

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-ACT-CON-2019/05085

In the matter between:

STANDARD BANK NAMIBIA

APPLICANT

and

DANNE RODNEY SHANINGUA

FIRST RESPONDENT

NAOMI NADIA SHANINGUA

SECOND RESPONDENT

Neutral citation: *Standard Bank Namibia v Shaningua* (HC-MD-CIV-ACT-CON-2019/05085) [2023] NAHCMD 388 (7 July 2023)

Coram: Christiaan AJ

Heard: 26 May 2023

Delivered: 7 July 2023

Flynote: Execution – Sale in execution – Immovable property – Application to declare immovable property specially executable in terms of rule 108 of the rules of court – To declare immovable property specially executable not merely for the asking –

Respondents failed to factually prove that less drastic measures exist – Discretion exercised in favour of applicant.

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: This is an application to declare the respondents' immovable property specially executable under rule 108. On 10 September 2020, default judgment was granted in the sum of N\$1 731 786,81 together with interest at the rate of 11,50 percent per annum as of 20 July 2018 until date of final payment, plus costs of suit on an attorney and client scale, jointly and severally, against the respondents.

On 12 July 2022, the applicant applied for the immovable property to be declared specially executable under rule 108 of the rules of court, which was formally opposed by the respondents on 29 September 2022. The parties exchanged affidavits and filed heads of arguments. Thereafter, the matter was set down for hearing of the rule 108 application.

The applicant contended that the arrears was at an amount of N\$243 197,83 at the time of handing over the instructions to its legal practitioner, being 19 July 2018. It is further contended that the respondents failed to make regular instalments on the bond and no effort was made by the respondents to settle the debt. The applicant contended that the judgment debt substantially increased since date of judgment. As a result, the respondents are unable to service the bond.

The first respondent contended that as a result of his incarceration, he was unaware that the bond was not being serviced by the tenant, and as a result, he was unable to take legal action against the tenant. The first respondent further proposed to make payment of N\$25 000 monthly as a minimum payment and undertakes to pay lump sum amounts to supplement the proposed monthly payment.

The parties conceded that payments were made in 2018 and 2019 in the respective amounts of N\$30 000 by the respondents. However, no further payments have been

made. The applicant argued that the arrear amount is substantial being the sum of N\$1 412 150,95. The applicant further argued that the proposal to make monthly payments of N\$25 000 is unreasonable and inadequate.

Held that, when determining an application to declare a debtor's immovable property specially executable under rule 108 of the rules of court, the court must exercise judicial oversight.

Held further that, the proposal made by the first respondent for payment of N\$25 000 in monthly instalments was made abruptly and no further explanation is made regarding the said proposal.

Held further that, the first respondent fails to factually prove that he is able to make the payment of N\$25 000 as proposed by him. No evidence is placed before the court to show that the respondents are able to make payment of N\$25 000 as proposed by the first respondent.

Held further that, the court exercises its discretion in favour of the applicant.

ORDER

1. The following property is hereby declared specially executable, to wit:

CERTAIN: ERF NO. 1227, (A PORTION OF ERF NO. 1479)
 HOCHLANDPARK

SITUATE: in the Municipality of WINDHOEK
 Registration Division "K"
 KHOMAS Region

MEASURING: 468 (FOUR SIX EIGHT) Square Meters

HELD: Deed of Transfer No T 5443/2000

SUBJECT: To all the Conditions Contained therein

2. The respondents must, jointly and severally, pay the applicant's costs of suit.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

CHRISTIAAN AJ:

Introduction

[1] Serving before this court is an application to declare the respondents' immovable property specially executable under rule 108 of the rules of court.

[2] Damaseb JP¹ in discussing the execution on hypothecated immovable property, and which was later endorsed in *Bank Windhoek Namibia Ltd v Mokasa Trading Enterprises CC*², had the following to say:

'The rule must not become the means by which to frustrate the legitimate commercial interests of a creditor to seek satisfaction of a judgment debt. It should be borne in mind that the judgment creditor is limited to only two opportunities to have a primary home declared specially executable. On the other hand, an execution debtor who offers a viable alternative that would reasonably satisfy the debt of the execution creditor must not be left homeless where doing so

¹ P. Damaseb. (2020). *Court-Managed Civil Procedure of the High Court of Namibia*. Cape Town: Juta & Company (Pty) Ltd at 334.

²*Bank Windhoek Namibia Ltd v Mokasa Trading Enterprises CC* (HC-MD-CIV-ACT-CON-2022/01614) [2022] NAHCMD 573 (20 October 2022).

does not meet the legitimate interest of modern-day commerce and the country's overall financial system, which rely on credit extension to the majority of the population.'

[3] The Supreme Court in *Kisilipile and Another v First National Bank of Namibia Limited*³ set the rationale of judicial oversight as follows:

[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 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...'

[4] In para 20 of *Kisilipile supra*, the Supreme Court further expounds on the rationale of judicial oversight, as follows:

'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

³ *Kisilipile and Another v First National Bank of Namibia Limited* 2021 (4) NR 921 (SC) paras 18 - 20.

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.’ (Underlining is my emphasis)

[5] In considering the approach of rule 108, the Supreme Court in *Standard Bank Namibia Limited v Shipila*⁴ held as follows:

[...] 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 judgment debtor be inclined to do so. In my view there is sufficient notice if there is substantial compliance with Form 24.’

[6] It is in view of the aforementioned principles outlined that I consider this application.

The parties and representation

[7] The applicant is Standard Bank Namibia Limited, a duly registered bank with limited liability carrying on business as such. Whereas, the first respondent is Danne Rodney Shaningua, an adult male and the second respondent is Naomi Nadia Shaningua, an adult female. For ease of reference, I will refer to the applicant as ‘Standard Bank’ and ‘the Bank’, interchangeably, and the first and second respondents as ‘Mr Shangingua’ and ‘Mrs Shangingua’, respectively, and ‘the respondents’, collectively.

[8] At the hearing, Standard Bank was represented by Ms Fernandes of Shikongo Law Chambers and the respondents were represented by Mr Mwakondange of Mwakondange & Associates Incorporated.

Relevant background

⁴ *Standard Bank Namibia Limited v Shipila* (SA 69/2015) [2018] NASC (6 July 2018) para 65.

[9] Standard Bank instituted legal proceedings against the respondents on 18 November 2019 claiming payment of the sum of N\$1 731 786,81 together with interest at the rate of 11,50 percent per annum as of 20 July 2018 until date of final payment and costs on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

[10] On 10 September 2020, the court granted default judgment, jointly and severally against the respondents, in the aforementioned amount together with interest and costs as prayed for. Subsequent thereto and on 2 November 2020, the Registrar of this court issued a writ of execution on movable properties. On 23 July 2021, a *nulla bona* return was filed of record by Standard Bank's counsel, which reflects that 'no disposal property could be found to satisfy' the writ.

[11] Approximately one year later, on 12 July 2022, Standard Bank applied for the immovable property, Erf No 1227, Hochlandpark ('the property'), to be declared specially executable under rule 108 of the rules of court.

[12] On 6 September 2022, Mr Shaningua opposed the rule 108 application of Standard Bank, in person. No opposition was filed by Mrs Shaningua. Later, on 29 September 2022, the respondents formally opposed the rule 108 application of Standard Bank, through their legal practitioner of record. Thereafter, the parties exchanged affidavits and heads of arguments were duly filed by the parties. Subsequently, the matter was set down for hearing of the rule 108 application.

[13] Before I proceed, I note that Mrs Shaningua opposed the relief sought by Standard Bank, but she failed to file any opposing affidavits. I deal with this later in this judgment.

The evidence

[14] Standard Bank's evidence was that at the date of handing over the instructions to its legal practitioners of record, being 19 July 2018, the arrears was at an amount of N\$243 197,83 and subsequently to handing over of the instructions, it obtained judgment on 10 September 2020 by default.

[15] It was Standard Bank's further evidence that as at the date of filing the application under rule 108 and despite being served with the relevant processes, the respondents had not resumed their regular instalments as per the bond. Furthermore, Standard Bank stated that no effort was made by the respondents to settle the debt, and as such, the finance charges (inclusive of the interest) had 'substantially increased since date of judgment'. The resultant is that the respondents are unable to service the bond.

[16] Standard Bank's further evidence was that it is entitled to execute on the property and considering that the outstanding amount far exceeds the original claim amount, it is apparent that no less drastic measures are available to it to resolve the dispute.

[17] Mr Shaningua answered to Standard Bank's claim and stated, under oath, that he is currently incarcerated at the Windhoek Correctional Facility. He stated that on 8 August 2015, he was arrested and was effectively refused bail and was held in custody until he was subsequently convicted and sentenced for a period of 24 years of direct imprisonment on 31 August 2017. He deposed that he is currently incarcerated at the Windhoek Correctional Facility serving his aforementioned sentence.

[18] It was Mr Shaningua's evidence that prior to his arrest, conviction and sentence, he had been a businessman with various different businesses that generated income to sustain his and his family's livelihood. As a result of his incarceration, for approximately

eight years, the same had an effect on his finances and he was unable to service his financial obligations.

[19] Mr Shaningua deposed that as a result of his incarceration, he had no knowledge that his tenant had defaulted on rental payments and the effect thereof was that his obligations towards the Bank had not been serviced. He stated that he could not take legal action to ensure payment in terms of the lease agreement between himself and the tenant who leased the property. Mr Shaningua further stated that he only learnt of the debt on 31 August 2022 when he received the summons through the reception area at the Windhoek Correctional Facility.

[20] Mr Shaningua, in his opposing affidavit, proposed to make payment in the sum of N\$25 000 on a monthly basis as a minimum payment towards the settlement of the judgment debt. He further proposed to make payment in lump sum payments to supplement the proposed monthly payment.

The arguments

[21] In her written arguments, Ms Fernandes submitted that the property is not the respondents' primary residence as evidenced in the opposing affidavit of Mr Shaningua and this entails that any execution on the property would not infringe on the conventional rights to shelter as the respondents do not currently reside at the property. Ms Fernandes argued that in any event, the court may still consider less drastic measures.

[22] Ms Fernandes further submitted, in her written arguments, that the respondents' monthly instalments were an amount of N\$21 647,28 and at the date of handing over of instructions, being 20 July 2018, the arrears was at the amount of N\$243 197,83. The last payment was made on 31 August 2017.

[23] Standard Bank conceded that payments were made in 2018 and 2019, respectively, at the global amount of N\$60 000, which entails that payment of N\$30 000 was made in 2018 and 2019, respectively. Thus, Ms Fernandes, in her written arguments, submitted that the respondents have been in arrears for a period of five years, which equates to 60 months and the arrears currently stands at a sum of N\$1 412 150,95.

[24] Ms Fernandes argued, at the hearing, that the offer of payment of N\$25 000 per month by the respondent is unreasonable as approximately an amount of N\$21 000 would be for the instalments whereas the remaining amount of N\$4000 would be paid on the arrears. Ms Fernandes argued that in the event that the proposal was accepted by Standard Bank, the debt will only be extinguished within 30 or 40 years.

[25] During the hearing, Ms Fernandes argued that onus rested on the respondents to provide a detailed affidavit with settlement proposals, which the respondents failed to do. Ms Fernandes argued further that Mr Shaningua, in his affidavit, failed to allege his age, whether he had dependents and to show how he is able to afford to pay the amount of N\$25 000 so proposed. It was argued by Ms Fernandes that these are relevant factors for the court to consider when determining an application under rule 108.

[26] Contra wise to Ms Fernandes' arguments, Mr Mwakondange, in his written arguments, argued that the property is currently being leased to a certain Mr Phila Kahambundu ('the lessee') for a two year period with an option for renewal whereof the lessee pays monthly rental in the amount of N\$25 000 per month. This rental amount would be paid to Standard Bank to service the bond.

[27] In her written arguments, Ms Fernandes submitted that less drastic measures had been considered and that a writ of execution for movable property had been issued, and the respondents do not have sufficient movable property to satisfy the debt. More

so, Ms Fernandes submitted that no payments have been made towards the arrears apart from the amount of N\$30 000 made in 2018 and 2019, respectively. Given this, it was submitted by Ms Fernandes that the respondents have failed to display an ability to repay the arrears considering the substantial amount.

[28] In conclusion, Ms Fernandes argued that the commercial interest of Standard Bank must be considered and that the Bank should not be strung along until such time that the respondents are able to make payment.

Discussion

[29] It is settled law that when determining an application to declare a debtor's immovable property specially executable under rule 108 of the rules of court, the court must exercise judicial oversight⁵.

[30] Masuku J held in *First National Bank of Namibia Limited v Ganaseb*⁶ as follows:

'...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.'⁷

[31] In response to Ms Fernandes' argument that the amount proposed by Mr Shaningua to settle the judgment debt and arrears is unreasonable and inadequate, Mr Mwakondange referred the court to *Standard Bank Namibia Limited v Moyo*⁸.

⁵ *Kisilipile supra*.

⁶ *First National Bank of Namibia Limited v Ganaseb* (HC-MD-CIV-ACT-CON-2019/01381) [2022] NAHCMD 360 (21 July 2022) para 14.

⁷ *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.

⁸ *Standard Bank Namibia Limited v Moyo* (HC-MD-CIV-ACT-CON-2019/00773) [2022] NAHCMD 78 (24 February 2022) para 28.

[32] Mr Mwakondange argued that similarly to the present matter, in the *Moyo* matter, the court was satisfied that a less drastic measure existed. In the *Moyo* matter, a payment in the sum of N\$20 000 was made by the respondent against his mortgage loan instalment, which was N\$15 000. Similarly as the *Moyo* matter, Mr Mwakondange argued that the proposal by Mr Shaningua of payment in the sum of N\$25 000 will not defeat the commercial interest of the Bank as the same constituted a less drastic measure.

[33] Although a tempting argument by Mr Mwakondange, the facts in the *Moyo* matter, may at first glance appear similar to the present case – but upon in depth consideration of the facts – what stands out is that in the *Moyo* matter, the respondent had consistently been making payment in the excess of N\$20 000 per month to settle his indebtedness. This is starkly in contrast to the present matter in which it was argued by Ms Fernandes that the bond has not been serviced save for the two payments of N\$30 000 made in 2018 and 2019, respectively. Since default judgment was obtained by the Bank, in 2020, no payments have been made by the respondents. This is undisputed between the parties.

[34] Given the afore-going, the *Moyo* matter does not assist the respondents, in any way. In considering the balancing exercise that the court must carry out in dealing with rule 108 applications, Masuku J held in *Moyo* supra as follows:

[28] It would appear to me that the court has a balancing exercise to carry out and at times with a touch of deftness and dexterity. There are two competing interests that the court is called upon to bring to some equilibrium and where the interests of justice will lie, will inevitably depend on the facts of the case at hand.

[29] The consideration is that the creditor must be able to benefit from the contractual obligations reduced to writing in the bond of security. In other words, the creditor's commercial interests must not be defeated by the court unreasonably and without justification, withholding a declaration of property executable in terms of rule 108. (Underlining is my emphasis.)

[35] What is interesting to me, further, is that the proposal for payment of N\$25 000 made by Mr Shaningua, in his answering affidavit, was made abruptly and no further explanation is made regarding the said proposal. All that was said by Mr Shaningua is as follows:

'[...] I propose to make payment of a monthly sum of N\$25,000.00, as a minimum payment towards settlement of the judgment debt. I will however, from time to time, be able to make further lump sum payments to supplement the proposed monthly payment.'⁹

[36] Mr Shaningua fails to set out, in his answering affidavit, how he intends to make payment of N\$25 000. This is especially alarming given that Mr Shaningua stated that he is currently incarcerated at the Windhoek Correctional Facility for 24 years. Mr Shaningua fails to factually prove that he is able to make the payment of N\$25 000 as proposed by him.

[37] I pause to note that, in his written arguments, Mr Mwakondange submitted that the property is currently leased to a certain Mr Kahambundu for a period of two years with an option for renewal and the monthly rental amount of N\$25 000, which Mr Shaningua intends to apply for payment towards the judgment debt. The problem with this is that not only is this not alleged in his affidavit, but no proof of any rental is attached by Mr Shaningua to his answering affidavit. This may have assisted Mr Shaningua in factually proving his ability to pay the proposed amount of N\$25 000.

[38] Notwithstanding the above, Ms Fernandes further argued that no facts were placed under oath by Mr Shaningua on whether he has any dependents, his age and his payment history, all which would have assisted him in his argument.

[39] In *Kisilipile* supra at para 21, the Supreme Court sets out factors for the court to consider when determining an application under rule 108. These factors are set out as follows:

⁹ Mr Shaningua's answering affidavit filed on 28 October 2022 at 3 para 8.

[...] 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.'

[40] It is settled that none of the above factors were set out in Mr Shaningua's answering affidavit. There is further no dispute that Mr Shaningua has not been making payment on the bond.

[41] Mr Shaningua's evidence was that he was unaware that the bond with Standard Bank had not been serviced given that he was in custody awaiting trial and then upon conviction and sentencing, he was incarcerated. I accept this evidence. However, no evidence was led as for Mrs Shaningua. It is uncertain what Mrs Shaningua had been doing since 2015. Neither answering nor confirmatory affidavits were filed by Mrs Shaningua, despite an appearance being entered on her behalf. I am of the view that Mrs Shaningua's failure to file any opposing affidavits setting out why she had not serviced the bond since Mr Shaningua's incarceration is fatal to the respondents' opposition.

[42] Before I conclude, I would be remiss for not mentioning that Mr Mwakondange, counsel for the respondents, spent majority of his time arguing dilatory points, which would take this matter nowhere and could possibly incur the respondents' further costs, failing to address the court on substantial arguments. I say no further than to mention that legal practitioners have an ethical duty to argue their clients' cases to the best of their ability and must not take up issues which do not see the just and speedy finalisation of a matter, but would only prolong the matter further and incur further legal costs for their clients.

[43] Given the above and in applying the principles enunciated hereinabove, together with considering the facts placed before the court by the parties, it is my considered

2. The respondents must, jointly and severally, pay the applicant's costs of suit.
3. The matter is removed from the roll and regarded as finalised.

P CHRISTIAAN
Acting Judge

APPEARANCES

APPLICANT:

F Fernandes
Of Shikongo Law Chambers, Windhoek

RESPONDENTS:

E Mwakondange
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