

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: FIRST NATIONAL BANK OF NAMIBIA LIMITED VS HAROLD VINCENT GANASEB	Case No: HC-MD-CIV-ACT-CON-2019/01381
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE JUSTICE MASUKU	Date of hearing: Determined on the papers
	Delivered on: 21 July 2022
Neutral citation: <i>First National Bank of Namibia Limited v Ganaseb</i> (HC-MD-CIV-ACT-CON-2019/01381) [2022] NAHCMD 360 (21 July 2022)	
The order: <ol style="list-style-type: none">1. The application that Certain Erf No.1129, Mondesa, Extension No 3, situate in the Municipality of Swakopmund, Registration Division “G”, Erongo Region, measuring 761 (seven six one) Square Metres, held by Deed of Transfer No T 129/1999, be declared specifically executable is dismissed.2. There shall be no order as to costs.3. The matter is removed from the roll and regarded as finalised.	
Reasons for the order:	
MASUKU, J <u>Introduction</u>	

[1] The court in an order dated 4 June 2019, granted default judgment in favour of the plaintiff against the defendants. The applicant has brought this application in terms of Rule 108 to declare the property (Certain Erf No.1129, Mondesa, Extension No 3, situate in the Municipality of Swakopmund, Registration Division "G", Erongo Region, measuring 761 (seven six one) Square Metres, held by Deed of Transfer No T 129/1999) specially executable, to satisfy the debt as stated in the default judgment.

The parties' submissions

[2] It is the applicant's submission that it instituted actions against the respondents, which were granted in the applicant's favour, on the following matters:

2.1 HC-MD-CIV-ACT-CON-2019/00825

2.2 HC-MD-CIV-ACT-CON-2019/00785

2.3 HC-MD-CIV-ACT-CON-2019/02450

2.4 HC-MD-CIV-ACT-CON-2019/01381

[3] According to the applicant, in the cases HC-MD-CIV-ACT-CON-2019/00825 and HC-MD-CIV-ACT-CON-2019/00785, the court already declared the properties specially executable, however that the sale of those properties would not be sufficient to settle the respondents' outstanding debt.

[4] The applicant also submitted that it cannot consent to the registration of a second bond in favour of Agribank, because respondents owe the applicant an amount of N\$ 2 713 64.03 and failed to make payments to the applicant since March 2020. It also submitted that Agribank would only lend and advance an amount of N\$400 000 to the respondents which amount is not enough to satisfy the debt.

[5] The applicant further contends that the first defendant has informed the court that he is a fulltime communal farmer and that he resides in the communal area and that he does not have money to pay for legal representation and it is in terms of that information that the applicant submitted that it is highly unlikely that the property in question (Erf No 1129, Mondesa, Swakopmund) is their primary home.

[6] The respondents contend that there exists other viable less drastic measures as opposed to declaring the respondents' primary home as specially executable. The first being the loan by Agribank to settle the debts of the respondents' however, the applicant needs to provide the requested permission for it.

[7] The second measure is (an alternative to the first measure, in the event that the court is not satisfied with the first measure) that the applicant has already obtained two orders declaring the respondents' alternative properties as specially executable and that the sale thereof will have the effect of extinguishing the cumulative debt owed by the respondents.

Determination

[8] In 2018, the respondents approached the Agricultural Bank of Namibia (Agribank) seeking financial assistance to take over the debt of the respondents relating to the applicant. The financial assistance sought by the respondents was at that time in the amount of N\$ 430 000.00 The loan application sought from Agribank was provisionally approved. Agribank, thus, sought permission from the plaintiff to register a second continuing covering bond for a total of N\$450 000.00 over the respondents' immovable property, which amount was at that time the amount in which the respondents were indebted. The plaintiff failed to provide the permission and as such the amount owed by the respondents accumulated to N\$ 2 713 64.03.

[9] In light of the fact that the plaintiff failed to provide the permission sought by Agribank in order for the respondent's debts to be settled, the respondents have provided for less drastic measures instead of declaring their primary home specially executable. The application in this instance cannot stand.

[10] The procedure in terms of declaring an immovable property specially executable is encompassed in Rule 108.

[11] In terms of Rule 108 (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 –

(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'.

[12] Where an order declaring bonded property executable is to be made, the court takes into consideration whether the immovable property concerned is a primary home of a judgment debtor. As a result, substantial compliance with Form 24 (requiring that service be personal service) would suffice.¹ Notwithstanding this, the court must also consider all relevant circumstances including 'less drastic measures than a sale in execution.'²

[13] In the present matter, the respondents do provide two less drastic measures that can be followed by the applicant instead of declaring the said property specially executable. The first being that the applicant should give consent for the second bond offered by Agribank, and alternatively to sell the two properties which are already declared specially executable by the court.

¹ *Standard Bank Namibia v Shipila and Others* (SA 69/2015) [2018] NASC 395 (06 July 2018).

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

[14] It was stated in *Futeni* that the issue of people losing their homes following unpaid debts is a source of concern in this country and therefore, that the rule was promulgated to balance two interests. The first was to regulate the sale of homes in execution when the property in question was a home. The second, was to ensure that the giving of credit by financial institutions remained effectual and was not rendered unserviceable.

[15] In light of the *Futeni* case, it would be improper to declare a third property specially executable, without the applicant first exploring the possibility of the options given by the respondents as alternatives or rather less drastic measures than a sale in execution of the respondents' primary home.

Conclusion

[16] I am of the considered view that the provisions of Rule 108 are clear in that where less drastic measures are available, it should to be considered, as opposed to declaring a property specially executable.

Order

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

1. The application that Certain Erf No.1129, Mondesa, Extension No 3, situate in the Municipality of Swakopmund, Registration Division "G", Erongo Region, measuring 761 (seven six one) Square Metres, held by Deed of Transfer No T 129/1999, be declared specifically executable is dismissed.
2. There shall be no order as to costs.
3. The matter is removed from the roll and regarded as finalised.

Judge's signature:

Note to the parties:

Masuku J	Not applicable.
Counsel:	
Applicant	Respondent
J C Van Wyk J C Van Wyk Attorneys, Windhoek	K Gaeb Sisa Namandje & Co, Inc, Windhoek