

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

CASE NO.: HC-MD-CIV-ACT-CON-2019/04881

In the matter between:

**NATIONAL HOUSING ENTERPRISE**

**PLAINTIFF**

and

**TEOPOLINA NAVATYE NAKANYALE**

**DEFENDANT**

CASE NO: HC-MD-CIV-ACT-CON-2019/04312

**NATIONAL HOUSING ENTERPRISE**

**PLAINTIFF**

and

**ERIC MXOLISI FATA**

**DEFENDANT**

**Neutral citation:** *National Housing Enterprise v Nakanyale* (HC-MD-CIV-ACT-CON-2019/04881) [2020] NAHCMD 478 (16 October 2020)

**CORAM:** PRINSLOO J

**Heard:** 23 September 2020

**Delivered:** 16 October 2020

**Reasons:** 19 October 2020

**Flynote:** Practice and Procedure – Second Motion – Default Judgment – Cause of action based on a money-lending claim and on a written agreement for loan of moneys – No loan agreement attached to the particulars of claim but Plaintiff attached a registered mortgage bond – Court holding that by law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatsoever there can be no hypothecation giving rise to a substantive claim – It follows from the definition of a mortgage (using the term in its wider sense in which it includes pledge, lien and other forms of hypothecation) as a right which secures the fulfilment of an obligation that it is always accessory to a principal obligation – Failing to attach the underlying agreement would cause the cause of action not to be properly pleaded

**Summary:** The parties entered into a written agreement for loan of moneys, in terms of which a mortgage bond was registered to secure the loan against the immovable property. The defendants breached their obligations in that they defaulted in the payment of the instalments as agreed which resulted in arrears. As a result the plaintiff claims by summons the outstanding capital amount, with interest together with costs. No loan agreement is however attached to the summons but the plaintiff attached a copy of the mortgage bond in terms of which it base its claim.

*Held* that where a written agreement is the basis of the cause of action a copy of the written agreement must be attached to the particulars of claim. Failing to attach the underlying agreement would cause the cause of action not to be properly pleaded. Application for default judgment is hereby refused.

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**ORDER**

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In respect of both matters:

1. The Plaintiff's application for default judgment is refused.
2. The Plaintiff is allowed an opportunity to amend and/or correct its particulars of claim, if so advised.
3. The matter is postponed to **19 November 2020** at **15h00** for status hearing.
4. The Plaintiff must file a status report on or before 16 November 2020.

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**JUDGMENT**

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PRINSLOO J

Background

[1] There are two different matters before me for default judgment brought by the applicant (plaintiff) against the defendants (homeowners) for orders for the payment of sums of moneys and application for leave to apply on the same papers, duly amplified, at a later stage to have the respective properties of the defendant's declared specifically executable.

[2] The matters were enrolled on motion court as they were undefended and on 31 January 2020 Tomassi J issued the following order:

- '1. The case is postponed to 14 February 2020 at 10h00 for Residual Court Roll hearing. (Reason: Request of Plaintiff).
2. The Plaintiff is ordered to file Heads of Argument in order to address the duty Judge why an underlying agreement is not necessary for this application.'

[3] When the matters came before me as the Duty Judge on Second Motion Court on 31 January 2020 Ms Nyashanu, the plaintiff's legal practitioner, was ready to argue. However having considered the nature of the matters I directed that an *amicus curiae* be appointed to argue the matter on behalf of the defendants, who did not defend their respective matters. Mr K Marais kindly agreed to argue the matter on behalf of the defendants and I wish to extend my gratitude to both counsel in this matter for their industry and assistance to this court.

[4] The question for determination in the two matters is whether the antecedent agreement should be attached to the summons or whether it would suffice to attach only the mortgage bond, which incorporate the terms of the said underlying agreement.

[5] The facts as set out in the particulars of claim in both matters are similar and the parties argued the *Nakanyale* matter<sup>1</sup> and the *Fata* matter<sup>2</sup> would therefore follow the outcome of the *Nakanyala* matter.

#### Nakanyala matter

[6] In its particulars of claim the plaintiff alleged the following (I refer to certain provisions of the agreement, which are relevant to the determination of the issue at hand):

'5. On or about 26 February 2013 the Parties entered into a written agreement for loan of monies, in terms of which a mortgage bond would be registered to secure the loan against the immovable property.

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<sup>1</sup> HC-MD-CIV-ACT-CON-2019/04881.

<sup>2</sup> HC-MD-CIV-ACT-CON-2019/04312.

6. On or about the 22 May 2013, at Windhoek, a mortgage bond, bond number B 2795/2013 (the Bond) in favor of the Plaintiff was registered over the property described as:

CERTAIN:	ERF NO. 6618 ONGWEDIVA EXTENSION NO. 14
SITUATE:	in the Town of Ongwediva Registration Division "A" Oshanan Region.
MEASURING:	325 (Three Two Five) Square Meters
HELD:	By Deed of Transfer. T 2467/2013 (Annexure "B"))
SUBJECT:	Conditions contained therein.

7. The Bond, annexed thereto marked "A", was registered as security in terms of the loan agreement, as embodied in the Bond, between the Parties, the material express, alternatively implicit and/or tacit, terms of which are as follows:

7.1 The Plaintiff would advance to the Defendant a loan in the amount of N\$ 359 854.34 (Two Hundred and Fifty Nine Thousand Eight Hundred and Forty Five Namibia Dollars and Thirty Four Cents) which would be repayable in monthly instalments.

7.2 The Defendant undertook to pay amounts owing to the Plaintiff under the Bond in consecutive monthly instalments, which instalments shall include the Capital and interest at 8.75% per annum as provided therein.

7.3 The Defendant would repay the amount to the Plaintiff in monthly instalments of N\$ 2 725.60 until the loan is paid in full.

7.4 -7.7.5

8. The Plaintiff has complied with its obligations in terms of the bond in that it advanced the money to the Defendant and attended to the registration of the Bond upon which the Defendant took possession of the property.'

#### The plaintiff's position

[7] Ms Nyashanu argued that the underlying agreement in relation to the bond is not strictly necessary for the granting of judgment by default in this matter as the plaintiff specifically pleads that the action is based on the bond, which is

attached and the averments in relation thereto are pleaded in the particulars of claim, which averments are sufficient for the defendant to reply to the claim against them. Ms Nyashanu further argued that there are four main points on which the plaintiff's claim stands to succeed, ie:

- a) The requirements of rule 45 have been substantially complied with to enable the defendant to understand and meet the case against her;
- b) The plaintiff argues that the reliance on the bond document for enforcement of the agreement between the parties is competent legal recourse;
- c) The bond is a document registered in terms of the Deeds Registries Act.<sup>3</sup> This process is overseen by the Registrar of Deeds, a public body, charged therewith and on this basis, the production of a true copy thereof is sufficient to prove the contents thereof without further evidence, unless the validity thereof is challenged; and
- d) It is the plaintiff's contention that all the evidence produced to court thus far sufficiently proves the existence of the debt secured by the bond. Due to the fact that the matter is unopposed, the evidence is unchallenged and stands to be accepted by court.

[8] Ms Nyashanu submitted that the *facta probantia* have been pleaded and are supported by substantive law. Counsel further submitted that the parties entered into an agreement upon which the mortgage bond was registered. The parts of the agreement materially relied on are incorporated in the bond, which in turn has been annexed to the particulars of claim. The mortgage bond gives rise to rights and obligations of both parties and was validly registered. Counsel argued that the plaintiff has performed in terms of the bond and advanced the loan and transferred ownership of the property to the defendant. In terms of the bond, the plaintiff is entitled to claim for the attachment of the immovable property, or the regaining of the capital plus interest, and has a right to claim for

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<sup>3</sup> No 47 of 1937.

costs. In terms of the terms of the bond the plaintiff is entitled to call up the bond in the event of breach of the terms of the bond and claim for the capital amount and/or the execution against the immovable property.

[9] Counsel argues that the plaintiff relies on the mortgage bond, which she submits supersedes the underlying deed of sale and loan agreement, as the instrument which categorically proves the existence of the indebtedness of the defendant to the plaintiff, and in terms of which the plaintiff seeks performance of the defendant's obligations under the bond.

[10] On the issue of compliance with the provisions of rule 45 of the Rules of Court Ms Nyashanu contended that without derogating from the fact that there was a written agreement executed between the parties, reliance is placed on the bond for purposes of this claim. This is owing to the fact that in the execution of the bond, the terms of the underlying agreement were incorporated therein to avoid circumstances where a dispute may arise between the two instruments.

[11] Counsel further contended that rule 45(7) requires the specifics of the 'contract' relied on to be pleaded and that a copy of the parts relied on be annexed to the pleading. In consideration thereof, the plaintiff specifically pleaded same in paras 6 and 7 of the particulars of claim of which the parts relied on can be found in the bond.

#### The defendant's position

[12] Mr Marias in turn argued that the plaintiff has approached this court for a default judgment sounding in money on the premise of the defendant's default on a written loan agreement, however the loan agreement relied upon is not annexed to the particulars of claim, (nor otherwise before this court) instead a mortgage bond, which was registered upon conclusion of the loan agreement, is annexed to the particulars of claim.

[13] Mr Marais conceded that the bond does contain the provisions as to the capital amount, repayment terms, interest and breach but argued that the bond is merely a means of securing a debt and not an instrument creating a debt. It is an instrument through which:

- a) property is bound and registered as security for the debt;
- b) the mortgagee restrains the alienation of the property;
- c) the bonded property can be liquidated and the proceeds used to settle the outstanding debt.

[14] Mr Marais argued that a bond cannot exist independent from an underlying cause or obligation. Counsel submitted that its nature is completely accessory to, and its existence dependent on an antecedent agreement between the mortgagor and the mortgagee.

[15] Mr Marais further submitted that if a mortgagee fails to establish an enforceable claim, which was intended to be secured by hypothecation, the bond falls away and from that it can be deduced that the bond cannot find liability in terms of the debt which the bond intends to secure. It is merely an instrument through which the mortgagee can hypothecate the bonded property, once liability in terms of the antecedent agreement has been proven and found.

[16] Mr Marias disagrees with the plaintiff that its cause of action is premised on the bond as attached. He argues that it is clear from the papers that the claim is premised on the underlying loan agreement and therefore in order to comply with the provisions of rule 45(7) the plaintiff must attach the loan agreement and failure to comply with this rule will render the pleadings of the plaintiff prima facie irregular for the prejudice caused to the defendant.

[17] Mr Marais argued that failure to attach the underlying agreement amounts to failure to plead all the facts necessary to sustain the plaintiff's action.

#### Legal principles and application

[18] The plaintiff's cause of action is based on money-lending and not the registered mortgage bond. This much is clear from para 5 of the particulars of claim wherein it is pleaded that 'the parties entered into a written agreement for the loan of monies, in terms of which a mortgage bond would be registered to secure the loan against the movable property.' (my underlining).

[19] The mortgage bond in this instance is nothing but proof of the fact that the plaintiff's claim has been secured by way of a mortgage bond over the immovable property of the debtor. I say this for the reasons hereunder.

[20] In this instance the requirements are regulated by rule 45(7) of the Rules of Court which provides as follows:

'A party who in his or her pleading relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleading must be annexed to the pleading.'

[21] The case of *Klerck NO v Van Zyl and Maritz*<sup>4</sup> is authority for a well-known principle that the loan agreement and not the mortgage bond is the basis for a money-lending claim and the following *dictum* at 276A is apposite:

'If there is no valid principal obligation for the mortgage bond to secure, there can be no valid mortgage bond and no real right of security in the hands of the mortgagee.'

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<sup>4</sup> 1989 (4) SA 263 (A) at p 275G – 276G.

[22] The court relied on the judgment of *Kilburn v Estate Kilburn*<sup>5</sup> where the following was said at 505 – 506:

‘It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim.’

[23] These principles as set out in *Klerck NO* and *Kilburn* matters were accepted by our court in *Standard Bank Namibia v Apisay*.<sup>6</sup> In *Apisay* the court found at para 13 of the judgment that the mortgage bond is an instrument hypothecating landed property and constitutes proof that the Plaintiff’s claim has been secured over the immovable property of the Defendant. It therefore follows that the real right created by a mortgage bond is accessory and dependent for its existence on the existence of the obligation which it secures.<sup>7</sup> This was also in line with the principles as applied in *Absa Bank Limited v Haynes N.O. and Others*,<sup>8</sup> *Standard Bank of South Africa Ltd v Gordon and Others*<sup>9</sup> and *Absa Bank Limited v Studdard and Another*.<sup>10</sup>

[24] Ms Nyashanu argued that the *Apisay* judgment is distinguishable from the current matter as the terms of the particulars of claim in the *Apisay* case were lacking a number of essential averments, for example, the plaintiff failed to plead the persons representing the parties, the place, date regarding the agreement and the bond. Further, the specific compliance with material terms of the bond were not pleaded, such as specific repayment terms, interest, the compliance of the plaintiff and the written demand required was neither pleaded nor attached. In accordance therewith, the counsel submits that the court would not be satisfied based on the pleadings in that matter and that judgment is not warranted

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<sup>5</sup> [1931 AD 501](#).

<sup>6</sup> (HC-MD-CIV-ACT-CON-2017/02741) NAHCMD 273 (07 September 2018).

<sup>7</sup> Supra para 13.

<sup>8</sup> 2013 (3619/2013) (12 December 2013) para 10 (a judgment of the High Court of South Africa, Free State Division, Bloemfontein).

<sup>9</sup> [2011] ZAGPJHC 114 2011/6477 (21 September 2011) paras 9 and 10.

<sup>10</sup> ZAGPJHC 26 (13 March 2012) para 5.

especially since there is absence of the loan agreement and/or evidence to prove its existence and the plaintiff's compliance therewith.

[25] Counsel argues that the bond is the instrument that, in the absence of anything to the contrary, proves the existence of the debt which it aims to secure. Up to this point I am in agreement with counsel. I however do not understand plaintiff's counsel to argue that the bond is the instrument creating the debt. Counsel argues that as the plaintiff's particulars of claim specifically makes reference to the existence of the underlying agreement being the basis of the registration of the bond, the bond in turn becomes the basis of the claim. I cannot agree with the plaintiff's counsel in this regard. The mere fact that the terms of the bond and the rights of the plaintiff were specifically pleaded as incorporated in the bond does not necessarily mean that there was compliance with rule 45(5) and (7).

[26] I agree that the facts of the current matter differs to a certain degree from that of the *Apisay* matter but in my considered view the principles set out in the *Apisay* case also apply to the facts before me.

[27] One must consider the nature and the purpose of a mortgage bond.

[28] According to Silberberg and Schoeman's *The Law of Property*<sup>11</sup> the term 'mortgage' is used in two senses. They states as follows:

'As a generic term it covers every form of hypothecation of property and in this sense it includes every real right which one person has in and over another person's property for the purposes of securing the payment of a debt or generally the performance of an obligation. In a more restricted sense the expression 'mortgage' signifies a special security over immovable property as opposed to a 'pledge' which denotes a special security over movable property. As a general rule, mortgages and

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<sup>11</sup> 2<sup>nd</sup> ed at 427 to 428.

pledges have their origin in an agreement between the parties, ie the creditor and the debtor.

. . . . The significance of mortgages, pledges, liens and all other forms of hypothecation lies in the fact that they provide the creditor with a “real security” for the payment of his claim; for, if the debtor is unable to raise the necessary funds to pay the debt which is thus secured, the creditor is entitled to demand that the property, ie the thing which is the subject-matter of his security, be sold and that the proceeds of such a sale are used for the satisfaction of his claim.’

The authors further proceed to state:

‘It follows from the definition of a mortgage (using the term in its wider sense in which it includes pledge, lien and other forms of hypothecation) as a right which secures the fulfilment of an obligation that it is always accessory to a principal obligation.’<sup>12</sup> (my emphasis)

[29] This view is supported in *Moosa and Other NNO v Hassam and Others NNO*<sup>13</sup> which concerned a party’s failure to annex a copy of the written agreement relied upon to the particulars of claim as required by Rule 18(6)<sup>14</sup> and wherein Swain J stated as follows:

‘The written agreement is a vital link in the chain of the respondents’ cause of action against the applicants . . . In the absence of the written agreement the basis of the respondents’ cause of action does not appear *ex facie* the pleadings.’

[30] In *Thienhaus NO v Metje & Ziegler Ltd and Another*<sup>15</sup> in the minority judgment of Wessels JA, the following passage appear:

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<sup>12</sup>Supra at 428.

<sup>13</sup> 2010 (2) SA 410 (KZP) para 18.

<sup>14</sup> Similar to our rule 45(7).

<sup>15</sup> 1965 (3) SA 25 (A) at 43 and 44.

‘When the mortgagor causes a mortgage bond to be registered in favour of the mortgagee he does so to give effect to an antecedent agreement between them – which may be either in writing or verbal – in terms of which the former bound himself to grant to the latter, as security for a debt, a real right in the immovable property concerned . . . .’

[31] Further to this in *Lief NO v Dettmann*<sup>16</sup> Van Wyk JA stated as follows:

‘The only real rights in favour of the mortgage created by the registration of a bond are rights in respect of the mortgaged property, eg the right to restrain its alienation and a right to claim a preference in respect of its proceeds on insolvency of the mortgagor. The real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them.’

[32] In the current matter the attached mortgage bond refers to several paras which are purportedly based on the written agreement entered into between the parties including, *inter alia*, aspects such as repayment of the loan, interest and calling up of the bond; however without having had the opportunity to consider the relevant underlying agreement, it would be impossible for a court to satisfy itself whether or not judgment should be granted<sup>17</sup> considering the fact that the obligations of a debtor arises from an underlying agreement, being the loan agreement.

[33] I am not convinced by Ms Nyashanu’s argument that there was full compliance with rule 45(5) and 45(7) in light the aforementioned authority and principles set out therein, and the plaintiff will therefore not be entitled to the relief claimed.

[34] I agree with Mr Marais that failing to attach the underlying agreement would cause the cause of action not to be properly pleaded. I can find no reason

<sup>16</sup> 1964 (2) SA 252(A) at 259B.

<sup>17</sup> *Absa Bank Limited v Haynes N.O. and Others* (3619/2013) [2013] ZAFSHC 232 (12 December 2013) para 18. Also see *Absa Bank v Nicholas and Another* 19942/2011, 18243/2011 [2013] ZAWCHC 58 (20 February 2013) para 13.

not to associate myself with the *Apisay* judgment and I am not prepared to grant relief without having had sight to the underlying agreement.

Order

[35] In respect of both matters:

1. The Plaintiff's application for default judgment is refused.
2. The Plaintiff is allowed opportunity to amend and/or correct its particulars of claim, if so advised.
3. The matter is postponed to **19 November 2020** at **15h00** for status hearing.
4. The Plaintiff must file a status report on or before 16 November 2020.

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JS Prinsloo  
Judge

## APPEARENCES:

## PLAINTIFF:

S Nyashanu  
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## DEFENDANT:

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