

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2021/01312

In the matter between:

STANDARD BANK NAMIBIA LTD

PLAINTIFF

and

BELINDA MARTHA MONGOYO
DEFENDANT

Neutral Citation: *Standard Bank Namibia Ltd v Mongoyo* (HC-MD-CIV-ACT-CON-2021/01312) [2023] NAHCMD 414 (20 July 2023)

Coram: MASUKU J

Heard: 24 March 2023

Delivered: 20 July 2023

Fly note: Rules of Court – Rule 108 – declaration of property executable – considerations taken into account - where the property to be declared specially executable is the primary home of the debtor, the court may, depending on the facts presented, refuse declaring a primary home specially executable. This is especially so if there is proof that the commercial interests of the creditor can be adequately catered for and at the same, the debtor is able to have a roof over his or her family's heads.

Summary: The plaintiff, a bondholder in respect of the property sought to be declared specially executable had extended a home loan to the defendant. The defendant fell into arrears leading to a breach of the agreement. The plaintiff obtained judgment by default and

proceeded in the due course of time, to apply for the property to be declared specially executable.

The defendant opposed the application and stated on oath that she does not dispute indebtedness to the plaintiff. Her inability to settle the debt was due to a lack of funds, after being unfairly dismissed by her employer. She challenged the dismissal in the office of the Labour Commissioner, which matter remains pending. The defendant deposed that the property in question is her primary residence and provides the only roof over her and her minor children's heads. The defendant undertook to settle the debt with the assistance of family members while job hunting.

Held that, there is nothing before the court to show or suggest that the defendant's labour case will or is likely to prevail.

Held further that, the family members who may assist the defendant financially are not identified and the court is further not informed of what monetary means they are possessed of.

Held further that, the sale of immovable property, constituting primary homes of execution debtors is not an issue that courts treat with levity. Where the circumstances of the case do not meet the provisions of rule 108(2)(c), the court is required by law to issue an order declaring the property specially executable.

Application declaring the property executable granted.

ORDER

1. The following property is hereby declared specially executable:

A unit consisting of –

- (a) Section No. 7 and more fully described on Sectional Plan No. 53/2010 in the building or buildings known as VALLE ROCOSO situate at Rocky Crest, in the Municipality of Windhoek, Registration Division "K". Khomas Region of which the floor area, according to the said Sectional Plan is 71 (Seventy-One) square metres in extent; and
- (b) An undivided share in the common property in the land and building or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section.

HELD under Certificate of Registered Sectional Title 53/2010 (7) (UNIT) dated 29 November 2010.

Subject to the conditions therein contained.

2. The defendant is ordered to pay the costs of the application on the scale between attorney and own client as agreed between the parties.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] Summary judgment is a judicial procedure that short-circuits a fully blown civil trial. It is employed sparingly and in circumscribed circumstances.¹ Chiefly, it is utilised in cases where the plaintiff has an unanswerable case or where the defendant's defence to the claim is bogus, meritless, lacking in *bona fides* (good faith) or amounts to a dilatory stratagem devised to unnecessarily prolong the plaintiff's early enjoyment of the fruits of the judgment.

[2] In her affidavit termed supplementary affidavit, filed in relation to the summary judgment, moved against her by the plaintiff, the defendant deposed to the following:

'Defendant herein does **NOT deny** owing Plaintiff (*sic*) claim in the summary judgment application. Defendant content that above action was occasioned by defendant was "*unfair dismissed*" from its full time employment of ages ago, which is currently pending before the Office of the Labour Commissioner, scheduled for **9th March 2023**.'²

[3] The above paragraph shows clearly that the issue for determination transcends the issue of summary judgment, which is no longer in contention. The true question the court is called upon to determine is whether this is a proper case for the court to declare the defendant's property specially executable in terms of rule 108.

The parties

¹ According to rule 60(1), it is resorted to where the plaintiff claims (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified movable property; or (d) for ejectment.

² Part 4 of the affidavit.

[4] The plaintiff is Standard Bank Namibia Limited, a registered commercial bank operating in Namibia. It is duly registered in accordance with the Banking Act 23 of 1965 and is a company duly incorporated and registered in terms of the company laws of this Republic. Its place of business is situate at No. 1371, I Chasie Street, Kleine Kuppe, and Windhoek.

[5] The defendant, on the other hand, is Ms. Belinda Martha Mongoyo, an adult female, who chose her *domicilium citandi et executandi* as Section No. 7, Valle Rocosso, Rocky Crest, Windhoek.

[6] I will, in this judgment, refer to the plaintiff as such and to the defendant, as such. Where reference is made to both the plaintiff and the defendant, I will refer to them as 'the parties'.

Background

[7] It is common cause that the parties in this matter entered into a written loan agreement on or about 19 November 2010 in Windhoek. The plaintiff was represented by its employees, Mr Noel William Christians and Ms Caroline Orange. The defendant represented herself. A true copy of the written agreement is attached to the particulars of claim.

[8] It is the plaintiff's case that in terms of the said agreement, the parties covenanted that the plaintiff would advance a loan to the defendant in the amount of N\$572 250, together with an additional amount of N\$143 062 for the purchase of immovable property, consisting of a unit consisting of Section No. 7 as shown more fully in the building(s) known as VALLE ROCOSO, situate in Rocky Crest, in the Municipality of the Windhoek. The defendant, was, in terms of the agreement, required to repay the amount in monthly instalments of N\$5 626.75, which was to be paid over a period of 240 months.

[9] It is also common cause that the plaintiff, to secure the loan, registered a mortgage bond over the immovable property in question on 23 October 2019. The plaintiff avers that it complied with all its obligations in terms of the said agreements by advancing the monies stated above to the defendant. It proceeds to state that the defendant did not, however, comply with her obligations, in that she failed to pay the full amount of instalments from March 2020 up to and including 3 March 2021.

[10] It is the plaintiff's case that in view of the defendant's non-compliance with and breach of her obligations in terms of the agreement, it is entitled to judgment in the amount of N\$467 583.92. It avers that it issued a letter of demand and placed the defendant *in mora* but the defendant did not, despite the demand, make good on her contractual obligations. It is for that reason that the plaintiff claims the amount stated above, together with interest on the said amount at the lending rate from time to time, currently at 7.00%, calculated from 3 March 2021 to the date of final payment.

[11] The plaintiff, in addition to the relief mentioned above, also prays for an order in terms of rule 108, for this court to declare the property in question, specially executable. Lastly, the plaintiff also claims costs on the attorney and own client scale, as recorded in the agreement between the parties.

[12] It must be placed on the record, that this judgment is concerned no longer with the monetary judgment. Its focus is to determine whether the plaintiff is entitled to an order declaring the property specially executable.

The defendant's case

[13] In her answering affidavit, the defendant does not, from my reading of her papers, dispute her indebtedness to the plaintiff. She claims that she had been in the employ of Namibia Airports Company Ltd at the time that the contract was entered into. She deposes further that in March 2021, she was unfairly dismissed by her employer and all the fountains of her liquidity dried up. This, it appears, is the time alleged by the plaintiff as the time when the breach of the agreement commenced.

[14] The defendant deposes further that she lodged a dispute of unfair dismissal but the dispute has not been resolved to the time she deposed to the affidavit. The defendant states further that she wrote some letters to the plaintiff to explain her predicament, which includes her having three minor children that she takes care of single-handedly. She states that this court should 'rest assured that she is a peace-loving citizen, and can surely re-assess I will be honouring my part every other month.'

[15] The defendant, after filing the initial affidavit, filed, what is termed a supplementary affidavit. In it, she states in a more structured form, her predicament. First, she relates the issue of her dismissal and the fact that since her dismissal, she is not in gainful employment and has no source of income. She affirms that she lodged a labour dispute under Case No:

CRWK 452-21, which remains pending at the office of the Labour Commissioner. It is her case that the plaintiff is aware of this case.

[16] The defendant further deposes that the property in question is her primary residence and provides the only roof over her and her minor children's heads. She states further that she lost her parents and has nowhere else to resort to for accommodation of herself and her school-going children. The defendant further undertakes to settle the debt and continue paying the instalment stated earlier with the assistance of her family members. She records her willingness to sign an acknowledgment of debt. Lastly, the defendant deposes that she is on a job-hunting mission, whilst awaiting the determination of her labour dispute with her erstwhile employer.

[17] I proceed to consider the propriety of granting the rule 108 application below. In this connection, I will briefly advert to the principles crystallised by case law as applicable to applications of this nature.

Is the plaintiff entitled to an order declaring the property specially executable?

[18] Applications for declaration of property specially executable, are governed by the provisions of rule 108(1). The provision reads as follows:

'(1) The registrar may not issue a writ of execution against immovable property of an execution debtor or of any other person unless –

- (a) a return has been made of any process which may have been issued against the movable property of the execution debtor from which it appears that that execution debtor or person has insufficient movable property to satisfy the writ; and
- (b) the immovable property has on application made to the court by the execution creditor, been subject to subrule (2), declared to be specially executable.

(2) If the immovable property sought to be attached is the primary home of the execution creditor 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.'

[19] Stripped to the bare bones, the above provision requires that before immovable property of an execution debtor can be declared specially executable, a writ must have been issued against movable property of that debtor. In this connection, it must be plain from the return thereto that the said execution debtor is not possessed of sufficient movable property to satisfy the writ.

[20] Second, the execution creditor must, after obtaining a *nulla bona* return, apply to the court to declare the property in question specially executable. In order to obtain this particular order, the court must be satisfied that personal service of Form 24 has been effected on the execution debtor or a tenant occupying the said property, notifying them that an application will be made for the declaration of the property specially executable and calling upon them to provide reasons to the court why the order declaring the property specially executable should not be granted.

[21] In considering whether or not to grant the application for declaring the property specially executable, the court must consider all relevant circumstances attendant to the matter. In this regard, the court should particularly consider less drastic measures available as opposed to declaring the primary home executable. Measures that the court may consider, although not a closed list, include the availability of alternative immovable property, which can be sold in lieu of the primary home.

[22] In the instant case, having considered the defendant's affidavit, she states that she was unfairly dismissed by her employer and in this connection, she filed a labour dispute. It is her case that this matter has not yet been determined by the office of the Labour Commissioner. She deposed that the matter was to be decided in March 2023. That date has come and gone and the court is in the dark as to what the outcome of those proceedings was.

[23] Furthermore, the defendant claims that she will enlist assistance from family members to pay the monthly instalments and to meet her obligations to the execution creditor. Nothing was placed before me regarding this issue. The question to consider, in the circumstances is

whether the defendant has managed to place relevant facts and circumstances before court which show that there are other viable means of meeting the defendant's indebtedness thus obviating the need to declare the primary home specially executable.

[24] I am unfortunately of the considered view, having had full regard to the answering affidavits filed by the defendant, that there are no such alternative and viable means open for the court to explore and which suggest that the sale of the primary home can be avoided. It may well be true that the defendant has launched a dispute of unfair dismissal. There is, however, nothing before the court to show or suggest that the defendant's labour case will or is likely to prevail.

[25] I dare say that even if that were suggested, it is a fact that these matters at times take a long time to resolve and in the interregnum, the amount of indebtedness would soar, resulting in the plaintiff's commercial viability being seriously undermined. This would unfortunately also result in the inevitable escalation of the debt, interest and costs, which may, if not properly checked, result in unmanageable harm to the detriment of the defendant.

[26] The other alternative offered by the defendant is that of enlisting financial assistance from her relatives. These relatives are not identified and more importantly, the court is not informed of what monetary means they are possessed of, which would suggest that they would be able to give the court comfort that the sale of the primary home should be avoided in this case. Where there is some financial assistance available, the alleged financier must state his or her means and readiness to meet the financial demands, which constitute the arrears as well as the monthly instalments.

[27] The sale of immovable property, constituting primary homes of execution debtors is not an issue that court treats with levity. The courts do everything in their power and within realms of reason, compassion and *Ubuntu*, to preserve a roof over an execution debtor's head. Where the circumstances of the case however, do not meet the provisions of rule 108(2)(c), the court is required by law, sad and heart wrenching it may be, to issue an order declaring the property home of a debtor, specially executable.

Conclusion

[28] Having regard to the specifics of this case, as discussed above, I have considered the material placed before court by the defendant. When I place it in the scales of the goddess of justice, Themis, it occurs to me that it unfortunately does not meet the test that the court

ought to apply in order to avoid declaring a primary home specially executable. If the court were to give in to the entreaties of the defendant, this may have the unfortunate consequence of stringing the plaintiff along for an indeterminable period. This would rest on the forlorn hope that some day, many years from now, the defendant may be able to meet her obligations and should, while waiting for that indeterminable day, continue to occupy the property without paying therefor.

[29] Taking all the above considerations into account, I am of the considered view that the defendant has failed to meet the requirements of rule 108(2)(c). From the material placed before me, I am not satisfied that there are less drastic means open to the court to explore in order to avoid declaring the primary home of the defendant, specially executable.

Order

[30] In the premises, I am of the considered view that the following order should follow:

1. The following property is hereby declared specially executable:

A unit consisting of –

- (c) Section No. 7 and more fully described on Sectional Plan No. 53/2010 in the building or buildings known as VALLE ROCOSO situate at Rocky Crest, in the Municipality of Windhoek, Registration Division “K”. Khomas Region of which the floor area, according to the said Sectional Plan is 71 (Seventy-One) square metres in extent; and
- (d) An undivided share in the common property in the land and building or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section.

HELD under Certificate of Registered Sectional Title 53/2010 (7) (UNIT) dated 29 November 2010.

Subject to the conditions therein contained.

2. The defendant is ordered to pay the costs of the application on the scale between attorney and own client as agreed between the parties.
3. The matter is removed from the roll and is regarded as finalised.

APPEARANCES:

PLAINTIFF: MR MEKUMBU TJITEERE
Of Dr Weder, Kauta & Hoveka Inc.

DEFENDANT: MS BELINDA MARTHA MONGOYO
The defendant in person