



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/01458

In the matter between:

BANK WINDHOEK LIMITED

PLAINTIFF

And

EMMARENTIA NANETTE IRION

1st DEFENDANT

TABBY MTSHIYA-MOYO

2nd DEFENDANT

Neutral citation: *Bank Windhoek Limited* (HC-MD-CIV-ACT-CON-2020/01458)
[2021] NAHCMD 464 (6 October 2021)

Coram: PARKER AJ

Heard: 13 August 2021

Delivered: 13 August 2021

Reasons: 6 October 2021

Flynote: Practice – Judgment and orders – Order declaring property specially executable – Rule 108 of the rules of court – Purpose of judicial oversight.

Held, the principle *pacta sunt servanda* part of the Namibia law.

Held, Object of rule 108 based on equitable considerations, is to blunt the sharp point of executing claims against specially hypothecated immovable property in order to satisfy a claim.

Held, where property earmarked for special execution is a primary home the court must satisfy itself that there are no less drastic alternatives to a sale in execution.

Held, where the execution debtor has proposed an alternative that is less drastic to sale in execution, the court ought to consider it favourably for the benefit of the execution debtor, so long as the alternative is viable.

Summary: Judgment and orders – Order declaring property executable – Rule 108 of the rules of court – Property ordered to be specially executed – Execution debtors proposed to the court what they considered to be less drastic alternative to immediate sale in execution – They craved indulgence of the court to give them a grace period of two months within which they were sure they would be able to liquidate the debt to prevent sale in execution – Court granted the indulgence by ordering that execution of the order would be suspended for two months from the date of the order as proposed by the execution debtors themselves – Court finding such an order a less drastic alternative to immediate execution of the order.

ORDER

The following immovable property is declared specially executable:

Certain: Erf No: 259, Elisenheim

Situated: In the Municipality of WINDHOEK

Registration division “K”,

KHOMAS Region

Measuring: 500 (Five nought nought) Square metres

First Transferred: by Deed of Transfer No: T4320/2012

With General Plan No. S.G NO. A407/2011

Relating thereto and held: by Deed of transfer No T2315/20156

2. Costs of the application.

JUDGMENT

[1] The following order was granted during a rule 108 motion court proceedings after hearing the parties:

Having heard **MS PAULUS**, on behalf of the Applicant and **TABBY MTSHIYA-MOYO** the second respondent in person, and having read the application for HC-MD-CIV-ACT-CON-2020/01458 and other documents filed of record

IT IS HEREBY ORDERED THAT:

The following immovable property is declared specially executable:

Certain: Erf No: 259, Elisenheim

Situated: In the Municipality of WINDHOEK

Registration division "K",

KHOMAS Region

Measuring: 500 (Five nought nought) Square metres

First Transferred: by Deed of Transfer No: T4320/2012

With General Plan No. S.G NO. A407/2011

Relating thereto and held: by Deed of transfer No T2315/20156

2. Costs of the application.

[2] The execution debtors have filed a notice of appeal before the Supreme Court; and they now request reasons for the order. These are the reasons.

[3] The first crucial point to make is this. It must be drummed in the heads of legal practitioners and litigants that the age-long and time-tested principle of *pacta sunt*

servanda is still part of our law. (*Erongo Regional Council and Other v Wlotzkasbaken Home Owners Association and Another* 2009 (1) NR 252 (SC)). Rule 108 of the rules of court has not set at naught and vaporized the principle. As I understand it, the object of rule 108 is, based on equitable considerations, to blunt the sharp point of executing claims against specially hypothecated immovable property in order to satisfy a claim. And I do not read *Kisilipe Niklaas and Lydia Vaanda Katjuongua v First National Bank of Namibia Limited* Case No. SA 65/2019 (SC) as having set at naught the aforementioned principle. Indeed, in that case Damaseb DCJ (writing the unanimous judgment of the court) stated:

'[19] The debtor must be invited to present alternatives that the court should consider to avoid a sale in execution but bearing in mind that the credit giver has a right to satisfaction of the bargain. The alternatives must be viable in that it must not amount to defeating the commercial interest of the creditor by in effect amounting to non-payment and stringing the creditor along until someday the debtor has the means to pay the debt. Should the circumstances justify, the court must stand the matter down or postpone to a date suitable to itself and the parties to conduct the inquiry. A failure to conduct the inquiry is reversible misdirection. If the debtor is legally unrepresented at the summary judgment proceedings, it behoves counsel for the creditor to draw the court's attention to the need for the inquiry in terms of rule 108.'

[4] One of the major principles enunciated by the Supreme Court in *Kisilipe Niklaas and Lydia Vaanda Katjuongua* is that judicial oversight under rule 108 of the rules of court exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of a primary home is a last resort. It follows that the court, in considering an application to declare a property especially executable, ought to look into whether, for instance, there exists 'good prospects of a debtor making arrangements to dispose of another asset within a reasonable time to liquidate the outstanding balance. (*Kisilipe Niklaas and Lydia Vaanda Katjuongua*, para 22) Thus, the gravamen of the principle there is that, in the end, the court should be seen to have enquired into whether there existed 'available viable and less drastic alternatives to declaring the property specially executable'. (*Kasilipile Niklaas and Lydia Katjuongua*, para 24)

[5] In the instant matter, after due enquiry, it seemed to me clear that the execution debtors did not seek to rely on the property in question being their primary home or leased to a third party (see *Mungunda v Bartha* NAHCMD 66 (14 March 2018)). They said rather clearly and unambiguously that they were expecting a windfall from consulting services they had rendered and were awaiting remuneration therefor. Indeed, in their notice of objection to 'our property being declared executable', in response to the execution creditor's rule 108 notice, they state:

'With the payment from this transaction, I will be able to clear the arrears on the Home Loan and bring our payments up to date. I am thus humbly requesting the Court to give us two more months to work on the transaction.'

[6] Having heard the execution debtors and counsel for the execution creditor, I decided to accept the prayers by the execution debtors that they needed two more months to clear the debt to prevent a sale in execution. In granting the two months' grace, I took into account the fact that the execution debtors did not tell the court that they had any other viable alternatives that the court ought to consider in order to avoid a sale in execution apart from what they themselves prayed the court to consider, that is, suspending execution of the order for two months, which the court considered in their favour (see *Kisilipile Niklaas and Lydia Vaanda Katjuongua*). In my view, where the execution creditor has proposed an alternative that is less drastic to sale in execution, the court ought to consider it favourably to the benefit of the execution debtor, so long as the alternative is viable.

[7] In the result, the court ordered that the order granted was not to be executed until after the expiry of two months. On the facts and in the circumstances of the case, I determined that that was a less drastic alternative (and accommodating to the execution debtors) to an immediate sale in execution. (*Kisilipe Niklaas and Lydia Vaanda Katjuongua v First National Bank of Namibia*) Besides, such order also relieved the execution creditor from having to incur the further expense of going through the whole rule 108 process once more after the expiry of the two months' grace period. The order is, thus, fair to both parties.

[8] I say it again; from their own mouths, the execution debtors informed the court that if the court gave them a grace period of two months they would 'be able to clear the arrears on the Home Loan and bring our payment up to date' to prevent a sale in execution. What else could the court do to answer the prayer of the execution debtors?

[9] In sum, there was a proper enquiry as to whether there existed viable alternatives to sale in execution. The less drastic alternative which the court accepted was proposed by the execution debtors themselves; I say it once more.

[10] In parentheses, I shall say the following in capitalities. In clear disrespect for the *pacta sunt servanda* principle, the execution debtors failed to carry out their end of the bargain with the execution creditor, who 'has a right to satisfaction of the bargain'. (*Kasilipile Niklaas and Lydia Vaanda Katjiuongua*, para 19) The court gave the execution debtors two months' grace period to clear the debt; an indulgence, which, it must be emphasised, they themselves craved. Within the grace period of two months, it would seem, the execution debtors have gained the financial means to hire and pay for the services of legal practitioners to appeal from the said court order. It seems clear to me that the execution debtors misled the court in material respects. They took the court for a ride; to use a pedestrian language. They were bent on 'defeating the commercial interest of the creditor by in effect amounting to non-payment and stringing the creditor along until someday the debtor has the means to pay the debt (if he or she is decent enough to do so; and minded to do so)' (see *Kisilipile Niklaas and Lydia Vaanda Katjiuongua*), para 19).

[11] Based on these reasons, the order appearing in para 1 above was made.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF: Ms PAULUS
Of Dr Weder, Kauta & hoveka Inc., Windhoek

DEFENDANT: Mr T MTSHIYA-MOYO
Globe Communications Namibia
Email: tabby@afol.com.na