REPORTABLE

CASE NO: SCR 7/2024

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NEDBANK NAMIBIA LIMITED	**Applicant**
and	
ANGA ENTERPRISES CC	**First Respondent**
GABRIELA NIETCHE KANDOLF	**Second Respondent**
ANDRE GEORG KANDOLF	**Third Respondent**
PROSPERITA BUSINESS PARK NUMBER FOUR CC	**Fourth Respondent**

Coram: SHIVUTE CJ, DAMASEB DCJ and MAINGA JA

Heard: **9 July 2025**

Delivered: **24 July 2025**

Summary: This matter came before this Court for review under s 16 of the Supreme Court Act 15 of 1990, following proceedings in the High Court under rule 108 of the High Court Rules. In the High Court, the applicant, as judgment creditor, sought an order declaring immovable properties – which were not primary homes – specially executable. It was common cause that the properties were held as security (through mortgage bonds) for the loans advanced to the respondents by the applicant.

The presiding judge nevertheless conducted a rule 108 inquiry, and in founding that less drastic alternatives to execution existed, granted the order declaring the properties executable, but stayed its execution for six months to allow the judgment debtor (a commercial enterprise) to settle the debt.

The central issue on review was whether the High Court erred in conducting a rule 108 inquiry and staying the execution order in respect of commercial properties that were not primary homes.

The Supreme Court found that, the High Court acted beyond its powers by inquiring into the personal circumstances of the judgment debtor and staying execution to allow instalment payments. Such an inquiry was not warranted under the applicable court rules as the properties were not primary homes.

Held furthermore that, the stay of execution was procedurally irregular, as it had not been requested by the respondents, nor was it canvassed through evidence or argument. This violated the principles of procedural fairness and the established rule that courts should not grant relief not sought by the parties.

The review succeeded with no order as to costs.

REVIEW JUDGMENT

DAMASEB DCJ (SHIVUTE CJ AND MAINGA JA concurring)

Introduction

[1] This matter came before this Court by way of review in terms of s 16 of the Supreme Court Act 15 of 1990. The request for review to this Court was necessitated in the following circumstances: During rule 108[1] proceedings in the High Court in which the applicant (as judgment creditor) sought an order declaring certain immovable properties (which, it was common cause, were not 'primary homes') specially executable – the presiding judge conducted an inquiry to determine less

[1] Rules of the High Court of Namibia 2014 (as amended).

drastic measures to execution and determined that less drastic measures existed; and declared the properties specially executable but stayed the order of execution for six months for the judgment debtor (the first respondent) to pay off the debt.

[2] The crisp issue to be decided on review is whether the High Court was correct to hold a rule 108 inquiry in respect of commercial properties which were not primary homes and also to stay the order of declaration of executability.

Background

[3] The factual background is not in dispute. The first respondent, a commercial enterprise, is the owner of immovable properties which it uses for commercial purposes and in respect of which the applicant had extended loan facilities in terms of mortgage bonds registered as security in favour of the applicant as follows:

(a) a first sectional mortgage bond dated 5 October 2009 over section No. 5, Prosperita Business Park, under Bond No. 1002/2009;

(b) a first sectional mortgage bond dated 11 August 2010 over section No. 4, Prosperita Business Park, under Bond No. 1063/2010;

(c) the second and third respondents, in their personal capacities caused the registration of a first sectional continuing covering mortgage bond over Erf No. 1486, Section No. 15, Hochland Village, Pelican Street, Hochland Park, under Bond No. 980/2010; and

(d) a first continuing covering mortgage bond dated 28 September 2010 over Erf No. 166, Auasblick, Windhoek, under Bond No. B7172/2010.

[4] It is common cause that none of the above bonded properties is a 'primary home' as contemplated in rule 108(2).

[5] On 15 March 2022, the applicant obtained default judgment against the respondents, jointly and severally, for payment of the amounts of N$5 738 037,34, N$565 990,13, and N$1 549 092,91, together with interest at the rate of 12 per cent per annum. Having obtained default judgment, on 21 February 2023 the applicant, as judgment creditor, sought an order of court declaring the above immovable properties specially executable.

[6] In the rule 108 application, the applicant alleged that all the properties were bonded in its favour, that three of the properties were registered in the name of the first respondent and that none of them constituted the first respondent's primary home.

[7] The respondents opposed the rule 108 application on 20 March 2023, *inter alia*, raising the defence that the applicant was required to first pursue execution against movable properties before resorting to immovable propeties. They further maintained that the applicant had to consider alternatives to execution and offered a lump sum payment of N$400 000 and monthly instalments of N$170 000 to pay off the debt.

[8] In reply, the applicant abandoned its request for an order declaring executable a sectional title unit owned by the second and third respondents and limited the relief to the three bonded properties owned by the first respondent. It maintained however

that because those properties were not primary homes, the court was not required to consider less drastic measures to execution.

[9] The court a quo heard the rule 108 application on 8 December 2023. On that occasion, the presiding judge inquired about the respondents' proposal to pay off the debt over a period of time, which the applicant had rejected. Although counsel for the respondents conceded that the properties were not primary homes, the court a quo allowed submissions on the viability of the respondents' offer and expressed concern that execution might impair the respondents' ability to trade and potentially jeopardise the employment security of the respondents' employees.

[10] The presiding judge accordingly postponed the matter to 16 January 2024 for further judicial case management and invited submissions on the exercise of the court's discretion and judicial oversight regarding the execution sought.

[11] When the matter was called on 16 January 2024, the court directed the parties to address it on three issues by means of supplementary affidavits and heads of argument:

(i) whether the court could declare immovable property executable in the absence of identified movable property or a *nulla bona* return;

(ii) the number of instalments that would be reasonable to avoid a declaration of executability; and

(iii) the applicability of the rights enshrined in Chapter 3 (Fundamental Human Rights and Freedoms) of the Namibian Constitution to the dispute.

[12] On 29 February 2024, the respondents filed a supplementary affidavit seeking to persuade the court not to grant the relief sought, asserting that such an order would unjustly impair their 'constitutional right' to conduct business. They proposed to make monthly payments of between N$300 000 and N$500 000, commencing 1 April 2024 through to 1 April 2025. The court then postponed the matter to 24 April 2024 for further consideration.

[13] At the resumed hearing on 24 April 2024, the presiding judge conducted an inquiry into 'less drastic measures', highlighting the potential adverse impact of execution on the respondents' business operations. The court explored with the applicant the possibility of suspending execution to give effect to the respondents' proposed repayment plan. The respondents submitted that the proposal would enable them to satisfy the judgment debt within three years. The court stood the matter down for the applicant to file further documentation detailing payments made by the respondents since the date of judgment.

[14] When the matter again served before court on 26 April 2024, the presiding judge proceeded with the inquiry and inquired whether execution could be stayed on condition that the respondents comply with their proposed monthly payments of N$300 000 to N$500 000. The applicant persisted with its request for the three properties to be declared specially executable.

[15] Having conducted the inquiry, the court a quo made the following order:

'1. The following immovable properties are hereby declared specially executable:

1.1 A unit consisting of-

(a) Section Number 4 as shown and more fully described on Sectional Plan No. 41/2006 in the building or buildings known as Prosperita Business Park situate at Prosperita in the Municipality of Windhoek, Khomas Region of which the floor area, according to the sectional plan is 464 (Four Hundred And Sixty-Four) square metres in extent; and (b) an undivided share in the common property in the land and buildings or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section. Held under Certificate of Registered Sectional Title No. 41/2006 (4) (UNIT) Dated 21 July 2006. Subject to such conditions as set out in the aforesaid Title Deed.

1.2 A unit consisting of-

(a) Section Number 5 as shown and more fully described on Sectional Plan No. 41/2006 in the development scheme known as Prosperita Business Park in respect of the land and building or buildings situate at Erf No. 236 (A Portion of Erf No. 231) Prosperita in the Municipality of Windhoek, Registration Division "K", Khomas Region, of which the floor area, according to the sectional plan is 464 (Four Hundred And Sixty-Four) square metres in extent; and (b) an undivided share in the common property in the development scheme apportioned to that section in accordance with the participation quota as endorsed on that Sectional Plan. Held under Certificate of Registered Sectional Title No. 41/2006 (5) (UNIT). Subject to the conditions contained therein.

1.3. A unit consisting of –

(a) Section Number 15 as shown and more fully described on Sectional Plan 23/1993 in the building or buildings known as Hochland Village situate at Hochland Park, in the Municipality of Windhoek, Registration Division "K", Khomas Region of which the floor area, according to the said Sectional Plan is 76 (Seventy-Six) square metres in extent; and

(b) An undivided share in the common property in the land and building or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section, Held under Certificate of Registered Sectional Title 23/1993(15) (UNIT)

CERTAIN: Erf No. 166 Auasblick
SITUATE In the Municipality of Windhoek
Registration Division "K"
Khomas Region
MEASURING: 1 739 (One Thousand Seven Hundred and Thirty-Nine) square metres
HELD BY: Deed of Transfer No. T 6115/2010
SUBJECT: To all the terms and conditions contained therein.

2. Costs of suit.

3. <u>Subject to paragraph 4 below, the execution of the above properties is stayed for a period of 6 months pending the judgment debtor/execution debtor paying monthly instalments of between N$300 000 - N$500 000 per month from date of this order.</u>

<u>4. If the judgment debtor/execution debtor fails to pay an instalment, then and in that event, the judgment creditor/execution creditor may execute against the immovable properties</u>.

5. The case is postponed to 29 October 2024 at 08:30 for Status Hearing (Reason: Pending payment from the judgment debtor/execution debtor).' (My underlining).

[16] Dissatisfied with orders 3 and 4, the applicant approached this Court to invoke its review jurisdiction. Although the respondent initially gave notice of opposition to the review application such opposition was withdrawn and no further papers were filed in opposition. The present review is therefore unopposed.

<u>Grounds of review</u>

[17] According to the applicant, it was irregular for the High Court to conduct an inquiry as envisaged in rule 108(2) so as to consider less drastic measures than a sale in execution, when the underlying properties sought to be declared specially executable are not primary homes but commercial properties. In conducting an inquiry pursuant to rule 108(2) in respect of commercial properties, the presiding judge committed a gross irregularity that infringed upon the applicant's common law and constitutional rights to a competent court and a fair hearing.

[18] Furthermore, it is alleged that the presiding judge committed an irregularity by *mero motu* staying the execution of the bonded properties and also by imposing vague conditions set out in order number 4 of its order of 30 April 2024.

<u>Submissions</u>

[19] Mr Kauta for the applicant filed helpful heads of argument which he supplemented with oral submissions at the hearing of the review. Counsel emphasised that the court a quo improperly conducted an inquiry in terms of rule 108(2) in circumstances where such an inquiry was not legally competent because the jurisdictional facts (being a primary home) necessary to trigger judicial oversight under rule 108(2) were absent. Therefore, the learned judge's inquiry into alternative payment arrangements was irregular.

[20] Secondly, Mr Kauta submitted that the court a quo erred in granting a stay of execution *mero motu* in circumstances where such an order fell outside the court's jurisdiction. Moreover, the argument went, the order of stay imposed conditions that are vague and unenforceable. The requirement that the respondents pay 'between N$300 000 and N$500 000' per month lacks precision and fails to establish a clear

legal obligation. It is unclear what amount would satisfy the court's order or what consequences would follow from non-compliance or partial compliance. Such ambiguity created uncertainty and rendered the order practically unenforceable, thereby prejudicing the applicant's ability to enforce its rights effectively.

[21] Mr Kauta added that the court a quo failed to apply binding legal precedent that affirms a judgment creditor's right to execute against immovable property hypothecated in its favour. Counsel relied in particular on *Standard Bank Namibia Ltd v Shipila & others.*[2] Despite this binding authority being cited in both the applicant's initial and supplementary heads of argument, the court a quo, it is said, failed to engage therewith, distinguish it, or explain its departure therefrom. This, counsel submitted, constitutes a a breach of *stare decisis* and Art 81[3] of the Namibian Constitution.

<u>The law</u>

[22] Rule 108(2) states:

> **'Conditions precedent to execution against immovable property and transfer of judgments**
>
> 108(1) . . .
>
> (2) <u>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 –</u>
>
> (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

[2] *Standard Bank Namibia Ltd v Shipila & others* 2018 (3) NR 849 (SC).
[3] Which states that decisions of the Supreme Court are binding on all other courts.

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 so 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 sale in execution 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.' (My underlining).

[23] Therefore, when it comes to attachment in execution of immoveable property, the rules of court make a distinction between a judgment debtor's 'primary home' and any other immoveable property.[4] The clear intent of the legislator therefore is to provide judicial oversight in respect of a primary home in which a judgment debtor or lessee actually lives.

[24] As Masuku J correctly observed in *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd*:[5]

> 'A primary home, in my view, would refer to a permanent structure . . . 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.'

[25] Hoff JA held in *Standard Bank Namibia Ltd v Shipila & others*:[6]

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[4] Rule 108(1) and 108(2).
[5] *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC) para 37.
[6] *Shipila* para 51.

> '[M]ortgage creditors can rely on a limited real right and can insist, absent abuse of process or mala fides, on directly executing their claims against specially hypothecated immoveable property of the debtor in order to satisfy a claim, but where the immoveable property is "the home of a person" judicial oversight is required in order to ascertain whether foreclosure can be avoided, having regard to viable alternatives'.

[26] In *Kisilipile & another v First National Bank of Namibia Ltd,*[7] this Court stated that when it comes to execution against a primary home, a creditor's right to execute is not absolute and must be balanced against the debtor's right to shelter, particularly where a person risks losing their home. It is therefore clearly established by this Court that an inquiry into less drastic means than execution is necessary only where the immovable property sought to be declared specially executable constitutes the primary home of the judgment debtor.

[27] Against the backdrop of widespread public concern about sales in execution of immovable property, the legislature recently made a deliberate intervention to strengthen judicial oversight but confined that special protection to 'primary homes'.

[28] The High Court Amendment Act 2 of 2024[8] inserted a new s 35A to the High Court Act 16 of 1990 which in relevant part states:

> **'Restriction on sale in execution of immovable property**
>
> **35A.** (1) Notwithstanding anything to the contrary contained in this Act or in any other law, including the common law, no person shall sell any immovable property in execution of a judgment of a court unless the sale in execution is carried out under the authority of, and in accordance with, an order of the court issued, after the following requirements have been complied with –

[7] *Kisilipile & another v First National Bank of Namibia Ltd* 2021 (4) NR 921 (SC) .
[8] Which was signed into law by the President on 3 April 2024 but has not yet come into force.

(a) the court, upon return of service of process by the sheriff or deputy- sheriff of the court, is satisfied that the judgment debtor has insufficient movable property to satisfy the judgment debt; and

(b) the court, upon application made to it by the judgment creditor, has declared the immovable property to be executable.

(2) A person does not need to comply with subsection (1)(a) relating to the requirement to submit a return of service that the debtor has insufficient movable property to satisfy the judgment debt if –

(a) the immovable property to be sold in execution in satisfaction of the judgment is subject to a mortgage bond registered in favour of the judgment creditor; and

(b) failure to satisfy the mortgage bond referred to in paragraph (a) in full or in part by the judgment debtor gave rise to the judgment debt which is the subject matter of the sale in execution.

(3) The court shall not issue an order authorising execution against immovable property of a judgment debtor which immovable property is used by the judgment debtor or by any other person as a primary home, unless the court is satisfied, after holding an inquiry in the manner set out in the rules of the court, that the sale of such immovable property is the most appropriate order to satisfy the judgment debt.

(4) If the court after conducting an inquiry as contemplated in subsection(3) is satisfied that a sale in execution of the immovable property is not appropriate in the circumstances of the case it may, having due regard to the interests of the judgment creditor, judgment debtor and any other person using the immovable property as a primary home, make an alternative order which may include but is not limited to -

(a) an order attaching alternative immovable property owned by the judgment debtor;

(b) an order varying the repayment period of the judgment debt or the instalments which are payable in terms of the agreement between the judgment debtor and the judgment creditor;

(c) an order that the debt be taken over by another person chosen by the judgment debtor, including a family member or relative of the judgment debtor, who is willing and able to fulfil the obligation to repay the debt, but subject to an agreement between the judgment debtor and such other person which agreement shall include a condition that ownership of the property remains vested in the judgment debtor, unless the court determines otherwise;

(d) an order allowing the judgment debtor to voluntarily dispose of the immovable property within a specified period of time; or

(e) any other order that the court considers proper and just in the circumstances of the case.' (My underlining)

[29] Act 2 of 2024 provides the following definition of a primary home:

"primary home" means a dwelling which a person uses as his or her main place of residence irrespective of whether that person occasionally resides at any other place of residence or owns another place of residence . . .'

[30] It is therefore clear from the new s 35A that in respect of a bonded immovable property that is not a primary home the legislature also removed the requirement to first execute against movables. Although it was not applicable at the time the present matter arose and has yet to come into force, I cite this legislative development to show the policy direction taken by the legislature on sales in execution of immoveable property, which does not support the approach taken by the court a quo.

[31] The court a quo's concern appears to have been the need to save the business operations of the respondents and to protect the interests of employees. Such interests, although important, have (at least not yet) been identified by the legislator for special protection against execution of a commercial property.

<u>Disposition</u>

[32] In the present case, the applicant sought execution against three immovable properties registered in the name of the first respondent, a juristic person, which were zoned for commercial use and (it is common cause) not being used as primary homes.

[33] The court a quo's inquiry into the personal circumstances of the judgment debtor and the subsequent stay of execution to accommodate instalment payments, was therefore *ultra vires* the court's powers under the rules of court. On this Court's approach in *Shipila,* the applicant was entitled to execute without more.

[34] It is trite that a court should not grant an order not sought by the parties.The order staying execution was not sought by the respondents nor the subject of argument or evidence before court. Its inclusion in the final order was therefore a procedural irregularity.

[35] For the reasons that the applicant clearly pleaded and I need not repeat, the court a quo's order is also irregular for vagueness. What compounds its vagueness is the fact that even if the first respondent paid the highest amount possible (N$500 000 per month) – it would not have liquidated the debt within six months directed by the court. The order does not also state what the rights and obligations of the parties are at the expiry of the six months.

[36] Absent written reasons for the order, I am unable to discern any other justification such as abuse of process (as adumbrated in *Shipila)* which would save it from review. The review application should therefore succeed.

[37] Mr Kauta for the applicant submitted that the applicant is not seeking costs on review.

Order

[38] In the result, I make the following order:

(a) The review application succeeds and the order of the High Court is reviewed and set aside and replaced with the following:

'1. The following immovable properties are hereby declared specially executable:

1.3 A unit consisting of-

(a) Section Number 4 as shown and more fully described on Sectional Plan No. 41/2006 in the building or buildings known as Prosperita Business Park situate at Prosperita in the Municipality of Windhoek, Khomas Region of which the floor area, according to the sectional plan is 464 (Four Hundred And Sixty-Four) square metres in extent; and (b) an undivided share in the common property in the land and buildings or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section. Held under Certificate of Registered Sectional Title No. 41/2006 (4) (UNIT) Dated 21 July 2006. Subject to such conditions as set out in the aforesaid Title Deed.

1.4 A unit consisting of-

(a) Section Number 5 as shown and more fully described on Sectional Plan No. 41/2006 in the development scheme known as Prosperita Business Park in respect of the land and building or buildings situate at Erf No. 236 (A Portion of Erf No. 231) Prosperita in the Municipality of Windhoek, Registration Division "K", Khomas Region, of which the floor area, according to the sectional plan is 464 (Four Hundred And Sixty-Four) square metres in extent; and (b) an undivided share in the common property in the development scheme apportioned to that section in accordance with the participation quota as endorsed on that Sectional Plan. Held under Certificate of Registered Sectional Title No. 41/2006 (5) (UNIT). Subject to the conditions contained therein.

1.3. A unit consisting of –

(a) Section Number 15 as shown and more fully described on Sectional Plan 23/1993 in the building or buildings known as Hochland Village situate at Hochland Park, in the Municipality of Windhoek, Registration Division "K", Khomas Region of which the floor area, according to the said Sectional Plan is 76 (Seventy-Six) square metres in extent; and

(b) An undivided share in the common property in the land and building or buildings as shown and more fully described on the said sectional plan, apportioned to the said section in accordance with the participation quota of the said section, Held under Certificate of Registered Sectional Title 23/1993(15) (UNIT)

CERTAIN:	Erf No. 166 Auasblick
SITUATE	In the Municipality of Windhoek
	Registration Division "K"
	Khomas Region
MEASURING:	1 739 (One Thousand Seven Hundred and Thirty-
Nine) square metres	
HELD BY:	Deed of Transfer No. T 6115/2010
SUBJECT:	To all the terms and conditions contained therein.

2. Costs of suit'.

(b) There is no order of costs on review.

DAMASEB DCJ

SHIVUTE CJ

MAINGA JA

APPEARANCES

APPLICANT:	P Kauta of Dr Weder, Kauta & Hoveka Inc
RESPONDENTS:	No appearances