

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

Case Title: NEDBANK NAMIBIA LIMITED APPLICANT and MILDRED NONTOBeko JANTJIES RESPONDENT	Case No: HC-MD-CIV-ACT-CON-2019/05236 (INT-HC-DECIMMPRO- 2023/00144)
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 14 July 2023
	Delivered on: 4 August 2023
Neutral citation: <i>Nedbank Namibia Ltd v Jantjies</i> (INT-HC-DECIMMPRO-2023/00144) [2023] NAHCMD 465 (4 August 2023)	
Results on merits: Merits not considered.	
The order: <ol style="list-style-type: none">1. The application in terms of rule 108 is struck from the roll with costs.2. Such costs to include the cost of one instructing and one instructed counsel.	
Reasons for orders:	

PRINSLOO J:

[1] This is an application in terms of rule 108 of the Rules of Court.

[2] The applicant Nedbank Namibia Ltd obtained judgment against the respondent Mildred Nontobeko Jantjies on 12 June 2020 in the amount of N\$130 843.22 and N\$573 627.13 plus interest at the rate of 16.4%, calculated daily, charged monthly in arrears and compounded from 24 October 2019 to date of final payment.

[3] In terms of rule 104(1) the applicant caused a writ of execution to be issued by the office of the registrar on 22 June 2020. Personal service of the writ of execution could not be effected on the respondent at her chosen address as she relocated to Katima Mulilo. The Deputy Sheriff, by means of a return of service dated 16 July 2021, reported that there was no sufficient movables located to satisfy the writ of execution.

[4] On 18 March 2022, the Deputy Sheriff attended to the respondent's Katima Mulilo address and reported similarly, that there was not sufficient movable property to satisfy the writ of execution despite a diligent search.

[5] In each of the two instances, the Deputy Sheriff issued a nulla bona return.

[6] On 8 March 2023 the applicant obtained leave from this court to serve the current application on the respondent by way of substituted service by publication in two newspapers.

The application

[7] The applicant is seeking an order declaring the immovable property situated at Erf 275, Gobabis, Omaheke Region executable.

[8] The respondent is opposing the application. As points in limine, the respondent firstly avers that by the applicant's own admission, there was non-compliance with the provisions of rule 108(3) by the Deputy Sheriff. As a result of the non-compliance, the respondent submits that the current application is premature as compliance with rule 108(1)(a) is a precondition for the declaratory relief sought under rule 108. In the alternative, the respondent pleads that the

return as contemplated in rule 108(1)(a) is dated 16 July 2021 and barred by the time provision in rule 108(4).

[9] Secondly, the respondent pleaded that there was non-compliance with rule 108(2)(b) as the property in question is leased out to a third party and the personal service as contemplated in rule 108(2)(b) was not effected on the third party lessee. In this regard, the respondent attached a confirmatory affidavit of the lessee Ms Louw to the record.

Arguments advanced

On behalf of the applicant

[10] Ms Ambunda-Nashilundo argued in respect of the points raised in limine as follows:

a) *Non-compliance with rule 108(3) and subsequently rule 108(1)(a)*: that there is no merit in the argument because the respondent does not contest the authenticity of the returns of service nor does she contend that she was not served with the process. The respondent also does not allege prejudice nor is any prejudice apparent as a result of the Deputy Sheriff not having filed the return of service with the registrar's office. Ms Ambunda-Nashilundo argued that since the 30 day time-bar is based on compliance with rule 108(3) the fact that the Deputy Sheriff did not file the returns of service should not halt the proceedings for want of compliance by the Deputy Sheriff.

b) *Non-compliance with rule 108(2)(b)*: Ms Ambunda-Nashilundo submitted that the service of the lessee would only be necessary where the property involved is the primary home of the debtor. Counsel further submitted that the immovable property in question is not the primary home of the respondent and the applicant is not obliged to serve the application on the lessee. It was further submitted that the lessee is aware of the proceedings as is evident from the confirmatory affidavit.

On behalf of the respondent

[11] Mr Diedericks argued that the rule 108(1)(b) application implicates the jurisdiction of this court to declare an immovable property specially executable. This power afforded to the court is subject to an applicant's compliance with rule 108(2). The latter sub-rule caters for two categories of persons, i.e. a debtor having the property as a primary residence, and a tenant

using the property as his / her home.

[12] In the answering papers of the respondent filed on 16 June 2023, she made it clear that there are tenants in the immovable property in question and provided the court with a confirmatory affidavit. However, despite being privy to this information the applicant, instead of withdrawing the current application and causing service on the tenant, forged ahead with the application contrary to rule 108(2)(b).

[13] Mr Diedericks further submitted that the rule 108(1)(a) return, albeit not filed by the Deputy Sheriff but by the applicant in support of the application for leave to serve by substituted service, evidences the following –

(a) they are returns dated July 2021 and March 2022, and

(b) was filed with this court by the applicant on 23 February 2023.

[14] Mr Diederick contended that the issue is not the Deputy Sheriff's non-compliance with rule 108(3). The issue is the fact that the application is time-barred and no condonation was sought by the applicant for non-compliance with rule 108(4). Accordingly, rule 54(2)(a), read with rule 55(1), finds application.

[15] In respect of the applicant's contention that 'the tenant is before court' for purposes of rule 108(2)(b) because she filed a confirmatory affidavit is a conflation of the dual requirement of the rule as both the judgment debtor and tenant, where applicable, have an unqualified right to service of process. The nulla bona dating back to 2020 of the immovable property is no excuse for not serving the tenant at the subject property in 2023.

[16] The court was referred to *Standard Bank Namibia Limited v Bock*¹ wherein the court made it clear that rule 108(2) contemplates two classes of persons who are entitled to personal notice of an intended application for declaring the property executable. These persons are entitled to make representations to the court in their own right.

[17] As a result, Mr Diedericks is of the view that the application is defective for want of compliance with rule 108(2)(b) and stands to be struck. Alternatively, the application is time-barred for want of compliance with rule 108(4) and stands to be dismissed.

¹ *Standard Bank Namibia Limited v Bock* (HC-MD-CIV-ACT-CON-2018/04032) [2021] NAHCMD 78 (25 February 2021) at para 24

Discussion

[18] I do not intend to engage in a long discussion on the principles of rule 108 as there have been many judgments produced by this court in this regard.

[19] It is a fact that the Deputy Sheriff did not comply with the provisions of rule 108(4) and I agree that the proceedings in terms of rule 108 cannot be halted because of the want of compliance by the Deputy Sheriff. However, I do not deem it necessary to decide this issue for the purposes of this ruling.

[20] In respect of the issue raised in terms of rule 108(2)(b) and the failure to serve the application on the lessee of the property in question. The rule pertinently 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

–
(a) the execution creditor has by means of personal service effected by the deputy sheriff given notice on Form 24 to the execution debtor 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 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.’ (my emphasis)

[21] I do not fully understand Ms Ambunda-Nashilundo’s argument when she submitted that the immovable property in question is not the primary home of the respondent and the applicant is not obliged to serve the application on the lessee. This in my view is a contradiction in terms because when a judgment debtor leases out his or her property it would not be the judgment debtor’s primary home. This would imply that there would never be an obligation on the judgment creditor to comply with rule 108(2)(b).

[22] One should not lose sight of the objective of service of the application. Service by the Deputy Sheriff is not only to inform the party of the application but also to explain the nature of the application, and I understand the rule to allow the tenant to make representations to the court in his or her own right.

[23] I do not agree that the lessee is before the court because of the confirmatory affidavit that

was filed.

[24] In my view, the application stands to be struck for lack of compliance with rule 108(2)(b).

Order

[25] As a result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Second Respondent
L Ambunda-Nashilundu Instructed by Engling, Stritter and Partners, Windhoek	J Diedericks Instructed by Africa Jantjies and Associates Windhoek