

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: Development Bank of Namibia v Jinhao Investments CC t/a OK FOODS	Case No: HC-MD-CIV-ACT-CON-2019/03305
	Division of Court: MAIN DIVISION
Heard before TOMMASI J	Date of hearing: 18 February 2020
	Delivered on: 09 March 2020
	Reasons delivered: 20 March 2020
Neutral citation: <i>Development Bank of Namibia v Jinhao Investments CC t/a OK FOODS</i> HC-MD-CIV-ACT-CON-2019/03305) [2020] NAHCMD108 (20 March 2020)	
Results on merits: .	
The order: Having heard MR P BARNARD on behalf of the Plaintiff , MR K AMOOMO on behalf of the 2 nd and 3 rd Defendants and MR T MUHONGO on behalf of the 4 th Defendant , and having read the documents filed of record: IT IS ORDERED THAT: 1. The court grants Summary Judgment against second, third and fourth defendants jointly and severally the one paying the other to be absolved as follow; (i) Payment in the sum of N\$7 083 515.79; (ii) Interest on the aforesaid amount from 31 May 2019 on the basis of the prime lending rate generally charged by First National Bank of Namibia Limited plus 3% per annum on the aforesaid amount or any balance thereof outstanding from time to time and calculated daily and compounded monthly; (iii) An order confirming the following immovable properties to be declared	

executable: (a) Section 14 as shown and more fully described on sectional plan no SS 37/2008 in the buildings or buildings known as Seagull Haven, situate at erf no 3349 Swakopmund (Extension NO 9), In the municipality of Swakomund, Registration Division "G: Erongo Region of which the floor area according to the sectional plan is 189 square meters in extent and an undivided share in the common property in the land and building or buildings are 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 NO 37/2008 (15)(UNIT) dated 23 July 2008.

(b) Certain: Portion 68 (A portion of portion 4) of the Farm Finckenstein No 526; SITUATE: In the Settlement area of Kappsfarm registration Division "K" Khomas Region; MEASURING: 7710 (seven seven one nil) square meters; HELD BY: Deed of Transfer NO. T 1535/2008

(iv) Cost of suit on an attorney and own client scale.

2. The matter is postponed to 25 March 2020 for the plaintiff to apply for default judgment against first defendant.

Reasons for orders:

TOMMASI J,

[1] This is an application for Summary Judgment by the Plaintiff against the defendants. The first Defendant did not defend the action. The second to fourth defendants entered an appearance to defend the action and they oppose the application for summary judgment.

[2] The Plaintiff claims for (i) cancellation of the Loan agreement, (ii) Payment in the sum of N\$7 083 515.79; (iii) Interest on the aforesaid amount from 31 May 2019 on the basis of the prime lending rate generally charged by First National Bank of Namibia Limited plus 3% per annum on the aforesaid amount or any balance thereof outstanding from time to time and calculated daily and compounded monthly; (iv) Cost of suit on an attorney and own client scale.

- [3] The affidavit of the Company Secretary of the plaintiff make the following averments in support of its application for Summary Judgement: 'I can and do hereby swear positively to the fact that the Defendants are indebted to the Plaintiff in respect of the capital claim as set out in the Particulars of Claim and on the grounds stated therein.'
- [4] Second and third defendant opposed the application on the grounds that: (i) the application does not comply with Rule 60 (2) (a) in that the affidavit does not verify the cause of action and the amount claimed. Counsel referred the court to *Mercedes-Benz Financial Services (Pty) Ltd v Makoma Mmaphetola Mahowa*, an unreported case of the Gauteng Division, Case NO 18716/2017 delivered on 29 September 2017; and it does not satisfy Rule 60 (1) (a-d).
- [5] The fourth defendant opposed the application mainly on the ground that the particulars of claim is excipiable as it does not contain the necessary averments to sustain a cause of action against the first defendant as the principal borrower and therefore against the fourth defendant who is the surety. The deficiency is that the plaintiff does not plead compliance with the written agreement which the plaintiff relies on against the first defendant.
- [6] The material provisions of Rule 60 provides as follow:
- ‘(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is -
- (a) on a liquid document;
 - (b) for a liquidated amount in money;
 - (c) for delivery of specified movable property; or
 - (d) for ejectment.
- “ (2) The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts –
- (a) verifying the cause of action and the amount, if any, claimed; and
 - (b) stating that in his or her opinion there is no *bona fide* defense to the action and that notice of intention to defend has been delivered solely for the purpose of delay”

[7] It is trite that the court must determine whether the defendant has a *bona fide* defence and has not entered a defence merely for purposes of delay. In this matter nothing has been stated in the defendant's affidavit in respect of the plaintiff's claim against the defendants but on the merits but a "technical" issue is raised against the application for summary judgment itself and an averment made that the particulars of claim is excipiable. In *First National Bank of Namibia Ltd v Louw* (I 1467 – 2014 [2015] NAHCMAD 139 (12 June 2015) the court, referring to *Visser v De La Ray* 1980 (3) SA 147 stated as follow:

'In determining summary judgment, the court is restricted to the manner in which the plaintiff has presented its case. In this regard, the court must insist on a strict compliance by the plaintiff and technically incorrect papers should see the application being refused'.

[8] The question for determination is whether the plaintiff has presented its case with strict compliance and technically correct papers; and whether there is merit in the fourth defendants assertion that the particulars of claim is excipiable.

[9] In the *Mercedes Benz* case, supra, cited by counsel for the second and third defendants the court took issue with the fact that the plaintiff failed to state "in his opinion" as is required in terms of Rule 32 (the wording of this rule is identical to Rule 60 (2)(b)).

[10] Having read the offending portion in the affidavit of the plaintiff I am satisfied that this statement adequately comply with what is required in terms of Rule 60(2)(a).

[11] Paragraph 14 of the particulars of claim stipulates that plaintiff complied with its obligations in terms of the loan agreement and it disbursed the amount of N\$3 697 543.78 to the first defendant on 9 December 2016 and a further N\$1 302 456.22 on 7 February 2017'. This allegation, on the assumption that same is correct, would suffice to establish that there has been compliance with the terms of the agreement which include paragraph 3 thereof insofar as it obligates the plaintiff to perform. The excipiability of the particulars of claim therefor cannot be raised as a *bona fide* defence to the plaintiff's particulars of claim.

[12] There has been no defence on the merits and no reasons advanced why the properties should not be declared executable. There is no reason why the court

should not order same.

In the result the following order is made:

1. The court grants Summary Judgment against second, third and fourth defendants jointly and severally the one paying the other to be absolved as follow;

(i) Payment in the sum of N\$7 083 515.79;

(ii) Interest on the aforesaid amount from 31 May 2019 on the basis of the prime lending rate generally charged by First National Bank of Namibia Limited plus 3% per annum on the aforesaid amount or any balance thereof outstanding from time to time and calculated daily and compounded monthly;

(iii) An order confirming the following immovable properties to be declared executable: (a) Section 14 as shown and more fully described on sectional plan no SS 37/2008 in the buildings or buildings known as Seagull Haven, situate at erf no 3349 Swakopmund (Extension No 9), In the municipality of Swakomund, Registration Division "G: Erongo Region of which the floor area according to the sectional plan is 189 square meters in extent and an undivided share in the common property in the land and building or buildings are 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 NO 37/2008 (15)(UNIT) dated 23 July 2008.

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(iv) Cost of suit on an attorney and own client scale.

2. The matter is postponed to 25 March 2020 for the plaintiff to apply for default judgment against first defendant

Judge's signature:

Note to the parties:

	Not applicable.
Counsel:	
Applicant	Respondent
<p><i>Adv P Barnard</i> <i>On instructions of</i> <i>Ellis Shilengudwa Inc</i></p>	<p><i>Mr K Amoomo</i> <i>Of</i> <i>Kadhila Amoomo Legal Practitioners</i> <i>For the</i> <i>Second and Third Respondents</i></p> <p><i>Mr T Muhongo</i> <i>On instructions of</i> <i>Appolos Shimakeleni Lawyers</i> <i>For the fourth Respondent</i></p>