REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

In the matter between:

CASE NO.: I 3044/2014

FUTENI COLLECTION (PTY) LTD PLAINTIFF

And

DE DUINE (PTY) LTDDEFENDANT

Neutral citation: *Futeni Collections (Pty) Ltd v De Duine (I 3044-2014) [2015] NAHCMD 119 (27 May 2015)*

CORAM; MASUKU, AJ.

Heard: 4 February 2015
Delivered: 27 May 2015

Flynote: PRACTICE – Rules of Court - default judgment - circumstances under which same is granted; declarations of property executable under rule 108 –steps necessary to be taken before the sale of a 'primary home' of a debtor. Rectification – elements to be satisfied before the relief of rectification can be granted.

SUMMARY – In an undefended matter, the plaintiff applied for judgment by default; rectification of an agreement and a declaration of property executable.

The court examined the procedures to be followed before default judgment can be granted and held they were satisfied. In relation to rectification, it was held that the plaintiff had not fully complied with all five requirements but had substantially complied therewith. Rectification also granted.

Regarding property being executable, the court examined the provisions of the rule and held that such steps as the filing of the *nulla bona* return should be complied with before a home can be sold in execution. The court further defined what a 'primary home' is and held that other means of settling a debt should be considered before resorting to the sale of a primary home. The court further set out the steps to be followed normally i.e. the obtaining of a monetary judgment; issuance of a *nulla bona return*; filing of an application for the property to be declared executable; the right of the debtor to show cause why the order should not be made. Further the court held that this process should be made easy and accessible even to those who cannot afford lawyers.

ORDER

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(1) Rectification of the clause 13 of the written agreement to read 'Erf 85, Hentiesbaai.'
(2) Payment of the amount of N$ 13 099 759, 77;
(3) Interest on the aforesaid amount *a tempore morae* at a rate of 20% per annum calculated from the date of summons to the date of final payment;
(4) The plaintiff is required to comply with the provisions of Rule 108 (1) and (2) as interpreted in the judgment above in relation to the prayer for the property described above to be declared specially executable;
(5) The matter may, if necessary, thereafter be set down before me for the conduct of the enquiry in terms of rule 108 (2) (c) of the rules upon notice to the execution creditor.

JUDGMENT

[1] Presently serving before court is an application for default judgment, moved in terms of the provisions of Rule 53 (2)[1] of the Rules of this court ('the Rules'. The circumstances in which this application is moved are chronicled below.

[2] The plaintiff sued out a combined summons dated 9 September 2014 against the defendant seeking the following relief:

(a) 'Rectification of clause 13 of the written agreement to read 'Erf 85, Hentiesbaai'
(b) Payment of an amount of N$ 13 099 759.77
(c) Interest on the aforesaid amount *a tempore morae* at a rate of 20% per annum calculated from date of summons to date of final payment.
(d) Declaring the following property executable

Certain: Erf No. 85 Henties Bay
Situated: In the Municipality of Henties Bay Registration Division "G",
Erongo Region
Measuring: 4095 square metres
Held by: Deed of Transfer No. T 8886/1995

(e) Costs of suit on a scale of attorney and own client, including the costs of one instructing and one instructed counsel.
(f) Further and/alternative relief.'

[1] Under Section 39 of the High Court Act No. 16 0f 1990.

[3] A return of service filed by the Assistant Deputy Sheriff indicates that service was effected on the defendant on 3 October 2014, by delivering same on a Mrs. A Booysen, the defendant's manager. Service was, according to the said return, effected at the defendant's place of business. As will appear below, the defendant entered appearance to defend the matter, but failed to file a plea.

[4] Briefly stated, the facts on which this case is predicated acuminate to this: The plaintiff and the defendant, duly represented by authorized plenipotentiaries, entered into a written contract, termed a 'Credit Agreement' in terms of which the former lent and advanced to the latter an amount of N$ 13 000 000. The defendant, in terms of the said agreement, undertook to repay the said amount together with interest and costs in terms that are, for present purposes, not material.

[5] As collateral, the agreement further records that the defendant provided security in the form of landed property referred to in paragraph [2] above. The said property was recorded to be valued at N$ 600 000. The plaintiff, in its particulars of claim averred that it fulfilled its part of the bargain by advancing the amount in question to the defendant but that the latter failed to repay the said amount in the terms agreed and that at the time of the issuance of the summons, the amount claimed, together with interest and costs was owing, due and payable to it by the defendant, but the latter had notwithstanding demand, not made good the payment.

[6] The application for judgment by default principally raises one matter of great moment, hence the need to deliver this judgment notwithstanding that the matter proceeded undefended, even after service on the defendant of the notice of application for judgment by default. The issue raised, and which I am informed by counsel for the plaintiff is in need of pronouncement by this court, is the proper interpretation and application of the provisions of rule 108[2] of the court's Rules. I shall advert to the said provision in due course.

[2] Promulgated by the Judge President of the High Court on 16, April, 2014 under section 39 of the High Court Rules, *op cit.*

(a) Propriety of moving application for default judgment

[7] The first matter that must be disposed of and I dare say without much ceremony, is whether this is a proper case in which to move the application for default judgment. Put differently, has the plaintiff in this matter fully met the peremptory requirements of the relevant Rule relating to default judgment?

[8] Applications for judgment by default are governed by the provisions of rule 15 (2)[3], which carry the following rendering:

> 'If a defendant fails to deliver a notice of intention to defend or a plea, the plaintiff may set the action down for a default judgment as provided in subrule (4).'

Subrule (4)[4], on the other hand provides the following:

> 'The proceedings referred to in subrule (2) must be set down for hearing before 12h00 on the day but one before the day on which the matter is to be heard.'

[9] The import of the above sub-Rules is that an application for default judgment may be moved in one of two cases *viz* where a defendant, notwithstanding service of a combined summons, fails to deliver a notice of intention to defend. The second instance, is where having delivered a notice of intention to defend, the defendant fails, however, to deliver a plea within the time stipulated or ordered by the court. In either event, the plaintiff is entitled to then move an application for default judgment, so long as that party sets down the said application on or before 12h00 on the day but one, before which the application is sought to be moved.

[3] Rules of Court *ibid.*
[4] Rules of Court *ibid.*

[10] In the instant case, having been served with the summons as indicated above, the defendant entered its appearance to defend dated 17 October 2014. By order dated 19 November 2014, the then managing judge, Mr. Justice Smuts put the defendant to terms to file its plea and counterclaim (if any) by 15 December 2014[5]. The defendant has, to date not complied with the said order, hence the application for default judgment. This inaction on the part of the defendant points ineluctably to the conclusion that this is a proper case in which to move for default judgment.

[11] There is presently no reason to suggest that the plaintiff in this matter has fallen foul of any of the above provisions. Not only has the plaintiff set down the matter as required in the Rules, but it has also caused a notice of set down of the default judgment to be served on the defendant, for the latter to be aware of the application and if advised, to make whatever application connected thereto that it may be minded or advised to make, including for instance, one for condonation. This service of the default judgment application clearly exudes fairness.

[12] The provisions of rule 15 (3) provide that, 'the court or managing judge may, where the claim is for a debt, liquidated demand or for the foreclosure of a bond without hearing evidence, and in the case of any other claim, after receiving evidence orally or on affidavit, grant judgment against the defendant or make such order as the court or managing judge considers appropriate.'

[13] In the instant case, it's clear that the claim against the defendant is for a debt. Furthermore, the plaintiff also seeks an order for the foreclosure of a bond. These two facts eminently place the matter within the bracket of cases where the court is at large to deal with the matter without hearing evidence. This is so for the reason that the claim is before court, including the amount allegedly owed and which has been brought to the defendant's notice but who that notwithstanding, did not defend the matter, including the amount claimed or the forfeiture in the present case. It would be a work of supererogation to call upon the court to then require evidence to be led in matters such as this,

[5] Order of Court dated 19 November, 2014.

where the amount claimed is certain and is, moreover, from present indications, not disputed by the defendant.

[14] I accordingly come to the inexorable conclusion, in the circumstances, that the plaintiff has followed the rule relating to default judgment to the letter. I therefor hold that this is a proper case in which default judgment may, subject to what I say below, be granted. I further find that the requirements of rule 15 (3), quoted above apply, and I further hold that default judgment may be given without the need of hearing oral or presenting affidavit evidence.

Rectification of the agreement

[15] As indicated earlier in this judgment, the plaintiff also applied for an order rectifying the agreement as it would appear that the name of the property liable to forfeiture, was incorrectly entered in the agreement. At the hearing of the application for default judgment, Ms. Schneider, for the plaintiff indicated that she was abandoning the prayer for rectification. This was after the court raised issue with regard to whether all the necessary averrals in relation to a claim for rectification had been made in the particulars of claim.

[16] Ms. Schneider was of the view that not all the necessary averrals which entitle a court to grant an order for rectification had been made. This view appears, in all probability, to have influenced the decision not to proceed with the claim for rectification. For completeness however, I find myself in duty bound to enumerate the necessary averrals with reference to authority and to decide whether the concession made was comely in the circumstances and whether a case had not been made out for the relief of rectification.

[17] The learned author Harms[6] states the following as requirements to be pleaded for an order of rectification to be granted:

(a) 'An agreement between the parties which was reduced to writing;

[6]Amler's Precedents of Pleadings, 7th Ed, Lexis Nexis, 2009 at p336.

(b) That the said written agreement did not accurately reflect the common intention of the parties;
(c) An intention by both the contractants to reduce the agreement into writing;
(d) A mistake in the drafting of the document; and
(e) The wording of the document as rectified. It does not suffice to give the general import of the common intention.'

For the sake of emphasis, the learned author, having enumerated the above requisites states, 'These facts must appear at least by way of necessary implication from the pleading.'

[18] The question to determine, is whether the necessary averrals were pleaded in the particulars of claim or at the least, whether they appear by necessary implication in the instant case. In dealing with the claim for rectification, the plaintiff pleaded the following in its particulars of claim:[7]

> '7. The written agreement does not correctly record clause 13 thereof the agreement between the parties in that it describes the collateral which shall be lodged as a first bond over Erf 192, Omdel, Hentiesbaai.
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> 8. The collateral which was in fact given, was a first bond over Erf No. 85, Hentiesbaai, in the Municipality of Hentiesbaai. The aforesaid is apparent from a copy of Mortgage Bond No B7666/2011, which is attached hereto as annexure **POC2**.
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> 9. The incorrect description of the Erf being bonded as security in clause 13 of the written agreement, was occasioned by a common error of the parties and the parties signed the written agreement in the *bona fides* but mistaken belief that it recorded the true agreement between the parties.
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> 10 This summons constitutes demand rectification of the written agreement so as to conform to the common intention of the parties and to reflect their true intention at the time that the written agreement was signed. Such rectification shall as to conform to Mortgage Bond B 7666/2011,

[7] Page 3 Para 3-10 (inclusive).

registered over Erf No. 85, Henties Bay, as collateral for the loan reflected in the written agreement.'

[19] It would appear to me that the requirement mentioned in (a) above has been met. This can be seen from the contents of paragraph 3 of the particulars of claim. Second, the requirement in (b) above is contained in paragraph 9 read together with the contents of paragraph 7 of the particulars of claim. The contents of the former paragraph are quoted in full in the immediately preceding paragraph. Regarding the third requirement, namely the intention by the contractants to reduce the agreement into writing does not appear to have been specifically pleaded as such. It would appear, that notwithstanding, that the parties intended and agreed that the agreement was to be reduced to writing and there is no contending contention in that regard. It is common cause that the parties did in fact have the agreement reduced to writing and this is plainly a recordal of their agreement and intention. I therefore find that this leg of the requirements has also been met.

[20] The next requirement, which is for the parties to allege a mistake in the document, I am of the view that paragraph 9 of the particulars of claim alleges that there was a mistake common to the parties in the drafting of the document. In this regard, I am of the considered opinion that this requirement has also been fully met by the plaintiff in this case. Lastly, has the last requirement been met, i.e. the wording of the document as rectified? It would appear to me that this part of the requirements was not directly met, as no rendition of the wording of the document as rectified has been provided in the particulars of claim. There is, however, a full reference, in the prayer, of how the agreement, as rectified, should read. I am of the considered opinion that although this is not fully met in the particulars of claim, there has, however, been substantial compliance with the requirements as pointed out that the agreement, as rectified, was stated in the relief sought.

[21] I also take into account the glaring fact that the defendants elected not to defend this matter and it would be unconscionable to refuse the relief for rectification only on the basis that one of five requirement has not been fully

met by the plaintiff. I must, however emphatically point out that by so overlooking the full compliance with the last requirement, the court must not be seen or perceived to countenance or encourage parties not to fully comply with the requirements which must be met *seriatim*. I do this in the full appreciation of the peculiar facts attendant to the present matter. I should otherwise state for emphasis, as appears from the excerpt quoted above, that the above averrals must be alleged and this, it is common cause, should be in the particulars of claim. That should be the invariable norm. In the premises, I am of the view that the claim for rectification must, in the circumstances, also be granted.

Declaration of property executable

[22] The last leg of the judgment, relates to the issue of whether this is a proper case in which to declare the encumbered property executable. This question arises primarily in view of the provisions of the rules of court, in particular, rule 108. The relevant rule that finds application, and which is critical to the present enquiry is rule 108 (1) (b), which must be read in conjunction with subrule (2) thereof. Rule 108 (1) has the following rendering:

'The registrar may not issue a writ of execution against 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 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, subject to subrule (2), declared to be specially executable.'

Subrule (2), on the other hand, provides:

'If immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as a home, the court may not declare that property executable unless -

(a) the execution creditor has by means of personal service effected by the deputy-sheriff given notice on Form 24 to the execution debtor that application will be made to the court for an order declaring the property executable and calling on the execution debtor to provide reasons to the court why such an order should not be granted;
(b) the execution creditor has caused the notice referred to in paragraph (a) to be served on any lessee of the property sought to be declared executable; and
(c) the court so orders, having considered all the relevant circumstances with specific reference to less drastic measures than the sale of the primary home under attachment, which measures may include attachment of an alternative immovable property to the immovable property serving as the primary home of the execution debtor or any third party making claim thereto.'

[23] What is plain is that before any immovable property may be declared executable, two things, which may be regarded and are stated to be conditions precedent, must unmistakably have occurred, namely, (a) the issuance of a return indicating that the execution debtor has insufficient property to satisfy the writ, or what is often referred to as *nulla bona* return; and (b) that an application has been made by the execution creditor for declaration by the court that the property is specially executable. I say so because at the end of (a) above, the law giver did not use the word "or", thereby indicating that both, and not either of the considerations have to be present.[8] To this extent, it would seem to me that the rules, as presently drafted have changed the position that previously obtained.

[8] See *Afrikaner v The Master of the High Court of Namibia (A 330/2011 [2013] NAHCMD 224 (29 July 2013) at paragraph 64; and Kalomo v Master of the high Court and Others (SA 37/2007) [2008 (2) NR 693 (SC) (25 August 2008*

[24] In the case of *Namib Building Society v Du Plessis*[9], a Full Bench of this court expressed the view that where there is a bond, in terms of which the property was to be declared executable, there is no need to first obtain a *nulla bona* return. The court expressed itself as follows in this regard[10], 'Unless some compelling reason exists to require such a plaintiff to first execute against movables, no reason occurs to me why he should not be given the benefit of his bargain. If some compelling reason exists, the duty surely lies on the mortgagor defendant to persuade the Court why the property should not be declared executable". I choose to deal with the issue of the existence of what is called in legal parlance a *nulla bona* return last. The main question is whether, as this is an application to have the property declared executable, the present circumstances constitute a proper case to do so.

[25] At common law, it must be mentioned, a mortgagee plaintiff has a substantive right to realize the immovable property of the judgment debtor in cases where the said judgment creditor duly registered the mortgage bond for the very purpose of securing the debt which is the subject matter of the claim[11]. It is now common cause that the terrain has changed somewhat since the amendment of the rules of court by the Judge President when he introduced the provisions of rule 108, mention of which is made in the preceding paragraphs.

[26] It must be recalled that the High Court Amendment Act[12] was promulgated "To amend the High Court Act, 1990, so as to give powers of to the Judge President to make rules to regulate the execution of immovable property where such property is the primary home of the judgment debtor and to make court-ordered alternative dispute resolution mechanisms compulsory in certain causes and matters as preliminary to the hearing or trial . . .' No question or suggestion is raised or can arise that the promulgation of the said rule has the effect of varying the common law and thus *ultra vires* the powers

[9] 1990 NR 161(HC) 161.
[10] *Ibid* at page 164 A.
[11] *Ibid* at page 163J – 164A.
[12] Act No. 12 of 2013

vested in the Judge President. This amendment, it must be mentioned, was enacted by the Parliament of Namibia and assented to by the President of this Republic. This is particularly the case for the reason that in terms of the amendment of section 39 of the High Court Act, at section 1 (1) (c) 'The Judge-President, with the approval of the President, may make rules to regulate execution against an immovable property of a judgment debtor where the property is the primary home of the such judgment debtor . . .' The foregoing provisions therefore put paid to any argument or contention that may be put up tending to suggest that the Judge-President may have acted *ultra vires* his powers.

[27] The introduction of rule 108 (2), in particular, introduces an element of judicial oversight over the sale of property that is regarded as the "primary home" of the execution debtor or where that property is leased to a third party as "home". The question that arises in the instant case, as foreshadowed above, is whether the instant case is a proper case in which to declare the property specially executable, and it follows that in addition to the court making that declaration, the judgment creditor must have produced a *nulla bona* return as aforesaid.

[28] It would appear to me that upon application to declare property which is the subject matter of the bond specially executable, the onus is generally on the execution debtor to make the court aware of the status of the property or the third party, who may be residing therein. In the latter instance, it would appear to me, the execution creditor has a duty to bring to the personal attention of the execution debtor or the third party residing in his or her house of the application for the said declaration and it would be for the latter to bring the status of the property in question to the court before it makes an appropriate order regarding the declaration sought. The notice must be served by an independent person in the form of the deputy sheriff. That this should be the case is, in my view, apparent from the provisions of rule 108 (2) (b), quoted above. It would otherwise seem to me an untenable situation to place the onus, in the reverse, as it were, for the execution creditor to show

that the property sought to be declared is not the primary home of the debtor or the home of a third party, as the case may well be.

[29] It must be mentioned in this regard that the notice given to the occupants of the immovable property may not be gleaned from the summons which will, amongst other relief, seek the declaration of the property specially executable. I say this for the reason that at the summons stage, the parties to the *lis* are referred to as the plaintiff and the defendant. At the stage of the issuance of the notice in terms of rule 108 (2) (a), however, the appellations change and the parties are referred to as the 'execution creditor' and 'execution debtor', respectively. This indicates that the notice is issued after judgment in favour of the plaintiff has already been granted and the parties are, at the stage of execution of the judgment, hence the use of the word execution creditor and debtor, respectively.

[30] I venture to say that in this circumstances, it is not enough for the execution creditor to have made the application to have the property declared specially executable in the summons, but it seems to me that a new application which conforms to the provisions of Form 24 is necessary. This notice must be served on the execution debtor or the third party leasing the property, as the case may well be. This is not just a notice, advising the said execution creditor or the third party of the application for a special declaration, but it also gives the said execution debtor or third party an opportunity to advance reasons 'why such an order should not be granted'. I am of the view that in this regard, the court should not be too prescriptive by requiring the said party required to show cause, to do so only in writing or to be legally represented in this enquiry. The notice, should in my view enable even one who is at that stage impecunious, to present him or herself and to make representations even orally, as to why the drastic course of declaring the property executable should not be granted.

[32] In this regard, it would seem to me that a procedure akin to that required for deflecting the grant of a summary judgment may be adopted. It will be recalled that in terms of rule 60 (5) (b) (ii), a defendant who claims that

he or she has a *bona fide* defence may, amongst other options, by 'oral evidence given with the leave of court, of himself or herself or of any other person who can swear positively to the fact . . .' It would be my view that generally speaking, an execution debtor would have to comply with the requirements of rule 108 (2) (a), namely, to show cause in writing why an order declaring the property in question executable should not be made, with the lave of court however, and which leave can be obtained from the bar, the court may relax that requirement and allow the said debtor, in view of his or her special and precarious circumstances, to make oral submissions in the form the court may find appropriate, on the declaration of executability of the property concerned.

[32] It is apparent from the provisions of rule 108 (2) (c) that the court must make an order for property to be declared specially executable after a full enquiry. This includes notice to be served by the deputy sheriff on the party whether the registered owner or a third party which stands to be affected by the declaration. Secondly, as I have said, an opportunity should be availed to the affected party to make representations, whether orally or in writing, and whether by counsel or personally by the execution debtor or the third party as to whether the declaration is in the circumstances proper. This will include for instance information to the court about the status of the property in question, particularly whether the property in question is the 'primary home' of the execution debtor or the 'home' of the third party. I deal with that status shortly.

[33] The process included in rule 108 has probably been influenced to some degree by jurisprudence which has emerged in the Republic of South Africa, where courts have taken upon themselves to provide 'judicial oversight' over the declaration of property specially executable. From a reading of the cases in South Africa, it would seem that the motivation for the judicial oversight was the need to comply with the Constitution of South Africa, which protects the right to everyone to adequate housing[13]. One such case referred to the court by the plaintiff's counsel, is *Mkhize v Umvoti Municipality And*

[13] The Constitution of the Republic of South Africa, 1996.

Others[14]where the Supreme Court of Appeal stated that the object of judicial oversight was to ensure that all cases of execution against immovable property conducted in terms of the Magistrates Court Act[15] did not serve to breach the constitutional right to housing.

[34] Namibia, unlike South Africa, does not have what are normally referred to as socio-economic rights, such as adequate housing, health care, food, water and social security enshrined and protected in the constitution. It is however, apparent that the issue of people losing their homes following unpaid debts became a source of concern in this country and this would, in my view, explain the reason for the introduction of judicial oversight in respect of declarations of immovable property especially executable in the rules. The rule was promulgated to balance two interests. The first was to regulate the sale of homes in execution when the property in question was a home. The second, was to ensure that the giving of credit by financial institutions remained effectual and was not rendered unserviceable. It is however plain that this was done primarily in order to protect home owners or third parties residing in homes from unbridled loss of homes by declarations of executability of landed property by orders of court and over which the courts simply had no control regarding application from the panoply available, of other remedies less drastic than the sale of a home..

[35] In order to prescribe issues to be taken into account before declarations of executability of property to be properly made during the enquiry, the law giver has, in rule 108 (2) (c) in addition to other considerations it might consider pertinent, called upon the court to consider whether there are other available measures of a less drastic nature than the sale of a home. In this regard, the court my take into account the sale of other immovable property than that forming the subject matter of the mortgage bond. This would appear to me, to give credence to the view I expressed earlier that contrary to the requirement in terms of the previous case law cited earlier, where there was no need to file a *nulla bona* return, it would appear

[14] 2012 (1) SA 1 (SCA).
[15] Act No 32 of 1944.

that filing the said return may be one of the first ports of call before landed property may be sold in execution.

[36] The last issue for determination may be what the law giver may have had in mind when it used the word ‘primary home’ in respect of the execution debtor or ‘home’ in relation to the third party referred to in rule 108 (2) (b) of the rules of court. Does this mean any house designed for people to live in? The Oxford Advanced Learner’s Dictionary defines the word ‘home’ as ‘the house or flat you live in, especially with your family’. In common usage, one could refer to a home as ‘a dwelling-place used as a permanent or semi-permanent residence for an individual, family, household or several families…’ In this regard, it would be deduced that a home is a permanent structure affixed to the land in which an individual person, family or clan live and use to sleep, cook and enjoy amenities that provide protection for them from weather vicissitudes and elements.

[37] What then is a ‘primary home’? The lawgiver did not provide a definition for this term in the text. It therefore behooves this court to attempt to seek out what the lawgiver meant by the words in question. A primary home, in my view, would refer to a permanent structure as described above, which constitutes the only viable place that provides shelter and protection from the vicissitudes of the weather and the elements to an individual person, family or even extended family, considering that we live in the African setting. By way of contrast, and where the concept of the primary home may be clearly illustrated, is in the *Mkhize* case, for instance, where the court at page 18 quoted an excerpt in which consideration was given for instance to a situation where the property sought to be sold in execution, though a home in the sense described above, is a secondary or alternative home in the sense of being a holiday home for the person or individual concerned, to be visited occasionally in certain seasons for leisure and relaxation, away from the regular home. In that regard, it cannot be regarded as the primary home, but an alternative home, which can, all other considerations taken into account, be sold in execution to satisfy the debt. In point of fact, although the word ‘primary home’ is used, this may as well read the ‘only’ home and that is the

sense in which the law giver would have intended to be conveyed in this matter.

[38] Although stated in relation to a different constitutional text, the *raison detre* for judicial oversight was stated in the following words in the *Mkhize* case[16]

> 'The real question is whether the defendant is likely to be deprived of access to adequate housing should he or she be deprived of the property in question – that is, whether he or she is unlikely to be left homeless as a result of the execution . . . Of course, the Supreme Court of Appeal in *Saunderson* is correct when it says (giving the example of a luxury or holiday home) that not all cases of execution of immovable property will have this effect. But how is one to know whether the Registrar is dealing with a holiday home or the family's only home?'

Further at paragraph [25], the court, in a concurring judgment, said:

> 'As was pointed out in *Gundwana* the rule established in *Jaftha* 'cautions courts that in allowing execution against immovable property due regard must be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes'.

[39] It would therefore appear to me that even in this jurisdiction, judicial oversight has been introduced to alleviate and where possible avoid the deleterious impact the sale of immovable property may have on persons who do not have alternative accommodation at their disposal. If granted willy-nilly, without any consideration of the particular circumstances attendant, the execution of immovable property may result in people living in squalor conditions, devoid of shelter and subject to the elements, thus infringing in a sense on their right to dignity, when in some cases, movable property or other immovable property is available to be sold in execution than selling a home in

[16] *Ibid* at para [18].

which the execution debtor lives, sometimes with many dependents, including members of the extended family, who are thereby rendered homeless. It is for that reason that the court has a panoply of considerations available to it, including determining whether there are less stringent measures that can be open to application than selling the home or primary home, as the case may well be.

[40] I now turn to the issues which presently obtain in the instant case regarding the prayer for the property to be declared specially executable. It would appear to me that first and foremost, it is necessary, after the obtaining of a default judgment, summary judgment or any other judgment, in which execution is due and may affect the sale of specified immovable property, that a return as stipulated in rule 108 (1) (a), is first obtained i.e. what I have referred to as the *nulla bona* return above. In the instant case, I have granted judgment for the amount prayed in the summons. It would be necessary, therefore, for the judgment creditor to obtain a *nulla bona* return, judgment for the monetary claim having been granted. It would therefore be necessary that this return be secured first and presented to the Registrar before any process for the execution of the property specified in terms of the mortgage bond may follow.

[41] Secondly, it would appear to me that once the said return has been obtained, that the notice in terms of section 108 (2) (a), is to be prepared and served by the deputy-sheriff personally on the judgment debtor or the third party occupying the property, as the case may be. As indicated, the said notice should be given to the said occupant for them to provide reasons within 10 days of receipt of the notice, as to why the property in question, as described in the rectification in this case, should not be declared executable. A reading of the rule is not prescriptive as what form the reasons should assume. The easiest and most convenient way would be to provide the reasons in writing. I would however, propose that some procedure must be put in place to allow persons who may be illiterate, to also have the opportunity to come to court and make oral representations regarding the question of declaring the property executable. It would, in my view, be unfair,

to leave the furnishing of reasons only to writing, as Namibia, has many different classes of persons, some of whom may have had no encounter, whatsoever, with the class room. They should not be left out of the benefits of this enquiry by attaching an interpretation which only caters for written submissions. In this regard, the Honourable Judge President, may wish to make a Practice Directive. It would be advisable to also include in the notice, the specific date set as to when the enquiry may take place so as to enable both the judgment creditor, of the one part, and the judgment debtor or the third party, of the other part, if they so desire, whether personally or by representative, attend the enquiry and make representations, whether orally or in writing, as suggested above.

[43] The judgment has regrettably taken longer than would otherwise have been the case. This is owed to the sheer weight of the issues up for determination and a realization that pronouncing on the procedure to be followed on such matters for the first time, needs a lot of time for sober consideration and weighing of all possible scenarios. Furthermore, the matter was not defended, depriving the court of the benefit of a different perspective to the live issues. This therefore called upon the court to be even more vigilant in assessing all the sides of the issue that may present themselves in the future.

[44] I am of the view that the following prayers should be made in the instant case:

(1) Rectification of the clause 13 of the written agreement to read ‘Erf 85, Hentiesbaai.’
(2) Payment of the amount of N$ 13 099 759, 77;
(3) Interest on the aforesaid amount *a tempore morae* at a rate of 20% per annum calculated from the date of summons to the date of final payment;
(4) The plaintiff is required to comply with the provisions of Rule 108 (1) and (2) as interpreted in the judgment above in relation to the prayer for the property described above to be declared specially executable;

(5) The matter may, if necessary, thereafter be set down before me for the conduct of the enquiry in terms of rule 108 (2) (c) of the rules upon notice to the execution debtor.

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TS Masuku, AJ

APPEARANCES

PLAINTIFF:	H Schneider Instructed by Theunissen, Louw & Partners
DEFENDANT:	C. Schickerling Instructed by Etzold-Duvenhage