

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Bank Windhoek Limited and Heino Christopher Van Zyl Christine Heleen Van Zyl	Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-CON-2023/00290 Division of Court: Main Division Heard on: 4 July 2023
Heard before: Honourable Mr Justice Usiku	Delivered on: 25 July 2023	

Neutral citation: *Bank Windhoek v Van Zyl* (HC-MD-CIV-ACT-CON-2023/00290) [2023] NAHCMD 434 (25 July 2023)

Order:

1. The court grants summary judgment in favour of the plaintiff against the first and second defendants, jointly and severally the one paying the other to be absolved, in the following terms:
 - (a) payment in the amount of N\$725 235.58;
 - (b) compound interest calculated daily and capitalized monthly on the aforementioned amount at plaintiff's prime lending rate of interest from time to time, currently 10.50% plus 1.50% per annum calculated from 20 December 2022 to date of final payment;
 - (c) the following immovable property is hereby declared specially executable:

Certain: Remaining Extent of Portion A of the Farm Narubis No 78,

Situate: Registration Division "T", Karas Region,

Measuring: 1 053,1922 (One Thousand and Fifty Three Comma One Nine Two Two)

Hectares,
 Held Under: Deed of Transfer No. T8316/2021,
 Subject: to the conditions contained therein;

(d) Costs of suit on a scale as between attorney and client.

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

Reasons for order:

USIKU J:

Introduction

[1] This is an application by the plaintiff for summary judgment against the first and second defendants.

[2] The plaintiff seeks the following relief:

‘1. Payment in the amount of N\$ 725 235.58.

2. Compound interest calculated daily and capitalized monthly on the aforementioned amount at Plaintiff’s Prime Lending Rate of interest from time to time, currently 10.50% plus 1.50% per annum calculated from 20 December 2022 to date of final payment.

3. An order declaring the following immovable property specially executable:

Certain: Remaining Extent of Portion A of the Farm Narubis No 78,

Situate: Registration Division “T” Karas Region

Measuring: 1 053,1922 (One Thousand and Fifty Three Comma One Nine Two Two) Hectares,

Held Under: Deed of Transfer No. T8316/2021

Subject: to the conditions contained therein;

4. Costs of suit on a scale as between attorney and client.

5. Further and/or alternative relief.’

[3] The plaintiff’s claim against the first defendant arises out of a written loan agreement concluded between itself and the first defendant, in terms of which it lent and advanced certain money to the first defendant. In terms of the agreement, the first defendant was to repay the loan

in certain specified instalments and agreed to pay all costs incurred by the plaintiff as a result of the first defendant's failure to comply with the provisions of the agreement, on an attorney and own client scale.

[4] The plaintiff's claim against the second defendant arises from a written suretyship agreement in terms of which the second defendant bound herself as surety and co-principal debtor with the first defendant for the repayment on demand of any sum of money which the first defendant may owe the plaintiff; including legal costs on an attorney and own client scale.

[5] The plaintiff alleges that the first defendant breached the agreement in that it failed to pay the full amounts due in respect of the instalments due and as a result thereof, it terminated the agreement.

[6] The plaintiff instituted action against the defendants, claiming payment of the amount owing. The defendants entered appearance to defend. The plaintiff then applied for summary judgment. The first defendant opposed the application. However, he filed his answering affidavit late and for that reason, he filed a condonation application to be considered together with the application for summary judgment.

[7] In his opposing affidavit, the first defendant does not take issue with his indebtedness to the plaintiff. However, he avers that he had entered into an oral agreement with the plaintiff, which the plaintiff breached.

[8] The plaintiff has filed its heads of argument timeously. The defendants have not filed their heads of argument, nor have they filed any condonation application.

Defendants' defence

[9] The essence of the defence put forth by the first defendant is that:

(a) he and the plaintiff concluded an oral agreement regarding payment of arrears and instalments in regard to the written loan agreement. The defendant alleges that plaintiff breached the oral agreement and such breach made it impossible for him to comply with the terms of the loan agreement;

(b) the plaintiff unlawfully cancelled the repayment terms without complying with clause 11.1.1 of the loan agreement;

(c) the second defendant holds a usufruct over the property in respect of the property which the plaintiff wishes to have declared specially executable;

(d) the aforesaid property is the primary home of the second defendant and the plaintiff has not met the requirements of rule 108; and that,

(e) the plaintiff has not complied with the provisions of rule 60(3) 'in respect of its founding affidavit of the summary judgment application'.

[10] The first defendant therefore, submits that the second defendant and him, have a bona fide defence to the plaintiff's claim and that the defendants be granted leave to defend the action.

Analysis

[11] The main issues for determination are whether the defendants have:

- (a) disclosed a bona fide defence that can be regarded as a good defence in law and;
- (b) whether they have:
 - (i) put forth circumstances, with reference to less drastic measures than the sale in execution of the primary home, and have,
 - (ii) provided reasons why the immovable property should not be declared specially executable.

[12] Upon a careful reading of the papers, I am of the view that the defendants have not put up a defence that meets the standard required to successfully avoid summary judgment being granted. The defendants have not set out the material facts upon which their purported defence is founded.

[13] In regard to the first defendant's alleged oral agreement, the defendants do not deny that the written loan agreement contains a non-variation clause. It is, therefore, clear that the alleged oral agreement insofar as it is at odds with the written agreement, cannot lawfully be allowed to

vary the terms of the written agreement. Consequently, the defence put forth regarding the oral agreement is not good in law.

[14] As regards to the allegations that the plaintiff has unlawfully cancelled the repayment terms (namely, that plaintiff did not call upon the defendant to remedy the default), this allegation contradicts the content of the letter of demand (ie Annexure POC2 to the particulars of claim). Furthermore, defendants do not set out material facts upon which such defence is founded. The defence put forward is therefore, not a good defence.

[15] Regarding the issue of the usufruct held by the second defendant over the property, it is noteworthy that the second defendant has waived the usufruct, in favour of the mortgage bond registered by the first defendant over the property. The existence of the usufruct is not an impediment to summary judgment being granted.

[16] In regards to the allegation that the plaintiff has not complied with rule 60(3) in that a copy of the mortgage bond is not attached to the application for summary judgment, it should be mentioned that the copy thereof is attached to the particulars of claim and forms part of the record of the present proceedings. There is therefore, no merit in that defence.

[17] Insofar as the defendants allege that plaintiff has not complied with the requirements of rule 108, it is noteworthy that the defendants have not set out the material facts upon which they rely for their defence on that score. Furthermore, they have not put forth, in their opposing affidavit, the circumstances with reference to less drastic measures than the sale in execution and have not provided reasons why the immovable property should not be sold.

[18] In conclusion, I am of the opinion that the defendants have not established that they have a bona fide defence to the plaintiff's claim and that the application for summary judgment stands to be upheld.

[19] In regard to the first defendant's application for condonation of the late filing of the answering affidavit, such application is refused on the ground that the defendant has no prospects of success on the merits of the summary judgment application.

[20] In the result, I make the following order:

1. The court grants summary judgment in favour of the plaintiff against the first and second defendants, jointly and severally the one paying the other to be absolved, in the following terms:

- (a) payment in the amount of N\$725 235.58;
- (b) compound interest calculated daily and capitalized monthly on the aforementioned amount at plaintiff's prime lending rate of interest from time to time, currently 10.50% plus 1.50% per annum calculated from 20 December 2022 to date of final payment;
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2. The matter is removed from the roll and regarded as finalised.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:
T Luvindao of Dr Weder Kauta and Hoveka, Windhoek	H Engelbrecht of Metcalfe and Beukes, Windhoek