

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
PRACTICE DIRECTIVE 61



MAIN DIVISION, WINDHOEK

<b>Case Title:</b> NEDBANK NAMIBIA LIMITED v ANGELO ROWEN HELMUTH	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/00429
	<b>Division of Court:</b> High Court (Main Division)
<b>Heard before:</b> Honourable Mr Justice Masuku	<b>Date of hearing:</b> 6 April 2023
	<b>Delivered on:</b> 6 April 2023
<b>Neutral citation:</b> <i>Nedbank Namibia Limited v Angelo Rowen Helmuth</i> (HC-MD-CIV-ACT-CON-2022/00429) [2023] NAHCMD 178 (6 April 2023)	
<b>The order:</b> Having heard <b>Mr D. Douseb</b> counsel for the applicant/plaintiff and <b>Mr A. Helmuth</b> the respondent/defendant in person and having read other documents filed of record:  <b>IT IS ORDERED THAT:</b> The plaintiff's application for summary judgment is granted against the Defendant in the following terms:  1. Payment in the amount of N\$2,939,071.14; 2. Interest on the amount of N\$2,939,071.14, calculated daily and capitalised monthly at the rate of 12.00% calculated from 17 January 2022 until date of final payment; 3. An order declaring the following property executable:  CERTAIN : ERF 4222 (A PORTION OF ERF 3148) WINDHOEK  SITUATE : IN THE MUNICIPALITY OF WINDHOEK  REGISTRATION DIVISION "K"  KHOMAS REGION  MEASURING: 1202 (ONE TWO ZERO TWO) SQUARE METRES	

HELD BY DEED OF TRANSFER NO. T 643/2013

SUBJECT : TO THE CONDITIONS CONTAINED THEREIN

4. Costs of suit are granted on an attorney and client scale.

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

**Following below are the reasons for the above order:**

MASUKU J:

Introduction

[1] Serving before court for determination presently, is an opposed application for summary judgment together with an application to declare certain movable property specially executable, in terms of rule 108. The application is moved by the plaintiff, Nedbank Namibia Limited against the defendant, Mr Angelo Rowen Helmuth.

[2] For purposes of this judgment, I will refer to both the plaintiff and the defendant as 'the parties'. Nedbank Namibia Limited, will be referred to as 'the plaintiff', whereas Mr Helmuth, will be referred to as 'the defendant'.

Relief sought

[3] In its particulars of claim, the plaintiff seeks payment in the amount of N\$2 939 071.14; debit interest on the said amount, calculated daily and capitalised monthly at the rate of 12.00%, calculated from 17 January 2022 to the date of final payment. The plaintiff further seeks an order for costs on the attorney and client scale. Last, but by no means least, the plaintiff applies for an order declaring the defendant's property described as Erf 4222 (a portion of Erf 3148 Windhoek), situate at Windhoek and measuring 1202 square metres and held by Deed of Transfer No. T 643/2013, to be declared specially executable in terms of rule 108 of this court's rules.

[4] It is important to state that the defendant, in principle, opposed the relief sought and to that extent, filed an affidavit opposing the granting of the summary judgment and

the declaration of the property specially executable.

#### The plaintiff's case

[5] The plaintiff, in its particulars of claim, avers that it and the defendant, entered into a written home loan agreement on 15 January 2013 in Windhoek. The said home loan agreement was to be secured by a mortgage bond, a copy of which was annexed to the particulars of claim. It is further averred that the plaintiff further re-advanced a loan to the defendant and in terms of which it lent and advanced the defendant monies in terms of a document entitled, 'Confirmation of Loan Approval to be secured by Mortgaged Bond'. The latter document, is dated 19 October 2016.

[6] It is the plaintiff's case that despite demand, the plaintiff failed and or neglected to make good on his indebtedness, hence the issuance of the summons in this matter. Upon the defendant entering his notice to defend, the plaintiff proceeded to file an application for summary judgment. The plaintiff claims that the defendant does not have a *bona fide* defence to the claim and has merely filed his defence for no other purpose than to frustrate the plaintiff in the early enjoyment of the fruits of the judgment it prays for.

#### The defendant's case

[7] In his answering affidavit, the defendant avers that he is unable to pay the monthly instalments on the bond due to insufficient funds and that he is self-employed. He however confirms addressing a letter to the plaintiff's legal practitioners on 31 January 2022 proposing a settlement plan for the amount in arrears but the plaintiff failed to respond to such letter.

[8] Although not stated in his answering affidavit, the defendant, in the letter addressed to plaintiff dated 31 January 2022, avers that the property to be declared specially executable is his primary property and the sale of the property will cause him great prejudice. In the same letter, defendant requests updated statements of his home loan account which should reflect the arrears and the penalties accumulated. He further suggested the following payment plan:

- 8.1 February – April 2022, he pays N\$10 000 per month.
- 8.2 May – August 2022, he pays N\$15 000 per month.
- 8.3 September – December 2022 he pays N\$20 000 per month.

[9] The said letter further stated that the abovementioned amounts would be reviewed in January 2023 with the aim of considering an increase of N\$ 5000 in the instalments.

#### The summary judgment application

[10] The plaintiff, as stated earlier, is seeking summary judgment as well as an order declaring the immovable property executable.

[11] Rule 60(5) of the High Court rules requires a respondent that opposes an application for summary judgment to satisfy a court by affidavit that it has a *bona fide* defence to the action and has not filed the opposition to merely delay the granting of the judgment. In order to meet this requirement, the affidavit must disclose fully the nature and the grounds of the defence and the material facts it is predicated on.

[12] On the requirements of an application for summary judgment, the case of *Maharaj v Barclays National Bank Ltd*,<sup>1</sup> outlines *inter alia* that:

‘The remedy of summary judgment is not intended to shut out defendants who are able to demonstrate a bona fide intention to defend the action. It does require them, however to show what their intended defences are. It must appear from what they say in this respect that the defences are legally sustainable and that they are maintained in good faith. They are expected to do this by setting out in their opposing affidavits the nature and grounds of the defence and the material facts upon which it is founded. If the averments made by a defendant in the opposing affidavit are vague, or markedly lacking in the particularity that might be expected in the circumstances of the case, then the court is likely to hold a bona fide defence has not been disclosed, and summary judgment will follow.’

[13] In *casu*, the defendant, in his opposing affidavit, does not dispute his indebtedness

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<sup>1</sup> *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425 – 426 (E).

to the plaintiff. He, instead, avers that his inability to pay his debt is due to a lack of funds and that the plaintiff should provide him with updated statements of his loan account so that payment arrangements may be made. Although a payment proposal is made in the letter attached to defendant's opposing affidavit, the contents of such letter are not pleaded in his papers under oath.

[14] The aforesaid averments made by defendant are vague and lacking in particularity. I can thus, conclude that the defendant has failed the first hurdle of the test in that he has not sufficiently disclosed in the opposing affidavit, the nature and the grounds of his defence and the facts upon which it is founded. In the premises, there is no basis for this court to refuse the application for summary judgment. It is accordingly granted as prayed.

#### Application for an order declaring the immovable property executable

[15] The second leg of the matter before court, is that of the rule 108 application. It is common cause that a mortgage bond has been registered over the immovable property in favour of the plaintiff. Rule 108 of the rules of this court stipulates that if the immovable property sought to be attached is the primary home of the execution debtor, the court may not declare that property to be specially executable before considering less drastic measures than sale in execution of the primary home under attachment. (Emphasis added).

[16] At common law, a mortgagee plaintiff has a substantive right to realise the immovable property of the judgment debtor in cases where the said judgment creditor duly registered the mortgage bond for the very purpose of securing the debt, which is the subject matter of the claim.<sup>2</sup>

[16] In the case of *Namib Building Society v Du Plessis*<sup>3</sup> this court said:

'A mortgagee plaintiff should in principle 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 has advanced money on the understanding that he can preferentially look to the proceeds of the mortgaged property. Unless some compelling reason exists to require such a plaintiff first to execute against movables, no reason occurs to me why he should not be given the benefit of his bargain. If some such compelling reason exists, the duty surely lies on the

<sup>2</sup> *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC). At para [25].

<sup>3</sup> 1990 NR 161 (HC) at 163J – 164A.

mortgagor defendant to persuade the Court why the property should not be declared executable.’

[17] The property in question is not only subject to a mortgage bond but the respondent does not state that the property in question constitutes his primary home. In *Futeni*,<sup>4</sup> the court described a primary home as ‘a permanent structure, which constitutes the only viable place that provides shelter and protection from the vicissitudes of the weather and the elements to an individual person, family or even extended family.’

[18] The object of rule 108, is based on equitable considerations, namely to ameliorate the sharp point of executing claims against specially hypothecated immovable property, in order to satisfy a claim. The Supreme Court, in *Kisilipile v First National Bank of Namibia Limited*<sup>5</sup>, with Damaseb DCJ (writing the unanimous judgment of the court) stated:

[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 or postpone to a date suitable to itself and the parties to conduct the inquiry. A failure to conduct the inquiry is reversible misdirection. If the debtor is legally unrepresented at the summary judgment proceedings, it behoves counsel for the creditor to draw the court’s attention to the need for the inquiry in terms of rule 108.’

### Determination

[19] It must be noted by litigants that the age-long and time-tested principle of *pacta sunt servanda* (that parties must be held to their undertakings), remains part of our law. The defendant signed a loan agreement with the plaintiff and the promises made therein should be honoured. Rule 108 of the rules of court does not serve to set the *pacta sunt servanda* principle at naught. In the instant matter, after due enquiry, it seemed clear to me that the execution debtor did not seek to rely on the property in question being his primary home. Such allegation is not made in defendant’s opposing affidavit. The closest that defendant came to making such an allegation was his letter dated 31 January 2022 where he claimed that the property is his ‘primary property’, which is not the same as a primary home.

[20] Although the defendant proposes a payment plan in the aforementioned letter, he

<sup>4</sup> *Futeni Collections (Pty) Ltd v De Duine* (I 3044-2014) [2015] NAHCMD 119 (27 May 2015).

<sup>5</sup> *Kisilipile v First National Bank of Namibia Limited* (SA 65/2019) [2021] NASC 52 (25 August 2021).

does not take the court into his confidence by stating how or when his financial position will improve, considering that he earlier indicated that he is self-employed and does not have funds to readily settle his debt.

[21] The payment alternatives proposed by the defendant must be viable in that they must not amount to defeating the commercial interests of the creditor. The court must be astute not to allow a situation that leads to non-payment of the debt and contemporaneously stringing the creditor along until someday when the debtor has the means to pay the debt.

[22] The defendant's debt to the plaintiff is substantial and I am satisfied that the defendant, despite being afforded an opportunity, failed to place facts before the court to indicate that the debt can be satisfied in a reasonable manner, without invoking the drastic consequences of declaring the mortgaged property executable. Although granting this relief is not always easy, considering the effects thereof on the judgment debtor, the court must grant such applications in cases where there are no less drastic measures available to exploit. This case is one such case.

#### Costs

[22] This leaves only the question of costs for determination. The general rules are that costs follow the event and that the granting of costs lies in the discretion of the court. No reasons have been advanced nor are apparent, as to why the general rule that costs follow the event, must not apply in this case. The plaintiff has been successful and is thus entitled to its costs as recorded in the agreements signed by the parties.

[23] In the result, the following order is made:

The plaintiff's application for summary judgment is granted against the Defendant in the following terms:

1. Payment in the amount of N\$2,939,071.14;
2. Interest on the amount of N\$2,939,071.14, calculated daily and capitalised monthly at the rate of 12.00% calculated from 17 January 2022 until date of final payment;
3. An order is hereby issued declaring the following property executable:

CERTAIN : ERF 4222 (A PORTION OF ERF 3148) WINDHOEK

SITUATE : IN THE MUNICIPALITY OF WINDHOEK  
 REGISTRATION DIVISION "K"  
 KHOMAS REGION

MEASURING: 1202 (ONE TWO ZERO TWO) SQUARE METRES

HELD BY DEED OF TRANSFER NO. T 643/2013

SUBJECT : TO THE CONDITIONS CONTAINED THEREIN

4. Costs of suit on an attorney and client scale.
5. The matter is removed from the roll and regarded as finalised.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
K Angula of Angula Co Inc., Windhoek	A Helmuth  The Defendant in person