

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2017/04027

In the matter between:

**BANK WINDHOEK LIMITED**

**PLAINTIFF**

and

**ABED IYAMBO SHIIMI**

**DEFENDANT**

**Neutral citation:** *Bank Windhoek Ltd v Shiimi* (HC-MD-CIV-ACT-CON-2017/04027 [2018] NAHCMD 352 (1 November 2018))

**Coram:** USIKU, J

**Heard on:** 01 November 2018

**Delivered:** 01 November 2018

**Released:** 07 November 2018

**Flynote:** Civil Procedure – Application for summary judgment.

**Summary:** The Plaintiff sued the Defendant for payment of N\$ 2,282,088.19 in respect of monies lent and advanced on basis of a written loan agreement. The

Defendant contended that since the Plaintiff indicates in its particulars of claim that the amount was initially advanced in terms of the loan agreement was N\$ 957,243.66, and now the Plaintiff claims N\$ 2, 828,088.19, therefore, the amount being claimed by the Plaintiff is not easily ascertainable and the Plaintiff's claim does not fall within the ambit of Rule 60.

Court holding that the amount claimed by the Plaintiff is for a liquidated amount in money and accordingly resorts within the ambit of summary judgment.

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**ORDER**

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Summary judgment is hereby granted in favour of the Plaintiff against the Defendant in the following terms:

1. Payment in the amount of N\$ 2 828 088.19.
2. Compound interest calculated daily and capitalized monthly on the amount of N\$ 2 828 088.19 at Plaintiff's mortgage lending rate of interest from time to time, currently 11.50% per year plus 3% calculated from 29 August 2017 to date of final payment.
3. Costs of suit on a scale as between Attorney and own client, as agreed.
4. The matter is removed from the roll and regarded finalized.

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## RULING

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USIKU, J:

### Introduction

[1] This is an application for summary judgment in terms of Rule 60 of the Rules of the High Court, brought by the Plaintiff, against the Defendant. For the sake of convenience I shall refer to the parties as 'Plaintiff' and 'Defendant'.

[2] The Plaintiff's claim in the summons is for payment in the amount of N\$ 2 828,088.19, interest at Plaintiff's mortgage lending rate from time to time, currently 11.5% per annum plus 3% calculated from 29 August 2017 to date of final payment; and costs of suit on the scale as between attorney and own client, as agreed between the parties.

[3] The parties engaged in the process of case management, during which the Plaintiff indicated its intention to move for an application for summary judgment. On the 24 July 2018 this court directed the parties to do certain things and exchange specified documents by stated time-lines. Among other things, the Defendant was directed to deliver his affidavit opposing summary judgment application, if any, by the 08 August 2018.

### Defendant's non-compliance with court order dated 24 July 2018

[4] The Defendant did not file his opposing affidavit on the 08 August 2018. On the 03 September 2018 the court noted that the Defendant had not filed any affidavit opposing the summary judgment application, even though by then both parties had filed their respective heads of argument. The court then ordered the Defendant to file a sanctions affidavit on or before 21 September 2018, explaining his reason for his:

- (a) non-compliance with the court order dated 24 July 2018;
- (b) failure to apply for condonation and extension of time in respect of the aforesaid non-compliance.

The Defendant was furthermore directed to show cause why:

- (a) sanctions contemplated under Rule 53(2) should not be imposed, alternatively why,
- (b) summary judgment should not be granted in favour of the Plaintiff.

[5] The Defendant filed the sanctions affidavit on the 21 September 2018, and on the same day the Defendant also filed an affidavit opposing the summary judgment application.

[6] The sanctions affidavit(s) is deposed to by Ms Losper, the Defendant's legal practitioner. In her affidavit she explains the reasons why she did not file the opposing affidavit on behalf of the Defendant on the 08 August 2018. She stated that on the 08 August 2018 she filed a confirmatory affidavit by herself together with annexures to the opposing affidavit on the e-justice system. Instead of filing the opposing affidavit, she had mistakenly filed an extra set of the same documents under the heading 'Founding Affidavit'. She further explained that, on the 09 August 2018 her office received an email from the office of the Plaintiff's attorneys alerting her to the fact that an opposing affidavit was not filed. She sent the opposing affidavit to the Plaintiff's attorneys, but only realised on 03 September 2018 that she had mistakenly sent the affidavit to one of her office's candidate legal practitioner.

[7] Ms Losper does not explain why she did not file the opposing affidavit on e-justice system on the 09 August 2018. Nor did she explain, why, after discovering the

non-compliance, she did not take steps towards seeking condonation for the non-compliance and extension of time within which to file the late affidavit.

[8] In its answering affidavit to Defendant's sanctions affidavit, the Plaintiff contends that Ms Losper fails to explain reasons why she did not properly load Defendants opposing affidavit on e-justice system, when her attention was drawn to the issue on the 09 August 2018. The Plaintiff further points out that even after realizing her default on 03 September 2018, Ms Losper did nothing to deliver the outstanding affidavit.

#### Defendant's prospects of success in the application for summary judgment

[9] The Defendant contends that he has a *bona fide* defence to the Plaintiff's claim. He argues that the relief the Plaintiff seeks is not competent as it does not fall within the requirements for summary judgment as set out in Rule 60. The Defendant states that the amount originally advanced by the Plaintiff to the Defendant, according to the particulars of claim, was N\$ 957, 243, 66. However, now the Plaintiff claims for the payment of N\$ 2 828,088.19. Therefore, the amount claimed by the Plaintiff is not easily ascertainable.

[10] It is further contended by the Defendant that the Plaintiff did not notify the Defendant of all charges and formula used by the Plaintiff before and after the Plaintiff availed the Plaintiff the loan facilities. The Defendant continues to pay his dues to the Plaintiff and the Plaintiff accepts such payment.

[11] On the other hand, the Plaintiff alleges that the argument by the Defendant that the Plaintiff's claim is not for a liquidated amount of money because such amount includes interest is not sustainable in law. The Plaintiff certified the outstanding balance as was contractually agreed in the written loan agreement.

[12] The Plaintiff contends that all charges, interests and costs are reflected in the Defendant's monthly account statements. The balance claimed by the Plaintiff is the

total outstanding balance regard being had to all debits and credits on the Defendant's accounts. The certificate of indebtedness, the Plaintiff argues, is prima facie proof of the amount owing, and the Defendant fails to make sufficient allegation on which the court may conclude that he has defence to the Plaintiff's claim.

### Analysis

[13] In my opinion the issues for determination now are whether:

- (a) the Plaintiff's claim is a claim for a liquidated amount of money within the ambit of Rule 60;
- (b) the Defendant has given a reasonable explanation for his non-compliance with the court order dated 24 July 2018, and if so,
- (c) whether the Defendant has shown that he has a *bona fide* defence to the Plaintiff's claim.

[14] In my view, a claim by a bank for the outstanding balance of monies lent and advanced, is prima facie a claim for a liquidated amount in money.<sup>1</sup> I do not see convincing facts advanced by the Defendant for its proposition that the Plaintiff's claim is not capable of easy and prompt ascertainment.

[15] In addition, the Defendant has not put forth facts from which one can conclude that the Plaintiff's claim is something other than a simple and straightforward claim for the balance outstanding on the loan agreement. From the written loan agreement the parties agreed that a certificate by the Plaintiff stating the amount owing by the Defendant to the Plaintiff on the loan agreement, shall be *prima facie* proof that such amount is so owing and is correct.

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<sup>1</sup> See *Commercial Bank of Namibia Ltd v Transcontinental Trading (Namibia)* 1992(2) SA 66 NHC at p. 73 H-J.

[16] On the basis of the foregoing I, therefore, hold that the Plaintiff's claim is for a liquidated amount in money and accordingly resorts within the ambit of summary judgment.

[17] I now come to the issue whether the defendant has given reasonable explanation for his non-compliance with the court order dated 24 July 2018. As was outlined earlier on, the Defendant did not explain why:

- (a) Ms Losper did not on the 09 August 2018, deliver/file the Defendant's opposing affidavit on the e-justice system, she was aware on the 09 August 2018, that the opposing affidavit was not 'delivered' ie not served on the other party and not filed in the court file;
- (b) Ms Losper did not immediately upon becoming aware of the non-compliance, seek condonation and extension of time.

[18] All in all I am not satisfied that the explanation given for the Defendant's non-compliance is reasonable in the circumstances. In my view the fact that the default was done by the Defendant's legal practitioners cannot save the Defendant in the circumstances. The explanation given for the non-compliance is not acceptable and I treat the matter from the basis that the Defendant did not file an opposing affidavit.

[19] In the premises, I am of the view that there is no basis upon which summary judgment can be refused in this matter. I accordingly grant summary judgment in favour of the Plaintiff against the Defendant in the following terms:

- a) Payment in the amount of N\$ 2 828 088.19.
- b) Compound interest calculated daily and capitalized monthly on the amount of N\$ 2 828 088.19 at Plaintiff's mortgage lending rate of interest from time to time,

currently 11.50% per year plus 3% calculated from 29 August 2017 to date of final payment.

- c) Costs of suit on a scale as between Attorney and own client, as agreed.
- d) The matter is removed from the roll and regarded finalized.

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B Usiku  
Judge



## APPEARANCES:

PLAINTIFF

Y Campbell

Instructed by Dr Weder, Kauta and  
Hoveka Inc, Windhoek

DEFENDANT

H H Engelbrecht

of Tjombe-Elago Inc, Windhoek