

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

Case Title: BANK WINDHOEK LIMITED v JP INVESTMENT CC FANEK MATHIAS	Case No: HC-MD-CIV-ACT-CON-2023/00487 INT-HC-SUMJUD-2023/00189 Division of Court: HIGH COURT (MAIN DIVISION) 1 ST RESPONDENT 2 ND RESPONDENT
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 6 July 2023 Delivered on: 28 July 2023
Neutral citation: <i>Bank Windhoek Limited v JP Investment CC</i> (INT-HC-SUMJUD-2023/00189) [2023] NAHCMD 455 (28 July 2023)	
Results on merits: Merits not considered.	
The order: Summary judgment is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved, in the following terms: 1. Payment in the amount of N\$12 729 557.18. 2. Compound interest calculated daily and capitalised monthly on the amount of N\$12 729 557.18 at the plaintiff's prime lending rate of interest from time to time, currently 10.5% plus 1.5% per annum calculated from 24 January 2023 to date of final payment.	

3. Cost of suit on a scale of attorney and client.

The matter is finalised and removed from the roll.

Reasons for orders:

PRINSLOO J:

Introduction

[1] This is an application for summary judgment. The applicant is Bank Windhoek, who instituted action against the respondents, JP Investment CC and Fanek Mathias, on 31 January 2023, claiming the relief sought against the respondents jointly and severally.

[2] The applicant and the first respondent entered into a commercial agreement on 20 December 2020 in terms of which the applicant would lend and advance to the first respondent the amount of N\$12 600 254. The loan would be repaid over five years with 59 monthly instalments of approximately N\$128 375.33. The second respondent bound himself as surety and co-principal debtor (for an unlimited amount) with the first respondent. To secure the loan amount, the continuing mortgage bonds were taken over several immovable properties owned by the respondents.

[3] During the period 16 August 2022 up to and including 8 December 2022, the respondents fell in arrears in the amount of N\$443 484.96.

[4] As a result of the breach by the respondents, the applicant seeks the following relief:

1. Payment in the amount of N\$12 729 557.18;
2. Compounded interest calculated daily and capitalised monthly on the amount of N\$12 729 557.18, currently 10.5% plus 1.5% per annum calculated from 24 January 2023 to date of final payment;
3. An order declaring four immovable properties executable. The immovable properties include Ervens 5562, 5564, 5565 and 5447, Extension 12, Ondangwa.

Background in respect of the JCM process

[5] The respondents defended the matter on 20 February 2023 and the parties were issued a case plan on 6 March 2023, setting out the procedural steps for the intended application for summary judgment that the applicant intended to pursue. The parties had to engage one another, and the applicant had to file the rule 32(10) report on or before 20 March 2023 and the application for summary judgment on 29 March 2023.

[6] On 9 March 2023, the respondents' erstwhile legal practitioners withdrew as legal practitioners of record, and although the notice was served on the respondents on 14 March 2023, the returns of service in terms of rule 44(7) were only filed on 22 March 2023. The respondents' new legal practitioner came on record on 24 March 2023.

[7] As directed by the court order dated 6 March 2023, the applicant filed its rule 32(10) report indicating that the respondents' legal practitioner withdrew and that the rule 32(9) engagement could not proceed as scheduled as the new legal practitioners, Slogan Mathews and Associates, were not on record for the respondents as yet.

[8] The applicant filed its summary judgment application on 30 March 2023. The applicant sought condonation for the late filing of the application, which was granted on 15 June 2023.

The opposition

[9] Mr Mathias, the second respondent and the sole member of the first respondent, deposed to the answering affidavit in opposition to the application for summary judgment.

[10] In opposition to the summary judgment application, the respondents raised three points in limine, which were a) non-compliance with rule 32(9), b) the applicant filed the summary judgment application out of time without a condonation application, and c) the deponent to the founding affidavit in support of the summary judgment application has no personal knowledge of the facts or particulars of the matter.

[11] On the merits, Mr Mathias firstly takes issue with the order sought to declare the

immovable properties executable as one of those properties (Erf 5565) is his primary residence and part of

ervens 5565, 5564 and 5447 are leased to different tenants. There appears to be an offer to purchase the remaining property. Mr Mathias contends that it is improper to declare the immovable properties executable without exploring less drastic measures as an alternative to the sale in execution of the properties. In this regard, Mr Mathias avers that in the event of selling the respondents' other properties, the deal would yield a sufficient return to cover the balance of the applicant's claim.

[12] In respect of the amount claimed by the applicant, Mr Mathias concedes that the respondents entered into a loan agreement with the applicant in the amount of N\$17 836 685.25 (inclusive of interest and all charges) but disputes that the balance of the loan as at January 2023 amounted to N\$12 729 557.18. Mr Mathias' reasoning in this regard is that the respondents made payment in the amount of N\$134 870.24 per month towards the loan. The outstanding balance in respect of the loan on 8 December 2022 was N\$12 627 741.61, resulting in a difference of N\$101 815.57 between the December 2022 balance and the January 2023 balance, which is not equal to a monthly instalment.

[13] Mr Mathias disputes the outstanding balance as alleged by the applicant and accordingly disputes that the amount reflected on the certificate of indebtedness is correct.

Arguments advanced on behalf of the parties

On behalf of the applicant

[14] Mr Luvindao submitted at the onset of his argument that the respondents failed to raise a triable issue, as the loan agreement between the parties and its terms is common cause, and the first respondent's default in respect of the loan agreement is undisputed. In reply to the points in limine raised by the respondents, Mr Luvindao submitted as follows and contended that the points in limine so raised stand to be dismissed:

a) Non-compliance with rules 32(9) and (10): Mr Luvindao proceeded to set out all the attempts to engage the erstwhile legal practitioners of the respondents and the current legal practitioners to resolve the matter amicably. Initially, the respondents' current legal practitioners could not attend the rule 32(9) engagement because they were not formally on record yet. Even

though not formally on record, they engaged the applicant's legal practitioners informing them that they are representing the respondents. Mr Luvindao submitted that once on record, the current legal practitioners did nothing to either apply for an extension of time or engage the applicant's legal practitioners in any way but instead idly sat back and did nothing. Mr Luvindao, in conclusion on this issue, pointed out that the respondents were fully aware of the rule 32(9) correspondence and well knowing that they had problems with their legal practitioner(s), did not respond to the rule 32(9) engagement.

b) The deponent to the summary judgment application had no personal knowledge of the facts of the matter: In this regard, Mr Luvindao submitted that the applicant is a corporate entity, and it is not required of the deponent to have first-hand knowledge of every fact. It would thus suffice if the deponent to the founding affidavit relied on the records in the company's possession and which are under her control.

[15] On the opposition raised by the respondents based on the outstanding balance, Mr Luvindao referred the court to the agreement between the parties wherein it was agreed that a certificate of balance purported to be signed by any director, manager, assistant manager or branch administrator of the applicant stating the amount owing by the first respondent would constitute prima facie proof of such amount due or of the correctness of such particulars.

[16] Mr Luvindao pointed out that despite denying that the outstanding balance is the correct amount, the respondents do not indicate what, according to them, would be the correct outstanding amount, nor do the respondents deny that they are in arrears. Counsel submitted that the respondents' contention about the inaccuracies in calculating the outstanding balance is incomprehensible, but it is clear that the respondents lost sight of the monthly interest charged to the first respondent's loan account when they did their calculations.

[17] Lastly, on the prayer that the court should declare the immovable property executable, Mr Luvindao submitted that the respondents do not dispute the mortgage bonds annexed to the particulars of claim, and the applicant is thus entitled to apply for an order declaring the immovable properties executable. The court was referred to *Standard Bank Namibia Limited v Shipila and Others*¹ in this regard.

[18] Mr Luvindao submits that the applicant duly complied with the requirements set out in rule

¹ *Standard Bank Namibia Limited v Shipila and Others* [2018] NASC 395 (06 July 2018).

108 of the Rules of Court and considering the opposition raised by the respondents, it would appear that they want to avoid the order sought in respect of the bonded property on the basis that one of the properties (Erf 5565) is the second respondent's primary home and the rest of Erf 5565 and the other properties have tenants. Rented properties are not a defence to avoid the properties from being declared specially executable. None of these properties are the primary residence of the respondents. In any event, the second respondent contradicted himself in his founding affidavit by indicating that he resides at Erf 5564 and not Erf 5565, as stated further in the founding affidavit.

[19] As a result, counsel submitted that the respondents failed to satisfy the court that they have a bona fide defence to the action and the summary judgment should accordingly be granted with costs.

On behalf of the respondents

[20] Mr Mwakondange submitted that the court is restricted to how the applicant presented its case and the court should therefore insist on strict compliance with the rules. Mr Mwakondange contended that the applicant only paid lip service to the provisions of rule 32(9) as there was no meaningful engagement as envisaged by the rule. Counsel was of the view that more is required from the applicant than merely writing a letter in an attempt to comply with rule 32(9).

[21] It was further his submission that the founding affidavit in support of the applicant's application for summary judgment was deposed to by Ms Wallace, an official of the applicant who does not have personal knowledge of the facts, as the applicant was represented by someone else at the time of concluding the agreement between the parties and that person did not depose to either the founding affidavit or a confirmatory affidavit confirming the allegations made by Ms Wallace.

[22] Counsel submits that all Ms Wallace did was inspect the documents relating to the claim. She is not even in a position to state that the documents presented to her were all the documents relevant to the matter. As a result, the affidavit deposed to by Ms Wallace constituted inadmissible hearsay evidence and accordingly, the summary judgment application must be dismissed.

[23] Mr Mwakondange argued that the respondents have a bona fide defence to the applicant's claim. Counsel contends that the founding affidavit did not depict how the amount due was calculated. At this point, it is necessary to refer to arguments put up in the written heads of argument. In para 6.4 it is stated that: "It is humbly submitted that Plaintiff received monthly payments of N\$134 871.24 from the defendants as from February 2021 as per the bank statement annexed to Defendant's affidavit opposing summary judgment. 6.5 It is on this basis that the amount claimed as per summary judgment is disputed." The case counsel is trying to make out by this statement escapes me. It is unclear how this argument ties in with the respondents disputing the amount claimed and whether counsel attempts to make out a case that the respondents are not in default with their payment.

[24] Finally, on the issue of declaring the properties executable, Mr Mwakondange submitted that such an order would be improper because the property sought to be declared specially executable constitutes the primary residence of the second respondent and other tenants. Therefore, the applicant must first explore the alternative option offered by the respondents in respect of the possible sale of another property of the respondents. The proceeds would be sufficient to cover the balance of the applicant's claim. In addition, Counsel raised the issue that the lessees of the properties concerned should have been personally served in terms of rule 108(2) as these properties serve as their primary homes.

General principles relating to summary judgment proceedings

[25] The procedure set out to apply for summary judgment is regulated by rule 60 of the Rules of this Court, and the legal principles governing summary judgment proceedings are well-established. They are set out in *Di Savino v Nedbank Namibia Ltd*² as follows:

[23] One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under rule 32(3)(b),³ the affidavit must 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

² *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

³ The forerunner of the current Rule 60.

[24] The enquiry that the court must conduct is foreshadowed in rule 32(3)(b) and it is this: first, has the defendant 'fully' disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.⁴ If the court is satisfied with these two grounds, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

[25] While the defendant is not required to deal 'exhaustively with the facts and the evidence relied upon to substantiate them', the defendant must at least disclose the defence to be raised 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'.⁵ Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the rule.⁶ (my emphasis)

Discussion

[26] The purpose of summary judgment is to assist a plaintiff where a defendant who cannot set up a bona fide defence or raise an issue to be tried, enters appearance simply to delay judgment.⁷

[27] If the Court doubts whether the applicant's case is unanswerable, such doubt should be exercised in favour of the respondent and the summary judgment should be refused.

[28] To determine if the applicant made out the case on the merits of the application, it is necessary to deal with the various points in limine raised on behalf of the respondents.

Compliance with rule 32(9)

[29] The respondents strongly rely on the fact that rule 32(9) was not duly complied with as directed in this court's order. The steps taken by the applicant's legal practitioner to facilitate a meeting between the parties are not in dispute. The respondents also do not dispute the fact that there were engagements with their erstwhile legal practitioner as well as with the counsel of

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A – C.

⁵ *Supra* at 426C – D.

⁶ *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304A – B.

⁷ *Meek v Kruger* 1958 (3) SA 154 (T) at 159H-160A.

record. Both the respondents and their legal practitioners were aware of the dates scheduled for the rule 32(9) engagement, and at the time, the current legal practitioners indicated that they were not yet on record.

[30] To determine whether there was compliance with the rule, it is necessary to look closely at the correspondence filed of record.

[31] The compliance with rules 32(9) and (10) had to be completed by 20 March 2023. On 15 March 2023, the respondents, more specifically the second respondent, was invited to a meeting, either in person or via Teams or Zoom, for either the 15th, 16th or 17th of March 2023 and an agenda was made available to the respondents.

[32] In response, on 17 March 2023, the current legal practitioner, Mr Slogan Matheus, in an email correspondence to Mr Luvindao, acknowledged the date for the filing of the rule 32(10) report and indicated that the date for the rule 32(9) engagement is in order but that he will only assist the respondents subject to him coming on record. To accommodate the respondents' legal practitioner, the meeting was moved to 20 March 2023. On 20 March 2023, an email was again forwarded to Mr Matheus to confirm if he would attend the meeting as scheduled. Mr Matheus chose not to attend, even though holding instructions to represent the respondents. The reason advanced for not attending the meeting was because the erstwhile legal practitioners did not complete their formal withdrawal on eJustice.

[33] The current legal practitioner then came on record on 24 March 2023 and was well aware of the rule 32(10) report filed on 20 March 2023 but did not approach the court for a further opportunity to engage the opposing party in an attempt to resolve the matter amicably even though there were five days left before the summary judgment application was due to be filed. The respondents' legal practitioner then chose to sit back, wait for the summary judgment application to be filed and now attempt to wield the purported non-compliance with rule 32(9) like a sword to

strike down the summary judgment application. This is unacceptable as it is not in the spirit of the rules. Rule 19 sets out the obligations of legal practitioners in relation to the judicial case management process. A few sub-rules that spring to mind are, rule 19(b) to assist the court in curtailing proceedings; (g) to use reasonable endeavours to resolve a dispute by agreement between the persons in the dispute; and (i) to act promptly and minimise delay.

[34] I am of the view that the applicant's legal practitioner did everything he could to constructively engage the legal practitioners of the respondents to resolve the matter amicably, and the correspondence filed of record speaks to that. Therefore, I find substantial compliance with rule 32(9) by the applicant.

[35] The issue regarding the late filing of the summary judgment application was duly addressed in a separate application and requires no further discussion.

The founding affidavit

[36] The last point in limine relates to the founding affidavit deposed to by Ms Athalia Wallace, who is the Acting Head: Legal Collections of the applicant. The objection raised in respect of the founding affidavit deposed to, is that Ms Wallace did not have personal knowledge of the facts or particulars of the matter.

[37] Ms Wallace stated the following in her affidavit:

1. I am a major female person and Acting Head: Legal Collections of the Applicant/Plaintiff in this matter and the contents and the facts stated herein fall within my personal knowledge unless indicated otherwise or the contrary appears therefrom and same being true and correct.

2. I am duly authorised to depose to this affidavit and to bring this application for summary judgment.

3. All the data and records, relating to the Plaintiff's action against the Defendants are under my control in my capacity as Acting Head: Legal Collections.

4. I have knowledge of the facts hereinafter stated, either personally or because of my access to all the relevant computer data and documents pertaining to the loan to the Defendant(s).'

[38] If the deponent lacks personal knowledge of the material facts, the integrity and veracity of the "evidence" placed before the court may be compromised. However, a manager in the collections department of a credit provider deposes to affidavits in summary judgment applications

as a matter of course. In such cases, the deponent exercises overall control of the relevant accounts and all the necessary information can be found in the relevant files. No reliance is placed by the deponent on unspecified "extensive" consultation with another person to gain personal knowledge.

[39] Rakow J in *Bank Windhoek Limited v Kock Investments*⁸ discussed who can depose to a

verifying affidavit as follows:

[16] When dealing with who can depose to the verifying affidavit on behalf of a plaintiff bringing a summary judgement application, the learned authors Van Niekerk, Geyer and Mundell in *Summary Judgment – A practical guide*⁹ said the following when summarizing the requirement of personal knowledge in the case of banks:

“A legal manager at regional level who confirms that he is duly authorized to depose to the verifying affidavit and also confirms that the facts fall within his personal knowledge is a competent deponent as he has, by virtue of his office, access to the bank’s records and qua legal manager prima facie has knowledge pertaining to the conclusion of the contract, its terms and effect.”

[40] The deponent clearly stated in what capacity she deposed to the affidavit and swore positively to the facts, verifying the cause of action. I am satisfied with the contents of the verifying affidavit and the capacity in which Ms Wallace deposed to it.

The merits

[41] Having considered the merits of the points in limine, I am convinced that the respondents raised them as a red herring to detract from the fact that they did not disclose any defence to the claim of the applicant. The respondents are silent about the default, what gave rise to it, and what their defence could be under the circumstances. The only issue raised is the calculation of the outstanding amount as set out in the balance certificate. However, the respondents make no averments as to what the outstanding amount should be. I fully agree with Mr Luvindao that Mr Mathias does not make much sense in his founding affidavit. The second respondent wants to imply that although payment was made, presumably in December 2022, a full instalment needs to be reflected in the balance in January 2023. If that is the case, then Mr Mathias lost sight of the interest the loan account attracts.

[42] The respondents made the averment that they dispute the certificate of balance but take no issue with the fact that the certificate of balance will be prima facie evidence of their indebtedness.

⁸ *Bank Windhoek Limited v Kock Investments* (HC-MD-CIV-ACT-CON-2020/03329) [2020] NAHCMD 574 (7 December 2020).

⁹ Van Niekerk, Geyer and Mundell *Summary Judgment A Practical Guide*, LexisNexis, Durban (1998), Service Issue 12 at 5-4.

[43] Clause 17 of the agreement, which is self-explanatory, reads as follows:

‘A certificate purporting to be signed by any manager, assistant manager or branch administrator of the Bank, whose appointment need not be proved, stating an amount owing by the Borrower to the Bank, or any other particular in connection with the Agreement, shall, for the purposes of summary judgment, provisional sentence or any other matter in connection with this transaction, be prima facie proof (sufficient evidence unless proved otherwise) that such amount is so owing or of the correctness of such particular thereof.’

[44] In *Small and Medium Enterprises Bank Limited v Hamukwaya*,¹⁰ it was held that a plaintiff does not have to deconstruct how a claim amount was constituted in the pleadings. Only when a claim is sufficiently placed in dispute will the plaintiff be required to deconstruct and prove the manner in which the claim amount has been constituted.¹¹

[45] Having considered the objections raised by the respondents, I believe that they dismally failed to sufficiently place the claim amount in dispute.

[46] As none of the points in limine or the issues in respect of the merits hold any water, the summary judgment must be granted.

[47] The last issue to consider is whether or not to order that the immovable property be declared executable.

[48] It is unclear to this court what the exact nature of the properties in question are. According to the respondents’ papers, it would appear that there are tenants in some of the buildings who are not commercial tenants because reference is made to the primary homes of the tenants. There

are several returns of service filed and there are references to specific units in the returns of service. It is unclear how many units there are and whether those units occupied by the tenants were all served with the rule 108 application or summary judgment application and if there was compliance with rule 108(2)(b) of the Rules of Court. For the above mentioned reasons, I am not

¹⁰ *Small and Medium Enterprises Bank Limited v Hamukwaya* (HC-MD-CIV-ACT-CON-2020/03922) [2021] NAHCMD 321 (05 May 2021) at para [60].

¹¹ *FI Advisers (Edms) Bp ken `n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999(1) SA 515 (SCA).

prepared to grant the relief sought in respect of the immovable property at this stage of the proceedings.

Order

[49] As a result, I make the order as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
T Luvindao Of Dr Weder, Kauta & Hoveka, Windhoek	E Mwakondange Of Slogan Matheus & Associates Inc, Windhoek