

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: GRAND DESIGN INVESTMENT (PTY) LTD & ANOTHER // DEPUTY SHERIFF MARIENTAL (ANDRIES PRETORIUS) & 4 OTHERS	Case No: HC-MD-CIV-MOT-REV-2020/00342
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Heard on: 15 AUGUST 2023
	Delivered on: 25 OCTOBER 2023
Neutral citation: <i>Grand Design Investment (Pty) Ltd v Deputy Sheriff Mariental (Andries Pretorius)</i> (HC-MD-CIV-MOT-REV-2020/00342) [2023] NAHCMD 677 (25 October 2023)	
Order:	
<ol style="list-style-type: none">1. The application is dismissed with costs.2. Costs are awarded in favour of the second respondent and the third respondent against the applicants, the one paying the other to be absolved.3. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ:	
[1] In this application, the applicants seek the order set out in the interpleader notice. It is	

to review and set aside the sale in execution by the first respondent of a judgment debt owed by the applicants to the judgment creditor, the second respondent. Ms Kahengombe represents the applicants. The third respondent (represented by Mr Maritz) and the second respondent (represented by Ms Mushore) have moved to reject the application.

[2] This should be said – with respect, of course. The court was bamboozled with a tome of heads of argument by Ms Kahengombe, running into 102 pages of absolute tedium of irrelevant principles of law that are largely of no assistance on the points that are under consideration in the instant proceedings. The heads are, with respect, so poorly prepared that, sadly, counsel characterised some of the grounds of review as points *in limine*.

[3] Added on to the gargantuan tome of heads of arguments were 22 Namibian authorities and 57 foreign authorities. I dare say, if Ms Kahengombe's written heads of argument and the list of authorities were competing in the Olympics, they would have taken Gold, putting to shame our fine, world-class athletes Ms Mboma and Ms Masilingi.

[4] Despite the aforesaid extremely copious heads of argument and 79 authorities, the determination of the application turns on an extremely short and narrow compass as will become apparent in due course.

[5] The farm in question, ie Farm Derm Oost No. 101, was sold by the first respondent on 20 March 2020 in execution of a judgment obtained on 14 August 2018. By an order of the court, per Masuku J, the farm was declared specially executable in terms of rule 108 of the rules of court ('the Masuku J order'). In that regard, it is important to note that the court has become *functus officio* in respect of the execution of the said judgment.

[6] A crucial point at the centre of the instant proceeding is that the applicants have approached the court for judicial review to challenge the validity of the conduct of the first respondent in 'the sale in execution of Farm Derm Oost No. 107 that was held on 20 March 2020 in the district of Mariental', as appears in the notice of motion. Thus, as a matter of course, it is the conduct of the first respondent only that is challenged by judicial review. The first respondent alone carried out the judicial execution of the said judgment. The other respondents did not conduct 'the sale in execution ... on 20 March 2020'. They have been joined, I suppose, because of any interest they may have in the outcome of the proceedings. Indeed, no order is sought against them. Therefore, any attack on whatever any one of them

did or did not do is immaterial, and I shall not waste any time considering whatever they did or did not do. I am also not interested in the cause of action that in the end brought about the Masuku J order.

[7] In this proceeding, the applicants bear the burden of satisfying the court that good grounds exist to review the first respondent's impugned conduct.¹ The good grounds should be satisfactory and sufficient grounds anchored in common law,² since the first respondent is not an administrative official, within the meaning of article 18 of the Namibian Constitution. And what is more, the grounds should be found in the founding affidavit.³ The reason is that the notice of motion must be accompanied by an affidavit verifying the facts relied on. Indeed, it is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. It is also trite that submission by counsel or parties is not evidence. It is, therefore, to the founding affidavit that I now direct the enquiry.

[8] The applicants have not indicated with any sufficient particularity in their affidavit which common law grounds of review known to the law⁴ that they rely on for relief. Be that as it may, since it is trite that in our law regard is had to substance rather than form,⁵ I have trawled through the applicants' founding affidavit to see if the applicants have placed before the court good grounds, in substance, to review the impugned decision of the first respondent.

[9] The founding affidavit contains 32 paragraphs. Paragraph 1 is an introductory paragraph on the particulars of the deponent of the affidavit. Paragraphs 2 to 8 describe the parties. Paragraph 9 contains the purpose of the application, and it is a rehash of the order sought in the notice of motion. Paragraphs 10 to 18 contain factual background. Paragraphs 19 to 31 is a rendition of the applicable law, and yet it is trite that an affidavit should contain only the facts relied on for support in terms of rule 65 (1) of the rules of court. Paragraph 32 is the last paragraph and is headed 'Conclusion'. The applicants state that paragraphs 19 to 31 contain both 'the applicable law' and 'the basis of the application'.

[10] I have set out in a few words what the various passages of the founding affidavit deal

¹ *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2002 (2) NR 753 (SC) para 15.

² *Nolte v Minister of Environment, Forestry and Tourism* [2003] NAHCMD 361 (28 June 2023) para 5.

³ *Nelumbu v Shikumwah* (SA27-2015) [2017] NASC 14 (13 April 2017) paras 40-45.

⁴ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS III, applied by the court in, for example, *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1991 NR 69 (HC); and *New Era Investment (Pty) Ltd v Roads Authority and Others* 2014 (2) NR 596 (HC).

⁵ *Kamwi v Standard Bank of Namibia Ltd* 2020 NR (4) 1038 (SC); *Helao Nafidi Town Council v Kambode* [2017] NASC (12 May 2017).

with to emphasise the point that as respects paras 19 to 31, my main focus shall be on the passages that deal with 'the basis of the application'. I understand 'the basis of the application' to mean grounds of review, considering the relief sought in the notice of motion.

[11] The first 'basis' (or ground) relates to the interpretation and application of s 17(1) and (2) of the Agricultural (Commercial) Land Reform Act 6 of 1995 (as amended) ('the ALRA'). The applicants contend that 'the owner of the farm can only escape the consequences of s 17(2) of the ALRA if he or she had given the State the right of first refusal'. The applicants' contention has no basis in law as far as the instant proceeding is concerned. There is filed of record a Certificate of Waiver. Ms Kahengombe argued that the waiver was granted not to the first respondent but to the first applicant, and therefore, the certificate is invalid. But I find that at the relevant time the title to the farm was in first applicant's name.

[12] As a matter of law and logic, the Certificate of Waiver could not have been granted by the Minister to a person whose name was not on the title deed that described the Farm and in respect of which the Minister was issuing the waiver.

[13] Granted, the definition of 'owner' in the ALRA was substituted by s 1 of the Agricultural (Commercial) Land Reform Amendment Act 1 of 2014 ('ALRAA') whereby 'owner' was defined to include, among others, the deputy sheriff concerned in respect of property attached in terms of an order of court. For that reason, Ms Kahengome argued that the certificate ought to have been issued to the first respondent. With respect, counsel misreads s 1 of Act 1 of 2014. The section does not provide that the name of the owner of the property can be replaced with the sheriff, deputy sheriff or messenger of the court concerned. It provides clearly that 'owner' includes, not is a deputy sheriff, sheriff, etc. It does not mean that if **X** is the owner of property **A** and that property is attached for execution in terms of an order of court, the deputy sheriff concerned becomes the new owner of property **A**.

[14] The deputy sheriff concerned has the power, for instance, to do all that is necessary to transfer ownership of the property to the purchaser where the owner of property **A** refuses or fails to act as such when called upon to do so. The said definition is for the purposes of the ALRAA. The deputy sheriff does not become the owner at common law or in terms of the Deeds Registries Act 14 of 2015, for instance.

[15] In the instant matter, at the time the Certificate of Waiver was granted, the name of the

owner of the farm was the applicant. It is only when the property has been transferred to a new owner by the deputy sheriff, if the first respondent refused to do so, would the deputy sheriff be able to do that which the applicant had refused to do. It is only at that time would a title deed issued by the Registrar of Deeds show the transferee of the property as the new owner, as Mr Maritz submitted.

[16] In any case, as Ms Mushore submitted, upon the correct interpretation of s 17(2) of the ALRA, the ALRA does not prohibit parties, including the deputy sheriff (seized with a judicial execution order), from concluding a contract of sale of agricultural land even if the minister's certificate of waiver has not been obtained. Only that the contract shall come into force upon the waiver having been obtained. Ms Mushore's submission has force, and is valid. Thus, the deputy sheriff could enter into a contract of sale of agricultural land even if the minister's waiver has not been obtained; except that the contract is not enforceable until the land has been offered for sale to the State or the seller has been furnished with a certificate of waiver in respect of the land.⁶

[17] Another 'basis' of review is premised upon rule 110(6) and 110(9) of the rules of court. In the interpretation and application of rule 110(9) the qualification introduced by the conjunctive phrase 'except that' is crucial. In the instant matter, it is not established that the farm was the primary home of the execution debtor, an artificial person, within the meaning of rule 108 of the rules of court, if an artificial person, as a matter of law and common sense, is capable of having a primary home, within the meaning of rule 108. The result is that this 'basis' cannot succeed. It is rejected as having no merit at all.

[18] The foregoing considerations and reasons propel me to the ineluctable conclusion that the application has failed. The applicants have not established that good grounds exist to review and set aside the sale in execution of Farm Derm Oost No. 107 that was held on 20 March 2020 in the district of Mariental.⁷

[19] In the result, I order as follows:

1. The application is dismissed with costs.

⁶ *PDS Holdings (BV1) v Minister of Land Reform* [2018] NAHCMD 129 (16 May 2018), applying *Locke v Van der Merwe* 016 (1) NR1 (SC) at 18H-19F.

⁷ See para 7 above.

2. Costs are awarded in favour of the second respondent and the third respondent against the applicants, the one paying the other to be absolved.
3. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondents
S Kahengombe Of Kahengombe Law Chambers, Windhoek	S F Maritz (1 st and 3 rd respondents) Of Dr Weder, Kauta & Hoveka Inc., Windhoek and K Mushore (2 nd respondent) Of Etzold-Duvenhage, Windhoek