



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 977/2014

In the matter between:

**STANDARD BANK NAMIBIA LIMITED**

**APPLICANT**

and

**WILFRED ABRAHAM AFRICA**

**FIRST RESPONDENT**

**KATRIENA AFRICA**

**SECOND RESPONDENT**

**Neutral citation:** *Standard Bank Namibia Limited v Africa* (I 977/2014) [2019]  
NAHCMD 22 (13 February 2019)

**Coram:** ANGULA DJP

**Heard:** 28 August 2018

**Delivered:** 13 February 2019

**Flynote:** Civil Practice – Applications to declare immovable property executable – Rule 108(2) of the High Court Rules – Execution against immovable property – Opposed by judgment debtor – Property to be sold in execution is the primary home – Whether there are less drastic measures other than to sell the primary home? Is it an abuse of court process by judgment creditor, in seeking the immovable property which is a primary home to be declared executable?

**Summary:** Applicant advanced a loan to the respondents in the amounts of N\$310 000 and N\$78 000 respectively, which the respondents failed to repay – Thereafter the Bank obtained summary judgment against the respondents – A writ was then issued and upon service on the judgment debtors it was found that they did not have sufficient realisable movable assets to satisfy the judgment debtor accordingly a *nulla bona* return was rendered by the Deputy-Sherriff – The Bank then filed this application to have the mortgage immovable property declared executable – The respondents opposed the application contending that the property constitutes their primary home if it were sold, they will suffer prejudice; and that there was a very likelihood that the first respondent would be re-instated in his previous job – Where after the first respondent will settle the judgment debt to the Bank.

---

### ORDER

---

1. That the following property is declared executable:

Certain: Erf No. 630, Otjomuise  
Situat: In the town of Windhoek, Khomas Region,  
Registration Division "K"  
Measuring: 585 (Five Eight Five) Square meters  
Held by: Deed of Transfer No. T 9014/2006  
Subject: To the conditions herein contained

2. That the respondents are ordered to pay the costs of this application.

---

### JUDGMENT

---

ANGULA DJP:

Introduction:

[1] This is an application by Standard Bank Namibia Limited ('the Bank'), in which it seeks an order to declare the bonded immovable property of Mr and Mrs Africa ('the respondents'), executable.

[2] This application is opposed by the respondents.

Brief background:

[3] The applicant granted a home loan to the respondents on 28 October 2011 in the amounts of N\$310 000 and N\$78 000 respectively. As security for the money lent, the Bank caused a mortgage bond to be registered over the immovable property belonging to the respondents, to wit: Erf No. 630, Otjomuise, Windhoek, Registration Division 'K', Khomas Region, Republic of Namibia, measuring 585 m<sup>2</sup> and held by the respondents under a Deed of Transfer No. T9014/2006 ('the immovable property').

[4] The respondents defaulted in their monthly instalments to the Bank, whereupon the Bank instituted legal proceedings for the recovery of its money. The respondents entered appearance to defend whereupon the Bank applied for a summary judgment which was granted.

[5] The respondents then filed a notice to appeal to the Supreme Court against the summary judgment, however the appeal lapsed.

[6] The Bank then caused a writ of execution to be issued against the respondents' movable properties. The Deputy-Sheriff however rendered a *nulla bona* return reporting that he could not find sufficient realisable movables in possession of the respondents to satisfy the judgment debt.

[7] Subsequent thereto, the Bank launched this application for an order to have the immovable property declared executable. It is to be noted that the respondents undertook to the Bank that, in the event they are unable to repay money lent, as to the security to repay the money they pledged their immovable property to the Bank to sell in order to recover its money lent, to them.

[8] As pointed out earlier, the respondents opposed this application and subsequently filed an answering affidavit. The answering affidavit was deposed to by the first respondent, Mr Wilfred Abraham Africa, on behalf of the respondents. He states that his failure to carry out his contractual obligation was due to acts of God and *force majeure* as he was medically boarded in 2014. The first respondent further went on and stated that his health condition has improved and that his temporary discharge from work might be reviewed soon and his prospects of being reinstated in his previous employment position are quite high. In support of this statement, the first respondent attached a letter dated 19 September 2017 by his medical examiner, Dr Whittaker. The letter in brief states as follows:

‘... Mr Africa was medically boarded a few years ago due to a Major Depressive Disorder. However the clinical evaluation at this time indicated that this patient has overcome the mood disorder and is emotionally ready to return to work....’

[9] The first respondent further states that upon him being reinstated, he will be able to receive his full salary with the benefits and as a result he will be able to carry out his contractual obligations with respect to the mortgage agreement between him and the Bank. He further states that he believes that his employer’s medical board will meet before December 2017 to determine his reinstatement.

[10] The first respondent further points out in the meantime that he has tried to keep up with his instalment payments towards the mortgage bond and attached to his affidavit proof of payments dated March, May and June 2017, each in the amount of N\$2 500. He further states that he has on several occasions tried to settle his indebtedness with the Bank on 25 September 2017, the respondents, through their legal practitioner, addressed a letter to the Bank, seeking an indulgence to resolve the matter amicably by offering to pay N\$6 000 per month starting from 31 October 2017 until the capital debt is fully settled.

[11] On 28 September 2017, the Bank responded to the letter, rejecting the respondents' proposal and demanding payment of the outstanding amount of N\$196,164.70, with immediate effect.

[12] In conclusion, the first respondent contends that the outstanding amount on the mortgage bond is likely to be settled in full, in less than 3 years once he is reinstated. He further states that if the property is sold in execution, he and his family will be greatly prejudiced and they will suffer as the property is their primary home.

[13] The matter was then assigned to a managing judge and while it was being case managed, it was postponed on a number of occasions for settlement negotiations. The court was later informed that the settlement negotiations between the parties were unsuccessful and the Bank was ordered to file its replying affidavit. The replying affidavit was deposed to by Mr Nolan William Christians, in his capacity as the Manager: Legal & Estates. He states that there exists no reasonable alternative means for the judgment debt to be satisfied judgment; and that the manner of payment suggested by the respondents is unreasonable under the circumstances. Mr Christians further points out that it is unreasonable to speculate that the first respondent will be reinstated in his previous employment.

[14] Mr Christians further points out that if the property is not sold in execution at this stage, the Bank will be at the mercy of uncertain future events and that it will be prejudiced in that it is unable to execute a valid judgment.

[15] On 28 August 2018 after hearing arguments by the parties, I reserved judgment for delivery on 5 December 2018. It however so happened that I was not able to finalise the judgment as anticipated, and I then postponed the matter to 13 February 2019 for delivery of judgment.

The parties' submissions:

*Submissions on behalf of the applicant*

[16] Ms Campbell, counsel for the Bank submits in her heads of argument that, there is simply no reasonable alternative means to satisfy the judgment and further that the manner of repayment suggested by the first respondent is unreasonable under the circumstances and it is not acceptable to the Bank.

[17] Counsel further submits that the respondents have failed to allege and/or prove any abuse of process on the part of the Bank and failed to place legally, relevant circumstances before Court to enable the Court to conclude that there exists alternative means to satisfy the judgment debt. In support of this submission, counsel referred the Court to what was said in the matter of *First Rand Bank v Folscher and Another* 2011 (4) SA 314 (GNP), at para 39 states:

‘Absent any extraordinary circumstances, the judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security . . .’

[18] Counsel finally submits that the court does not administer a system of equity as a distinct from a system of law. Accordingly, the Court cannot come to the assistance of the respondents on equitable grounds.

#### *Submissions by the respondents*

[19] Mr Bangamwabo who appeared for the respondents, argued that the first respondent’s inability to carry out his contractual obligation was due to acts of *force majeure* – acts of God, as he was medically declared to be unfit to work and put on sick leave since 2014; that his health status has in the meantime improved and that his temporary discharge from employment is likely to be reviewed soon thereafter which he will be reinstated. Upon being re-instated, he will be receiving his full salary and benefits and will be able to resume with his contractual obligation to redeem his debt.

[20] Counsel further points out that, if the property is declared executable, the result will be more drastic and prejudicial to him (the first respondent), his wife and their three minor children as they have been living in that property for 7 years as their primary home. He further points out that the sale in execution of the property would

violate the respondents right to dignity which must be read to incorporate the right to adequate housing, submitting further that no human being can claim to enjoy human dignity if they are stripped of their shelter.

[21] Mr Bangamwabo, with reference to the provisions of Rule 108, argues that the rule does not put judgment creditor in a more advantageous or better position than the judgment debtor, but merely outlines the procedures that should be followed. In addition, so the argument continues, the immovable property is not liable to be declared executable as the respondents have been making payments, despite their circumstances (unemployed and loss of housing subsidy) and that they have also tried to settle the debt to no avail. Accordingly, counsel prayed that the application be dismissed, with costs.

Issue:

[22] The issue for determination in this matter is whether the Bank is entitled to an order declaring the respondents' property specially executable. The considerations raised by the parties relevant to the determination of the issues are: (1) whether the Bank by instituting these proceedings amounts to an abuse of the court's process; and (2) whether there are no other reasonable alternatives or less drastic measures other than to declare the immovable property executable.

The Applicable Law:

[23] It is now accepted that at common law the judgment creditor or mortgagor has the right to seek execution against a mortgagee where a mortgage bond is registered over the immovable property of the mortgagee. In the *Futeni Collections (Pty) Ltd v De Duine*<sup>1</sup>, Masuku J reiterated the common law position as follows:

[25] At common law, it must be mentioned, 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. It is now common cause that the terrain has

---

<sup>1</sup> I 3044/2014 [2015] NAHCMD 119 (27 May 2015).

changed somewhat since the amendment of the rules of court by the Judge President when he introduced the provisions of rule 108...'

[24] Recently the Supreme Court in the case of *Standard Bank Namibia Limited v Shipila* (SA 69/2015) [2018] NASC (6 July 2018) (2) reiterated the principle that a judgment creditor has as of right to seek to have the mortgage property executable. The Court stated the following at para 22 -

'[22] In *Namib Building Society v Du Plessis*<sup>2</sup> one of the questions on appeal was whether a mortgagee can as of right seek to have recourse against the burdened property, and thus entitled to have it declared executable. The full bench of the High Court answered this question in the affirmative.

[23] The following appears at 163C-J and 164A:

There appears to be considerable authority to support the contention that a mortgagee can as of right look to the mortgaged property to satisfy his claim. In the materials available to me I found P Merula *Manier van Procederen* 4.94; S van Leeuwen *Commentaries on Roman-Dutch Law* (Kotze's translation) Vol. II at 536; cf also U Huber *Hedendaegse Recht-geleertheyt* II chap. 49. See also *Roodepoort United Main Reef GM Co Ltd (in Liquidation) and Another v Du Tait* NO 1928 AD 66 at 71 and cf *Rothschild v Lozondes* 1908 TS 493 at 498; *Whinney NO v Gardner NO* (1893) 10 SC 333 .at 341; *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 242; *Wilkie v Wilkie* 1934 NPD 308 at 310; *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander* 1975 (4) SA 936 (T) at 941F. The earlier South African practice was in accordance with this view. See G B van Zyl, *The Theory of the Judicial Practice of South Africa* Vol. 1, 3<sup>rd</sup> ed at 294-5. He writes that in Roman law movables first had to be exhausted before recourse could be had to land. He continues:

"It is the same with us when the plaintiff has no hypothec or pledge. But when property has been specially mortgaged that property must first be sold in execution before any other can be taken and only for the deficiency can other property be taken." '

---

<sup>2</sup> 1990 NR (HC) 161.



[25] It is therefore clear that mortgage creditors can rely on a limited real right and can insist to have the property declared specifically executable.

[26] The Supreme Court in the *Shipila* judgment did not declare Rule 108 *null and void* and as against the common law, but found that a different application need not be made, and the judgment creditor can already at the stage of the application for the application for a default judgment, seek to declare the mortgaged property executable with notice to the judgment debtor.

Application of the law to the facts:

[27] It is common cause: That there was a mortgage bond agreement between the Bank and the respondents; that the respondents fell into arrears and despite demand, did not settle the debt; that the plaintiff filed an action for a claim against the defendants for a sum of N\$306 643.99; that a summary judgment was granted; that a writ of execution against movables of the defendants was issued; that the deputy-sheriff rendered a *nulla bona* return; that the Bank on Form 24, served the respondents with a Rule 108 application, informing them that the Bank will bring an application to have the mortgage property specially executable.

[28] It is also clear from the letter dated 25 September 2017, that the first respondent has attempted to settle his debt with the Bank, by offering to pay N\$6 000 per month as from 31 October 2017 until the capital debt is fully settled. However this proposal was rejected by the plaintiff and first respondent was informed that the amount of N\$196 164.70 is due and should be settled forthwith. I proceed to consider the issues identified for consideration earlier in this judgment.

Did the Bank abuse the Court's process?

[29] The general effects of a mortgage is to enable the creditor in the event of default under the principal obligation to have the mortgaged security realized and to obtain payment of the secured debt from the proceeds. The only way the creditor can recover and secure such debt is to institute an action against the defaulting

mortgagee. In *Standard Credit Corporation Ltd v Bester and Others*<sup>3</sup> the court stated that:

'In general terms, however, an abuse of the process of the court can be said to take place when its procedures used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings.'

In *Brummer v Gorfal Brothers Investments (Pty) Ltd en Andere*<sup>4</sup>, the court said the following:

"In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out 'to effect an object not within the scope of the process: ... In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought: ..." '

[30] It can barely be said that the remedy which the Bank sought by applying for the respondents bonded property to be declared executable, is unsuitable. The procedure has been authorised by the rule of this Court. The Bank executing on the judgment granted in their favour, seeks an order to execute the property which is bonded in its favour and which stands as the only security to the Bank in order to recover its money, this cannot be said to be an abuse of Court process.

[31] There are no facts before Court indicating that the Bank abused the Court's process neither does the respondents make such allegation that the Bank abused the Court's process. Accordingly, this consideration does not find application in these proceedings. I next consider whether there are any other alternative measures, than to execute the property.

*Whether there is no reasonable other alternative or less drastic measure other than to execute the property.*

---

<sup>3</sup> 1987 (1) SA 812 (W) at 820 A - D

<sup>4</sup> 1992 (2) All SA 127 (A)

[32] The general rule is that the Courts would be slow to declare the execution debtor's immovable property executable when it is a primary home and if there are less drastic measures available. The first respondents in the present matter state that if the property is declared executable, it is a more drastic step and prejudicial to him, his wife and their three minor children as they have been living in that property for 7 years as their primary home.

[33] The primary aim of Rule 108 was made in an attempt to protect and save homes from sale in execution of those persons who are in a less fortunate position and for whom such property is their primary home. However on the other side, Rule 108 recognises the right of the money lending institutions, such as the Bank in the present matter, who lend their money to a second party, and utilise such loan to acquire immovable property as a home. And in turn pledge the house as security for the repayment of such loan by registering a mortgage over such immovable property. The second party freely pledges his or her said property, in the event of his or her default on repayment of the money advanced, gives the right to the Bank to execute the immovable property in order to recover its money lent to the second party.

[34] On the facts presently before Court, the respondents have not satisfied the Court that there are other reasonable or alternative or less drastic measure other than to sell in execution the immovable property. I say this for the reason that the respondents opposition is based on what might or might not happen, such as the possibilities of being re-employed. In the unlikely event of the first respondent not being reinstated, there is no evidence to show that the respondents will be able to pay the amount that they suggested or where they will get such monies, considering the fact that the first respondent is unemployed and has been struggling to make payment towards the bond in 2014 to 2018 almost four years. Furthermore, there is no evidence before Court that shows that the employer intends to reinstate the first respondent or that they are at least considering his re-instatement. Consequently, the less drastic measures as suggested by the respondents are founded on his mere 'hope'.

[35] In addition, the respondents made a settlement offer to the Bank in September 2017 and despite them stating that they are willing to pay an amount of N\$6 000 starting October 2017, they have not done so. Regardless as to whether that offer was accepted by the Bank or not, first respondent should have continued to make payments towards the mortgage bond. Moreover, the last payment made according to the annexures filed by the respondents towards the mortgage bond was during June 2017. Therefore the court is unable to conceive what other or less drastic measures can be employed to ensure that the Bank recovers its monies and the respondents retain the house.

[36] Under the circumstances, the Court has arrived on this unenviable conclusion, based on the law and on the application of the legal principles to the facts that the respondents have failed to persuade the Court that there are '*alternative or less drastic measure other than to execute the property*'.

#### Costs

[37] I see no reason why costs should not follow the event. In the result, the following order is made:

1. That the following property is declared executable:

Certain: Erf No. 630, Otjomuise  
Situat: In the town of Windhoek, Khomas Region,  
Registration Division "K"  
Measuring: 585 (Five Eight Five) Square meters  
Held by: Deed of Transfer No. T 9014/2006  
Subject: To the conditions herein contained

2. That the respondents are ordered to pay the costs of this application.

---

H Angula  
Deputy-Judge President

APPEARANCES:

APPLICANT:

Y CAMPBELL

Instructed by Engling, Stritter & Partners,  
Windhoek

FIRST AND SECOND  
RESPONDENTS:

F X BANGAMWABO

Of FB Law Chambers, Windhoek