

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Practice Directive 61

RULING ON RULE 108 APPLICATION

Case Title: Bank Windhoek Limited and Jimmy Johny Dax Rachel Dax	Applicant 1st Respondent 2nd Respondent	Case No: HC-MD-CIV-ACT-CON- 2022/05174
		Division of Court: Main Division
		Heard on: 27 October 2023
Heard before: Masuku, J	Delivered on: 25 January 2024	
Neutral citation: <i>Bank Windhoek Limited v Dax</i> (HC-MD-CIV-ACT-CON-2022/05174) [2024] NAHCMD 10 (25 January 2024)		
Order: 1. The following immovable property is hereby declared specially executable: CERTAIN: ERF NO. 57 EPAKO SITUATE: IN THE MUNICIPALITY OF GOBABIS REGISTRATION DIVISION "L" OMAHEKE REGION MEASURING: 550 (FIVE HUNDRED AND FIFTY) SQUARE METRES HELD BY: DEED OF TRANSFER NO. T4304/2020		

SUBJECT: TO ALL THE CONDITIONS CONTAINED THEREIN

2. The respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit regarding the rule 108 application.
3. The matter is regarded as finalised and removed from the roll.

Reasons for order:

MASUKU, J:

Introduction

[1] This is an application, in terms of rule 108 of the rules of this court, in which the applicant prays that the property described herein below be declared specially executable, namely:

CERTAIN: ERF NO. 57 EPAKO

SITUATE: IN THE MUNICIPALITY OF GOBABIS
REGISTRATION DIVISION "L"
OMAHEKE REGION

MEASURING: 550 (FIVE HUNDRED AND FIFTY) SQUARE METRES

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[2] The applicant's application is founded on the fact that the respondents breached some agreements between them and the applicant, culminating in the applicant instituting legal action against the first respondent, on three claims. It is important to mention that judgment was entered in favour of the applicant in respect of the said claims. The claims are summarised as follows:

CLAIM 1

[2.1] On April 2020 and at Windhoek, the applicant, duly represented by Ms. M Pretorius and the first and second respondent acting in their personal capacities, entered into a written mortgage loan agreement. The applicant advanced an amount of N\$450 000 to the respondents. The loan was repayable in 240 monthly instalments of approximately N\$4 100,50.

[2.2] The first and second respondent would register a first and covering mortgage bond in favour of the applicant over Erf No. 57 Epako, G Dawids Street, Gobabis, Republic of Namibia, for all amounts which the first and second respondent owe or may at any time thereafter owe to the applicant, arising from this agreement or any other cause.

[2.3] The first and second respondent have breached the agreement by failing to pay the monthly instalments and therefor, the whole amount of N\$ 473 398,98 in terms of the loan agreement became due and payable.

CLAIM 2

[2.4] On 06 June 2022 and at Windhoek, the applicant, duly represented by Ms S Hoosain, and the first respondent acting in his personal capacity, concluded a partly written, partly oral overdraft agreement in terms of which the applicant provided the first respondent with an overdraft facility of N\$11 000.00.

[2.5] The first respondent in breach of the facility agreement, failed to effect payments timeously and at all and is therefor indebted to the applicant in the amount of N\$11 051.67.

CLAIM 3

[2.6] On 12 February 2021 and at Windhoek, and or Gobabis, the applicant duly represented by Mr Frank van Rooyen and the first respondent in his personal capacity, entered into an oral credit card facility agreement, in terms of which the applicant granted credit card facilities to the first respondent on a credit card number 80221177204 in the amount of N\$30 000.00.

[2.7] The first respondent utilised and depleted the credit facility, and in breach of the agreement, he failed to effect payments timeously.

The arguments

[3] The first respondent, submitted that he is experiencing a financial crisis. In his affidavit objecting to the rule 108 application, he stated that he lost his sister and catered financially for her interment. He went on to state further that his daughter had an operation at the Rhino Park private hospital and he paid for her medical costs. The first respondent indicated that he is still experiencing financial constraints and requested the court to grant him a grace period within which to sort out his financial position.

[4] It is worth pointing out that the first respondent, in his affidavit objecting to the rule 108 application, made no mention of the fact that Erf No. 57, Epako, in the district of Gobabis is his primary home.

[5] The applicant filed a replying affidavit, in which it stated that the immovable property stands as security for the judgment debt(s) and the respondents have not indicated how, if at all, they can afford to pay the judgment debt even if it is in instalments. Further, the applicant submitted that there are no projected earnings or income and/or income and expenses documents disclosed that would demonstrate the respondents' ability to pay the judgment debt in the future even if it is in instalments and at the same time afford to continue to service their other living expenses. In short, the applicant submitted that this is a proper case in which the relief sought should be granted.

Analysis

[6] Damaseb P, in his work titled *Court Managed Civil Procedure of the High Court of Namibia*,¹ had the occasion to discuss the execution on hypothecated immovable property and stated as follows at para 13-046:

'The rule must not become the means by which to frustrate the legitimate commercial interests of a creditor to seek satisfaction of a judgment debt. It should be borne in mind that the judgment creditor is limited to only two opportunities to have a primary home declared specially executable. On the other hand, an execution debtor who offers a viable alternative that would reasonably satisfy the

¹ P. Damaseb. (2020). *Court-Managed Civil Procedure of the High Court of Namibia*. Cape Town: Juta & company (Pty) Ltd, p. 334.

debt of the execution creditor must not be left homeless where doing so does not meet the legitimate interest of modern-day commerce and the country's overall financial system, which rely on credit extension to the majority of the population.'

[7] In terms of rule 108 (2):

'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'.

[8] In our jurisdiction, when it comes to the sale of immovable property in execution, the court should consider whether the property sought to be specially executed is the primary home of the respondent. If it is, the court must proceed to consider whether there are less drastic measures available rather than the sale in execution. Where the judgment debtor fails to state that the property in question is the primary home, this does not relieve the court of its obligation to enquire into the availability or otherwise of less drastic alternative measures.²

[9] The respondents signed the immovable property Erf No.57, Epako, Gobabis, as security for all the debts they owe to the applicant, and so far they are in breach of three agreements.

[10] It is common cause that the respondents made no submissions on whether the immovable property in question is their primary home. More importantly, there are no measures suggested to the court by the respondents that would serve as less drastic, for the

² *Kisilipile v First National Bank of Namibia Limited* (SA 65 of 2019) [2021] NASC 52 (25 August 2021) para 18.

court to consider in deciding whether or not to grant the applicant's order.

[11] The court has considered the personal circumstances of the respondents, however, it would not be fair nor in the interest of justice for the court to act from the reservoirs of pity in making a judgment on whether to grant the applicant's order. The weight of applicable legal authority unfortunately stacked against the respondents, as a result of which the court's hands are tied.

[12] As a result, I make the following order:

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

CERTAIN: ERF NO. 57 EPAKO

SITUATE: IN THE MUNICIPALITY OF GOBABIS
REGISTRATION DIVISION "L"
OMAHEKE REGION

MEASURING: 550 (FIVE HUNDRED AND FIFTY) SQUARE METRES

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Judge's signature	Note to the parties:
T Masuku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
In person	Tshuka Luvindao

Mr Jimmy Dax	Dr weder Kauta and Hoveka Inc. Windhoek
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