

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2020/04450

In the matter between:

GIFT KAVARI

FIRST APPLICANT

TUYE PROPERTY INVESTMENTS FIFTEEN CC

SECOND APPLICANT

and

BANK WINDHOEK LIMITED

RESPONDENT

Neutral citation: *Kavari v Bank Windhoek Limited* (HC-MD-CIV-ACT-CON-2020/04450) [2024] NAHCMD 91 (8 March 2024)

Coram: SIBEYA J

Heard on: 6 November 2023

Delivered: 6 November 2023

Reasons: 8 March 2024

ORDER

1. The application is dismissed with costs.
2. The matter is removed from the roll: Case Finalised.

EX TEMPORE JUDGMENT

Introduction

[1] This is an application brought by the applicants against the respondent being Bank Windhoek Limited to interdict the sale in execution. The first applicant is Mr Gift Kavari and he appears in person and on behalf of the second applicant. The respondent is represented by Mr Luvindao.

Relief sought

[2] The application is brought in the normal course, it is not brought on urgency and the relief sought in the application is contained in paragraphs 10 to 13, which are as follows:

- a) That the applicant (first applicant) has a pending labour court case 2023/00002 where judgment was reserved for 23 October 2023.
- b) Therein, the applicant (first applicant) has sought N\$300 000 in compensation for loss of income which will be used to settle outstanding arrears on the home loan account.

- c) That Bank Windhoek's intention to sell the property 1106 Rocky Crest situated in Gran Canaria Road on 4 October 2023 be cancelled and reversed by the court pending the finalisation of the pending labour court case.
- d) That Bank Windhoek allow the restructuring of the mortgage loan in favour of the applicant (first applicant) as requested by the applicant (first applicant) in April 2023.
- e) That Bank Windhoek accepts N\$8000 monthly instalments for the home loan account.
- f) That the Bank Windhoek consent to the applicant (first applicant)'s request to allow Agricultural Bank of Namibia (Agribank) to use the property 1106 Gran Canaria Road as collateral for the N\$140 000 Agribank loan sought by the applicant (first applicant).

Discussion and findings

[3] The applicants' notice of motion is dated 26 August 2023. It should be pointed out that the sale and execution emanated from an order of this court granted by Parker AJ on 21 May 2021 where he declared the property Erf 1106 Gran Canaria Road, Rocky Crest, specially executable, together with an order of cost of the application. During oral arguments, Mr Kavari was questioned as to whether he has knowledge of this order and his version, that he brought to court, is that this order was never served on him, therefore, he is not aware of the application being made. This version he insisted on, despite the fact that there is a return of service filed of record where the deputy sheriff indicates that on 5 May 2021 at 18:04, Mr Kavari was served with the notice of motion regarding the application to declare the immovable property specially executable in terms of rule 108 of the rules of this court.

[4] The return of service of the rule 108 application served on Mr Kavari shows that Mr Kavari was on 5 May 2021 at 18:04, served with the Notice of Motion

together with the founding affidavit of Athalia Wallace-Mcnab and annexures; the Notice of set down of the rule 108 application and the rule 108(2)(a) and (b) the notice by judgment creditor to judgment debtor. Therefore, *prima facie*, it is established that the rule 108 application was served on Mr Kavari.

[5] There is a court order of 21 May 2021, and there has been no challenge or attack against that order. The said order armed the respondent to comply with the order and that is to execute on Erf 1106, Rocky Crest.

[6] The execution was conducted on the 4 October 2023 where the property was sold on execution. This information was known to Mr Kavari as is apparent from his notice of motion of 26 August 2023, that he was aware of the date of the intended sale.

[7] It becomes necessary at this stage to consider the relief sought by Mr Kavari and determine whether such relief is competent. Mr Luvindao argued that the relief sought is incompetent.

[8] The first relief is for Bank Windhoek not to sell the property pending judgment which was reserved by the Labour Court under case no. 2023/00002 reserved for 23 October 2023.

[9] It was admitted by both Mr Kavari as well as Mr Luvindao, and a quick glance on e-justice, confirms the submission by the parties, that indeed a judgment was delivered in the labour matter on 31 October 2023, where Mr Kavari's appeal was dismissed. It should be remembered that the relief sought was that the execution be stayed, pending the applicant's receipt of this judgment, where he should have generated or obtained an amount of N\$300 000 and compensation.

[10] It suffice to say that in my view, the dismissal of Mr Kavari's labour appeal pours water on this relief to stay the sale in execution pending the labour appeal judgment and renders the relief incompetent.

[11] I proceed to consider relief no.11 and 12 together, that is for Bank Windhoek to allow the restructuring of the loan and to accept the N\$8000 monthly instalments for the home loan. Similarly, I consider the last relief for the bank to consent to the applicant's request to allow Agribank to use the property as collateral for the loan with Agribank. All these relief, in my view, are strictly speaking requests which should have been made to Bank Windhoek because Bank Windhoek is armed with the order of 21 May 2021 as stated above. There is nothing, in my view, that prohibits Bank Windhoek from executing on the order of 21 May 2021. That order of 21 May 2021, stands until it is set aside by a competent court. As long as the order stands, Bank Windhoek is entitled to execute on the order. What this, therefore, means is that in line with the order of 21 May 2021, I find nothing in this application to upset the sale which has already occurred on 4 October 2023.

[12] In my view, the above findings renders the remainder of the relief that is 11, 12 and 13, to be moot or academic, so to speak. This is mainly because the property has already been sold. Several decisions of this court have pronounced that the court should not entertain matters that are moot or where the relief sought is incompetent. These relate to matters where there is strictly speaking no dispute which is live between the parties. One such matter is the *Moombola v Simataa*¹ a decision of this court.

[13] In view of the above, I find that the dismissal of the labour appeal of Mr Kavari, and the effectiveness of the 21 May 2021 order authorising the sale in execution of the immovable property in question, sold on 4 October 2023, rendered the applicants' present application moot. As a result, I make the following order:

1. The application is dismissed with costs.
2. The matter is removed from the roll: Case Finalized.

¹ *Moombola v Simata* (HC-MD-LAB-MOT-REV-2017/00020) [2020] NALCMD 2 (23 January 2020).

O Sibeya
Judge

APPEARANCES

APPLICANTS: Gift Kavari
In Person, Windhoek

RESPONDENT: T Luvindao
Of Dr Weder Kauta & Hoveka Inc, Windhoek