

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: NEDBANK NAMIBIA LIMITED // ERF EIGHTY TWO ROSSMUND CC & ANOTHER	Case No: HC-MD-CIV-ACT-CON-2017/03250
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 6 OCTOBER 2023
	Delivered on: 1 NOVEMBER 2023
Neutral citation: <i>Nedbank Namibia Limited v Erf Eighty Two Rossmund CC</i> (HC-MD-CIV-ACT-CON-2017/03250) [2023] NAHCMD 691 (1 November 2023)	
Order:	
1. The following immovable property is hereby declared specially executable: CERTAIN: Erf 82, Rossmund Golf Course SITUATE: In the Municipality of Swakopmund Registration Division "G" Erongo Region MEASURING: 1227 (One Thousand Two Hundred And Twenty Seven) Square Meters HELD: Deed of Transfer No. T 1360/2010	

SUBJECT: to all the terms and conditions as contained therein

2. Costs of suit on a scale as between attorney (Legal practitioner) and own client, the one paying the other to be absolved.
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. Ms Kuzeeko represents the plaintiff (applicant) and Mr Juuso Kambueshe (also known as Mr Frank Kambueshe, as appears on the papers), in person, represents the defendants (respondents). It is worth noting, as Ms Kuzeeko submitted, that the execution debtor (ie the first respondent) is a close corporation, a juristic entity and is the owner of the immovable property sought to be specially executed. I shall return to those legal realities in due course.

[2] Ms Kuzeeko filed heads of argument. Mr Juuso Kambueshe also filed the respondents' heads of argument. In the heads of argument, Juuso Kambueshe confirmed that the said immovable property is owned by the first respondent, who is the execution debtor, and a juristic entity, as aforesaid.

[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 *Kisilipile Niklaas and Lydia Vaanda Katjiungua 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

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

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

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 *Kisilipile Niklaas and Lydia Vaanda Katjuongua* the *Kisilipile* requirements.

[5] The centrepiece of the *Kisilipile* 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

[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. Furthermore, there was nothing placed before the court to indicate that the property was leased to a lessee.

[8] The following statement by Juuso Kambueshe is the bone and marrow of the

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

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

respondents' response to the applicant's application.

[9] The respondents took the view that the applicant bore the burden 'to present alternatives that the court should consider to avoid a sale in execution,' that is, 'viable alternatives'.⁵ I hold that the applicant bears no such burden. The respondent's view establishes undeniably that the respondent has failed to present alternatives, satisfactory to the court, to avoid a sale in execution. In any case, since the execution debtor, who is the owner of the said immovable property, is a juristic entity, the judicial oversight protection under rule 108 is not available to it, as held in paras 6 and 7 above.

[10] Based on these reasons, I find that the respondent has failed to resist an order declaring the said property to be specially executable. And I hold that the applicant has made out a case for the relief sought. In the result, I order as follows:

1. The following immovable property is hereby declared specially executable:

CERTAIN: Erf 82, Rossmund Golf Course

SITUATE: In the Municipality of Swakopmund
Registration Division "G"
Erongo Region

MEASURING: 1227 (One Thousand Two Hundred And
Twenty Seven) Square Meters

HELD: Deed of Transfer No. T 1360/2010

SUBJECT: to all the terms and conditions as contained therein

2. Costs of suit on a scale as between attorney (Legal practitioner) and own client, the one paying the other to be absolved.
3. The matter is finalised and removed from the roll.

⁵ *Kisilipile Niklaas and Lydia Vaanda Katjuongua* footnote 2 para 19.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Second Respondent
M U Kuzeeko Of Dr Weder, Kauta & Hoveka Inc., Windhoek	J Kambueshe In Person (on behalf of the respondents)