

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Judgement in terms of Rule 108 of the rules of court

Case No: HC-MD-CIV-ACT-CON-2018/00405

In the matter between:

STANDARD BANK NAMIBIA LIMITED

APPLICANT

and

MGM PROPERTIES CC

1ST RESPONDENT

MADLINE MBUTU

2ND RESPONDENT

NATHAN PIETER MBUTU

3RD RESPONDENT

Neutral citation: *Standard Bank Namibia Limited v MGM Properties CC* (HC-MD-CIV-ACT-CON-2018-00405) [2020] NAHCMD 28 (30 January 2020)

CORAM: NDAUENDAPO, J

Heard: 8 November 2019

Delivered: 30 January 2020

Flynote: Practice- Rule 108 application - Where the property sought to be specially declared executable is the primary home of the judgment debtor - The court must consider less drastic measures including the sale of an alternative property -

And where there are none and the judgment debtor unreasonable delays the granting of the order in terms of Rule 108 the court may grant such an order.

Summary: The applicant obtained a default judgment in the amount of N\$2 429 098.31 plus interest against the respondents. The default judgment was granted pursuant to a loan granted by the applicant to the respondents which they failed to repay. As security for the loan a bond was registered over the property. The applicant launched an application in terms of Rule 108 to have the property specially declared executable. The respondents opposed the application on the basis that the property is their primary home, it is more valuable than the amount owed, the respondents had a partnership agreement with the applicant from which they unjustifiably withdrew and the respondents are suing them for breach and the proceeds from that case will be used to settle the debt.

Held, that where the property sought to be specially executable is the private home of the respondents, court must consider less drastic measure including the sale of an alternative property.

Held, further, that where there are no other less drastic measures and the respondents offer no alternative property and unreasonably delay the granting of the order, the court may grant such an order.

Held, further, that the business of property financing is based on the assurance that the lender will, without unreasonable delay, recoup its moneys from the judgment debtor who defaulted by selling the bonded property.

Held, further, that applicant made out a case for the relief sought.

ORDER

The following immovable property, namely:

CERTAIN	Portion 36 (A portion of portion 4) of the farm Nubuamis No. 37
SITUATED	In the Municipality of Windhoek
MEASURING	50,0324 (FIVE ZERO COMMA ZERO THREE TWO FOUR) hectares
HELD BY	Deed of Transfer No. T4426/2007

Is declared specially executable

2. The respondents must, jointly and severally the one paying the other to be absolved, pay the applicant's costs in respect of the Rule108 application. The costs are on the scale as between attorney and own client.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] Before me is an application in terms of Rule 108 of this court's rules in which the applicant seeks an order declaring the respondents' immovable property specifically executable. The application is opposed by the respondents. They filed an answering affidavit in which they set out the reasons why the property should not be declared specially executable.

Factual background

The parties

[2] The applicant is Standard Bank Namibia Limited, a registered commercial bank, duly registered in accordance with the company laws applicable in the Republic of Namibia, having its principal place of business at 5th floor c/o Werner List and Post Street Mall Street, Windhoek. The first respondent is MGM Properties CC, a close corporation incorporated as such in accordance with the close corporation Act, 1988 of the Republic of Namibia, Reg. no cc/2005/1171 with principal place of business at portion 36 of farm Nubuamis no 37 Windhoek. The second respondent is Madeline Mbutu, an adult businesswoman with chosen *domicillium et exutandi* at portion 36 of farm Nubuamis no 37 Windhoek. The third respondent is Nathan Mbutu an adult businessman with chosen *domicillium et exutandi* at portion 36 of farm Nubuamis no 37 Windhoek.

[3] On 11 April 2018 the applicant obtained a default judgment against the respondents jointly and severally the one paying the other to be absolved, for:

Payment in the amount of N\$2 429 298.31 together with interest at the rate of 12.50% calculated daily and capitalized monthly on the said amount. The judgement arose out of a loan granted by the applicant to the respondents which respondents failed to repay. As security for the loan, a mortgage bond was registered over the property which is the subject matter of the Rule 108 application.

On 14 June 2019 the applicant launched an application in terms of Rule 108 seeking an order to have the following property declared specially executable:

Namely; Portion 36 (A portion of portion 4) of the farm Nubuamis No. 37, in the municipality of Windhoek, measuring 50,0324 hectares (the property).

Rule 108(2) provides: "If the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as home the court may not declare that property to be specially executable unless-

- (a) the execution creditor has by means of personal service effected by the deputy-sheriff given notice on Form 24 to the execution debtor that application will be made to the court for an order declaring the property executable and calling on the execution debtor to provide reasons to the court why such an order should not be granted;
- (b) the execution creditor has caused the notice referred to in paragraph (a) to be served personally on any lessee of the property so sought to be declared executable; and
- (c) the court so orders, having considered all the relevant circumstances with specific reference to less drastic measures than sale in execution of the primary home under attachment, which measures may include attachment of an alternative immovable property to the immovable property serving as the primary home of the execution debtor or any third party making claim thereto."

[4] The applicant complied with the procedural aspects of Rule 108(1)(a). After obtaining the default judgment order dated 11 April 2018, the applicant proceeded to cause a writ of execution against movables to be issued and to be served and executed on the respondents which resulted in *nulla bona* returns of service dated 11 July 2018.

As far as the relevant circumstances, the court has to take into account in terms of rule 108(2)(c) before declaring a primary home specially executable are concerned, the court in

*Roman Catholic Church v Phillepus Lombeleni Thomas & 2 others*¹ held that:

“Rule 108(2) enjoins a court to consider all the circumstances before it makes an order to declare an immovable property executable or not executable. Justice Mokgoro in the South African case of Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others warned that it would be unwise to set out all the circumstances that would be relevant to consider when considering whether or not to declare immovable property executable, but nonetheless gave some guidance.

The learned judge mentioned the following factors as guiding factors; whether the procedure prescribed by the Rules have been complied with. Whether there are other reasonable ways in which the debt can be paid. Whether ordering of a sale in execution would be grossly disproportionate to other means of satisfying the judgment. Another factor of great importance will be the circumstances in which the debt arose. The learned Judge furthermore remarked that the question whether or not the judgment creditor is abusing the Court process and is acting in bad faith is equally relevant. A final consideration will be the availability of alternatives which might allow for the recovery of the debt but not require the sale in execution of the debtor’s home.”

[5] The applicant submits that to date the respondents have not shown that they have sufficient movable disposable assets to satisfy the judgment debt, hence the Rule 108 application. The applicant further submits that the reliance by the respondents on a breach of an oral agreement by the applicant relating to another property and the issuance of summons for that breach is of no force or effect as it was not reduced to writing and signed by both parties. Applicant argues that the provisions of rule 108 are not a means to obtain extension of time to pay.

¹ Roman Catholic Church v Phillepus Lombeleni Thomas & 2 others case No. 2017/04548 delivered on 12 April 2019.

Applicant contends furthermore that respondents were unable and remain unable to satisfy the judgement debt and more than a year has passed since the applicant obtained judgement against the respondents and the only option is to declare the property specially executable.

[6] The respondents however, submit that the property sought to be declared specially executable is their primary home and that there are less drastic measures than a sale in execution of their primary home and provide the fact that the property is valued far more than the loan amount.

[7] The respondents in their written heads further submit that: 'In a nutshell, respondents' opposition to the instant application is mainly that applicant's conduct in its dealings with respondents is unreasonable, *mala fide* and *prejudicial* to their business relationship. Further, it is the respondents' case that their inability to service the home-loan facility was due to the applicant's unjustified breach of contract between the parties. In this respect, this court is referred to para. 6.1 to 6.9 of respondents' answering papers which are not refuted by the applicant. In addition, respondents contend that presently, the same parties are embroiled in a legal battle involving a commercial property loan in respect of Erf 1449, under case number: 2018/01218.

[8] Furthermore, the respondents allege that there was an oral agreement between the parties in terms of which all other loan facilities granted by the applicant to the respondents shall be consolidated into the CPL (Commercial property loan).

From the reading of para 6.3 of the respondents answering affidavit only" other loan facilities that the 2nd and 3rd respondents have with the applicant will be consolidated in the CPL" the loan which resulted in the default judgement and the rule 108 application was only granted to first respondent and 2nd and 3rd respondents only signed suretyships, and therefore that loan was not consolidated in the CPL. Furthermore all the loan facilities between the parties were reduced to writing and there are standard non variation clauses in all those agreements and any variation to those loan agreements have to be reduced to writing and signed by both parties and the submission that there was an oral agreement is highly doubtful.

[9] Respondents further submit that the parties entered into and concluded a partnership agreement. In terms of the said agreement, the applicant undertook to grant a CPL to the 1st respondent to build 107 two bedroom apartments at the cost of N\$860 000.00 each and 86 one bedroom apartments at the cost of N\$760 000 and after completion of the apartments, the applicant's employees will purchase same with home loans from the applicant. The income and profit would have been used to pay off the CPL. The applicant breached the agreement by pulling out of the partnership and the respondents were unable to service the CPL including the loan facilities which are the subject of this application. The applicant is partly blameworthy in the respondents' to pay the CPL as agreed.

[10] In the court's views, as far as the alleged partnership agreement is concerned, it appears that in terms of 'annexure 2'² (the respondents addressed a letter to the applicant in which they propose the formation of a partnership with the applicant to provide affordable housing to Namibians. The respondents will make erf 1448 available for development and they further proposed: 'We propose to Standard Bank to consolidate all the above outstanding amounts together with a small profit margin for MGM properties for the sale of the land to Standard Bank for N\$50 250 000.00.' The applicant rejected that proposal on 14 December 2018 and there is no evidence presented that the applicant accepted that proposal and signed a sale agreement.

[11] The mere fact that the respondents and the applicant are involved in a legal battle for breach of contract by the applicant unrelated to the loan which was granted in this case and which respondents failed to honor, should in my view not stand in the way of the applicant obtaining the relief sought. The applicant has a default judgement in its favour. How long will it take before the legal battle is resolved? What guarantee is there that the respondents will emerge victorious? Is it fair and reasonable for the applicant to endure such a lengthy wait? I think not. The default judgement was obtained on 11 April 2018 and more than eighteen months have passed since the default judgement was obtained and the judgement debt remained

² Annexed to the answering affidavit) (dated 28 November 2017)

unsatisfied .This court has not been informed of any attempt by the respondents to sell the property for a better price than what the applicant is demanding nor has the respondents offered any alternative property to be attached and to be sold in execution. The business of property financing is based on the assurance that those who lend moneys to others to buy property and have mortgage bonds registered over those property as security can sell the bonded property in case the debtor default(ed) to recoup their moneys subject to the provisions of rule 108 and without unreasonable delay. That is the cornerstone of real estate financing and the court must give effect to it. Those sentiments were eloquently and cohesively echoed in *Baretzky and Another v Standard Bank of South Africa*³ where the court held that: 'there is a public interest in the eligibility of judgments sounding in money. That creditors should obtain the authorization of a court to exact payment from their debtors is a fundamental aspect of the rule of law. The alternative would be the chaos and lawlessness of a regime of self-help, in which the most vulnerable in society would be the most exposed to abuse. A court regulated system of debt recovery must be effective, however, if it is to command respect. There would be no point in creditors having to obtain judgments for the purposes of exacting recovery from their debtors if there was no law in place to lend force to the judgments and provide for their execution. The rules of court governing execution against a judgment debtor's property afford such law. The notion that a debtor's property should be available to satisfy is universally accepted. Execution does not occur arbitrarily. It takes place only after a court has by its judgment confirmed the existence of the obligation and authorized enforcement of compliance with it. Thereafter, a number of prescribed procedures have to be complied with before execution of the judgment is actually carried out...'

[11] In this case the applicant is the holder of a judgment debt and it has a substantive right to execute against the property. To unreasonably delay the execution against the property is unfair and unjust. In *Standard Bank Namibia Limited v Magdalena Shipila and Others*⁴, the Supreme Court of Namibia held that:

³ *Baretzky and Another v Standard Bank of South Africa* (Western Cape Division, Cape Town case no.13668/2016 delivered on 17 February 2016)

⁴ *Standard Bank Namibia Limited v Magdalena Shipila and Others* 2018(3) NR 849(SC)

'The term "mortgage", in the narrow sense of the word refers to a real right of security in an immovable asset or immovable assets of another, which is created by registration in the deed registry pursuant to an agreement between the parties, and the object of a mortgage bond is to give notice to the world in general that a particular property of a debtor is the subject of a charge in favour of a particular credit...

The principle distilled from the aforementioned cases is that a court will normally only decline a writ of execution in circumstances which would render the enforcement of a judgment debt an abuse of process or where the exercise of the mortgagee's right is in bad faith...

The appellant has a substantive right to foreclosure subject to a court order having been obtained and Rule 108 being procedural in nature should not be read to take away that right.'

In *casu*, there is no evidence that the applicant is acting in bad faith; abusing the court process or is unreasonable in its dealings with the respondents .The applicant is merely seeking an order to recoup its moneys by selling the property over which a bond was registered as security for the loan granted. The respondents are unable to pay the debt and have not offered any other property to the applicant for sale in execution. Under those circumstances the relief sought is unavoidable. Having considered all the facts and the relevant circumstances Including less drastic measures than a sale in execution, I am satisfied that the applicant has made out a case for the relief sought.

Order

1. The following immovable property, namely:

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G N NDAUENDAPO

Judge

APPEARANCES

FOR THE PLAINTIFF

Mr. Patrick Kauta
Of Dr Weder, Kauta & Hoveka Inc.

FOR THE 1st, 2nd and 3rd DEFENDANT Mr. Francois Bangamwabo
Of FB Law Chambers