

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REASONS

HC-MD-CIV-APP-GEN-2023/00596

In the matter between:

**ELSE NDAPANDULA CHEN**

**1<sup>ST</sup> APPLICANT**

**YU-KUN CHEN**

**2<sup>ND</sup> APPLICANT**

and

**BODY CORPORATE NELSONS COURT**

**1<sup>ST</sup> RESPONDENT**

**THE MANAGING AGENT OF NELSONS COURT**

**2<sup>ND</sup> RESPONDENT**

**DEPUTY SHERIFF WINDHOEK**

**3<sup>RD</sup> RESPONDENT**

**REGISTRAR OF DEEDS**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Chen v Body Corporate Nelsons Court* (HC-MD-CIV-APP-GEN-2023/00596) [2024] NAHCMD 28 (1 February 2024)

**CORAM:** MASUKU J

**Heard:** 22 December 2023

**Delivered:** 1 February 2024

**Flynote:** Civil Procedure – Urgent application, with interim interdict – Requirements for granting interim interdict – Sale of immovable property and the need to follow the provisions of rule 108 discussed – Costs of suit – Whether it is

proper to mulct a party in costs when it has not opposed the matter in circumstances where the applicant sought costs against a respondent who opposes the matter.

**Summary:** The applicants are a married couple. They are involved in religious activity and assist some vulnerable persons. They each hold 50% members' interest in a close corporation, which owns certain immovable property in which they reside. The applicants were sued for recovery of an amount of N\$73 763, 80 in respect of arrear levies due to Body Corporate. Summary judgment was obtained against the applicants. They allege that they paid the amount of the writ, together with a taxed bill of costs. That notwithstanding, the deputy sheriff advertised the immovable property for sale of the applicants' members' interest and the property was sold at an auction. The applicants thereafter approached the court seeking an interim interdict preventing the transfer of the property and related actions, pending an application for rescission to be moved by the applicants.

*Held:* That an applicant seeking an interim interdict must show that he or she has a *prima facie* right, although open to some doubt; that there is a well-grounded apprehension of harm; that the balance of convenience favours the applicant and that there is no other satisfactory remedy open than to grant the relief prayed for.

*Held that:* There are no clear reasons why the respondents concerned did not follow the provisions of rule 108 before the property was sold. There must be substantial reasons shown as to why a party should be allowed to sell immovable property in which people live, without selling movables and without following the provisions of rule 108.

*Held further that:* There should be no shortcuts in the following of processes relating to sale of immovable property and that the policy reasons behind rule 108, must not be thwarted.

*Held:* That where a party seeks costs in the event the matter is opposed, the fact that the party succeeds in obtaining the relief does not entitle them to costs as the respondent would have considered the issue of costs before deciding whether or not to oppose the relief sought.

Application granted with no order as to costs.

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**ORDER**

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1. The applicants' non-compliance with the forms and services as provided for in the Rules of the High Court of Namibia is condoned and the matter is heard as one of urgency as contemplated in Rule 73(3).
2. The first, second and third respondents are compelled and directed, to forthwith stop dealing in any manner with the property, to wit; Sectional Title Unit, Unit 1, Erf No. 3711, Nelsons Court, Klein Windhoek, pending judgment in an application for rescission of judgment to be brought by the applicants within one month from the date of this order.
3. The Respondents are interdicted and restrained from removing any movables in or at the property described in paragraph 2 herein above, until such time that the rescission application to be brought by the applicants have been adjudicated upon.
4. The fourth respondent is hereby interdicted and restrained from processing any transfer or registration of the property described in paragraph 2 in the name of any person including the name of the first and/or second respondents.
5. The Body Corporate Nelsons Court and the Board of Trustees of the Body Corporate Nelsons Court are ordered to disclose the arrears with respect to Unit 1, 3711, Nelsons Court, Klein Windhoek, at the time immediately prior to and during the public auction.
6. The first and respondents are hereby ordered to restore possession and occupation of the immovable property to the Applicants forthwith.
7. It is declared that the public auction held on the 13 December 2023 is *null* and *void*.

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## REASONS

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### MASUKU J:

#### Introduction

[1] On 22 December 2023, after listening to arguments presented on behalf of the applicants, I granted the applicants the relief that follows below. I further indicated that the reasons for the relief granted, would follow in due course. Those reasons follow below.

#### The relief granted

[2] After hearing counsel for the applicants, the court granted the following relief:

‘1. The applicants’ non-compliance with the forms and services as provided for in the Rules of the High Court of Namibia is condoned and the matter is heard as one of urgency as contemplated in Rule 73(3).

2. The first, second and third respondents are compelled and directed, to forthwith stop dealing in any manner with the property, to wit; Sectional Title Unit, Unit 1, Erf No. 3711, Nelsons Court, Klein Windhoek, pending judgment in an application for rescission of judgment to be brought by the applicants within one month from the date of this order.

3. The Respondents are interdicted and restrained from removing any movables in or at the property described in paragraph 2 herein above, until such time that the rescission application to be brought by the applicants have been adjudicated upon.

4. The fourth respondent is hereby interdicted and restrained from processing any transfer or registration of the property described in paragraph 2 in the name of any person including the name of the first and/or second respondents.

5. The Body Corporate Nelsons Court and the Board of Trustees of the Body Corporate Nelsons Court are ordered to disclose the arrears with respect to Unit 1, 3711, Nelsons Court, Klein Windhoek, at the time immediately prior to and during the public auction.

6. The first and respondents are hereby ordered to restore possession and occupation of the immovable property to the Applicants forthwith.

7. It is declared that the public auction held on the 13 December 2023 is *null and void*.<sup>1</sup>

### Background

[3] The applicants, who are husband and wife, approached the court on an urgent basis, in essence seeking interdictory relief to the following effect: that the matter be heard on the basis of urgency and compelling the first three respondents mentioned above, to stop dealing in any manner with the property described as Sectional Title Unit, Unit 1, Erf No 3711, Nelsons Court, Klein Windhoek, ('the property'), pending the determination of an application for rescission, to be brought in due course.

[4] The applicants further sought an order interdicting the respondents from removing any movables from the said property, until the application for rescission has been determined. They further sought an order restraining the fourth respondent, the Registrar of Deeds, from processing the transfer of the property into the name of the first two respondents. Additionally, they sought an order directing the first respondent and the Board of Trustees of the first respondent, to disclose the arrears owing and due to the said respondents by the applicants in respect of the property.

[5] The applicants further prayed for an order directing the first and second respondents to restore possession of the property to the applicants forthwith. Last, but by no means least, the applicants sought an order that any respondent, who opposes the application, be ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.

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<sup>1</sup> The order was corrected as there were some typographical errors noted.

[6] The application was served on the various respondents but none of them opted to oppose the application. The matter, was therefor heard virtually unopposed. There are, however, a few issues that raised the court's eyebrows, hence the decision to provide written reasons for the order.

#### The applicants' case

[7] The application was predicated on the founding affidavit of the first applicant, Mrs Chen, who indicated that her husband, the second applicant, was out of the country at the material time. It was her case that the first respondent instituted action proceedings against the applicants for recovery of an amount of N\$73 763, 80, allegedly outstanding from them in respect of levies concerning the property.

[8] It is the applicants' case that the property in question, is owned by an entity known as Black Shoe Investment Four CC, which is in turn owned by Heavenly Manna Ministries. Proof of the registration of ownership, as alleged by the applicants, is attached to the papers accordingly.

[9] The applicants depose that the action proceedings were pursued and in terms of which an order for summary judgment was entered against them by this court, under case HC-MD-CIV-ACT-CON-2021/00870.<sup>2</sup> A writ of execution was thereafter obtained against the applicants. It is the applicants' case that they settled the amount of the writ by paying the amount of N\$96 000 and an allocatur in the amount of N\$29 648, 57, after taxation of the bill of costs. Proof of these assertions is provided in the affidavit.

[10] It is the applicants' case that notwithstanding payment of the amount of the writ and costs of the action, the first respondent proceeded to execute against the immovable property, ie the unit in question, which is owned by Black Shoe Investment, as stated earlier. The applicants state that the property in question, although owned by the close corporation, has been their primary residence and that they each hold 50% members' interest in the close corporation in question.

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<sup>2</sup> *Body Corporate Nelsons Court v Else Ndapandula Chen* HC-MD-CIV-ACT-CON-2021/00870.

[11] It is the applicants' case that besides residing at the said premises, they also conduct other humanitarian causes therefrom, including providing food and necessities for needy people who reside in the settlements within Windhoek. This includes cooking meals for the disadvantaged persons. The applicants further contend that although the close corporation is the registered owner of the property, it was not served with the summons commencing action. This, it is claimed, renders the summary judgment having been erroneously sought and granted within the realms of rule 103.

[12] Furthermore, it is the applicants' case that notwithstanding that the summary judgment indicated that the applicants, in their personal capacities, were the defendants, the property of the close corporation was eventually sold in execution during an auction conducted by the deputy sheriff. The applicants cry foul and move the court to grant interdictory relief in this matter, pending the filing of the application for rescission.

#### Determination

[13] This matter is not before court for the purpose of determining whether an application for rescission should be granted. This is a matter that will be determined, at the appropriate time, by the court that will be seized with the application for rescission. Grounds in support thereof, will be provided accordingly at the appropriate time and forum.

[14] What this court is concerned with, at the moment, is whether this is a proper case in which to issue an interim interdict. In order to do so, the court must be satisfied that the applicant has (1) a *prima facie* right, although open to some doubt; (2) that the applicant has a well-rounded apprehension of irreparable harm; (3) that the balance of convenience favours the applicant and (4) that there is no other satisfactory remedy open to the applicant.<sup>3</sup>

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<sup>3</sup> CB Prest, *Interlocutory Interdicts*, Juta & Co Ltd, 1993, p 55.

[15] I am of the considered view that the applicants have satisfied the court that they are entitled to the granting of an interim interdict in this matter. First, they appear to have a *prima facie* right, to occupy the property, which has been sold in execution of a writ. In this regard, it is not disputed that the applicants occupied the property in question but there were no proceedings moved in terms of rule 108, in order to have the property declared executable. As persons who resided in the property, whatever relationship they may have with the registered owner, they were entitled to be served with the application in terms of rule 108(2) of this court's rules before a sale in execution of the said property, could eventuate.

[16] It is also queer that there does not appear to have been a sale of movable property before resort to the sale of the immovable property was had in this matter. I am of the considered view, that deputy sheriffs must ensure that they always act in accordance with the law. The fact that they get instructions from parties and/or legal practitioners to carry out certain duties in terms of the rules, does not exempt them from ensuring that all the preceding steps have been followed and to the letter, before they are requested to execute on court orders.

[17] The same, in my considered view, applies to legal practitioners. I do not understand how the order for summary judgment was escalated to the stage of selling the immovable property, without the sale of movable goods of the debtors, considering that the amount owed did not, in any event, run into millions. Even if it did, the first port of call, unless there is a mortgage bond, (which also does not necessarily serve to circumvent the provisions of rule 108), is to execute against movable property first. It is not apparent why the claimant chose to pursue the members' interest when there was no *nulla bona* return in this case as it was apparent that sale of the members' interest in fact amounted to sale of the immovable property.

[18] It must be necessarily stated that compliance with all the requirements of the rules is necessary and parties must not hope that the actions they take in contravention of the relevant procedures will not come to light. Even those who are unlettered in law or 'legally' vulnerable, are not entitled to be given the short end of the stick. The applicable rules must be complied with to the letter – regardless of



who is at the receiving end thereof. Not only is this required by the rules, but it is also fair that before resort is had to selling immovable property, the first port of call must be to proceed against movable property. The laudable intentions of the lawgiver, in promulgating rule 108, must not be undermined, for any reason.

[19] I note that the respondents' legal practitioners, who did not formally come on record in this application, appear not to have been involved in the sale of the property. They appear to have become involved in the matter after the sale of the property had been done. There is some correspondence between the parties' legal representatives that is marked 'without prejudice' but which the applicants' legal practitioners attached to the papers. This is impermissible and must not be repeated.<sup>4</sup> I have, for that reason, had no regard to the contents of the said letter and nothing further shall be said of the said letter or its contents.

[20] Having regard to the papers filed of record, I am also satisfied that the applicants do have a well-grounded apprehension of harm. They hold 50% members' interest in the close corporation and in this instance, the property has already been sold to a third party. Furthermore, it was their case that they were, as a result of the sale, denied access to the property, for purposes of living there and enjoying the amenities therein available, not to mention that some of the documents they needed for the proceedings, were kept locked in the property in question. This in my considered view constitutes irreparable harm, as envisaged.

[21] There is nothing as demeaning to one's dignity, as being denied access to one's home, especially in circumstances, where the provisions of the law appear to

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<sup>4</sup> *Gcabashe v Nene* 1975 (3) SA 912 at 914F-G, where the court dealt with the meaning of the words 'without prejudice' in the following terms as stated by Kekewich J in *Kurtz & Co v Spence & Sons* (1887) 57 LJ Ch 238 at p 241, 'I shall not attempt to define the words "without prejudice" – but what I understand by negotiations without prejudice is this : The plaintiff or defendant – a party litigant – may say to his opponent: "Now you and I are likely to be engaged in severe warfare; if that warfare proceeds, you understand I shall take every advantage of you that the game of war permits; you must not expect mercy, and I shall ask for none; but before bloodshed let us discuss the matter, and let us agree that for the purpose of this discussion we will be more or less frank; we will try to come to terms, and that nothing that each of us says shall ever be used against the other so as to interfere with our rights at war, if, unfortunately, war results." That is what I understand to be the meaning, not the definition, of "without prejudice"'.

have been short-circuited. In this regard, every minute of what happens to be an unlawful denial of access to one's home, constitutes irreparable harm which calls for immediate intervention by the court.

[22] I am of the considered view that the balance of convenience, having regard to what I have stated above, appears to favour the applicants. The respondents, in this case, did not put up any papers, to argue or show that the applicants' case is one devoid of merit. I am, in any event, of the considered opinion that the cutting of corners and particularly the deleterious, and possibly the illegal effect of allowing the present circumstances to prevail, would result in great inconvenience to the applicants, which as stated, affects their dignity, as they have, by sleight of hand, been denied a roof over their heads and the amenities they need for a dignified life.

[23] Lastly, I am of the considered view that there is no other satisfactory remedy that may be accorded to them. From the papers filed, and considering that the respondents were served and they elected, for whatever reason, not to oppose the proceedings, it appears *prima facie* clear that the sale of the property may have been done in contravention of the applicable law. The property has not yet been transferred to the purchaser, from what is before me.

[24] To allow the transfer of the property, to proceed in the circumstances, considering as well that there is an application for rescission of the judgment giving rise to the sale to be filed, shows that damages at a later stage would not suffice. Refusing to grant the relief on an interim basis, would result in the applicants possibly having no roof over their heads in the interregnum. Obtaining a house overnight, is not easy. Furthermore, the costs associated with instituting action proceedings, likely themselves to run for a few years, demonstrates that there is no other satisfactory remedy open to the applicants in this case than the granting of the interim interdict.

[25] Regarding urgency, it is plain, from what I have stated above, in relation to certain parts of the interim interdict, that the matter is indeed urgent. As indicated, the applicants have been deprived of their primary home and they have no place in which to live. Their moveable property and clothes, were locked in the house in

question. It is clear that they could not have been afforded substantial redress at a hearing in due course. It was not only necessary but also expedient for the court to deal with the matter on an urgent basis.

[26] I take comfort in the fact that the respondents, as stated earlier, were served with the papers but they did not oppose the proceedings. This may have been an indicator that the applicants' case may not have been meritless after all is said and done. Regardless of what the respondents did or did not do, once served with the application, I am of the considered view that the provisions of rule 73 were met by the applicants in this matter. It is for that reason that the relief sought was substantially granted as prayed.

[27] I should hasten to mention that the applicants also sought an order declaring the sale in execution, null and void. For the reasons stated in paras 16 to 19 above, I am of the considered opinion that the sale of the immovable property was not done in terms of the relevant provisions of the applicable law. The reasons for that conclusion can be found in the paragraphs mentioned immediately above. For that reason, I am of the considered view that the declaration that the sale in execution was null and void, is well merited and was thus granted.

### Costs

[28] It is clear, when proper regard is had to the applicants' notice of motion, that they sought an order for costs against any respondent who opposed the relief sought. As matters stand, none of the respondents opposed the relief. Despite Mr Ntelamo's best efforts, I declined the invitation to order costs against the respondents, as they did not oppose the application. I do hold the view that the applicants were possibly mistreated by some of the respondents and would otherwise be entitled to costs.

[29] Where the applicant, in his or her notice of motion, drafts the relief in relation to costs in the manner that the applicants did, it would be improper and unfair for the court to, in those circumstances, mulct the respondents in costs, especially without

affording them an opportunity to make representations in that regard. In this case, the applicants made their bed and they must, accordingly, lie in it.

[30] There shall accordingly be no order as to costs, as there was no opposition to the application by the respondents.

[31] The foregoing, constitute the reasons why I granted the order indicated above.

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T S MASUKU  
Judge

## APPEARANCES

APPLICANTS: N Ntelamo  
Instructed by Gaenor Michael & Associates, Windhoek

RESPONDENTS: No appearance