in deserving cases, as I have said, after all that is required by law to execute the judgment, has failed. The overriding objectives of attempting to settle matters without expending much time and finance must be given a very good chance in these matters.

Applicability of Rule 32 (9) and (10)

[24] Mr. Ravenscroft-Jones had another arrow at his disposal. He argued that the applicant had jumped the gun by bringing the rule 108 application without first complying with rule 32(9) and (10). The above sub rules have received very generous comment in numerous judgments of this court. Stripped to the bare bones, it requires parties to try and amicably resolve interlocutory matters before launching same for hearing. This is in line with the ethos of judicial case management, as encapsulated in rule 1(3).

[25] The judgment that got the ball rolling was *Mukata v Appolus*² followed by others including *Nkandi v Namibia Airports Company Ltd*³ and *Bank Windhoek Limited v Benlin Investments CC*.⁴ Essentially, the *ratio decidendi* is that where a party has failed to comply with the above said rules, the court should strike the matter off from the roll for non-compliance therewith.

² (13396/2014) [2015] NAHCMD 54 (12 March 2015).

³ (13622/2014) [2018] NAHCMD 274 (31 August 2018).

⁴ 2017 (2) NR 403.

[26] The question is whether the said provisions apply to this matter. Put differently, the question is whether an application in terms of rule 108 can be properly be described as falling within what are called interlocutory applications? In the case of *Soltec CC v Swakopmund Super Spar*⁵ this court attempted to define what the import of the word interlocutory entails in reference to rule 32 (9) and (10).

[27] In answering the question, the court quoted with approval the reasoning of the Supreme Court in *Di Savino v Nedbank Namibia Ltd*,⁶ where the Supreme Court, with the learned Chief Justice writing for the Court said:

‘The order given by Miller AJ refusing leave to amend is interlocutory. According to the *South Cape* case, the term “interlocutory” refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to or during the progress of litigation.’

[28] The court in *Soltec CC* did not stop there but it enumerated the classes of cases falling under this category and even listed some of those matters with reference to the applicable rules, where appropriate. An application in terms of rule 108 is starkly absent from that list. I can confirm that although the court said the list was not exhaustive, it did not escape the court’s mind to include a rule 108 application. It was omitted because it just does not belong to the category of matters to which rule 32 (9) and (10) applies.

[29] I am of the view that an application in terms of rule 108 is not an interlocutory matter within the meaning ascribed in the *Di Savino* case. It cannot be described as an incidental matter or one that is preparatory to the main dispute, incidental or one resorted to during the progress of litigation. It is a self-contained post judgment procedure prescribed by the rules and open to a party which has complied with all the preceding execution measures but has not received joy in those endeavours.

⁵ (Case No. I 160/2015 [2018] NAHCMD 265 (31 August 2018).

⁶ 2017 (3) NR 880 SC.

[30] On a strict interpretation, I am of the view that a rule 108 application is a substantive application standing on its own as there is no dispute existing at that juncture that may be said to be "the main dispute" and to which rule 108 can be said to be subservient or peripheral. Mr. Jones is accordingly not correct in his argument.

[31] Having said this, I sense that there is at times a slavish and regimented approach to the rules of this court, especially rule 32 (9) and (10). There is no need, in my considered view for parties to adopt a dogmatic and mechanical approach to particular rules in the same ways the Pharisees in the Bible interpreted scripture, without due regard to sense, substance or context. I would only urge that we consider the application of all the rules of court in the spirit particularly of the overriding objectives of judicial case management, rather than looking at isolated rules and fighting for their implementation or otherwise, in an absolutist all or nothing approach.

[32] The correct and mature approach, in my view should be considering whether there is anything to be gained by the parties employing rule 32 (9) and (10), even if the issue at hand is not one that can be properly assigned to the pigeonhole of interlocutory matters. I have in mind, for instance, special pleas, which are not, strictly speaking interlocutory. That notwithstanding, a party can employ the provisions of the rule 32 (9) and (10) to good effect. The approach should be towards the gains at hand, rather than the strict characterisation of types of cases along the unyielding lines of whether they are interlocutory or not. In this regard, there may be cases where the parties may engage in rule 32 procedures before launching a rule 108 application, and to good effect to the benefit of their clients, the court and the litigating public.

[32] In this case, for instance, it is clear that some attachment of movable goods was done and the amount claimed still remained unpaid. Although this is not an interlocutory application, the parties' meeting in the form of a rule 32 (9) fashion, could have yielded results that may have obviated the need to bring the rule 108 application.

[33] In retrospect, it would seem that this view has been expressed in an earlier case, namely, *Husselmann v Saem*.⁷ In that case, the court expressed itself as follows on the liberal application of rule 32 (9) and (10):

‘In this regard, the overriding principles of judicial case management must take effective sway in informing the direction the matter ought to take. For instance, even if it can be held that the special plea of non-joinder or misjoinder is not interlocutory in nature, the legal practitioners should still explore and take advantage of submitting same to rule 32 (9) and (10) in a bid to cut out the chuff and go for the grain proper, so to speak. This is clearly inexpensive and conduces to the early determination of the real issues, enabling the parties to apply a sieve to the proceedings, allowing the liquids to pass, so to speak, in order to deal properly with the solids that remain as it were.’

[34] It is my fervent hope that a new litigation culture will be inculcated that will avoid taking cheap and technical points but focus on dealing with the main issues on the merits, speedily and cheaply. This is what judicial case management and its overriding objects are all about. We can depart therefrom to our detriment and do great disservice to the litigating public in the process.

[35] In the premises, although the point of non-joinder is good, I am of the considered opinion that this is not a matter that should have been the subject of a rule 108 application in view of the amount owed and the avenues for settlement of the amount that were open and glaring. This is more the case, considering that there was no attempt to discuss the matter with a view to liquidating the amount in instalments. This resulted in the rule 108 application being launched where objectively viewed, the circumstances called for less drastic measures of execution of the debt, in line with the legislative solicitudes, which resulted in the enactment of the relevant provisions granting this court judicial oversight in such matters.

⁷ 2017 (3) NR 761 (HC) at p65 para [16].

Conclusion

[36] In view of the foregoing considerations, I am of the considered view that this is not a proper case in which to grant the application in terms of rule 108.

Order

[37] In the premises, I issue the following order:

1. The application for declaring the property described as Erf. 870 Hochland Park, Municipality of Windhoek, Registration K, is hereby refused.
2. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed counsel.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES

PLAINTIFF: Y. Campbell
Instructed by: Behrens & Pfeiffer

DEFENDANTS: J.P. Ravenscroft-Jones
Instructed by: Van Wyk Legal Practitioners