

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

<b>Case Title:</b> NEDBANK NAMIBIA LIMITED // FRANK'S PROPERTY HOLDING 45 CC & 2 OTHERS	<b>Case No:</b> HC-MD-CIV-ACT-CON-2017/03892
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> PARKER, AJ	<b>Heard on:</b> 6 OCTOBER 2023
	<b>Delivered on:</b> 1 NOVEMBER 2023

**Neutral citation** Nedbank Namibia Limited // Frank's Property Holding 45 CC (HC-MD-CIV-ACT-CON-2017/03892) [2023] NAHCMD 692 (1 November 2023)

**Order:**

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

A unit ("the mortgage unit") consisting of-

(a) Section No. 28

As shown and more fully described on Sectional Plan No. 7/2005 in the building or buildings known as VOGELSICHT situate at VOGELSTRAND in the Municipality of SWAKOPMUND, Registration division "G" ERONGO Region of which the floor area, according to the said Sectional Plan is 75 (SEVENTY-FIVE) square metres in extent; and

(b) An undivided share in common property in the land and building or buildings as

shown and more fully described on the said plan, apportioned to the said section in accordance with the participation quota of the said section,

Held under Certificate of Registered Sectional Title No. 7/2005(28) (Unit) dated 25 February 2005.

2. Payment of applicant's costs of suit on a scale as between attorney (legal practitioner) and 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. Ms Kuuzeko is counsel for the applicant (plaintiff). There was no appearance for the respondent in person or by counsel.

[2] As is the practice of the court, the court requested the court orderly to call three times the names of the respondent 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 court order, was already on board.

[3] What is disturbing about the instant matter is this: Mr Juuso Kambueshe (also known as Mr Frank Kambueshe, as appears on the papers) had just left the courtroom after participating in a just-ended proceedings in Case No. 2017/03250. Upon such intimation from the bar by Ms Kuuzeko, the court asked the court orderly to call Mr Juuso Kambueshe (also known as Mr Frank Kambueshe) to return to the court. He returned to the courtroom, whereupon the court asked him if he was not involved in the instant matter. His unequivocal response was that he was not, and he quickly left the courtroom for the proceedings to take place in his absence. Yet he was the one who filed the notice of intention to defend the action in the first place. He had also filed an answering affidavit in some proceedings on 14 June

2023 under the instant matter.

[4] Speaking for myself, I would say, such conduct is yet another example where an execution debtor has made unconscionable attempts to prostitute rule 108 which is meant to stave off by judicial oversight uncontrolled execution against immovable property.

[5] 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.<sup>1</sup> 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 Katjuongua v First National Bank of Namibia Limited*<sup>2</sup> 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.'

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

[7] 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,

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

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

the court should be seen to have enquired into whether there existed 'available, viable and less drastic alternatives to declaring the property specially executable'.<sup>3</sup>

[8] The following superlatively crucial point is stated in capitalities: The *Kisilipile* 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).

[9] 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.<sup>4</sup> 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 is nothing placed before the court to indicate that the property was leased to a lessee.

[10] There was no antipodean material placed before the court to resist the granting of the application. In the circumstances, the court cannot carry out the exercise to satisfy the aforementioned *Kisilipile* requirements.

[11] 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. The following immovable property is hereby declared specially executable:

A unit ("the mortgage unit") consisting of-

(a) Section No. 28

As shown and more fully described on Sectional Plan No. 7/2005 in the building or buildings known as VOGELSICHT situate at VOGELSTRAND in the Municipality of SWAKOPMUND, Registration division "G" ERONGO Region of which the floor area, according to the said Sectional Plan is 75 (SEVENTY-FIVE) square metres in extent; and

<sup>3</sup> *Kisilipile Niklaas and Lydia Vaanda Katjuongua* footnote 2 para 24.

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

(b) An undivided share in common property in the land and building or buildings as shown and more fully described on the said plan, apportioned to the said section in accordance with the participation quota of the said section,

Held under Certificate of Registered Sectional Title No. 7/2005(28) (Unit) dated 25 February 2005.

2. Payment of applicant's costs of suit on a scale as between attorney (legal practitioner) and client.
3. The matter is finalised and removed from the roll.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
M U Kuzeeko Of Dr Weder, Kauta & Hoveka Inc., Windhoek	No appearance