



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/00121

In the matter between:

DEVELOPMENT BANK OF NAMIBIA LIMITED

PLAINTIFF

and

MAILA NGHINDINWA TRADING AS

RESTAURANT AFRICA BED AND BREAKFAST

DEFENDANT

Neutral citation: *Development Bank of Namibia Limited v Maila Nghindinwa Trading as Restaurant Africa Bed and Breakfast (HC-MD-CIV-ACT-CON-2019/00121) [2019] NAHCMD 243 (16 July 2019)*

Coram: TOMASSI, J

Heard: 13 June 2019

Delivered: 16 July 2019

Flynote: Civil Practice – Summary Judgment – Requirements in terms of Rule 60 of the High Court rules – What must be satisfied by the defendant in opposing a summary judgment – Whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded – Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. Court held – A

summary judgment is a drastic measure, hence the defendant is required to fully disclose the nature and grounds of his or her defence and the material facts upon which it is founded – Defendant failed to fully disclose the facts upon which she relies for her defence.

ORDER

1. Summary Judgment is granted in the following terms:
 - a. Payment of the amount of N\$3 031 510.62.
 - b. Interest on N\$3 031 510.62 at the rate of 11.5% from 31 October 2018 to the date of final payment.
 - c. Costs of suit in respect of the application for summary judgment and on a scale as between attorney and own client in the action in main.

2. The matter is removed from the roll and is regarded as finalized.

JUDGMENT

TOMASSI J:

[1] This is an application for summary judgment. The parties will be referred to as in the main action. The plaintiff herein applied for summary judgment in the following terms:

- 1.1. Payment of the amount of N\$3 031 510.62;
- 1.2. Interest on N\$3 031 510.62 at the rate of 11.5% from 31 October 2018 to the date of final payment;
- 1.3. Costs on a scale as between attorney and own client;
- 1.4. Further and/or alternative relief.

[2] The plaintiff duly complied with the requirements of rule 32 (9) and (10). I have read the application for summary judgement and I am satisfied that the claim

sought is for a liquidated amount in money and the affidavit filed by the plaintiff meets the requirements as set out in Rule 60 (2) (a) and (b).

[3] The defendant opposed the application and stated that she has not entered an appearance to defend merely for the sake of delay and that she has a *bona fide* defence. The following is a summary of the issues raised in her defence:

- (a) The amount of \$3 031 510.62 as claimed by the plaintiff is not correctly calculated and this will be demonstrated at discovery stage.
- (b) The date of breach is disputed in view of the fact that the date of breach is 31 October 2018 and the certificate of indebtedness is dated 28 November 2018;
- (c) The certificate of indebtedness does not prove breach in any manner;
- (d) None of the agreements attached reflect the obligations of the Defendant towards the Plaintiff;
- (e) the plaintiff's particulars of claim does not disclose a cause of action
- (f) The Plaintiff failed to serve a notice of the Defendant's breach as per the agreement.

[4] Ms Janke, counsel for the defendant, submitted that the defendant has a *bona fide* defence in that she is not indebted to the plaintiff in the amount as claimed. She submitted that the Plaintiff failed to account for payments made by the defendant and the defendant is in possession of and shall provide bank statements of the said loan account to demonstrate that the amount claimed by the plaintiff has been 'cooked up'.

[5] Ms Janke further submits that the plaintiff's particulars of claim is not proof at all that the defendant is in breach of the loan agreement and that the plaintiff's particulars of claim do not disclose a cause of action. She argued that the certificate of indebtedness is not proof that the defendant is in breach of the loan agreement thus not accepted by the defendant given that it was incorrectly calculated. Counsel submits further that the certificate of indebtedness is dated 28 November 2018, whereas the plaintiff states that breach was from 31 October 2018, therefore the date of breach is disputed and the plaintiff will be required to prove the date on which the said breach of occurred.

[6] She further submitted that, in terms of the law, the plaintiff is obliged, in the event of a breach, to serve a notice of breach on the defendant before issuing

summons. She submits, in conclusion, that the defendant has a *bona fide* defence and is not merely defending the matter for purposes of delay and prays that the application for summary judgment be dismissed with costs.

[7] Ms Kuzeeko, counsel for the plaintiff, submits that the conclusion of a loan agreement is not disputed and neither the fact that the amount of N\$2 970 000.00 was advanced in terms of the agreement. She submitted that the defendant challenges the calculations but fails to place any primary facts before court to support this conclusion. She argued that nothing turns on the certificate of indebtedness as same merely quantifies the outstanding balance. She submitted that the cause of action has been properly pleaded and a breach has been established in terms of the particulars of claim.

[8] Counsel submitted that there are no facts stated in support of the allegation that the particulars of claim is expiable. With regards to the notice, she submitted that clause 5 of the loan agreement provides that upon breach, without prejudice to any of its other rights, the full amount owing in terms of the loan agreement shall become due and payable. She submitted that there is thus no obligation placed on the plaintiff to notify the defendant of her breach.

The relevant law in application for Summary Judgments

[9] The law on summary judgment in our courts is trite. In the case of *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), the following was stated with regards to what must be satisfied by the defendant in opposing summary judgment -

‘Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the

Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.' Underlining for emphasis.

[10] In the case of *Standard Bank Namibia Limited v Nekwaya*¹ Ueitele J stated the following at para 24 –

'[24] The enquiry, where a plaintiff has applied for summary judgment is thus whether (a) the defendant has, in his or her affidavit opposing the application for summary judgment, "fully" disclosed the nature and grounds of his or her defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law...'

[11] A summary judgment is a drastic measure; hence the defendant is required to fully disclose the nature and grounds of his or her defence and the material facts upon which it is founded. In the case of *Moder v Teets t/a Neyer's Garage Nachfolger*², Hannah J stated that 'a court cannot exercise a discretion in favour of a defendant on a hunch that there could be a defence lurking somewhere in papers. There would need to be factual material placed before court sufficiently placing in doubt that the plaintiff's case is unanswerable.

[12] The Plaintiff's claim is premised on a loan agreement and two addendums thereto. This loan is further secured by a Mortgage Bond over immovable property and a deed of Cession. The Plaintiff claims that the defendant failed to pay the full amounts due in respect of the Term Loan Facility and that the defendant is in arrears in the amount of N\$3 031 510.62 as at 31 October 2018, as shown in the Certificate of Indebtedness annexed to the Particulars of Claim. Admittedly the Plaintiff does not indicate the full details of the breach but the allegation of breach is in fact made.

¹ (HC-MD-CIV-ACT-CON-2017/01164) [2018] NAHCMD 172 (15 June 2018)

² At 125E-F.

[13] The defendant in her affidavit disputes the amount claimed by plaintiff and alleges that all the payments are not accounted for. The evidence, according to the defendant will be made available during disclosure. The allegation lacks detail and particularity which is required for this court to determine whether this would constitute a *bona fide* defence. The number of payments made, the amounts paid and the dates on which the payments were made are not disclosed. The details of the correct outstanding amount is not furnished. The defendant is required to 'disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence'. As it stands there are no facts to support the allegation that the amount has been incorrectly calculated and arrived at.

[14] The defendant further stated that none of the agreements attached reflect the obligations of the defendant towards the plaintiff and the plaintiff's particulars of claim does not disclose a cause of action and therefore are excipiable. This is not strictly a defence but one which, given the drastic nature of the procedure of summary judgment, the court must consider. Once again no grounds are given to support the allegation that the particulars of claim does not disclose a cause of action.

[15] The particulars of claim does not give the exact amount of repayment but the agreements refer to the structure of the repayment. The allegation is made that the agreement was breached and that the defendant was in arrears. In *Van Straten No and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC)) it was held that when an exception was taken on the grounds that no cause of action was disclosed, the facts as alleged in the plaintiff's pleadings must be taken as correct, and only if no possible evidence led on the pleadings could disclose a cause of action would the particulars of claim be excipiable. The particulars of claim, read with the agreements annexed thereto adequately support the plaintiff's claim.

[16] The defendant raised an issue that she was not served with a notice of the said breach to remedy said breach before summons were instituted. It is well established that service of summons also constitutes demand, (See *ABSA Bank Ltd v Cure Group CC and Others* (56697/2011) [2012] ZAGPPHC 284 (20 November 2012); *Standard Bank of South Africa Ltd v Hand* 2012 (3) SA 319 (GSJ) at para

[22]). The Plaintiff in any event made out a case that, in terms of the agreement, the full amount owing in terms of the loan agreement shall forthwith become due and payable.

[17] Lastly, the defendant raised an issue in respect of the certificate of indebtedness i.e. that it is not proof of the defendant's indebtedness and neither does it reflect the date of breach. It is indeed so that the date on which the defendant defaulted is not mentioned in the particulars of claim. The defence raised is not that no breach occurred, but that the amount claimed does not correctly reflect the balance due. Furthermore, the certificate of balance was prepared in terms of the agreed terms and conditions between the parties. Nothing in my view turns on the different dates which appear in the certificate of balance, as the import of each date is clearly indicated.

[17] This court is unable to conclude that the defences raised are both bona fide and good in law.

[18] What is left is the question of costs. The general rule is that costs are in the discretion of the Court and that costs must follow the course. I see no reason why this should not follow. In the result, I make the following order:

1. Summary Judgment is granted in the following terms:
 - a. Payment of the amount of N\$3 031 510.62.
 - b. Interest on N\$3 031 510.62 at the rate of 11.5% from 31 October 2018 to the date of final payment.
 - c. Costs of suit in respect of the application for summary judgment and on a scale as between attorney and own client in the action in main.

2. The matter is removed from the roll and is regarded as finalized.

M Tommasi
Judge

APPEARANCES:

PLAINTIFF:

M Kuzeeko

Of Dr Weder, Kauta & Hoveka, Inc., Windhoek

DEFENDANT:

J JANKE

Of Sisa Namandje & Co., Windhoek