

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING: APPLICATION RULE 108

<b>Case Title:</b> Kambwa Trading CC v Valued Electrical Construction CC Paulus Henock Dumeni	Applicant  1 <sup>st</sup> Respondent 2 <sup>nd</sup> Respondent	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2019/03313  <b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Date of hearing:</b> 4 March 2023 <b>Date of order:</b> 24 March 2023	
<b>Neutral citation:</b> <i>Kambwa Trading CC v Valued Electrical Construction CC</i> (HC-MD-CIV-ACT-OTH-2019/03313) [2023] NAHCMD 142 ( 24 March 2023)		
<b>Results on merits:</b> Merits not considered.		
<b>The order:</b> <ol style="list-style-type: none"><li>1. The first point in limine is dismissed.</li><li>2. The second point in limine is upheld.</li><li>3. The defendant is granted leave to approach this Court on the same papers, duly amplified where necessary.</li><li>4. Each party to pay their own costs.</li></ol> <b>Further conduct of the matter:</b> <ol style="list-style-type: none"><li>5. The matter is postponed to 11 May 2023 at 15h00 (Reason: Application in terms of r</li></ol>		

108).

### **Reasons for orders:**

#### Introduction

[1] Serving before this court for determination is an application in terms of rule 108, in which the applicant seeks an order declaring the immovable property of the second respondent and his wife, who is not a party to the current proceedings, executable. The couple are married in community of property.

[2] The property sought to be declared executable can be described as the remainder of Erf No. 5126, Ongwediva (Extension No. 11), in the town of Ongwediva, Registration Division A, Oshana Region, 1037 (One Nil Three Seven) Square Metres, Deed of Transfer No. T5894/2013.

[3] I will refer to the parties as plaintiff and defendant or applicant and respondent, depending on the stage of the proceedings under discussion.

#### Background

[4] During July to August 2018, the plaintiff and the first defendant entered into a partly written credit agreement, executed to provide credit facilities to enable the first defendant, Valued Electrical and Construction CC, to purchase building materials from the plaintiff. The first defendant was represented at the time by the second defendant, Paulus Henok Dumeni, who is the sole member of the CC defendant.

[5] It is common cause that the first defendant utilised the credit facilities to the tune of N\$215 354.36 by purchasing building materials from the plaintiff. The first defendant, however, only made a partial payment of N\$40 000 towards the debt, leaving a balance of N\$170 354.36. When the plaintiff was about to institute action against the first defendant, the second defendant committed himself personally to settle the debt. This did not happen, and

as a result, the plaintiff issued summons in July 2019 against the defendants for payment of N\$170 354.36 based on joint and several liability, together with interest at the rate of 20% a tempore morae and cost of suit.

[6] During judicial case management of the action, the parties were able to settle the matter amicably. In September 2019, the parties entered into a settlement agreement wherein the parties agreed that the principal debt would be paid in equal instalments of N\$20 000 per month, with the first payment being made on 6 September 2019 and after that, on the 5<sup>th</sup> day of each consecutive month until the principal debt has been settled.

[7] In terms of the settlement agreement, both defendants admitted their liability and bound themselves to the plaintiff for payment of the principal debt. The said settlement agreement was made an order of the court on 11 September 2019 and the matter was removed from the roll.

[8] The defendants failed to fulfil their obligations regarding the monthly payments, and the plaintiff obtained a writ of execution against the movable property of the defendants. The Deputy Sheriff made three attempts to execute the writ of execution, and pursuant to each attempt, the second defendant deposited the amount of N\$10 000 with the Deputy Sheriff. The plaintiff's legal practitioner subsequently informed the Deputy Sheriff that the moneys should be paid directly to their offices.

[9] As the Deputy Sheriff could not find any disposable movable property to satisfy the judgment, he issued a nulla bona return on 24 March 2021 regarding the second defendant. No nulla bona return was filed on behalf of the first defendant.

[10] The plaintiff conducted a deed search and determined that the property now sought to be declared especially executable was registered in the names of the second defendant and his wife, Rachel Dumeni.

[11] The second defendant's wife and the bank, holding a bond over the property in question, were made aware of the r 108 proceedings.

### The opposition to the r 108 application

[12] The second respondent raised three points in limine in opposition to the current application. The points in limine are as follows:

- a) Non-compliance with r 108(2) of the rules of court. This point in limine was abandoned by the second respondent.
- b) The provisions of ss 7 and 8 of the Married Person's Equality Act 1 of 1996 (the Act).
- c) No nulla bona return was filed in respect of the first respondent.

### Arguments advanced

[13] I will refer to the oral arguments and written arguments interchangeably. If in the course of this ruling, I use the words 'submit' and 'argue' and their derivatives, they must be understood to encompass both.

#### *On behalf of the applicant*

[14] Ms Janke argues that the second defendant's reliance on the provisions of s 7 of the Married Persons Equality Act is misplaced as it is clear that s 7(5) of the Act provides an exception to the remainder of the subsections of s 7. Ms Janke argues that the initial agreement between the plaintiff and the defendants and the subsequent settlement agreement must be regarded as agreements entered into by the second respondent within the ordinary course of his business. As a result, it falls squarely within s 7(5) of the Act and therefore, the consent of his wife to conclude the said business deals were not required. In this regard, the court was referred to *Behrens N. O. v The Home Doctor CC*.<sup>1</sup>

[15] On the issue of the applicant's failure to file a nulla bona return in respect of the first respondent Ms Janke argues, with reference to *Standard Bank Namibia Limited v Shipila and*

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<sup>1</sup> *Behrens N. O. v The Home Doctor CC* (HC-MD-CIV-ACT-CON-2018/03150) [2020] NAHCMD 557 (3 December 2020).

*Others*,<sup>2</sup> that where property sought to be declared executable is subject to a mortgage bond, it is unnecessary that an applicant must file a nulla bona return and therefore r 108(1)(a) does not find application.

[16] Ms Janke argues that the respondents have failed to provide alternative measures or less drastic measures other than the execution of the property in question. Counsel submits that the respondents' suggestion that they will be able to make monthly payments is without merit as the defendants continuously failed to honour their undertakings since September 2019.

*On behalf of the second respondent*

[17] The gist of the second respondent's reliance on the Married Person's Equality Act is that the Act was specifically promulgated to protect the interests of female married persons who were married in community of property. In particular, the Act provides for their equal treatment with their husbands in the administration and decision-making of the estate. In the current instance, Mrs Rachel Dumeni was not a party to the main action. She is not cited as a party to this application, nor did she sign as surety to the main agreement between the parties or agree to the settlement agreement, which was made an order of court. The wife of the second respondent also did not sign the settlement agreement as a witness.

[18] It was submitted on behalf of the second respondent that the policy reason behind the promulgation of the Act is, in part, to protect estate property from spouses, including spendthrift spouses, who commit themselves to debt and then seek to have estate property, in which both they and their spouses have an interest, becomes liable for sale for payment of individual debts.

[19] It was, however, conceded that s 7(5) of the Act provides the exception, but it was maintained that the settlement agreement risking the joint property is not one of them and does not fall within the exception. Moreover, for the exception to apply, the wife of the second respondent ought to have signed as surety for the due performance of the first and second

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<sup>2</sup> *Standard Bank Namibia Limited v Shipila and Others* 2018 (3) NR 849 (SC).

respondent's obligations towards the applicant, which was not the case.

[20] On the issue of the nulla bona return in respect of the first respondent, it was submitted that as the first respondent is a juristic person, it was incumbent on the applicant first to determine if the first respondent had any movable property, which could be sold in execution in satisfaction of the debt before approaching the court in terms of r 108.

[21] On the merits of the opposition, the first respondent advanced an argument that both respondents indicated their willingness to settle the remaining debt in instalments of N\$10 000 per month but that the applicant was reluctant to accept the offer so made.

[22] According to the second respondent, this offer was made to satisfy a less drastic measure instead of declaring his primary home executable. The second respondent contends that attempts were made to settle the judgment debt and that declaring the immovable property executable would be inappropriate in the circumstances of settling the judgment debt.

#### Legal principles applicable and discussion

[23] The first point in limine to consider is the argument advanced in terms of the Married Persons Equality Act.

[24] Section 7 (1) of the Act provides that 'Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse:-'. This section then proceeds to enumerate all the instances in terms in which a spouse shall not act without the consent of the other spouse. It is however clear that s 7(5) provides for an exception, which reads as follows:

'(5) A spouse married in community of property may, in the ordinary course of his or her profession, trade, occupation, or business perform any of the acts referred to in paragraphs (b), (c), (f) and (g) of subsection (1), without the consent of the other spouse as required by that subsection.'

[25] Section 8 of the Act continues as follows:

'8. Consequences of act performed without required consent

‘(1) If a spouse married in community of property enters into a transaction with another person without the consent required by the provisions of section 7, or without leave granted by a competent court in terms of section 10 or contrary to an order of court in terms of section 11, and –

- (a) that other person does not know and cannot reasonably know that the transaction is being entered into without such consent or leave or in contravention of that order, as the case may be, such transaction shall be deemed to have entered into with the required consent or leave while the power concerned of the spouse has not been suspended, as the case may be;
- (b) that spouse knows or ought reasonably to know that he or she will probably not obtain such consent or leave or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, in adjustment of that transaction shall be effected in favour of the other spouse –
  - (i) upon division of the joint estate; or
  - (ii) upon demand of the other spouse at any time during the subsistence of the marriage.’

[26] Masuku J considered ss 7(5) and 8 of the Act in *Behrens N. O. v The Home Doctor CC*<sup>3</sup> and concluded that if read properly together, it appears that both ss 7(5) and 8(1)(a) of the Act create an exception and permits in those limited circumstances the alienation of property which forms part of the joint estate without the consent of the other spouse.

[27] The second respondent bound himself with the first respondent for the payment of the principal debt, which arose from a business agreement between the applicant and the first respondent. The settlement agreement entered into with the applicant was clearly a business decision, and in terms of s 7(5) of the Act, it would not require the consent of the second respondent’s spouse. It should be borne in mind that the settlement was for the payment of money and not a contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in an immovable property forming part of the joint estate.

[28] It seems that the second respondent wishes to make out a case that the second respondent acted as a surety on behalf of the first respondent and therefore had to obtain the permission of his spouse to do so. However, this cannot be the case as a deed of surety must

<sup>3</sup> *Behrens N.O. v The Home Doctor CC* (HC-MD-CIV-ACT-CON-2018/03150) [2020] NAHCMD 557 (3 December 2020) at para 35.

be in writing and signed by or on behalf of the surety, which never happened. In any event, the settlement agreement brought finality to the original lis between the parties and the obligations by the parties fall within the confines of the settlement agreement.

[29] The second respondent is the sole member of the first respondent, and he made the business decision on behalf of both respondents. Therefore, this point in limine raised by the respondents has no merit and should be dismissed.

[30] The second point in limine that the respondents pursue is that no nulla bona return was filed on behalf of the first defendant/respondent.

[31] The argument on behalf of the applicant that this is a bonded property and, therefore, a nulla bona return is not required is incorrect. That argument only applies when the property serves as a security for the mortgage bond. In terms of *Standard Bank Ltd v Shipila and Others*<sup>4</sup> only the mortgage creditor– the creditor in whose favour the immovable property is bonded does not need to obtain a nulla bona return for movable property and not just any creditor.

[32] There is, therefore, a distinction between a bondholder declaring property executable and a non-bondholder in that, in the latter case there must be a nulla bona return from the Deputy Sheriff in respect of movables or that there are insufficient movables. Accordingly, the immovable property is the only remaining asset of the debtor. The bondholder does not have to first proceed against movable property. The applicant is a non-bondholder, and therefore the rest of my discussion is premised on that principle.

[33] It is common cause that there is no nulla bona return filed in respect of the first respondent, and it appears that the applicant's departure point for the non-filing of a nulla bona is that the second respondent is the sole member of the first respondent and the respondents are jointly and severally liable for the debt.

[34] What should be borne in mind in the current facts is that the applicant is not seeking an order in respect of just any immovable property, but indeed, the immovable property that is

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<sup>4</sup> *Standard Bank Namibia Ltd v Shipila and Others* 2018 (3) NR 849 (SC).



the primary home of the second respondent and his wife.

[35] Rule 108 of the Rules of this Court stipulates that:

‘(1) The registrar may not issue a writ of execution against the immovable property of an execution debtor or of any other person unless –

(a) a return has been made of any process which may have been issued against the movable property of the execution debtor from which it appears that that execution debtor or person has insufficient movable property to satisfy the writ; and

(b) the immovable property has, on application made to the court by the execution creditor, been, subject to subrule (2), declared to be specially executable.

(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 order should not be made;

(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.’ (my underlining)

[36] Rule 108(1) requires that the judgment creditor first seeks satisfaction of the judgment debt from the judgment debtor’s movable property before having recourse to the immovable property of the judgment debtor. In addition thereto, the judgment creditor must apply to court to have the immovable property of the judgment debtor declared specially executable in accordance with the procedure described in r 108(2)(a) – (c).<sup>5</sup>

<sup>5</sup> P. Damaseb. (2020). *Court-Managed Civil Procedure of the High Court of Namibia*. Cape Town: Juta & company (Pty) Ltd, p. 324.

[37] A writ was issued in respect of the first respondent, yet there is no return of service showing that the Deputy Sheriff demanded satisfaction of the writ from the first respondent.

[38] The effect of the nulla bona return, if issued by the Deputy Sheriff, is first, altering the status of a debtor (to that of insolvency) and second, of infringing upon a debtor's right not to be deprived of their home or property without due process (declaring immovable property executable). It is accordingly a gateway, on the current facts, to the debtor losing his or her residential home.<sup>6</sup> It is for that reason that a nulla bona return, in my considered view, had to be obtained in respect of the first respondent as well.

[39] In exercising judicial oversight, in the current instance, this court must consider whether the CC respondent or the member owns any or sufficient movable assets which can be realised to meet the judgment debt. It follows that where the applicant has not moved against the movables of both the respondents, it cannot succeed in the relief sought against immovable property.

[40] The point in limine in this regard must, therefore, be upheld.

[41] Finally, on the issue of costs, I am of the view that each party should pay its own costs.

[42] My order is as above.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.

<sup>6</sup> *N S B v A F B* Case 260/2019 Unreported judgment delivered by Norman J, Judge of the High Court of South Africa, Eastern Cape Division, Makhanda.

<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondents</b>
Ms J Janke of Sisa Namandje and Co., Windhoek	Mr L Mukondomi of Gaenor Michaels & Associates on behalf of Ms M Amupolo