



Republic of Namibia

MINISTERIAL MOTIVATION

ON THE

HIGH COURT AMENDMENT BILL

IN THE NATIONAL ASSEMBLY

BY

THE MINISTER OF JUSTICE

HON. YVONNE DAUSAB, MP

3 October 2023

– To be checked against delivery –

Honourable Speaker,
Honourable Members,
Members of the public,

1. This afternoon I rise to table the High Court Amendment Bill.
2. The High Court Amendment Bill was originally tabled in the National Assembly in 2021. However, the debates in the National Assembly centered around the inadequate protection afforded to the rights of homeowners, and how the Courts are not granted sufficient discretionary powers, to intervene where someone is about to lose their primary home.
3. Following the lapse of the bill in 2021, and in an effort to address these concerns and inadequacies, consultations were held with the different stakeholders including Bank of Namibia, Bankers Association of Namibia, Law Society of Namibia, Legal Assistance Centre, Legal Aid, Office of the Judiciary, homeowners and other interested groups. The full content of those discussions, cautions and concerns raised are reflected therein.
4. The Ministry further consulted with the Ministry of Finance and Public Enterprises and the Bank of Namibia aimed at enhancing the protection of rights of both judgement creditors and judgement debtors. These consultations were also aimed at ensuring that there isn't a grave encroachment on financial systems in place.
5. It is common cause that home loan accounts make a significant part of commercial bank activity. Also, we could not ignore that financial institutions play an important role in the economic life of the country. It was therefore important to balance the competing interests.
6. After the process of research and incorporating the changes for nearly two years, the bill has now had amendments made to it which are primarily aimed at the imposition of restrictions on the sale of immovable property, especially primary homes.

7. Arguably, International Human Rights Law recognizes everyone's right to an adequate standard of living, including adequate housing. Although, the Namibian Constitution does not directly provide for a right to housing under the Bill of Rights, you cannot talk of the right to life and dignity without shelter.¹ The Government's paramount objective should therefore be to keep borrowers in their homes wherever feasible, making repossession of primary residences to be an option of last resort.

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8. These amendments seek to strike a balance between protecting the rights of primary homeowners, while promoting commercial activity, and protect the integrity and stability of the system. This is not intended to encourage mortgage bond holders to dishonour their contractual obligations but, where due to legitimate reasons such as the drought, retrenchment, Covid-19 etc, they are not able, every effort must be made to mitigate against having a debtor lose a primary home.
9. It is also hoped that lawyers will not use debt collection tactics that are degrading and amounts to harassment of debtors. Creditors must not use lawyers as a first option to negotiate payments. Lawyers must rather be used as a last resort to avoid adding more debt to the existing debt of the client because it is not tenable, to add more debt and anxiety to the debtors. Behind the credit control system are human beings and our hope is they will act as such.

¹ See Art. 95 of the Namibian Constitution. 1990. Also see Nakuta, J. [2009]. *The justiciability of social, economic and cultural rights in Namibia and the role of non-governmental organisations*. Human Rights and the Rule of Law in Namibia. Konrad Adenauer Foundation: Windhoek. p. 89-100.

10. The bill, for the first time defines the meaning and scope of a primary home to afford protection to all those persons who utilise any form of immovable property as their place of primary residence.
11. For instance, those persons formerly residing on commercial land were not protected. This is so because a primary home was constructed to not necessarily include them which is in many instances also a place of primary residence.
12. We have anecdotal examples of people losing their homes despite making significant efforts to repay the bank what is due to them. We have seen owners cry for losing homes despite efforts to satisfy the Bank. Financial institutions have in some instances been seen as intransigent and credit control has shown no empathy for people's efforts. Their primary focus being what Noam Chomsky would dub as "profit over people".² It is true that we have also seen instances where financial institutions make every effort to meet their clients halfway, but too many people are losing their primary homes.
13. In the case of *Standard Bank v Magdalena Shipala and 4 Others*³ delivered on July 6, 2018, the Supreme Court held that "the issue before the court *a quo* (the High Court), as well as on appeal, was whether the provisions of Rule 108⁴ of the Rules of the High Court apply in an application for an order declaring immovable property belonging to a judgment debtor specially executable". The High Court ruled in favour of this submission.⁵
14. In light of the effect of the judgment, weighed against the right to adequate housing, the Ministry of Justice obtained Cabinet Approval to amend the High Court Act,

² See Chomsky, N. [1999]. *'Profit Over People'* Neoliberalism and global order. Seven Stories Press: New York. p. 43-47.

³ Case No.: SA 69/2015.

⁴ Rule 108 of the High Court provides for conditions precedent to execution of immovable property and transfer of judgement.

⁵ Rule 108 provides that the registrar may not issue a writ of execution against immovable property unless a *nulla bona* return has been issued and where a court has on application declared the immovable property specifically executable.

1990 and the Magistrates' Court Act, 1932 to make provision in the Principle Act for judicial oversight in matters affecting litigants in the sale of immovable property.

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15. The anticipated amendments will provide for judicial oversight in more a substantive manner rather than just having the courts undertake a mechanical process, in matters affecting litigants who expect the courts to be the protector of their rights.
16. In *Kisilipile v First National Bank of Namibia Limited*⁶ the court held that in Namibia, judicial oversight takes the form that, if a property is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. The onus rests on the judgment debtor to present the relevant evidence of less drastic measures. However, where the judgment debtor fails to do so it does not relieve the court of its obligation to inquire into the availability of less drastic alternatives.
17. In another example, in a South African Case of *Standard Bank of South Africa Ltd v Saunderson & others*⁷ the court explained that, according to the long-standing practice, execution must be directed first against the debtor's movable property. It is only thereafter, if the movables are insufficient, that the execution is directed against immovable property. Equally, a Court may alter that sequence, or provide further direction on how the matter should be resolved.
18. When the debt is secured by a mortgage bond, the secured creditor (i.e. bank) 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

⁶ (SA 65 of 2019) [2021] NASC 52 (25 August 2021).

⁷ 2006 (2) SA 244 (SCA).

property failing to realise the money sum, then to have recourse against the immovable property”.

19. With the bill, this means the Courts will be empowered to grant alternative orders, such as rescheduling the debt repayment period, or authorising ‘payment holidays’ as forms of relief enabling the debtor to secure other sources of income. The courts will also be empowered to make any other determination that will enhance the chance for the debtor “not to lose their primary home”.

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20. The other amendments the bill seeks to amend section 39 of the High Court Act, 1990 (Act No. 16 of 1990) to enable the Judge-President to make rules regulating the cession of rights in matters before the High Court.
21. The other rules are in respect of the appointment, administration, security, jurisdiction and the fees of deputy-sheriffs and assistants to deputy-sheriffs and to make rules relating to the conduct and disciplinary procedures of deputy-sheriffs.
22. This is an important amendment because, we have received multiple complaints of how these external court functionaries have allegedly abused their powers and ostensibly the Registrar was unable to discipline them.
23. In respect of the cession of rights - the arrangement will be that the real litigant “cedes” his or her right to institute proceedings to the “unqualified person” in return for payment when the case is concluded.
24. This issue has arisen following a number of so called “lay litigants” representing “clients” without the requisite papers (such as what admitted legal practitioners have). This often left the client with no recourse in the case of negligence.

25. This provision allows the court some oversight in those proceedings. This the court does by ensuring the person that is entrusting the lay lawyer with their case understands the consequences and still gives the right away to be represented. We also understand that some of these issues arise because people simply cannot afford legal representation, because legal costs are too prohibitive.
26. In reality there will be no genuine cession of rights by the litigant, yet the purported cession enables the unqualified person to institute proceedings as if he or she is the litigant in the matter. Once the matter is concluded the unqualified person obtains whatever remedy is granted on behalf of the real litigant and gets paid for his or her “services”, by agreement.

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27. I submit that a transparent, competency-based recruitment and appointment process for the appointment of deputy-sheriffs is needed to ensure the most suitable candidates are appointed and that all interested applicants are afforded a fair opportunity to apply and be considered.
28. I would like to encourage this August House to support the High Court Amendment Bill to demonstrate our resolve to serve our people in a just, fair and reasonable fashion.

I thank you and so submit.