

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/02570

In the matter between:

STANDARD BANK NAMIBIA LIMITED

APPLICANT/PLAINTIFF

And

EMBASSY OF THE REPUBLIC OF ANGOLA:

WINDHOEK-NAMIBIA

1ST REpondent/DEFENDANT

RODRIGUES MANUEL ALEXANDRE

2ND RESPONDENT

Neutral citation: *Standard Bank Namibia Limited v Embassy of the Republic of Angola: Windhoek Namibia* (HC-MD-CIV-ACT-CON-2021/02570 [2023] NAHCMD 456 (31 July 2023))

Coram: TOMMASI J

Heard: 28 June 2023

Delivered: 31 July 2023

Flynote: Execution — Sale in execution — Immovable property — Order to declare property specially executable — Rules of the High Court, rule 108 — second respondent a pensioner who claims that the property, is his, offered less drastic measures than sale in execution of the primary home under attachment — second respondent however not the execution debtor nor the tenant — court having judicial oversight cannot ignore the plight of the second respondent but must also consider the commercial interest of the applicant.

Summary: The applicant entered into an agreement with the first respondent, the previous employer of the second intervening respondent. Second respondent avers that the home is his primary home and has made an offer to the applicant to pay the mortgage bond of the first respondent which offer was declined by the applicant. The first respondent confirmed in writing that the home belongs to the second respondent.

Held that, the court in exercising its judicial oversight, cannot ignore the claim of the second respondent that he is in fact the owner of the property and that it is his primary home, but neither can it deny the applicant its right to have the property declared specially executable.

ORDER

1. The application in terms of rule 108 of the Rules of the High Court, for the declaration of the property described as certain: remaining extent of portion of Erf 22 Klein Windhoek situate: in the Municipality of Windhoek registration division “K” measuring: 4218,13 (four two one eight comma one three) square metres held: by deed of transfer no. T 7975/2002, is granted on the following conditions:

- (a) The applicant may only sell the property in execution without further notice thereof to the second respondent, if the second respondent fails to pay the

amount of N\$150 000 to the applicant before or on 7 August 2023 and fails to pay the remaining part of the judgment debt in monthly instalments of N\$50 000 to the applicant payable on or before the 7th day of September 2023 and on or before the 7th day of each consecutive month thereafter until the judgment debt has been paid in full.

2. The second respondent is ordered to pay the applicant's costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

TOMMASI J:

[1] This is an application in terms of rule 108 for the execution of the immovable property situate at Erf 22, Klein Windhoek (the property). The second respondent brought an application to intervene and such application was granted. The application is not opposed by the first respondent but is opposed by the second respondent.

[2] The applicant and the first respondent (the Embassy of the Republic of Angola), entered into an agreement of waiver of diplomatic immunity and the defendant consented to the jurisdiction of this court. On 20 November 2002 the applicant granted a home loan to the first defendant in the sum of N\$3 800 000 and for an additional sum of N\$950 000. The loan is secured by the passing and registration of a first continuing covering mortgage bond over property. The applicant claimed that the first respondent breached the agreement and an amount of N\$ 1 235 486.34 was due and payable.

[3] On 27 July 2021, the Deputy Sheriff served the summons by leaving a copy thereof at the property as nobody was willing to accept service. On 15 December 2021

the court granted default judgment in favour of the applicant and against the first respondent in the sum of N\$ 1,235,486.34 together with interest of 6.75 percent per annum as from 1 October 2020 until date of final payment and cost of suit. On 17 September 2021 the court issued a writ of execution for the movable property.

[4] The applicant brought this application and attached thereto a return of service from which it appears that the execution debtor or person has insufficient movable property to satisfy the writ (a *nulla bona* return). It appears further that the writ of execution was served on Bianca De Almeida on 16 May 2022. The application was served on 5 October 2022 at the property on Gloria Da Silva, who was apparently in charge of the property. The application was enrolled to be heard on 11 November 2022.

[5] The deponent on behalf of the applicant indicated that the first respondent has made no attempt to repay the debt which is substantial. The applicant further avers that first respondent did not adhere to the further commitments and all arrangements made by the first respondent did not realise. The applicant avers that there were no movable properties which they could attach.

[6] On 31 October 2020 the second respondent entered an appearance to oppose the application and the matter was postponed to 25 November 2022 for the exchange of further affidavits. The applicant filed a status report on 21 November 2022. Of interest to this matter is the fact that there were some discussions held and the applicant was prepared to grant the second respondent an extension of 12 months to conclude and to adhere to any payment arrangement.

[7] The second respondent's affidavit answering filed in answer to the application may be summarised as follow: The second respondent was in the employ of the first respondent as the ambassador from 2013 to 2019 when he retired. At the time he deposed to the affidavit he was a pensioner.

[8] The second respondent avers that the application was not served on him personally. He also stated that the application was in any event not served on the property as per the return of service, as Ms Da Silva does not reside at the property but is employed by the first respondent. The second respondent however states that he became aware of the application and thereafter consulted a legal practitioner. He does not indicate how he became aware. His legal practitioner of record drafted a letter to the applicant's legal practitioners advising them that:

- (a) The property has been allocated to him by the first respondent attaching a confirmatory letter that, although the property is registered in the name of the first respondent, it belongs to the second respondent.
- (b) The second respondent has commenced with preparations to settle the outstanding debt of the applicant.
- (c) He currently has N\$150 000 in trust and is prepared to pay a monthly instalment of N\$50 000 toward the settlement of the outstanding bond which in essence is the offer made to settle the matter.

[9] The response of the applicant to this offer was to accept the payment of N\$150 000 but rejected the rest of the offer.

[10] The applicant avers that he has been trying since May 2022 to have the property transferred into his name but this process has been complicated due to the fact that the property was registered in the name of the first respondent. He indicated that he was also in the process to repatriate funds from Angola but the process is very slow due to strict restrictions imposed by the Government of Angola on the transfer of money outside of Angola.

[11] The second respondent stated that the property is his primary home and that of his children and nephews. He denies that the applicant ever attempted to execute the

movable property of the first respondent at the offices of the Embassy. He submit that he has made a reasonable offer and as soon as the money is repatriated, he would settle the outstanding balance of the mortgage bond. He submitted that the bond would be settled in full within one year and 10 months if he repays it, as undertaken.

[12] The applicant raises the fact that the second respondent is not part of the agreement which exist between the applicant and the first respondent and cannot therefore dictate the contractual terms of the home loan agreement with the applicant. The applicant persisted that a proper case has been made out for the court to grant an order declaring the property executable.

[13] Rule 108 (2) provides as follow:

'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.**' [my emphasis]

[14] It is common cause that the underlying issue in this matter is the agreement between the applicant and the first respondent. The loan was to be repaid by the first respondent in monthly instalments of N\$50 730. The first respondent fell in arrears as from 20 November 2019. The full amount (capital, and additional sum and interest) still

owing to the applicant, became due and owing. Default judgment was obtained in the sum of N\$ 1 235 486.34. These facts are not in dispute.

[15] The applicant submits that the home is not the primary home of the respondent. The applicant submits further that the second respondent in any way, does not have money to repay the debt and has not offered any other property for sale. The applicant argues that an application in terms of rule 108 of the Rules of this Honourable Court cannot be used to obtain an extension of time to satisfy the judgment debt. Referring to *Standard Bank Namibia Limited v MGM Properties CC*¹ wherein it states that the business of property finance is based on the assurance that the lender will, without unreasonable delay, recoup its money from the judgment debtor who defaulted by selling the bonded property. The applicant submits that the first respondent was unable and remains unable to satisfy the judgment debt and more than a year has passed since the applicant obtained judgment against the first respondent. The only remaining relief for the applicant is to have the property declared executable.

[16] The applicant raised the issue that the second respondent did not sign the affidavit in accordance with Rule 128. The affidavit was signed by the second respondent at the embassy of Namibia in Luanda in the presence of Andreas Nelumbu who is a Police Attaché at the said embassy. He appears to be a person who is authorised to authenticate documents in Angola. I am satisfied that there has been compliance with Rule 128.

[17] The second respondent's counsel submitted that it is a jurisdictional requirement that there must have been personal service on the occupants of the premises. He argued that the court ought to determine who ought to get personal notice and in this regard referred this court to *Standard Bank Namibia Ltd v Bock*² where the court stated the following:

¹ 2 *Standard Bank Namibia Limited v MGM Properties CC* (HC-MD-CIV-ACT-CON-2018-00405) [2020] NAHCMD 28 (30 January 2020).

² *Standard Bank Namibia Ltd v Bock* (HC-MD-CIV-ACT-CON-2018/04032 [2021] NAHCMD 78 (25 February 2021) at paragraph 29.

'In this connection, I incline to the view that the person who is entitled to notice in terms of the rule, is a person who is able to bring to the court's attention less drastic measures than the attachment of the property. It must, in other words, be a person with means, either to put up another property, or who can suggest other modes of payment, including instalments that may be seen as acceptable to the judgment creditor.'

[18] Counsel for the second respondent makes the following remarks when it comes to the inquiry itself. He submits that the respondent has provided an option that is less drastic measure than the sale of the property in execution which is the offer made. He submits that the full outstanding balance will be paid within 22 months from date of acceptance of offer. Citing a list of cases where this court expressed concern that vulnerable persons would be left homeless if no proper consideration is given to the less drastic measures offered by the respondent.

[19] The facts in the matter of *Standard Bank Namibia Ltd v Bock*³ are comparable to the case at hand. In that case the property was also not the primary residence of the respondents but it was the primary residence of their family members. In respect of service the court held that in terms of rule 108, people entitled to be personally served with the notice are the execution debtor and/or their tenants. In this matter likewise the second respondent is not a tenant but this court recognised that he is a party making claim to the property. The court is satisfied that the second respondent has been given every opportunity to state his case before the court and is not in the least prejudiced by the fact that he received no personal service.⁴

[20] The second respondent avers that he is a pensioner and the property is his primary home. This court has no reason to doubt this fact on the mere say so of the applicant. The applicant is clearly aware of the fact that the second respondent has a claim against the property but it maintains that the second respondent does not have the necessary money to make the offer it did. It is indeed so that the first respondent

³ *Standard Bank Namibia Ltd v Bock* (HC-MD-CIV-ACT-CON-2018/04032 [2021] NAHCMD 78 (25 February 2021)).

⁴ See *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC).

could have provided the court with more information regarding his ability to pay the outstanding amount in the instalments of N\$50 000 per month.

[21] The second applicant however is not the execution debtor nor is he the lessee. There is no agreement between the applicant and the second respondent. The applicant's commercial interest herein must also be protected. Rule 108 (5) provides that a further application may not be made in respect of the same immovable property which previously formed the subject matter of any earlier application made in terms of subrule (1)(b) or (4)(b), unless the immovable property which previously formed the subject matter of the application is no longer the primary home of the execution debtor for the applicant.

[22] The offer made by the second respondent offers a less drastic alternative to declaring the property specially executable and the applicant would be able to recover its interest in a relatively short period of time. It is preferable to leaving the second respondent, a pensioner, who would have difficulty acquiring another property at his age, without a roof over his head. Ordinarily this would mean that the court may not declare the property specially executable. The second respondent is however not the execution debtor nor the tenant. The court in exercising its judicial oversight cannot ignore the claim of the second respondent that he is in fact the owner of the property and that it is his primary home but neither can it deny the applicant its right to have the property declared specially executable. The court must therefore find a solution which would afford both parties the relief it seeks. In this regard I am fortified by the applicant's willingness to consider granting the second respondent a period of extension to afford him time to repay the judgment debt of the first respondent.

Costs

[23] The cost in this matter follows the event and the second respondent must therefore pay the applicant's cost of the application.

[24] In the result the following order is made:

1. The application in terms of rule 108 of the Rules of the High Court, for the declaration of the property described as certain: remaining extent of portion of Erf 22 Klein Windhoek situate: in the Municipality of Windhoek registration division "K" measuring: 4218,13 (four two one eight comma one three) square metres held: by deed of transfer no. T 7975/2002, is granted on the following conditions:
 - a. The applicant may only sell the property in execution without further notice thereof to the second respondent, if the second respondent fails to pay the amount of N\$150 000 to the applicant before or on 7 August 2023 and fails to pay the remaining part of the judgement debt in monthly instalments of N\$50 000 to the applicant payable on or before the 7th day of September 2023 and on or before the 7th day of each consecutive month thereafter until the judgment debt has been paid in full.
2. The second respondent is ordered to pay the applicant's costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

M A TOMMASI

Judge

APPEARANCES

PLAINTIFF: C Visser
Of LorentzAngula Inc, Windhoek

1ST RESPONDENT Embassy of the Republic of Angola:
Windhoek-Namibia

2ND RESPONDENT: J Arnolds
Of Sisa Namandje Inc, Windhoek