

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

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<b>Case Title:</b> AGRICULTURAL BANK OF NAMIBIA vs KILLARNEY (PROPRIETARY) LIMITED & TULIO VAN DER MERWE PARREIRA	<b>Case No:</b> HC-MD-CIV-ACT-CON-2020/00282
	<b>Division of Court:</b> MAIN DIVISION
<b>Heard before</b> TOMMASI J	<b>Date of hearing:</b> 02 September 2020
	<b>Delivered on:</b> 22 September 2020
<b>Neutral citation:</b> <i>Agricultural Bank of Namibia v Killarney (Pty) (Ltd)</i> (HC-MD-CIV-ACT-CON-2020/00282 [2020] NAHCMD 431 (22 September 2020))	
<b>Results on merits:</b> .	
<b>The order:</b> Having heard <b>MS PAULSE</b> on behalf of the Plaintiff, <b>ADV JACOBS</b> on behalf of the 1 <sup>st</sup> and 2 <sup>nd</sup> Defendants, and having read the documents filed of record:  <b>IT IS ORDERED THAT:</b>  <ol style="list-style-type: none"><li>1. The application for Summary Judgment is dismissed with costs;</li><li>2. The cost is limited in terms of the provisions of Rule 32(11);</li><li>3. The parties must file their case plan on or before 16 October 2020;</li><li>4. The case is postponed to 21 October 2020 for case planning conference.</li></ol>	
<b>Reasons for orders:</b>	
[1] This is an application for Summary Judgment by the Plaintiff against the Defendants.	

[2] The Plaintiff's action is based on a written loan agreement which 1<sup>st</sup> Defendant breached by failing to make the required payments in terms of the agreement. Second Defendant signed a surety agreement for the first defendant's indebtedness. The plaintiff claims payment in the sum of N\$49 149 885.40, interest of (9.25% *per annum* on the amount of N\$39 108 403.40 from 31 March 2020 calculated yearly on 31 August; and 11.25% *per annum* on the amount of N\$10 040 972 from 31 March 2020 calculated monthly and added to the interest bearing sum(s)); an order to declare the immovable property over which a security mortgage was registered in favour of plaintiff, executable; and costs of suit.

[3] The grounds upon which the defendant opposes the application for summary judgment are as follow:

- The affidavit filed in support of the application for Summary Judgment was deposed to by the Acting Manager, Legal Services who does not have the requisite personal knowledge of the facts deposed to as she was not privy thereto;
- The deponent impermissibly attached annexures to the affidavit in support of the application for Summary Judgment as none of the documents qualify as liquid documents;
- The Certificate of Balance does not bear the name of the signatory thereto;
- The relief that the property be declared executable cannot be granted in an application for Summary Judgment as it does not constitute a liquid claim and it attempts to bypass the requirements of Rule 108.

[4] At the hearing of the matter the defendant did not persist with the objection against non-compliance with Rule 108 and the only remaining issue is whether the plaintiff has presented its case with strict compliance with the rules of court and technically correct papers.

[5] 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.” [my emphasis]

[6] 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’.

[7] The founding affidavit is deposed by the plaintiff’s Acting Manager of Legal Services, Ms Kalumbu. She states that she is able to swear positively to the facts verifying the cause of action. She annexed the following documents to the founding affidavit:

- The Standard Loan Agreement
- A written letter of demand addressed to the 1<sup>st</sup> Respondent.
- Deed of Suretyship;
- A written letter of demand to 2<sup>nd</sup> Respondent;
- A Surety Mortgage bond;
- A pledge and cession agreement;
- A certificate of balance

[8] Paragraph 4.7 of the Standard Loan Agreement stipulates that in the event that interest or capital or any part thereof at any time becomes due immediately, a certificate by the Chief Executive Officer or any Manager of plaintiff showing the actual amount of capital and interest then outstanding in terms of the agreement, shall be conclusive evidence against the borrower of the amount of his indebtedness to the plaintiff.

[9] The certificate of balance in this instance reflects that it was compiled by the Chief Financial Officer of the Plaintiff but the signature appended thereto is that of someone who signed on his behalf. The identity and position this person within the structures of plaintiff, is not known. This certificate therefore does not comply with the provisions of the agreement between the parties. There is thus no conclusive evidence of the outstanding amount in terms of the agreement.

[10] The applicant must ensure that a technically correct application is brought in order to succeed with its application for Summary Judgment. There has not been compliance with Rule 60 as the deponent to the affidavit filed in support of the application for Summary Judgment could not and did not verify the amount outstanding. In the premises the application for Summary Judgment cannot succeed.

[11] The cost herein follow the result and there is no reason for this court to award cost beyond the scale provided for in terms of Rule 32 (11).

[12] In the result the following order is made:

1. The application for Summary Judgment is dismissed with costs;
2. The cost is limited in terms of the provisions of Rule 32(11);
3. The parties must file their case plan on or before 16 October 2020;
4. The case is postponed to 21 October 2020 for case planning conference.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
Mr. Charles Visser Of LorentsAngula Inc. Windhoek	Mr. Barend Van Der Merwe (JNR) Of Van Der Merwe-Greeff Andima Inc. Windhoek