

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

Case Title: NEDBANK NAMIBIA LIMITED // BENJAMIN HAUWANGA & 2 OTHERS	Case No: HC-MD-CIV-ACT-CON-2022/05327
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Date reserved: 6 JUNE 2023
	Delivered on: 21 JUNE 2023
Neutral citation: <i>Nedbank Namibia Limited v Hauwanga</i> (HC-MD-CIV-ACT-CON-2022/05327) [2023] NAHCMD 343 (21 June 2023)	
Order:	
<ol style="list-style-type: none">1. The application for summary judgment is dismissed.2. The plaintiff (applicant) shall pay the defendants' costs, which costs include costs of one instructing counsel and one instructed counsel.3. The summary judgment application is finalised and removed from the roll.4. The matter is postponed to 5 July 2023 at 08h30 for Status hearing (Reason: further conduct of the matter).	
Reasons for the above order:	
<p>[1] The plaintiff has applied to the court to grant an order of summary judgment, and it is represented by Ms Kuzeeko. The defendants have moved to reject the application, and are</p>	

represented by Mr Chibwana.

[2] The plaintiff instituted action against the defendants for ‘the payment...of N\$50 021 147,46, payment of interest at the rate of 14.80% per annum on the said amount, calculated from 21 October 2022 to the date of payment and costs’. In addition, the plaintiff seeks an order declaring certain identified properties of the defendants specially executable. The plaintiff’s claim is based on a loan agreement concluded between the plaintiff and the defendants on 28 December 2020.

[3] The plaintiff’s case is briefly this: The defendants have failed to pay the full amounts due under the loan agreement. As on 21 October 2022 the amount outstanding to be paid by the defendants was N\$50 021 147,46. Therefore, as a result of the breach, the plaintiff is entitled to the outstanding amount as set out in the Balance Certificate that is filed of record. The Balance Certificate ‘constitutes *prima facie proof* of the defendants’ indebtedness to the plaintiff. (Italicised for emphasis) According to the plaintiff the issuance of summons amounted to a demand that the defendants should satisfy their indebtedness.

[4] I accept that the issuance of summons constituted demand, as a general principle of law.¹ I shall return to this general common law principle in due course.

[5] The defendants, on the other hand, contend in the following terms: For the plaintiff’s claim to pass the lowest threshold in terms of the loan agreement, the plaintiff must allege in the particulars of claim that there were amounts due to be paid by the third defendant to the plaintiff as on 21 October 2022. The defendants aver that no amount of money was due and payable in terms of the loan agreement as on 21 October 2022. In particular, the defendants contend that the particulars of claim do not identify a term of the loan agreement that required the defendants to pay N\$50 021 147,46 on or before 21 October 2022. In sum, for the defendants, the parties did not agree that any moneys were due and payable by the third defendant to the plaintiff on or before 21 October 2022. Thus, the defendants contend that no breach of the loan agreement is established in the particulars of claim.

[6] It is a requirement of the common law that to place a debtor in *mora*, the creditor must give the debtor an unequivocal and unconditional demand for performance within a specified time.

¹ *PDS Holdings (BVI) v Zaire* 2014 (3) NR 676 (HC).

[7] On the other hand, the plaintiff contends that a demand for payment was properly made by the issuance of summons, as submitted by Ms Kuzeeko. But counsel misses the point. The common law principle relied on by counsel is, as I have said previously, a general principle. That principle is inapplicable where the parties in their agreement have provided the manner in which notice of breach must be communicated to the errant party, as is found in clause 15 of the loan agreement.

[8] I stated in the recent case of *Namibia Wildlife Resorts Limited v Maxuilili-Ankama*² that the purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain a summary judgment without trial if the plaintiff can prove his or her claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.

[9] From the brief contentions of the plaintiff's and the defendants' that I have set out previously, it seems to me clear that the defendants have not only set up a bona fide defence which is good, but they have also raised issues against the claim which ought to be tried. Thus, summary judgment may be granted only where the court is satisfied that the plaintiff's case is unanswerable,³ in the sense that the defendant has not set up a bona fide defence or has not raised issues that ought to be tried.⁴

[10] Based on these reasons, I decline to grant an order of summary judgment, whereupon, I make the following order:

1. The application for summary judgment is dismissed.
2. The plaintiff (applicant) shall pay the defendants' costs, which costs include costs of one instructing counsel and one instructed counsel.
3. The summary judgment application is finalised and removed from the roll.
4. The matter is postponed to 5 July 2023 at 08h30 for Status hearing (Reason: further conduct of the matter).

² *Namibia Wildlife Resorts Limited v Maxuilili-Ankama* [2023] NAHCMD 94 (7 March 2023) para 10.

³ *FNB Limited v Louw* [2015] NAHCMD 139 (12 June 2015).

⁴ *Namibia Wildlife Resorts* footnote 2.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
M KUZEEKO of Dr Weder, Kauta & Hoveka Inc., Windhoek	T CHIBWANA Instructed by Andreas-Hamunyela Legal Practitioners, Windhoek