

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: FIRST NATIONAL BANK OF NAMIBIA LTD v YEUNG TAI FOODSTUFF & TRADING CC	Case No: HC-MD-CIV-ACT-CON-2020/03709
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Schimming-Chase	Date of hearing: 28 March 2022
	Judgment delivered on: 28 March 2022
Neutral citation: <i>First National Bank Of Namibia Ltd v Yeung Tai Foodstuff & Trading CC</i> (HC-MD-CIV-ACT-CON-2020/03709) [2022] NAHCMD 143 (28 March 2022)	
Results on the merits: Summary judgment granted.	
The order: Having heard Mr R Linde , on behalf of the plaintiff, and upon no appearance on behalf of the first-, second-, third- and fourth defendants and having read the papers filed of record for HC-MD-CIV-ACT-CON-2020/03709: IT IS HEREBY ORDERED THAT: 1. The plaintiff's late filing of its summary judgment application is condoned. 2. Summary judgment is granted in favour of the plaintiff in respect of claim 1 against the first-, second-, third- and fourth defendants, jointly and severally, the one paying the others to be absolved in the following terms: 2.1 Payment in the amount of N\$2,199,365.17. 2.2 Interest calculated on the aforesaid amount at the rate 7.75% per annum,	

calculated on a daily balance and compounded monthly in arrears, as from 1 March 2022 to date of full and final payment.

2.3 Costs of suit on an attorney-client scale, consequent upon the employment of one instructed and one instructing legal practitioner.

3. The matter is removed from the roll and is regarded as finalised.

Reasons for the order:

SCHIMMING-CHASE J

Introduction

[1] The plaintiff in this matter, First National Bank of Namibia Ltd, applies for summary judgment against the first to fourth defendants. The first two defendants are Yeung Tai Foodstuff and Trading CC and Angelina Property and Trading CC. The third and fourth defendants are Yiu Wah Yeunga and Hong Shen. The third defendant is the sole member of the second defendant and the fourth defendant is the sole member of the first defendant.

[2] The plaintiff instituted action proceedings in this court on 10 September 2020.

Particulars of claim

[3] The plaintiff's first claim is based on a written mortgage bond agreement concluded between the plaintiff and the first defendant – represented by the fourth defendant – on 23 February 2016, in terms of which the plaintiff lent and advanced to the first defendant the sum of N\$4.5 million.

[4] On 22 February 2016 the second-, third- and fourth defendants signed unlimited suretyship agreements in terms of which they bound themselves as surety and co-principal debtors in respect of the first defendant's obligations towards the plaintiff.

[5] It is alleged that the first defendant breached the agreement by failing to effect payments of the monthly instalments when they became due as from March 2020. As is the norm in loan agreements, the agreement contained an acceleration clause, which the plaintiff exercised upon the first defendant's default of its obligations. According to the certificate of indebtedness dated 11 August 2020 and annexed to the particulars of claim as annexure "F", as at 1 August 2020 the first defendant was indebted to the

plaintiff in the amount of N\$3,889,565.74 with interest at the rate of 7.75% calculated from 1 August 2020.

[6] The plaintiff's second claim is also based on a written loan agreement, concluded between the plaintiff and the second defendant – represented by the third defendant – on 8 November 2004, in terms of which the plaintiff lent and advanced to the second defendant the sum of N\$1,579,000.00.

[7] On 22 February 2016 the third- and fourth defendants signed unlimited suretyship agreements in terms of which they bound themselves as surety and co-principal debtors in respect of the second defendant's obligations towards the plaintiff.

[8] The second defendant allegedly breached the agreement by failing to effect payments of the monthly instalments when they became due as from March 2020. Similar to its first claim, the plaintiff exercised the acceleration clause contained in the agreement. According to the certificate of indebtedness dated 11 August 2020 and annexed to the particulars of claim as annexure "O", as at 16 July 2020 the second defendant was indebted to the plaintiff in the amount of N\$1,274,659.80 with interest at the rate of 8.75% calculated from 16 July 2020.

[9] In summary, the plaintiff sought to recover the amounts of N\$3,889,565.74 and N\$1,274,659.80, with interest and costs.

[10] All four defendants noted their intention to defend the plaintiff's action on 3 September 2021.

Application for summary judgment

[11] Although this action was instituted in September 2020, progress in these proceedings was protracted by, inter alia, the plaintiff's delay in prosecuting the action, settlement negotiations which proved futile and the withdrawal of the defendants' erstwhile legal practitioner.

[12] In the case plan order of 4 March 2022, the parties were given directions as to the delivery of their respective affidavits and the filing of heads of argument. The defendants did not deliver answering papers and this application is therefore unopposed.

[13] In terms of the order, the plaintiff was directed to deliver its application by 10 March 2022. The application was delivered on the due date at 15:09¹. Plaintiff seeks condonation for the delay in delivery of its application. Although an application for condonation was not filed, the plaintiff engaged the defendant in terms of rule 32(9) and filed a rule 32(10) report advising the defendants indicated that the delay in filing was not substantial and they accordingly had not suffered any prejudice thereby. I agree with the defendants view and accordingly condone the late filing of the application. In any event, the application was delivered only nine minutes late.

[14] Rule 60(2) of the Rules of Court sets out the averments that must be made by a party seeking summary judgment. The deponent must swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no bona fide defence to the action and that the intention to defend has been delivered solely for the purpose of delay.

[15] In this case the affidavit to the summary judgment application was deposed to by the plaintiff's Manager of Collection and Recovery at One Legal Department and contains the necessary averments.

[16] The plaintiff only seeks summary judgment only in respect of its first claim and for a reduced amount. This is evident from the notice of motion and paragraph 2 of the founding affidavit, in which the deponent confirms that the defendants are indebted to the plaintiff in the amount of N\$2,199,365.17 as at 10 March 2022, with interest, as set out in the certificate of indebtedness annexed to the affidavit as "MN1". During argument, counsel for the plaintiff advised the court that the plaintiff's second claim and a portion of its first claim had been settled through proceeds from the sale of the second defendant's immovable property, hence the reduced claim amount.

[17] The objective of the summary judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim.²

[18] This court has a discretion on whether or not to grant summary judgment. Due to

¹ Rule 2 of the Rules of Court sets the deadline for issuing of any process or filing of any document at 15:00 on a court day.

² Herbstein & van Winsen: *The Civil Practice of the High Courts of South Africa* 5th Ed at 516.

the stringent and drastic nature of this remedy, the court in exercising its discretion, may refuse summary judgment even if a defendant has not found security or where the defendant's answering affidavit does not satisfy the requirements of rule 60(5)(b). In *Namibia Airports Company Limited v Conradie*³ this court quoted the South African Supreme Court which held that the court's discretion in summary judgment applications 'may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is a good one'.⁴

[19] In this case the defendants have not raised any defence to the claim. The court is therefore not in a position to determine whether the defendants in deed have a defence good in law or whether – as it appears – their notices of intention to defend were delivered solely as a mere delay tactic amounting to an abuse of the process of the court.

[20] In light of the aforesaid, the plaintiff has made out a case for summary judgment to be granted and accordingly I find in favour of the plaintiff and make the following order:

1. The plaintiff's late filing of its summary judgment application is condoned.
2. Summary judgment is granted in favour of the plaintiff in respect of claim 1 against the first-, second-, third- and fourth defendants, jointly and severally, the one paying the others to be absolved, for the following:
 - 2.1 Payment in the amount of N\$2,199,365.17.
 - 2.2 Interest calculated on the aforesaid amount at the rate 7.75% per annum, calculated on a daily balance and compounded monthly in arrears, as from 1 March 2022 to date of full and final payment.
 - 2.3 Costs of suit on an attorney-client scale, consequent upon the employment of one instructed and one instructing legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

Judge's signature	Note to the parties:
	Not applicable.

³ *Namibia Airports Company Limited v Conradie* 2007 (1) NR 375 (HC) para 22.

⁴ *Tesven CC and Another v South African Bank of Athens* 2000 (1) 268 (SCA) at 277 H – I.

Counsel:	
Plaintiff	First to fourth defendants
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