REPORTABLE

CASE NO: SA 65/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

KISILIPILE NIKLAAS **First Appellant**
LYDIA VAANDA KATJIUONGUA **Second Appellant**

and

FIRST NATIONAL BANK OF NAMIBIA LIMITED **Respondent**

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: **1, 18 June 2021 and 13 July 2021**

Delivered: **25 August 2021**

Summary: This appeal arises from an order by the court *a quo* declaring the first and second appellants' immovable property specially executable in terms of rule 108 of the High Court Rules.

The respondent bank (the Bank) granted a loan to the appellants for the purchase of the property and secured it by means of a mortgage bond. The appellants fell short on their monthly repayments and the bank instituted litigation to recover its money. Acting personally, the appellants defended the claim. The Bank then filed an application for summary judgment in terms of rule 60 of the High Court Rules

accompanied by an application to declare the appellants' immovable property specially executable in terms of rule 108 of the High Court Rules.

Rule 108 requires that where it is sought to declare a primary home specially executable, the court should consider 'all the relevant circumstances with specific reference to less drastic measures than sale in execution.' This means that an order to declare a primary home specially executable should not be granted lightly and for the mere asking.

At the summary judgment application hearing, the appellants informed the presiding judge that they had not been afforded enough time to negotiate repayment terms with the Bank. After hearing the parties, the presiding judge was satisfied that the appellants had not disclosed a *bona fide* defence to the claim and granted summary judgment and simultaneously ordered the property specially executable.

The fact that the appellants had no *bona fide* defence against the summary judgment application is a separate question from whether the court should have declared the property specially executable.

During the proceedings in the court *a quo*, the presiding judge did not bring the safeguards under rule 108 to the attention of the appellants. The court conflated the summary judgment proceedings with the rule 108 proceedings.

Held, it is not the law 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. (*Standard Bank Namibia v Shipila & others* 2018 (3) NR 849 (SC)).

Held that in Namibia, judicial oversight takes the form that, if a property is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. Although the onus rests on the judgment debtor to present the relevant evidence of less drastic measures, where the judgment debtor fails to do so it does

not relieve the court of its obligation to inquire into the availability of less drastic alternatives.

Held that if the debtor is legally unrepresented his or her attention must specifically be drawn to the protection granted under rule 108. The debtor must be invited to present alternatives for the court to consider to avoid a sale in execution, but bearing in mind that the credit giver has a right to satisfaction of its bargain.

Held that failure to conduct the inquiry is a reversible misdirection.

Held that this court's oversight role in rule 108 proceedings is such that if on appeal there is material from which an inference can be drawn that there could well be less drastic measures to a sale in execution, the court will not be slow to interfere with an order by the High Court declaring a primary home specially executable.

Held further, in relation to the condonation and reinstatement application that a legal practitioner should not accept, and if already seized therewith should return, an instruction if he or she does not have the time or skill to attend to the matter.

Held that although the appellants' explanation for the non-compliance with the rules of court is woefully unsatisfactory, the court *a quo's* failure to conduct an inquiry in terms of rule 108 constitutes sufficient cause for this court to condone the non-compliance.

Held that this court's practice is not to grant costs against legally aided litigants. There is no reason to depart from that practice in this case as it is clear that it is the legal practitioners of record that were responsible for the serial breaches resulting in the appeal lapsing.

Held that the appeal succeeds and the order of the High Court declaring the property specially executable is set aside.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and HOFF JA concurring):

Introduction

[1] This is an appeal against an order given by the High Court on 24 April 2019, declaring the first and second appellants' immovable property in Cimbebasia, Extension 11 in the Municipality of Windhoek (the property), specially executable in terms of rule 108 of the High Court Rules. The appellants were not legally represented during the rule 108 proceedings.

[2] Rule 108 requires that where a primary home is sought to be attached and to be declared specially executable the court should consider 'all the relevant circumstances with specific reference to less drastic measures than sale in execution'. In other words, an order to declare a primary home specially executable should not be granted lightly and for the mere asking.

[3] The first and second appellants are married to one another under the customary laws of Namibia. Although the appeal was initially lodged by both of them, the second appellant subsequently withdrew because she was unable to furnish security for the respondent's costs in the appeal. Reference hereafter to the 'appellant' is therefore to the first appellant.

[4] The appellant is aggrieved by the High Court's order granted in favour of the respondent (FNB, the Bank or the Creditor) and arising from the couple's admitted

indebtedness to the Bank. Although the indebtedness and default were admitted by the couple in the court below, their case was that they were not afforded sufficient time and opportunity by the Creditor to negotiate repayment terms and to make arrangements towards that end.

[5] It is common cause that the Bank granted a loan to the appellants for the purchase of the property and secured it by means of a mortgage bond.

Background

[6] On 12 November 2018, relying on the appellant's and his wife's default with the terms of the loan agreement entered between it and the couple, the Bank instituted a claim against them, seeking:

a. 'Payment in the sum of N$1 588,855. 98.

b. Compound interest thereon at the rate of 11.50% per annum as from 2 October 2018 to date of final payment.

c. An order in terms whereof the immovable property to wit: Erf NO.1007 Cimbebasia (Extension No.3) in the Municipality of Windhoek, Khomas Region, measuring 352 square meters, and held by Deed of transfer No. T692/2013, be declared specifically executable and that a warrant of execution against immovable property be authorised.'

[7] The particulars of claim alleged that the mortgage bond executed by the appellant and his wife in favour of FNB stipulates that in the event of the couple breaching any of its terms:

a. ‘The full amount outstanding would immediately become due and payable, together with compound interest;

b. the bank may institute proceedings for the recovery of the debt and seek an order declaring the mortgaged property executable;

c. that the property is not the primary residence of the appellant, and his wife nor is it leased to a third party.’

[8] Acting personally, the appellant and his wife defended the claim after which the parties signed a joint case plan which was made an order of court. The Bank then filed an application for summary judgment in terms of rule 60 of the High Court Rules. The appellants filed a document as a ‘response to defend the application for default/summary judgment’.

[9] It is common ground that this document is not an ‘affidavit’ as contemplated by rule 60(5)(b) of the High Court Rules, although the appellant and his wife considered it as such. Clearly, the appellant and his wife had no *bona fide* defence to the claim if regard is had to the document they filed in which they admitted that their bond repayments were in arrears. But that is a separate question from whether the court should have declared the property specially executable.

[10] In the document they filed, the appellant and his wife alleged that the property was their ‘primary’ residence. They attributed their failure to meet their obligations to ‘the current economic crises’ which ‘has had an impact on our monthly payments’. They expressed that they ‘remain committed, to continue to fight, and pay up our arrears’. They beseeched the court ‘to consider our plea and mitigate this situation to offer us ample time to restore our account to good faith with the Plaintiff’.

[11] When the summary judgment application and the rule 108 application were heard on 24 April 2019, the appellant and his wife were present in person. They informed the court that they had not been afforded enough time to negotiate with the Bank. The presiding judge informed them that they did not file an answering affidavit and that the document they filed was not compliant with the rules of court. The court however granted them an opportunity to state their case. Their explanation was that they had tried to negotiate with the Bank in good faith but to no avail. They further informed the court that due to the economic situation, they were experiencing financial problems and requested to be given sufficient time to pay the arrears.

[12] After giving the court the explanation above, the appellant sought direction from the court as follows:

> 'So, I am not quite sure whether our explanation has satisfied the Court, or that is what the Court wanted or perhaps we have completely missed it.'[1]

The court however did not comment or give guidance on the appellant's statement.

[13] After hearing the parties, the presiding judge was satisfied that the appellant and his wife had not disclosed a *bona fide* defence to the claim, and that the granting of summary judgment was inevitable. The judge granted summary judgment and ordered the property specially executable.

[14] It is now common ground that during the rule 108 proceedings, the presiding judge did not explain to the appellant and his wife the kind of information and

[1] Appeal Record at page 46 line 20.

evidence they needed to present if they were to ward off an application to have their property declared specially executable. The court clearly conflated the summary judgment proceedings with the rule 108 proceedings.

[15] Before this court's decision in *Standard Bank Namibia v Shipila & others* (Shipila)[2], rule 108 of the High Court Rules was interpreted by the High Court to require a plaintiff seeking default judgment[3] 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 immoveable property that is a primary home, may not be declared specially executable.[4]

[16] That approach was disapproved by this court in *Shipila*. As Hoff JA put it (at paras 63- 65:

> 'In my view the language of rule 15(3) does not preclude a court from considering an order for the foreclosure of a bond together with an order for default judgment in respect of the capital amount. This has been a long-standing practice in applications for default judgments involving bonded immovable property. In such a case there would be automatic judicial oversight, since in Namibia the registrar has no power to declare immovable property executable.
>
> [64] If a court is to apply the provisions of rule 108 strictly as suggested in *Futeni* non-compliance with rule 108 would mean that the whole process must start afresh. The appellant will have to obtain a fresh return of service stating that the judgment debtor has insufficient movable property. Thereafter a substantial application will have to be lodged in order to determine whether the immovable property could be declared specially executable. Such process will cause the escalation of costs, all to the detriment of the impecunious judgment debtor. It will at the same time undermine the

[2] 2018 (3) NR 849 (SC).
[3] *Under rule 15 of the High Court Rules.*
[4] *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC).

> overriding objective of the rules namely "to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable . . . ."
>
> [65] It must be said that an insistence by the court a quo that notice in terms of the provisions of rule 108(2)(*a*) be 'on Form 24' is overly formalistic, and may, if regarded as peremptory, also result in the unnecessary escalation of costs. This approach puts form before substance. In my view 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 inclined to do so. In my view there is sufficient notice if there is substantial compliance with Form 24.'

[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 at 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.' (My emphasis).

Nature of judicial oversight in rule 108 proceedings

[18] In Namibia, judicial oversight takes the following form when it comes to declaring a primary home specially executable. If a property 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 burden. He or she should preferably lay the relevant information before court on affidavit especially if assisted

by a legal practitioner, either in resisting default judgment or summary judgment. The failure to do so however does not relieve the court of its obligation to inquire into the availability of less drastic alternatives. If the debtor is legally unrepresented his or her attention must be drawn to the protection granted under rule 108.

[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 a 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.

[20] Judicial oversight exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of a primary home is a last resort. The court is required to take into account 'all the relevant circumstances'. When exercising the discretion under rule 108 the court should bear in mind that a sale in execution of a primary home does not necessarily extinguish the debt. The reality is often the contrary. In other words, the debtor remains indebted to the credit giver for the balance of the debt, considering that under the current rule framework the property is to be sold to the highest bidder for not less than 75% of either the local

authority council or regional council valuation or in the absence of that, at not less than 75% of a sworn valuation.[5] There is no requirement that the highest bid be not less than the actual indebtedness of the judgment debtor to the credit giver.

[21] Such a debtor would ordinarily be listed with ITC and would not be able to secure any further loan finance. The prospect of securing another mortgage to buy a home is therefore almost nil. The court should also take into consideration the payment history of the debtor. Greater latitude should be given to the debtor who has a reasonably good payment history; the extent of the balance outstanding; and the age of the debtor - which is an important factor whether or not the debtor will be able to secure another loan to buy a home.

[22] For example, it would be oppressive to sell a home valued at N$1 million to recover an outstanding balance of N$100 000 when there are good prospects of a debtor making arrangements to dispose off another asset within a reasonable time to liquidate the outstanding balance.

Misdirection

[23] Rule 108 proceedings must not become a perfunctory exercise of going through the motions as it were. That is especially so where, as here, the creditor seeks summary judgment and in the same papers seeks to declare a property specially executable - a practice that is now in vogue in the wake of this court's judgment in *Shipila* (at paras 63-65) holding that such a practice is not unlawful.

[5] Rule 110 (9) (a) & (b).

What the court made clear, however, as I have shown is that judicial oversight in such proceedings remains.

[24] It was a misdirection therefore for the presiding judge not to inquire into the available viable and less drastic alternatives to declaring the property specially executable. The court had an obligation since the appellant and his wife were legally unrepresented to explain to them the purpose behind rule 108 and what information they must present to ward off the property (being their primary home) being declared specially executable.

The appeal has lapsed

[25] The only obstacle facing the appellant is the fact that the appeal had lapsed and that the breaches of the rules which are directly attributable to the legal practitioners are flagrant and gross and that the explanation offered for it is utterly unsatisfactory.

[26] It is common cause that from the time the appellant and his wife were sued, until the order appealed against was granted, they were not legally represented. It is further common cause that after the order, they remained legally unrepresented and made some effort without legal representation to appeal against the High Court's order.

[27] From the appellant's affidavit and the annexures thereto, it is clear that he and his wife made several attempts starting on 29 April 2019 to note an appeal. The final attempt they made on 26 June 2019 by filing a notice of appeal at the Supreme

Court's registry which was met by the following response from the deputy registrar on 27 June 2019:

> 'With reference to your notice of appeal which you brought to the Supreme Court. I hereby refer you to Rule 7(1) of the Supreme Court states that: "Every appellant in a civil case who has a right of appeal must file his or her notice of appeal with the registrar and the registrar of the court appealed from and serve a copy of the notice on the respondent or his or her legal practitioner within 21 days or such longer period as may be allowed on good cause shown……." We are hereby informing you that overall, your appeal does not comply with the rules of the Supreme Court and urge you to comply because it is out of time.'

[28] The significance of these efforts does not lie in their non-conformity with the rules but in the fact that as lay litigants they made an effort and demonstrated a desire to appeal the High Court's order. I am prepared therefore to excuse their failure to file a competent appeal up to the point when they became legally represented.

[29] On 30 July 2019 the Directorate of Legal Aid (Legal Aid) appointed the firm of Nixon Markus Public Law Office (the legal practitioners of record) to assist the appellant and his wife. It is stating the obvious that when the legal practitioners of record accepted the instruction by Legal Aid it was with the full knowledge that the time for prosecuting the appeal had lapsed. Thereafter every procedural rule dealing with appeals was not complied with. The matter was assigned to a candidate legal practitioner who appeared to be groping in the dark without a clear strategy as to what needed to be done. The appellants were then advised that an appeal had no prospects of success.

[30] On 10 October 2019, the candidate legal practitioner addressed a letter to the Creditor's legal representative seeking an indulgence for the appellant and his wife to secure another loan from her employer (Bank Windhoek), and for the sale in execution to be stayed. No appeal had yet been filed at that stage.

[31] The Bank's legal representative in a reply on 15 October 2019 advised that the appellant and his wife would be granted time until 30 October 2019 to secure a loan with Bank Windhoek.

[32] It was only on 17 October 2019 that an admitted legal practitioner took charge of the matter. It is alleged in the condonation application filed by the legal practitioner of record that a decision was taken on or about 25 October 2019 that an appeal be noted, reversing an earlier decision that an appeal had no prospects of success. A notice of appeal and an application for condonation and re-instatement of the appeal were then filed of record on 30 October 2019. The record of appeal did not accompany the notice of appeal and no power of attorney was filed either. It is common cause that the record was only filed on 20 February 2020, still without a power of attorney which was only filed on 28 February 2020. Such is the litany of non-compliance for which the appellant seeks condonation and reinstatement of the appeal. On the approach that this court takes the breaches of the rules by the legal practitioners of record are flagrant and gross.[6]

[6] *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another* 2020 (1) NR 19 (SC).

[33] The initial considerable delay in the prosecution of the appeal was due to the fact that after the appellant's legal practitioners accepted the mandate from Legal Aid, a non-admitted practitioner was assigned the matter and fumbled around without supervision and a clue as to what to do. The admitted practitioner who later took over the conduct of the matter, further failed to act promptly in prosecuting the matter and bringing a condonation and reinstatement application. The reason for that is either that she was too busy attending to other matters, that she forgot to take some necessary steps, or that because of lack of experience in the legal issues involved she needed time to do background legal research.

[34] Had it not been for the turn of events during the hearing of the appeal favourable to the appellant, the application for condonation ought to have been dismissed without consideration of the prospects of success.

Developments on appeal

[35] During the hearing of the appeal counsel for the appellant, Ms Mondo, placed on record that the wife of the appellant is an employee of Bank Windhoek and that she had secured a loan from her employer to take over the mortgage bond from FNB. In that case, as we understood it, the Creditor's debt would be satisfied.

[36] The Bank's counsel, Ms Campbell, intimated, after taking instructions that the Bank would consider the offer if it were genuine - except that it raises the question what would happen to the appeal considering that there was an extant judgment of the High Court binding on the parties.

[37] The concern raised by Ms Campbell is a genuine one, but it is met sufficiently by a concession that she made during oral argument. And it is that judicial oversight when it comes to the sale of a primary home under rule 108 extends even to the appellate process. We are indebted to Ms Campbell for that concession. That concession operates on two levels. The first relates to the exercise of the High Court's discretion and how this court will approach it on appeal. The second is procedural in such matters as its approach to a condonation application as I will demonstrate in due course.

[38] As to the first, if it emerges during appeal that there is a real prospect of the judgment creditor's debt being satisfied in full and thus avoiding a sale in execution, this court will not be formalistic in deciding the appeal rather than allowing the parties to settle the matter. It must nevertheless decide any residual matters such as costs. In addition, even on appeal this court will, in a suitable case, play an active (if less deferential) role to test if the execution order made by the High Court in the exercise of its discretion is justified and not out of kilter with the mischief that rule 108 seeks to address.

[39] My further understanding of this court's oversight role is that if on appeal there is material from which an inference can be drawn that there could well be less drastic measures to a sale in execution, it will not be slow to interfere with an order by the High Court declaring a primary home specially executable. That may include referring the matter back to the High Court for the issue to be properly ventilated in a rule 108 inquiry or allow the debtor to demonstrate on common cause facts the

existence of less drastic alternatives which ought to have been had regard to by the High Court.

High Court overlooked less drastic measures

[40] It is common cause that in the document filed of record in opposition to the summary judgment application the appellant and his wife mooted the prospect of a bond take-over by Bank Windhoek, in whose employ appellant's wife is, but that the prospect was being impeded by the fact that FNB had listed her with the credit bureau (ITC). That issue was not canvassed *a quo* and the court gave no consideration to it. On appeal, Ms Mondo for the appellant repeated the prospect of a bond take-over by Bank Windhoek and stated that the appellant's wife has in fact received a loan approval from Bank Windhoek.

[41] Ms Campbell accepted that as part of this court's oversight role it was necessary to stand the matter down to enable the appellant to produce proof of the offer of bond take-over which clearly is a viable alternative to a sale in execution. It is for that reason that after hearing argument on appeal on 1 June 2021 we ordered that:

> '1. Judgment is reserved in the appeal.
>
> 2. Appeal stands over to 18 June 2021 at 09H30.
>
> 3. Appellants are granted the opportunity to file an affidavit of record relating to whether Bank Windhoek has approved a takeover loan of the mortgage bond currently registered over the appellant's immovable property by no later than 14 June 2021.
>
> 4. The respondent may file its response to the appellant's aforementioned affidavit by no later than 16 June 2021.'

[42] We made clear to the parties that in the circumstances of this case the bond take over by Bank Windhoek was the only viable alternative which, if properly ventilated *a quo*, could have avoided an order declaring the property specially executable. In fact, it is the only basis on which we could conceivably refer the matter back to the High Court as things stood on the date it made the order declaring the property specially executable. Our order was justified by the common cause fact that the High Court did not conduct any inquiry at all.

[43] On 3 August 2021, the parties filed a joint minute report recording the following:

> '1. The Parties met at the Office of the Registrar of the Supreme Court on 3 August 2021 to discuss the status of the settlement negotiations.
>
> 2. The Appellant was represented by Ms Mondo and the Respondent was represented by Mr McCulloch.
>
> 3. The Parties record that Bank Windhoek is taking over the mortgage bond from the Respondent and First National Bank currently await a guarantee in this regard.
>
> 4. The Parties, however, were unable to resolve the issue of costs and will leave it to the Court to decide.
>
> 5. The Court may proceed to deliver its judgment in this matter.'

Discussion

[44] The legal practitioner's conduct which the condonation application asks us to overlook, implicates important aspects of legal ethics. The first is that a legal

practitioner should not accept, and if already seized therewith should return, an instruction if he or she does not have the time to attend to the matter. Secondly, a legal practitioner should not accept an instruction if it relates to a matter or subject that falls outside his or her competence.

[45] When a legal practitioner accepts instructions, he or she must be in a position to fulfil his or her mandate properly and timeously and if, because of his or her workload, the practitioner is unable to do so then he or she has an ethical duty to refuse the work. Where a legal practitioner has received acquiescence from client to attend to the work at a later stage, he or she has a further duty to satisfy himself or herself that the work can wait without prejudice to the client and if it cannot he or she must refer the client elsewhere.[7]

[46] A legal practitioner is required to have reasonable competence in the performance of his or her work. Where the practitioner is seized with an instruction which is outside his or her expertise and skill, the practitioner should not be eager to undertake it, but should consider referring the client to a colleague who has the experience and /or expertise.

[47] As Lewis aptly observes:

> 'The only advice which can be given to the young and inexperienced is never to rush headlong into unfamiliar territory and, if in the time available he cannot acquire the necessary expertise, to invite the client to engage a specialist and assist him to do so.'[8]

[7] E. A. L. Lewis, *Legal Ethics: A Guide to Professional Conduct for South African Attorneys.* Juta, 1982. p74.
[8] Lewis at p 7.

[48] For the breach of all these ethical rules this is a case where condonation and reinstatement ought to fail but because of this court's oversight role in rule 108 proceedings, the need to correct a misdirection that has resulted in an injustice to the appellant cries out for granting the condonation and reinstatement application.

Disposal

[49] Although the appellant's explanation for the delay in prosecuting the appeal is woefully unsatisfactory, the court *a quo's* failure to conduct an inquiry in terms of rule 108 constitutes sufficient cause for this court to condone the non-compliance and to come to the assistance of the appellant.

Costs

[50] Ms Campbell argued on appeal that although the appellant is legally aided the Bank should be granted costs in the appeal because of the unmeritorious application for condonation and reinstatement. As we pointed out to counsel in the course of oral argument, this court's practice is not to grant costs against legally aided litigants. I see no reason to depart from that practice in this case when it is clear that it is the legal practitioners of record that have been responsible for the serial breaches that made the appeal lapse.

Order

[51] I therefore propose the following order:

1. The application for condonation for the non-compliance with the rules of this court is granted and the appeal is reinstated.

2. The appeal succeeds and the order of the High Court declaring the property specially executable is set aside and replaced by the following order:

   ‘(i) By agreement between the parties, the judgment creditor’s (FNB’s) mortgage bond in respect of the property (in the Municipality of Windhoek, Khomas Region, measuring 352 square meters, and held by Deed of transfer No. T692/2013) shall be taken over by Bank Windhoek in terms of a guarantee to be furnished by Bank Windhoek to the judgment creditor on behalf of the defendants (respondents in the summary judgment application).

   (ii) There is no order as to costs’.

3. There is no order of costs in the appeal.

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DAMASEB DCJ

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MAINGA JA

_____
HOFF JA

APPEARANCES

APPELLANTS:	R Mondo Nixon Marcus Public Law Office, Windhoek
RESPONDENT:	Y Campbell Instructed by Fisher, Quarmby & Pfeifer, Windhoek