REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING: SUMMARY JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2023/04812

In the matter between:

BANK WINDHOEK LIMITED **PLAINTIFF**

and

KHOMAS ALUMMINIUM AND GLASS CC **1ST DEFENDANT**
I-CHUAN KUO **2ND DEFENDANT**
FRIEDENAU STREET PROPERTY DEVELOPERS ONE CC **3RD DEFENDANT**
CHIU-MIN KUO WANG **4TH DEFENDANT**

Neutral Citation: *Bank Windhoek Limited vs Khomas Aluminium and Glass CC* (HC-MD-CIV-ACT-CON-2023/04812) [2024] NAHCMD 199 (30 April 2024)

CORAM: UEITELE J
Heard: **28 March 2024**
Delivered: **30 April 2024**

Flynote: Practice — Summary Judgment — Declaring immovable property specially executable — Limited procedure provided for under rule 60 — Application for summary judgment and an application to declare immovable property specially executable cannot be brought in one application or together.

Summary: In July 2019, the plaintiff and the first defendant concluded a written commercial loan agreement in terms of which the plaintiff lend and advanced the amount of N$18 901 000 plus stamp duties and other fees to the first defendant. In terms of the agreement, the defendant would repay this loan over a period of 5 years, with 59 monthly instalments of approximately N$221 682.82.

Shortly thereafter, the plaintiff and the first defendant then concluded a written overdraft agreement. The plaintiff also provided the second defendant with an overdraft facility which was taken over by the first defendant. The third and fourth defendants bound themselves as surety and co-principal debtors for the due and proper fulfilment of all obligations of the first and second defendants arising out of the loan agreements and the overdraft facilities.

The plaintiff instituted proceedings against the defendants when the first defendant failed to pay its monthly installments as and when they became due. The plaintiff, amongst others, sought payment in the amount of N$30 768 884.21 from the defendant as well as an order declaring certain immovable properties of the defendants, which was bonded as security for the loan and overdraft facilities repayment, specially executable.

Held that: the court exerts strict compliance with the rules and legal requirements and only grants summary judgment in cases where the applicant for the relief has an unanswerable case.

Held that: a court must be careful to guard against injustice to a defendant who is called upon at short notice and without the benefit of discovery or cross-examination, to satisfy that he has a bona fide defence.

Held further that: the procedure provided for under rule 60 is for a limited objective namely, to enable a plaintiff with a clear and unanswerable claim to obtain a swift judgment. It is thus clear that summary judgment procedure was designed to avoid delays at trials. On the other hand, a claim to declare immovable property executable is a post-trial procedure and is governed by rule 108.

Held that: an order declaring an immovable property executable is as a general rule a post-trial procedure, in other words it is a procedure setting out how judgment debt can be satisfied.

Held further that: the procedure governing applications for summary judgment and the procedure governing applications to declare immovable property executable are two separate procedures and they must not be conflated.

Held further that: as a general rule, an application for summary judgment and an application to declare immovable property specially executable cannot be brought in one application or together.

ORDER

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1. The first to the fourth defendants must, jointly and severally, the one paying the others to be absolved:

1.1 in respect of the commercial loan agreement (on account number CL4000071001), pay to the plaintiff the amount of N$21 441 663.24 plus compound interest calculated daily and capitalized monthly on the amount of N$21 441 663.24 at plaintiff's prime lending rate of interest from time to time, currently 11.5%, plus 1.5% per annum calculated from 3 October 2023 to date of final payment both days included; and

1.2 in respect of the overdraft facility (on account number IL5004236434 previously account number 8002295382) pay to the plaintiff the amount

of N$8 379 958.41 plus compound interest calculated daily and capitalized monthly on the amount of N$8 379 958.41 at the plaintiff's prime lending rate of interest from time to time, currently 11.5%, plus 1.5% per year calculated from 3 October 2023 to date of final payment both days included; and

1.3 in respect of the overdraft facility (on account number IL5004236445 previous account number 8002295089) pay to the plaintiff the amount of N$947 262.56 plus compound interest calculated daily and capitalized monthly on the amount of N$947 262.56 at the plaintiff's prime lending rate of interest from time to time, currently 11.5%, plus 1.5% per year calculated from 3 October 2023 to date of final payment both days included.

2. The first to the fourth defendants must, jointly and severally, the one paying the others to be absolved, pay the plaintiff's costs of suit.

3. The prayer to declare the immovable property executable is refused because there is no application in accordance with rule 108 before court.

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

JUDGMENT

UEITELE J:

Introduction

[1] Bank Windhoek Limited, the plaintiff in the main action and the applicant in this summary judgment application, instituted proceedings against four defendants, who are the four respondents in this summary judgment application, for the payment

of the balance of money it lent and advanced to a close corporation named Khomas Aluminium and Glass CC (the first defendant in the action). In addition to the payment of the moneys claimed, the plaintiff also sought certain immovable properties belonging to the first defendant to be declared specially executable.

[2] The background facts which gave rise to the application for summary judgment are in summary these. On 4 July 2019 and at Windhoek, the plaintiff, and Khomas Aluminium and Glass CC (the first defendant) concluded a written commercial loan agreement in terms of which the plaintiff lent and advanced the amount of N$18 901 000 plus stamp duties and other fees or charges as set out in paragraph 2.2 of the agreement to the first defendant. It was a term of the agreement that defendant would repay the loan over 5 years, with 59 monthly instalments of approximately N$221 682.82.

[3] On 31 January 2022, the plaintiff and the first defendant concluded a written overdraft agreement in terms whereof the plaintiff provided the first defendant with an overdraft facility of N$7 765 000 which overdraft facility would expire on 20 May 2022. On 31 January 2023, the overdraft facility was extended to N$7 990 000. On 31 January 2022 and at Windhoek, the plaintiff provided the second defendant with an overdraft facility of N$100 000 which would expire on 20 May 2022. On 31 January 2023, overdraft facility of N$100 000 was extended to N$900 000 and taken over by the first defendant. The third and fourth defendants bound themselves as surety and co-principal debtors for the due and proper fulfilment of all obligations of the first and second defendants arising out of the loan agreements and the overdraft facilities.

[4] Alleging that the first defendant breached the loan agreement and the overdraft facilities in that it failed to make payments of monthly installments as and when they became due, the plaintiff during October 2023 commenced proceedings by issuing summons out of this court seeking amongst other remedies, payment from the defendants, jointly and severally in a total amount of N$30 768 884.21. The plaintiff, in addition to the payment, sought an order declaring immovable properties which was bonded as security for the loan and overdraft facilities repayment, specially executable.

[5] The defendants, faced with the combined summons, filed a notice of intention to defend the plaintiff's claim. This was swiftly met with an application for summary judgment, with the plaintiff contending that the defendants have no valid or bona fide defence to its claims. The plaintiff alleged that the defendants filed the notice to defend for no other purpose than to delay the plaintiff in the enjoyment of the fruits of its judgment.

<u>The defendants' basis of opposing the summary judgment application</u>

[6] As they were entitled to, the defendants filed an answering affidavit in response to the plaintiff's allegations filed in support of the application for summary judgment. The second defendant, Mr I-Chuan Kuo, deposed to the answering affidavit on behalf of the defendants. The main contention by the defendants is that they have not filed the notice to defend for the nefarious purpose of delaying the granting of the judgment.

[7] Mr I-Chuan Kuo, in his answering affidavit, contends that the plaintiff pleaded that he (I-Chuan Kuo) represented the first defendant when the commercial loan agreement was concluded. The plaintiff, however, failed to attach any document on the basis which this court ought to make a determination that he (Mr I-Chuan Kuo) was duly authorized to act and bind the first defendant to the loan agreement. He deposed that he was advised that where any act of a member of a close corporation is performed for a purpose apparently not connected with the ordinary course of the business of the corporation stated in its founding statement or actually being carried on by it at the time of the performance of the act, the corporation shall not be bound by such act, unless the act has in fact been authorized or is ratified as contemplated in subsection (2)(a) of the Close Corporation Act 26 of 1988 (the Close Corporation Act).

[8] As regards the second and third claims in respect of the overdraft facilities, Mr I-Chuan Kuo deposed that, although he was authorised to act on behalf of the first defendant, the overdraft facilities and the extension of the overdraft facilities were not signed on behalf of the first defendant. He thus contended that in so far as the plaintiff was relying on a tacit agreement, the plaintiff had to, on a preponderance of

probabilities, prove conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement. This, the contention continued, requires the leading of evidence. The fact that the first defendant used the overdraft facility cannot be conclusive proof that the first defendant agreed to be bound to the terms and conditions which the plaintiff pleaded.

Summary judgment

[9] Before I restate the principles applicable to summary judgment applications, I pause here and observe that when the matter was called for hearing on 28 March 2024, Mr Alexander who had the previous day filed heads of arguments on behalf of the defendants did not appear for and on behalf of the defendants in their opposition of the summary judgment application. Mr Luvindao, for the plaintiff, proceeded to make his submissions in support of the application. I have, however, considered all the papers that have been filed in this matter, including the heads of argument that were filed both on behalf of the plaintiff and the defendants.

[10] The principles applicable to summary judgment are now well settled. I therefore do not need to rehearse them. I, however, find it worth repeating the rule which provides for a litigant to apply for summary judgment and to emphasize that summary judgment is a stringent remedy, which may permit the granting of a final judgment without affording the defendant the full benefit of a trial.[1] In this regard, the court exerts strict compliance with the rules and legal requirements and only grants summary judgment in cases where the applicant for the relief has an unanswerable case.[2]

[11] Rule 60(1), (2), and (3)[3] provides that:

‘(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is –

[1] See *Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C).
[2] *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC) at 201C – F.
[3] Rules of the High Court of Namibia: High Court Act, 1990.

(a) on a liquid document;

(b) for a liquidated amount in money;
(c) for delivery of a specified movable property; or

(d) for ejectment.

(2) The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts –

(a) verifying the cause of action and the amount, if any, claimed; and

(b) stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

(3) If the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit and the notice of application must state that the application will be set down for hearing on a date fixed in the case plan order.'

[12] A defendant wishing to oppose summary judgment has to invoke the procedure set out in rule 60(5), which provides the following steps to be followed, namely that he or she must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given;[4] or he or she may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may with the leave of court be supplemented by oral evidence) that he or she has a bona fide defence to the claim on which summary judgment is sought.[5]

[13] The enquiry, where a plaintiff has applied for summary judgment is thus whether the defendant has, in his or her affidavit opposing the application for summary judgment, 'fully' disclosed the nature and grounds of his or her defence and the material facts upon which it is founded, and whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim,

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[4] Rule 60(5)(a).
[5] Rule 60(5)(b).

a defence which is both *bona fide* and good in law. It is to that enquiry that I now turn.

Has the defendant fully disclosed his defence?

[14] The matter of *Maharaj v Barclays National Bank Limited,*[6] which has been cited and recited in this court stated that the 'extraordinary and drastic nature' of summary judgment was 'based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law'.[7]

[15] A court must be careful to guard against injustice to a defendant who is called upon at short notice and without the benefit of discovery or cross-examination, to satisfy it that a defendant has a bona fide defence.[8]

[16] At the hearing of this matter, I enquired from Mr Luvindao (counsel for the plaintiff) whether the relief to declare the immovable properties as executable falls within the category of claims contemplated in rule 60(1) and is therefore, available to the plaintiff in summary judgment proceedings. Mr Luvindao argued the relief to declare the immovable property executable is available to a plaintiff at the summary judgment stage. He referred me to three authorities, two from this court and one from the High Court of South Africa (Mpumalanga Division).[9] I will come back to this aspect later in this ruling. I will first deal with the question of whether or not the defendant has satisfied the requirements to fend off a claim for summary judgment.

[17] I mention here that the plaintiff's monetary claims fall in the category of claims contemplated under rule 60(1) of the Rules of this Court. In determining whether the defendants have established a bona fide defence, the court is, under rule 60(5),

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6 *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) 422G.

7 *Maharaj* Supra at 423G.

8 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

9 *Nedbank Namibia Limited v Hallie Investment 116 CC* (HC-MD-CIV- ACT-CON-2022/02817) [2022] NAHCMD 23 (02 February 2023), *Nedbank Limited v Mbuduma's Jazz Club CC and Others* (3486/2020) [2023] ZAMPMHC 40 (8 November 2023). *Bank Windhoek Limited v WIN Information Technology CC* (HC-MD-CIV-ACT-CON-2022/01809) [2022] NAHCMD 639 (22 November 2022).

required to enquire whether the defendants have disclosed the nature and the grounds of the defence and the material facts upon which the defence is based.

[18] The enquiry foreshadowed by rule 60(5) is this: has the defendant 'fully' disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law. If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.[10]

[19] From a consideration of the affidavits and all documents before court, the applicants have presented and verified their claim, together with copies of all documents relied upon in support of the claim, namely a copy of the commercial loan agreement, the letters of award of the overdraft facilities, certificates of the balance of the outstanding money, the deeds of suretyship, the deeds of unlimited suretyship and the mortgage bonds registered as security for the repayment of the loans and the overdraft facility.

[20] In the opposing affidavit deposed to by a member (Mr I-Chuan Kuo) of the first defendant on behalf of the first defendant, the first defendant raised only certain meritless technical points[11] without disclosing the nature and grounds of the defendants' defences to the plaintiff's claim or the material facts relied on for the defences. I say the technical point raised on behalf of the defendants is meritless for the following reasons. The deponent to the defendants answering affidavit, alleges that the plaintiff does not support (by providing documentary proof) its allegation that he was duly authorised to act and bind the first defendant. In *The Town Council of Rehoboth v Swartz & 2 Others*[12] this Court held that:

> 'In terms of the *Turquand rule*, an outsider who enters into a contract with a company in good faith, is entitled to assume that the internal requirements and procedures of the

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10 *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

11 Being those points I referred to in paras 6-8 above in the judgment.

12 *The Town Council of Rehoboth v Swartz & 2 Others* (HC-MD-CIV-ACT-OTH2020/01403) [2022] NAHCMD 126 (18 March 2022).

company, have been complied with. As a result, the company will be bound by the contract even if the internal requirements and procedures were not followed. However, the outsider cannot claim under the *Turquand rule,* if he/she was aware that the internal requirements and procedures have not been complied with. The effect of the *Turquand rule* is that an outsider entering into a contract with a company is not required to ascertain whether the company's internal requirements have been met.

[21] It follows that in this matter, the plaintiff is entitled to assume that the first defendant authorised the second defendant (Mr I-Chuan Kuo), who is also a member of the first defendant, to act and bind the first defendant.

[22] Furthermore, Mr I-Chuan Kuo did not say anything about whether or not he could swear positively to the fact that the first defendant has a bona fide defence to the plaintiff's action. Nowhere in the defendants' opposing affidavits has the deponent to the opposing affidavit specifically stated that the first defendant did not receive the money from the plaintiff or that it was not in arrears with its monthly instalments. On the contrary, in its opposing affidavit, the deponent states that the first defendant did not sign the overdraft facility agreement. The deponent, however, admits that the first defendant received the money from the plaintiff pursuant to the letters of grant of the overdraft facilities and utilised the money, but contended that that fact must not be seen as an admission of a tacit contract.

[23] The admission that the first defendant received moneys from the plaintiff pursuant to the letters of grant of an overdraft facility is, in my view a clear acknowledgment, contrary to what Mr I-Chuan Kuo avers in his affidavit, of the existence of an agreement between the plaintiff and the defendants. The fact that the first defendant allegedly did not sign the letter of grant of the facility is in my view immaterial. Of further significance, is the fact that the first defendant has not, in the opposing affidavit, alleged payment by it of any of the instalments under the loan agreement or the overdraft facility on due date, which were said by the plaintiff to have not been paid. Generally speaking, one would have expected such a statement to have been made in order to establish a bona fide defence for the purposes of resisting summary judgment.

[24] From a consideration of the answering affidavit, I am satisfied that the

defendants have not fully, materially, or at all, shown to the court that there is an arguable or a triable defence in respect of the monetary claims. Instead, as I said only unexplained and meritless technical points were raised.[13] I will thus in respect of the monetary claims grant summary judgment in favour of the plaintiff. I now return to the question of whether an order to declare immovable property executable is competent in summary judgment proceedings.

Is an order to declare immovable property executable competent in summary judgment proceedings

[25] The starting point to the answer of the above question must be rule 60 (1) which I have quoted earlier. Van Winsen & Herbstein reason that summary judgment procedure is designed to enable a plaintiff whose claim falls within a defined category of claims, (claims in respect of: (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified immovable property; or (d) for ejectment) to obtain judgment without the necessity of going to trial in spite of the fact that an intention to raise a defence has been intimated by the delivery of the of a notice of intention to defend.[14]

[26] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[15] Navsa JA reasoned as follows:

> '[29] …A summary judgment procedure was first introduced into our practice by the Magistrates' Courts Act of 1917. It was based upon a procedure introduced in England … whereby a plaintiff was able, by means of a summary proceeding, to obtain a final judgment when there was no *bona fide* defence to an action.
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> [30] In *John Wallingford v The Directors of the Mutual Society,*[16] Lord Hatherley referred to the objects of the new English procedure as follows:
> I apprehend that from the first the objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I

[13] *See Kelnic Construction (Pty) Ltd v Cadilu Fishing* 1998 NR 198.

[14] Cilliers AC, Loots C and Nel HC; *Herbstein & Van Winsen. The Civil Practice of the High Courts of South Africa,* 5th ed p 515.

[15] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

[16] *John Wallingford v The Directors of the Mutual Society* (1880) 5 AC 685 (HL) at 699 – 700.

am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.

[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The *rationale* for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425g - 426e, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment.'

[27] From the above reasoning, it is thus clear that the procedure provided for under rule 60 is for a limited objective namely, to enable a plaintiff with a clear and unanswerable claim to obtain a swift judgment. It is thus clear that summary judgment procedure was designed to avoid delays at trials. On the other hand, a claim to declare immovable property executable is a post-trial procedure and is

governed by rule 108. As I have indicated, I was referred to three judgments where immovable property was declared executable at the summary judgment stage.

[28] The first case is the matter *Bank Windhoek Limited v WIN Information Technology CC*,[17] where the court identified the issues for determination as being whether: (a) the defendants [in that case] have disclosed a bona fide defence to the plaintiff's claim and whether; (b) there are triable issues raised by the defendants in their opposing affidavit. After discussing the defences raised by the defendants in their affidavit resisting summary judgment the court found that 'the defendants have not shown that they have a *bona fide* defence to the plaintiff's claim. Furthermore, the defendants have not raised triable issues entitling them to defend the plaintiff's claim.' The court accordingly granted summary judgment without any discussion of the conditions precedent set out in Rule 108 declared the immovable property specially executable.

[29] The second case is the matter *Nedbank Namibia Limited v Hallie Investment 116*[18]*.* In that matter, the defendant conceded that it had no defence to the plaintiff's claim, the court accordingly proceeded and granted summary judgment. The court then proceeded to consider what it termed the 'second leg of the interlocutory application' namely the Rule 108 application. What is not clear from the court's judgment is whether there were two separate applications or one application. That notwithstanding the court proceeded and found that from the *Kisilipile* judgment[19] an application for default judgment or summary judgment can be brought together with an application for a declaration of executability. The precondition is that the court must exercise judicial oversight in such an instance, specifically where the immovable property is the primary home of a defendant, said Prinsloo J.

[30] The learned Judge relying on the *Kisilipile* judgment proceeded and reasoned that a property which is the subject of an application for declaration of executability is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. The judgment debtor bears the evidential

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[17] *Bank Windhoek Limited v WIN Information Technology CC* (HC-MD-CIV-ACT-CON-2022/01809) [2022] NAHCMD 639 (22 November 2022).

[18] *Nedbank Namibia Limited v Hallie Investment 116 CC* (HC-MD-CIV- ACT-CON-2022/02817) [2022] NAHCMD 23 (02 February 2023).

[19] *Kisilipile and Another v First National Bank of Namibia Ltd* 2021 (4) NR 921 (SC).

burden. He or she should preferably lay the relevant information before court on affidavit especially if assisted by a legal practitioner. No such affidavit, said the court, was filed on behalf of the defendants in that case and on that basis the court declared the property executable. Justice Prinsloo said:

'In fact, the only 'defence' levelled against the declaration of the property executable was that the defendants themselves were selling the property, which is their primary home, to settle the debt owed to the plaintiff. No indication was given on the papers as to how long the defendants had been attempting to sell the property. There has similarly been no indication from the defendants about the possible selling price of the property. The first defendant was served with the Form 24 notice and was afforded the opportunity to address the court on less drastic measures than the sale in execution, which the defendants failed to do.'

[31] It furthermore appears that the court felt that it was bound by the decision in *Kisilipile.* The learned Judge reasoned that:

'[24] Despite drawing Counsel's attention to the *Shipila* matter, Ms Mouton repeatedly argued that the principles outlined in the *Futeni* judgment should be applied strictly to not only this matter but to any similar issues and that this court cannot deviate from the provisions of rule 108.

[26] The *Shipila* judgment was again confirmed in *Kisilipile* v *First National Bank of Namibia Limited*. It is clear from the *Kisilipile* judgment that an application for default judgment or summary judgment can be brought together with an application for a declaration of execution. The precondition is that the court must exercise judicial oversight in such an instance, specifically where the immovable property is the primary home of a defendant.'

[32] The third case is the South African matter of *Nedbank Limited v Mbuduma's Jazz Club CC and Others.*[20] In that matter the plaintiff in addition to seeking summary judgment for the payment of certain amounts, also sought an order to declare creation immovable property executable. At the beginning of the hearing, Counsel for the defendants raised an issue regarding the manner in which the

[20] *Nedbank Limited v Mbuduma's Jazz Club CC and Others* (3486/2020) [2023] ZAMPMHC 40 (8 November 2023).

plaintiff intended to proceed with the applications before court. She contended that the application for summary judgment and the application in terms of Rule 46 [that is to declare immovable property executable] are not suited to be heard in one application for summary judgment. The basis for her contention was that the plaintiff had already proceeded against the defendants by way of action in which it prays for a monetary judgment against the defendants and the executability of the defendants' property.

[33] Counsel for the defendant further argued that because the matter is already ceased by way of action and because the plaintiff could not ask for these prayers together, summary judgment is thus not suited for these proceedings. Her view was that, if the plaintiff asks for relief by way of action then it conceded that kind of dispute, namely, whether the property is executable or not, must be tried by way of action. Counsel for the plaintiff persisted and argued that these applications are to be heard simultaneously depending on whether the plaintiff is successful in its application for summary judgment where after the court can proceed with the rule 46A application.

[34] The court agreed with the plaintiff and granted both the summary judgment and the order declaring the property executable. Vukeya J said:

> 'I could not find merit in the defendants' contentions. The nature of a summary judgment application is such that a summons must be issued and after the defendant has filed its plea, then summary judgment may be obtained. The defendants' argument that if the plaintiff asks for relief by way of action then this means it concedes that the dispute whether the property is executable or not must be tried by way of action cannot be sustained. As soon as summary judgment is obtained over the monetary part of the claim, nothing stops the plaintiff from applying for the executability of the subject property as long as the application has merit. Based on these grounds I ruled that the two applications could proceed simultaneously.'

[35] Article 81 of the Namibian Constitution provides that a decision of the Supreme Court shall be binding on all other courts of Namibia and all persons in Namibia, unless it is reversed by the Supreme Court itself or is contradicted by an

Act of Parliament. In *Digashu and Others v Government of the Republic of Namibia and Others*[21] this court accepted that Article 81 is in essence the constitutional foundation of the principle of *stare decisis* (more commonly referred to as the doctrine of precedent), which encourages the consistent development of legal principles and ensures reliability of judicial decisions. The doctrine of precedent and Article 81 require and bind subordinate courts to the decisions of superior courts. The binding authority of precedent is, however, confined to the *ratio decidendi* (rationale or basis of decision), the binding basis, of a judgment, and not what is subsidiary, termed *obiter dicta* ('considered to be said along the wayside').[22]

[36] In *Kisilipile*[23] the Deputy Chief Justice stated that:

> '[17] Shipila does not decide that when a declaration of executability is sought together with an application for default judgment (or summary judgment for that matter), a court is not bound to consider 'less drastic measures' than an outright sale in execution. In fact, Shipila states the contrary…'

[37] The phrase 'or summary judgment for that matter' in the above quotation is, in my view, a 'by the way' remark by the Deputy Chief Justice. It is a statements which is not necessary to the decision and it goes beyond the occasion and lay down a rule that is unnecessary for the purpose in hand. The phrase is therefore what is generally termed *dicta* or *obiter dicta*. This court is thus at liberty not to follow that statement. I therefore take a view different from that which my sister takes in *Nedbank Namibia Limited v Hallie Investment 116 CC.* Since I regard the statement by the Deputy Chief Justice as *obiter*, I am not bound by the view that an application for summary judgment can be brought together with an application for a declaration of executability. I set out my reasons for the view I take in the next paragraphs.

[38] As I have indicated earlier, summary judgment is a procedure that is available before the trial takes place to avoid delays before a plaintiff can obtain judgment where a defendant has an unmeritorious defence. On the other hand, an order

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[21] *Digashu and Others v Government of the Republic of Namibia and Others* 2022 (1) NR 156 (HC), approved by the Supreme Court.

[22] (*ibid*.:para 62).

[23] *Supra* footnote 17 at p 925.

declaring an immovable property executable is as a general rule a post-trial procedure, in other words it is a procedure setting out how judgment debt can be satisfied. In our jurisdiction execution of judgment debts is governed by Part 11 of the rules of this court and in particular rules 104 (execution: general), 105 (execution: movables), 106 (execution: incorporeal property, liens and real rights), 107 (attachment of debt held by garnishee), 108 (conditions precedent to execution against immovable property and transfer of judgments), 109 (execution: immovable property) and rule 110 (procedure for sale of immovable property).

[39] In terms of Rule 108(1), the registrar may not issue a writ of execution against the immovable property of an execution debtor or of any other person unless –

(a) a return has been made of any process which may have been issued against the movable property of the execution debtor from which it appears that that execution debtor or person has insufficient movable property to satisfy the writ; and

(b) the immovable property has, on application made to the court by the execution creditor, been, declared to be specially executable.

[40] In *Kisilipile*[24] the Supreme Court noted that before the Supreme Court's decision in *Standard Bank Namibia Ltd v Shipila and Others*[25] rule 108 of this court's rules was interpreted by this court to require a plaintiff seeking default judgment against a debtor to, after obtaining judgment, deliver a notice to the judgment debtor requiring him or her to appear before court and to show cause why an immovable property that is a primary home, may not be declared specially executable. The approach of this court was disapproved in *Shipila*[26], where the Supreme Court stated that:

'… the primary objective of this rule 108(2)(a) is to inform a judgment debtor that an application will be made for an order declaring the property executable and giving the judgment debtor an opportunity to oppose such an application if such judgment debtor be

[24] *Supra* footnote 17 at p 925, per Damaseb DCJ, who delivered the Court's judgment.
[25] *Standard Bank Namibia Ltd v Shipila and Others* 2018 (3) NR 849 (SC).
[26] *Ibid* in paras 63-64.

inclined to do so. In my view there is sufficient notice if there is substantial compliance with Form 24.'

[41] The Supreme Court continued and stated that Shipila does not decide that when a declaration of executability is sought together with an application for default judgment (or summary judgment for that matter), a court is not bound to consider 'less drastic measures' than an outright sale in execution. The Deputy Chief Justice said, in fact Shipila states the contrary in para 51 as follows:

‘(M)ortgage creditors can rely on a limited real right and can insist, absent abuse of process or *mala fides*, on directly executing their claims against specially hypothecated immovable property of the debtor in order to satisfy a claim, but where the immovable property is the home of a person judicial oversight is required in order to ascertain whether foreclosure can be avoided, having regard to viable alternatives.’

[42] The learned Deputy Chief Justice continued and said:

‘When a court hears an application in terms of Rule 108(1)(b), the court must do two things. The court must first establish whether the property is the primary residence of the judgment debtor and second, whether the judgment debtor can offer alternative means by which he can pay the debt, other than by execution against the primary residence.’

[43] What is apparent from the Kisilipile judgment is that the procedure governing applications for summary judgment and the procedure governing applications to declare immovable property executable are two separate procedures and they must not be conflated. In a summary judgment procedure, rule 60 is clear in that it is procedure available to a plaintiff who regards a notice which the defendant intends to raise as being bogus or a sham. In that instance the defendant is then required under rule 60(5) to set out facts upon which his or her defence is premised.

[44] In an application to declare the immovable property executable, the court would already have found for the plaintiff and the plaintiff is simply seeking satisfaction of its judgment and this is where the role of the court comes in. The court plays an oversight role to an ensure that where the immovable property sought to be declared executable is the home of a judgment debtor judicial oversight is required in

order to ascertain whether foreclosure can be avoided, having regard to viable alternatives.

[45] The oversight process is not a trial, the judgment debtor is not defending anything and the procedure is akin to an inquiry by the court. All that the court does is to, on the basis of information presented to it by the judgment debtor under oath, determine whether or not there are less drastic measure than a sale in execution. The inquiry process is, in terms of rule 108 initiated by the judgment/execution creditor who must apply to court and give notice on Form 24 (by way of personal service effected by the deputy-sheriff) to the execution debtor that an application will be made to the court for an order declaring the property executable and must call upon the execution debtor to provide reasons to the court why such an order must not be granted.

[46] In addition to the fact the two processes are distinct I do not see how it is practical and legal to bring both process under one application. I express my doubts on the legality of combining the two process on the basis of rule 60(1) to (3). This rule requires of a plaintiff who wishes to bring an application for summary judgment to deliver a notice of the application which must be accompanied by an affidavit made by plaintiff or by any other person who can swear positively to the facts, first verifying the cause of action and the amount, if any, claimed; and stating that in his or her opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

[47] Rule 60(5) in turn requires a defendant who is faced with an application for summary judgment to either give security to the plaintiff to the satisfaction of the registrar for any judgment including interest and costs. Alternatively, a defendant satisfy the court by affidavit or by oral evidence, given with the leave of the court, of himself or herself or of any other person who can swear positively to the fact, that he or she has a bona fide defence to the action and the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.

[48] The practical difficulty is that the affidavits envisaged under rule 60 must contain only that information as prescribed by the rule. So practically speaking, how

will a plaintiff who is applying for summary judgment apply in that same affidavit for the immovable property to be declared executable without falling foul of rule 60(2)? Similarly, how will a defendant who intends to provide reasons to the court as to why his or her property must not be declared executable do so in the affidavit contemplated under rule 60(5), without falling foul of that rule.

[49] For the reasons that I have set out in this ruling, I find that as a general rule an application for summary judgment and an application to declare immovable property especially executable cannot be brought in one application or together. I do not find it necessary to discuss the special circumstances or instances in which an application for summary judgment and application to declare immovable property specially executable can be brought in one application or simultaneously, because this case was not presented on the basis of there being such special circumstances.

[50] In the result, I then make the following order:

1. The first to the fourth defendants must, jointly and severally the one paying the others to be absolved:

1.1 in respect of the commercial loan agreement (on account number CL4000071001), pay to the plaintiff the amount of N$21 441 663.24 plus compound interest calculated daily and capitalized monthly on the amount of N$21 441 663.24 at plaintiff's prime lending rate of interest from time to time, currently 11.5%, plus 1.5% per annum calculated from 3 October 2023 to date of final payment both days included; and

1.2 in respect of the overdraft facility (on account number IL5004236434 previously account number 8002295382) pay to the plaintiff the amount of N$8 379 958.41 plus compound interest calculated daily and capitalized monthly on the amount of N$8 379 958.41 at the plaintiff's prime lending rate of interest from time to time, currently 11.5%, plus 1.5% per year calculated from 3 October 2023 to date of final payment both days included; and

1.3 in respect of the overdraft facility (on account number IL5004236445 previous account number 8002295089) pay to the plaintiff the amount off N$947 262.56 plus compound interest calculated daily and capitalized monthly on the amount of N$947 262.56 at the plaintiff's prime lending rate of interest from time to time, currently 11.5%, plus 1.5% per year calculated from 3 October 2023 to date of final payment both days included.

2. The first to the fourth defendants must, jointly and severally, the one paying the others to be absolved, pay the plaintiff's costs of suit.

3. The prayer to declare the immovable property executable is refused because there is no application in accordance with rule 108 before court.

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

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UEITELE SFI
Judge

APPEARANCES

Applicant:	T Luvindao of Dr Weder Kauta & Hoveka Inc, Windhoek.
First to the fourth Respondents:	No appearance.