

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
JUDGMENT
(PRACTICE DIRECTION 61)



MAIN DIVISION, WINDHOEK

Case Title: NAMIBIA WILDLIFE RESORTS LIMITED APPLICANT and DEBBIE KALEINASHO MAXUILILI-ANKAMA RESPONDENT	Case No: INT-HC-DECIMMPRO- 2023/00328 Main Case No: HC-MD-CIV-ACT-OTH- 2022/04660 Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE PARKER, ACTING	Date of hearing: 7 DECEMBER 2023 Delivered on: 24 JANUARY 2024
Neutral citation: <i>Namibia Wildlife Resorts Limited v Maxuilili-Ankama</i> (HC-MD-CIV-ACT-OTH-2022/04660) [2024] NAHCMD 6 (24 January 2024)	
IT IS ORDERED THAT: 1. The following immovable property is hereby declared specially executable: CERTAIN: Erf 4950 (a portion of Erf 2781) SITUATED: In the Municipality of Windhoek Registration Division "K" Khomas Region MEASURING: 606 (Six Nil Six) square meters HELD: Deed of Transfer No. T 1288/1994	

2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

Following below are the reasons for the above order:

[1] Once more we are seized with an application concerning rule 108 of the rules of court. Mr Boltman represents the applicant and Mr Lombard represents the respondent and the interested party, whatever that means.

[2] I shall say the following but in parentheses because it is not relevant in the instant motion proceedings: The respondent's allegation that she is 'seeking appropriate relief from the Office of the Labour Commissioner' matters tuppence in the instant motion proceedings, which concern the lawful execution of a summary judgment order of the High Court only.

[3] I do not intend to garnish this judgment with bushes of unnecessary background antecedents. The factual antecedents to the instant application are laid out in the judgment of the court, granting summary judgment in favour of the applicant against the respondent, dated 7 March 2023 ('the 7 March 2023 order').

[4] It is important to note that the 7 March 2023 order has not been set aside by a competent court and the rule of law demands that court orders must be implemented. It follows irrefragably that the 7 March 2023 order must be implemented.

[5] It is not part of our law for a defendant or respondent against whom an order has been made to tell the court when the court order should be executed and how. In the instant matter, the applicant, the beneficiary of the order, has approached the seat of judgment of the court to execute specially against the immovable property of the respondent mentioned in the notice of motion. In that regard, the mechanism of judicial oversight that rule 108 of the rules of court has provided becomes operational.

[6] Therefore, 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.¹ Rule 108 of the rules of court has not set at nought and vaporized the principle.

¹ *Erongo Regional Council and Others v Wlotzkasbaken Homeowners Association and Another* 2009

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 to satisfy the claim. I do not read *Kisilipile Niklaas and Lydia Vaanda Katjuongua v First National Bank of Namibia Limited*² as having set at naught the aforesaid 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.'

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

[8] 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 consider whether, for instance, there exists good prospects of a debtor planning to dispose of another asset within a reasonable time to liquidate the outstanding balance. Thus, the court should be seen to have enquired into whether there existed 'available, viable and less drastic alternatives to declaring the property specially executable'.³

[9] 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 and the leased property is that third party's primary home, within the meaning of rule 108(2).

[10] I note – and both counsel seem to agree, though not in so many words – that, although the

(1) NR 252 (SC).

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

³ *Kisilipile v First National Bank of Namibia Limited* footnote 2.

Kisilipile requirements were propounded in a matter that concerned a claim against hypothecated immovable property, I see no good reason why they should not apply with equal force to claims not arising from mortgage bonds.

[11] Mr Boltman submitted that all the procedural steps prescribed by rule 108 had been followed. I did not hear Mr Lombard to contradict Mr Boltman. Accordingly, the next level of the enquiry is to consider the *Kisilipile* requirements.

[12] Upon the *Kisilipile* requirements, I state the following crucial element: The respondent (ie the execution debtor) alone bears the onus of satisfying the court all at once that (a) the immovable property sought to be attached is his or her primary home or is leased to a third party and it is that third party's primary home; and (b) there are in existence available, viable and less drastic alternatives to declaring the property specially executable. *A fortiori*, the facts relied on to satisfy the court with regard to the elements in (a) and (b) should be set out in the execution debtor's answering affidavit. A sanitized version thereanent in his or her counsel's written or oral submission does not count.

[13] As to element (a) of para 12 above, the respondent has stated that the property in question is her primary home, and the applicant has not taken issue with it.

[14] As to element (b) of para 12 above, the question that arises is what available, viable and less drastic alternatives to declaring the property executable has the execution debtor placed before the court?

[15] I have pored over the respondent's answering affidavit and I see the following passage as the respondent's attempt to satisfy element (b) of para 12 above:

'21. I therefore propose that I pay the amount of N\$120 000.00 (One Hundred and Twenty Thousand Namibian Dollar), through my legal practitioners to the Applicant, and I pay an amount of N\$2 000.00 (Two Thousand Namibian Dollars) to the Applicant until the amount as owed is settled in full.'

[16] As submitted by Mr Boltman, as on 23 October 2023 the total amount (including interest) that the judgment debtor is liable to pay stood at N\$1 620 105,77. Thus, in terms of the alternative placed before the court, it would take the execution debtor some 60 years to repay the debt. I find and hold that the alternative to avoid a sale in execution of the property placed before

the court is not viable, and it defeats the commercial interest of the applicant, bearing in mind that applicant is a State-Owned Enterprise, as Mr Boltman reminded the court. And it should be remembered, the amount which the respondent has refused to return to the applicant forms part of State funds. What is more, the respondent has failed and refused to tell the court what she has done with the amount that was paid to her by the applicant, referred to in the judgment of the court, granting summary judgment in favour of the applicant against the respondent, dated 7 March 2023.

[17] Without beating about the bush, I should say that the respondent wants to eat her cake and have it. Such conduct is unjust and unreasonable in the extreme on any pan of legal and equitable scales, and so the court should not come to the aid of the respondent.

[18] Based on these reasons, I hold that the applicant has made out a case for the relief sought. The respondent has failed to resist an order declaring the property in question specially executable. As to costs, in virtue of Mr Lombard's submission that he was instructed to represent the respondent by the Legal Aid Directorate of the Ministry of Justice, I shall make no order as to costs.⁴

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
APPLICANT	RESPONDENT (and Interested Party)
<p style="text-align: center;">J BOLTMAN <i>of</i> Köpplinger Boltman, Windhoek</p>	<p style="text-align: center;">J LOMBARD <i>of</i> PD Theron & Associates, Windhoek</p>

⁴ *Mantoor v Usebiu (SA 24/2015) [2017] NASC 12 (19 April 2017)*.