

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING *I.T.O.* PRACTICE DIRECTIVE 61

CASE NO. HC-MD-CIV-ACT-CON-2017/03090

In the matter between:

**FIRST NATIONAL BANK OF NAMIBIA LIMITED**

**APPLICANT**

and

**TUYE PROPERTY INVESTMENTS SIX (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**JESSE MAHOLA**

**2<sup>ND</sup> RESPONDENT**

**TUYAMBEKA PAULUS MWANDINGI**

**3<sup>RD</sup> RESPONDENT**

**FRANSINA NETUMBO NAMBAHU**

**4<sup>TH</sup> RESPONDENT**

**HILLCREST PHARMACEUTICALS CC**

**5<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *First National Bank of Namibia Limited v Tuye Property Investments Six (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/03090) [2019] NAHCMD 258 (26 July 2019)

**Coram:** Masuku J

**Heard on:** 5 July 2019

**Delivered:** 26 July 2019

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**ORDER**

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- (a) That the immovable property to wit: - ERF NO. 496 (A PORTION OF REMAINING EXTENT OF ERF NO. 50) PROSPERITA, In the Municipality of Windhoek, Registration Division "K", KHOMAS Region, measuring 585 square meters in extent, and held by Deed of Transfer No. T 7072/2012 is declared specifically executable.
- (b) That the first to fifth respondents pay the costs of this application on an attorney and client scale.

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### REASONS FOR THE ORDER

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MASUKU, J

[1] Serving before the court is an application in terms of rule 108 of the High Court Rules of Namibia, wherein the applicant seeks an order declaring Erf No. 496 (a portion of the remaining extent of Erf No. 50), Registration Division "K", Khomas Region, measuring 585 square meters, specially executable.

[2] The applicant is the First National Bank of Namibia Ltd, a financial institution, duly registered in Namibia. It is common cause that the applicant extended credit facilities to the first applicant.

[3] The first respondent is the registered owner of the aforementioned immovable property mentioned in para 1 above. The second to fifth respondents are sureties who bound themselves as such and as co-principal debtor for the due and timely fulfilment of the first respondent's liabilities to the applicant.

[4] For purposes of this ruling, it is not necessary to delve into the history of the matter save to state that the respondents defaulted on payment resulting from a settlement agreement dated 29 November 2017. Subsequent to this, the applicant and

respondents entered into a settlement agreement, which was made an order of court on 30 November 2017. It is common cause that the respondents failed to comply with their undertakings in terms of the said settlement agreement.

[5] As a result of the respondents renegeing on the settlement agreement, the applicant filed an application in terms of rule 108, wherein it seeks an order declaring the immovable property in question specially executable. This application is opposed by the respondents, who, in their papers claim that the property in question constitutes the place from which the first respondent conducts its pharmaceutical business, which is, so to speak, the goose that lays the golden egg that can be used to settle its indebtedness to the applicant.

[6] At the hearing of the matter, the respondents were not represented. The court, however, took into consideration the argument advanced in its papers. It was submitted on the applicant's behalf that the property sought to be declared specially executable consists of a business premises which is being utilised as a pharmaceutical wholesaler and therefore, the provisions of rule 108 (2) requiring the court to have regard to all relevant circumstances only find application where residential property is concerned. It was further submitted on behalf of the applicant that, as a result of the nature of the immovable property concerned, the order sought should follow without any further enquiry.

[7] It was the applicant's further contention that even if the court were to make a further enquiry into this case, that it could only have regard to legally relevant circumstances.

[8] The applicant also submitted that a plaintiff wishing to execute against bonded commercial property can validly seek an order declaring the subject executable simultaneously with its request for default judgment without any further enquiry.

[9] Where an order declaring bonded property executable is to be made, the court takes into consideration whether immovable property concerned is a primary home of a judgment debtor. As a result, substantial compliance with Form 24 (requiring that service be personal service) would suffice. Notwithstanding this, the court must also consider all relevant circumstances including 'less drastic measures' than a sale in execution.

[10] The notion that a debtor's immovable property should be available to satisfy its debts is universally accepted, and this is the case even where residential property, where all the requirements of rule 108 have been followed to the letter, is concerned. In the present case however, the immovable property is not only not a primary home used for residential purposes but, a commercial property or warehouse, which is not the primary home, nor is it leased to any person.

[11] In the circumstances, the court finds no reason why the relief sought by the applicant should not be granted with an appropriate order as to costs. The applicant has complied with its obligations in terms of rule 108 and it must be considered that an attempt to resolve this matter without resorting to the rule 108 failed due to the respondents' failure to comply with their undertaking.

[12] In the premises, the court makes the following order:

- (1) The immovable property to wit: - ERF NO. 496 (A PORTION OF REMAINING EXTENT OF ERF NO. 50) PROSPERITA, In the Municipality of Windhoek, Registration Division "K", KHOMAS Region, measuring 585 square meters in extent, and held by Deed of Transfer No. T 7072/2012, is hereby declared specifically executable.
- (2) The First to Fifth respondents are hereby ordered to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

(3) The matter is removed from the roll and is regarded as finalised.

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T.S Masuku  
Judge

**APPEARANCES:**

**APPLICANT:** Ms. Y. Campbell

**Instructed by:** Fisher, Quarmby & Pfeiffer, Windhoek.

**RESPONDENTS:** No appearance.