

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2017/04027

In the matter between:

BANK WINDHOEK LIMITED

APPLICANT

and

ABED IYAMBO SHIIMI

RESPONDENT

Neutral Citation: *Bank Windhoek Limited v Shiimi* (HC-MD-CIV-ACT-CON-2017/04027) [2021] NAHCMD 354 (4 August 2021).

CORAM: MASUKU J

Heard: 30 April 2021

Delivered: 4 August 2021

Flynote: Rule 108 – declaration of property specially executable – requirements to be met by the parties – effect of mortgage bond in favour of the creditor, on the need to file a *nulla bona* return.

Summary: The applicant and the respondent entered into a loan agreement, which the respondent breached, culminating in a summary judgment granted against the respondent. The applicant proceeded with the execution processes but the respondent could not be found for purposes of dealing with the possible attachment

and sale of movables. The respondent was not available for service of the rule 108 application. The applicant was compelled to approach the court for authorisation of substituted service, which was granted.

Held: that on the authority of *Standard Bank v Shipila*, it was not necessary for an applicant to execute against movable property in view of the property serving as security for the loan.

Held that: in any event, the applicant had attempted to execute against movable property of the respondent, if any, but the respondent spirited himself away and beyond the reach of the deputy- sheriff. As such, it sits ill in the mouth for the respondent to seek to capitalise on his own 'truancy'.

Held further: that the respondent did not make any averments that the property was his primary home and he also did not state that there were other viable means available which would render it unnecessary to declare the property specially executable.

The court found that the applicant had made out a case for the granting of the order sought. On the other hand, the respondent failed to make out a case that the case was one in which a declaration for the property specially executable was inappropriate. The application was thus granted with costs.

ORDER

1. An order is hereby issued, declaring the under mentioned property specially executable:
 - 1.1 Erf No. 5304, Swakopmund (Extension No.15)
 - 1.2 Situated: In the Municipality of Swakopmund Registration "G", Erongo Region;
 - 1.3 Measuring: 600 (Six Nil Nil) square metres
 - 1.4 Held by: Deed of Transfer T 696/2014.

2. That the Respondent should pay the costs of this application, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] This is a matter with a convoluted history. It has gone through a number of phases, since summary judgment was granted in 2017. Stripped to the bare bones, and shorn of all the frills, this is an application in terms of rule 108 of this court's rules.

[2] The applicant essentially prays for immovable property described as Erf No. 5304, Swakopmund (Extension No. 15) in the Municipality of Swakopmund, Registration Division "G", Erongo Region, measuring 600 square metres, to be declared specially executable. The applicant further prays for costs to be granted in its favour.

[3] It is perhaps important to mention at this nascent stage of the judgment, that the matter is opposed by the respondent. It is not necessary at this stage, to set out the bases of the opposition, as this will be done at the opportune time as the judgment unfolds.

The parties

[4] The applicant, is Bank Windhoek Limited, a public company, duly registered in terms of the company laws of Namibia. Its premises are situate at 262 Independence Avenue, Windhoek The respondent, on the other hand, is Mr. Abed Shiimi, and adult Namibian male, whose address on the record is in Klein Windhoek, Windhoek. It

must be mentioned that service of this application on the respondent has been a torrid affair, as he could not be traced. He did eventually surface and opposed the application as indicated earlier.

Background

[5] It is common cause that the applicant, on 1 November 2017, obtained summary judgment against the defendant for payment of an amount of N\$ 2, 282,088.19 and costs. The judgment was granted pursuant to a written loan agreement signed by the parties, which the respondent was alleged to have breached, hence the claim for the amount mentioned above.

[6] The respondent appears at some stage to note an appeal against the judgment but it does not appear to have seen the light of day. In the normal development of the case, the applicant pursued the execution processes provided for in the rules of court, which eventually culminated in an application in terms of rule 108, considering that the applicant derived no joy from the execution processes, including the return of a *nulla bona*, considering that the deputy sheriff could not locate the respondent for purposes of attaching his movable assets, if any.

[7] The applicant appears to have hit a snag when it was to serve an application in terms of rule 108. The respondent could not be traced. It therefor obtained an order dated 23 July 2020 granting it leave to serve the rule 108 application via substituted service, namely via email, as the respondent was said to be in the United States of America at the time.

[8] As indicated above, the respondent eventually opposed the application despite the difficulties in locating him for service earlier. It is perhaps important to mention at this juncture that the applicant holds a mortgage bond of security over the property in question.

[9] The question to be determined, is whether the respondent, in his answering affidavit, has made out any case that should, in terms of the law, serve to deny the applicant the relief it seeks. In particular, the court will have to consider whether the

respondent does make out a case that there are less drastic measures open to the applicant to recover the debt than to have the said property declared specially executable.

[10] It is the respondent's case that the applicant is not entitled to the order it seeks and that this court should dismiss this application with costs. The respondent alleges on oath that although the loan agreement was duly signed by the parties, and the property in question was registered in his name, the applicant failed to perform its part of the bargain by failing to pay the amount due to the respondent in terms of the loan agreement into his account. This was a breach of the agreement by the applicant, so contends the respondent.

[11] It is his further case that the applicant, of the amount of N\$ 2,870,000 that was due to be paid to him in terms of the agreement, only an amount of N\$ 2,572,692.56 was credited to his account by the applicant. The applicant further alleges that he was never served with a writ of execution as required by the rules and as such, it cannot be said that he does not have sufficient movable property to satisfy the writ. He also makes an issue that the deputy sheriff never filed a return of service but rather a service of non-return. He thus contends that the applicant is not entitled to the relief that it seeks for these reasons.

[12] The issues raised above, constitute the basis of the respondent's opposition. Do these issues raised by the respondent hold water? Nay, says the applicant. In its reply, the applicant points out the issues mentioned below in response to the allegations made by the respondent in his answering affidavit.

[13] First, it is the applicant's contention that it received a return of non-service because the respondent could not be traced at his *domicilium*. As a result, it had to approach the court to grant an order to serve the respondent via substituted service as pointed out above. It is the applicant's further contention that the respondent does not, in his affidavit, allege that the property in question is his primary home neither does he state less drastic measures available to be exploited than declaring the property specially executable.

[14] It is the applicant's further case that the respondent does not state what assets he is possessed of that may defray the amount of the judgment, neither does he give any information regarding whether the property in question is leased to third parties. Furthermore, he does not state why the declaration of the property specially executable would be inappropriate in the circumstances.

[15] The applicant further points out that the property in question is bonded to it and was purchased by the respondent from the funds supplied by the applicant in terms of the loan agreement. The property, the parties specifically agreed, was to serve as security for the loan and that if the respondent breached the agreement, the applicant would be at large to apply for the declaration in terms of rule 108 without further ado.

[16] In dealing with some of the allegations by the respondent in his papers, the applicant states that in properties subject to a mortgage bond, it is not required to file a *nulla bona* return. The applicant further points out that in any event, the respondent evaded service of all the necessary process, thus compelling the applicant to approach the court for an order for substituted service. It must be stated, for completeness' sake that the *nulla bona* returns were subsequently filed and after the replying affidavit had been filed by the applicant

[17] In sum, the applicant submits that the respondent has not made any case that would warrant the court to refuse to make the declaration sought. As such, it urged the court to grant the application as prayed. The question to now determine, is which of the protagonists is on the correct side of the law in this debacle?

[18] It is important to mention that in its order dated 19 February 2021, the court put the parties to terms regarding the filing of the necessary papers. This included the filing of heads of argument by both protagonists. It must be stated that the respondent was ordered to file his set of heads of argument on or before 19 March 2021. He did not do so. No application for condonation in this regard was sought. As a result, the court dealt with the matter in the absence of the respondent's heads of argument.

Determination

[19] It has since been stated by the Supreme Court in *Shipila*¹ that in property which is subject to a mortgage bond, it is unnecessary that an applicant must file a *nulla bona* return. In this regard, it is therefor clear, having regard to *Shipila*, that the respondent's contentions regarding the absence of a *nulla bona* return, are without substance.

[20] I am of the view, in any event, that the respondent cannot benefit from his own 'truancy', if I may call them that. The respondent placed himself beyond the reach of the deputy sheriff and no process could be served on him in terms of the rules for some time. The applicant did not sit idle in this regard. It approached this court seeking an order for it to be allowed to attempt service on the applicant via substituted service. The respondent cannot benefit from processes he, by his own conduct, frustrated. There is no merit to this point and it is dismissed.

[21] It is also important to mention that the rule in question, and judicial oversight, was primarily introduced to attempt to stem the indiscriminate sale of property which constituted a primary home of the execution debtor. This was an attempt at avoiding people homeless, which would impact on their dignity. In this regard, respondents faced with rule 108 applications had to play open cards with the court and give the court the true status of the property in order to enable the court to make an appropriate order in the circumstances.

[22] Besides the fact that the property in question is subject to a mortgage bond, the respondent does not state that the property in question constitutes his primary home. In *Futeni*,² the court described a primary home as 'a permanent structure, which constitutes the only viable place that provides shelter and protection from the vicissitudes of the weather and the elements to an individual person, family or even extended family.'

¹ *Standard Bank v Shipila* 2018 (3) NR 849 (SC).

² *Futeni Collections (Pty) Ltd v De Duine* (I 3044-2014) [2015] NAHCMD 119 (27 May 2015)

[23] It was incumbent upon the respondent to inform the court about the status of this property. That he does not say it is his primary home suggests that it is not one in respect of which the rule in question strictly applies. I accordingly find that there is no evidence that it is his primary home, suggesting that he has other property that would not render him homeless even if this property be declared specially executable.

[24] The contentions by the respondent regarding the applicant's alleged breach of the agreement and the allegation that the applicant did not credit the entire amount loaned to him, is neither here nor there at this juncture. I say so for the reason that the summary judgment stands and it was not appealed against, let alone successfully. In that event, it stands and this court may, all things being equal, regard that judgment as final and the proper basis, all other requirements met, for declaring the said property specially executable.

[25] A close examination of the respondent's papers reveals that the respondent has said absolutely nothing about the existence of other alternative means by which the debt can be paid than selling the property in question. It is incumbent on a respondent to allege and show to the satisfaction of the court that there are other viable means that may be employed to settle the debt. In this case, the court has no other option than to authorise the sale of the property in question.

[26] I cannot, in good conscience close my eyes to the fact that the amount is substantial and that the summary judgment was granted in 2017 and the debt remains unpaid some three or so years later. To compound matters, the respondent at some point placed himself beyond the reach of the deputy sheriff regarding service of necessary court processes. The failure by the respondent to deal with the critical issues and to place the relevant facts that may enable the court to exercise its discretion in the respondent's favour before court, unfortunately redounds to the respondent's detriment.

Conclusion

[27] Having regard to all the foregoing, it appears that the instant case, being one based on a mortgage bond, is one where the applicant was not required to file a *nulla*

bona return. In any event, the respondent placed himself beyond the reach of the deputy sheriffs when they could have complied with that requirement, if strictly applicable in this case. The failure by the respondent to state that this is primary home and that there are other viable options open to settle the debt, leave the court with very little choice than to grant the application.

Costs

[28] The rule is that the costs follow the event. There is nothing placed before me that would serve to detract from this rule, which is not immutable as the court always exercises a discretion in matters of costs. The parties, in their agreement provided for costs to be paid by the respondent in an event such as the present one. As such, the respondent is liable to pay the costs of this application.

Order

[29] In view of the conclusions in the discussion of the salient parts of the judgment above, the following order would commend itself as being appropriate in this matter:

1. An order is hereby issued, declaring the under mentioned property specially executable:
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 - 1.4 Held by: Deed of Transfer T 696/2014.
2. That the Respondent should pay the costs of this application, consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge

APPEARANCES

For the applicants:

A. S. Van Vuuren

For the respondent:

No appearance