

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 114/2014

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

AUGUST NDJWAKI AUGUSTO

FIRST DEFENDANT

ZIITA AUGUSTO

SECOND DEFENDANT

AUGI INVESTMENTS CC

THIRD DEFENDANT

HOME LAND SECURITY SERVICES

FOURTH DEFENDANT

Neutral citation: *Standard Bank Namibia Ltd v Augusto* (I 114/2014) [2019]
NAHCMD 208 (25 June 2019)

Coram: UEITELE J

Heard: 29 June 2017

Delivered: 30 November 2018

Reasons released 25 June 2019

Flynote: Application and Motions – Application in terms of rule 108 (1) (b) of the High Court Rules – Opposition to rule 108 Application – Application by Mortgagee to declare an immovable property, placed under a mortgage bond specially executable – Immovable property being the primary home – Judgment Debtor seeks the courts indulgence to stay the Rule 108 Application.

Summary: Applicant/plaintiff advanced a loan of N\$846 761.77 to respondent/defendant which she failed to repay resulting in summons being issued against her and subsequently a default judgment was entered against her. A writ was obtained and upon service on the judgment debtor, it was found that she did not have any attachable movable assets hence a *nulla bona* return of service was issued by the Deputy Sherriff.

Held that factors that a court might consider, but to which a court was not limited, were: The circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.

ORDER

- a) The following property namely:
- i. A Unit consisting of –
 - a. Section No. 2 as shown and more fully described on Sectional Plan No. SS 87/1995 in the development scheme known as LOFT-ES COURT, in respect of the land and building or buildings situated at ERF NO. 1370, PIONIERSPARK, EXTENSION NO.1 in the Municipality of Windhoek, Registration Division “K”, KHOMAS REGION of which the floor area according to the said Sectional Plan , is 245 (TWO FOUR FIVE) SQUARE METRES in extent; and

ii) An undivided share in the common property in the development scheme apportioned to that section in accordance with the participation quota and endorsed on the sectional plan.

HELD UNDER DEED OF TRANSFER NO. ST 1131/2015.

AND

b) A Unit consisting of –

- i. Section No. 4 as shown and more fully described on Sectional Plan No. SS 87/1995 in the development scheme known as LOFT-ES COURT, in respect of the land and building or buildings situated at ERF NO. 1370, PIONIERSPARK, EXTENSION NO.1 in the Municipality of Windhoek, Registration Division “K”, KHOMAS REGION of which the floor area according to the said Sectional Plan , is 17 (ONE SEVEN) SQUARE METRES in extent; and
- ii. An undivided share in the common property in the development scheme apportioned to that section in accordance with the participation quota and endorsed on the sectional plan.

HELD UNDER DEED OF TRANSFER NO. ST 1131/2015

is declared specially executable.

c) The defendants must, jointly and severally the one paying the other to be absolved, pay the plaintiff's costs of this application.

JUDGMENT

UEITELE J:

[1] This is an application in terms of rule 108 of the High Court Rules in terms of which the plaintiff, (Standard Bank of Namibia) seeks an order declaring the first and second defendants' immovable property specially executable.

Factual background:

[2] On 18 June 2015 the plaintiff approved a home loan application of the first and second defendants. The first and second defendants bound themselves in favour of the plaintiff in the amounts of N\$ 3 380 000. As security for the monies lent and advanced, the defendants registered a continuing covering mortgage bond over the immovable property which belongs to them.

[3] The first and second defendants defaulted in their monthly instalments to the plaintiff and were, according to the certificate of indebtedness issued on behalf of the plaintiff, as at 01 March 2016, indebted to the plaintiff in the amount of N\$ 3 564 414-90. After several demands, the plaintiff instituted legal action for the recovery of the debt. The summons instituting the action was served on the defendants on 14 May 2016. On 24 May 2016 the defendants gave notice of their intention to defend the action instituted against them.

[4] The plaintiff alleging that the defendants entered notice to defend the action solely for the purposes of delaying its claim sought summary judgment against the defendants. The plaintiff's application for summary judgement succeeded and on 2 August 2016, this court ordered the defendants to pay to the plaintiff the amount of N\$ 3 564 414-90 plus compound interest calculated daily and capitalized monthly on the amount of N\$ 3 564 414-90 at the rate of 11.50% per year as from 01 March 2016 to date of payment.

[5] The plaintiff, in pursuit of the satisfaction of the judgment in its favour, sued out a writ of execution. During September 2016, the Deputy Sherriff returned a *nulla bona*

certificate indicating that he could not find sufficient movable property belonging to defendants to satisfy the judgment granted in favour of the plaintiff. The plaintiff's reaction to the *nulla bona* return was to apply, in terms of rule 108, to this court seeking an order declaring the defendant's immovable property specially executable. The first defendant, on 27 April 2017, filed an affidavit in which he provides reasons why the mortgaged immovable property must not be declared specially executable. I will in the next paragraphs briefly outline the basis on which the plaintiff seeks the order that the defendants' mortgaged immovable property be declared executable and the basis on which the defendants implore this court not to declare their mortgaged immovable property not executable.

The basis of the application

[6] The plaintiff indicates that it provided a loan to the first and second defendants. I indicated above that the plaintiff obtained summary judgment against the defendants. I also indicated that when the judgment remained unsatisfied the plaintiff applied in terms of rule 108 for the mortgaged property to be declared executable. The plaintiff further contends that it has, on the prescribed form and in the prescribed manner applied for the mortgaged property to be declared executable. The plaintiff further contends that it caused the application to declare the mortgaged property executable to be served personally on the defendants.

[7] The plaintiff further contends that conscious of the fact that the mortgaged property may be the defendants' primary home, the defendants were afforded the opportunity to show cause why the mortgaged property must not be declared executable. The plaintiff furthermore contend that from explanation provided by the defendants, it becomes apparent that the defendants will not be rendered homeless and destitute if the mortgaged property were to be declared executable. The plaintiff thus concludes by submitting that having complied with all the procedural steps as required under rule 108, it is entitled to call upon its security in order to satisfy the judgment debt.

The basis of the opposition of the application.

[8] The defendants implore this court not to declare the mortgaged property executable on the basis that the mortgaged property is the first defendant's house and primary residence. Augusto, who deposed to the affidavit on behalf of the defendants states that he, his wife and five of his children aged 22, 19, 13, 12 and 9 live with him at the mortgaged property. He thus deposed that if the property were to be declared executable and ultimately sold in execution, it would render him and his family homeless and that would also be an injury to his dignity. He states that his wife and his five children will survive with extreme difficulty particularly in view of the fact that four of the children are minors.

[9] The defendants admit their liability and indebtedness to the plaintiff. The first defendant states his business position significantly improved as he is now working on a new project in Rundu. He states that he will make arrangements to repay the amounts owed to the plaintiff.

[10] The question that I am required to answer is, whether on the basis of the competing contentions by the plaintiff and the defendants, the court can declare the mortgaged property executable. I will, before I deal with that question, briefly set out the applicable legal principles.

The applicable legal principles

[11] At common law, a mortgagee plaintiff has a substantive right to realise 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.¹ See the case of *Namib Building Society v Du Plessis*² where this Court said:

¹ *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC). At para [25].

² 1990 NR 161 (HC) at 163J – 164A.

'A mortgagee plaintiff should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he sues. Such a plaintiff has advanced money on the understanding that he can preferentially look to the proceeds of the mortgaged property. Unless some compelling reason exists to require such a plaintiff first to execute against movables, no reason occurs to me why he should not be given the benefit of his bargain. If some such compelling reason exists, the duty surely lies on the mortgagor defendant to persuade the Court why the property should not be declared executable.'

[12] In the *Futeni Collection (Pty) Ltd*,³ Masuku J remarked that, and I endorse those remarks, it is now common cause that the terrain has changed somewhat since the amendment of the rules of court by the Judge President when he introduced the provisions of rule 108. Rule 108 has been the subject of interpretation by this court a number of judgments and I will therefore not repeat quoting it here.

[13] The procedure that must be followed by a judgment creditor who desires to have a judgment debtor's immovable property declared executable was stated as follows in the *Futeni* matter:

'[40] ... It would appear to me that first and foremost, it is necessary, after the obtaining of a default judgment, summary judgment or any other judgment, in which execution is due and may affect the sale of specified immovable property, that a return as stipulated in rule 108(1)(a), is first obtained i.e. what I have referred to as the *nulla bona* return above. ... It would therefore be necessary that this return be secured first and presented to the registrar before any process for the execution of the property specified in terms of the mortgage bond may follow.

[41] Secondly, it would appear to me that once the said return has been obtained, the notice in terms of rule 108(2)(a), is to be prepared and served by the deputy sheriff personally on the judgment debtor or the third party occupying the property, as the case may be. As indicated, the said notice should be given to the said occupant for them to provide reasons within 10 days of receipt of the notice, as to why the property in question ... should not be declared executable...'

³ *Supra* foot note 1.

[14] It is furthermore common cause that under the new rules, a court must conduct an enquiry before it declares immovable property specially executable. In *Standard Bank Namibia Limited v Shipila*⁴ this court said:

[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.* (Italicized and underlined for emphasis).

[15] I now proceed to consider whether the defendants have satisfactorily answered the question whether the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences declaring the immovable property executable.

Can the judgment debt be satisfied in a reasonable manner?

[16] The facts that are not in dispute between the parties are the following: the defendants obtained a home loan from the plaintiff. The defendants are in default with the payment of the monthly instalments as per their home loan agreement. The home loan agreement was consequently cancelled after a letter of demand was sent out by

⁴ *Standard Bank Namibia Limited v Shipila* 2016 (2) NR 476 HC.

the plaintiff to the defendants. The defendants are indebted to the plaintiff in the amount of N\$ 3 564 414-90, which amount remains due and payable.

[17] The plaintiff's takes the stance that it has complied with the law to the latter and there is no guarantee that the debt will be paid in full if the request to pay the debt in installments as requested by the plaintiff, is granted, more so because the defendant is unemployed .

[18] The defendants stance is simply that they did not willingly or deliberately defaulted to pay the moneys that they owe the plaintiff. The defendants furthermore take the stance that the first defendant's current business position has improved significantly. The first defendant thus states that in view of the improved business position, he is willing and able to pay the judgment creditors debt in instalments if given a chance.

[19] Mokgoro J in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*⁵ guides that one of the available alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home is for a judgment debtor to approach a court with an offer to pay off a debt in instalments. The learned judge states that the concept of paying off the debt in instalments is important and the practicability of making such an order must be ever present in the mind of the judicial officer when determining whether there is good cause to order execution. The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort must be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.

[20] Mr Augusto Ndjwaki Augusto's affidavit, in which attempts to give reasons why the mortgaged property must not be declared executable, is characterized by a profound absence of detail and specificity. Mr Augusto does not tell the court what he

⁵ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

means by stating that his business position has improved significantly. He does not take the court into his confidence and state the period over which his business position has 'significantly improved'. The defendants have not, although the first defendant alleges that his 'business position has significantly improved', made any payment let alone approaching the court with a practical offer to pay the plaintiff. The lack of detail and specificity makes it impossible for the court to consider creative alternatives which allow the plaintiff to recover its debt.

[22] The defendants' debt to the plaintiff is substantial and I am satisfied that the defendants have failed to place facts before the court to indicate that the debt can be satisfied in a reasonable manner, without involving the drastic consequences of declaring the mortgaged property executable. This leaves only the question of costs. The general rule is that costs follow the course and that costs are in the discretion of the court. No reasons have been advanced why the general rule must not apply.

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

a) The following property namely:

i. A Unit consisting of –

a. Section No. 2 as shown and more fully described on Sectional Plan No. SS 87/1995 in the development scheme known as LOFT-ES COURT, in respect of the land and building or buildings situated at ERF NO. 1370, PIONIERSPARK, EXTENSION NO.1 in the Municipality of Windhoek, Registration Division "K", KHOMAS REGION of which the floor area according to the said Sectional Plan , is 245 (TWO FOUR FIVE) SQUARE METRES in extent; and

ii) An undivided share in the common property in the development scheme apportioned to that section in accordance with the participation quota and endorsed on the sectional plan.

HELD UNDER DEED OF TRANSFER NO. ST 1131/2015.

AND

b) A Unit consisting of –

- i. Section No. 4 as shown and more fully described on Sectional Plan No. SS 87/1995 in the development scheme known as LOFT-ES COURT, in respect of the land and building or buildings situated at ERF NO. 1370, PIONIERSPARK, EXTENSION NO.1 in the Municipality of Windhoek, Registration Division “K”, KHOMAS REGION of which the floor area according to the said Sectional Plan , is 17 (ONE SEVEN) SQUARE METRES in extent; and
- ii. An undivided share in the common property in the development scheme apportioned to that section in accordance with the participation quota and endorsed on the sectional plan.

HELD UNDER DEED OF TRANSFER NO. ST 1131/2015

is declared specially executable.

c) The defendants must, jointly and severally the one paying the other to be absolved, pay the plaintiff's costs of this application.

S F I U E I T E L E

APPEARANCES:

PLAINTIFF:

K Angula

Of AngulaCo. Incorporated

DEFENDANTS:

JR Kaumbi

Of JR KAUMBI INC.