REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-CON-2018/04032

In the matter between:

STANDARD BANK NAMIBIA LTD **APPLICANT**

and

ANDREAS DANIEL BOCK **1ST RESPONDENT**

GLYNNIS MICHELLE ELIZE BOCK **2ND RESPONDENT**

Neutral Citation: *Standard Bank Namibia Ltd v Bock* (HC-MD-CIV-ACT-CON-2018/04032 [2021] NAHCMD 78 (25 February 2021).

CORAM: MASUKU J
Heard: **11 November 2020**
Delivered: **25 February 2021**

Flynote: Subordinate legislation- Rules of the High Court of Namibia, 1990 - Rule 108 -Declaring immovable property specifically executable – Considerations taken into account in deciding - Authority of individual instituting proceedings on behalf of a body corporate discussed – Persons entitled to personal service in applications for property to be declared specifically executable.

Summary: The applicants in this matter sought an order for the immovable property of the respondents to be declared specifically executable in terms of Rule 108 of the

Rules of the High Court. The property, it is common cause, is occupied by the respondents' extended family members. It was the applicant's case that the property is not the primary home of the respondents and that there are no other viable means to recover the judgement debt than the declaration of the property executable.

The respondents, in opposing this application, raised a point in *limine* questioning the authority of the deponent deposing the affidavit made on behalf of the applicant to bring the proceedings but the respondents were met with no response. The respondents took the view that there are other viable measures available to the applicant to explore and which are less drastic than the sale of immovable property in which members of their family live.

Held: that when the authority of an individual instituting proceedings is questioned, the party is obliged to provide evidence of such authority even in reply.

Held that: the failure to provide such authority puts the Court in a position of not knowing whether the proceedings have been properly authorised.

Held further that: in terms of Rule 108 people entitled to be personally served with the notice are the execution debtor and/or their tenants. A person who is entitled to personal service, should be a person of means who is either capable of suggesting other modes of payment, including instalments, or putting up another property subsequently contributing to the enquiry.

Held: that a court may exercise its inherent jurisdiction in appropriate circumstances and direct that affected parties, like the respondents' relatives in this case, be heard ultimately, for instance in affording them time to find alternative accommodation, with the applicant's rights being catered for in that event.

Held that: the respondents made reasonable proposals which suggest that selling of the property may not be the appropriate course to follow as there exist viable measures which are less drastic to be explored by the applicant.

Held further that: the house not being the primary home of the respondents should not be considered in isolation, thereby being the only basis for granting the order, when there are viable but less drastic measures that can be taken to avert the declaration of the property executable and thus rendering human beings, who may be vulnerable, homeless.

As a result, the application to declare the immovable property specifically executable, was dismissed with costs.

ORDER

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1. The application in terms of Rule 108 of the Rules of the High Court, for the declaration of the property described as Erf. A186, Rehoboth, measuring 1525 square metres, and held by land Tile No. A186, is refused.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] At the heart of this judgment lingers one question, *viz* – is this a proper case in which the court should declare certain property registered in the respondents' names, specially executable, in terms of the provisions of rule 108 of this court's rules?

[2] As would be expected, the court has received discordant answers to this critical question from the parties. For the applicant, the answer was a resounding 'Yes!!". From the respondents' end, however, it was an emphatic No!!

Background

[3] It is common cause between the parties that the applicant sued out papers from the office of the registrar of this court, claiming payment of an amount of N$ 380 000 in respect of a loan that was at that point not paid for by the respondent as per the agreement between the parties. It is also common cause that the applicant registered a first mortgage bond in its favour for the amount of the loan, plus an additional 20% of the loan, N$ 75 600, in respect of costs of security for the loan.

[4] On 6 December 2018, the applicant obtained judgment in the amount of N$ 686 690.53, by default and proceeded to follow the execution procedures mentioned in the rules. It would appear that the applicant derived no joy from all these processes including the attachment of movable property, as a *nulla bona* return was filed by the Deputy Sheriff. The applicant then proceeded to launch the present application, which is vigorously opposed by the respondents, who it must be mentioned, are husband and wife, married in community of property.

[5] In its affidavit in support of the application, the applicant deposes that the respondent made an offer to pay the outstanding amount in instalments but they failed to honour that agreement. The arrears, according to the applicant, stand at N$118 231.03. It is the applicant's case that the property is not the respondents' primary home but constitutes the dwelling place of the respondent's mother-in-law. It is the applicant's case that in the circumstances, there is no other viable means of settling the debt other than declaring the property specially executable.

[6] In answer to the applicant's application, the 1st respondent acknowledges that the property sought to be declared executable, is registered in his and his wife's names. It is his case that he and his spouse, reside in Oranjemund. According to him, they purchased the property from his mother-in-law, i.e. Mrs. Christinah Hendrina Scholtz, who due to her age, is a pensioner and unable to afford the monthly bond payments, yet was in dire need of housing.

[7] The 1st respondent states further that since 2007, his mother-in-law lives with her sons, the 1st respondent's brothers-in-law. The brothers share one thing in common. They are both medically unfit to work and as such, the property constitutes

shelter and protection of the three persons from the vicissitudes of the weather and elements. It is thus their primary home, he contends further.

[8] The said respondent further contends that there are viable alternatives available to the applicant to explore and which are less drastic than the sale of the immovable property. The 1st respondent states that he and his wife are capable and able to pay the bond in the amount of N$ 7 500 per month and a further N$ 2 500, towards the arrears, which he claims are presently in the amount of N$ 52 041.40. He accordingly accused the applicant, in the circumstances, as invoking the procedure in question 'as a weapon of oppression'.[1]

[9] The 1st respondent states further that the amount of the arrears is relatively small and does not warrant the serious and drastic step of declaring the property specially executable. He further attached receipts of money that he has paid to the applicant and its legal practitioners since the default judgment was granted. The amount paid to the applicant in respect of the home loan, is N$ 100 200, and that paid to the applicant's legal practitioners, is N$ 97 500.

[10] The said respondent further states on oath that his legal practitioners communicated to the applicant's legal practitioners that he qualifies for a back home loan with his employer and it amounts to N$ 1.4 million. He undertook to apply for N$ 150 000 in respect of the pension back home loan and pay that amount to the applicant in order to settle the arrears.

[11] He, however, has a difficulty in making this arrangement work. He is listed by the applicant with ITC and his requests for the removal of his and his spouses' names from that list has been refused by the applicant, although it is that route that will make the money available to settle the arrears. This, he contends, is a less drastic measure than the declaration of the property specially executable.

[12] The 1st respondent further states that he and his spouse are in gainful employment and both earn monthly salaries. In this connection, he argues that the

[1] Para 9 of the answering affidavit.

applicant has the option to transfer this case to the Magistrate's Court, where it would be dealt with in terms of s 65 of that Court's rules.

[13] In reply, the applicant notes that the property in question, is, by the respondents' submission, not their primary home as they do not reside there. It provides a home for others than the respondents and as such, there is no basis for the court not to issue the declaration sought. In responding to this aspect, the applicant states that, 'Unfortunately the Applicant is not in a position to cater for extended family members unable to contribute to the repayment of the bond, who are unable to work, and who are basically living in a mortgaged property for free due to their unfortunate circumstances.' Quite telling a response.

[14] The applicant pours scorn on the settlement proposal made by the respondents, contending in the first place, that the amounts paid by the respondents referred to in their answering affidavits are sporadic and that if the arrears were to be settled on the terms suggested by the respondents, the payment of arrears would take an unreasonable time of 3 years to settle. The applicant maintains that the application has nothing to do with the respondents' extended family and their plight is of no assistance to the court.

[15] Regarding the pension back home loan, offered by the 1st respondent, it is the applicant's case that it shall have no regard for the document supplied by him because it is not signed or stamped, 'thus the legitimacy of same is questionable, and simply on the face of it unreliable for a settlement as proposed by the Respondents.'[2]

[16] The applicant retorts as follows on the question of the pension back home loan:

> 'Furthermore, the very documents states (*sic*) that the figures are for illustration purposes only, and thereof I consider it as a draft or simply an estimation, nothing accurate and thus unreliable and therefore the Applicant does not at this stage deems (*sic*) it necessary or safe for the Applicant to remove the names of the Respondents from ITC.'

[2] Para 6, p 4 of the replying affidavit.

[17] Regarding the referral of the matter to the Magistrate's Court, as suggested by the respondents draws the invective of the applicant, which accuses the respondents of intending to abuse the processes of the courts. Section 65 of the Magistrate's Court Act is therefor seen by the applicant as an option that is not viable. The court was asked to discard this argument. Last, but by no means least, the applicant states that it was unnecessary for it to cause the process to be served on the respondents' relatives as they are not tenants to the respondents.

Determination

Point ***in limine***

[18] The respondents, in their answering affidavit, raised the issue of the authority of the applicant's official who deposed to the affidavit and also launched the rule 108 application. Strangely, this issue was not dealt with by the applicant at all, notwithstanding that it had been pertinently raised by the respondents. It was also not dealt with in the heads of argument by the applicant.

[19] One of the leading authorities in this jurisdiction on this matter, is the judgment of Ueitele J in *Ondonga Traditional Authority v Elifas*.[3] In that case, and dealing with the issue of authority, the learned Judge said the following:

'The case of *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* is regarded as the main authority in respect of the question whether proceedings instituted on behalf of an artificial person are properly instituted or not. Watermeyer AJ, dealt with the argument submitted in respect of the *ratio* behind the requirement that a deponent should be authorised to bring an application on behalf of an artificial person as follows:

"It must always be proved, so he argued, that the applicant is in fact a party to the proceedings, for if it were not so the successful respondent who is awarded costs might find himself unable to enforce the award against the applicant. There was, he submitted, a special danger when the litigant was an artificial person, like a company, because if it should subsequently transpire that no proper resolution to litigate had been passed the company

[3] (HC-MD-MOT-EXP-2017/00134) [2017] NAHCMD 142 (15 May 2017), para 22.

would be free to take the point that it was not bound by the Court's order because it had never authorised the proceedings to be taken."'

[20] There is, in addition to this judgment, a long line of cases in this jurisdiction making the same point. This includes, *Rally for Democracy and Progress and Others v The Electoral Commission for Namibia*[4] *Otjozondjupa Regional Council v Dr. Ngahafa Aino-Cecilia Nghifindaka*[5] and *Standard Bank Namibia Ltd v Nekwaya,*[6] to mention but only a few. The procedure is for the party, whose authority is questioned to provide such authority, even in reply.

[21] In the instant case, although the point was taken by the respondents in their answering affidavit, the applicant did not provide the authority. In the premises, the court is not in a position to know that these proceedings are properly authorised by the applicant. As a consequence, I am of the considered view that the question of applicant's authority is well taken and should bring the court to a conclusion that the proceedings are not properly authorised.

[22] That should ordinarily be the end of the matter. I have, notwithstanding the above finding of lack of authority, decided, nonetheless, in the event I am not correct on this aspect, to deal with the matter on the merits. This might serve the interests of both parties in the long run.

The merits

[23] I would like to comment on the last issue mentioned in paragraph 17 above first, namely, the question of service of the application on the respondents' relatives who occupy the property sought to be declared specially executable. Rule 108 (2) of this court's rules, provides the following:

'(2) 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 –

[4] 2013 (3) NR 663 (SC) para 42.
[5] (LC 1/2009) 22 July 2009.
[6] (HC-MD-CIV-MOT-GEN-2020/00089) NAHCMD 122 (26 March 2020).

(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 …'.

[24] A reading of the above provisions shows that the rule maker identified two classes of persons who are entitled to personal notice of an intended declaration of property executable. These persons are further entitled to make representations to the court on the propriety of declaring the property specially executable. These are the execution debtor and a lessee of the property.

[25] The question that begs an answer in the circumstances is the following: if a person resides on the property sought to be declared executable and is neither the registered owner nor a tenant, is that person not entitled to notice of the proceedings? In the instant case, the respondents state on oath, and this is not disputed, that there is a pensioner and two infirmed relatives of the respondents who reside on the property and for them, it constitutes their 'primary home'. If the declaration should be made, it is claimed, they would be susceptible to weather elements and may lose the only roof over their heads. Do their rights matter?

[26] The applicant takes the stone-cold view that as the property is registered in the respondents' names, the occupants, who are the respondents' relatives, are not entitled to notice. Notice, in terms of the rules, is strictly reserved for the registered owners and/or their tenants.

[27] The respondents' counsel referred the court to the remarks in *Futeni Collections v De Duine (Pty) Ltd*[7], where the court observed that in African settings, the question of the primary home does not only apply to the nuclear family, but may

[7] 2015 (3) NR 829 (HC), para 39.

even apply to members of the extended family. This was in consideration of the communal nature of African relationships.

[28] In answering this question, I am of the view that the correct answer should be determined by the nature of the enquiry that the court would ultimately have to answer. This is to be found in rule 108(2)(*c*), in terms of which the court will make a determination, 'having considered all the relevant circumstances with specific reference to less drastic measures than the sale in execution of the primary home under attachment, which measures may include attachment of an alternative immovable property serving as the primary home of the execution debtor or any third party making a claim thereto.'

[29] In this connection, I incline to the view that the person who is entitled to notice in terms of the rule, is a person who is able to bring to the court's attention less drastic measures than the attachment of the property. It must, in other words, be a person with means, either to put up another property, or who can suggest other modes of payment, including instalments that may be seen as acceptable to the judgment creditor.

[30] In saying this, the court must not be understood to be declaring that the respondents' relatives have no rights that stand to be imperilled, and possibly seriously, if the declaration of the property executable, is made. Those who may not answer the question from the enquiry. It is my view that the court, ultimately has the power, in exercising its inherent jurisdiction, to order such persons to be heard in appropriate circumstances. This would be not for them to suggest less drastic measures as such but rather, to enable the court, if there are no less drastic measures, to consider an order that would be humane in those circumstances. It would, in the premises, have to be fair to the applicant as well.

[31] I accordingly come to the view that the respondents' relatives, although they stand to be affected by the order, are not entitled to the personal service of the application in terms of the enquiry that the court engages in. That however, is not the end of the matter, as the court may, in appropriate circumstances, reserve the right to

hear the parties affected, in exercise of its inherent jurisdiction. I accordingly find for the applicants in this regard.

[32] I now turn to deal with the main question for determination of the matter, namely, to decide whether the respondents have shown that there are less drastic measures that can be resorted to than the declaration of the property specially executable.

[33] I wish, before I do so, to note with concern the aloofness and insensitive responses of the applicant's deponent. These matters, should, in my view, be litigated humanely and with a sense of respect, according the debtors, some dignity. The contents of some of the applicants' reply, for instance that quoted in para 13 above, is far beneath the attitude the court would expect from a lender in the applicant's position. It appears personal, vindictive and insensitive. Court papers pertaining to rule 108 matters, may be drafted without the added but unnecessary outpouring of institutional emotion and personal attack that the applicant has displayed in this matter. Its officials can surely do better.

[34] There being no doubt that the applicant has complied with the provisions of the relevant rule, the next question becomes whether the respondents have shown that declaring the property executable is not the appropriate relief in this case and that there are less drastic but effective measures in place to meet the indebtedness.

[35] I do not agree with the applicant that the fact that the property in question is not the primary home of the respondents that the court should not, for that reason go any further, but grant the application as prayed. The allegations by the respondents of the circumstances of their relatives and effect of the order on their interests, was not placed in issue. It must thus be accepted. That more facts could have been placed before court by the respondents may be true but that does not mean that the court is not entitled to consider the full impact of the granting of the order and the availability of less drastic measures.

[36] In *Standard Bank v Augisto and Others*[8] this court reasoned as follows, in this type of scenario:

> 'If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, an alternative course should be considered by judicially before granting execution orders.'

[37] There are two courses that the respondents say are open to the court that can be resorted to in order to avoid the catastrophic consequences of selling the property in this matter. The question is whether, if 'considered judicially', as stated above, they would avail the respondents.

[38] The first is the payment of the amounts in instalments, which the respondents have offered. They offer to pay both the arrears and the monthly bond. The applicant has taken a very hard-line approach to the matter. They claim that there is no evidence that the respondents are employed and earn a salary. I am of the considered view that this is not a proper manner to deal with this aspect. The applicant could have requested the respondents to provide the proof of employment and the monthly income due to both of them. When a person states under oath that he is employed, and as it is on record, they have paid some of the instalments, it cannot be proper to throw them out with both hands when means to verify the information outside court processes are available. Banks routinely ask for proof of one thing or the other from their customers all the time.

[39] The respondents have also stated on oath that the 1st respondent is due to receive his back home loan and would be able to settle the arrears and proceed with the monthly instalments. This would only be so once the applicant removes the respondents from the ITC list, which it refuses to do. It claims that the letter relied on by the respondent regarding the bank home loan is not signed and does not appear to be genuine.

[40] Again, I find the applicant's approach rather odd. It appears hell bent on selling the property, come rain or sunshine. The letter making the offer to pay money from

[8] I 114/2014 [2019] NAHCMD 208 (25 June 2019).

the back home loan was exchanged by the parties in an effort to settle the matter amicably. It was open to the applicant to request all the information it needed and to also contact the respondent's employers to verify the correctness of the respondents' assertions, which have since been placed on oath. There has been no effort to get confirmations that were necessary and available before considering the matter and this is not, in my considered view fair.

[41] In *First National Bank v Musheti*[9] Angula DJP commented regarding the core business of banks. This was in a case where the Bank appeared to be intransigent and determined to have the property declared executable, when other viable means were available. The learned DJP remarked as follows:

> 'I also take into account the fact that banks, such as FNB in the present matters, are not in the business of repossessing immovable properties and selling such properties in execution but they are in the business of lending money to their customers on which loans they charge interest. In my view it will be in the interest of both parties to reinstate the agreement and continue to earn interest on the money lent.'

[42] I am of the considered view that the views expressed immediately above apply in the instant case and they resonate to some extent with this matter. I am of the considered view that the fact that a house is not a primary home of the respondent, should not, on its own, be a basis for granting the order, when some other less drastic measures are available. Whilst the respondents may not be living in the property, they have fully explained how and why they acquired the property.

[43] The court cannot look away from the fact that some human beings, including a pensioner, may be rendered homeless when means to settle the outstanding debt are available. At the end of the day, should the respondents, as the applicant appears to have some foreboding, reasonable or not, not make good on their word, the applicant would still be able to apply to the court for an appropriate order. In that scenario, the applicant can take due comfort, knowing that the respondents will have been afforded every available opportunity to rescue the property and to pace a roof over their immediate family members.

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[9] 9HC-MD-CIV-CON-2016/04122) NAHCMD 304 (18 October 2017).

[44] I do not find it necessary to deal with the last issue regarding the provisions of s 65 of the Magistrates Court Act. I am of the considered view that this is a matter, in which there are options available for the settlement of the debt, rather than declaring the property specially executable, with the result that some human beings, including a pensioner, and some infirmed, may have no roof over their heads.

[45] In doing so, I have taken guidance and believe I am not in violation of the admonition forcefully given by the Damaseb JP in his work entitled Court Managed Civil Procedure of the High Court of Namibia.[10] He states the following at para 13-046:

> 'The rule must not become the means by which to frustrate the legitimate commercial interests of a creditor to seek satisfaction of a judgment debt. It should be borne in mind that the judgment creditor is limited to only two opportunities to have a primary home declared specially executable. On the other hand, an execution debtor who offers a viable alternative that would reasonably satisfy the debt of the execution creditor must not be left homeless where doing so does not meet the legitimate interest of modern-day commerce and the country's overall financial system, which rely on credit extension to the majority of the population.'

[46] It appears to me that a solution can be found in this matter, which meets the interests of both parties as stated by the learned author above. Furthermore, the order I have in mind to issue, also takes care of the interest of the other affected persons. It renders the declaration of the property inappropriate in the present circumstances.

Conclusion

[47] Having considered the matter, I have come to the conclusion that this is a matter in which the interests of fairness and justice, require that the respondents be afforded an opportunity to pay the debt as the sale of the immovable property has

[10] Damaseb P 2020 *Court Managed Civil Procedure of the High Court of Namibia* Juta South Africa.

drastic consequences which are avoidable and may in the long run, redound to the benefit of all the parties in the long term.

Costs

[48] The ordinary rule in the awarding of costs is that costs follow the event. It is manifest that the respondents have been successful in this matter. They are therefore entitled to their costs.

Order

[49] I have accordingly come to the position that the proper order to issue in this matter is the following:

1. The application in terms of Rule 108 of the Rules of the High Court, for the declaration of the property described as Erf. A186, Rehoboth, measuring 1525 square metres, and held by land Tile No. A186, is refused.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANT:	B. O'Davids Of Engling, Stritter & Partners
RESPONDENTS:	L. Lochner Of Van der Merwe-Greeff Andima Inc.