

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: First National Bank of Namibia Ltd and Yvonne Sus Eichas	Case No: HC-MD-CIV-ACT-CON-2022/04982
	Division of Court: Main Division, Windhoek
	Heard on: 18 April 2023
Heard before: Honourable Lady Justice Rakow	Delivered on: 9 May 2023
Neutral citation: <i>First National Bank of Namibia Ltd v Eichas</i> (HC-MD-CIV-ACT-CON-2022/04982) [2023] NAHCMD 243 (9 May 2023)	
Order:	
1. AD CLAIM 1	
1.1 Payment in the amount of N\$328 933.53.	
1.2 Compound interest calculated daily and capitalized monthly on the amount of N\$328 933.53 at plaintiff's mortgage lending rate of interest from time to time, currently 10.25% per year calculated from 30 August 2022 to date of final payment.	
1.3 Cost of suit granted on attorney client scale.	
2. AD CLAIM 2	
2.1 Payment in the amount of N\$83 417.13.	
2.2 Compound interest calculated daily and capitalized monthly on the amount of N\$83 417.13 at plaintiff's mortgage lending rate of interest from time to time, currently 10.25% per year, calculated from 30 August 2022 to date of final payment.	
2.3 Cost of suit granted on attorney client scale.	

3. AD CLAIM 3:

3.1 Payment in the amount of N\$39 076.16.

3.2 Compound interest calculated daily and capitalized monthly on the amount of N\$39 076.16 at plaintiff's prime rate of interest from time to time, currently 9.25% per year plus 4.50%, calculated from 30 August 2022 to date of final payment.

3.3 Cost of suit granted on attorney own client scale.

4. AD CLAIM 4:

4.1 Payment in the amount of N\$114 063.90.

4.2 Compound interest calculated daily and capitalized monthly on the amount of N\$114 063.90 at plaintiff's prime rate of interest from time to time, currently 9.25% per year plus 4.50%, calculated from 30 August 2022 to date of final payment.

4.3 Cost of suit granted on attorney own client scale.

5. AD CLAIM 5:

5.1 Payment in the amount of N\$3 507.39.

5.2 Compound interest calculated daily and capitalized monthly on the amount of N\$3 507.39 at plaintiff's prime rate of interest from time to time, currently 9.25% per year plus 5.55%, calculated from 18 September 2022 to date of final payment.

5.3 Cost of suit.

6. AD CLAIM 6:

6.1 Payment in the amount of N\$18 004.06.

6.2 Compound interest calculated daily and capitalized monthly on the amount of N\$18 004.06 at plaintiff's prime rate of interest from time to time, currently 9.25% per year plus 5.55%, calculated from 29 August 2022 to date of final payment.

6.3 Cost of suit granted on attorney own client scale..

7. An order in terms whereof the following property is declared executable:

Certain: Erf No Rehoboth E 664

Situate: In the Town of Rehoboth

Registration Division "M"

Hardap Region

Measuring: 724 (Seven Two Four) Square Metres.

The matter is removed from the roll and regarded as finalized.

Reasons for order:

RAKOW J:

Introduction

[1] The plaintiff, First National Bank of Namibia Ltd, was the previous employer of the defendant. The plaintiff (both in its summons and its application for summary judgment) seeks payment of the capital, further interest and costs in respect of monies lent and advanced to the defendant on two mortgage loan agreements, two overdraft facilities, one personal loan and a credit card facility. They also seek an order in terms of rule 108 to allow for the sale in execution of the immovable property. The total indebtedness of the defendant is about N\$587 000.

[2] The defendant is opposing the application and requesting a stay of these proceedings pending the finalization of a labour appeal matter in this court. The Labour Commissioner dismissed her claim on 23 September 2022 and it is against this dismissal she intends to appeal although no appeal has been filed at this time.

Arguments

[3] The plaintiff argued that the first issue that falls for determination is whether summary judgment should be granted. It was argued that summary judgment ought to be granted against the defendant since the defendant has failed to satisfy the requirements to escape summary judgment. The second issue that fall for determination is whether or not the defendant's property should be declared executable.

[4] It was further argued that the defendant's affidavit is not a model of clarity. The defendant simply makes sweeping statements unsupported by any facts. She fails completely to give any detail of whatever defence she might have to the plaintiff's claims. No attempt whatsoever is made by the defendant to state what her defence to the plaintiff's claim is. She also fails to state a single fact upon which it can be concluded that she has a defence to the plaintiff's claims.

[5] The defendant argued in person. She indicated that she is entitled to have this application stayed as she has good prospects of success in her labour matter, in which she is claiming monies for constructive dismissal which will far exceed the amount she is indebted to the plaintiff.

Legal principles

[6] The requirements of rule 60(5)(b), which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus*, *Maharaj v Barclays National Bank Ltd*¹ by Corbett JA with regard to the previous rule 32, dealing with summary judgment applications:

'Accordingly, one of the ways in which the respondent may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the applicants in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the respondent has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the respondent appears to have, as to either the whole or part of the claim, a defence which is *bona fide and good in law*.

If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the respondent need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.'

[7] In general, the approach of the court is as set out by Justice Cheda in *Lofty-Eaton v Ramos* as follows:²

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

'The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by an applicants where a respondent raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate applicant who without doing so, will continue to endure the frustration mounted by an unscrupulous respondent (s) on the basis of some imagined defence. As remedy available to applicants is an extra-ordinary one and is indeed stringent to the respondent, it should only be availed to a party who has a watertight case and that there is absolutely no chance of respondent/respondent answering it, see *Standard Bank of Namibia Ltd v Veldsman*.³ Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caston Ltd v Barrigo*.⁴ In that case, Roberts, AJ went further and crystalised the principle as follows:

"it is confined to claims in respect of which it is alleged and appears to the court that the respondent has no bona fide defence, and that appearance has been entered solely for the purpose of delay."

Discussion

[8] The defendant's defence which she seeks to advance in resisting summary judgment is not bona fide. The defendant fails to disclose to this court that the arbitration has been finally disposed of in favour of the plaintiff. No appeal currently lies against that award, although it is seemingly still the intention of the defendant to appeal the award by the Labour Commissioner. No documents towards this appeal was filed, although her legal representative for the said matter indicates in a letter that it would have been filed already. It is true that one can rely on an unliquidated counterclaim to avoid summary judgment, no counterclaim is currently pending against the plaintiff and the award by the Labour Commissioner in favour of the plaintiff still stands.

Declaring the property executable

² *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

³ *Standard Bank of Namibia Ltd v Veldsman* 1993 NR 391 (HC).

⁴ *Caston Ltd v Barrigo* 1960 (4) SA 1 at 3H.

[9] In *Kisilipile v First National Bank of Namibia*⁵ the Supreme Court said the following regarding declaring the immovable property executable:

[18] In Namibia, judicial oversight takes the following form when it comes to declaring a primary home specially executable. If a property is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. The judgment debtor bears the evidential burden. He or she should preferably lay the relevant information before court on affidavit especially if assisted by a legal practitioner, either in resisting default judgment or summary judgment. The failure to do so does not relieve the court of its obligation to inquire into the availability of less drastic alternatives. If the debtor is legally unrepresented his or her attention must be drawn to the protection granted under rule 108.

[19] The debtor must be invited to present alternatives that the court should consider to avoid a sale in execution but bearing in mind that the credit giver has a right to satisfaction of the bargain. The alternatives must be viable in that it must not amount to defeating the commercial interest of the creditor by in effect amounting to non-payment and stringing the creditor along until someday the debtor has the means to pay the debt . . .’

[10] At para [20] the Supreme Court continued to lay down the law as follows in *Kisilipile*:

‘Judicial oversight exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of the primary home is a last resort. The court is required to take into account “all the relevant circumstances”.

When exercising the discretion under rule the court should bear in mind that a sale in execution of a primary home does not necessarily extinguish a debt. The reality is often the contrary. In other words, the debtor remains indebted to the credit giver for the balance of the debt, considering that under the current rule framework the property is sold to the highest bidder for not less than 75% of the either the local authority or regional council evaluation.’

[11] Finally, at para [21], the Supreme Court reasoned as follows on the subject:

‘ . . . The court should also take into consideration the payment history of the debtor. Greater latitude should be given to the debtor who has a reasonably good payment history; the extent of the balance outstanding; the age of the debtor – which is an important factor whether or not the debtor will be able to secure another loan to buy a home.’

⁵ *Kisilipile v First National Bank of Namibia* 2021 (4) NR 921 SC para 17.

[12] The court explained to the defendant that we can now proceed with an enquiry under rule 108 of the court rules to determine whether she has other means to settle her debt. She chose not to proceed with a rule 108 enquiry but the court proceeded and enquired about her prospects to settle the outstanding debt without selling her primary home. She explained that she is not currently working and has not worked since leaving the employ of the plaintiff about two years ago. She further has received her pension payout as well as a payout for her outstanding leave days and those funds are no longer available to settle her debt. She has no means to settle the outstanding debt except if she is successful with her appeal and receive money from the plaintiff for remuneration payment for constructive dismissal.

[13] The order is as set out above.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:
Y Campbell Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek.	YS Eichas In person.