

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION  
PRACTICE DIRECTIONS 61

<b>Case Title:</b> Bank Windhoek Limited Applicant vs Grace City Investments CC First Respondent Nelson Daniel Weyulu Haihambo Second Respondent Loide Haihambo Third Respondent Shrike Investments CC Fourth Respondent	<b>Case No:</b> HC-MD-CIV-ACT-CON-2023/00993 (INT-HC-SUMJUD-2023/00194)
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE CLAASEN	<b>Date of hearing:</b> 05 July 2023
	<b>Delivered on:</b> 21 July 2023
<b>Neutral citation:</b> <i>Bank Windhoek Limited v Grace City Investments CC</i> (HC-MD-CIV-ACT-CON-2023/00993) [2023] NAHCMD 421 (21 July 2023)	
<b>The order:</b>  1. The application for summary judgment is granted in the following terms:  Claim 1: 1.1. Payment in the amount of N\$2 775 646.82; 1.2. Compound interest calculated daily and capitalised monthly at plaintiff's prime lending rate of interest from time to time, currently 10.5% plus 1.5% per year	

calculated from 8 February 2023 to date of final payment;

1.3. Cost of suit on scale as between attorney and own client as agreed.

Claim 2:

1.4. Payment in the amount of N\$1 889 629.31;

1.5. Compound interest calculated daily and capitalised monthly at plaintiff's prime lending rate of interest from time to time, currently 10.5% plus 1.5% per year calculated from 8 February 2023 to date of final payment;

1.6. Cost of suit on scale as between attorney and own client as agreed.

2. The application to declare the property as per the notice of motion executable is refused with costs.

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

### **Reasons for orders:**

#### Introduction

[1] This is an application for summary judgment for two claims as well as an order authorising the Registrar to issue a warrant of execution against certain immovable property.

[2] The claims are based on breach of contract for two loan agreements concluded between the plaintiff and the first defendant. Firstly, a written loan agreement which was entered into for the amount of N\$2 700 000 and secondly, a written mortgage loan for the amount of N\$1 800 000. The second, third and fourth defendants respectively concluded suretyship contracts wherein they bound themselves for the debts of the first defendant. The first defendant defaulted on the loan repayments as from October 2022 where after the plaintiff issued summons for that.

[3] The relief prayed for in the notice of motion are as follows:

AD CLAIM 1

1. Payment in the amount of Payment in the amount of N\$2 775 646.82
2. Compound interest calculated daily and capitalised monthly at plaintiff's prime lending rate of interest from time to time, currently 10.5% plus 1.5% per year calculated from 8 February 2023 to date of final payment.

AD CLAIM 2

3. Payment in the amount of N\$1 889 629.31
4. Compound interest calculated daily and capitalised monthly at plaintiff's prime lending rate of interest from time to time, currently 10.5% plus 1.5% per year calculated from 8 February 2023 to date of final payment.

AD ALL CLAIMS

5. An order declaring the following property executable:
  - Certain: Erf No. 449 Eros Park
  - Situate: In the Municipality of Windhoek Registration Division "K"
  - Measuring: 1337(one thousand three hundred and seventy seven) square metres
  - Held by: Deed of transfer no T 8904/2002.
  - Subject: To all the conditions contained therein
6. Cost of suit on scale as between attorney and own client as agreed.

*Summary Judgment*

[4] The application was opposed only in respect of the prayer in respect of declaring the immovable property specially executable, leaving that as the only issue for determination. Having considered the nature of the claims for summary judgment and that no defense was postulated, summary judgment, interest and costs stand to be granted in respect of both claims.

*Execution of immovable property*

[5] According to the particulars of claim, the loans were secured by the registration of a first continuing covering mortgage bond (B 2965/2021) for the amount of N\$4 800 000 plus an additional amount of N\$960 000, as well as a second continuing covering mortgage bond (B 5741/2022) for the amount of N\$1 000 000 plus an additional amount of N\$200 000 in favour of the plaintiff over the specified immovable property situated in Windhoek. The plaintiff pleaded that it was not aware as to whether the said property constitutes a primary home of the defendants.

[6] The case for the applicant as execution creditor as deposed to by the acting head of Legal Collections at Bank Windhoek in the founding affidavit merely states that the plaintiff meets the requirements for the court to declare the specified property specifically executable.

[7] The case for the opposition for the execution was set out by the second defendant who is a member of the first and fourth defendant. Mr Haihambo deposed that the property was currently leased to a certain Mr Hango who uses it as his primary residence. He has attached a copy of a lease between them showing a monthly rental amount of N\$25 000. Furthermore that there are less drastic measures available in that the business has concluded a three year contract to supply salt to a company in Zambia and the deponent has annexed a copy of the said contract and invoice for the first consignment so delivered. He furthermore states that he is able to make payments in the amount of N\$120 000 monthly as from July 2023 for 6 months towards the arrears and pay the monthly premiums.

[8] There has been no service on the application for execution on the lessee of the said property. However, counsel for the execution creditor submitted that strict formalism of Form 24 should be discouraged. He contends that it can be assumed that the lessee saw the documents because the respondent's answering affidavit makes reference about a proposal by the lessee to assist Mr Haihambo. As far as the proposal that the rental amount can be applied towards the debt, counsel laments the position that neither Mr

Haihambo, nor the lessee, has explained why there are no viable alternatives for the lessee's housing situation. As for the purported salt contract, the concern was that it was a once off delivery of 6 000 bags to the value of N\$1 459 036.60, which information appears on a purchase order dated 3 May 2023. Nor does the first defendant specify the overheads or other information as to his employment status or other sources of income. Thus he does not regard these as a reasonable way to settle the outstanding debt.

[9] In opposition of the application, the arguments were that the property was the primary residence of the lessee, but there was no personal service on him. Furthermore, it was argued that there are less drastic measures available other than to sell the property, namely that the debt can be served from the income of the salt contract and the rental contract.

[10] As for the strike out application, it was argued that there was no proper application for that and that it is not to be readily granted.

[11] In turning to the applicable law the court has in *Bank Windhoek Namibia Ltd v Mokasa Trading Enterprises CC*<sup>1</sup> encapsulated the requirements of rule 108 of the Rules of this Court as follows:

'[16] Firstly, a writ of execution against the immovable property of an execution debtor or of any other person may not be issued by the Registrar unless two jurisdictional facts set out in rule 108(1)(a) and (b) are present. These are:

- a) A return issued against the movable property of the execution debtor from which it appears that the execution debtor or person has insufficient movable property to satisfy the writ;
- b) The immovable property has, on application made to the court by the execution creditor, been, declared to be specially executable.

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<sup>1</sup> *Bank Windhoek Namibia Ltd v Mokasa Trading Enterprises CC* ( HC-MD-CIV-ACT-CON- 2022/01614) [2022] NAHCMD 573(20 October 2022).

[17] Secondly, if the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as a home, a court order declaring the immovable property specially executable may only be granted subject to the presence of certain jurisdictional facts under Rule 108(2)(a) and (b).'

[12] There is no doubt that a mortgagee has the right to have recourse against the bonded property but also that the execution creditor has to follow the required procedures. In *Standard Bank Namibia Ltd v Shipila and Others*<sup>2</sup> it was held that:

[15] . . . [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.'

[12] I briefly pause at the contention by the applicant that certain paragraphs in the respondent's answering affidavit should be struck out. It appears to be an afterthought as no averments pertaining to that relief have been made in the founding affidavit, nor was any specific application filed for that. I thus agree with the stance of the counsel for the respondent that it is not just for the mere asking in heads of argument. Furthermore, the applicant in its heads of argument submits that the respondent has filed its answering affidavit late and thus there is no opposition against the summary judgment application before court. It is evident on the ejustice file that the parties engaged in settlement negotiations after the applicant indicated its intention to bring a summary judgment application. Thereafter, the parties agreed, by virtue of a joint status report which was filed on 19 June 2023 that the respondents was to file its 'answering papers to the summary judgment application on 30 June 2023', which it did. Thus, the latter submission by the applicant bears no merit.

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<sup>2</sup> *Standard Bank Namibia Ltd v Shipila and Others* 2018 (3) NR 849 (SC).

[13] In considering the requirements that the execution creditor had to meet, there is no doubt that it omitted to have served the lessee that occupies the property. Had that happened, this court could attach weight to the contention that there was no explanation as to why the lessee could not seek alternative accommodation. However no formal notice was given to the lessee, thus it is not clear how such person can be expected to furnish an explanation. Be that as it may, as things stand now, the execution creditor has failed to comply with r 108(2)(b) of the rules of this court.

[14] Finally, even if the court would have entertained the argument by counsel for the execution debtor to assume that the lessee somehow learned about the execution, this court is not convinced that there are no viable alternatives presented by the execution debtor. It is not entirely true that the debtor has placed nothing before this court from which it can be gauged that the debtor cannot pay off the outstanding amounts. Apart from the lease contract which was signed until 2026 and that will bring in N\$25 000 each month, it also transpires that the delivery of salt is not a once off delivery as contended by counsel for the execution creditor. The signed contract shows it to be for the delivery of 300 tonnes of salt every week for a minimum of three years, which carries the expectation of substantial income for the said period. For these reasons the court is satisfied that the debtor will have means to pay the outstanding debt and the application stand to fail.

[15] In the result the following order is made.

1. The application for summary judgment is granted in the following terms:

Claim 1:

1.1 Payment in the amount of N\$2 775 646.82;

1.2 Compound interest calculated daily and capitalised monthly at plaintiff's prime lending rate of interest from time to time, currently 10.5% plus 1.5% per year calculated from 8 February 2023 to date of final payment;

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1.6 Cost of suit on scale as between attorney and own client as agreed.

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<b>Judge's signature</b>	<b>Note to the parties:</b>
Claasen J	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondents</b>
T Luvindao Of Dr Weder, Kaut & Hoveka, Inc Windhoek	A Ndungula Of Nakamhela Attorneys Windhoek



