

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-CON-2022/01614

In the matter between:

BANK WINDHOEK NAMIBIA LIMITED

APPLICANT

and

MOKASA TRADING ENTERPRISES CC

1ST RESPONDENT

JAN EPAFRAS MULINASHO MUKWILONGO

2ND RESPONDENT

AINO MARIANE MUKWILONGO

3RD RESPONDENT

Neutral Citation: *Bank Windhoek Namibia Ltd v Mokasa Trading Enterprises CC*
(HC-MD-CIV-ACT-CON-2022/01614) [2022] NAHCMD 573 (20
October 2022).

Coram: SIBEYA J

Heard: 19 September 2022

Delivered: 20 October 2022

Flynote: Rules of Court – Rule 108 - Declaring immovable property specifically executable – Considerations taken into account in deciding – Judgment creditor competent to execute against the bonded property without first executing against

movables – Persons entitled to personal service in applications for property which constitute primary home, sought to be declared specifically executable.

Summary: The applicant obtained default judgment sound in money against the respondents, subsequently launched an application in terms of rule 108 in order to declare an immovable bonded property declared specially executable.

The application was served on the first and second respondents but personal service was only effected on the third respondent.

Held that: once an immovable property is bonded, such property is tendered as security for the loan advanced and the judgment creditor is entitled to execute against the immovable property even in the absence of a *nulla bona* return.

Held further that: the failure by the respondents to oppose the rule 108 application does not mean that the court must disregard the requirements set out in rule 108, where it appears that the immovable property concerned may be a primary home of the respondents.

Held further that: where the mortgage property sought to be declared executable is the primary home of the respondents, the court is duty-bound to exercise its inherent powers of judicial oversight.

Held further that: the fact that the first and second respondent are married in community of property is no consent for the waiver of personal service of the rule 108 application.

Held further that: failure to effect personally service of the rule 108 application on the second respondent is fatal to the application and resultantly, the application to declare the immovable property specifically executable, is dismissed

ORDER

1. The application in terms of rule 108 of the Rules of Court, is refused.
 2. There is no order as to costs.
 3. The matter is removed from the roll and is regarded as finalised.
-

JUDGMENT

SIBEYA J:

Introduction

[1] The kernel issue that revolves around this judgment is the propriety of the rule 108 process, where, in the absence of a *nulla bona* return of service on which it would appear that the execution debtor has insufficient movable property to satisfy a judgment debt, the judgment creditor seeks an order to declare an immovable property specially executable.

[2] The secondary issue is simply whether the mere fact that parties are married in community of property, constitutes a waiver, so to speak, to serve only one party with the rule 108 process.

[3] As would be expected, there were jarring answers to these two critical issues.

Parties and their representation

[4] The applicant is Bank Windhoek Limited, a public company duly incorporated as such and duly registered as a commercial bank in terms of the applicable laws of Namibia with its principle place of business and registered address situated at 262, Independence Avenue, Windhoek, Republic of Namibia.

[5] The first respondent is Mokasa Trading Enterprises CC, a close corporation incorporated in terms of the laws of Namibia with its chosen *domicilium citandi et executandi* at Erf 399, Oshakati West, Oshakati, Namibia.

[6] The second respondent is Jan Epafra Mulinasho Mukwiilongo, an adult male residing at Erf 399, Oshakati West, Oshakati, Namibia.

[7] The third respondent is Aino Mariane Mukwiilongo, an adult female residing at Erf 399, Oshakati West, Oshakati, Namibia.

[8] The second and third respondents are married to each other in community of property and are members of the first respondent.

[9] Where reference is made to the first, second and third respondents jointly, they shall be referred to as 'the respondents'. The respondents did not oppose the rule 108 application and filed no answering affidavits.

[10] The applicant is represented by Mr Luvindao.

[11] The court appointed Mr Nekwaya to act as *amicus curiae* and to address the concerns raised by the court. Mr Nekwaya filed heads of argument and made oral submissions.

Background

[12] The applicant instituted action proceedings on 13 April 2022, against the respondents. Default Judgment was subsequently granted on 8 June 2022 against the respondents, jointly and severally, the one paying, the other to be absolved, for:

- '1. Payment in the amount of N\$ 1 574 321.22.
2. Compound interest calculated daily and capitalized monthly on the amount of N\$ 1 574 321.22 at Plaintiff's Prime Lending Rate of interest from time to time, currently 7.75% plus 1.5% per annum calculated from 4 April 2022 to date of final payment.
3. Costs of suit on a scale as between Attorney and Client.
4. Matter is removed from the roll: Case Finalized.'

[13] The applicant, after obtaining default judgment for the capital, interest, and costs, proceeded to issue an application in terms of rule 108. The applicant sought to declare a property of the second and third respondents executable. The property sought to be declared executable is best described as:

CERTAIN: *ERF NO. 399 OSHAKATI (EXTENSION NO.1)*

SITUATE: *IN THE TOWN OF OSHAKATI*
REGISTRATION DIVISION "A"
OSHANA REGION

MEASURING: *1203 (ONE TWO NIL THREE) SQUARE METRES*

HELD BY: *DEED OF TRANSFER NO. T 824/2008*

SUBJECT: *TO THE CONDITIONS CONTAINED THEREIN*

(hereinafter referred to as 'the property').

The law

[14] Rule 108 of the Rules of this Court, stipulates that:

'(1) The registrar may not issue a writ of execution against the immovable property of an execution debtor or of any other person unless –

- (a) a return has been made of any process which may have been issued against the movable property of the execution debtor from which it appears that the that execution debtor or person has insufficient movable property to satisfy the writ; and
- (b) the immovable property has, on application made to the court by the execution creditor, been, subject to subrule (2), declared to be specially executable.

(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 order should not be made;
- (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.'

[15] Plainly, rule 108 has two important requirements.

[16] **Firstly**, a writ of execution against the immovable property of an execution debtor or of any other person may not be issued by the Registrar unless two jurisdictional facts set out in rule 108(1)(a) and (b) are present. These are:

- a) A return issued against the movable property of the execution debtor from which it appears that the execution debtor or person has insufficient movable property to satisfy the writ;
- b) The immovable property has, on application made to the court by the execution creditor, been, declared to be specially executable.

[17] **Secondly**, if the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as a home, a court order declaring the immovable property specially executable may only be granted subject to the presence of certain jurisdictional facts under Rule 108(2)(a) and (b).

[18] As alluded to above, engaged in these proceedings is the question whether or not, in circumstances where the parties have bonded an immovable property, and in the absence of a return of service issued against the movable properties of the execution debtor from where it appears that the execution debtor has insufficient

movable property to satisfy the writ (*nulla bona* return), the court must declare the bonded immovable property, specially executable.

Applicant's case and argument

[19] The gravamen of the applicant's case is that where immovable property has been specifically bonded, it has a substantial real right to such property and is entitled to first execute against the immovable property and only to the extent of any shortfall thereafter, can it execute against the movables.

[20] In addition, the applicant contends that in relation to property, which is subject to a mortgage bond, it is unnecessary to first obtain a *nulla bona* return of service in order to execute against a bonded property.

[21] Mr Luvindao emphatically argued that a mortgagee (the applicant) has a right to have recourse against the burdened property and the applicant is, therefore, entitled to have the immovable property declared executable.

[22] Mr Luvindao further argued that the respondents failed to oppose the application and to file answering papers and as such no allegations are before court that:

- a) the property is the respondents' primary home;
- b) less drastic measures exist whereby the judgement debt can be satisfied in any manner other than the sale of the immovable property;
- c) the respondents had made any attempts to settle the judgement debt;
- d) the respondents have other assets available whereby the judgement debt can be satisfied;
- e) the property is rented to third parties or occupied by third parties;

f) declaring the property executable would be inappropriate in the circumstances of settling the judgment debt; and

g) the respondents will be able to satisfy the judgment debt by other means.

[23] In this connection, Mr Luvindao concludes that the property is bonded in favour of the applicant and the parties expressly agreed by registration of the mortgage bond, that the property would specifically serve as security for the loan. The parties agreed that should the respondents breach the loan agreement, the applicant can have the property declared executable instead of first executing against the movable property of the respondents.

[24] The right to have a mortgaged property declared executable is a contractual right as agreed to by the parties. The reason for the continued application of the principle embodied in the maxim *pacta servanda sunt* is the need for certainty in commerce and that the parties will know what their contract means and that they are entitled to rely on its terms unless such contract is against public policy or the enforcement thereof would be unconscionable. On this score Mr Luvindao relied on the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

Amicus Curiae arguments

[25] Given the seriousness of the issues before court and the effect that such issues may have on the judgment creditors and judgment debtors, this court thought it fit to appoint Counsel as *amicus curiae*, to advance argument on the issues before court for determination.

[26] It is on the said basis that the court appointed Mr Nekwaya to act as *amicus curiae*. The court appreciates arguments advanced and the assistance rendered by Mr Nekwaya.

[27] Mr Nekwaya concurred with the applicant that once an immovable property is bonded, such property is tendered as security for the loan advanced. As a result, the judgment creditor is entitled to execute against the immovable property even in the

absence of a *nulla bona* return of service.

[28] Mr Nekwaya, however, argued that there is nothing in law which precludes this court to hold an enquiry where the immovable property is ‘the primary home of a person’ as part of the overall judicial oversight required by rule 108. This is necessary in order ascertain whether foreclosure can be avoided, having regard to viable alternatives.

Discussion

Entitlement to execute hypothecated immovable property directly

[29] Damaseb JP in his work titled *Court Managed Civil Procedure of the High Court of Namibia*,¹ had the occasion to discuss the execution on hypothecated immovable property and stated as follows 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.’

[30] Furthermore, in *Standard Bank Namibia Ltd v Shipila and Others*,² the Supreme Court stated that:

‘[15].....[M]ortgage creditors can rely on a limited real right and can insist, absent abuse of process or mala fides, on directly executing their claims against specially hypothecated immovable property of the debtor in order to satisfy a claim, but where the immovable property is ‘the home of a person’ judicial oversight is required in order to ascertain whether foreclosure can be avoided, having regard to viable alternatives.’ (own

¹ P. Damaseb. (2020). *Court-Managed Civil Procedure of the High Court of Namibia*. Cape Town: Juta & company (Pty) Ltd, p. 334.

² *Standard Bank Namibia Ltd v Shipila and Others* 2018 (3) NR 849 (SC).

emphasis)

[31] The above authority is plain for the principle that a judgment creditor may execute directly on the hypothecated property without first obtaining a *nulla bona* return of service. There is therefore, nothing untoward with the approach adopted by the applicant in *casu*, as the approach is embraced by the law.

[32] For the said reason, I find that there is no abuse of process or *mala fides*, on the part of the applicant for directly executing its claim against the specially hypothecated immovable property of the debtors (respondents) in order to satisfy a claim.

Should the court consider less drastic measures?

[33] First and foremost, I wish to highlight that, on a meticulous perusal of the record, it is clear as day that the respondents did not file any affidavit to explain why an order declaring the mortgaged property specially executable should not be granted. As stated hereinabove, the respondents did not oppose the application.

[34] The failure by the respondents to oppose the application does not, however, mean that the court must turn a blind eye to the requirements set out in rule 108, where it appears that the immovable property concerned may be the primary home of the second and third respondents.

[35] It is abundantly clear that rule 108 requires that where an immovable property sought to be declared executable is a primary home, the court should consider 'all the relevant circumstances with specific reference to less drastic measures than the sale in execution.' In this regard, I find that the courts are compelled to conduct an inquiry irrespective of whether the immovable property is hypothecated or not, in order to determine whether to declare the property executable. This is part and parcel of judicial oversight.

[36] It follows from the above that an order to declare a primary home specially

executable should not be granted lightly and for the mere asking.³

[37] It is apparent from the particulars of claim, that the second and third respondents' place of residence is cited as Erf No. 399, Oshakati West, Oshakati, Namibia, which is the immovable property that the applicant seeks to be declared executable.

[38] What is damning to the applicant's case is that it simultaneously and unequivocally pleads, in paragraph 24 of the particulars of claim that the property to be declared executable is the 'primary residence' of the second and third respondents. For all intents and purposes it is fair to say that the said immovable property appears to be the primary home of the second and third respondents. In light of such allegations, should this court then not consider less drastic measures than a sale in execution as part of its inherent powers of judicial oversight?

[39] The applicant, however, in an attempt to circumvent what is clearly pleaded tried to draw a distinction between 'primary home' and 'primary residence'. Mr Luvindao in this connection argued that the second and third respondents might use the property as their primary residence which on its own does not render the property a primary home. He argued that a primary residence is distinguishable from a primary home. Mr Luvindao referred to no authority to substantiate his contention.

[40] The English Oxford dictionary defines home 'as the place, house or flat, where one lives', while residence is defined as 'a person's home'. I find that the two concepts, 'home' and 'residence', has one common denominator and that is a person's home.

[41] I thus find the distinction between home and residence sought to be drawn by the applicant to be far-fetched and, in my view, it does not get the applicant out of the starting blocks. In order for the applicant to place this court in a position to decide whether the property to be declared executable is the primary home of the second and third respondents or not, the applicants should have, at the very least produced

³ *Kisilipile v First National Bank of Namibia Limited* (SA 65 of 2019) [2021] NASC 52 (25 August 2021) para 2.

evidence in attempt to buttress its argument (e.g. a Deeds Search, showing that the second and third respondents possess other property).

[42] In the absence of evidence to the contrary, I find that, the property sought to be declared executable and referred to as the primary residence, is the primary home of the second and third respondents. I further find that the reference in the particulars of claim to primary residence should be understood to mean primary home.

[43] As stated in *Shipila (supra)*, judicial oversight is required in order to ascertain whether there are viable alternatives available where the property sought to be declared specially executable is the home of the person.⁴

[44] Having found that the mortgaged property sought to be declared executable is the primary home of the second and third respondents, the court is duty-bound to exercise its inherent powers of judicial oversight. In the exercise of my judicial oversight, I take note that I should consider whether there are any less drastic measures available than to declare the mortgaged property specially executable.

[45] In *casu*, the third respondent, who is married to the second respondent in community of property was personally served with the rule 108 application. The second respondent, however, did not have the pleasure of being served with the same application personally.

[46] The fact that the second and third respondents are married in community of property is no consent for the waiver of personal service of the rule 108 process. Given the finding that I have made above that the property in question is the primary home of the second and third respondents, it was incumbent of the applicant to ensure that both the second and third respondents are personally served with the rule 108 application.

[47] Failure to effect personally service as aforesaid is fatal to the application.

⁴ *Standard Bank Namibia Ltd v Shipila and Others* 2018 (3) NR 849 (SC).

Conclusion

[48] In view of the findings and conclusions made hereinabove and in the exercise of my discretion, I find that it is in interests of fairness and justice, that the primary home of the second and third respondents as alleged by the applicant in its particulars of claim should not be declared executable, for failure to effect personal service on the second respondent.

[49] In light of the above finding, this court has an obligation to consider whether there are less drastic measures available.

[50] In *casu*, the court cannot embark on the said inquiry in the absence of personal service on the second respondent.

[51] Although, I found earlier in the judgment that the mortgagee can execute on the hypothecated property without having to obtain a *nulla bona* return of service on the movables, I find that where the property sought to be declared executable is the primary home of the judgment debtor (the second and third respondents), as part of judicial oversight, the court should inquire whether there are movables available to satisfy the judgment debt, without first directly resorting to the immovable property. This, after all, constitutes part of judicial oversight.

[52] In the present matter, the absence of a *nulla bona* return of service on which it would appear that the second and third respondents have insufficient movable property to satisfy the debts, places the applicant in a more precarious position.

[53] In the result, the applicant's application to have the property declared executable falls to be dismissed.

Costs

[54] In view of the fact that the application is unopposed, no costs will be awarded.

[55] 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 Court, is refused.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

Sibeya J

Judge

APPEARANCES:

APPLICANT: T. Luvindao
Of Dr Weder, Kauta & Hoveka, Inc
Windhoek

RESPONDENTS: No appearance

AMICUS CURIAE: E. Nekwaya