**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA** **MAIN DIVISION, WINDHOEK**

**INTERLOCUTORY RULING**

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| **Case Title:**<br>Nedbank Namibia Limited<br>v<br>Hallie Investment 116 CC & Another | **Case No:**<br>HC-MD-CIV-ACT-CON-2022/02817<br>**Division of Court:**<br>High Court (Main Division) |
| **Heard before:**<br>Honourable Lady Justice Prinsloo | **Date of hearing:**<br>17 January 2023<br>**Delivered on:**<br>02 February 2023 |
| **Neutral citation:** *Nedbank Namibia Limited v Hallie Investment 116 CC* (HC-MD-CIV-ACT-CON-2022/02817) [2022] NAHCMD 23 (02 February 2023) | |

**The order:**

Having heard **Mr Lochner** counsel for the applicant/plaintiff and **Ms Mouton** counsel for the respondent/defendant and having read other documents filed of record:

**IT IS ORDERED THAT:**

1. Plaintiff`s application for summary judgment is granted against the Defendants, jointly and severally, the one paying the other to be absolved in the following terms:
   a) Cancellation of the Agreement;
   b) Payment in the amount of N$1 571 606,53 plus interest at 12.80% per annum, calculated daily, charged monthly in arrears and compounded as from 16 May 2022 until date of payment;

2. The property is hereby declared specially executable, being:
   a) Section number 6 as shown and more fully described on Sectional Plan No. SS 94/2005 in the development scheme known as Aegams, in respect of the land and building or buildings situated at Erf No. 3550 (a portion of portion 1 of Erf

No.23) Windhoek, in the Municipality of Windhoek, Registration Division “K”, Khomas Region, of which the floor area, according to the said Sectional Plan is 147 (one hundred and forty seven) square metres in extent; and

b) (An undivided share in the common property in the development scheme apportioned to the said section in accordance with the participation quota as endorsed on the said Sectional Plan. HELD by Sectional Plan No. 94/2005.

3. The execution is stayed for a period of 3 months from date of this judgment.

4. The defendant is ordered to pay the costs of this application, which costs are limited to those outlined in rule 32(11) of the High Court rules.

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

[1] The plaintiff instituted action against the defendants claiming inter alia payment of N$1 571 606,53 and an order declaring the property, described in the particulars of claim, specifically executable.

[2] The defendants defended the action, and as a result, the plaintiff applied for a summary judgement under rule 60(1)(*b*), including an application to declare the immovable property specifically executable.

Background

[3] On 9 August 2018, at Windhoek, the plaintiff and the first defendant concluded a written home loan agreement in terms of which the plaintiff lent an amount of N$1 280 000 to the first defendant in respect of the purchase of an immoveable property Erf 3550 (a portion of portion 1 of Erf No. 23) Windhoek.

[4] The afore stated amount was lent and advanced to the first defendant at an interest rate of 9% per annum calculated daily (with the plaintiff`s right to vary the interest rates). The loan was secured by a mortgage bond registered over the property in favour of the plaintiff. The loan had to be repaid in equal monthly instalments of N$11 516,49 per month.

[5] The second defendant`s liability is premised on a suretyship agreement in favour of the plaintiff wherein she bound herself as surety and co-principal debtor.

[6] The first defendant however breached the agreement in that it failed to pay the monthly instalments as it became due since June 2019. The first defendant is currently indebted to the plaintiff in the amount of N$1 571 606,53 plus further interest.

[7] The plaintiff's claims in this instance against first defendant is a debt for which the second defendant is liable for by virtue of the suretyship.

Summary judgment application

[8] The plaintiff is seeking summary judgment as well as an order declaring the immovable property executable.

[9] From the onset it is important to note that the defendants conceded to the summary judgment application and agreed that there is in fact no defence (admitted their indebtedness) to the claim instituted against them by the plaintiff. Therefore, no reason exists to dwell on the summary judgment application.

Application for an order declaring the immovable property executable

[10] The second leg of the interlocutory application before court, is that of the rule 108 application.

[11] It is common cause that a mortgage bond has been registered over the immovable property in favour of the plaintiff and as indicated the plaintiff now seeks to have the bonded property declared specially executable, which application is opposed by the defendants.

Argument on behalf of the plaintiff

[12] On behalf of the plaintiff, Mr Lochner contends that the plaintiff is entitled to the order sought since the defendants failed to place sufficient facts before the court to

prove that reasonable alternative means exist to satisfy the judgement debt.

[13] Mr Lochner further submits that defendants bear the onus to persuade the court why the immovable property should not be declared executable. In doing so, the onus is on the defendants to make the court aware of the status of the property, i.e. whether the property constitutes residential property or the primary home of either the judgment debtor or a third party, and to prove that less drastic measures exist to satisfy the judgment debt other than the sale of the immovable property.

[14] Mr Lochner submits that such proposed less drastic measures should not amount to mere promises, possibilities or speculation but should be viable and realistic alternatives.

[15] In this regard, Counsel referred the court to the answering papers of the defendants, from which it is clear that the only 'defence' against the rule 108 application put forward by the defendants is that they are in the process of selling the immovable property sought to be declared executable.

[16] Mr Lochner further submitted that the rule 108 mechanism was designed to protect people from losing their primary home if other less drastic measures exist other than a sale. Considering that the defendants, in any event, do not intend on holding onto their primary home, no reason exists why the court should not declare the property executable.

[17] Mr Lochner concluded that the possibility of the defendants selling the property is in law and logic, not an alternative to the sale of the property in execution as the result remains the same, i.e. the property must be sold. Thus the defendants failed to set out a bona fide defence (by admitting their indebtedness) and have been unable to show that less drastic measures other than sale in execution exist. As a result, the plaintiff's relief sought, should as a consequence, be granted.

<u>Argument on behalf of the defendants</u>

[18] In her argument, Ms Mouton relied heavily on *Futeni Collections (Pty) Ltd v De Duine*[1] for her argument against having the summary judgement application heard

concurrently with the application in terms of rule 108(1)(*b*). Ms Mouton submitted that the application currently before the court falls short of the rule 108 requirements for the following reasons: firstly, contrary to rule 108(1)(*a*), the papers of the plaintiff bear no writ of execution against the moveable property of the defendants. Secondly, contrary to rule 108(4), the plaintiff's papers bear no return of service filed by the Deputy Sheriff. Ms Mouton submits that the above requirements are peremptory to the rule 108(1)(*b*) application being successful.

[19] Ms Mouton further submits that strict compliance with the procedural requirements of rules 108(1) and (2) is a pre-condition for any order declaring bonded immovable property specifically executable by a court of law.

[20] Ms Mouton pointed out, rather adamantly, that it is not enough that the applicant has made the relevant averments to have the property specifically executed in its particulars of claim. Counsel contends that there must be a specific application after judgment has been granted, a writ of execution has been served against the Defendant's movable property, and 30 days have expired after the return of service has been uploaded. Counsel emphasises that rule 108 is post-execution proceedings, and any deviation therefrom is contrary to the intended purpose of rule 108.

[21] Ms Mouton further added that the first defendant received a promotion at work as assistant company secretary as of the 01st of February and indicated that if the sale is postponed for a period of six months, the second defendant would be in a position to file a payslip and build credibility for six months to get her property refinanced, as banking regulations require six months to determine whether the first defendant can afford to pay the bond.

Discussion

[22] The interpretation of rule 108 by the High Court in *Futeni Collections (Pty) Ltd v De Duine*[2], before the instructive judgment by our Supreme Court of Appeal in *Standard Bank Namibia v Shipila & others*[3], was that a plaintiff seeking default judgment against a debtor to, after obtaining judgment, deliver a notice to the judgment debtor requiring him

[1] *Futeni Collections (Pty) Ltd v De Duine* (I 3044-2014) [2015] NAHCMD 119 (27 May 2015).
[2] Ibid.
[3] *Standard Bank Namibia Limited v Shipila and Others* (69 of 2015) [2018] NASC 395 (06 July 2018).

to appear before the court and to show cause why an immovable property that is a primary home, may not be declared executable.

[23] The approach in *Futeni* was disapproved in the *Shipila* matter[4] in paras 63-65 wherein Hoff JA held as follows:

"[63] In my view the language of the rule 15 (3) does not preclude a court from considering an order for the foreclosure of a bond together with an order for default judgment in respect of the capital amount. This has been a long-standing practice in applications for default judgments involving bonded immoveable property. In such a case there would be automatic judicial oversight, since in Namibia the registrar has no power to declare immoveable property executable.

[64] If a court is to apply the provisions of rule 108 strictly as suggested in Futeni non-compliance with rule 108 would mean that the whole process must start afresh. The appellant will have to obtain a fresh return of service stating that the judgment debtor has insufficient moveable property. Thereafter a substantial application will have to be lodged in order to determine whether the immoveable property could be declared specially executable. Such process will cause the escalation of costs, all to the detriment of the impecunious judgment debtor. It will at the same time undermine the overriding objectives of the rules namely "to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable…"

[65] It must be said that an insistence by the court a quo that notice in terms of the provisions of rule 108 (2) (a) be `on Form 24` is overly formalistic, and may, if regarded as peremptory, also result in the unnecessary escalation of costs. This approach puts form before substance. In my view the primary objective of this rule 108 (2) (a) is to inform a judgment debtor that an application will be made for an order declaring the property executable and giving the judgment debtor an opportunity to oppose such an application if such judgement debtor be inclined to do so. In my view there is sufficient notice if there is substantial compliance with Form 24."[5]

[24] Despite drawing Counsel's attention to the *Shipila* matter, Ms Mouton repeatedly argued that the principles outlined in the *Futeni* judgment should be applied strictly to not only this matter but to any similar issues and that this court cannot deviate from the provisions of rule 108.

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[4] Ibid.

[5] *Standard Bank Namibia Limited v Shipila and Others* (69 of 2015) [2018] NASC 395 (06 July 2018).

[25] In my view, the 'strict compliance' argument on behalf of the defendant flies in the face of the judgments that emanated from our Supreme Court.

[26] The *Shipila* judgment was again confirmed in *Kisilipile* v *First National Bank of Namibia Limited*. It is clear from the *Kisilipile* judgment that an application for default judgment or summary judgment can be brought together with an application for a declaration of executability. The precondition is that the court must exercise judicial oversight in such an instance, specifically where the immovable property is the primary home of a defendant.

[27] Damaseb DCJ refered to para 51 of the Shipila judgment, where the court held that:

'[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.'

[28] In para 17 of the *Kisilipile* judgment Damaseb DCJ further held that "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".[6] (my underlining)

[29] No such affidavit was filed on behalf of the defendants. In fact, the only 'defence' levelled against the declaration of the property executable was that the defendants themselves were selling the property, which is their primary home, to settle the debt owed to the plaintiff. No indication was given on the papers as to how long the defendants had been attempting to sell the property. There has similarly been no indication from the defendants about the possible selling price of the property. The first defendant was served with the Form 24 notice and was afforded the opportunity to address the court on less drastic measures than the sale in execution, which the

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

defendants failed to do.

[30] At the time of the proceedings before me, the parties were allowed to engage on the issue of less drastic measures and Counsel for the defendants was allowed to address the issue. Still, ultimately nothing came to the fore that can be classified as proposals on less drastic measures apart from a six-month extension to enable the second defendant to try and salvage her creditworthiness and to attempt refinancing the bond. There is no assurance that the second defendant will be able to refinance the bond, and failure to succeed in this endeavour will cause a further delay in satisfying the plaintiff's claim.

[31] From the particulars of claim it appears that the defendants fell into default as far back as June 2019 and received a letter of demand in May 2022. Yet, to date, the defendants have been unable to come up with less drastic measures to apply to avoid the sale of the immovable property. However, given the current economic climate, this court will give the defendants an opportunity to get their affairs in this regard in order by suspending the execution for a period of three months.

[32] In conclusion, subject to the discussion above, the plaintiff's application for summary judgment and the application to have the property declared executable must succeed.

[33] My order is set out above.

| **Judge's signature:** | **Note to the parties:** |
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| | Not applicable. |

**Counsel:**

| **Plaintiff** | **Defendant** |
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| Mr Lochner<br>On instructions of<br>Ellis, Shilengudwa Inc, Windhoek | Ms L Mouton<br>of<br>Van Wyk Legal Practitioners, Windhoek |