

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: STANDARD BANK NAMIBIA // LAZARETT INVESTMENTS FORTY CC & 2 OTHERS	Case No: HC-MD-CIV-ACT-CON-2019/02700
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Heard on: 5 OCTOBER 2023
	Delivered on: 18 OCTOBER 2023
Neutral citation: <i>Standard Bank Namibia v Lazarett Investments Forty CC</i> (HC-MD-CIV-ACT-CON-2019/02700) [2023] NAHCMD 663 (18 October 2023)	
Order:	
1. It is declared that the following immovable property is declared specially executable: CERTAIN: Section No. 34, 51 Lazarett Windhoek Namibia SITUATE: In the Municipality of Windhoek Registration Division "K" Khomas Region MEASURING: 63 (Six Three) Square Meters HELD: By Deed of Transfer ST 426/2017	

SUBJECT: Conditions Contained therein

2. The respondents shall, the one paying the others to be absolved, pay the applicant's costs of suit on the scale as between attorney (legal practitioner) and own client.
3. The matter is finalised and removed from the roll.

Reasons:

PARKER AJ:

[1] This is an application brought in terms of rule 108 of the rules of court. On 16 August 2023 and in the presence of the parties or their representatives, the court ordered as follows:

'Having heard MS FERNANDES, on behalf of the plaintiff/applicant and MR NAANDA, second defendant/respondent in person and having read the pleadings for HC-MD-CIV-ACT-CON-2019/02700 and other documents filed of record:

IT IS HEREBY ORDERED THAT:

1. The respondents shall file their answering affidavit on or before 31 August 2023.
2. The applicant shall file its replying affidavit on or before 7 September 2023.
3. The parties shall file their heads of arguments in terms of the rules.
4. The case is postponed to 5 October 2023 at 10:00 for Interlocutory hearing (Reason: Hearing).

BY ORDER OF THE COURT'

[2] On the hearing date, the plaintiff (applicant) appeared by counsel. There was no appearance by the defendants (respondents) in person or by counsel. The respondents were aware of the hearing date but they chose not to appear without explanation. The plaintiff (applicant) who had complied with the court order respecting the filing of papers, appeared by counsel. As is the practice of the court, the court requested the court orderly to call three times the names of the respondents outside the courtroom and in the nearby corridors of the court. The orderly reported that there was no response. It is not part of constitutional fair trial to all parties for the court to stop the movement of the train of justice for one party to board at

that party's whims and caprices, when the other party, in compliance with a set down order, was already on board. Accordingly, counsel for the plaintiff (applicant) was allowed to move the application.

[3] The first crucial point to make at the threshold is this. It must be noted by legal practitioners and litigants that the age-long and time-tested principle of *pacta sunt servanda* is still part of our law.¹ Rule 108 of the rules of court has not set at naught and vaporized the principle. As I understand it, the object of rule 108 is, based on equitable considerations, to blunt the sharp point of executing specially claims against hypothecated immovable property in order to satisfy the claim. I do not read *Kisilipe Niklaas and Lydia Vaanda Katjuongua v First National Bank of Namibia Limited*² as having set at naught the aforementioned principle. Indeed, in that case, Damaseb DCJ (writing the unanimous judgment of the court) stated:

'[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 reversible misdirection. If the debtor is legally unrepresented at the summary judgment proceedings, it behoves counsel for the creditor to draw the court's attention to the need for the inquiry in terms of rule 108.'

[4] I shall call the aforesaid requirements in *Kisilipe Niklaas and Lydia Vaanda Katjuongua* the *Kisilipe* requirements.

[5] The centrepiece of the *Kisilipe* requirements is that judicial oversight under rule 108 of the rules of court exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of a primary home should be the last resort. It follows that the court, in considering an application to declare a property specially executable, ought to look into whether, for instance, there exists good prospects of a debtor making arrangements to dispose of another asset within a reasonable time to liquidate the outstanding balance. Thus, the court should be seen to have enquired into whether there existed 'available, viable and less drastic alternatives to declaring the property specially executable'.³

¹ *Erongo Regional Council and Others v Wlotzkasbaken Home Owners Association and Another* 2009 (1) NR 252 (SC).

² *Kisilipe Niklaas and Lydia Vaanda Katjuongua v First National Bank of Namibia Limited* Case No. SA 65/2019 (SC).

[6] The following superlatively crucial point is stated in capitalities: The *Kisilipe* requirements apply only where 'the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as home', within the meaning of rule 108 (2).

[7] As a matter of language, law and common sense, and considering the object of rule 108, discussed previously, an immovable property cannot be the primary home of a juristic entity.⁴ To argue that a juristic entity can have a primary home is to do violence to the English language and to render ludicrous the object of the protection offered by judicial oversight under rule 108.

[8] In the instant matter, the execution debtor failed, without explanation, to appear in court for the hearing of the application, and *a fortiori*, there was no antipodean material placed before the court to resist the granting of the application. In the circumstances, the court could not carry out the exercise to satisfy the aforementioned *Kisilipe* requirements. And no satisfactory and sufficient material was placed before the court, as aforesaid, to persuade the court to refuse to grant the relief sought.

[9] I am satisfied that the applicant has made out a case for the relief sought and is, therefore, entitled to judgment. In the result, I order as follows:

1 It is declared that the following immovable property is declared specially executable:

CERTAIN: Section No. 34, 51 Lazarett
 Windhoek
 Namibia

SITUATE: In the Municipality of Windhoek
 Registration Division "K"
 Khomas Region

MEASURING: 63 (Six Three) Square Meters

³ *Kisilipe Niklaas and Lydia Vaanda Katjuongua* footnote 2 para 24.

⁴ *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC).

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Judge's signature:

Note to the parties:

Not applicable.

Counsel:

Applicant

Respondents

F Fernandes
Of
Shikongo Law Chambers, Windhoek

No appearance