

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2020/02469

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

RICARDO MATIAS GOAGOSEB

DEFENDANT

Neutral citation: *Standard Bank Namibia Limited v Goagoseb* (HC-MD-CIV-ACT-CON-2020/02469) [2023] NAHCMD 146 (27 March 2023)

Coram: Schimming-Chase J

Heard: 3 February 2023

Delivered: 27 March 2023

Flynote: Execution — Sale in execution — Immovable property — Application to declare immovable property specially executable — Duty of court where immovable property is primary home of legally unrepresented debtor — Judicial oversight required.

Practice — Rules of the High Court — Rule 108 — In exercising judicial oversight, court must consider all relevant circumstances including 'less drastic measures than a sale in execution'.

Summary: The plaintiff sued the defendant for an amount of N\$1 563 379,39 plus compound interest at the rate of 9.00 percent per annum from 15 May 2020 until date of final payment, as well as costs of suit on an attorney-and-client scale. The plaintiff's case was that the defendant had breached the terms of a written mortgage bond by failing to make payment on the bond instalments. The plaintiff obtained default judgment against the defendant and obtained writs of execution against the defendant's movable property. Thereafter an application was launched to declare the defendant's property specially executable.

The defendant was consistently and without delay paying monthly instalments of N\$13 473,55 by agreement with the plaintiff. The plaintiff's concern was with the arrear payment offers being too small to effectively and legally reduce the arrears which stood at approximately N\$400 000. The defendant was placed on ITC and was unable to apply for finance to raise money to cover the arrears.

Held, if a property is a primary home, the court must be 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. Such a debtor would ordinarily be listed with ITC and would not be able to secure any further loan finance.

Held, 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.

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

Held, the defendant debtor had been making regular payments to the plaintiff consistently and without delay. The issue was only with the arrears, which amount was too low. The debtor was unable to secure additional finance due to being listed on ITC. In the circumstances, there was sufficient evidence placed to show that the plaintiff had other viable and less drastic measures available. One such less drastic measure was restructuring the debt. Application accordingly dismissed.

ORDER

1. The application to declare the immovable property described as Erf 1079, Section 13, Caroline Court, Dorado Park, Windhoek, Republic of Namibia, specially executable is dismissed.
2. The plaintiff is ordered to pay the costs of this application.
- 3 The matter is finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] Serving before me is an application under rule 108 of the High Court Rules to declare the defendant's home specially executable.

[2] In *First National Bank of Namibia Limited v Ganaseb*,¹ Masuku J stated that

‘...the issue of people losing their homes following unpaid debts is a source of concern in this country, and therefore [rule 108] 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.’²

[3] The Supreme Court held in *Kisilipile and Another v First National Bank of Namibia Limited*³ that a court must exercise judicial oversight when determining an application to declare the primary home of a debtor in proceedings executable in terms of Rule 108. The ambit and rationale of judicial oversight was succinctly set out:

[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 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 however does not relieve the court of its obligation to inquire into the availability of less drastic alternatives.

[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 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 someday the debtor has the means to pay the debt. Should the circumstances justify, the court must stand the matter down

¹*First National Bank of Namibia Limited v Ganaseb* (HC-MD-CIV-ACT-CON-2019/01381) [2022] NAHCMD 360 (21 July 2022) para 14.

² *Futeni Collections (Pty) Ltd v De Duine* (I 3044/2014) [2015] NAHCMD 119 (27 May 2015) para 34, approved in *Amupadhi and Another V Du Toit* 2021 (3) NR 626 (SC) para 62.

³ *Kisilipile and Another v First National Bank of Namibia Limited* 2021 (4) NR 921 (SC).

or postpone to a date suitable to itself and the parties to conduct the inquiry. A failure to conduct the inquiry is a reversible misdirection...

[20] 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. The court is required to take into account "all the relevant circumstances". When exercising the discretion under rule 108 the court should bear in mind that a sale in execution of a primary home does not necessarily extinguish the 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 to be sold to the highest bidder for not less than 75% of either the local authority council or regional council valuation or in the absence of that, at not less than 75% of a sworn valuation. There is no requirement that the highest bid be not less than the actual indebtedness of the judgment debtor to the credit giver.'

[4] Bearing the above principles in mind, I now consider the application.

[5] The plaintiff and applicant in these proceedings is Standard Bank of Namibia Limited, a commercial bank duly registered in terms of the relevant and company laws of the Republic of Namibia. The defendant is Ricardo Matias Goagoseb, a major male person. I will refer to the plaintiff as "Standard Bank" or "the Bank" interchangeably, and to the defendant as "Mr Goagoseb".

[6] Standard Bank is represented in these proceedings by Ms Nyashanu of Koep & Partners, and Mr Goagoseb is represented by Ms Kamarenga of Muluti & Partners.

Relevant factual background

[7] On 30 June 2020, Standard Bank sued the defendant claiming an amount of N\$1 563 379,39 plus compound interest at the rate of 9.00 percent per annum from 15 May 2020 until date of final payment, as well as costs of suit on an attorney-and-client scale. The basis of Standard Bank's case was that Mr Goagoseb had breached the terms of a written mortgage bond

executed by Mr Goagoseb in its favour by failing to make payment on the bond instalments.

[8] On 24 September 2020, Standard Bank obtained default judgment in this court against Mr Goagoseb in the amount of N\$1 563 379,39. Thereafter Standard Bank duly sought writs of execution against Mr Goagoseb's movable property. This was done on 2 December 2020.

[9] On 3 August 2021, Standard Bank applied for an order in terms of rule 12 to serve Mr Goagoseb with the intended rule 108 application via substituted service, which was granted on 12 August 2021. Standard Bank was granted leave to serve the rule 108 application on Mr Goagoseb through one publication in the The Republikein and The Namibian newspapers and via his email address.

[10] Subsequent thereto, Standard Bank applied for an order declaring Mr Goagoseb's immovable property executable in terms of rule 108. The property is described as Erf 1079, Section 13, Caroline Court, Dorado Park, Windhoek, Republic of Namibia.

[11] Mr Goagoseb, through his legal practitioners, opposed the rule 108 application and affidavits were exchanged between the parties.

[12] From a perusal of the record, the parties initially attended court-connected mediation in hopes of amicably settling the dispute between them. These settlement negotiations failed. Thereafter, Mr Goagoseb attempted to apply to the Supreme Court to invoke its reviewing procedures under s 16 of the Supreme Court Act 15 of 1995. This application was aptly withdrawn by Mr Goagoseb on 22 November 2022 and the matter was set down for hearing of the application in terms of rule 108.

The parties evidence and contentions

[13] It is Standard Bank's evidence that Mr Goagoseb is the registered owner of the property, Erf 1079, Section 13, Caroline Court, Dorado Park, Windhoek, Republic of Namibia, so sought to be declared specially executable, which is bonded to Standard Bank. It is further stated by Standard Bank that the property is not Mr Goagoseb's primary home, and that despite engagement and attempts to settle the matter, Mr Goagoseb has been unable to service the bond and the arrears. He has accordingly failed to comply with his undertakings to pay, and this is causing prejudice to Standard Bank, especially in light of Mr Goagoseb's contractual obligations to the Bank.

[14] Mr Goagoseb denied that the aforementioned property is not his primary home, and alleged that same is indeed his primary home, where he resides with his two minor children since its purchase.

[15] Mr Goagoseb acknowledged his default, but disputes that it was wilful as he was dismissed from his employment and upon appealing the said dismissal on unfairness, such appeal was only successful on 28 November 2018.

[16] Despite such successful appeal, his erstwhile employers refused to reinstate him. He stated further that he obtained gainful employment with the Government of Namibia on 6 October 2022, and subsequently approached Standard Bank with an offer of payment in the amount of N\$13 473,55 per month on the monthly instalments, which Standard Bank initially accepted.

[17] He alleged that the above was honoured and attached to his opposing affidavit various proof of payments to that effect. To this end, Mr Goagoseb refuted Standard Bank's averment that it is prejudiced and alleged that there are less drastic measures that could be employed, given his regular payments as promised.

Parties' submissions

[18] At the hearing, Ms Nyashanu on behalf of Standard Bank conceded that Mr Goagoseb has consistently been making payments in the amount of N\$13 473,55 per month on the monthly instalments, as undertaken by him. Ms Nyashanu, however, argued that such payment is not enough to settle his arrears which she estimated being at an amount of N\$450 000 as at 3 February 2023 (at the time of filing the replying affidavit on 3 June 2022, the arrears stood at an amount of N\$299 74,89).

[19] Ms Nyashanu argued that Mr Goagoseb undertook to settle the arrears within 12 months, and by February 2021, he failed to do so, resulting in an escalation of arrears and loss of value to the property.

[20] She argued further that it appeared that Mr Goagoseb is self-employed, however no statements were provided by him to enable a proper assessment. In addition, that the offer of the sum of N\$2500 towards the arrears made by Mr Goagoseb is simply not enough as the internal procedures and Bank of Namibia regulations stipulate that in his case, an amount of N\$38 506,21 must be paid monthly on the arrears if a party intends to fully pay the arrears within 12 months.

[21] Ms Nyashanu also argued that no evidence was proffered by Mr Goagoseb that he has any children and a mere blanket statement was made. She argued that evidence must be presented that the children exist.

[22] Ms Kamarenga, on behalf of Mr Goagoseb, submitted that there are less drastic measures available other than declaring the property specially executable, on the facts of this case. In this regard, and since November 2020, Mr Goagoseb was making consistent monthly instalment payments in the amount of N\$13 473,55, without default and/or delay.

[23] Ms Kamarenga argued that Standard Bank's issue was not with the regular monthly instalments paid by Mr Goagoseb, but appears to be in respect of the arrears. In this regard, she argued that Mr Goagoseb had made an offer to pay an amount of N\$2500 on the arrears, plus the continuous monthly instalment of N\$13 473,55. This was at least something that Mr Goagoseb was attempting to reduce the arrears, and given the capital amount owing, the Bank remains unyielding in considering less drastic measures.

[24] Ms Kamarenga argued that it is Standard Bank's own doing that the arrears cannot be paid in full by Mr Goagoseb because he is currently listed on the TransUnion Bureau (ITC) by Standard Bank and after numerous requests by Mr Goagoseb to have him removed, Standard Bank has refused.

[25] Ms Kamarenga pointed out that on the papers before court, Mr Goagoseb requested Standard Bank to have him removed from ITC to enable him to obtain financial assistance or a loan elsewhere to settle the arrears, but this, Standard Bank has also refused. Ms Kamarenga submitted that in these circumstances, the court had an unfettered discretion to consider a less drastic measure. Reference was made to the decision of *Standard Bank Namibia Ltd v Bock*.⁴

[26] In *Standard Bank Namibia Ltd v Bock*, two less drastic measures were proffered to the court, which included that the first respondent in the matter was due to receive his home loan which would have enabled him to settle the arrears and proceed with the monthly instalment payments, but this would only have occurred if the applicant removed the respondents' from ITC, which it refused to do.

[27] Ms Kamarenga argued that the court has an unfettered discretion to consider a less drastic measure, and Mr Goagoseb's removal from ITC to enable him to obtain another loan or financial assistance would constitute such less drastic measure.

⁴ *Standard Bank Namibia Ltd v Bock* (HC-MD-CIV-ACT-CON-2018/04032) [2021] NAHCMD 78 (25 February 2021).

[28] On this particular issue, Ms Nyashanu submitted that being listed on ITC is merely regulatory, and this forum only informs financial institutions that undertake background financial investigations on a party, on whether a party already has a debt elsewhere. She argued that being listed on ITC does not prohibit Mr Goagoseb from obtaining a loan or financial assistance.

[29] This argument is contradictory, in my view, as a financial institution that runs a background check on a party and finds that such party is listed on ITC would not necessarily grant such financial assistance or loan to the said party, thus, prohibiting the party from obtaining such financial assistance or loan, in any event.

Discussion

[30] To determine an application under rule 108 of this court's rules, the court is required to consider whether there are less drastic measures that can be employed before declaring the property specially executable.⁵ I am alive to the fact that in considering the less drastic measures, same should not amount to defeating the commercial interest of Standard Bank.⁶

[31] It is common cause that Mr Goagoseb has kept to his undertaking and consistently makes payment in the sum of N\$13 473,55 to Standard Bank. There is no dispute regarding this.

[32] The issue here is with the amount offered for arrears. Mr Goagoseb offered to pay the amount of N\$2500 for the arrears, which Standard Bank submits is wholly insufficient. Arrears are currently estimated at approximately N\$450 000 as of 3 February 2023 (at the time of filing the replying affidavit on 3 June 2022, the arrears stood at an amount of N\$299 74,89).

⁵ *Futeni Collections (Pty) Ltd v De Duine* (I 3044/2014) [2015] NAHCMD 119 (27 May 2015).

⁶ *Kisilipile and Another v First National Bank of Namibia Limited supra* para 19.

[33] It cannot be disputed that being listed on ITC significantly, if not completely, reduces Mr Goagoseb's ability to apply for a loan so as to increase the offer and payments on the arrear amount. In *Kisilipile v First National Bank*⁷ the Supreme Court had this to say in explaining the rationale of judicial oversight:

[20] 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. The court is required to take into account 'all the relevant circumstances'. When exercising the discretion under rule 108 the court should bear in mind that a sale in execution of a primary home does not necessarily extinguish the 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 to be sold to the highest bidder for not less than 75% of either the local authority council or regional council valuation or in the absence of that, at not less than 75% of a sworn valuation. There is no requirement that the highest bid be not less than the actual indebtedness of the judgment debtor to the credit giver.

[21] Such a debtor would ordinarily be listed with ITC and would not be able to secure any further loan finance. The prospect of securing another mortgage to buy a home is therefore almost nil. 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; and 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' (emphasis supplied).

[34] In *Standard Bank v Augisto and Others*⁸ the court held that:

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

⁷ *Kisilipile and Another v First National Bank of Namibia Limited supra* par 20-21.

⁸ *Standard Bank v Augisto and Others* (I 114/2014) [2019] NAHCMD 208 (25 June 2019); *Standard Bank Limited v Shipila* 2016 (2) NR 476 HC para 26.

[35] In *First National Bank v Musheti*⁹ Angula DJP stated that:

‘... 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.’

[36] Applying the above principles, and considering the facts placed before court, it cannot be gainsaid that there are no less drastic measures available to be considered, other than to declare Mr Goagoseb’s immovable property specially executable. It has been shown that Standard Bank consistently receives payment in the sum of N\$13 473,55, coupled with Mr Goagoseb’s offer to make payment in the amount of N\$2500 per month on the arrears.

[37] Without being able to apply for additional financing whilst listed on ITC negatively affects Mr Goagoseb’s ability to pay a higher amount in arrears. Interestingly enough, Ms Nyashanu argued that a restructure with Standard Bank could take place, as well, but that Mr Goagoseb has not indicated that he intends to do so.

Conclusion

[38] This is a case where the court exercises its discretion in favour of Mr Goagoseb because on the facts presented it has been shown that Standard Bank could consider and apply less drastic measures and obtain payment of the capital amount plus the arrears. This is not a situation where a debtor is paying nothing and making no efforts to comply with his payment obligations.

⁹ *First National Bank v Musheti* (HC-MD-CIV-ACT-CON-2016) [2017] NAHCMD 304 (18 October 2017) para 39.

[39] As it pertains to costs, neither party made submissions thereto, and I see no reason why the court should deviate from the general principle.

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

1. The application to declare the immovable property described as Erf 1079, Section 13, Caroline Court, Dorado Park, Windhoek, Republic of Namibia, specially executable is dismissed.
2. The plaintiff is ordered to pay the defendant's costs.
3. The matter is finalised and removed from the roll.

E M SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:

S Nyashanu
of Koep & Partners, Windhoek

DEFENDANT:

P Kamarenga
of Muluti & Partners, Windhoek