REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2019/00773

In the matter between:

STANDARD BANK NAMIBIA LIMITED **PLAINTIFF**

and

MATHIAS NKORE MOYO **DEFENDANT**

Neutral Citation: *Standard Bank Namibia Limited v Moyo* (HC-MD-CIV-ACT-CON - 2019/00773) [2022] NAHCMD 78 (24 February 2022).

CORAM: MASUKU J
Heard: **03 and 06 December 2021**
Delivered: **24 February 2022**

Flynote: Rules of Court – Rule 108 – declaration of property executable – considerations taken into account - Where the property to be declared specially executable is the primary home of the debtor, the court may, depending on the facts presented, refuse declaring a primary home specially executable. This is especially so

if there is proof that the commercial interests of the creditor can be adequately be catered for and at the same, the debtor is able to have a roof over the family's heads.

Summary: The applicant, a bondholder in respect of the property sought to be declared specially executable had extended a home loan to the respondent. The respondent fell into arrears leading to a breach the agreement. The applicant obtained judgment by default and proceeded in the due course of time, to apply for the property to be declared specially executable.

The respondent opposed the application and stated on oath that he had consistently been making payments for a period in the excess of a calendar year and undertook to continue to do so. In addition to that, on the applicant's papers, the court found that there were less drastic measures available to settle the debt than to declare the property executable, a move which would leave the respondent and his family homeless in the doldrums, as the property in question constituted their primary home. This latter allegation was not gainsaid. The court found as follows:

Held: In as much as the applicant wants to terminate the agreement with the respondent, the essence of Rule 108 is to avoid debtors from unnecessarily losing their primary homes in circumstances where the commercial interests of the creditor can be reasonably met by allowing viable alternatives to be implemented.

Held that: The court, in exercising its judicial oversight, is entitled, if there are viable options which would bring a balance in protecting the creditor's commercial interest and at the same avoiding selling a debtor's primary home in execution, may refuse to declare the property in question specially executable.

Held further that: The respondent's payment of the debt together with his promise to continue to pay brings about a win-win situation, in the sense that the applicant's commercial interest will be fully catered for without while at the same time, the respondent is able to provide a roof over his family's heads.

ORDER

1. The application for the declaration of Erf. No. 831 Elisenheim (Ext. No. 7, in the Municipality of Windhoek, Registration Division “K” Khomas Region, measuring 480 (Four Eight Zero) square metres and held by Deed of Transfer T 620/2016 executable, is refused.
2. The Applicant is ordered to pay the costs of this application.
3. Each party is to bear its own costs pertaining to the uncompleted hearing of the rule 108 application before Mr. Justice Parker.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] This is an opposed application for the declaration of certain property described as Erf No. 831 Elisenheim (Ext. No 7, in the Municipality of Windhoek, Registration Division “K”, Khomas Region, measuring 480 (Four Eight Zero) square metres, and held under Deed of Transfer T 620/2016 specially executable.

[2] As such, the main question for determination is whether the applicant has shown that this is an appropriate case in which the declaration sought should be granted. The respondent has submitted that this is not a case eminently suited for the granting of the declaration sought. As the judgment unfolds, it will become clear as to who of these protagonists is on the correct side of the law in this regard.

The parties

[3] The applicant is Standard Bank Namibia Limited, a company with limited liability, duly registered in terms of the company laws of this Republic. It is also registered as a financial institution in terms of the relevant laws. It is headquartered in Windhoek.

[4] The respondent is Mr. Mathias Nkore Moyo, an adult male person who is statistician by profession. He is in the employ of the Electricity Control Board and resides in Windhoek in the very property sought to be declared executable by the applicant.

[5] The parties will be referred to as the applicant and the respondent, respectively. In this connection, Standard Bank will be referred to as the applicant and Mr. Moyo as the respondent.

[6] Mr. Jacobs appeared on behalf of the applicant on the instructions of Fisher Quarmby & Pfeifer. The respondent was represented by Mr. Rukambe from Sisa Namandje Inc.

Background

[7] The facts giving birth to these proceedings are fairly straightforward and are not seriously contested. The contestation will be in the application of the applicable law to the facts and it is where the parties differ materially.

[8] Briefly stated, the relevant facts are the following: the applicant, a bond holder in respect of the property sought to be declared executable in these proceedings, sued the defendant for payment of an amount of N$ 1, 988, 892.37, interest and costs and on order declaring the property specially executable. The claim arose as a result of a loan extended by the applicant to the respondent and whose terms the latter failed to adhere to.

[9] On 3 May 2019, a default judgment was granted by this court in the amount claimed, together with interest and costs. No order was granted regarding the declaration of the property specially executable on that date. Execution processes

against the respondent's movables ensued, eventually culminating in the present proceedings for the declaration of the property specially executable.

[10] The respondent was personally served with the application in terms of rule 108 and as he is entitled to at law, he opposed the proceedings. Because the allegations in support of the application are more or less standard, it is important to consider the bases of the opposition by the respondent.

The respondent's bases of opposition

[11] In his answering affidavit, the respondent opposed the relief sought. He, in the first place, alleged that the property in question is the primary home and houses his wife, three minor children and himself. In this connection, he pointed out that were the court to issue the order as prayed, that would have far reaching consequences and the declaration would have debilitating consequences on innocent parties, which I understood to refer to the children.

[12] Furthermore, the respondent contended that the relief sought is wholly inappropriate and incongruent with the established fundamental precedent in this court. He submitted that on the applicant's own papers, it was plain that there were less drastic means or options available to settle the debt than the option to declare the property executable.

[13] The respondent further pointed out that the applicant had failed to comply with the requirements of rule 108(4) regarding the return of service in relation to the movable property. He contended in this regard that the return of service is dated 26 May 2021, whereas the application itself was served on 13 October 2021.

[14] Whilst he did not dispute the liability in terms of the order dated 03 May 2019, it was his case that he had caused several payments to be made on the account. These reflect that the respondent had consistently made payments since January 2020, which have been made monthly. He undertook to continue making the payments and asserts that it would, in those circumstances, be unconscionable to grant the order, which leaves him and his family, subject to the weather elements.

[15] The respondent further deposed that from the month of April 2020, up to the date of the hearing of the matter, he had been paying an amount of N$ 20 000 per month on a consistent basis. He undertook to continue doing so. Furthermore, earlier, in March 2021, he further deposed, he made a lump sum payment of N$ 57 369.25 towards reduction of the debt.

[16] It is not disputed that the applicant, out of choice, did not file a replying affidavit, which deals with the contents of the answering affidavit. As such, the respondent's contentions remain unchallenged and therefor liable to be accepted. Furthermore, the *Plascon-Evan's* rule operates in this matter. It allows the dispute to be determined on the respondent's version.[1] That does not, however translate to saying that the application should be dismissed. In this regard, the court will need to consider the applicable legal principles and precedent set in place to deal with the propriety of declaring the property executable in the circumstances.

Argument

[17] Mr. Jacobs argued that the application should be granted as prayed because it is common cause that the debt is not disputed, as well as the fact that the respondent fell into arrears. Because the applicant is the bondholder in this case, it is entitled to execute against the immovable property. It is the applicant's case that the offer to continue paying the amounts he has been doing, does not constitute a viable alternative within the meaning referred to in case law.

[18] It was the applicant's case that the applicant is, in the circumstances, entitled to immediate satisfaction of its bargain. Otherwise, so argued the applicant, the period it would take the respondent to pay the debt, together with interest, is in the excess of 8 years. With interest, the period is even longer. It was accordingly argued that the application should be granted with costs on the attorney and client scale as agreed.

[19] Mr. Rukambe, on the other hand, argued that this is a matter in which the court should exercise its discretion and refuse the application. It was his case that in view of

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

the dire consequences if the order is granted, considered together with the alternative available to declaring the property executable, the court should refuse the application.

Determination

[20] It is perhaps important to decipher from case law, some of the applicable principles from case law. In this connection, I will lend an ear firstly to local judgments and where necessary, consider what the position in South Africa, a jurisdiction which provides highly persuasive authority to us.

[21] In *Gundwana v Steko & Others*[2] the Constitutional Court of South Africa stated as follows:

'It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only where there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.'

[22] In *Namib Building Society v Du Plessis*[3] this court dealt with the issue of execution as follows:

'A mortgagee plaintiff in principle should be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he sues. Such a plaintiff advanced money on the understanding that he can preferentially look to the proceeds of the mortgaged property.'

[23] Recently, in *Kisipile*,[4] the Supreme Court adumbrated the law as follows at paras 18 and 19:

'[18] In Namibia, judicial oversight takes the following form when it comes to declaring a primary home specially executable. If a property is a primary home, the court must be

[2] *Gundwana v Steko & Others* 2011 (3) SA 608 (CC) at 626F.
[3] 1990 NR 161 (HC) at 163J – 164A.
[4] *Kisipile v First National Bank Namibia Ltd* (SA 65-2019) [2021] NASC (25 August 2021), para 18-2

satisfied that there are no less drastic alternatives to a sale in execution. The judgment debtor bears the evidential burden. He or she should preferably lay the relevant information before court on affidavit especially if assisted by a legal practitioner, either in resisting default judgment or summary judgment. The failure to do so does not relieve the court of its obligation to inquire into the availability of less drastic alternatives. If the debtor is legally unrepresented his or her attention must be drawn to the protection granted under rule 108.

[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 the 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 some day the debtor has the means to pay the debt . . .'

[24] At para [20] the Supreme Court continued to lay down the law as follows in *Kisipile*:

'Judicial oversight exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of the primary home is a last resort. The court is required to take into account "all the relevant circumstances". When exercising the discretion under rule the court should bear in mind that a sale in execution of a primary home does not necessarily extinguish a debt. The reality is often the contrary. In other words, the debtor remains indebted to the credit giver for the balance of the debt, considering that under the current rule framework the property is sold to the highest bidder for not less than 75% of the either the local authority or regional council evaluation.'

[25] Finally, at para [21], the Supreme Court reasoned as follows on the subject:

' . . . The court should also take into consideration the payment history of the debtor. Greater latitude should be given to the debtor who has a reasonably good payment history; the extent of the balance outstanding; the age of the debtor – which is an important factor whether or not the debtor will be able to secure another loan to buy a home.'

[26] It now behoves me to comment briefly on these guiding principles and to then apply the relevant ones to the facts of this case. The first principle that applies is that there is nothing inherently wrong in selling property in execution, as it is part of ordinary economic life. This also applies to landed property, especially where there is a

mortgage bond in relation to the said property sought to be declared specially executable. This legal fact ordinarily entitles the bondholder to realise that very property for the purpose of securing the debt and to look to the primarily at the proceeds of the property to settle the indebtedness.

[27] That said, it however becomes odious in situations where it is disproportionate because there are other viable means open to effect the settlement of the debt, as opposed to selling the property. This is especially the case where the property in question is the primary home of the debtor. In this connection, the court must be cautioned not to allow execution of immovable property willy-nilly. The impact of the sale of primary homes on judgment debtors must be taken into consideration, including that they run the risk of losing their primary homes and as such lose a roof over their heads, which in turn, affects their dignity.

[28] It would appear to me that the court has a balancing exercise to carry out and at times with a touch of deftness and dexterity. There are two competing interests that the court is called upon to bring to some equilibrium and where the interests of justice will lie, will inevitably depend on the facts of the case at hand.

[29] The one consideration is that the creditor must be able to benefit from the contractual obligations reduced to writing in the bond of security. In other words, the creditor's commercial interests must not be defeated by the court unreasonably and without justification, withholding a declaration of property executable in terms or rule 108.

[30] On the other end of the spectrum is the real and devastating potential to leave a debtor and his or her family without a roof over their heads when there is a viable alternative to declaring the property executable. In this connection, the court should, in order to avoid deleterious consequences of homelessness, refuse the application when the commercial interests of the debtor can be adequately catered for and at the same time, the debtor and his or her family are able to cover themselves in dignity with a roof over their heads. In a sense, this becomes a win-win situation for both parties.

[31] The question is which direction the relevant circumstances of this case point to? Is it in granting the application in terms of rule 108 or in refusing it? It would appear to me that from what the respondent has stated in his answering affidavit, and which has not been refuted by the applicant, the former has been consistently paying an amount in the excess of N$20 000 per month to settle the indebtedness in the matter. This, on all accounts, is not a trifling amount when regard is had to the effect that the respondent was to pay a monthly amount of N$ 15 544.56 in terms of the mortgage bond.[5]

[32] In the larger scheme of things, it does not appear to me that the situation that obtains in this matter is not one that can be regarded as defeating the commercial interests of the applicant. Objectively considered, it does not amount to what the Supreme Court referred to in *Kisipile* as 'non-payment and stringing the creditor along until someday the debtor has means to pay the debt.'[6] In this case, the respondent has been paying a sizable amount of N$ 20,000 of the debt on a continuous basis. The court should, in the circumstances, come to the respondent's aid, ensuring in the process that the applicant's commercial interests are catered for. They appear to be, in my considered view.

[33] Mr. Jacobs argued strenuously and submitted that the court cannot compel the applicant to continue in a relationship with the respondent that it wants to terminate. He submitted that the respondent breached the agreement, and the applicant is in terms of the acceleration clause, entitled to payment immediately of the entire outstanding amount. As the respondent is able to pay a sizeable amount in satisfaction of the debt, it means that he is capable of obtaining alternative finance and that the court should therefor grant the application, allowing the respondent time to obtain alternative finance.

[34] Whilst there may be some force to Mr. Jacob's submissions, it must be remembered that the rule in question was designed to avoid the unnecessary loss of houses in circumstances where the commercial interests of the creditor can be

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[5] Clause 3.1 of the mortgage bond.

[6] *Ibid* para 19.

reasonably met by allowing viable alternatives to be implemented so as to avoid the sale of the primary home of the debtor, which the present one unarguably is.

[35] The judicial oversight reposed in this court allows it, in appropriate cases, to refuse an application such as this, when the commercial interests of the creditor are met, yet the granting of the order would spell disaster in the sense of homelessness and possible indignity for the debtor. The respondent is employed and appears to earn a very decent salary that renders him able to meet his financial obligations to the respondent and at the same time, eminently able to provide the serenity of a roof over his family, especially his minor children.

[36] If this situation, which appears to be a win-win situation, the applicant will be able to recover the entire debt owing to it eventually. It may well be that the time will be extended but it is able to charge interest, which ameliorates the commercial harshness of a situation in which the respondent would be living in the property without any prospect of paying out the amount of the debt, even in the foreseeable future.

[37] In *Kisipile,* the Supreme Court ruled that 'Judicial oversight exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of a primary home is a last resort.' Do the facts of this case demonstrate that the sale of the applicant's primary home is, all material things considered, the last resort? I think not. This is because of the reasons that have been advanced above.

Conclusion

[38] Having regard to the discussion and considerations recorded above, I am of the considered view that this is not a case where it can be stated without equivocation that the sale of the respondent's house is a measure of last resort and nothing can be done to preserve the dignity of the respondent's family and at the same time, meet the applicant's commercial interest. The application must for that reason fail.

Costs

[39] The ordinary rule applicable to costs has been mentioned times without number. It is this – costs ordinarily follow the event. In this case, the respondent has been successful and as such, he is entitled to the costs of the application.

[40] There is, however, an issue regarding costs incurred on 26 November 2021, when the parties appeared before Mr. Justice Parker for hearing of the matter. It would appear that the argument commenced and after Mr. Jacobs had completed his main argument and the respondent's representative was to start firing, Mr. Justice Parker realised that the matter emanated from the offices of Sisa Namandje Inc, in respect of which he had a conflict. The issue of the conflict is recorded in the court order dated 26 November 2021 accordingly.

[41] Mr. Jacobs argued that the respondent must bear the wasted costs because his legal practitioner should have been aware that Mr. Justice Parker is conflicted in respect of matters from that law firm. I do not agree. The conflict was not on the part of the legal practitioner but from the Bench. As such, it would be wrong for a legal practitioner to second-guess what a judge would say. It may well be that the conflict would have ended, or its existence obliterated by events unbeknown to the legal practitioner.

[42] In this matter, it would have been the duty of the court to alert the parties before the commencement of the proceedings of the conflict in order to avoid running up any costs. It would be inconsiderate in the circumstances to mulct the respondent with the costs in the circumstances. Nor would it be fair order the respondent's legal practitioner to bear these *de bonis propiis*. I mention the latter on a broader consideration of the matter, not because it was suggested by the applicant that the respondent's legal practitioner should have borne the costs personally.

[43] Having regard to the manner in which and the reasons behind the aborting of the hearing on 26 November 2021, it would appear to me that the proper order to issue regarding the wasted costs of that is to order each party to bear its own costs. I accordingly do so.

<u>Order</u>

[44] In the circumstances, and considering all the issues raised, considered and the manner in which they were determined, the appropriate order is the following:

1. The application for the declaration of Erf. No. 831 Elisenheim (Ext. No. 7, in the Municipality of Windhoek, Registration Division “K” Khomas Region, measuring 480 (Four Eight Zero) square metres and held by Deed of Transfer T 620/2016 executable, is refused.
2. The Applicant is ordered to pay the costs of this application.
3. Each party is to bear its own costs pertaining to the uncompleted hearing of the rule 108 application before Mr. Justice Parker.
4. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANT:	J. Jacobs
Instructed by	Fisher, Quarmby & Pfeiffer
RESPONDENT:	U. Rukambe
	Of Sisa Namandje & Co. Inc.