

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-CON-2018/03150

In the matter between:

RALPH PETER BEHRENS N. O.

APPLICANT

and

THE HOME DOCTOR CC

1ST RESPONDENT

WINFRIED VINZENZ LEITNER

2ND RESPONDENT

ULRIKE CHRISTEL BEATE LEITNER

3RD RESPONDENT

Neutral Citation: *Behrens N. O. v The Home Doctor CC* (HC-MD-CIV-ACT-CON-2018/03150) [2020] NAHCMD 557 (3 December 2020)

Coram: **MASUKU J:**

Heard: 18 September 2020

Delivered: **03 December 2020**

Flynote: Applications and Motions – Execution against Immovable Property: Rule 108 of the Court Rules – Surety Agreement entered into by 2nd respondent and applicant in respect of settlement agreement entered into between the applicant and 1st respondent – 2nd and 3rd respondent married in community of property – Provisions of s 7 and 8 of the Married Persons Equality Act applicable – Duty to ascertain marital status of debtor – Where the debtor agrees to stand as surety, for the debt of another, the onus is on

the creditor, before that surety signs the suretyship agreement, to ensure that questions relating firstly to the proposed surety's marital status and regime, are pertinently asked.

Summary: Before court is an application in terms of Rule 108 wherein the applicant seeks to have certain immovable property owned by the 2nd and 3rd respondent declared specially executable due to an outstanding balance of monies owed by the 1st respondent. After suing the 1st respondent for an outstanding amount owing to him, the applicant and 1st and 2nd respondent entered into a settlement agreement, which was made an order of court. In terms of this agreement, the 2nd respondent entered into a surety agreement, binding himself as surety and co-principal debtor with the 1st respondent for the due fulfilment of the 1st respondent's liabilities to the applicant. At the time of entering the latter, the 2nd respondent was married in community of property to the 3rd respondent, which marriage still subsists. The 3rd respondent was not requested to sign the suretyship agreement or to confirm the 2nd respondent's signature.

Held that: the legislature in terms of s 7 and 8 of the Married Persons Equality Act, No. 1 of 1996 (the Act) decreed that a party married in community of property, requires the written consent of the other spouse to bind him or herself, as surety.

Held further that: s 8(1)(a) of the Act, allows a transaction entered into without following the provisions of s 7 to be deemed to have been entered into with the consent of the other spouse if the other person does not know and cannot reasonably know that the transaction was entered into without the requisite consent.

Held further that: in terms of s 8(1)(a) of the Act, the onus is on the party who is a creditor to show that he or she does not know and cannot reasonably be expected to know that the transaction is being carried out without the consent necessary. The concept of reasonably knowing, ushers in the duty on the

creditor, to make the necessary enquiries where the issue of the marital regime is not apparent.

Held: that the court cannot close its eyes to the fact that the applicant is a legal practitioner, who would be expected to know the requirements of the law in this regard and would accordingly have made the necessary enquiries from the 2nd respondent before signing as surety.

Held that: that the fact that the 3rd respondent signed the suretyship agreement as her husband's witness does not in any way suggest that she gave her consent to the 2nd respondent to sign the said agreement as required by s 7 of the Act.

The application in terms of Rule 108 is therefore dismissed with costs.

ORDER

1. The application to declare the property described as Erf No. 1208 (A Portion of Consolidated Erf No. 2101) Klein Windhoek, situated in the Municipality of Windhoek Division "K" Khomas Region, measuring 1325 square metres, alternatively, Portion 20 (A Portion of Portion 6) of the Farm Emmerentia No. 380, situate in the Municipality of Windhoek, Registration "K", measuring 5, 0021 hectares, is hereby dismissed.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Submitted for determination before court is an application brought in terms of the provisions of rule 108 of the rules of this court. In the application, the applicant seeks an order declaring certain property described as Erf No. 1208 (A Portion of Consolidated Erf No. 1201) Klein Windhoek, in the Municipality of Windhoek, to be declared specially executable.

[2] In the alternative, the applicant prays for an order declaring Portion 20 (A Portion of Portion 6) of the Farm Emmerentia No. 380, situate in the Municipality of Windhoek, Registration "K", measuring 5,0021 hectares, specially executable.

[3] Needless to say, the application is opposed by the respondents. The bases of their opposition will be apparent as the judgment unfolds.

The parties

[4] The applicant, Mr. Ralph Peter Behrens, a legal practitioner of this court. He is cited in this matter in his official capacity as the executor in the estate of the Late Rüdiger Woortman, ('the deceased'), who in his lifetime, traded under the style, Afro Pumps & Metalcraft.

[5] The 1st respondent is The Home Doctor CC, a close corporation duly registered and incorporated in accordance with the Close Corporation laws of this Republic. Its principal place of business is situate at Farm Emmerentia, Windhoek. The 2nd respondent, on the other hand, is Mr. Winfred Vinzenz Leitner, a major adult male. He is further described as the sole member of the 1st respondent, with his address also being on Farm Emmerentia, Windhoek.

[6] The 2nd respondent, on the other hand, is Ms. Ulrike Christel Beate Leitner, a major female also resident on Farm Emmerentia. It is deposed by the applicant that both the 2nd and 3rd respondents, are a couple, married in community of property.

Background

[7] From the affidavits filed, it appears that the matter has a chequered history. Briefly narrated, it would appear that the 1st respondent contracted the services of the deceased. The latter was, however, not paid the balance due for the services he had rendered. Payment was then demanded from the 1st respondent by the applicant. In May 2018, the 1st respondent acknowledged liability and in the applicant's presence, undertook to make good the outstanding payment. This was not to be.

[8] The deceased thereafter instituted action proceedings for the recovery of the outstanding balance. The action was prosecuted under Case Number HC-MD-CIV-CON-2018/03150. The matter did not reach finality in court as the parties concluded a settlement agreement, which was recorded and made an order of court. In terms of the agreement, the 2nd respondent bound himself as surety and co-principal debtor with the 1st respondent for the due fulfilment of the 1st respondent's liabilities to the applicant.

[9] In the case of a breach of the obligations in terms of the settlement agreement by the 1st and 2nd respondent, continued the settlement agreement, the 2nd respondent would be liable jointly and severally with the 1st respondent to the applicant, the one paying and the other being absolved. It is the applicant's case that the 1st respondent did not, however, comply with his obligations in terms of the settlement agreement. It is the applicant's case that the respondents are liable to the applicant in the amount of N\$ 456,356.94, together with interest and costs.

[10] It would appear that some payments were effected on behalf of the respondents, thus leaving the amount owing at N\$416,747.23. A search by the applicant at the Deeds Registry yielded the information that there is property registered in the name of the 2nd and 3rd respondents. It later transpired that the said respondents are married in community of property, a fact the applicant states he did not know about previously.

[11] It is the applicant's case that in the light of the remaining debt, there is no other viable means for settling the debt, save exploiting the avenue provided by rule 108. It is the applicant's case that no other means have been taken by the respondents to settle the outstanding amount. The applicant accordingly claims that he has a right to execute against the 2nd and 3rd respondents' immovable properties by way of rule 108.

[12] What do the respondents say? The 2nd respondent filed an opposing affidavit on his and the 3rd respondent's behalf. In essence, the respondents admit the action having been instituted. They further admit the signing of an acknowledgement of debt and the settlement agreement being concluded *inter partes*. The 2nd respondent does, however appear to say in veiled terms that the deceased was not paid because he had presented work with defects.

[13] The 2nd respondent also deposes on oath that he was put under pressure to sign the settlement agreement and to also sign a suretyship agreement as a co-principal debtor with the 1st respondent. It is his case though that 3rd respondent, his wife, to whom he is married in community of property, was not requested to sign the suretyship agreement or to confirm the 2nd respondent's signature. The 2nd respondent, in this connection, lays much store on the provisions of the Married Persons Equality Act, No. 1 of 1966, ('the Act'), which require the 3rd respondent's consent in this regard. He contends that the settlement agreement is thus invalid as it contravenes the Act.

[14] That is not all. The 2nd respondent claims that he is not a legal practitioner and would not, in the circumstances, have been expected to know what the provisions of the Act in the situation require. The applicant, further contends the 2nd respondent, being a legal practitioner, on the other hand knew or ought to have known the said provisions. It is his case that the movable property belonging to the estate that was attached and sold in execution of the order in question, should not have been so attached and sold. He states that he and his wife are therefor entitled to recover damages

suffered by them as a result of the unlawful sale of the property of the joint estate at the behest of the applicant.

[15] The respondents also appear to take issue with the amount now being claimed by the applicant. They claim that the amount seems exorbitant considered in the context of the amount initially claimed, namely N\$173, 835,38. The respondents also claim that the amount stated to be costs is on the high side considering that the matter did not reach trial but was settled at mediation. The respondents also appear to take issue that some of the items attached and sold included personal goods owned by the couple, including household effects that should not have been sold.

[16] The respondents proceed to deny that there are no other reasonable means open to the settlement of the amount owing than to sell the property in question. The 2nd respondent attached a payment certificate issued to him by the Kavango East Regional Council in the amount of N\$1 067, 463, 20, in respect of a building project. It is the respondents' case that although the matter is before court and at summary judgment stage, he is advised that the outcome of the said proceedings should be awaited rather than selling the property of the respondents' joint estate.

[17] In reply, the applicant points out that the allegation that the costs are exorbitant loses sight of the fact that the costs payable by the respondents in terms of the settlement agreement, was on the punitive scale. It is the applicant's case also that the case had moved beyond summary judgment at the time that the settlement agreement was entered into, hence the amount of costs claimed. In this regard, the pleadings had been closed; discovery made and witnesses' statements exchanged.

[18] The applicant, in dealing with the issue of the alleged invalidity of the attachment and sale of the respondent's goods, takes the position that the respondents have not made any claim or counter-claim in relation to the alleged unlawfulness of the attachment and sale of property belonging to the joint estate of the 2nd and 3rd respondents. The applicant further denies that

the items attached and sold in execution, were exempt from attachment and sale when regard is had to the provisions of the High Court Act.

[19] Lastly, the applicant denies that the 2nd respondent's certificate on in relation to the work done for the Kavango Regional Council is enforceable. The applicant claims that the said certificate has been rescinded or liable to be so rescinded in any event. He further points out that the said Regional Council has a counter-claim against the 2nd respondent which, if granted, would extinguish the 2nd respondent's claim. Finally, the applicant pours serious doubt on the prospects of the 1st respondent succeeding in its claim against the Kavango Regional Council.

Observation

[20] It is thus safe to state that having regard to positions taken by the parties in this matter, it would seem that there are two major legal issues that are central to the proper disposal of this matter. These are, firstly, the implications of the provisions of the Act on this case and secondly, the propriety of granting the order sought in the light of the proceedings that have been instituted by the 2nd respondent against the Kavango East Regional Council.

[21] Counsel on both sides filed comprehensive heads of argument on behalf of their respective clients and also presented riveting oral argument on the date of hearing. The court is indebted to both Mr. Van Vuuren, for the applicant and the indefatigable Mr. Vaatz, for the respondents, for their assistance. I should, however say that although the parties dedicated their argument to wider issues, I am of the considered view that the court should rather deal with what are the core issues in dispute. Those have been narrated in the immediately preceding paragraph.

[22] In this regard, no time will be dedicated to the law generally applicable to applications in terms of rule 108, as there is no contest about that aspect. Nor, I may add, is any contestation that the provisions of the said rule have

been complied with by the applicant. The court will therefor confine itself to the narrow question whether there is any legal impediment in the granting of the order prayed for and whether there are no other reasonable means to satisfy the debt than to invoke the provisions of rule 108.

[23] In saying this, it must be made clear that both parties are *ad idem* that the property sought to be declared specially executable in this matter, is the not primary home of the 2nd and 3rd respondents. At page 92 of the record, the 2nd applicant, in answer to an allegation that the property sought to be declared executable is not the 2nd and 3rd respondents' primary home, agrees and states that their primary home is situate at Portion 20 of the Farm Emmerentia No. 380.

[24] It must be reiterated in this regard, that in the alternative, the applicant seeks an order declaring Farm Emmerentia, specially executable. This latter property, it must be mentioned, is the primary home of the 2nd and 3rd respondents. I pause to observe that both in the heads of argument and in oral argument, the question of the alternative relief, was not pursued by the applicant. The concept of what a 'primary home' is, was defined in *Futeni* as the 'only' home of the respondents, the deprivation of which may open them to the vicissitudes of the weather and the elements.¹

Determination

[25] As indicated earlier, there are two principal questions to be determined. I will deal with each of them in turn. The first relates to the implications of the provisions of the Married Persons Equality Act, No. 1 of 1996, ('the Act'). It is to that question that I turn presently.

The Act

[26] Mr. Vaatz, in his able argument, submitted that the Act, was passed by the legislature to protect females who are married in community of property. It

¹ *Futeni Collections (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 826 (HC), para 36 and 37.

was his argument that the women married in community of property should be treated equally to their husbands in the administration of the joint estate. It was his further submission that in the instant case, the 3rd respondent did not sign the suretyship agreement and that she was not a partner or member of the 1st respondent. It was his submission that the injustice in this case to the 3rd respondent, is manifest because she stood to lose property as a result not of debts by her husband but by the close corporation of which she is not even a member.

[27] It was thus Mr. Vaatz's argument that the provisions of s. 7 of the Act, requiring a spouse to consent applies in this matter. It was his further submission that the consent is to be in writing, from a reading of the general scheme of the Act. In this regard, he further submitted, where an outsider deals with one of the parties to a marriage in community of property, that party should make the necessary enquiries about the marital regime of the parties in order to ascertain whether consent of the other spouse, is required.

[28] Lastly, the respondents submit that there is no question that the 3rd respondent did not give her consent to her husband to whom she is married in community of property, to sign the suretyship agreement. For that reason, contends Mr. Vaatz, the application should be dismissed for the non-compliance with s 7 of the Act.

[29] The applicant, on the other hand, submitted that where a creditor is aware that a debtor is married in community of property at the time of the conclusion of the any agreement to which s. 7 of the Act applies, regarding consent of the other party to the marriage, the said agreement may be set aside. Where, however, the creditor is not aware of the marital status and regime of the debtor, it is for the debtor to disclose that information to the creditor. This, it was argued, the 2nd respondent did not do.

[30] The said provision records the following:

'7. (1) Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse –

(a)

*

(h) bind himself as surety:

(2) The consent required under subsection (1) for the performance of an act contemplated in that subsection may be given either orally or in writing, but the consent required for the performance of –

(a) any such act which entails the registration, execution or attestation of a deed or other document in a deed registry; or

(b) an act contemplated in paragraph (h) of that subsection

shall, in respect of each separate performance of such act, be given in writing only.'

[31] It would appear to me, from a reading of the provisions quoted above, that the legislature decreed that a party married in community of property, requires the written consent of the other spouse to bind him or herself, as surety. There are other actions, however, where consent may be given orally but this clearly does not apply in instances where the question of a party to a marriage in community of property signing a suretyship agreement is concerned, arises. In that case, the consent of the other spouse must be obtained in writing.

[32] Section 8, entitled, 'Consequences of act performed without required consent', reads as follows:

'(1) If a spouse married in community of property enters into a transaction with another person without the consent required by the provisions of section 7, or without leave granted by a competent court in terms of section 10 or contrary to an order of court in terms of section 11, and –

(a) that other person does not know and cannot reasonably know that the transaction is being entered into without such consent or leave or in

contravention of that order, as the case may be, such transaction shall be deemed to have entered into with the required consent or leave while the power concerned of the spouse has not been suspended, as the case may be;

(b) that spouse knows or ought reasonably to know that he or she will probably not obtain such consent or leave or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, in adjustment of that transaction shall be effected in favour of the other spouse –

- (i) upon division of the joint estate; or
- (ii) upon demand of the other spouse at any time during the subsistence of the marriage.’

[33] Another provision that would appear to create an exception and permit a spouse, although married in community of property to alienate property that may form part of the joint estate, is to be found in s 7(5) of the Act. That section reads as follows:

‘A spouse married in community of property may, in the ordinary course of his or her profession, trade, occupation or business perform any of the acts referred to in paragraphs (b), (c), (f) and (g) of subsection (1) without the consent of the other spouse as required by that subsection’.

[34] It would appear to me that the above provision, i.e. s 8(1)(a), allows a transaction entered into without following the provisions of s 7 to be deemed to have been entered into with the consent of the other spouse if the other person does not know and cannot reasonably know that the transaction was entered into without the requisite consent. The question is whether this provision applies in the instant case. In other words, can the transaction in this case, be properly deemed to have been entered into with the consent of the 3rd respondent?

[35] Read properly and together, it would appear to me that both sections, i.e., ss7(5) and 8(1)(a) of the Act, create an exception and permit, in those

limited circumstances, the alienation of property which forms part of the joint estate without the consent of the other spouse.

[36] Returning to s 8(1)(a), I am of the considered view that for the deeming provision to be inferred, the key word to be satisfied in this regard is whether that other person does not know and cannot reasonably know that transaction in question has been entered into without the necessary consent. Two words, which must be considered conjunctively, leap out, namely, 'does not know and cannot reasonably know' that the transaction is being carried out without the necessary consent.

[37] This particular provision, it would seem to me, places the onus on the party who is a creditor. He or she must show that he or she does not know and cannot reasonably be expected to know that the transaction is being carried out without the consent necessary. The concept of reasonably knowing, in my view ushers in the duty on the creditor, to make the necessary enquiries. It is upon making enquiries that yield no positive information that the creditor can be said not to have reasonably known that the consent had not been obtained. (Emphasis added).

[38] I am accordingly of the considered view that where as in this case a debtor agrees to stand as surety, for the debt of another, the onus is on the creditor, before that surety signs the suretyship agreement, to ensure that questions relating firstly to the proposed surety's marital status and regime, are pertinently asked. If the answer returned is to the effect that the proposed surety is married in community of property, the creditor should then demand a written consent of the proposed surety's spouse.

[39] In the instant case, Mr. Van Vuuren argued that 'where a creditor is unaware of the marital status and regime, it is submitted, it is for the married person to disclose the same.' I am not in agreement with that proposition for the reason that s 8(1)(a), appears, in my view, to place the onus to know or at least enquire, on the said creditor. As a creditor, the latter should ordinarily know what the demands of the law relating to suretyship agreements and the

need to obtain consent are. In the instant case, the court cannot close its eyes to the fact that the applicant is a legal practitioner, who would be expected to know the requirements of the law in this regard.

[40] The duty to then enquire from the surety as to the marital status and regime cannot be said to be unduly onerous. The consequences of signing a suretyship agreement without consent has serious consequences to the creditor, hence it is my view that the latter bears the onus to make the enquiries to place him or her in a position to know the exact status which will affect the validity of the suretyship agreement in case the parties are married in community of property after all.

[41] I am of the considered view that it would be incorrect and unjust for the estate property to be alienated in this matter as a result of a suretyship agreement that the 2nd respondent signed without the consent of the 3rd respondent. It is thus clear that the policy reason behind the promulgation of the Act, is in part, to protect estate property from spouses, including spendthrift spouses, who commit themselves to debt and then seek to have estate property, in which both they and their spouses have an interest, becomes liable to sale for payment of individual debts.

[42] It is apparent that the 3rd respondent signed the settlement agreement in terms of which the property is now being sought to be declared executable. It is not in dispute that the 3rd respondent signed the document as a witness but that does not translate into her having given her spouse consent to sign the suretyship agreement. The consent to the signing as a suretyship agreement by a spouse and signing a settlement agreement as a witness to one's spouse, is a different kettle of fish altogether.

[43] Because the order sought is predicated on the settlement agreement in which the 2nd respondent agreed to stand as the 1st respondent's surety for the due and timeous performance of its obligations to the applicant, I am of the considered view that it would not be proper to sanction the order declaring the property executable in the circumstances. This would give effect to the

very harm and solicitudes that actuated and drove the legislature to enact the provisions of the Act discussed above.

[44] This issue has found comment in the judgment of Usiku J in *Standard Bank Namibia Limited v Groenewald*². The learned Judge reasoned the matter as follows at para 41:

‘I am of the view that the prohibition enacted by s7(2)(b) is intended to protect both spouses against unilateral conduct of either of them. Either spouse is entitled to assert his/her interest in the joint estate against a creditor seeking to enforce an otherwise prohibited act, unless the creditor can bring the impugned act within the scope of the exceptions provided in s7(5) or s8(1)(a). Should the creditor be unable to bring the challenged act within the scope of those exceptions, then the prohibited act should be a nullity and unenforceable.’

[45] I am in agreement with the analysis and conclusion reached by the learned Judge in this matter. This leads me to the conclusion that properly considered, there are no circumstances permitted by the Act, which allow the alienation of estate property in the instant case. For the reason that the order seeking to declare the property specially executable finds its life and being in the settlement agreement, I am of the considered view that the application should be dismissed. To not do so, would be tantamount to this court sanctioning what the legislature has prohibited and for good reason.

[46] I should pertinently add that the conclusion above, in any event, equally affects the order sought by the applicant in the alternative as recorded in the earlier parts of this judgment. It would probably be more difficult to grant the alternative order, in view of the fact that it constitutes the 2nd and 3rd respondents’ primary home.

[47] In view of the conclusion reached above, I do not find it necessary, in the circumstances, to deal with the other issues that arise, including the

²(I 633/2016) [2019] NAHCMD 326 (06 September 2020).

question whether there are other means open to the applicant to have the debt satisfied than declaring the property in question, specially executable.

Conclusion

[48] In the premises, I am of the considered view that the failure to observe the provisions of the Act in this matter relating to the signing of a suretyship agreement without the consent of the 3rd respondent renders it improper for the court to declare the property in question, specially executable. The application must, for that reason, fail.

Costs

[49] The ordinary rule that applies in civil proceedings, is that costs will normally follow the event. In the present proceedings, it is clear that the respondents have succeeded in their opposition. There is no reason, in my considered opinion, why the applicant should not, in view of the outcome, not pay the costs. Costs are accordingly awarded in the respondents' favour.

Order

[50] The conclusion reached above, leads to the following order presenting itself as the appropriate one in the circumstances, namely:

1. The application to declare the property described as Erf No. 1208 (A Portion of Consolidated Erf No. 2101) Klein Windhoek, situated in the Municipality of Windhoek Division "K" Khomas Region, measuring 1325 square metres, alternatively, Portion 20 (A Portion of Portion 6) of the Farm Emmerentia No. 380, situate in the Municipality of Windhoek, Registration "K", measuring 5, 0021 hectares, is hereby dismissed.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge

APPEARANCES:

APPLICANT A. S. Van Vuuren
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RESPONDENT A. Vaatz
 Of Andreas Vaatz & Partners, Windhoek