

“ANNEXURE 11”

Practice Direction 61

IN THE HIGH COURT OF NAMIBIA

Case Title: <i>Agricultural Bank of Namibia Limited v Frans Gaoseb</i>	Case No.: HC-MD-CIV-ACT-CONT-2018/03546
	Division of Court: High Court (Main Division)
Heard/tried before: Honourable Mr. Justice Usiku	Date of hearing: 08 April 2019
	Delivered on: 08 April 2019
Neutral citation: <i>Agricultural Bank of Namibia Limited v Gaoseb</i> (HC-MD-CIV-ACT-CONT-2018/03546) [2019] NACHMD 93 (08 April 2019)	
The Order: Having heard Ms Janke , on behalf of the Plaintiff and having read documents filed of record: IT IS ORDERED THAT: Judgment is granted in favour of the plaintiff against the defendant, in the following terms: <ol style="list-style-type: none">1. Payment in the amount of N\$ 76,015.89;2. Interest at the rate of 6% calculated on N\$ 75,505.89 as from 31 August 2018 to the date of payment calculated at the end of each month and added to the interest-bearing sum(s);3. The court makes no order as to costs.	

4. The matter is removed from the roll and regarded finalised.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an application by plaintiff, against the defendant, for summary judgment. The plaintiff seeks for an order in the following terms:

- '1. Payment in the amount of 76, 015.89;
 - 2. Interest thereon at the rate of 6 % on N\$ 75 505.89 as from 31 August 2018 to date of payment calculated at the end of each month and added to the interest-bearing sum(s);
 - 3. An order in terms whereof the immovable property:
 - CERTAIN: ERF NO. 535, USAB
 - SITUATE: IN THE MUNICIPALITY OF KARIBIB
REGISTRATION DIVISION "H"
ERONGO REGION
 - MEASURING: 262 (TWO SIX TWO) SQUARE METERS
 - HELD BY: DEED OF TRANSFER NO. T4470/1991
- is declared especially executable as provided for in terms of rule 108(2);
- 4. Costs of suit;
 - 5. Further and/or alternative.'

[2] By court order dated the 6th November 2018, the defendant was directed file an opposing affidavit, (or give security to the plaintiff), if any, on or before 15 February 2019. The defendant did not do so and is, therefore, *ipso facto* barred in terms of rule 54(3). The defendant has not filed any application for condonation and/or for uplifting of the automatic bar. Therefore, the application for summary judgment proceeds on an unopposed basis.

Cause of action

[3] The plaintiff's cause of action is based on a written loan agreement dated 24 June 2005 entered into between the plaintiff and the defendant, in terms of which the plaintiff lent

and advanced the amount of N\$ 41 600 to the defendant. A certain Petrus Rebebe (not a party to the proceedings) bound himself as surety and co-principal debtor for the due payment of the aforesaid sum and interest thereon, and executed a deed of suretyship on 24 June 2005. Petrus Rebebe also executed a surety mortgage bond in favour of the plaintiff, providing as security for the payment of the debt, certain Erf No. 535, Usab, situated in the Municipality of Karibib, in the event of the principal debtor failing to fulfil any of the obligations under the principal debt.

[4] Deed of Transfer No. T4470/1991 is attached to the pleadings, confirming that Petrus Rebebe is the owner of Erf No. 535 Usab, Karibib.

The application for summary judgment

[5] The application for summary judgment appears, prima facie, to fall within the ambit of summary judgment proceedings, in terms of rule 60.

[6] As was stated earlier, the defendant did not file an opposing affidavit to the application, and in my opinion, the plaintiff is entitled to the relief in terms of prayers 1 and 2 as set out under para [1] hereof.

[7] As regards the relief set out under prayer 3, as appears under para [1] hereof, the plaintiff is clearly not entitled to such relief. The surety (Petrus Rebebe) is not a party to the present proceedings and has not been afforded any opportunity to answer to the allegations, concerning his immovable property. The relief claimed by the plaintiff to have the immovable property of Petrus Rebebe declared specially executable obviously violates the fundamental principle of justice, which requires that a person who has substantial interest in the outcome of a matter before court or whose rights may be affected by an order sought, must be afforded opportunity to be heard before such relief is granted.

[8] For seeking to violate a tenet, so basic to the principle of justice, I am inclined to believe that this is an appropriate matter to deny the plaintiff the costs of suit in this matter.

This step, as drastic as it may seem, is aimed to alert the plaintiff to be cautious when seeking to have other people's immovable property declared specially executable and to first assure itself in advance that it is indeed entitled to the order it seeks to obtain. I shall, therefore, make no order as to costs in the present matter.

[9] In the result I make the following order :

Judgment is granted in favour of the Plaintiff against the defendant, in the following terms:

1. Payment in the amount of N\$ 76,015.89;
2. Interest at the rate of 6% calculated on N\$ 75,505.89 as from 31 August 2018 to the date of payment calculated at the end of each month and added to the interest-bearing sum(s);
3. The court makes no order as to costs.
4. The matter is removed from the roll and regarded finalised.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Applicant	Defendant
J.A Janke Of Sisa Namadje & Co Inc, Windhoek	No appearance