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REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: I 1791/2014

STANDARD BANK NAMIBIA LIMITED **PLAINTIFF**

And

MAGDALENA SHIPILA **DEFENDANT**

THE OMBUDSMAN **AMICUS CURIAE**

NEDBANK NAMIBIA LIMITED **1ST COMMERCIAL BANK**

FIRST NATIONAL BANK NAMIBIA LIMITED **2ND COMMERCIAL BANK**

BANK WINDHOEK LIMITED **3RD COMMERCIAL BANK**

Neutral citation: *Standard Bank Namibia Ltd v Shipila* (I 1791-2014)[2015] NAHCMD 281 (19 November 2015)

Coram: MILLER AJ

Heard: **22 May 2015**

Delivered: **19 November 2015**

Flynote: Practice – High Court Rule 108(1) and (2) – Interpretation thereof – Application by Mortgagee to declare an immovable property, placed under a mortgage bond specially executable, as of right together with the default judgment – Principles in *Futeni* Judgment restated – Rule 108 not changing the common law right of mortgagee to declared bonded property executable but merely stating the procedures to be followed – Rule 108 (1) and (2) in line with the common law position that execution must first be laid against movables and thereafter immovable - Such Mortgagee not in a better position than any other judgment creditor - Application struck from the roll.

ORDER

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1. The application to declare the immovable property, to write: *Erf. no [6…..], [R…..] [C…..], [Extension no…..], Windhoek, Republic of Namibia, Registration Division K, Khomas Region, measuring 360 square metres and held by Deed of Transfer No.[T2………],* specially executable is struck from the roll.
2. The plaintiff must bear the defendant's costs limited to actual disbursements reasonably incurred.

JUDGMENT

MILLER AJ:

[1] This is an application in terms of which the Commercial Banks (Standard Bank, FNB, NEDBANK and Bank Windhoek) seek guidance from the court as to the correct procedure to be followed in cases where foreclosure of a bond is sought in terms of an existing mortgage bond agreement. The guidelines and reasons follows.

Factual background: The claim

[2] The plaintiff approved a home loan application of the defendant on 20 May 2008 and to which the defendant bound herself in favour of the plaintiff in the amounts of N$ 300 275.00 and N$ 75 069.00. As security for the monies advanced, a continuing covering mortgage bond was registered over the immovable property belonging to the defendant, *to writ: Erf. no [6……], [R……] [C……], [Extension no……], Windhoek, Republic of Namibia, Registration Division K, Khomas Region, measuring 360 square metres and held by Deed of Transfer No.[T2…….]*.

[3] The defendant defaulted in her monthly instalments to the plaintiff and was, according to the certificate of Indebtedness, as at 26 June 2014 indebted to the plaintiff in the amount of N$ 299 862.47. After several demands, the plaintiff instituted legal action for the recovery of the debt, and rightly so in terms of the bond agreement, on 10 July 2014. The relevant portion of the agreement reads as follows:

> ‘21. Default by Mortgagor
>
> 21.1 The mortgagor shall be deemed to be in breach of the Mortgagor’s obligation in respect of the loan, if:
>
> 21.1.1 the Mortgagor fails to pay any amount due in terms of the loan or any other amount due to the Bank in respect of any other liability of whatsoever nature to the Bank on due date or commits a breach of any other provision of the loan or the Bond (whatever such breach is material or not) or;
>
> 21.2 If the Mortgagor is deemed, in terms of clause 21.1 to be in breach, then at the option of the Bank, all amounts whatsoever owing to the Bank by the Mortgagor shall forthwith be payable in full, notwithstanding the exercise by the Bank of any other rights and the Bank may institute proceedings for the recovery thereof and for an order declaring the mortgaged property executable. The Bank shall further be entitled, and is hereby authorised by the Mortgagor, to surrender or otherwise realise any policy of insurance or any other security which is ceded or made payable to the Bank as collateral security, and to appropriate the surrender value or amount otherwise realised in reduction of the amount outstanding.’

[4] As part of the summons, the plaintiff makes the allegation that leave would be sought to declare the property executable and that any submissions from the defendant should be placed before court for consideration at the hearing of the matter. No allegation was ever made that the property is not the primary home of the defendant. It can however be assumed that it is the primary home of the defendant, hence the notice served in terms of rule 108(2)(a). The summons and the annexures (the bond agreement, the certificate of Indebtedness and the Notice in terms of rule 108(2)(a) and (b)) where served on the defendant on 22 July 2014 by attachment to the principal door of the subject property as no other manner of service was possible.

Defence to the claim

[5] The action was defended and the application for default judgment was opposed on 31 July 2014 and in summary, the defendant states that liability towards the plaintiff is not denied and that arrangements would be made to repay the amounts owed to the plaintiff. The defendant is currently unemployed but has identified a unit which is nearing completion in order to generate funds to pay off the loan or alternatively, offers her retirement fund annuities available in the Old Mutual Retirement Fund Investment, meanwhile waiving any protection that may be attached to these for purposes of fulfilling a debt, in order to pay the debt owing to the plaintiff. Alternatively, that such annuities will be made available only in February 2016. The defendant further states that she will be left homeless with her children if the house, which is her primary home, is sold in execution.

[6] The court on 14 August 2014 granted judgment for the payment of N$ 299 862.46 with compound interest at the rate of 8.75% per annum to be calculated on a daily basis and capitalized monthly as from 27th of June 2014 to date of payment as agreed to between the parties, as well as costs of suit. The court refused the prayer to declare the subject property executable. A writ of execution against movable goods of the defendant was issued out of the office of the Registrar of the High Court on 23 September 2014, personally served on the defendant and a *nulla bona* return was filed

with the court on 30 September 2014. The applicant then brought an application to declare the subject property executable. The procedural question in terms of rule 108 was then set down for determination.

The application

[7] The court on 21 January 2015 joined the Ombudsman as *amicus curiae* and further granted leave to Old mutual Max Investment Pension Fund, First National Bank and Bank Windhoek to intervene as parties with a potential interest in the outcome of the matter and to present arguments on the issue at hand. Only the Ombudsman and the commercial banks presented arguments on the matter.

[8] The application before court is to the effect that the defendant seeks the release of the house from an interim attachment in exchange of an amount equivalent to the debt which is to be released from the retirement fund. The plaintiff's takes the stance that there is no guarantee that the debt will be paid in full if a grace period of two years as requested by the plaintiff, is granted, more so because the defendant is unemployed and is not in any position to afford the instalments. In respect of the flat, the plaintiff states that it is not clear as to the source of the funds used to build the flat, how far the completion is and what amounts are expected to be generated from the Unit and that such uncertainty does not count for the defendant. As regards the retirement annuities, the plaintiff states that such request is unenforceable in terms of the Pension Fund Act, 1956 and as such, the rights cannot be ceded; the amounts are only paid out in portions and would in any event not be sufficient enough to cover the debt. The plaintiff rejects any assurances offered by the plaintiff as they are unreasonable and unenforceable.

The legal issue that needs to be determined

[9] In addition to the guidance sought by the Commercial Banks, the remaining prayer by the plaintiff is to declare the immovable property belonging to the defendant executable. The bone of contention between the parties is whether rule 108 would in this instance be strictly applied.

<u>The parties' submissions</u>

On behalf of the commercial Banks

[10] The commercial banks jointly made submissions on the subject and take the stance that rule 108 should not apply in cases where the creditor (Bank) has a mortgage registered in its favour over an immovable property. Adv. Heathcote represented the Commercial banks and submits that the judgment creditor, may seek an order for the foreclosure of a bond together with an order for default judgment in terms of rule 15(3). Counsel submits that rule 108 does not apply in cases where the immovable property is bonded in favour of the judgment creditor; or where the property belongs to a corporation; where the property is not a primary home of the defendant and not leased to a third party.

[11] As regards procedure, the Commercial banks position is that judgment creditor has a substantive right in the property which it is entitled to enforce by having the property sold in execution, and this right stems from the common law. Mr Heathcote relied on authorities sustaining the position that a judgment creditor has, as of right and at its choice, an inherent right to have the property executed whether the agreement contains such a clause or not and in the absence of an execution against the movables, especially in cases where the property has been specifically mortgaged. Such relief would be granted if prayed for in the summons at the same time that default judgment is sought. Counsel submits that rule 15(3) is in line with common law and that the conflict is created by rule 108 which, in such instances and bearing in mind the presumption of legality, rule 108 should not be made to apply to claims involving mortgage bonds.

[12] As a result, the guidelines suggested by the commercial banks includes that judgment creditors be granted an executable order when applying for default judgment in terms of rule 15 on condition that the judgment debtor is notified, such service to be in compliance with rule 8, of the intention of seek such an order and be given an opportunity to be heard before the order can be made. These suggestions are based on

the interpretation of rule 108(1) and (2) by the Commercial banks that form 24 may be served simultaneously with the summons on the defendant; that the court does not have to look at extraordinary circumstances before being satisfied and that a mere indication that the judgment debtor has been informed of his/her rights before issuing the order and where there is no indication of any abuse of court process. Accordingly, the court should not exercise its discretion unless in circumstances where there are other ways to satisfy the judgment debt.

[13] Counsel submits that since a *nulla bona* was obtained against the movables of the defendant on 30 September 2015, the order prayed for must be granted as this would not amount to an abuse of court process. With regard to the defendant's offer that judgment be satisfy by means of the pension annuities being paid out on February 2016, the plaintiff states that s 37A of the Pension Fund, 1956 states that, unless for tax purposes or maintenance claims, no right in the fund benefit may be reduced, transferred or ceded or hypothecated or be liable to be attached or be subjected to any form of execution. Any such attachment would be in violation of statutory law.

On behalf of the Ombudsman: Amicus Curiae

[14] Adv. Frank appeared on behalf of the Ombudsman and submitted that the practice has been that a court could declare a property executable if the plaintiff asked for that relief whether there is a foreclosure clause in the agreement of not. Accordingly, rule 108 reaffirms common law but extends judicial oversight even after a writ on movables has failed to satisfy the judgment debt. In answering the questions posed by the Commercial banks, the Ombudsman takes the stance that Form 24 should only be served after default judgment has been granted and not annexed to the summons and that the conditions precedent to the execution against the immovables must be fulfilled. Accordingly, an application must be brought before court for the property in question to be declared executable, which such application must comply with rule 65 and rule 32. The reasoning behind the support of the procedures as set out in rule 108 is that the court at the default judgment stage cannot overlook the fact that there may be movable

properties that may satisfy the debt and the process used by the plaintiff to have the property declared executable on the basis of the summons is an abuse of court's process.

[15] The Ombudsman denied that there is conflict between common law and rules 15 and 108. Accordingly, rule 108 does not affect the Commercial Banks rights to the foreclosure of a bond and that it simply affords the court judicial oversight before immovable properties are executed.

The defendant

[16] The defendant's position is that the property in question is her primary home and the only home where she lives with her two dependent children. It is clear from her submissions that there are no movable properties that could satisfy the debt, which by now has inflated with interest. The acknowledgment of her indebtedness is obvious from the record but she submits that she will be left in destitute if the home is to be sold. She is more than willing to waive the protection placed on retirement annuities and even proposes that such an arrangement be made an order of court.

[17] No submissions where made from the Retirement Fund.

<u>The law</u>

[18] The effect of the arguments advanced on behalf of the Commercial banks is that Rule 108 procedure would not apply in cases where the property is bonded in their favour. Let us do a close read-up and interpretation of this rule:

'Conditions precedent to execution against immovable property and transfer of judgments

108. (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.

[19] It is trite law that the rules of the high court has done away with default judgments been granted by the registrar and that the rationale behind this rule is to give more judicial oversight on the question of declaring primary homes executable. From the reading of subrule (1), it is clear that the only instances under which a writ against any immovable will be issued is if there is a *nulla bona* return and if there is a court order. No distinction was made here between immovable belonging to a corporate or to an individual and whether it's a primary home or not. This section thus subjects all properties sought to be declared executable. The section does further not make any distinction as to whether the property was bonded or not. I do not think that was the intention of the drafters either.

[20] Note that subrule 1(b) is subjected to subrule (2). This means that the court order is further subjected to an enquiry in terms of subrule (2), which comes into play if the immovable property is the primary home of the judgment debtor. If the immovable property is not the primary home of the judgment debtor, then the enquiry in terms of subrule (2) does not come into play. This means that the court would be exercise its judicial oversight before granting the order in order to ensure that all cases of execution against immovable property conducted in terms of the rules did not serve to breach the constitutional right to housing.[1]

[21] The word and between the subrules is an indication that the *nulla bona* return and the court order must be obtained before any writ may be issued. The position is different in South Africa, as correctly pointed out by the Commercial banks, in terms of

[1] Principle set out in the case of Mkize v Umvoti Municipality and Others 2012 (1) SA 1 (SCA).

which rule 46 alternate between the *nulla bona* and the court order. This means that a property may be declared executable even if no *nulla bona* has been obtained. This is not the position in Namibia and the position as stated in *Namib Building Society v Du Plessis*[2] has been changed.[3]

[22] Rule 108(1)(b) deals specifically with the courts' order declaring an immovable property executable. The rules create an even further enquiry to be carried out before the order may be granted. Rule 108(2) reads:

> '(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 <u>personal service</u> 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; <u>and</u>
>
> (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.' (Underlining for emphasis)

[23] This subrule applies in cases where the immovable property is the primary home of the judgment debtor and it places a duty on the court to ensure that subrule (2)(a)-(c)

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[2] 1990 NR 161(HC)161.

[3] See *Futeni collections (Pty) Ltd v De Duine (I 3044/2014) [2015] NAHCMD 119 (27 May 2015), at para [*

is complied with before any order is made. This means that on the day that the application is to be made, the following should be before court:

a) *A return of service showing that notice has been given on form 24 and has been personally served on the judgment debtor and any third party leasing the property.*

[24] This is to inform the judgment debtor that the judgment creditor intends to apply to the court to have the property declared executable, after the receiving a *nulla bona* return, and to afford the judgment debtor an opportunity to provide reasons why such an order may not be granted. The wording of form 24 reads:

> 'TAKE NOTICE THAT .... (plaintiff/defendant)(hereinafter called the judgment creditor) has obtained judgment against .... (plaintiff/defendant) (hereinafter called the judgment debtor) on .... (date) in this court.
>
> TAKE FURTHER NOTICE THAT the judgment creditor has applied in terms of rule 108(1)(b) for an order declaring the property executable and the judgment creditor is hereby called to provide reasons to this honourable court within 10 days why such an order may not be granted.'

[25] There is no doubt from the wording of Form 24 that what is intended is for a default judgment to be granted first before an application is made for the property to be declared executable. It has become practice that Form 24 being attached to the summons differ from the provided Form in terms of the rules. Attention is brought to the wording of subrule 108(2)(a) that notice should be 'on Form 24' as opposed to 'as near as it may be to Form 24'. This implies that the Form must be precisely as required by the rules without any additions or subtractions. The court in the *Futeni* Judgment at para [29] elaborated more on this point and stated that 'at the summons stage, the parties to the *lis* are referred to as the plaintiff and the defendant. At the stage of the issuance of the notice in terms of rule 108 (2) (a), however, the appellations change and the parties are referred to as the 'execution creditor' and 'execution debtor', respectively. This

indicates that the notice is issued after judgment in favour of the plaintiff has already been granted and the parties are, at the stage of execution of the judgment hence the use of the word, execution creditor and debtor, respectively'.

b) *having considered all the 'relevant circumstances' with specific reference to less drastic measures than sale in execution of the primary home under attachment,*

[26] This sub-rule is primarily made to protect home owners or third parties residing in homes from unbridled loss of homes by declarations of executability of landed property by court orders and over which the courts simply had no control and considerations over other remedies less drastic than the sale of a home.[4] Relevant circumstances and less drastic measures would in this case be an execution against the movables that may be able to satisfy the judgment. Although, these considerations do not change the common law principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money, this is a caution to the courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at the risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, alternative course should be judicially considered before granting execution orders.[5]

[27] This is the mechanism adopted by the courts to protect homes of judgment debtors. At common law, as in the words of my brother Masuku, AJ, a mortgagee plaintiff has a substantive right to realize the immovable property of the judgment debtor in cases where the said judgment creditor duly registered the mortgage bond for the very purpose of securing the debt which is the subject matter of the claim.[6] It is now common cause that the terrain has changed somewhat since the amendment of the

[4] *Futeni* Judgment, para [34]; see further *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* **[2004] ZACC 25**; **2005 (2) SA 140** (CC).
[5] *Gundwana v Steko Development and Others* **2011 (3) SA 608** (CC), at para [53].
[6] *Ibid* at page 163J – 164A.

rules[7] of court by the Judge President when he introduced the provisions of rule 108.[8] The rule was promulgated to balance two interests. The first was to regulate the sale of homes in execution when the property in question was a home. The second, was to ensure that the giving of credit by financial institutions remained effectual and was not rendered unserviceable. Rule 108 does therefore, as conceded to by the Ombudsman, not take away the creditors right to execute against the properties of the debtor but merely sets down procedures as to how that should be done. The Banks do not therefore find themselves in a better and more advantageous position than any other judgment creditor.

[28] The courts are very slow in setting general guidelines that will apply across the board since each case should be decided on its own facts. The guidelines in one case might not necessarily apply in the next case. In this matter, the plaintiff has not complied with the procedural requirements of rule 108(1) and (2) in that default judgment was not first sought before the application was brought. Furthermore, the application before court does not comply with rule 65. I find that mortgage holders are obliged to comply with rule 108. Since, in the instance case, there has been no compliance with that rule, it must follow that the application must be struck from the roll and it is so ordered.

[29] Costs would in this instance also follow the event. The defendant's cost is however only limited to actual disbursements reasonably incurred.[9]

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

3. The application to declare the immovable property, to writ: *Erf. no 698, Rocky Crest, Extension no.1, Windhoek, Republic of Namibia, Registration Division K, Khomas Region, measuring 360 square metres and held by Deed of Transfer No.T2999/2008,* specially executable is struck from the roll.

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[7] High Court Amendment Act 12 of 2013.
[8] *Futeni* Judgment, para [25].
[9] See Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd 2007 (2) NR 592 (HC).

4. The plaintiff must bear the defendant's costs limited to actual disbursements reasonably incurred.

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Miller, AJ

Acting

Appearance:

On behalf of the Commercial Banks:	R Heathcote, SC (Assisted by Y Campbell)
On instructions of	Behrens & Pfeiffer, Windhoek
On behalf of Interested party: *Ombundsman*	T Frank, SC (Assisted by g Dicks)
On instructions of	Fisher, Quarmby & Pfeiffer, Windhoek
Defendant	*In person*