

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING ON RULE 108 AND RESCISSION APPLICATION**

Case no.: HC-MD-CIV-ACT-CON-2021/03649

In the matter between:

**STANDARD BANK NAMIBIA LIMITED**

**APPLICANT**

and

**MONARCH CAR SALES AND PANEL BEATING CC**

**FIRST RESPONDENT**

**PAUL EDWARD DOYLE**

**SECOND RESPONDENT**

**COMMUNARD TWENTY THREE CC**

**THIRD RESPONDENT**

**Neutral citation:** *Standard Bank Namibia Ltd v Monarch Car Sales and Panel Beating CC* (HC-MD-CIV-ACT-CON-2021/03649) [2023] NAHCMD 492 (10 August 2023)

**Coram:** SIBEYA J

**Heard:** 21 July 2023

**Delivered:** 10 August 2023

**Flynote:** Civil procedure – Rules of Court – Rescission of default judgment – Rule 108 application – Service of summons where a party moved from the *domicilium citandi et executandi* address and failed to inform the applicant thereof – Sale in execution where the property is not a primary home – Whether settlement negotiations suspend the filing of pleadings.

**Summary:** The matter before court for determination involves two applications, namely: the application brought in terms of rule 108 of the High Court Rules and a rescission application of the default judgment on which the rule 108 application finds its strength.

Initially this matter served before court for an application by the applicant to declare immovable properties specially executable in terms of rule 108, subsequent to a default judgment being granted against the respondents. While the application was due to be heard, the respondents filed an application for rescission of the aforesaid default judgment. The rule 108 application is opposed by the respondents while the applicant on the other hand opposes the rescission application. The said applications were heard jointly.

The respondents raised the issue of lack of proper service of processes as well as the fact that there were ongoing settlement negotiations between the parties.

*Held:* where a party has chosen a *domicilium* for purposes of service and such party is served on the said address, even though the party does not regard that address as his or her *domicilium* anymore, it remains proper service for as long as such address remains his or her unchanged chosen *domicilium*.

*Held that:* settlement negotiations do not suspend the filing of pleadings.

*Held further that:* the property in question is not a primary home and it is property used as a warehouse for panel beating and spray painting of vehicles, nevertheless, the court in exercising its judicial oversight already postponed the matter for months to afford the

respondents time to service the debt owed to the applicant without success. No satisfactory reasons were presented why the property should not be declared specially executable.

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**ORDER**

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1. The respondents' application for rescission of the default judgment, filed on 21 April 2023 is dismissed.
2. The following immovable properties:

CERTAIN:           ERF 108 (A PORTION OF ERF NO. 95) LAFRENZ  
SITUATE:           IN THE MUNICIPALITY OF WINDHOEK  
                          REGISTRATION DIVISION "K", KHOMAS REGION  
MEASURING:       912 (NINE ONE TWO) SQUARE METERS  
HELD BY:           DEED OF TRANSFER NO T 7371/2006  
SUBJECT:           TO THE CONDITIONS CONTAINED THEREIN

AND

CERTAIN:           ERF 109 (A PORTION OF ERF NO. 95) LAFRENZ  
SITUATE:           IN THE MUNICIPALITY OF WINDHOEK  
                          REGISTRATION DIVISION "K", KHOMAS REGION  
MEASURING:       1161 (ONE ONE SIX ONE) SQUARE METERS  
HELD BY:           DEED OF TRANSFER NO T 7371/2006  
SUBJECT:           TO THE CONDITIONS CONTAINED THEREIN

are declared specially executable.

3. The respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit regarding the rule 108 application and the applicant's costs for opposing the rescission application on a party-party scale.
4. The matter is regarded as finalised and removed from the roll.

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## RULING

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SIBEYA J:

### Introduction

[1] The court is faced with a two-in-one application. One such application is an application brought in terms of rule 108 of the High Court Rules and the other is an application for rescission of the default judgment on which the rule 108 application finds its strength.

[2] Initially this matter served before court for an application by the applicant to declare immovable properties specially executable in terms of rule 108, subsequent to a default judgment being granted against the respondents. While the application was due to be heard, the respondents filed an application for rescission of the default judgment, the basis on which the rule 108 application stems. The rule 108 application is opposed by the respondents while the applicant on the other hand opposes the rescission application. The said applications were heard jointly.

### Parties and their representation

[3] The applicant is Standard Bank of Namibia Limited, a banking institution with limited liability duly registered and incorporated according to the banking laws and company laws of the Republic. The applicant shall be referred to as 'the bank'.

[4] The first respondent is Monarch Car Sales and Panel Beating CC, a close corporation registered and incorporated in terms of the Close Corporations Act 26 of 1998. The first respondent shall be referred to as 'Monarch'.

[5] The second respondent is Mr Paul Edward Doyle, an adult male businessman. He shall be referred to as 'Mr Dolye'.

[6] The third respondent is Communard Twenty Three CC, a close corporation duly registered and incorporated in terms of the Close Corporations Act with its chosen *domicilium citandi et executandi* at Erf 108 and 109 Lafrenz, Windhoek. The third respondent shall be referred to as 'Communard'.

[7] Where reference is made to the first, second and third respondents jointly, they shall be referred to as 'the respondents', however, where reference is made to both the applicant and the respondents, they shall be referred to as, 'the parties'.

[8] Ms Omoregie appears for the applicant, while Mr Doyle appears in person for the respondents.

### Background

[9] On 24 September 2021, the applicant instituted action proceedings against the respondents for a claim sound in money for outstanding loan repayments following a loan that was advanced to the respondents. The loan agreement for the amount of N\$ 3,5 million was concluded on 20 August 2019, between the bank and Monarch duly represented by Mr Doyle. Monarch failed to effect payment and by 18 February 2021, the outstanding amount was N\$ 3 776 857,88.

[10] Mr Doyle bound himself as surety and co-principal debtor, in *solidium* with Monarch for Monarch's indebtedness to the bank.

[11] Communard registered a mortgage bond for Monarch's indebtedness to the bank for whatever cause arising including future and contingent indebtedness. Communard is the holder of a First Mortgage Bond, over immovable properties Erf 108 and 109, Lafrenz, Windhoek. The said mortgage bond was registered as security by Communard for Monarch's existing, future or contingent indebtedness to the bank.

[12] The combined summons were served on the respondents at their chosen *domicilium citandi et executandi* or registered address. The respondents never defended the action, as a result, the matter was set down for an application for default judgment. On 16 November 2021, the court, in chambers and in the absence of the parties, granted a default judgment in favour of the applicant against the respondents, jointly and severally, the one paying the other to be absolved. The applicant, during November 2021, obtained the writ of execution against movable properties of the respondents.

[13] An attempt to execute the judgment on the movable properties of Communard was made on 22 April 2022 and the Deputy Sheriff filed a *nulla bona* return for there being no movable properties to satisfy the judgment debt. A rule 108 application to declare the bonded properties, Erf 108 and 109, specially executable was served on Communard on 14 July 2022 and the rule 108 application subsequently launched.

[14] On 11 November 2022, the respondents opposed the rule 108 application. The parties were ordered to file answering and replying affidavits and the matter was postponed to 15 February 2023 for hearing of the application. The hearing was rescheduled to 9 March 2023. On 9 March 2023, Mr Doyle, acting for the respondents, requested a postponement of the matter for about three months in order to service the debt. As a result, the matter was postponed to 29 June 2023 for hearing.

[15] In the interim, on 21 April 2023, shy of just two months after seeking a postponement to service the debt, the respondents filed an application for rescission of the judgment delivered on 16 November 2021. I, therefore, consider it prudent to

address the application for rescission of judgment first as its success has the capacity to dispose the rule 108 application.

The rescission application

[16] In the application for rescission of judgment, the respondents seek the following relief:

- (a) Condoning the late filing of the application for rescission of judgment;
- (b) Rescinding the judgment of 16 November 2021 and staying its execution;
- (c) Costs of suit.

[17] Mr Doyle deposed to the founding affidavit in support of the rescission application and stated that he is a sole member of both Monarch and Communard. He further stated that he had on numerous occasions engaged the bank on ways to service the outstanding debt. He says that the bank was aware of his plans to sell Erf 108 and 109 (the property) to a private buyer in order to pay the debt. He further states he obtained the property about 21 years prior and was trading on the property as a panel beater and spray painter. Mr Doyle states that during October 2021, he found a purchaser, a certain Mr Akinin, who intended to purchase the property for N\$ 6,5 million and who is also a client of the bank. This purchase and sale of the property did not materialise. He further alleges that the impact of COVID-19 took its toll on him.

[18] Mr Doyle stated in the founding affidavit that:

‘14. It is not a matter that I do not owe the Respondent, but I say that I would have serviced my debt and the Respondent would not have to take legal action against me.’

[19] Mr Doyle complains that the bank rushed to obtain default judgment while the parties were engaged in negotiations on how the debt could be serviced.

[20] Mr Doyle further stated that the returns of service of the summons reveal that Monarch was served at c/o P M Strauss, 1191 Nelson Mandela Avenue which was the address of Conradie & Damaseb Legal Practitioners, and the legal practitioners moved from the address in 2012. The return of service of summons in respect of Mr Doyle provides that service was effected on 7 October 2021 at 95 Flamink Street, Hochland Park. Mr Doyle stated that he resided at the said address, but sold the property in 2019 and never resided there ever since. Mr Doyle further stated that the return of service regarding Communard shows that summons were served on the property on 7 October 2021. He deposed further that he resided in South Africa from February 2021 in search for better work opportunities.

[21] Mr Doyle stated further that he learnt of the default judgment for the first time on 19 June 2022. He states further that, as a layperson, he thought he defended the main claim, but only came to realise later that he was opposing the rule 108 application as the judgment was already granted in the main action. He further states that he only managed to secure the amount of N\$ 5000 in April 2023 in order to launch the rescission application. He stated further that he commenced to work on the rescission application on 11 April 2023.

[22] Mr Doyle argued that the delay to file the rescission application, if found to exist, should be condoned for reasons stated above and the judgement of 16 November 2021 be rescinded.

[23] The bank contends that the rescission application is brought in terms of rule 16. Rule 16 requires that a rescission application must be brought within 20 days of becoming aware of the default judgment. In *casu*, the bank contends that the respondents do not comply with the 20 day rule and their application for condonation do not provide a reasonable explanation and reasonable prospects of success.

[24] Ms Omoregie argued that the fact that Mr Doyle is a lay litigant does not exempt him from complying with the rules of court. She argued that lay litigants, just like legal



practitioners, are obliged to comply with the rules of court. She referred to the Supreme Court decision of *Namrights Inc v Government of the Namibia and Others*,<sup>1</sup> where it was remarked at para 17 that: “the rules apply equally to all”.

[25] The bank states that, in respect of the summons, Monarch chose as its *domicilium citandi et executandi*, the property that is mortgaged, Erf 108 and 109, Lafrenz. The combined summons together with the particulars of claim were served at Monarch’s chosen *domicilium citandi et executandi*. Under para 20 of the Deed of Suretyship, Mr Doyle chose Flamink Street, Hochland Park as his *domicilium citandi et executandi* and that is where the summons were served. Ms Omoregie argued that, the fact that Mr Doyle is said to have sold his residential property subtracts nothing from the said service as he did not inform the bank of the change in the address. In respect of service on Communard, the combined summons were served by affixing same to the main gate of the premises of its registered address.

[26] Ms Omoregie argued that the rescission application together with the condonation application should fail as the respondents were duty-bound to inform the bank of any change in the address of service which the respondents failed to do.

### Analysis

#### *Service*

[27] The respondents raised service as an issue. According to Mr Doyle he was unaware of the service of the summons on him and the other respondents. The respondents were properly served on their chosen *domicilium* addresses and the respondents cannot escape that fact.

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<sup>1</sup> *Namrights Inc v Government of Namibia and Others* (SA 87/2019) [2023] NASC 12 (28 April 2023) para 17.

[28] In *First National Bank of Namibia v Nan Von Schach*,<sup>2</sup> Ueitele J upheld a decision of *MLN Extreme Safety Wear CC v Rockstar Footwear (Pty) Ltd*<sup>3</sup> and stated the following:

[34] ... the defendant did not enter an appearance to defend after summons. The service of summons was effected by affixing it on the principal door at the *domicilium citandi* that was chosen by applicant himself. Applicant however, contended that summons were served at a place which he had left three months prior to the service of summons. He, therefore, did not have knowledge of it. The Court held that the correct legal position is that it is proper service if it is effected at the previous *domicilium citandi* even where change in *domicilium* was not brought to the plaintiff's attention.'

[29] From the above excerpt, it is clear that where a party has chosen a *domicilium* for purposes of service and such party is served on the said address, even though the party does not regard that address as his or her *domicilium* anymore, it remains proper service where the change in address was not communicated to the other party. With that being said, the respondents' argument of not being aware of the summons constitutes a non-issue as the respondents were duty-bound to inform the applicant of any change in their *domicilium* address. I will for that reason not labour on this subject any further.

#### *Settlement negotiations vs suspension of pleadings*

[30] In a recent judgment<sup>4</sup>, a passage was cited from *Bergmann v Commercial Bank of Namibia Ltd*<sup>5</sup> where the following was stated:

'It often happens that, whilst pleadings are being exchanged or whilst execution procedures are under way, the litigating parties attempt to negotiate a settlement of their

<sup>2</sup> *First National Bank of Namibia v Nan Von Schach* (HC-MD-CIV-ACT-CON-2020/02921) [2021] NAHCMD 493 (26 October 2021).

<sup>3</sup> *MLN Extreme Safety Wear CC v Rockstar Footwear (Pty) Ltd* (I351/2013) [2014] NAHCMD 49 (14 February 2014).

<sup>4</sup> *Naruseb v Standard Bank of Namibia Limited and Another* (HC-MD-CIV-MOT-GEN-2023/00136) [2023] NAHCMD 156 (26 March 2023) para 23.

<sup>5</sup> *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 (HC) at 50.

disputes or some arrangement regarding payment of the judgment debt in instalments. The existence of such negotiations does not *ipso facto* suspend the further exchange of pleadings or stay the execution proceedings. That will only be the effect if there is an express or implied agreement between the parties to that effect.'

[31] The court in the *Bergmann* matter made it very clear that it is settled law that the settlement negotiations do not suspend the filing of pleadings. The fact that Mr Doyle mentions that there were settlement negotiations and that the applicant proceeded with the default judgment even though the parties were in the process of settlement negotiations does not clothe the respondents with the authority or permission not to file pleadings. Simply put settlement negotiations do not stay or suspend the filing of pleadings unless agreed to by the parties and ordered by the court.

#### *Primary residence*

[32] In terms of Rule 108 (2):

'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; and

(c) the court so orders, having considered all the relevant circumstances with specific reference to less drastic measures than 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’.

[33] Namibian judicial oversight in rule 108 applications takes the form that, if a property is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. Although the onus rests on the judgment debtor to present the relevant evidence of less drastic measures, where the judgment debtor fails to do so, it does not relieve the court of its obligation to inquire into the availability of less drastic alternatives.<sup>6</sup>

[34] In the matter before court, the property in question is not a primary home and it is used as a warehouse for panel beating and spray painting of vehicles. The court in exercising its judicial oversight already postponed the matter for a period of three months, and on the respondents’ request, to allow the respondents to service the debt owed to the bank, even though the property is not a primary home. No justifiable reasons were presented to the court in order for the property not to be declared specially executable.

### Conclusion

[35] The respondents failed to satisfy the court that less drastic alternatives exist to avoid a sale in execution. The respondents further failed to establish merit to rescind the default judgment. The concessions made by Mr Doyle that the respondents acknowledge their indebtedness to the bank, and the fact that the respondents were served with summons at their chosen domicilium, are reasons enough to demonstrate that there is no basis for the court to rescind the default judgment.

### Order

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<sup>6</sup> *Kisilipile v First National Bank of Namibia Limited* (SA 65 of 2019) [2021] NASC 52 (25 August 2021) para 18.

[20] In the result, it is ordered that:

1. The respondents' application for rescission of the default judgment, filed on 21 April 2023 is dismissed.
2. The following immovable properties:

CERTAIN: ERF 108 (A PORTION OF ERF NO. 95) LAFRENZ  
SITUATE: IN THE MUNICIPALITY OF WINDHOEK  
REGISTRATION DIVISION "K", KHOMAS REGION  
MEASURING: 912 (NINE ONE TWO) SQUARE METERS  
HELD BY: DEED OF TRANSFER NO T 7371/2006  
SUBJECT: TO THE CONDITIONS CONTAINED THEREIN

AND

CERTAIN: ERF 109 (A PORTION OF ERF NO. 95) LAFRENZ  
SITUATE: IN THE MUNICIPALITY OF WINDHOEK  
REGISTRATION DIVISION "K", KHOMAS REGION  
MEASURING: 1161 (ONE ONE SIX ONE) SQUARE METERS  
HELD BY: DEED OF TRANSFER NO T 7371/2006  
SUBJECT: TO THE CONDITIONS CONTAINED THEREIN

are declared specially executable.

3. The respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit regarding the rule 108 application and the applicant's costs for opposing the rescission application on a party party scale.
4. The matter is regarded as finalised and removed from the roll.

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O S Sibeya  
Judge

## APPEARANCES

APPLICANT: E Omoregie  
LorentzAngula Inc,  
Windhoek

RESPONDENTS: P E Doyle  
In person