REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/02833

In the matter between:

SEAGULL ALL-FISH CC **APPLICANT**

and

TUYENI KUMWE FOOD & COMMODITY DISTRIBUTORS CC **FIRST RESPONDENT**

MICHAEL TUYENI NGHIILWAMO **SECOND RESPONDENT**

Neutral citation: *Seagull All-Fish CC v Tuyeni Kumwe Food & Commodity Distributors CC* (HC-MD-CIV-ACT-CON-2017/02833) [2019] NAHCMD 135 (24 April 2019)

Coram: ANGULA DJP

Heard: **11 February 2019**

Delivered: **24 April 2019**

Flynote: Applications and Motions – Execution against Immovable Property: Rule 108 of the Court Rules – Settlement Agreements made an order of court – Execution of immovable property due to breach of the terms of settlement agreements made an order of court – Issue; Whether applicant needed to prove breach of agreement before execution of immovable property.

Summary: The applicant sued the respondents for payment of monies – The parties entered into a settlement agreement which was subsequently made an order of court – In terms of the agreement, the respondents were to make payments to the applicant to liquidate their debt by way of installments – The respondents failed to comply to the terms of the settlement agreement – The applicant caused a writ of execution against the respondent's movables – Thereafter the deputy-sheriff rendered a *nulla bona* return – The applicant filed an application for execution against an immovable property belonging to the respondents, in terms of rule 108 of the Rules of this Court. The first respondent opposed the application, contending that the applicant did not allege in his founding affidavit that the respondents had breached the agreement, therefore the application to declare the immovable property was defective and the order sought should not be granted.

Court held: The purpose of a settlement agreement being made an order of court is, in the event of non-compliance, the party in whose favour the order operates should be in position to enforce it through execution or contempt proceedings. Once a settlement agreement has been made an order of court, it will be treated like and interpreted like all court orders. The order brings finality to the *lis* – the lawsuit, between the parties.

Held further: The making of a settlement agreement an order of court brings about a change in the status of the rights and obligations of the parties. When the court makes a settlement agreement an order of court, it preserves authority over its own order to ensure that the terms thereof are complied with.

Held further: That where an enforcement of a court order is sought, it must be readily capable of execution.

Held further: It was not necessary for the applicant to have made an allegation that the respondents committed a breach of the court order because both in terms of the settlement agreement and in terms of the law, a judgment creditor is entitled to execute upon the court order made in its favour.

Held further: In this matter, it was common cause that the immovable property sought to be declared executable was not a primary home within the meaning of the provisions of rule 108. It thus fell outside the ambits of the judicial oversight envisaged by rule 108.

ORDER

1. The following immovable property is here by declared executable:

A CERTAIN:	Erf No. 788, Extension 2, Wanaheda
SITUATED:	In the Town Council of Windhoek
	Registration Division, "K"
	Khomas Region
MEASURING:	558M² (Five Five Eight) square meters
HELD UNDER:	Deed of Transfer No. T5124/2012
SUBJECT:	To the conditions registered against the Deed of Transfer.

2. The respondents are to pay the applicant's costs, such costs to include one instructed counsel and one instructing counsel.

3. The matter is removed from the roll and considered finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an application made in terms of rule 108 for an order to declare an immovable property belonging to the execution debtors, executable. The application is opposed by the respondents, the execution debtors. For the sake of brevity, I will

simply refer to the parties as ‘the applicant’ in respect of the execution creditor and in respect of the execution debtors as ‘the respondents’.

The parties

[2] The applicant, a Close Corporation, is represented in these proceedings by its managing member. The first respondent is also a Close Corporation, it is represented by its sole member who is the second respondent to the proceedings.

Factual background

[3] It would appear from the papers filed on record in this application that initially the applicant had instituted an action against the respondents for the payment of the sum of N$672 755.19. That action was settled between the parties resulting into a written settlement agreement entered between the parties and which was subsequently made an order of this Court. In terms of the agreement, the respondents undertook to pay their indebtedness to the applicant in installments.

[4] Thereafter the respondents defaulted, whereupon the applicant cause a writ of execution issued against the respondents’ movable properties. The deputy-sheriff however rendered a *nulla bona* return reporting that he could not find realizable movable assets to attach. The applicant then launched this application, to have the respondents’ immovable property declared executable in terms of rule 108 of the rules of this court.

Opposition by the respondents

[5] The respondents opposed the application and alleged that the application amounts to an abuse of court process and is made in bad faith. The reason for this allegation was based on the fact that, subsequent to the serving of the application, the respondents made a proposal to the applicant to repay the judgement debt. The respondents claimed that the proposal contained reasonable terms which the applicant rejected. The respondents alleged further that the proposal was a lesser drastic measure compared to the harsh measure of selling of a primary home.

Issue for determination

[6] The issue for determination in this matter is whether the applicant ought to have alleged and proved that the respondents breached the terms of the settlement agreement which was made an order of court, in order to succeed with its application to have the respondents' immovable property declared executable in terms of rule 108.

Applicable law

[7] The Supreme Court in the recent judgment of *Standard Bank v Shipila*[1] matter expressed its agreement with the view expounded by this Court in *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd*[2] that the introduction of rule 108(2) introduced judicial oversight over the sale of an immovable property that is regarded as the 'primary home' of the execution debtor or where the property is leased to a third party as a home for such third party.

[8] The respondents initially claimed in their papers that the immovable property sought to be declared executable is a primary home within the meaning of rule 108 and as interpreted by the Court in the *Futeni Collection* matter. That allegation was disputed by the applicant. At the hearing Mr Amoomo, who appeared for the respondents informed the court that the respondents were no longer persisting with the claim that the immovable property in question is a primary home. With the abandonment of the claim that the property was a 'primary home', the ancillary point raised by the respondents regarding obligation imposed upon the judgment creditor by rule 108, to consider 'less drastic measures' before embarking on the process aimed at declaring an immovable property as executable, which is a primary home, became moot and as a result fell by the way-side.

[9] Mr Amoomo raised a point in his heads of argument, which he claim was a point of law *in limine*, hence it was not necessary for the respondents to have raised it in their answering affidavit. Counsel submitted that the applicant did not make an allegation in his founding paper that the respondents breached the terms of the

[1] (SA 69-2015) 2018 NASC (6 July 2018).
[2] 2015 (30 NR 29 HC.

settlement agreement which was made an order of court. Therefore, so the argument continued, the omission to have made that allegation was fatal to the applicant's case and for that reason the application should be dismissed; and that the effect of the agreement was that it barred the bringing of proceedings based on the original cause of action.

[10] In support of his foregoing submission, Mr Amoomo referred the Court to *Metal Australia Ltd and Another v Amakutuwa and Others*[3]. In that matter, the Supreme Court had to consider the validity of two agreements relating to two mineral licences to prospect exclusively for uranium in certain parts of Namibia. The appellant contended that the second agreement constituted a compromise. The court considered the second agreement and concluded that its purpose was to put an end to the possibility of litigations between the parties and was thus a valid agreement of compromise.

[11] In the present matter, Mr Amoomo, in an attempt to rely on the finding in the *Metal Australia* matter, argued that the applicant's cause of action in the current proceedings should have been based on the breach of the terms of settlement agreement. In essence Counsel argued, as I understand his argument, that the applicant should have instituted fresh proceedings, in which the cause action should have been the breach of the terms of the settlement agreement. I do not agree with Counsel's submission for the reasons set out below.

[12] In my view, the facts of the present matter are distinguishable from the facts in *Metal Australia* matter, in that, in this matter the settlement agreement was made an order of court, in *Metal Australia* matter the compromise agreement was found to be valid but was not made an order of court. Furthermore, in the *Metal Australia* matter, the court had to determine the validity of the two agreements, which is not the issue in this matter.

[13] The purpose of a settlement agreement being made an order of court is, in the event of non-compliance, the party in whose favour the order operates should be in position to enforce it through execution or contempt proceedings. Once a settlement agreement has been made an order of court, it will be treated like and

[3] 2011 (1) NR 262.

interpreted like all court orders. The order brings finality to the *lis* – the lawsuit, between the parties. The dispute thus becomes *res judicata,* which literally means the 'matter is judged'. An order based on a settlement agreement which makes provision for the payment of a judgment debt by installments might pose a challenge in enforcing by way of execution because the amount that remains owed might have to be determined, which may require going back to court just to determine the balance outstanding before the authorisation of a warrant of execution[4].

[14] In *PL v YL* 2013 (6) SA ECG, the issue for decision was whether a settlement agreement which was incorporated into an order of court and was made an order of court was a 'judgment debt' within the meaning of the Prescription Act, No. 68 of 1969 of South Africa. The court concluded that the settlement agreement in that matter was as 'judgment debt' within the meaning of the Act. The court explained that the making of a settlement agreement an order of court brings about a change in the status of the rights and obligations of the parties; that the granting of the consent judgment is a judicial act which vests the settlement agreement with authority, force and effect of a judgment. The court reasoned further that the court retains authority over its own order to ensure that the terms thereof are complied with. This in turn gives the parties the right to approach the court for appropriate relief in the event of a failure by one of the parties to honour the terms of the order. The court further pointed out that where an enforcement of a court order is sought, it must be readily capable of execution. The notion that a court order must be readily enforceable is based on the principle of the effective enforcement by the court of its order.

[15] In light of the foregoing well-settled principles and before considering the terms of the settlement agreement which was made an order of court and which in essence is the subject matter of the present proceedings, it is necessary for the court to further elaborate on the principles governing the interpretation of a court order.

[16] I have already mentioned the principle that states that once a settlement agreement has been made an order of court, it has to be interpreted like any other order of court. In this connection it has been stated that[5]:

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[4] *Eke v Parsons* [2015] ZACC 30.

[5] *Fishing Touch 163 (Pty) v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49 2013 (2) SA 204 (SCA).

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to ascertain primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

[17] Before I proceed I should mention that this judgment was due for delivery on 24 April 2019, as I was preparing the judgment, it occurred to me that there was one aspect of the agreement which I had overlooked to seek assistance from counsel when the matter was argued before me. I accordingly addressed a request to counsel to make submission whether: 'It was the intention of the parties when the settlement agreement was made an order of court, that in the event of default or breach of the terms of the agreement by the judgment debtor, the judgment creditor would execute on the property described in the settlement agreement or whether the judgment creditor could execute on any immovable property owned by the judgment debtor'. Counsel duly obliged and filed short but useful supplementary heads of argument. I wish to hereby express my gratitude to counsel for their valuable assistance to the court.

[18] I now proceed to consider the terms and conditions of the settlement agreement in question.

[19] In terms of the agreement, the respondents acknowledged their indebtedness to the applicant in the sum of N$672 755.19. They undertook to pay their debt to the applicant by weekly installments of N$10 000 payable on or before every Friday until the second respondent's certain immovable property has been sold and transferred to a purchaser in terms of the deed of sale. The settlement agreement was signed on 6 September 2017.

[20] In the definition clause of the agreement, 'the property' is defined as Erf No. 2152, Wambo Location, Katutura, Windhoek, Republic of Namibia.' Clause two provides *inter alia* that:

'Once this agreement is made an order of court, the plaintiff shall be entitled to execute in the event of breach.'

Furthermore, clause 4(g) stipulates that:

'Should the defendant fail to make payment of the N$10 000 on any Friday from and including Friday, 1 September 2017 by close of business in respect of the claim, then, in that event, plaintiff shall execute on this order without further notice.' (Underlining supplied for emphasis)

Finally, clause 5, stipulates that:

'The parties record and agree that, should the defendants fail to pay any amount payable as stipulated herein, or to take any action to comply with any term of this agreement, plaintiff will be entitled to execute on this court order.' (Underlining supplied for emphasis)

[21] Mr Amoomo for the respondents argued that the applicant did not allege in his affidavit that the respondents committed a breach of the terms of the agreement. And therefore, it did not follow as a necessary consequence from its allegations that the applicant is entitled to have the property declared executable.

[22] Mr Nekwaya for the applicant on the other hand argued that, it was not necessary for the applicant to allege that the respondents committed a breach of the terms of the agreement because the agreement gives the applicant the right to execute the order, without any notice to the respondent.

[23] I am in agreement with Mr Nekwaya's submission. Even if Mr Amoomo was right that a breach of the terms of the agreement has not been alleged, there are a number of facts on the papers which indicate that the respondents committed breaches of the terms of the agreement. I will mention two.

[24] Firstly, it is common cause that on 6 June 2018, the respondents through their legal practitioner, caused a letter to be addressed to the applicant making an offer of payment which was different and contrary to the payment terms agreed upon and recorded in the settlement agreement. I am of the view that the only reasonable inference to be drawn from this fact is that the respondents attempted to make a new

offer because they did not honour the original, agreed upon payment terms, made an order of Court.

[25] Secondly, in terms of the agreement, payments were to be made into the trust account of the applicant's legal practitioner, however the letter of 6 June 2018 states that a payment of N$20 000 was made in the account of the applicant. This in my view is a clear breach of a term of the agreement, though it might appear to be a minor breach.

[26] Mr Nekwaya pointed out that, the respondents did not complain or raise any issue when the writ of execution was issued and an attempt was made to execute upon their movable property. In this regard, counsel submits that the respondents' conduct constituted an admission that the applicant was entitled to execute the court order. I agree with the submission. The respondents cannot demand an allegation of breach in respect of the proceedings for leave to execute upon the immovable property and did not make similar demand when execution was sought to be levied upon their movable property. Such inconsistent and irrational conduct, in my view only demonstrate that the respondents are not serious or genuine in their opposition. It follows therefore that the argument advanced on behalf of the respondents cannot be entertained and is rejected.

[27] The applicant did not need to make an allegation that the respondents committed a breach of the court order. In my view, quite apart from the clear terms of the settlement agreement, in terms of the law, a judgment creditor is entitled to execute upon the court order made in its favour. It is common cause that the immovable property sought to be declared executable is not a primary home. It thus falls outside the ambits of the judicial oversight envisaged by rule 108.

Conclusion and order

[28] I have therefore arrived at the conclusion that the applicant is entitled to the order declaring the immovable property being Erf No. 778, Extension 2, Wanaheda, Katutura, executable in satisfaction of the order of court, this court made on 2 November 2017.

[29] As regards the costs, I cannot see the reason why the normal rule regarding costs, namely costs follow the result, should not apply.

[30] In the result, I make the following order:

1. The following immovable property is here by declared executable:

A CERTAIN:	Erf No. 788, Extension 2, Wanaheda
SITUATED:	In the Town Council of Windhoek Registration Division, "K" Khomas Region
MEASURING:	558M² (Five Five Eight) square meters
HELD UNDER:	Deed of Transfer No. T5124/2012
SUBJECT:	To the conditions registered against the Deed of Transfer.

2. The respondents are to pay the applicant's costs, such costs to include one instructed counsel and one instructing counsel.

3. The matter is removed from the roll and considered finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	E NEKWAYA Instructed by Engling, Stritter & Partners, Windhoek
RESPONDENTS:	K AMOOMO Of Kadhila Amoomo Legal Practitioners, Windhoek