**REPUBLIC OF NAMIBIA**

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

**JUDGMENT**

Practice Directive 61

| **Case Title:** | | **Case No:** |
|---|---|---|
| | | I 3776/2013 |
| Fruit & Veg City (Pty) Ltd<br>t/a Fresh Produce Market | Applicant | **Division of Court:**<br>Main Division |
| v | | **Heard:**<br>Determined on the papers |
| Rudolph Izaaks t/a<br>Namsea Ship Supplies | Respondent | |
| **Heard before:**<br>Honourable Justice Masuku | | **Delivered:**<br>24 November 2022 |
| | | **Reasons:**<br>20 January 2023 |

**Neutral citation**: *Fruit & Veg City (Pty) Ltd t/a Fresh Produce Market v Rudolph Izaaks t/a Namsea Ship Supplies (*I 3776/2013) [2023] NAHCMD 3 (20 January 2023)

**Order:**

1. The following immovable property is declared specially executable:

   Certain: Erf No: 4041, Walvis Bay (Extension No 9)

   Situated: In the Municipality of WALVIS BAY
   Registration division “F”,
   ERONGO Region

   Measuring: 735 (Seven Three Five) Square meters

   First Transferred: by Deed of Transfer No: T4160/2004

2. Costs of the application are to be paid by the respondent.
3. The matter is removed from the roll and regarded as finalised.

**Reasons for order:**

MASUKU J:

Introduction

[1] This court, in an order dated 17 June 2015, granted default judgment in favour of the plaintiff against the defendant. The applicant has brought this application in terms of Rule 108 to declare the property (Erf No. 4041, Walvisbay, Extension No 9, situate in the Municipality of Walvisbay, Registration Division "F", Erongo Region, measuring 735 (seven three five) Square Metres, held by Deed of Transfer No T 4160/2004) specially executable, to satisfy the debt as stated in the default judgment.

[2] The respondent was served personally in terms of rule 8 (2)(*a*), with the rule 108 application on 26 July 2021. Despite being served with the application, the respondent failed to oppose the matter and has also not offered to settle the amount owed to the applicant to date.

The applicant's case

[3] The applicant contends that it has a common law right to attach and sell the assets of the respondent in order to recover whatever is owed to it, notwithstanding the amount of the debt. The applicant has in addition to its application provided the court with an affidavit to confirm the outstanding balance as well as brief heads of argument on why its application should be granted.

[4] It is further the applicant's case that the respondent made no effort to oppose the matter, nor did the respondent make any effort to make arrangements to pay the debt owed to the applicant. The applicant contends that it further incurred costs to bring the application to court and that there exists no alternative means which are reasonable and less drastic. The applicant further submitted that the only means to settle the debt is to declare the above-mentioned property executable.

Determination

[5] The procedure for declaring immovable property specially executable is encompassed in rule 108.

[6] Rule 108 (2) provides the following:

'If the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as home the court may not declare that property to be specially executable unless –

(a) the execution creditor has by means of personal service effected by the deputy sheriff given notice on Form 24 to the execution debtor that application will be made to the court for an order declaring the property executable and calling on the execution debtor to provide reasons to the court why such an order should not be granted;

(b) the execution creditor has caused the notice referred to in paragraph (a) to be served personally on any lessee of the property so sought to be declared executable; and

(c) the court so orders, having considered all the relevant circumstances with specific reference to less drastic measures than sale in execution of the primary home under attachment, which measures may include attachment of an alternative immovable property to the immovable property serving as the primary home of the execution debtor or any third party making claim thereto'.

[7] In terms of rule 108 (2) quoted above, where an order declaring property executable is sought to be made in respect of a primary home, the court is obliged to ensure that personal service of the relevant papers on the execution debtor or his or her lessee, is effected. Furthermore, the court is enjoined, having regard to all the circumstances, to consider whether there exist 'less drastic measures than a sale in execution'.[1] In this connection, the execution debtor plays a pivotal role in placing before the court relevant circumstances pertinent to the existence of less drastic measures to possibly avert a sale in execution. This is so because the court may not know the intricate details of the personal circumstances and financial ability of the execution debtor.

[8] In the present matter, it would appear that the property in question is a primary home. The respondent did not, despite the necessary personal notice, file any papers or place before court any relevant information regarding his ability to settle the amount in question. The applicant's application thus stands uncontested.

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

[9] In the case of *Kisilipile v First National Bank of Namibia Limited*[2] the Supreme Court held that:

'[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….'

[10] In light of the *Kisilipile* case, the judgment debtor bears the evidential burden to lay relevant information before court in resisting the application. The respondent, in the matter before court, has done nothing to satisfy the court that there are less drastic alternatives to be followed to avoid declaring the property specially executable.

[11] Generally it would be improper to declare a property specially executable, without the applicant first exploring the possibility of the options given by the respondent as alternatives or rather less drastic measures than a sale in execution of the respondents' primary home. In the matter before court, however, the respondent failed or neglected to take the court into his confidence and did not assist the court in exercising its judicial oversight. This is so despite the respondent being served with the rule 108 application personally. Consequently there is nothing before the court to be taken into consideration and in the respondent's favour. The only information before the court is that which has been provided by the applicant.

[12] I am mindful of the relatively negligible amount of the debt in this matter. Where the respondent has been served personally with the papers, but does not place any material before court pointing to the less drastic measures open, the court is placed in a straight-jacket and has no material facts at hand to avoid granting the relief sought.

[13] In exercising judicial oversight, and notwithstanding provisions of rule 108(2), I ordered the applicant, before I could decide the matter, to once again cause a writ to be issued in relation to movable property, before the ultimate sanction could be issued. This was contained in an order of

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

court dated 24 November 2022. In this regard, the deputy-sheriff issued a *nulla bona* return, which indicates that the respondent was personally served with the writ and upon enquiry, the respondent could not afford to pay the amount of the debt and he also failed to point out any movable property that could be attached and sold in execution.

[14] It is, in this regard clear that the court has done everything within its power to attempt to avoid the sale of the respondent's primary home. Sadly, the respondent did not co-operate in this process. The non co-operation, which culminated in the respondent not complying with the demands of the rule, to avoid the sale of the primary home, leaves the court with no other option at its disposal but to grant the relief sought.

Conclusion

[15] I am of the considered view that the provisions of rule 108 are clear in that where less drastic measures are available, they should be considered, as opposed to declaring the property specially executable. On the other hand, where there are no less drastic measures available or placed before the court for consideration, the court cannot lightly refuse an application to declare the property specially executable. In light of the fact that no less drastic alternatives to a sale in execution have been placed before me, the application has to be granted as prayed. The court cannot, in the circumstances, *mero motu* invent less drastic measures when the respondent does not assist the court in establishing the same.

Costs

[16] The applicant has applied for costs on the attorney and own client in respect of the application. There is no basis laid for costs at this scale. It bears mentioning that when regard is had to the particulars of claim, no allegation was made regarding the scale of costs being what it eventually became as the matter progressed, namely attorney and own client costs. In the premises, costs will be granted on the ordinary scale, which is the scale recorded in the amended particulars of claim.

Order

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

1. The following immovable property is declared specially executable:

   Certain: Erf No: 4041, Walvisbay (Extension No 9)

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| Situated: In the Municipality of WALVISBAY<br>Registration division “F”,<br>ERONGO Region<br>Measuring: 735 (Seven Three Five) Square meters<br>First Transferred: by Deed of Transfer No: T4160/2004<br><br>2. Costs of the application are to be paid by the respondent.<br>3. The matter is removed from the roll and regarded as finalised. |

| **Judge’s signature** | **Note to the parties:** |
|---|---|
| | Not applicable |
| **Counsel:** | |
| **Applicant:** | **Respondent**: |
| J Barkhuizen<br>Of Etzold Duvenhage, Windhoek | No appearance |