

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

Case Title: STANDARD BANK NAMIBIA LTD and FARAI HANSEN MUKUMBA	Case No: HC-MD-CIV-ACT-CON-2022/00623 Division of Court: HIGH COURT (MAIN DIVISION) DEFENDANT
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 15 March 2024 Delivered on: 12 April 2024
Neutral citation: <i>Standard Bank Namibia Ltd v Mukumba</i> (HC-MD-CIV-ACT-CON-2022/00623) [2024] NAHCMD 168 (12 April 2024)	
Results on merits: Merits not considered.	
The order: 1. The immovable property known as Erf No 1021, Osona Village (Extension No 3), in the Municipality of Okahandja, Registration Division "J", Otjozondjupa Region, and held by Deed of Transfer No. T 8958/2019, is declared specifically executable as envisaged in rule 108 (1)(b). 2. The Defendant must pay the costs of this application on an attorney and client scale. 3. The matter is finalised and removed from the roll.	

Reasons for orders:

Prinsloo J:

Introduction

[1] Serving before this court for determination is an application in terms of rule 108, in which the applicant seeks an order declaring the immovable property of the respondent executable. The property in question is hypothecated in favour of the applicant by the registration of a first mortgage bond under bond number B 7738/2019.

[2] The applicant instituted action against the respondent on 16 February 2022 and obtained default judgment in its favour on 25 April 2022, in the amount of N\$926 427.09, together with interest and costs.

[3] To date, this judgment remains unsatisfied. A writ of execution of movable property was issued on 9 May 2022. However, a nulla bona was issued on 28 November 2022.

[4] The property sought to be declared executable is described as Erf no. 1021, Osona Village (Extension No. 3) in the Municipality of Okahandja, Registration Division "J", Otjizondjupa Region, Namibia, and held by Deed of Transfer No. T 8958/2019. The respondent opposed the application.

The opposition and less drastic measures proposed

[5] The respondent's main opposition to the application is that the immovable property in question is his primary home. The respondent contended that he was unable to pay the instalments from June 2020 as a result of the COVID 19 pandemic, and the school where he is employed closed down.

[6] The respondent conceded that the current arrears are approximately N\$220 344 but submitted that, given the opportunity, he would be able to settle the arrears together with his monthly bond payments. The respondent indicated that he requires 36 months to catch up with

the arrears. In the alternative, he is in the process of securing a buyer for the property, and if successful, he would be able to settle the mortgage bond.

Arguments advanced

On behalf of the applicant

[7] Mr Gaya strongly denied that the property in question is the respondent's primary home. In support of his contention, Mr Gaya referred the court to the return of service of the Deputy Sheriff dated 30 November 2022, in which he indicated that the dwelling was vacant.

[8] Mr Gaya emphasized that all the procedures relating to the rule 108 proceedings were personally served on the respondent at Onethindi, Ondangwa District. The documents were served in the North because the respondent works as an administrator at a private school located in Onethindi, which is approximately 500 kilometres away from the property. Everything, therefore, points to Onethindi as the respondent's primary home, and the property in Okahandja is not the respondent's primary home.

[9] On the issue of less drastic measures, Mr Gaya argued that the respondent's payment history is inconsistent with the averment that his financial position has improved. The respondent failed to present anything of substance to the court to convince the court that he would be able to comply with his regular bond payment obligations and pay the arrears.

[10] Mr Gaya advanced the argument that the respondent did not make any submissions on his income and expenditure. As a result, the court cannot determine the feasibility of the proposed less drastic measures. Mr Gaya further contended that the less drastic measures should also be in the best interest of the Bank's commercial interests.

On behalf of the respondent

[11] Mr Nanhapo argued that the court must distinguish between the respondent's primary home and his temporary residence at his place of employment. He contended that the applicant furnished no evidence that the Okahandja property is not the respondent's primary home. He submitted that the court cannot find that this property is not the respondent's primary home on the basis of the Deputy Sheriff's return of service. The Deputy Sheriff visited the property once,

but that does not mean that the property has been vacant to this day.

[12] According to counsel, the respondent is employed at Onethindi, but he does not own property there or elsewhere, apart from the Okahandja house.

[13] Mr Nanhapo argued that the Namibian economy had been severely impacted by the COVID-19 pandemic, causing financial hardship for many individuals and families. However, despite these challenges, the respondent is committed to making payments towards his mortgage bond. While acknowledging that the payments have been inconsistent, Mr Nanhapo emphasized that the delays were not intentional or wilful.

[14] Counsel argued that the mortgage bond spans over 20 years, and the respondent was only in his sixth year of payment towards the bond. Therefore, if the respondent is allowed to repay the arrears in 36 months together with his monthly payments, he will pay off the bond within the agreed period of 20 years. Alternatively, if the respondent is allowed to sell the house, he will be able to sell the house at approximately 85% of the house value, which would be a win-win for both parties.

[15] Mr Nanhapo contended there are thus less drastic measures available which are viable and which would not defeat the commercial interest of the Bank. However, should the court grant the order sought, it would leave the respondent and his family homeless.

Legal principles and the application thereof

[16] When considering such an application, the court must weigh the two competing interests and reach an equitable decision.

[17] The main point of contention between the parties is whether the property in question is the primary home of the respondent or not. It is agreed that the respondent works and lives in Onethindi. The question at hand is whether the Okahandja property can be considered as the respondent's primary residence, given his work circumstances.

[18] The second issue to consider is whether the respondent discharged the evidentiary burden resting on him with respect to less drastic measures that can be followed in order to avoid an order declaring the property executable.

Primary home

[19] When it comes to attachment in execution of immovable property, there is a distinction made between the judgment debtor's 'primary home' and any other immovable property.

[20] Damaseb JP contends that although 'primary home' is not defined in either the High Court Act or rules of court, the manifest intent is to confine it to the home in which the judgment debtor or lessee ordinarily resides, either alone or with his or her family.¹

[21] In *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd*, Masuku J defined primary home as follows:²

'A primary home....would refer to a permanent structure as described above, which constitutes the only viable place that provides shelter and protection from the vicissitudes of the weather and the elements to an individual person, family or even extended family, considering that we live in an African setting.' (emphasis added)

[22] If regard is had to the definitions above of what a 'primary home' would constitute, then the respondent would fail on both accounts. Firstly, he does not permanently stay in the said house as he works and stays 500 kilometres away, and secondly, when the Deputy Sherriff attempted to serve process on the respondent, he observed that the house was vacant.

[23] In my understanding, vacant means it was not occupied or empty.

[24] The respondent's reliance on the fact that this property is his 'primary home' is brandished like a sword and shield to veer off the applicant's current application. Even if the respondent's primary home is confirmed by the court, it does not guarantee the property's immunity from being declared executable.

[25] This is not an instance where part of the respondent's family permanently resides in the house, and he commutes between his family home and his place of employment. Moreover, the fact that the house is vacant indicates that the respondent does not consider it as his primary residence. Therefore, in my considered view, the property cannot be considered as the

¹ PT Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia*, 1st Ed 2020, Juta at 13-020.

² *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC) at 37.

respondent's primary home.

Less drastic measures

[26] The execution debtor bears the evidential burden of proving that there are reasons why the property should not be declared executable. The execution creditor is entitled to satisfaction of the judgment obtained.

[27] Mr Nanhapo referred the court to *Kisipile v First National Bank Namibia Ltd*,³ wherein the Supreme Court stated that the court should also take into consideration the payment history of the debtor and greater latitude should be given to the debtor who has a reasonably good payment history. He submitted that the applicant failed to allege that the respondent has a bad payment history and that a repayment agreement is not a viable option as a result thereof.

[28] I have difficulty with Mr Nanhapo's argument as he conceded during the oral argument that the respondent deliberately stopped making payments towards his bond when the applicant issued summons against him. This behaviour is not a characteristic of a responsible debtor. Therefore, the claim that the non-payment was not intentional doesn't hold any ground. To stop making payments towards the bond without any valid reason is evidence of a lack of willingness to pay. This conduct goes against the claim of having a genuine inability to pay.

[29] I am willing to acknowledge the fact that the respondent faced financial difficulties due to the closure of the school during the COVID-19 pandemic, which resulted in him not earning any salary. I also understand that he fell behind on his payments as a result of this situation. However, the respondent failed to provide any evidence to the court regarding when his financial position improved or what his current financial situation is. Although the respondent suggests that he will repay the arrears along with his current bond payment, there is no proof to support his claim that he is capable of doing so. It is important to confirm that this proposal is not just an empty promise that he won't be able to fulfil.

[30] The respondent has proposed that the applicant should allow him to sell the immovable property. However, he has not provided clear information to the court regarding the efforts made to find a potential buyer. It is unclear whether any efforts were made in this regard.

³ *Kisipile v First National Bank Namibia Ltd* (SA 65-2019) [2021] NASC (25 August 2021) para 21.

Conclusion

[31] Having considered all the facts placed before this court, I must find that the property in question is not the respondent's primary home and that the respondent has failed to make out a case for acceptable payment arrangements or other means less drastic than the sale of the property in execution.

Costs

[32] The respondent is liable for the costs of this application.

Order

[33] My order is set out above.

Note to the parties:

Not applicable.

Counsel:**Applicant**

J Gaya
Fisher, Quarmby & Pfeifer
Windhoek

Respondent

T Nanhapo
T Nanhapo Inc.
Windhoek