

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Bank Windhoek Limited and Surine Bekker Theoniel Bekker	Case No: HC-MD-CIV-ACT-CON-2023/01870 Division of Court: Main Division Heard on: 28 March 2024
Case Title: Bank Windhoek Limited and Surine Bekker Theoniel Bekker	Case No: HC-MD-CIV-ACT-CON-2023/01870 Division of Court: Main Division Heard on: 28 March 2024
Plaintiff: Bank Windhoek Limited	Defendants: Surine Bekker Theoniel Bekker
Heard before: Honourable Mr Justice Usiku	Delivered on: 22 April 2024
Neutral citation: <i>Bank Windhoek Limited v Bekker</i> (HC-MD-CIV-ACT-CON-2023/01870) [2024] NAHCMD 183 (22 April 2024)	
Order: 1. The court grants judgment in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, in the following terms: (a) Payment in the amount of N\$2 182 497.14; (b) Compound interest calculated daily and capitalized monthly on the amount of N\$2 182 497.14 at plaintiff's Prime Lending Rate of interest from time to time, currently 10.75% plus 1.50% per annum calculated from 6 March 2023 to date of final payment; (c) The following immovable property is declared specially executable, namely: CERTAIN: ERF NO. 895 (A PORTION OF ERF 891) TSUMEB SITUATE: IN THE MUNICIPALITY OF TSUMEB REGISTRATION DIVISION "B" OSHIKOTO REGION	

MEASURING: 1952 (ONE THOUSAND NINE HUNDRED AND FIFTY TWO) SQUARE METRES

HELD: UNDER DEED OF TRANSFER NO. T3231/2016;

(d) Costs of suit on a scale as between Attorney and client as agreed.

2. The declaration of executability of the immovable property is stayed for a period of four months from the date of this judgment.

3. The matter is removed from the roll and is regarded as finalised.

Reasons for order:

USIKU J:

Introduction

[1] This is an application by the plaintiff against the defendants, for summary judgment in terms of rule 60 of the rules of this court. For the sake of convenience, I shall refer to the parties as they are cited in the action. The plaintiff seeks relief in the following terms:

'1. Payment in the amount of N\$2 182 497.14.

2. Compound interest calculated daily and capitalised monthly on the amount of N\$2 182 497.14 at plaintiff's prime lending rate of interest from time to time, currently 10.75% plus 1.50% per annum calculated from 6 March 2023 to date of final payment.

3. An order declaring the following immovable property executable:

CERTAIN: ERF NO. 895 (A PORTION OF ERF 891) TSUMEB

SITUATE: IN THE MUNICIPALITY OF TSUMEB

REGISTRATION DIVISION "B"

OSHIKOTO REGION

MEASURING: 1952 (ONE THOUSAND NINE HUNDRED AND FIFTY TWO) SQUARE METRES

HELD: UNDER DEED OF TRANSFER NO. T3231/2016

4. Costs of suit on a scale as between attorney and client as agreed.

5. Further and/or alternative relief.'

[2] During oral arguments, the defendants indicated that they do not contest the granting of prayers 1, 2 and 4 as set out in the plaintiff's notice of motion. However, the defendants oppose the granting of prayers 3, namely, the declaration of the immovable property as specially executable. The court is satisfied that having regard to the contents of the summary judgment application, the plaintiff is entitled to the relief as set out in prayers 1, 2 and 4, and same stand to be granted.

[3] The main issue for determination is whether the plaintiff is entitled to prayer 3.

Whether or not the immovable property should be declared specially executable

[4] According to the particulars of claim, the plaintiff and the defendants entered into a written loan agreement on or about 30 December 2020 and 4 January 2021, in terms of which a sum of N\$2 145 000 together with interest at the rate of the plaintiff's prime interest rate (of 7.26% at that time) per annum, was advanced and lent to the defendants. The defendants hypothecated the immovable property, known as:

Certain: Erf no. 895 (a portion of Erf 891) Tsumeb

Situate: In the Municipality of Tsumeb

Registration Division "B"

Oshikoto Region

Measuring: 1952 square metres

in favour of the plaintiff as security for their indebtedness. It is further alleged that the defendants defaulted on the agreement as they failed to pay the full amount due in respect of instalments due for the period of 1 December 2022 up to and including 6 March 2023 in the amount of N\$137 099.03. Despite demand, the defendants have failed to remedy the breach.

[5] The plaintiff asserts that the defendants are indebted to the plaintiff for the full outstanding balance in the amount of N\$2 182 497.14 plus interest thereon at the rate of 10.75% plus 1.50% per annum. The plaintiff has advised the defendants of its intention to seek an order declaring the immovable property executable in terms of rule 108(2) and has invited them to place relevant facts and/or circumstances before this court and show cause why the property should not be declared executable.

[6] The plaintiff thus, seeks to have immovable property declared specially executable simultaneously with the granting of summary judgment.

[7] The defendants resist the granting of the relief sought on the basis that:

(a) the property in question is a guesthouse as well as the primary home of residence of the defendants;

(b) the defendants have used their money to upgrade the property from a theatre to a guesthouse and permanent home, in order to generate income. As a result of COVID 19 and lost catering tenders, the defendants were unable to maintain the monthly instalments;

(c) currently the defendants have temporarily moved to Windhoek to seek other business opportunities to strengthen their earning capacity to enable them to pay back the loan;

(d) the guesthouse is currently generating an income and the defendants believe it will increase the extent that the outstanding balance can be settled. The defendants will be in a position to make an offer for a down payment soon;

(e) the second defendant has applied for a management position at a lodge in the south, which income is assisting the defendants to generate financial resources to increase their financial capability. The defendants believe they will be in position to service the loan between 8 to 12 months and that;

(f) the defendants will be able to service the debt once the occupancy rate of the guesthouse increases. In addition, the first defendant is generating an income from her own business that does hospitality training, social media management and website design;

(g) the defendants' approximate collective income per month amounts to N\$80 000. The defendants expect to be able to be on track with a payment schedule within a period of one year.

[8] The defendants therefore, submit that an alternative solution exists to pay off the debt and pray that an order declaring the property executable should be refused.

[9] During oral argument, counsel for the defendants submitted that the defendants have established existence of less drastic measures than the sale of the primary residence and requested that the matter be stood down and be postponed to a future date so that an enquiry

contemplated by the provisions of rule 108(2) is conducted.

[10] On the other hand, the plaintiff submitted that the defendants have not established existence of less drastic measures and that the relief prayed for be granted.

Analysis

[11] The principal issue for determination is whether the defendants have established existence of less drastic measures than the sale in execution of the immovable property.

[12] For the purpose of this judgment I shall accept the factual allegations made by the defendants as correct, except where otherwise stated. I shall therefore, accept that the property in question is the primary home of the defendants.

[13] The defendants oppose the relief sought by the plaintiff, mainly, on the basis that they need time for their finances to improve. According to their evidence, the defendants expect to be able to start paying off the debt within a period of one year. In other words, the less drastic measure put forth by the defendants to avoid a sale in execution is a plea that the defendants be afforded more time, in the hope that their earning capacity may improve in 8 to 12 months to enable them to service the debt.

[14] I am not persuaded that the 'alternatives' put forth are viable. The defendants have not set out concrete facts upon which their belief is based that their financial situation may improve during the suggested period. I am of the view that, the 'alternatives' suggested by the defendants amount to defeating the commercial interest of the plaintiff and will be equivalent to non-payment.

[15] In the present matter, the defendants were advised by the plaintiff well in advance, that the application will be made for an order declaring the property executable and the defendants are given an opportunity to oppose the application, if so inclined. The defendants have opposed the application and have given their reasons for so doing. There is therefore, no reason to accede to the request by the defendant's counsel that the matter be postponed to a future date to conduct a different and separate rule 108 enquiry.

[16] It is trite that an order for the property to be declared executable can be sought in an

application for summary judgment, as long as a plaintiff has informed the defendant in terms of rule 108(2) that an application for such order will be made and the defendant is given an opportunity to oppose such an order, if so inclined.¹

[17] I am of the view that, in the absence of viable less drastic alternatives, the relief sought by the plaintiff must be granted. The foregoing notwithstanding, I have given consideration to the fact that the current economic climate is not favourable (though this does not constitute a less drastic measure), and deem it appropriate, in the circumstances, to give the defendants opportunity to get their affairs in order, by suspending the execution of the immovable property for a period of four months. I shall therefore make an order to that effect.

[18] In the result, I make the following order:

1. The court grants judgment in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved, in the following terms:

(a) Payment in the amount of N\$2 182 497.14;

(b) Compound interest calculated daily and capitalized monthly on the amount of N\$2 182 497.14 at plaintiff's Prime Lending Rate of interest from time to time, currently 10.75% plus 1.50% per annum calculated from 6 March 2023 to date of final payment;

(c) The following immovable property is declared specially executable, namely:

CERTAIN: ERF NO. 895 (A PORTION OF ERF 891) TSUMEB

SITUATE: IN THE MUNICIPALITY OF TSUMEB

REGISTRATION DIVISION "B"

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MEASURING: 1952 (ONE THOUSAND NINE HUNDRED AND FIFTY TWO) SQUARE METRES

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(d) Costs of suit on a scale as between Attorney and client as agreed.

2. The declaration of executability of the immovable property is stayed for a period of four months from the date of this judgment.

¹ *Standard Bank Namibia Limited v Shipila* 2018 (3) NR 849 at 867 paras 65, 66 and 69.

3. The matter is removed from the roll and is regarded as finalised.	
Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	1st and 2nd Defendant:
T Martin Of Dr Weder, Kauta & Hoveka Inc., Windhoek	S Horn Of Theunissen, Louw & Partners, Windhoek