



**REPORTABLE**

CASE NO: SA 69/2015

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**STANDARD BANK NAMIBIA LIMITED**

**Appellant**

and

**MAGDALENA SHIPILA**

**First Respondent**

**THE OMBUDSMAN (*AMICUS CURIAE*)**

**Second Respondent**

**NEDBANK NAMIBIA LIMITED**

**Third Respondent**

**FIRST NATIONAL BANK NAMIBIA**

**LIMITED**

**Fourth Respondent**

**BANK WINDHOEK LIMITED**

**Fifth Respondent**

**Coram:** HOFF JA, CHOMBA AJA and MOKGORO AJA

**Heard:** 11 October 2016

**Delivered:** 6 July 2018

**Summary:** The issue for determination in the court *a quo* as well as on appeal was whether the provisions of rule 108 of the High Court rules apply in an application for

an order declaring, immovable property belonging to a judgment debtor specially executable.

The court *a quo* answered the question in the affirmative. Rule 108 provides that the registrar may not issue a writ of execution against immovable property unless a *nulla bona* return has been made and where a court has on application declared the immovable property specially executable.

Where the immovable property is the primary home of the judgment debtor, a court may not declare such immovable property executable unless the execution debtor had personally been informed of an application intended to be made to have the immovable property declared executable and the execution debtor had been informed to provide reasons to court why such an order should not be made.

A court having regard to all the relevant circumstances including less drastic measures than a sale in execution of the primary home, may order the immovable property specially executable or may decline to do so.

In terms of the common law movables first have to be exhausted before recourse could be had to the land except when the plaintiff has a hypothec or a pledge. Thus where immovable property has been specially bonded, the judgment creditor has a substantial limited real right to such property and is entitled to first execute against the immovable property and only to the extent of any shortfall afterwards against the movables.

Rule 108(1) of the High Court rules by providing in peremptory terms execution against movables first reverses the sequence of execution and is in conflict with the common law in so far as it relates to the right to execute against hypothecated immovable properties.

In the event of a conflict between the common law on the one hand and a rule of court on the other hand, the presumption is strongly against the common law being cut down by the rule. A rule of court is not presumed to take away prior existing rights

unless it appears expressly from the legislation. Where a rule of court is not a rule for the conduct of proceedings but a substantive rule of law it is *ultra vires* and is of no legal force or effect.

It is accepted that there must be judicial oversight where a claim is in respect of the foreclosure of a bond in terms of the provisions of rule 15(3). Where immovable property is the primary home of a judgment debtor a court must consider viable alternatives, ie less drastic measures than a sale in execution.

Formalism in the application of rules of court is discouraged. Rules of court are not an end in themselves to be observed for their own sake but are there to provide the inexpensive and expeditious completion of litigation before the courts; to facilitate the real issues in dispute justly and speedily.

A creditor may include a prayer in a summons, for a writ of execution against property specially hypothecated, in the event of the matter going by default. This would obviate the need to prepare another application at additional cost and waste of time.

A court is not precluded from exercising judicial oversight already at the stage where a creditor approaches the court for default judgment in respect of the capital amount outstanding with an additional prayer for an order to have the immovable property declared specially executable.

In the absence of any abuse of process or bad faith a judgment creditor will normally be entitled to enforce a judgment by executing against bonded immovable property.

The first respondent in this appeal had been informed personally of the intention of the appellant to apply to court for an order to declare the relevant immovable property specially executable. First respondent in the court *a quo* made submissions why the property should not be ordered specially executable. A *nulla bona* return was rendered in respect of the movable property of the first respondent. The respondent

never settled the debt as promised. The first respondent never made an allegation that the appellant abused court process or that appellant acted in bad faith.

The court *a quo* should have declared the immovable property specially executable since there was no viable alternative or less drastic measure other than a sale in execution.

The appeal succeeds and the order of the court *a quo* striking the matter from the roll is set aside and substituted with one declaring the immovable property of the first respondent specially executable.

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### APPEAL JUDGMENT

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HOFF JA (CHOMBA AJA and MOKGORO AJA concurring):

[1] This is an appeal against the order of the High Court striking from the roll an application to declare immovable property specially executable.

[2] The grounds of appeal were that the learned judge erred in law and/or facts in that:

1. He struck the application from the roll;
2. He failed to declare the immovable property belonging to the First Respondent executable;
3. He failed to have regard to the fact that the registered bond in favour of the Appellant, constitutes 'property' as envisaged in Article 16 of the Constitution of the Republic of Namibia and/or common law rights agreed

upon (and registered) between the Appellant and the First Respondent. In failing to recognise these substantial rights he further erred in the following respects:-

3.1 By not declaring rule 108(1)(a) and (b) of the Rules of the High Court(GN4/2014, as amended) *ultra vires* the High Court Act, 1990 (as amended) the common law and Article 16 of the Constitution of the Republic of Namibia;

3.2 By not reading rule 108(1)(a) and (b) down, as to be only applicable in circumstances where the judgment creditor does not have a registered mortgage bond in its favour.

4. He failed to give recognition to the legal principle that the mortgage bond, *in casu*, protects the rights of the Appellant (judgment creditor) as well the rights of the First respondent (judgment debtor).
5. He failed to interpret rule 108 within its proper constitutional setting, being that, where a registered bond is in existence and the Appellant (judgment creditor) moves for default judgment in terms of rule 15(3), the said rule (rule 15(3)) itself, provides for any required judicial oversight, particularly in the circumstances of this case where the First Respondent (judgment debtor) was forewarned in the Appellant's summons that if default judgment is obtained an order declaring the immovable property executable, will be

sought, and particularly in circumstances where judicial oversight, as required by the Constitution, was indeed manifested in the fact that the First Respondent (judgment debtor) was present in court and endeavoured to show cause why the property should not be declared executable.

6. He erred in this case, particularly given the applicable Constitutional rights of the appellant (judgment creditor), by failing to read the word '*and*' as provided for in rule 108(1)(b), to mean '*or*'.
  
7. He failed to give proper consideration to the primary purpose of the Constitution in the applicable circumstances, i.e. to provide opportunity for judicial oversight before a judgment debtor's primary home is declared executable and that the required judicial oversight is not contained in or limited to a pedantic rule 108 process (ignoring the judgment creditor's Constitutional rights as well as the registered agreement between the judgment debtor and judgment creditor) but rather, that the required judicial oversight was served by granting the opportunity to the judgment debtor to advance reasons to the Court why an order as envisaged in rule 15(3) should not have been granted.

## Background

[3] The appellant issued a combined summons claiming an amount of N\$299 862,47 together with compound interest on the basis of breach of contract by the first respondent.

[4] The appellant lent and advanced monies to the first respondent and as security for the loan, a continuing covering mortgage bond was registered in appellant's favour over the immovable property of the first respondent.

[5] It was alleged that due to non-payment of the monthly instalments due to the appellant, the first respondent fell into arrears resulting in the entire balance outstanding becoming due and payable.

[6] A copy of the mortgage bond and a certificate of indebtedness were attached to the combined summons. Para 6 of the particulars of claim partially reads as follows:

'6 On application of judgment the plaintiff will seek an order declaring the mortgaged property to be executable. The defendant has been advised of the plaintiff's intention as provided for in Rule 108(2) (The notice as provided for by Rule 108(2)(a) is attached hereto marked annexure "C".) As this summons was served at the immovable property as same is the chosen *domicilium citandi et executandi* of the defendant, any lessee of the property has also received notice as provided for in Rule 108(2)(b).'

Para 7 reads as follows:

'7 If the defendant or the lessee wishes to object to the immovable property being declared executable, he/she is obliged to place facts and submissions before the Court to enable the Court to consider them when the plaintiff applies for judgment. Failure to do so may result in an order declaring the aforesaid immovable property being declared (sic) executable.'

[7] On 31 July 2014 first respondent delivered a document titled 'opposing affidavit' from which it appears that:

first respondent is a single mother with two dependants; first respondent acknowledged her indebtedness to the appellant; first respondent obtained the loan from the appellant for the purpose of purchasing the immovable property; although the first respondent is unemployed, she intends repaying the loan in full; the arrears on the relevant mortgage bond account was last up to date on 13 June 2013; first respondent is in the process of constructing a flat on the immovable property that she intends leasing out to generate income; first respondent is of the belief that she will generate enough money to pay the monthly instalments due to the appellant including the arrears; first respondent has funds available in the Old Mutual Retirement Fund and once she receives the pay out in February 2016, she will immediately settle the debt; and the immovable property is the only home of the first respondent and if she loses the home, first respondent and her children will have no shelter.

[8] On 14 August 2014 the court granted default judgment against the defendant for the payment of the capital amount, plus interests and costs. In view of the



'opposing affidavit' delivered by the first respondent, the determination of the prayer sought by the appellant to have the immovable property declared executable, stood over to be determined at a later stage.

[9] Subsequent to the granting of the default judgment a writ was issued against movables and on 30 September 2014, a *nulla bona* return was made by the deputy sheriff.

[10] On the initial date set for the hearing the Ombudsman indicated that he wished to intervene in the application. The Ombudsman was thus joined as *amicus curiae* and all other commercial banks as well as Old Mutual Pension Fund were invited to intervene, should they so wish.

[11] During the adjournment of the proceedings third, fourth and fifth respondents gave notice of their intention to intervene in the proceedings. No further pleadings were filed on their behalf. In the court *a quo*, argument was advanced on behalf of all the commercial banks jointly. The second respondent also advanced argument. The first respondent appeared in person throughout the proceedings in the court *a quo*.

[12] On appeal Mr Heathcote advanced argument on behalf of the appellant. The first respondent appeared in person and addressed the court. No one appeared on behalf of the second, third, fourth and fifth respondents.

### The High Court judgment

[13] The issue to be considered in the court below was whether the provisions of rule 108 apply in an application for an order declaring the immovable property belonging to the first respondent executable.

Rule 108 provides as follows:

#### **‘Conditions precedent to execution against immovable property and transfer of judgments**

108(1) 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 from which it appears that that 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.

(2) if the immovable property sought to be attached is the primary home of the execution debtor or is leased to a third party as home the court may not declare that property to be specially 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 personally on any lessee of the property sought to be declared executable;
- (c) the court so orders, having considered all the relevant circumstances with specific reference to less drastic measures than sale in execution of the primary home under attachment, which measures may include attachment of an alternative immovable property serving as the primary home of the execution debtor or any third party making claim thereto.'

[14] The court *a quo* answered the aforementioned question in the affirmative and the application to declare the immovable property of the first respondent specially executable was struck from the roll. The reasoning of the court appears from para 25 to 28 of its judgment which read as follows:

'25 There is no doubt that the wording of Form 24 that what is intended is for a default judgment to be granted first before an application is made for the property to be declared executable. It has become practice that Form 24 being attached to the summons differ from the provided Form in terms of the rules. Attention is brought to the wording of subrule 108(2)(a) that notice should be 'on Form 24' as opposed to 'as near as it may be to Form 24'. This implies that the Form must be precisely as required by the rules without any additions or subtractions. The court in the *Futeni* Judgment at para [29] elaborated more on this point and stated 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.

b) *having considered all the 'relevant circumstances' with specific reference to less drastic measures than sale in execution of the primary home under attachment,*

26 This sub-rule 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 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 judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, alternative course should be judicially considered before granting execution orders.

27 This is the mechanism adopted by the courts to protect homes of judgment debtors. At common law, as in the words of my brother Masuku, AJ, 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.'<sup>8</sup> 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.<sup>8</sup> 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. Rule 108 does therefore, as conceded to by the Ombudsman, not take away the creditors right to execute against the properties of the debtor but merely sets down procedures as to how that should be done. The Banks do not therefore find themselves in a better and more advantageous position than any other judgment creditor.

28 The courts are very slow in setting general guidelines that will apply across the board since each case should be decided on its own facts. The guidelines in one case might not necessarily apply in the next case. In this matter, the plaintiff has not complied with the procedural requirements of rule 108(1) and (2) in that default judgment was not first sought before the application was brought. Furthermore, the application before court does not comply with rule 65. I find that mortgage holders are obliged to comply with rule 108. Since, in the instance case, there has been no compliance with that rule, it must follow that the application must be struck from the roll and it is so ordered.'

[15] Rule 65 deals with the requirements in respect of an application, and subrule (1) provides that every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief.

[16] The issue on appeal is the same faced by the High Court, namely whether or not rule 108 finds application in respect of immovable property bonded in favour of the judgment debtor.

[17] Mr Heathcote on behalf of the appellant submitted that it does not, since a judgment creditor who is also a bondholder, may seek an order for foreclosure of a bond together with an order for default judgment in respect of capital, interest and costs in terms of rule 15(3), despite the existence of rule 108.

[18] It was submitted that rule 108 is a procedural guideline given to the registrar. Rule 108 does not and may not give power to the registrar to ignore a court order granted in terms of rule 15(3). The argument was that if rule 108 was intended to

apply to bonded property, then it is *ultra vires* the Constitution of Namibia and the common law and have to be struck out as *ultra vires* s 39 of the High Court Act 16 of 1990.

[19] It was submitted that if rule 108 only finds application in respect of unbonded property, then it serves the mischief which the rule-giver wanted to curb.

[20] Rule 15 deals with default judgments and rule 15(2) and (3) reads as follows:

- '(2) 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 for in subrule (4).
  
- (3) The court or managing judge may, where the claim is for a debt, liquidated demand or the foreclosure of a bond, without hearing evidence and in the case of any other claim after hearing or receiving evidence orally or an affidavit, grant judgment against the defendant or make such order as the court or managing judge considers appropriate.'

[21] 'The term 'mortgage', in the narrow sense of the word refers to a real right of security in an immovable asset or immovable assets of another, which is created by registration in the deeds registry pursuant to an agreement between the parties,<sup>1</sup> and the object of a mortgage bond is to give notice to the world in general that a particular property of a debtor is the subject of a charge in favour of a particular creditor. The registration in a deeds office of the instrument of hypothecation is the means of

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<sup>1</sup> *The Law of South Africa* 2 ed vol 17 part 2 p 290 para 327.

informing other creditors that in respect of the hypothecated property a *jus in re aliena* exists in favour of the mortgagee.<sup>2</sup>

#### Execution against bonded immovable property

[22] In *Namib Building Society v Du Plessis*<sup>3</sup> one of the questions on appeal was whether a mortgagee can as of right seek to have recourse against the burdened property, and thus entitled to have it declared executable. The full bench of the High Court answered this question in the affirmative.

[23] The following appears at 163C-J and 164A:

'There appears to be considerable authority to support the contention that a mortgagee can as of right look to the mortgaged property to satisfy his claim. In the materials available to me I found P Merula *Manier van Procederen* 4.94; S van Leeuwen *Commentaries on Roman-Dutch Law* (Kotze's translation) vol II at 536; cf also U Huber *Hedendaegse Recht-geleertheit* II chap 49. See also *Roodepoort United Main Reef GM Co Ltd (in Liquidation) and Another v Du Tait NO* 1928 AD 66 at 71 and cf *Rothschild v Lozondes* 1908 TS 493 at 498; *Whinney NO v Gardner NO (1893) 10 SC 333 .at 341*; *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 242; *Wilkie v Wilkie* 1934 NPD 308 at 310; *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander* 1975 (4) SA 936(T) at 941F. The earlier South African practice was in accordance with this view. See G B van Zyl *The Theory of the Judicial Practice of South Africa* vol 1 3rd ed at 294-5. He writes that in Roman law movables first had to be exhausted before recourse could be had to land. He continues:

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<sup>2</sup> *Thienhans, NO v Metje & Ziegler Ltd & another* 1965 (3) SA 25 (AD) at p 31G-H.

<sup>3</sup> 1990 NR (HC) 161.

It is the same with us when the plaintiff has no hypothec or pledge. But when property has been specially mortgaged that property must first be sold in execution before any other can be taken and only for the deficiency can other property be taken.

See also *Wilk and Millin's Mercantile Law of South Africa* 18<sup>th</sup> ed at 407; *Wille's Mortgage and Pledge in South Africa* 3rd ed at 5.

The Rules of Court now deal with the question of execution:

Rule of Court 45(1), in summary, provides that, *except* where by judgment of the Court immovable property has been declared executable, a writ of execution against immovable property will not be issued by the Registrar of the Court until a return on a writ against movables shows that they will not satisfy the debt. (The emphasis is mine.) A Court, in deciding whether or not fixed mortgaged property should be declared executable, is therefore not fettered by Rule 45(1).

A mortgagee plaintiff should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he sues. Such a plaintiff has advanced money on the understanding that he can preferentially look to the proceeds of the mortgaged property. Unless some compelling reason exists to require such a plaintiff first to execute against movables, no reason occurs to me why he should not be given the benefit of his bargain. If some such compelling reason exists, the duty surely lies on the mortgagor defendant to persuade the Court why the property should not be declared executable.'

(The emphasis appears in the original text).

and at 164G-H:

'The right to apply for a writ of execution does not depend on any agreement between creditor and debtor. It is a consequence of the judgment against the debtor. A clause in a mortgage bond stating that the mortgagee is entitled to recover the debt from the proceeds of the sale of the property does not seem to take the



creditor's rights any further. Such relief furthermore can be granted simply on a prayer asking that the property be declared executable.'

[24] Similarly, in *Nedbank v Mortison*<sup>4</sup> the origin and development of rule 45(1) of the rules of court was considered and reference was made to a full bench judgment in the matter of *Gerber v Stolze & others*<sup>5</sup> where the history of the rule has been set out.<sup>6</sup>

[25] The court in *Mortison* concluded as follows in para 17:

'There were thus two recognised methods of attachment of immovable property by writ. First, after a writ against movables had been issued and the Registrar determined that the judgment had not been satisfied thereby. Second, where the court declared the immovable property executable and this would occur when the property had been specifically hypothecated. The rationale for this was set out in *Gerber* at 172F-H in the following terms:

"The only reason for applying to Court at all is to have a short-cut in the one case where a money judgment has been obtained and the money judgment is secured to the plaintiff by specially hypothecated immovable property; then, in the normal course, the Court is asked in advance, to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable specially hypothecated, that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.'"

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<sup>4</sup> 2005 (6) SA 462 WLD.

<sup>5</sup> 1951 (2) SA 166 T at 171H-172A.

<sup>6</sup> Reference was made in that case to a rule 67(a) promulgated in Transvaal in 1902 and similarly worded as rule 45(1).

[26] It is accepted practice that in applications for orders to have bonded immovable property declared specially executable, that such orders are ordinarily sought contemporaneously with, and ancillary to, the orders granting judgment in respect of the principal debt. What is contentious is the question whether an applicant must now<sup>7</sup> bring a substantive application pursuant to the provisions of rule 65, ie on notice of motion, strictly complying with the procedural requirements of rule 108(1) and (2) before a court may declare bonded property specially executable, or may (as in this instant case) a defendant be forewarned in a summons that if judgment is obtained an order declaring the immovable property executable will be sought simultaneously giving the defendant notice in advance as required by rule 108(2)(a) and (b)?

[27] The court *a quo* found that strict compliance with the procedural requirements of rule 108(1) and (2) was a pre-condition for an order declaring bonded immovable property specially executable by a court of law. The court *a quo* followed the reasoning in the matter of *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 29 HC.

[28] In *Futeni* the court held that a 'judgment creditor must make a new application for an order for the immovable property to be declared executable in accordance with the following procedures:

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<sup>7</sup> ie subsequent to the promulgation of the new High Court rules which came into effect on 14 April 2014.

1. The judgment creditor had to first obtain a *nulla bona* return and present it to the registrar before any process for the execution against the immovable property could follow.
2. Once the return had been obtained, a notice in terms of rule 108(2)(a) had to be prepared for personal service by the deputy sheriff on the judgment debtor or the third party occupying the property.
3. The judgment debtor or occupant had then to provide reasons within 10 days of receipt of the notice, as to why the property in question should not be declared executable.<sup>8</sup>

[29] In paras 29 and 30 the court in *Futeni* stated the following:

'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 the 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 these 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.<sup>9</sup>

[30] It appears to me from the *Futeni* judgment that a plaintiff issuing summons is strictly speaking not precluded from praying for an order declaring immovable property specially executable, but must in addition and subsequently bring a new

<sup>8</sup> An extract from the headnote.

<sup>9</sup> Para 30 of the *Futeni* judgment quoted in part only.

application, on notice of motion, complying with the requirements of rule 108(2)(a) and (b).

[31] The inference, in view of these paragraphs is that a plaintiff *may* in a summons pray for an order declaring immovable property specially executable and an execution creditor *must* subsequently again in an application to have the said immovable property declared specially executable comply with the requirements of rule 108(2)(a) and (b) for the purposes of this rule.

[32] I agree with Masuku AJ in *Futeni* that the 'introduction of rule 108(2) . . . introduces . . . judicial oversight over the sale of property that is regarded as the 'primary home' of the execution debtor or where the property is leased to a third party as a 'home'. Furthermore that the process required 'by rule 108 has probably been influenced . . . by jurisdiction which has emerged in the Republic of South Africa where the courts have taken it upon themselves to provide "judicial oversight" over the declaration of property specially executable'

[33] A reading from the cases decided in South Africa appears that the rationale for judicial oversight was compliance with a constitutional imperative as reflected in Art 26 of the South African constitution guaranteeing the right of everyone to 'adequate housing' and in addition, registrars could have granted orders declaring executable immovable property in certain circumstances ie without court oversight.

[34] In my view it would be instructive to briefly consider some of the South African decisions in respect of the issue of declaring immovable property specially executable.

1. *Japhta v Schoeman & others; Van Rooyen v Stoltz & others*<sup>10</sup>

This case concerned two separate but similar situations where the debtors' homes had been sold in execution for very small unsecured debts of R250 and R190 respectively.

The case turned on a procedural point. Section 66(1)(2) of the Magistrates' Court Act<sup>11</sup> provides that whenever a court gives judgment for the payment of money, failure to pay such money shall be enforceable by execution against the movable property, and if insufficient movable property is found, then execution against the immovable property of the debtor. Rule 36(1) of the Magistrates' court rules provides that the process of execution of any judgment whether in respect of movable or immovable property shall be issued and signed by the clerk of the court and addressed to the messenger.

[35] Rule 36(7) of the Magistrates' Court provides where the original judgment was entered by consent or by default (and the debt is for a liquidated amount) that the

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<sup>10</sup> 2005 (2) SA 140 (CC).

<sup>11</sup> Act 32 of 1944 as amended.

application which initiates the process of execution to occur simultaneously with the granting of the judgment and not at a later date. This entire process was without judicial oversight.

[36] The High Court held *inter alia* that the execution process does not violate s 26 of the Constitution of the Republic of South Africa because this section does not contain a right to ownership.

[37] In the Constitutional Court the appellant sought the same relief as in the High Court and challenged the constitutionality of s 66(1)(a).

[38] Section 26 of the Constitution of South Africa provides as follows:

- '(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

There is no similar provision in the Namibian constitution.

[39] This section provides procedural protection against arbitrary evictions and ensures that the occupier's circumstances are judicially considered prior to any eviction from the home.

[40] The Constitutional Court<sup>12</sup> accepted that a sale in execution may limit a debtor's right in terms of s 26(1), but that such a limitation may be justified under s 36 of the Constitution which prescribes a strict proportionality test.

[41] The court recognised that the purpose of the limitation of a debtor's access to housing is important, but stated that it 'is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt'.

[42] The court<sup>13</sup> held that s 66(1)(a) is over-broad and constitutes a violation of s 26(1) of the Constitution<sup>14</sup> to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure. The remedy employed by the court was to read in certain words into s 66(1)(a). Although the court did not deal specifically with a mortgage, it sets out some guidelines relevant to the exercise of judicial oversight, some of which are the following (at para 57):

'As has been pointed out above, it may often be difficult to conclude that a debt is insignificant. In this regard, it is important too to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur.'<sup>15</sup>

and at para 58:

'Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as

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<sup>12</sup> At para 34.

<sup>13</sup> A unanimous judgment by Mokgoro J.

<sup>14</sup> At p 164F.

<sup>15</sup> At p 162D-E.

security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.’

and at para 59:

‘A final consideration will be the availability of alternatives which might allow for the recovery of the debt but do not require the sale in execution of the debtor’s home . . . .’

2. *Standard Bank of South Africa Ltd v Saunderson & others*<sup>16</sup>

[43] This matter dealt with applications for judgment against debts and for ancillary orders declaring mortgaged property to be executable. The court explained the execution process as follows:<sup>17</sup>

‘It is a long-standing practice of our courts that execution must be directed first against the debtor’s movable property, and only thereafter, if the movables are insufficient, against immovable property,<sup>18</sup> but a Court may alter that sequence. This occurs when the debt is secured by a mortgage bond for the secured creditor will then ordinarily ask the Court in advance

“to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.<sup>19</sup>

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<sup>16</sup> 2006 (2) SA 244 (SCA).

<sup>17</sup> In para 3.

<sup>18</sup> *Gerber v Stolze & others* 1951 (2) SA 166 (T).

<sup>19</sup> *Gerber v Stolze* (supra) at 172F-G.



What is helpful, is that the Court issued a rule of practice “requiring a summons in which an order for execution against immovable property is sought to inform the defendant that his or her right of access to adequate housing might be implicated by such an order. It is plainly desirable that this development should be prospective only, and it is as well to make clear that existing summonses are not invalid for want of reference to s 26(1).”<sup>20</sup>

[44] The court regarded it as ‘desirable that the defaulting debtor should be informed, in the process of initiating action, that s 26(1) may affect the bond-holder’s claim to execution’. Thus creditors must advise debtors of their right to bring information to the court if they believe that their right to adequate housing may be compromised.

### 3. Gundwana v Steko Development & others<sup>21</sup>

[45] The appellant in this matter challenged the constitutionality of the authority of a registrar to grant execution orders in respect of immovable property. The Constitutional Court declared the relevant High Court rule unconstitutional.

[46] The court in para 37 explained the execution process *inter alia* with reference to *Gerber v Stolze & others* and stated that the ‘practice of ordering immovable property specially executable at the time of judgment arose on the basis of practical expediency, namely to circumvent the necessity of first executing against movables, where immovable property had been specially hypothecated as security for a debt’.

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<sup>20</sup> P 276I-277A.

<sup>21</sup> 2011 (3) SA 608 CC.

[47] In para 54 Froneman J referred to what Mokgoro J had said in *Japhtha* namely that it is 'unwise to set out all the facts that would be relevant to the exercise of judicial oversight' and added the following:

'It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only where there is disproportionality between the means used in the execution process to exact payment for the judgment debt compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.'

[48] It was further held that an 'evaluation of the facts of each case is necessary in order to determine whether a declaration, that hypothecated property constituting a person's home is specially executable, may be made'.<sup>22</sup>

[49] The principle distilled from the aforementioned cases is that a court will normally only decline a writ of execution in circumstances which would render the enforcement of a judgment debt an abuse of process or where the exercise of the mortgagee's right is in bad faith. In *First National Bank v Folscher & another*<sup>23</sup> it was found that a creditor's conduct 'need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although bona fide, may be iniquitous because the debtor will lose his home, while alternative modes of satisfying the creditor's demands might exist, that would not cause any significant prejudice to the creditor'.

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<sup>22</sup> Para 49.

<sup>23</sup> 2011 (4) SA 314 GNP at 332E-F.

[50] In terms of the *Saunderson* judgment the summons had to inform defendants that an order declaring immovable property executable might infringe their right of access to adequate housing. This is repeated in the *Folscher* matter<sup>24</sup> namely that the debtor is entitled to be informed of his rights in terms of s 26(1) in the summons and the court remarked as follows at para 48.

'It would clearly be desirable to include a prayer in any summons, for a writ, of execution against property especially hypothecated, in the event of the matter going by default, as this would obviate the necessity to prepare another application at additional cost and waste of time.'

I endorse this approach.

[51] It is apparent from *Gundwana* that mortgage 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'<sup>25</sup> judicial oversight is required in order to ascertain whether foreclosure can be avoided, having regard to viable alternatives.

#### The present appeal

[52] In the matter which is the subject of this appeal, in its particulars of claim, the appellant advised the first respondent of its intention to seek an order declaring the mortgaged property executable. A notice as provided by rule 108(2)(a) was attached

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<sup>24</sup> At para 47.

<sup>25</sup> Para 65.

to the summons (as annexure 'C'). The summons was served at the *domicilium citandi et executandi* of the first respondent.

[53] The first respondent was advised that should she wish to object to the immovable property being declared executable she was obliged to place facts and submissions before the court to enable the court to consider those when appellant would apply for judgment.

[54] The first respondent subsequently appeared in person in the court *a quo*, filed an opposing affidavit and made submissions why her immovable property (her primary home) should not be declared especially executable. It is common cause that a *nulla bona* return was made by the deputy sheriff in respect of the movable property of the first respondent.

[55] The court *a quo* found that plaintiff had 'not complied with the provisions of rule 108(1) and (2) in that default judgment was not first sought before the application was brought'. This refers to the application to have the immovable property of the respondent declared especially executable.

[56] The court *a quo* found that mortgage holders are obliged to comply with rule 108.

### Conflict between rule of court and common law

[57] In *Standard Bank of South Africa Limited v Van der Westhuizen & others*<sup>26</sup> the following principle was highlighted, where there is a conflict between a rule of court and the common law:

‘The rules constitute subordinate legislation and in event of a conflict between a statutory provision and a rule relating thereto, the presumption is strongly against such provision of a statute being cut down by the rule, even though the rule has been given statutory authority; a *fortiori* where the rule has not been given such statutory authority (Erasmus, *Superior Court Practice*, B5). This statement holds true also in the case of conflict between a common law principle and a rule of court. Therefore, for the Rules Board to impinge upon the jurisdiction of the courts or upon litigants’ rights of access would require express and clear statutory empowerment.’<sup>27</sup>

In *Djama*<sup>28</sup> it was held that a statute is not presumed to take away prior existing rights, unless it expressly appears from the statute.’ A *fortiori* in respect of rules of court.

[58] It must be emphasised that the object of rules of court is to secure the inexpensive and expeditious completion of litigation before the court especially in view of recently introduced judicial case management system in the High Court.<sup>29</sup> The following was stated in *Federated Trust Ltd v Botha* 1978 (3) 645 AD at 654C-D:

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<sup>26</sup> [1998] JOL 298 (ELC) at p 6 and p 7.

<sup>27</sup> See also *Soja v Tuckers Land & Development Corporation* 1981 (3) SA AD at 325A-B; *Djama v Government of the Republic of Namibia & others* 1993 (1) SA 387 NmHC at 395A.

<sup>28</sup> See *Djama* p 395A and the authorities referred to.

<sup>29</sup> Which came into operation on 16 April 2014.

'The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.'

[59] The appellant has a substantive right to foreclosure subject to a court order having been obtained and rule 108 being procedural in nature should not be read to take away that right.

[60] Section 39 of the High Court Act<sup>30</sup> as amended<sup>31</sup> provides that 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 judgment debtor.<sup>32</sup> Section 39 as amended gives the rule-maker the authority to make rules relating to procedure only, not to make substantive rules of law.

In *Ex Parte Christodolides*<sup>33</sup> the court held that:

'The portion of the section to be emphasised is that the authority conferred by the section is to frame rules for the conduct of the proceedings in the various divisions of the Supreme Court. It is common cause between all counsel who appeared that the new rule cited above goes beyond that provision and lays down what is not a rule of procedure or a rule for the conduct of proceedings, but a substantive rule of law. It follows that the new rule referred to above is *ultra vires* and is of no legal force or effect.'

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<sup>30</sup> Act 16 of 1990.

<sup>31</sup> Act 12 of 2013.

<sup>32</sup> Section 39(1)(c).

<sup>33</sup> 1953 (2) SA 192 (T) 194H-195D in particular at 195C.

[61] Relevant to the issue of conflict between common law and a rule of court, is the presumption against provisions encroaching on existing rights. In *Lawsa*<sup>34</sup> the following explanation appears:

'It appears that the presumption against encroachments on existing rights obtains with additional force when elementary rights, such as the right to entrance to one's own property, the 'liberty of indulging in social activities', the freedom of speech or of the press, and *contractual freedom*<sup>35</sup> stand to be interfered with: 'The more fundamental the right, the stronger the presumption'. The protection of fundamental or elementary rights predominantly derives from the common law and in consequence the presumption against unnecessary alternations to the existing law partly explains the additional force with inroads on such rights obtain.'<sup>36</sup>

[62] It seems that the bargain or common law right of the judgment creditor can only be overruled if a stronger substantive right resting in the judgment debtor exists.

### Conclusion

[63] 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 longstanding 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.

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<sup>34</sup> 25 *Lawsa* 2 ed para 284.

<sup>35</sup> Emphasis provided.

<sup>36</sup> Footnotes omitted.

[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 overriding objective of the rules namely 'to facilitate the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable . . . .'<sup>37</sup>

[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.<sup>38</sup>

[66] A creditor may in my view include a prayer in the summons for a writ of execution against property specially hypothecated, in the event of the matter going by

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<sup>37</sup> Rule 1(3) of the rules of the High Court made under s 39 of the High Court Act 16 of 1990 and published in the Government Notice No. 4 of 2014.

<sup>38</sup> Provision is made in rule 56(3) that a managing judge may on good cause shown condone non-compliance with the rules, practice direction or court order. See also *Standard Bank Namibia Ltd & others v August Maletzky & others* (case no. SA 15/2013 delivered on 24 June 2015) at para 23 where this court (per O'Regan AJA) considered the approach in respect of non-compliance with the rules.



default, as stated in *Folscher*, in order to obviate the necessity to prepare another application at additional costs and waste of time.

[67] A reading from *Futeni* appears that the judgment creditor had a registered bond in its favour, but unlike as in the present case, did not draw the defendant's attention in the summons to the fact that when a judgment debtor's primary home is to be sold, then judicial oversight is required before the immovable property may be declared especially executable.

[68] I am of the view that in view of the particular facts of this case it is not necessary to declare rule 108 to be *ultra vires* the High Court Act or *ultra vires* Art 16 of the Constitution or the common law, provided that the rule is read in its proper context namely, that it may not be read to take away the substantive right to foreclosure a judgment creditor has. Where the immovable property is the primary home of the judgment debtor, substantial compliance with Form 24 would suffice, whereafter a court may or may not order the immovable property specially executable, 'having considered all the relevant circumstances' including 'less drastic measures than a sale in execution'.

[69] In the present instance the appellant (and commercial banks) accepts that there must be judicial oversight where a claim is in respect of the foreclosure of a bond in terms of the provisions of rule 15(3). The first respondent in this matter had been informed personally of the intention of the appellant to apply to court for an order to declare the relevant immovable property specially executable, and had been

given the opportunity to make submissions in the court *a quo* (which she did); the deputy sheriff made a *nulla bona* return (which was not strictly necessary in respect of a claim for the foreclosure of a registered mortgage bond); the first respondent never settled the debt as promised; the first respondent never made an allegation that the appellant by instituting an action for the recovery of the outstanding amount, abused the court's process, and neither is there a suggestion that the appellant acted in bad faith.

[70] The court *a quo* should in these circumstances have declared the said immovable property specially executable in view of the fact that there is no viable alternative or no less drastic measure other than a sale in execution.

[71] The appellant did not ask for costs in respect of the proceedings in High Court.

[72] In the result, the following orders are made:

1. The appeal succeeds with costs, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.
2. The order of the court *a quo* is set aside and substituted with the following order:

The immovable property, Erf no. 698 Rocky Crest (Extension 1) Windhoek, Registration Division 'K', Khomas Region, measuring 360 square metres,

and held by Deed of Transfer No. T 2999/2008, is declared specially executable.

3. No order as to costs is made in respect of the proceedings in the court *a quo*.

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**HOFF JA**

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**CHOMBA AJA**

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**MOKGORO AJA**

## APPEARANCES

APPELLANT: R Heathcote (with him Y Campbell)  
Instructed by Behrens & Pfeifer, Windhoek

FIRST RESPONDENT: In Person