

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Nedbank Namibia Limited and Eva Fifteen Closed Corporation Bookie Monica Kethusegile-Juru	Case No: HC-MD-CIV-ACT-CON-2019/03814
Applicant	Division of Court: Main Division
1 ^s Respondent	Heard on: 18 November 2022
2 nd Respondent	
Heard before: Honourable Lady Justice Rakow	Delivered on: 27 January 2023
Neutral citation: <i>Nedbank Namibia Limited v Eva Fifteen CC</i> (HC-MD-CIV-ACT-CON-(2019/03814) [2023] NAHCMD 14 (27 January 2023)	
Order:	
1. The following property is declared specifically executable: Certain: Erf 290 Auasblick Situate: In the Municipality of Windhoek Registration Division "K", Khomas Region Measuring: 1329(One Three Two Nine) square metres Held: under Deed of Transfer No T 1352/2003 Subject: To all the terms and condition contained therein	
2. The matter is removed from the roll and regarded as finalised.	
Reasons for order:	
RAKOW J,	

Introduction

[1] This matter came on the roll for an application in terms of rule 108 for the selling of a property situated at Erf 290 Mandane Street, Auasblick, Windhoek. The second respondent also gave her chosen *domicilium citandi et executandi* as the same Erf. The respondents are indebted to the applicant in the amount of N\$1 499 767 together with interest and costs and a judgement was granted in this Court on 17 November 2020. Currently there is no order sought against the second defendant.

[2] The purpose of the application, which is brought in terms of rule 108(1)(b) is to declare the following property specifically executable:

‘Certain: Erf 290 Auasblick

Situate: In the Municipality of Windhoek

Registration Division “K”, Khomas Region

Measuring: 1329(One Three Two Nine) square metres

Held: under Deed of Transfer No T 1352/2003

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[3] The application was initially opposed but the legal representative for the respondent did not appear in court on 18 November 2022 to argue the matter and the court therefore proceeded and listen to the arguments of the legal practitioner on behalf of the applicant, Ms Turck.

The explanation by defendants

[4] The second defendant filed a statement on behalf of the first defendant as she indicated that she is the owner of 100% of the membership interest of the first defendant and she is also acquainted with the facts in the present matter. She indicated that the main source of income of the first defendant is the income generated from leasing out the property. She further indicated that her health declined during February 2019, which then had a negative impact on her business. She could not attend to her own affairs or that of the first respondent until the end of 2021 when her health had improved again. During this time, a tenant of hers did not pay his rental fees and she could not institute legal action against him due to her ill health. The rental amount he owes her is in the sum of N\$119 564.71. The Covid 19 pandemic further impacted on the business.

[5] The property is being leased as from 1 February 2022 until 31 January 2024 for the amount of N\$15 000 per month. She made a settlement proposal to the legal practitioners of the plaintiff to make certain payments to them in an attempt to settle the arrears as well as undertook to pay the rental amount she receives for the property to them. She made the following payments:

- (a) N\$ 25 000 on 30 November 2021
- (b) N\$ 25 000 on 27 January 2022
- (c) N\$ 10 180 on 10 March 2022
- (d) N\$ 5 800 on 1 April 2022
- (e) N\$ 9 234 on 27 April 2022
- (f) N\$ 50 000 on 19 May 2022
- (g) N\$ 14 590.61 on 8 June 2022
- (h) N\$ 15 000 on 2 August 2022
- (i) N\$ 415 000 on 8 September 2022.

[6] She further explains that she owns various shares in companies that also struggled during the Covid 19 pandemic however their financial position is expected to improve. She received these court documents only on 14 September 2022. She is willing to make a payment of N\$25 000 a month with further lump sum payments from time to time until the debt is fully paid. She further argues that no proper service was effected on the lessee of the property as the documents were just affixed to the main gate of the premises and thus no personal service took place.

Legal Considerations

[7] Rule 108(1) provides that the Registrar may not issue a writ of execution against 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 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.’

[8] In *Namib Building Society v Du Plessis*¹ it was found that a mortgage as a right can seek

¹ *Namib Building Society v Du Plessis* 1990 NR (HC) 161.

recourse against a bonded property. This judgement said the following:

'There appears to be considerable authority to support the contention that a mortgagee can as of right look to the mortgaged property to satisfy his claim. In the materials available to me I found P Merula Manier van Procederen 4.94; S van Leeuwen Commentaries on Roman-Dutch Law (Kotze's translation) vol II at 536; cf also U Huber Hedendaegse Recht-geleertheyt II chap 49. See also Roodepoort United Main Reef GM Co Ltd (in Liquidation) and Another v Du Tait NO 1928 AD 66 at 71 and cf Rothschild v Lozondes 1908 TS 493 at 498; Whinney NO v Gardner NO (1893) 10 SC 333 .at 341; National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235 at 242; Wilkie v Wilkie 1934 NPD 308 at 310; Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander 1975 (4) SA 936(T) at 941F. The earlier South African practice was in accordance with this view. See G B van Zyl The Theory of the Judicial Practice of South Africa vol 1 3rd ed at 294-5. He writes that in Roman law movables first had to be exhausted before recourse could be had to land. He continues:

It is the same with us when the plaintiff has no hypothec or pledge. But when property has been specially mortgaged that property must first be sold in execution before any other can be taken and only for the deficiency can other property be taken.'

[9] The *locus classicus* in these matters is the case of *Standard Bank Namibia Limited v Shipila and Others*² and specifically deals with the owner's right to protect his or her primary home against execution. The argument put forward in the current matter is that the owner of the property is a closed corporation and it is common cause that it is not the primary home of the second respondent but that the first respondent is leasing out the property to a third party, who received notification of these proceedings. The Supreme court concluded:

'In the present instance the appellant (and commercial banks) accepts that there must be judicial oversight where a claim is in respect of the foreclosure of a bond in terms of the provisions of rule 15(3). The first respondent in this matter had been informed personally of the intention of the appellant to apply to court for an order to declare the relevant immovable property specially executable, and had been given the opportunity to make submissions in the court a quo (which she did); the deputy sheriff made a nulla bona return (which was not strictly necessary in respect of a claim for the foreclosure of a registered mortgage bond); the first respondent never settled the debt as promised; the first respondent never made an allegation that the appellant by instituting an action for the recovery of the outstanding amount, abused the court's process, and neither is there a suggestion that the appellant acted in bad faith.

[70] The court *a quo* should in these circumstances have declared the said immovable property specially executable in view of the fact that there is no viable alternative or no less drastic measure other than a sale in execution.'

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

Conclusion

[10] In the present matter, there was no indication as to how the first respondent intends to settle the amount outstanding except for utilizing the rental amount being received every month. Because of the default on the side of the first defendant to repay its debt as agreed in the initial agreement, the plaintiff obtained a default judgement and as such, is entitled to call up the bond and sell the property on execution.

I therefore make the following order:

1. The following property is declared specifically executable:

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2. The matter is removed from the roll and regarded as finalised.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Applicant:	Defendant:
Ms Turck Of Weder Kauta and Hoveka Windhoek	No appearance