

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: I 161/2016

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

ESTELLA EBENHAEZER HEITA

DEFENDANT

Neutral citation: *Standard Bank Namibia Limited v Heita* (I 161/2016) [2018]
NAHCNLD 137 (04 December 2018)

Coram: CHEDA J

Heard: 30 July 2018; 5 November 2018

Delivered: 4 December 2018

Flynote: Practice - In a rule 108 application the execution creditor must apply for the declaration that an immovable property be declared specially executable. Procedure to follow – issuance of summons, if not defended, application for a default judgment must be made - issuance of a writ – if there are no attachable movable assets - Deputy Sherriff – issues a *nulla bona* return of service - execution creditor gives a 30 day notice to execution debtor to show cause why the immovable property should not be declared specially executable.

Defence – execution debtor must submit a reason that is legally acceptable in order to avoid the property being declared specially executable.

Summary: Applicant/plaintiff advanced a loan of N\$846 761.77 to respondent/defendant which she failed to repay resulting in summons being issued against her and subsequently a default judgment was entered against her. A writ was obtained and upon service on the judgment debtor it was found that she did not have any attachable movable assets hence a *nulla bona* return of service was issued by the Deputy Sherriff.

In terms of rule 108, the judgment creditor, who now becomes the execution creditor gave the execution debtor a 30 day notice to furnish it with reasons why the immovable property should not be declared specially executable. The execution debtor advanced a reason which is not legally recognisable and therefore the court had no alternative, but, to declare the property specially executable.

ORDER

1. The following property is declared executable:

Certain: Erf No. 3699, Ongwediva (Extension No. 7)
Situatid: In the town of Ongwediva, Registration Division "A",
Oshana Region
Measuring: 452 (Four Five Two) square metres
Held by: Deed of transfer No. T5393/3006
Subject: To all the terms and conditions contained therein.

JUDGMENT

CHEDA J:

[1] This is an application in terms of rule 108 of the High Court Rules for the declaration of respondent's (executioner debtor) immovable property specially executable, following a *nulla bona* return of service by the Deputy Sherriff.

[2] The brief background of this matter, whose facts are common cause, is that applicant is a banking institution while respondent was their client. Respondent applied for and was granted a loan in the sum of N\$846 761.77 in terms of the Home Loan Agreement. One of the terms of the agreement was that respondent was to pay (variable instalments) of N\$4128-00 and N\$3698-52 per month. She failed to service the loan and fell into arrears.

[3] Applicant issued out summons which respondent did not defend and a default judgment was entered against her. Subsequent to the default judgement, a writ of execution was issued and served upon respondent. However, the Deputy Sherriff issued a *nulla bona* return of service as respondent had no attachable movable assets.

[4] It should be borne in mind that after the default judgment has been granted, if applicant choses to proceed under rule 108, the parties' titles change in that plaintiff/applicant becomes execution creditor while defendant/respondent becomes execution debtor. This position was made clear in *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 29 (HC)

[5] In view of the fact that respondent had no attachable assets, applicant (now execution creditor) commenced the process of having respondent's (execution debtor) immovable property declared specially executable. The execution creditor gave the execution creditor a 30 day notice to give reasons why the said immovable property should not be declared executable. This notice was personally served on respondent/defendant as is required by law.

[6] The execution debtor responded to the notice in which she acknowledged her indebtedness to the execution creditor, but, went further and asked for further time to pay as;

- a) she is not employed;
- b) she looks after her bedridden sister who suffered a stroke;
- c) she also looks after three of her grandchildren; and
- d) she has no other alternative, place to live as the property under discussion is her only primary home.

[7] The general rule is that the courts are slow to declare the execution debtor's immovable property executable where it is a primary home. It is for that reason that rule 108 was coined in order to discourage execution creditors from moving with speed towards selling poor execution debtor's immovable properties willy-nilly.

[8] The court will therefore not easily declare the said immovable properties executable unless and until the execution creditor proves that the execution debtor does not have attachable assets and that he/she has been personally served with the notice in terms of rule 108(2)(a) which clearly states that the notice should be in Form 24. Further that in the event of none compliance by the execution creditor the court will most likely dismiss the said application.

[9] It is clear therefore that this procedure was introduced in order to protect the less fortunate home owners. The rules require that the execution creditor must first exhaust the avenue of attaching movables which is a less drastic measure in the circumstances.

[10] In that regard, I take a leaf from the remarks in *Standard Bank Namibia Limited v Magdalena Shipila & 4 others* para 14¹ where Hoff JA stated:

"This subrule is primarily made to protect home owners or third parties residing in homes from unbridled loss of homes by declarations of executability of landed property by court orders and over which the courts simply had no control and considerations over other remedies less drastic than the sale of a home. Relevant circumstances and less drastic

¹ (SA 69/2015) [2018] NASC

measures would in this case be an execution against the movables that may be able to satisfy the judgment. Although, these considerations do not change the common law principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money, this is a caution to the courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at the risk of losing their homes. If the judgement debt can be satisfied in a reasonable manner, without involving those drastic consequences, alternative course should be judicially considered before granting execution orders.”

[11] Where an execution debtor proffers a good reason why the immovable property should not be declared executable, these courts will not be found wanting in dismissing the application in light of the overriding desire to save poor peoples' principal homes.

[12] In *casu*, execution debtor has indeed advanced her reason to save the property. However, I do not see how these reasons being good enough at law to prevent the inevitable. It should be borne in mind that the execution creditor is entitled at law to recover what is due to it as it is protected by common law and rule 108 does not prevent it from doing so either. What is required is to religiously follow certain procedures to secure it, see *Futeni Collection (Pty) Ltd v De Duine* (supra).

[13] In the result I find that the reason advanced by the execution debtor cannot persuade the court from depriving the execution creditor from obtaining its order as prayed.

[14] In the result the following is the order of court:

1. The following property is declared executable:

Certain: Erf No. 3699, Ongwediva (Extension No. 7)

Situated: In the town of Ongwediva, Registration Division “A”,
Oshana Region

Measuring: 452 (Four Five Two) square metres

Held by: Deed of transfer No. T5393/3006

Subject: To all the terms and conditions contained therein.

M Cheda
Judge

APPEARANCES

PLAINTIFF: P Kasita
of AngulaCo. Inc., Ongwediva

DEFENDANT: In-person