

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

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

CASE NO. HC-MD-CIV-ACT-CON-2018/00813

In the matter between:

**SMALL AND MEDIUM ENTERPRISES LIMITED**  
represented by **BRUNI & MCLAREN**

**APPLICANT**

and

**REKAP INVESTMENTS CLOSE CORPORATION**  
**EDISON KAPUUN**  
**RYNO NGUMERITZA KAPUUN**

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

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

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

**Neutral Citation:** *Small and Medium Enterprises Limited v Rekap Investments CC* (HC-MD-CIV-ACT-CON-2018/00813) [2020] NAHCMD 253 (18 June 2020)

**Coram:** Masuku J

**Heard on:** Matter decided on the papers

**Delivered:** 18 June 2020

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**ORDER**

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1. The following property is hereby declared specially executable:

CERTAIN: ERF 1535 OTJOMUISE EXTENSION 2

SITUATED: IN THE MUNICIPALITY OF WINDHOEK  
REGISTRATION DIVISION "K"  
KHOMAS REGION

MEASURING: 330 (THREE THREE ZERO) SQUARE METRES

HELD BY: DEED OF TRANSFER NO T4732/2014

SUBJECT: TO ALL TERMS AND CONDITIONS THEREIN

2. The respondents are ordered to pay the costs of suit on a scale as between attorney and client.
3. The matter is removed from the roll and is regarded as finalised.

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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

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[2] The applicant is a registered commercial bank and public company with limited liability, in liquidation by order of court dated 29 November 2017, under case number HC-MD-CIV-MOT-GEN-2017/00227, represented by David John Bruni and Ian Robert McLaren of Bruni & McLaren, who were appointed by this court as the applicant's liquidators, its principal place of business is at 2<sup>nd</sup> floor, Hidas Centre, 21 Nelson Mandela Avenue, Klein Windhoek, Namibia.

[3] The first defendant is Rekap Investments CC, a close corporation duly registered in terms of the laws of the Republic of Namibia, with its chosen *domicilium citandi* at erf 1358, Sparrow Street, Hochland Park, Republic of Namibia. Second and third defendants are members of the first defendant.

[4] The applicant and the 1<sup>st</sup> respondent entered into a written loan agreement in terms of which the applicant lent and advanced money to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent bound themselves in *solidum* as surety and co-principal debtors for the due repayment of the 1<sup>st</sup> respondent's debt to the applicant.

[5] The present proceedings were instituted as a result of the respondents' failure to comply with their repayment obligations in terms of the agreement. According to the applicant, the respondents are indebted to it in the amount of N\$ 2 120 021.49. It should be mentioned that the debt emanates from the year 2015 and has not been settled since judgment was granted by default on 08 June 2018.

[6] The respondents opposed the application on the grounds that; the said property is the 3<sup>rd</sup> respondent's primary home in which he resides with his wife as well as his four children; that there other alternative means to settle the debt as opposed to the drastic step of having the house declared specially executable.

[7] At the hearing of the matter, the applicant submitted that it had complied with all procedural steps in terms of Rule 108. According to the applicant, the 3<sup>rd</sup> respondent has alleged time and again that he would satisfy the debt since 2017; that he had signed a settlement agreement and pledged various amounts but no payment has been received to date. According to the applicant, despite the respondent confirming that he currently has means from which he derives an income, that is the coal business, he fails to make any proposals as to how he will go about paying the outstanding debt. The applicant is of the view that the respondent has adopted an arms folded approach, and that he has failed to make out a case for the court to exercise its discretion in his favour.

[8] The applicant went on to submit further that in the circumstances of this case, there exists no alternative means which are reasonable and less drastic to settle the debt. According to the applicant, where no such alternative means are apparent, the court must then declare the immovable property executable.<sup>1</sup>

[9] The 3<sup>rd</sup> respondent, on the other hand, submitted that the effect of granting the order is devastating and permanent to him and the potential prejudice that the primary home owner will suffer is permanent in that the Namibian economy is in a steady decline with the property market not showing signs of improvement. According to this respondent, selling the property on auction will result in a sale below market value and this will in turn result in a further outstanding amount due and payable by the respondents.

[10] The respondents contend that the applicant knowingly provided funding to them whereas and it well knew that it may suffer a loss but continued to provide funding to the respondents with insufficient security.

[11] The 3<sup>rd</sup> respondent submitted further that he has provided alternative methods in which the debt can and will be repaid but that the applicant fails to engage him. The further submission was that the 3<sup>rd</sup> respondent and his family will be rendered homeless

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<sup>1</sup> First National Bank of Namibia v Musheti [2017] NAHCMD 304 (18 October 2017).

in order to pay a debt owed to a banking institution and that granting him more time to settle the debt with the less drastic measures is an option which is justifiable in law.

[12] 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.<sup>2</sup> Notwithstanding this, the court must also consider all relevant circumstances including 'less drastic measures than a sale in execution.'<sup>3</sup> It goes without saying that in the present instance, all the requirements of Rule 108 have been complied with by the applicant.

[13] The notion that a debtor's property should be available to satisfy its debts is universally accepted, and this is the case even where residential property is concerned. As was correctly held in *First Rand Bank v Folscher and Another* 2011 (4) SA 314 GNP at 39;

'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'.

[14] As rightly submitted by the applicant, the alternatives provided by the 3<sup>rd</sup> respondent are not viable in that, it is claimed that their financial position has improved due to the coal business which has placed them in a better financial position to comply with the previous undertakings. Despite this submission by the respondent, the existence of the coal company is not backed up by any proof and there is thus no guarantee that the said coal company even exists. Further to this submission is the allegation that the 3<sup>rd</sup> respondent would sell cattle to aid in repaying the loan. He however, fails to provide any list of the branded cattle and or quantity that he wishes to sell nor does he state why he has not already sold such cattle despite knowledge of the debt. The court, in the circumstances finds no reason why the relief sought by the applicant should not be granted.

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<sup>2</sup> *Standard Bank Namibia v Shipila and Others* (SA 69/2015) [2018] NASC 395 (06 July 2018).

<sup>3</sup> *Futeni Collections (Pty) Ltd v De Duine* (I 3044-2014) [2015] NAHCMD 119 (27 May 2015).

[15] It is for the forgoing reasons that the court finds that the appropriate order to give in the circumstances is that:

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T.S Masuku  
Judge

## APPEARANCES:

APPLICANT: H. Iifo  
Of AngulaCo.Inc.  
Windhoek

RESPONDENTS: E. Shigwedha  
Of Dr Weder, Kauta & Hoveka Inc.  
Windhoek