REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/00253

In the matter between:

SMALL AND MEDIUM ENTERPRISES LIMITED REPRESENTED BY BRUNI & MCLAREN **PLAINTIFF**

and

GREEN TECHNOLOGY INVESTMENT CC **1ST DEFENDANT**
FESTUS HAMUKWAYA **2ND DEFENDANT**
FERNAND AELOHEBA BARUANI **3RD DEFENDANT**

Neutral Citation*: Small and Medium Enterprises Limited represented by Bruni & McLaren vs Green Technology Investment CC* (HC-MD-CIV-ACT-CON-2018/00253) [2021] NAHCMD 150 (08 April 2021)

CORAM: MILLER AJ
Heard: **05 February 2021**
Delivered: **08 April 2021**

Flynote: Practice – Execution of immovable property – Second respondent breaching agreement and unilaterally making monthly payments not agreed to by the applicant – Court holding the view that a party in breach of an agreement cannot unilaterally decide what payments it should make to service the loan and arrears caused.

Summary: The facts are as they appear in the judgment below.

ORDER

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a) The court hereby declares the following immovable property specially executable:

Certain:	ERF 1130, Cimbebasia
Situated:	In the Municipality of Windhoek, Registration Division "**K**", Khomas Region
Measuring:	391 (Three Nine One) Square metres
Held by:	Deed of Transfer No T6807/2012
Subject:	To all the terms and conditions contained therein

b) The second respondent must pay the applicant's costs of the application.

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

RULING

MILLER AJ:

[1] The matter before me involves an opposed application wherein the applicant seeks an order to declare the concerned immovable property specially executable in terms of rule 108 of the High Court rules. The background facts giving rise to the matter before me seem to be trite between the parties and I will therefore not repeat them in this ruling.

[2] The second respondent, in opposition to the sought relief by the applicant, raised primarily two point in *limine*, firstly being *lis pendens* on the notion that an application filed by the applicant on the 6th of November 2019 was yet to be heard as an opposed motion and therefore still pending determination and secondly that the aforementioned application contains certain procedural irregularities.

[3] The points in *limine* raised by the second respondent holds no water primarily on the basis that this court by virtue of the order dated 12 October 2020 dealt with that application in removing it from roll, further ordering that the matter be re-enrolled on the rule 108 roll. For all intents and purposes, a new application was filed on the rule 108 roll, disposing of the previous application filed on 06 November 2019. Consequently, the 06 November 2019 application was dealt with and finalised in a sense and it is presently not the application that I need to adjudicate upon.

[4] Therefore, the defence of *lis pendens* as raised by the second respondent in this cannot be sustained. Consequently the second point in *limine* as raised by the second respondent on irregularities concerning the application filed on 06 November 2019 must also fail.

[5] Having dealt with the points in *limine*, I will now proceed to address the merits of the present application before me.

[6] It is clear that the second respondent is indebted to the applicant, so much so that the second respondent also acknowledges same in its opposing affidavit. To further add ammunition to its opposition, the second respondent made the submissions that he intends paying off his indebtedness to the applicant and is allegedly making monthly payments of N$15 000.00, which is submitted to be sufficient to cover the monthly instalments on the property in question. The second respondent further submitted that he is willing to increase it further to monthly instalments of N$20 000.00 should it be necessary due to the fact that the property in question is the second respondent's primary home and only residence.

[7] With the above, the second respondent formed the view that an order declaring the immovable property specially executable would, in the circumstances of this case and in light of the monthly instalments being paid, be too drastic a measure.

[8] The applicant, on the other hand, submitted that the second respondent has been dubious in his dealings with the applicant by failing to heed to the applicant's settlement proposal and unilaterally adopting a payment structure not accepted by the applicant. The fact that the second respondent had been making monthly instalments of N$15 000.00 continuously since April 2019 while such offer was never accepted, much less made an order of court, are not good enough to prevent the inevitable.

[9] The applicant further submitted primarily that the second respondent further did not take the court into confidence by making no allegations on where he works and what his monthly income and expenses are, taking into consideration the outstanding balance in respect of monies lent and advanced by the applicant to the second respondent in the amount of N$800, 791.17, being a substantial amount. The applicant further submitted that the relevant circumstances and less drastic measures would in this case be an execution against the immovable property as there are insufficient movable properties that may satisfy the judgment.

[10] With the above in mind, it is common cause between the parties that an agreement for monies lent and advanced was agreed to with its obligations and expectations. Both parties knew what was expected from the other and I would like to think that the consequences for failure to perform as per the agreement were also well understood between the parties. As is further acknowledged by the second respondent, he breached the terms of the agreement by not making the agreed payments as due, resulting in its account with the applicant to fall into arrears.

[11] From the papers, it is further evident that settlement negotiations were explored at some stage before the current application came before me. Seemingly no agreement was finalised, with the applicant submitting that the settlement proposal it drew up received no feedback from the second respondent. As a result, it approached this court to seek the immovable property to be declared executable as it entitled.

[12] It is rather odd in the present matter that the second respondent would adopt a payment schedule on its own volition without obtaining or seeking the necessary consultations and feedback from the applicant first, as it is quite clear that the second respondent breached the terms of the agreement with the applicant and continues to do so. In the ordinary course of events, one would at least expect for the parties to meet each other at the settlement table and to amicably resolve the matter, without having to incur unnecessary litigation costs over an issue that may well have been settled out of court.

[13] It is further more odd that the second respondent would be willing to increase the monthly instalment from N$15 000.00 to N$20 000.00 in order to service the agreement it entered into with the applicant, considering the arrears incurred as a result of non-payment. Surely, a court would not force an applicant to accept absurd terms of payment with the aim of avoiding a primary home to be declared specially executable but in the current circumstance, this terms as offered by the second respondent seem to be reasonable, all things considered, however, why the applicant would not accept such a payment term, considering the current economic state of affairs as brought about the COVID-19 pandemic, leaves me with the impression that the applicant may not have been given the opportunity to consider such terms. This then further raises the question on whether the second respondent genuinely approached the applicant to seek alternative means to service the loan apart from the current relief sought now before me.

[14] It should further be noted that the rule 108 procedure was not adopted to deprive a judgment creditor (being the applicant in this case of its right to seek relief by declaring properties executable in cases of defaulting parties, but merely to ensure that other alternative methods are explored before having properties, especially properties that constitute primary homes, be specially executable to satisfy debts owed by judgment debtors (being the second respondent in this case).

[15] In my view, the fact that the second respondent makes the submission that it is now willing to service the loan and arrears by making a monthly instalment of as N$20 000.00, is indicative of the fact that he was not genuinely trying to engage the applicant with respect to the breach of the agreement and merely at the eleventh hour elected to prevent losing out on the property in question. Such practices would generally not be condoned by the courts, especially considering the fact that it is expected generally that when a benefit is obtained from a business enterprise, the parties thereto should be prepared to handle both the profit and any other legal obligations to such enterprise or agreement. In other words and in the present matter, the second respondent derived a benefit from the applicant by receiving monies lent and advanced by virtue of a loan agreement. As a result, the second respondent cannot merely thereafter change the terms of the agreement just by its own volition. Generally, no court can allow such practices as it goes against the common principles of *pacta sunt servanda.*

[16] In the result, I make the following order:

a) The court hereby declares the following immovable property specially executable:

Certain:	ERF 1130, Cimbebasia
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	Registration Division "**K**", Khomas Region
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b) The second respondent must pay the applicant's costs of the application.

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

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K MILLER

Acting Judge

APPEARANCES:

APPLICANT:	M Angula AngulaCo Inc.
2nd RESPONDENT:	AJB Small Instructed by Theunissen, Louw & Partners