

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 3939/2015

In the matter between:

**STANDARD BANK OF NAMIBIA Ltd**

**PLAINTIFF**

and

**SCHAMEERAH COURT NUMBER SEVEN CC**

**FIRST DEFENDANT**

**DANIEL KUDUMO KAMUNOKO**

**SECOND DEFENDANT**

**SCHAMEERAH COURT NUMBER FOUR CC  
DEFENDANT**

**THIRD**

**Neutral Citation:** *Standard Bank of Namibia Ltd v Schameerah Court Number Seven CC* (I 3939/2015) [2018] NAHCMD 378 (27 November 2018)

**Coram:** PARKER AJ  
**Heard:** 17-18 September, 10 October 2018  
**Delivered:** 27 November 2018

**Flynote:** Contract – Home Loan Agreement and Access Bond Facility Agreement – Breach and enforcing of – Recovery of monies lent and advanced by plaintiff Bank – Certificate of balance indicating outstanding balance of amount claimed – Court finding first defendant and second defendant liable jointly and severally to pay amount claimed together with interest thereon – Consequently, court entered judgment for plaintiff in the amount claimed together with interest thereon – Furthermore, plaintiff applied by notice for an order declaring the immovable property in question executable in terms of rule 108 of the rules of court - Court satisfied notice complied with requirements of the rules – Court found that no defendant and no other persons provided reasons why such order should not be granted – Consequently, court granted order prayed for. Principle in *Standard Bank Namibia Limited v Magdalena Shipila and Other* Case No. SA 69/2015 (SC) applied.

**Summary:** Contract – Home Loan agreement and Access Bond Facility agreement – Breach and enforcing of – Recovery of monies lent and advanced by plaintiff Bank – Certificate of balance indicating outstanding balance of amount claimed – Court finding first defendant and second defendant liable jointly and severally to pay amount claimed together with interest thereon – Plaintiff on the one side and first and second defendants on the other side concluded Access Bond Facility agreement and Home Loan agreement – Court found second defendant by deed of suretyship bound himself jointly, severally and in solidum with first defendant as surety and co-principal debtor to plaintiff for repayment of the amount claimed together with interest – Court found further that dispute between plaintiff and defendants respecting third defendant is res judicata with the default judgment granted against third defendant – Finding dispositive of counter claim apparently instituted by second defendant.

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**ORDER**

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1. Judgment for plaintiff in the amount of N\$651 667, 81 against first and second defendants, jointly and severally the one paying the other to be absolved.
2. Payment of compound interest on the aforementioned amount of N\$651 667, 81 at the rate of 12,75 per cent per annum calculated and capitalized monthly as from 9 January 2015 to date of full and final payment.
3. It is hereby declared that the following property is executable:
  - (a) Section No.7 as shown and more fully described on Sectional Plan No. 32/2003 in the building or buildings known as SCHAMEERAH COURT situate at Hochland Park, in the municipality of Windhoek, of which the floor area, according to the said Sectional Plan, is 167 (One Six Seven) 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 Number 32/2003 (7) (UNIT) dated 4 December 2003; subject to the conditions therein contained.
4. First and second defendants must jointly and severally pay plaintiff's costs on the scale as between attorney (legal practitioners) and client, one paying the other to be absolved, and such costs include costs occasioned by the employment of one instructing counsel and one instructed counsel.

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## JUDGMENT

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PARKER J:

[1] This matter comes a long way from 2015, involving initially Standard Bank Namibia Ltd ('Standard Bank') as plaintiff, Schameerah Court Number Seven CC ('Schameerah Court Seven') as first defendant, and Mr Daniel Kudumo Kamunoko as second defendant. In the course of events Schameerah Court Number Four CC ('Schameerah Court Four') was joined as third defendant.

[2] In the instant proceeding, Mr Narib, represents plaintiff. In that regard, it is important to note in capitalities that defendants have at all material times, including judicial case management periods, had legal representation, including legal representatives who acted as amici curiae. Since I became seized with the matter defendants were represented by an instructing counsel and instructed counsel, each as an amicus curiae. Before commencement of the trial on 17 September 2018, having been satisfied upon application from the Bar that Mr Barnard, instructed counsel amicus curiae, and Mr Horn, instructing counsel amicus curiae, were unable to carry out the duties of counsel in the interests of the court and defendants, I released them from their appointment on 17 September 2018.

[3] On 18 September 2018, having heard Kamunoko on his application from the Bar for postponement and having heard Mr Narib in answer, I did, in the interest of justice, postpone the trial to this day (10 October 2018) to enable Kamunoko to seek legal representation for defendants or represent himself and the other defendants; in which case, they would have been given ample time to prepare for trial. On 10 October inst. Kamunoko informed the court he was representing all defendants, which he was entitled to do. I leave this background information and proceed to the trial and substantial matters. At the outset it is important to note that the parties' legal representatives had filed on 12 June 2018 a joint proposed pre-trial order, which was made an order of court

in terms of the rules, which means the matter was subjected to judicial case management in terms of the rules.

[4] During the trial, plaintiff called one witness in the person of Nolan William Christian in his capacity as Head of Department, Rehabilitation and Recoveries. Kamunoko did not testify neither did he call any witnesses to testify, which, again, he was entitled to do. I was not interested to hear why defendants offered no evidence. One does not need to justify one's decision not to enjoy one's rights, of which one is aware. It is clear that upon closing their case, defendants had placed not one iota of evidence before the court. Kamunoko informed the court that he relied on his pleadings, and was content with making submissions only.

[5] Kamunoko's choice notwithstanding, in order to succeed, plaintiff bore the onus to prove its case on the preponderance of probability on the evidence. It follows that unless, as Mr Narib correctly submitted, plaintiff has admitted an averment in defendants' plea, the court is entitled to accept plaintiff's version as the truth; unless of course such version is so improbable that no reasonable court acting judicially would accept it as the truth. Furthermore, I held in *DM v SM* 2014 (4) NR 1074 (HC) that in Namibia –

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt...for, in finding facts or making inferences in a civil case, it seems to me that the one may... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[*M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuilt v Kurz* 2008 (2) NR 775 (SC) at para 31, approving *Govan v Skidmore* 1952 (1) SA 732 (N) at 735A – D]

[6] Having kept the foregoing principles and approaches in my mind's eye and having carefully considered the evidence, I make these factual findings and conclusions

thereanent in the succeeding paragraphs (ie para 7- 17) that are relevant and that would assist the court in determining the instant matter.

[7] On 5 January 2004 at Windhoek second defendant in his capacity as sole member of first defendant, concluded an Access Bond Facility agreement with plaintiff. The terms that governed the Access Bond Facility were that –

(a) any re-advances would be made under a mortgage loan by way of direct transfer to a current account by completing Form 00279 at the plaintiff's office.

(b) funds may be withdrawn from the mortgage loan account number 04269 2407 only in the following mode:

(i) three times per month;

(ii) in an amount of N\$1 000 or a multiple thereof on each occasion;

(iii) up to the limit of the mortgage loan account being N\$550 000 and an additional sum of N\$137 500; and

(iv) by such means, as may be permitted by plaintiff.

(c) plaintiff may, in its absolute discretion, terminate the Access Bond Facility at any time without giving reasons.

(d) no interest should be payable on any credit balance that may arise in the Mortgage Loan Account.

- (e) all re-advances in terms of the Access Bond Facility shall be covered by every form of security and/or suretyship furnished to the plaintiff in respect of the mortgage loan.

[8] As indicated in the pretrial order, the terms of the Access Bond Facility agreement are not in dispute. On 26 January 2004, plaintiff wrote to the first defendant and confirmed approval of its Home Loan application. The material, express, alternatively implied, in the further alternative, tacit terms of the Home Loan agreement were:

- (a) Plaintiff loaned a total sum of N\$550 000 with an additional sum of N\$137 500 to first defendant for first defendant's purchase of immovable property. It is not in dispute as indicated in the pretrial order what the amounts were in respect of Home Loan Account No.042692407 (ie first defendant).
- (b) The loan was advanced to first defendant, subject to repayment in monthly instalments of N\$5 676.
- (c) The loan was advanced on a repayment term of 20 years.
- (d) The initial interest rate of the loan was 11 per cent per annum. However, the plaintiff could, from time to time, by written notice to first defendant, alter the rate to accord with the prevailing interest rate charged by plaintiff from time to time on home loans.
- (e) The general terms and conditions, which govern the loan, would be incorporated in the First Sectional Continuing Covering Mortgage Bond.

[9] On 19 February 2004, at Windhoek, first defendant gave a written power of attorney to register a First Sectional Continuing Covering Mortgage Bond in favour of

plaintiff in respect of Section No. Seven (7) Schameerah Court, Hochland Park, Windhoek, over -

a unit consisting of:

- (a) Section Number 7 as shown and more fully described on Sectional Plan Number 32/2003 in the building or buildings known as Schameerah Court situated at Hochland Park, Windhoek, in the Municipality of Windhoek, Registration Division "K", Khomas Region of which the floor area, according to the said Sectional Plan is 167 (One Six Seven) 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.

[10] In terms of the aforementioned mortgage bond, if first defendant defaulted on the payment of the instalments as agreed and, demand notwithstanding, failed and/or neglected to make payment of the aforementioned amount, as agreed, to plaintiff, then at the option of plaintiff, all amounts howsoever owing to the plaintiff by first defendant must forthwith be payable in full, notwithstanding the exercise by plaintiff of any other rights, and plaintiff may institute proceedings for the recovery thereof and for an order declaring the mortgaged property executable. In terms of the aforesaid mortgage bond, if the mortgaged property was attached at the instance of plaintiff or any other creditor of first defendant, any prospective purchaser of the mortgaged property and plaintiff, through its servants, agents and nominees, should be entitled to exhibit "For Sale" notices on the mortgaged property.

[11] Furthermore, in terms of the aforesaid mortgage bond, once in each calendar month any arrear interest would be capitalized and would thereupon form a portion of the amount outstanding. Moreover, if any advance or other payment was made by plaintiff during a month, then interest would be reckoned on the daily balance



outstanding on first defendant's Home Loan Account and debited to first defendant's Home Loan Account on a day convenient to plaintiff. Thus, in terms of the aforementioned mortgage bond, the defendant agreed to be liable for all costs on the scale as between attorney and client incurred by the plaintiff in the recovery of any amount due under such bond. Furthermore in terms of the aforementioned mortgage bond, a certificate signed by the Manager, Secretary or Accountant of plaintiff, whose appointment and authority need not be proved, may prove the amount of first defendant's indebtedness. Significantly, such certificate would be prima facie proof of the facts therein stated. I note that the terms of the Home Loan Agreement are also not in dispute, as indicated in the pretrial order.

[12] On 17 February 2004, second defendant, by written Deed of Suretyship bound himself jointly, severally and in solidum with the first defendant as surety and co-principal debtor to plaintiff for the due repayment of any outstanding sum of Home Loan account number 042692407, with interest thereon and charges under the express renunciation of the benefits of excursion and division; the meaning and effect of which second defendant acknowledged he was fully acquainted. The said Deed of Suretyship was attached to the Combined Summons (as Annexure "F").

[13] As at 7 August 2004, the outstanding balance on Home Loan Account 042692407 stood at N\$549 856 49. On 23 September 2004, second defendant paid an amount of N\$553 967,14 towards first defendant's Home Loan Account. The effect was that his payment settled the balance that was outstanding on the aforementioned date. However, on 27 July 2005, second defendant instructed plaintiff to pay an amount of N\$650 000 from first defendant's Home Loan Account No. 042692407 to Du Toit and Associates (legal practitioners and conveyancers) in respect of Schameerah Court Four CC. Consequently, on 1 August 2005, plaintiff received a letter from Du Toit and Associates wherein they requested a guarantee from plaintiff to secure the full purchase price of Schameerah Court Four CC. The letter from Du Toit and Associates to the plaintiff was in writing, and as appears on the face of it, on the specific instructions of second defendant.

[14] On 4 August 2005, second defendant pledged a sum of N\$100 000 in cash from a L.Hangula to warrant the transfer and purchase of Schameerah Court Four CC. In response to the aforementioned letter received from Du Toit and Associates on 1 August 2005, plaintiff sent a guarantee letter to Du Toit and Associates on 5 August 2005. Plaintiff did that because of the pledge mentioned previously, coupled with the fact that there was N\$550 000 00 available on Home Loan Account 042692407 as it was fully paid. On 16 August 2005, L.Hangula paid into the Home Loan Account 042692407 of first defendant the pledged cash in the sum of N\$100 000. Plaintiff paid N\$650 000 to Du Toit and Associates the same day as instructed by the second defendant. This resulted in first defendant's Home Loan Account being in debit to the tune of N\$550 000. It is worth noting that first defendant made monthly payments towards the Home Loan Account after borrowing the sum of N\$650 000 from plaintiff on 27 July 2005. However, on 7 January 2012, first defendant totally stopped payments on Home Loan Account 042692407. Plaintiff reacted by sending a letter of demand to first defendant for the payment of Home Loan Account 042692407. It is important to note that a statement on first defendant's Account (annexure SB6 of the combined summons) reflects the activities that took place on Home Loan Account 042692407. In these circumstances and for the reasons indicated previously, the defendants are indebted to the plaintiff as reflected in annexure "H" of the combined summons.

[15] The evidence is overwhelming and unchallenged and establishes how the indebtedness of first defendant arose. I reject defendants' position that once the entire indebtedness of first defendant was paid, the bond thereon should have been cancelled. In any case, plaintiff has not received instructions to cancel the Bond. Moreover – and this is crucial - shortly after this Bond was paid off, second defendant used that very fact together with the aforementioned N\$100 000 paid into Home Loan Account 042692407 to purchase Schameerah Court Four CC (third defendant). Therefore, on the facts I cannot accept defendants' unproved allegation that plaintiff kept monies paid by the first defendant and used same to purchase Schameerah Court Four CC (third defendant).

[16] I interpose here with the present paragraph and paras 17,18, and 19 to look at Schameerah Court 4 (third defendant) because the facts relevant to it form part of the *res gestae* in the instant proceeding, which concerns Schameerah Court 7 (first defendant). On the evidence, it is abundantly clear that Schameerah Court Four CC was originally purchased with funds out of first defendant's Home Loan Account 042692407. With a power of attorney given on 7 July 2006 by Schameerah Court Four CC, it authorized the registration of a Sectional Continuing Covering Mortgage Bond No.882/2006, which was registered on 15 July 2006 in favour of plaintiff with Schameerach Court Four CC as mortgagor and plaintiff as mortgagee in the capital sum of N\$500 000 and an additional sum of N\$125 000 00. It is a special term of the Continuing Covering Mortgage Bond that the additional amount and capital sum are in respect of –

- (a) an existing indebtedness which is secured as part of the said maximum sum, arising from the causes specified in Clause 4.2.2.3 and elsewhere in the Bond in question.
- (b) future debts generally up to the said maximum sum, arising from and being the mortgagor's indebtedness generally to plaintiff, including:
  - (i) actual and contingent indebtedness;
  - (ii) indebtedness incurred by the mortgagor in the mortgagor's own name, jointly in the names of the mortgagor and any other person(s) or in the name of any firm in which the mortgagor may be trading, either solely or in partnership with others or otherwise;
  - (iii) indebtedness arising from money lent or advanced, promissory notes, or bills of exchange made, accepted or endorsed, money overdrawn on account(s), acts of guarantee and suretyship executed by the mortgagor or given by the plaintiff on the mortgagor's behalf, sums disbursed by the plaintiff in respect

of premiums of insurance, stand licenses, rates and taxes, commission and charges and costs of recovery of any indebtedness, the granting of any other banking facilities, or otherwise howsoever; the additional sum arising from and being in respect thereof.

- (c) interest on all amounts secured by the Bond, calculated in the manner and at the rate agreed upon between the mortgagor and the plaintiff, or failing such agreement, in the manner and the rate usually required by plaintiff for the kind of transaction in question.
- (d) all costs incurred by plaintiff in connection with the Bond, such as, but not restricted to, insurance premiums, rates, taxes, levies, stamp duties, interest, legal expenses (on the scale as between attorney and client) incurred in suing for recovery of any amount due under the Bond, and expenses and charges incurred to protect the security or otherwise to assist the mortgagor.
- (e) as security for the above, the mortgagor bound as a First Mortgage, subject to the conditions set out in the annexure to the Bond.

[17] On 26 May 2010, Schameerah Court Four CC (third defendant) in respect of Account No. 042697409 was in a debit of N\$664 923 78. The debit on the account was as a result of second defendant transferring a sum of N\$ 100 000 from Schameerah Court Four CC to his current account on 29 September 2006, N\$100 000 on 27 November 2007, and N\$ 100 000 on 4 December 2007. Second defendant further bound himself by written Deed of Suretyship as principal debtor of Schameerah Court Four CC. On the basis of the aforementioned indebtedness, plaintiff obtained judgment by default on 25 September 2009, wherein Schameerah Court No. Four CC was declared executable.

[18] It is important to note that the default judgment was not set aside by a competent court. Following upon the judgment by default, on 9 March 2010, Schameerah Court Four CC was sold to John-Nujoma Nangolo (purchaser).

[19] It follows inevitably that any dispute between plaintiff and defendants respecting third defendant is *res judicata*, as Mr Narib submitted. This conclusion is also dispositive of the counter claim that second defendant appeared to have instituted.

[20] We continue the enquiry from where we left off in para 15 in respect of Schameerah court 7(first defendant), which, as I have said previously, is the only real concern of the instant proceeding.

[21] Based on the foregoing reasoning and conclusions, which in my judgment resolve the issues of facts and law indicated in the pretrial order in favour of plaintiff, I find that plaintiff has proved its claim in convention and successfully defended the counter claim(as I have decided previously). Plaintiff's claim therefore, succeeds.

[22] It remains to deal with plaintiff's notice in terms of rule 108(2) (a) and (b) of the rules of court and annexed to plaintiff's particulars of claim as annexure 'E'. I am satisfied that the notice satisfies the requirements of rule 108. Apart from that, it is a term of the aforementioned First Sectional Continuing Covering Mortgage Bond (see paras 9-10 above) that if first defendant defaulted on payment of instalments, plaintiff is entitled to institute proceedings to recover the amount owed and to apply for an order declaring the mortgaged property executable. Based on these reasons I hold that on the authority of *Standard Bank Namibia Limited v Magdalena Shipila and Others* Case No. SA 69/2015(SC) (judgment: 6 July 2018), plaintiff has made out a case for an order declaring executable the immoveable property situated at Schameerah Court Section No.7, Hochland Park, Windhoek. No persons, including defendants and lessees, have given reasons to the court why such an order should not be made.

[23] In the result, I order as follows:

1. Judgment for plaintiff in the amount of N\$651 667, 81 against first and second defendants jointly and severally, the one paying the other to be absolved.

2. Payment of compound interest on the aforementioned amount of N\$651 667 81 at the rate of 12, 75 per cent per annum calculated and capitalized monthly as from 9 January 2015 to date of full and final payment.
3. It is hereby declared that the following property is executable:
  - (a) Section No.7 as shown and more fully described on Sectional Plan No. 32/2003 in the building or buildings known as SCHAMEERAH COURT situate at Hochland Park, in the municipality of Windhoek, of which the floor area, according to the said Sectional Plan, is 167 (One Six Seven) 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 Number 32/2003 (7) (UNIT) dated 4 December 2003; subject to the conditions therein contained.
4. First and second defendants must jointly and severally pay plaintiff's costs on the scale as between attorney (legal practitioners) and client, one paying the other to be absolved, and such costs include costs occasioned by the employment of one instructing counsel and one instructed counsel.

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C Parker

Acting Judge

APPEARANCES:

Plaintiff:	G Narib instructed by Dr Weder, Kauta & Hoveka, Windhoek
Second Defendant:	In person