

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

**RULING ON APPLICATION TO STAY DECLARATION OF AN IMMOVABLE
PROPERTY EXECUTABLE**

Case no: HC-MD-CIV-ACT-CON-2016/04122

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA

APPLICANT

and

BEAVEN DICKSON MUSHETI

RESPONDENT

Neutral Citation: *First National Bank of Namibia v Musheti* (HC-MD-CIV-ACT-CON-2016/04122) [2017] NAHCMD 304 (18 October 2017)

Coram: ANGULA DJP

Heard: 29 September 2017

Delivered: 18 October 2017

Flynote: Application and Motions – Application in terms of Rule 108(1)(b) of the High Court Rules – Application to declare immovable Property specially executable – Opposition to Rule 108 Application – Primary Home of Judgment Debtor – Judgment debtor seeking the court to stay proceedings to declare his primary home executable –

Such grounds to stay proceedings should not cause prejudice to the other party – Grounds should not be problematic, speculative and/or hypothetical – The High Court has inherent jurisdiction to stay civil proceedings pending the outcome of other civil proceedings.

Summary: Judgment debtor defaulted with his mortgage repayment following his dismissal from employment – He appealed against the dismissal – While his appeal was pending the plaintiff bank obtained a default judgment against the judgment debtor and subsequently applied for an order declaring the primary home to be declared specially executable – Meanwhile the judgment debtor’s appeal succeeded and he was reinstated in his previous job – He applied for the stay of the proceedings to declare his primary home executable pending receipt of his pay-out of his back pay in order to settle the arrears and for reinstatement of his mortgage bond.

The bank opposed the judgment debtor’s application contending that there was no duty on the bank to grant the indulgence sought; the judgment debtor was not *bona fide*; that there was no indication when the appeal would be finalised; that the appeal may drag on indefinitely; and that the judgement debtor had failed to place sufficient information before court so as to enable the court to determine whether the appeal has good prospect of success or not. Finally, that although the bank was sympathetic to the judgment debtor’s position, as a commercial bank it could not suspend execution of the judgment in his favour for the reasons advanced by the judgement debtor.

Held that: Exceptional circumstances existed justifying the court to exercise its discretion in granting the stay of the proceedings to declare the immovable property specially executable; and that the stay of the proceedings constituted a less drastic measure comparing to declaring the immovable property executable.

ORDER

1. The application for stay is granted.
2. The proceedings are postponed to **24 January 2018** at **8h30**.
3. Mr Bernard Benz, the Chief Human Resource Practitioner of the Office of the Auditor General is hereby directed to provide the Chief-Registrar of this court with a status report concerning processing of Mr Musheti's salary and other benefits payout due to him, on or before 8th December 2017. A copy of this order to be hand delivered by the legal practitioner for Mr Musheti personally to Mr Benz.
4. The costs of this application shall stand over for determination at hearing of the application to declare the immovable property executable.

JUDGMENT

ANGULA DJP:

Introduction

[1] I have before me two applications. In one application, First National Bank of Namibia ('FNB'), seeks an order declaring the respondent's immovable property executable in terms of rule 108(1)(b) of the rules of this court. The application is opposed by the respondent, Mr Musheti. The other application has been filed by Mr Musheti, in which he seeks an order staying FNB's proceedings until he has received back-payment from his employer following his reinstatement in his previous job. The application is likewise opposed by FNB. In order to avoid confusion the parties will be referred in this ruling by their names.

[2] I will first outline the application to declare the immovable property executable and thereafter consider the application for leave to stay execution proceedings.

Application to declare the immovable property executable

FNB's case

[3] By nature of things, the founding affidavit filed on behalf of FNB was of a formal nature. The deponent to FNB's founding affidavit deposed to the facts; that FNB has been granted judgment by default against Mr Musheti; that it received a *nulla bona* return in respect of the movables; that the application to declare the immovable property executable has been personally served on Mr Musheti; and that the judgment amount, interest and costs remain unpaid. Those are the usual necessary averments to be made by a party applying for an order to declare an immovable property executable.

The respondent's reasons for opposition

[4] Mr Musheti states in his opposing affidavit that his employment with the Office of the Auditor-General was terminated on 15 August 2016; that he then lodged an appeal against his dismissal. In the meantime summons has been issued and judgment by default has been granted against him in favour of FNB. He states further that he then addressed a letter to FNB's legal practitioner requesting them to hold further steps in abeyance pending the outcome of his appeal. He also personally attended at the offices of FNB's legal practitioner to plead with them to hold back further steps, but to no avail. Mr Musheti further relates that after the writ of execution in respect of the movables was served on him he again attended at FNB's legal practitioner and pleaded with them not to proceed with the matter pending the outcome of his appeal. On 30 March 2017 the papers in the application to declare his immovable property executable were personally served on him.

[5] With regard to the reasons for opposing the application, Mr Musheti acknowledges that he does not have a defense to the application but points out that he is not *mala fide* in his opposition but rather opposing the sale in execution of his house on humanitarian reasons. He says that he requires an extension in order to settle the judgment debt once his financial situation has changed. Mr Musheti states that based on his previous experience, the appeal would be finalised within a period of five months. He pledges to settle the judgment debt once his appeal has succeeded. However in the event the appeal does not succeed, he expects to receive a substantial amount of pension benefit from GIPF.

[6] In conclusion Mr Musheti states that the immovable property sought to be declared executable is his only primary home, if sold, it will leave him on the street.

The replying affidavit on behalf of FNB

[7] FNB's replying affidavit has been deposed to by the manager: legal department. It is replete with legal submissions and arguments which are repeated later in the heads of arguments. I will confine myself to the replies directed at the factual allegations by Mr Musheti.

[8] The deponent states that there is no duty on FNB to grant the indulgence sought by Mr Musheti. The deponent denies that if Mr Musheti's appeal succeeds and he is paid out, he will be in position to settle the full amount due to FNB. In this connection the deponent points out that the judgment debt is substantial amounting to about N\$600 000 excluding interests.

[9] The deponent denies that Mr Musheti is *bona fide*. She further points out that there is no indication when the appeal will be finalised; that the appeal may drag on indefinitely. The deponent points out that Mr Musheti has failed to place sufficient information before court so as to enable the court to determine whether the appeal has good prospect of success.

[10] In respect of Mr Musheti undertaking to settle the judgment with the funds from his pension pay-out, the deponent points out that there is no guarantee that he will receive any substantial amount of monies.

[11] The deponent disputes Mr Musheti's allegation that he has no source of income and that he is unable to obtain other employment. In this connection the deponent points out that there is no reason why Mr Musheti cannot acquire employment in order to ameliorate the destitute financial situation he finds himself. In the deponent's view, sitting back idly waiting for the finalisation of the labour appeal is reckless.

[12] The deponent admits that Mr Musheti may find himself on the street if the immovable property is sold; that although FNB is sympathetic to his position, as a commercial bank it cannot suspend execution of the judgment in his favour for that reason. In conclusion the deponent asserts that Mr Musheti's request is unreasonable and accordingly he failed to make out a case for the stay of the execution.

[13] When the matter was called on 19 July 2017 I ordered that the matter should be postponed to a mutually convenient date to hear arguments from the parties' legal representatives. The matter was then set down for hearing on 29 September 2017.

Application to stay proceedings declaring the immovable executable

[14] A few days before the hearing on 29 September 2017, Mr Musheti filed the application in which he *inter alia* seeks an order condoning his non-compliance with the court order of 19 July 2017 in that his heads of argument were filed out of the time period specified in the order and further for an order staying the proceedings declaring his immovable property executable until he has received his pay-out from his employer following his reinstatement in his previous job. Alternatively he prayed for an order setting the matter down for a new date for hearing of the application with no order as to costs alternatively costs to be costs in the cause. The application is opposed by FNB.

[15] The application for condonation for the late filing of the heads of argument was not opposed.

[16] The court is satisfied that an acceptable explanation has been given and condonation in that regard is accordingly granted.

[17] The supporting affidavit in respect of the application to stay proceedings has been deposed to by Mr Musheti's legal practitioner. It is a practice which is frowned upon by this court. No explanation has been given why Mr Musheti could not depose to the affidavit himself. Mr Musheti however filed a confirmatory affidavit. It has been numerous times stressed by this court that a legal practitioner cannot be a witness for his or her client and a legal practitioner in the matter at the same time. The two roles are mutually exclusive.

[18] Be that it may, Mr Marco Schurz for Mr Musheti states in his affidavit that the situation has in the meantime changed since the answering affidavit to the application for leave to declare the immovable property executable was filed in that Mr Musheti has been re-instated in his previous job; that he stands to receive about N\$280 000 in back pay. In support of these statements Mr Schurz annexes letters from Mr Musheti's employer confirming those facts. Mr Schurz states further he has contacted the official of FNB who confirmed to him that since Mr Musheti has been re-instated it was possible for his bond to be reinstated; that the outstanding instalments was about N\$110 000 plus a second loan of N\$28 000. This means that the amount of N\$280 000 would be sufficient to cover the outstanding instalments and full capital amount in respect of the second loan and costs.

[19] Mr Schurz states further that he then addressed a letter to FNB's legal representative advising of the current development and suggested further that the parties approach the managing judge in chambers to postpone the matter pending receipt of pay-out by Mr Musheti so as to enable him to settle the outstanding

instalments and thereafter to arrange for the reinstatement of the bond. Mr Schurz states further that he received a response from FNB's legal practitioner declining the suggestion and pointing out that the amount tendered was less than the judgment debt and that negotiation for a new agreement was unacceptable.

[20] In the meantime Mr Musheti received a letter from his employer informing him that the payment has been delayed and it could only be expected during October or November 2017.

[21] Mr Schurz submits that there is no prejudice to be suffered by FNB because the payment is forthcoming; the only person to suffer would be Mr Musheti because if the house is sold at an auction it would not be sold for its real market value resulting in Mr Musheti suffering immense financial loss.

[22] Mr Schurz finally submits that the overarching objective of rule 108 is to protect the person's right to property guaranteed by Article 16 of the Constitution; and that there are less drastic measures that the court should consider instead of sanctioning the sale in execution of the immovable property which is a primary home for Mr Musheti.

[23] No opposing affidavit was filed on behalf of FNB to Mr Musheti's application for stay of execution proceedings. However as indicated earlier, the application is opposed and most of the grounds for opposition have been foreshadowed in the replying affidavit filed on behalf of FNB.

Issue for determination

[24] The crisp issue for determination is whether Mr Musheti has made out a case for the court to exercise its discretion to stay the execution proceedings. If the answer to this question is in the negative then the court would be bound to declare the immovable property in question executable.

Submissions by the parties

[25] In his heads of argument Mr Schurz, counsel for Mr Musheti referred the court to the judgment in the matter of *Standard Bank Namibia Limited v Shipila*¹ where the court said the following with regard to the purpose of rule 108:

[26] Rule 108(2)(c) 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 in respect of other remedies less drastic than the sale of a home. 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 against 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, an alternative course should be considered judicially before granting execution orders.'

[26] On the basis of the above statement by the court, counsel submitted with reference to the matter before court that there are less drastic measures than selling Mr Musheti primary home. Furthermore, it is contended, all that Mr Musheti seeks is an extension of time to settle the judgment debt when he receives his payment and for the re-instatement of the mortgage bond.

[27] Ms de Jager who appeared for FNB submitted that the onus to persuade the court that the property must not be declared executable lies on the judgment debtor. Counsel submitted that the rule requires that the court inquiries into less drastic measure than the sale in execution, for instance attaching an alternative immovable property; that the rule does not create a right to seek or sanction the stay of execution

¹ 2016 (2) NR 476 HC.

proceedings nor does it intend to preserve the right of execution debtor to such debtor's immovable property while no other reasonable means exist to satisfy the judgment debt.

[28] Ms de Jager further argued that it is only where the immovable property sought to be declared executable is a primary home that the court's discretion arises; and that such discretion must be exercised having regard to all the relevant circumstances.

[29] Counsel submitted further that assuming that the judgment debtor would receive a sum of money as pay-out from his employer, such amount will not be sufficient to satisfy the judgment debt. Therefore, so the argument went, Mr Musheti did not make out a case to sustain the stay of execution proceedings.

[30] In respect of Mr Musheti's plea which is based on humanitarian grounds, Ms de Jager submitted that this is not possible in law; in that the court cannot simply come to the judgment debtor's assistance on equitable grounds alone. In support this submission counsel relied on what was said by the court in *Kalipi v Hochobeb*² with regard to a court presumably exercising equitable discretion:

[45] To sum up: it appears from these cases that all the learned judges, who had occasion to deal with this issue, accepted:

- (a) That the high court also has an inherent jurisdiction to stay civil proceedings pending the outcome of other civil proceedings;
- (b) that this power is to be exercised by the court to prevent an abuse of its process in the form of vexatious litigation; and if an action is already pending between the same parties on the same cause of action;
- (c) that in this regard the court has a judicial discretion, which must be sparingly exercised on strong grounds, with great caution and in exceptional circumstances.

² 2014 (1) NR HC 90 at paras 45 to 46

[46] Insofar as the courts have assumed an equitable discretion, hesitate to make that same assumption in the absence of considered argument on that aspect. On the other hand I have no doubt that our courts would also exercise any such discretion in the recognition that the courts in Namibia do not just simply administer a system of equity in the abstract, as distinct from a system of law, and that in this country also, when considering the 'equities' of a case, in the broad sense, the courts will always be desirous to administer 'equity' in accordance with the principles of the Roman-Dutch law – and I might add – in accordance with Namibian law – and if the courts cannot do so, in accordance with those principles, they cannot do so at all.'

Applicable legal principles

[31] In addition to the legal principles cited by the respective counsel in support of their submissions, the court also take into consideration what was said by the court in the matter of *Mouton v Goaseb*³, where the court had occasion to consider the application for leave to stay eviction proceedings on the ground that there were pending proceedings before the Supreme Court. Masuku J outlined the factors a court has to take in consideration when considering an application for stay of civil proceedings. The learned judge stated as follows at paragraph [13]:

'It thus becomes clear that applications for stay of proceedings are not granted lightly and merely for the asking. It would seem that exceptional circumstances must be proved to be extant before the court may resort to this measure. I would think this is because once legal proceedings are initiated, it is expected that they will be dealt with speedily and brought to finality because tied in them are rights and interests of parties, which it is in the public interest to bring to finality without undue delay. Applications for stay have the innate consequence of holding the decisions and the rights and interests of the parties in abeyance. It is for that reason that these applications are granted sparingly. It would appear to me, in line with the overriding principles of judicial case management, the bar for meeting the requirements for stay of proceedings is even higher as the application impacts on the completion of the case, time

³ (14215-2011) [2015] NAMHCMD 257 (28 October 2015)

expended on the application itself (not to mention the time to be waited during the time when the stay operates if successful) and obviously, the issue of costs.'

[32] The court in the *Kalipi* matter *supra* referred with approval to the judgment of Nicholas J in the matter of *Fisheries Development Corporation of SA (Pty) Ltd v Chairman, Wine and Spirit Board and Other*⁴ where it was stated that where there is an application for stay made on the grounds of prejudice, such prejudice and harm must not be '*problematical, hypothetical and speculative*'.

Application of the law to the facts

[33] It is common cause that the immovable property which is the subject matter of the present proceedings is the primary home for Mr Musheti. In essence Mr Musheti needs an extension of time to settle the judgment debt when he receives his pay-out. It would appear however that the mortgage bond agreement was not cancelled when the default judgment was granted. The judgment granted in favour of FNB is for the payment of the amount of about N\$547 991 plus interest and legal costs. It did not include an order cancelling the agreement.

[34] It would further appear from the papers that FNB does not intend to refuse to accept payment of the arrears tendered by Mr Musheti. FNB's replying affidavit was deposed to at the stage when Mr Musheti was still waiting for the outcome of the appeal. At that stage FNB's concern, and understandably so, was that '*there was no telling when the appeal may be finalised*'; that it '*may drag on indefinitely*'; '*that the defendant (Mr Musheti) had failed to make sufficient averments to conclude that he has good prospect of success*'.

[35] It would further appear to me that the even though FNB's attitude, was against the negotiation of a new agreement as conveyed to Mr Schurz by FNB legal representative, such stance appeared to have softened in that the deponent to the FNB

⁴ 1999 (3) SA 832 (C)

affidavit states that even if Mr Musheti were to receive his full remuneration there is no duty for FNB to enter into settlement negotiations. I understand this statement to mean that FNB has not completely ruled out settlement negotiations in respect of the judgment debt. If FNB were to completely refuse to accept payment of the arrears and to renegotiate a new arrangement with the judgment debtor it would remind one of the Shakespearian merchant of Venice. Mr Shylock, who despite being offered payment more than the amount owed, albeit out of time, he demanded his pound of flesh as per original agreement. Thanks to the wisdom and sagacity of the judge who ruled that Mr Shylock could have his pound of flesh on condition that no drop of blood was to be shed. The court would not imagine that FNB would insist on its pound of flesh and decline to accept payment of the arrears.

[36] Mr Schurz referred the court to some cases which are based on the interpretation of provisions of the South African National Credit Act⁵, whereby a bond agreement is automatically reinstated once the judgment debtor has paid all the outstanding arrears including interests and enforcement costs⁶.

[37] Our law is still debtor-unfriendly: it entitles the creditor like in the present matter, a bank to whom an immovable property was mortgaged, to contractually refuse late payment of home-loan instalments; only payment of the full outstanding accelerated amounts, not just the arrears, would save a mortgagor's property. I see no reason in principle why the banks in Namibia cannot adopt a self-regulating system in the absence of legislation to negotiate and agree on the terms of re-instatement of bond agreements. Such re-instatement will offer the mortgagor a lifeline. It spares the mortgagor who is faced with a sale in execution of his or her primary home⁷. Such approach will contribute and advance socio- economic welfare for the Namibian people which will in turn create a stable and conducive business environment by facilitating home ownership. Then when default on loan repayment occurs, like in the present matter, to accommodate and be prepared to renegotiate new terms of the loan.

⁵ Act No 34 of 2005

⁶ *Nkata v Firstrand Bank* 2016 (4) SA 257 (CC)

⁷ See: *Nkata* (supra) at page 273 par 59

[38] On the issue of prejudice, it is so that either way both parties stand to suffer prejudice if a certain course is followed. In respect of FNB, it will suffer prejudice in that there will be a delay in enforcing its judgment by causing the immovable property to be sold in execution and then obtain the proceeds of the sale in execution in order to recover its money lent to the judgment debtor. I think it is fair to say objectively viewed and by all reasonable standards, the prejudice to be suffered by FNB is of a temporary nature. After the , so to speak, grace period has expired if the judgment debtor had not paid the arrears, FNB will proceed to move for the order to declare the immovable property executable. In respect of Mr Musheti, the prejudice is not temporary; it is devastating and permanent. Not only will he lose his primary home, but in addition he will in all probability be left with a balance of the judgment debt still owed to the bank which he will be under obligation to repay. Applying the principles laid down in *Fisheries Development Corporation of SA (supra)* it is clear that the prejudice stands to be suffered by Mr Musheti will not be '*problematical, hypothetical and speculative*' but will be real and devastating to his life.

[39] Having regard to the facts and the circumstances of the present matter, I am of the considered view that Mr Musheti's application for stay should be granted. In the exercise of my discretion I take the following facts into consideration in no specific sequence: the fact that Mr Musheti offers to settle the total outstanding arrears; the fact that the offer has not been outrightly rejected by FNB; the fact that indicative period before payment when payment is to be received is only about two months coupled with the fact that the time-line for a sale in execution of an immovable property is also about two months, if not more; the prejudice and the devastating hardship likely to be suffered by Mr Musheti if the property is sold in execution; the fact that the loan agreement has not formally been terminated, coupled with the fact that it is possible for the parties, subject to FNB's willingness, to re-instate or renegotiate a new agreement; the fact that Mr Musheti has been reinstated in his previous job which guarantees him the same level of income to be able to resume with his monthly instalments of the mortgage bond. I also take into account the fact that banks, such as FNB in the present matters, are not

in the business of repossessing immovable properties and selling such properties in execution but they are in the business of lending money to their customers on which loans they charge interest and earn money. In my view it will be in the best interest of both parties for FNB to reinstate the agreement and continue to earn interests on the money lent. I finally take into account that the default judgment resulted from what appears to have been a wrong decision by Mr Musheti's employer to terminate his employment. Accordingly there is no basis to find that Mr Musheti is *mala fide* or merely dilatory seeking to obtain a tactical delay.

[40] The cumulative effect of all the facts outlined above, in my considered view, constitute an exceptional circumstance and lead to an ineluctable conclusion that granting a stay of the proceedings to declare the immovable property executable at this stage, is a less drastic measure, under the circumstance than declaring the property Mr Musheti's only home, executable.

[41] In the result I make the following order:

1. The application for stay is granted.
2. The proceedings are postponed to **24 January 2018** at **8h30**.
3. Mr Bernard Benz, the Chief Human Resource Practitioner of the Office of the Auditor General is hereby directed to provide the Chief-Registrar of this court with a status report concerning processing of Mr Musheti's salary and other benefits payout due to him, on or before 8th December 2017. A copy of this order to be hand delivered by the legal practitioner for Mr Musheti personally to Mr Benz.
4. The costs of this application shall stand over for determination at hearing of the application to declare the immovable property executable.

H Angula
Deputy-Judge President

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APPLICANT:

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