

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON SUMMARY JUDGMENT

PRACTICE DIRECTION 61

<b>Case Title:</b> First National Bank of Namibia Ltd  and  Gunther Farming Enterprises (Pty) Ltd Erastus Hafeni Haitengela Roburst Investments Corporation (Pty) Ltd	Plaintiff   1 <sup>st</sup> Defendant 2 <sup>nd</sup> Defendant 3 <sup>rd</sup> Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/03235  <b>Division of Court:</b> High Court, Main Division
<b>Coram:</b> Honourable Justice Coleman	<b>Heard:</b> 21 July 2023  <b>Reasons:</b> 10 August 2023	
<b>Neutral citation:</b>	<i>First National Bank of Namibia Ltd v Gunther Farming Enterprises (Pty) Ltd and others</i> (HC-MD-CIV-ACT-CON-2022/03235) [2023] NAHCMD 494 (10 August 2023)	
<b>Order:</b>	<ol style="list-style-type: none"><li>1. The first, second and third defendants are ordered to pay the plaintiff N\$10 083 643,95, jointly and severally, the one paying the other to be absolved.</li><li>2. Interest is payable on the above amount at plaintiff's applicable rate from time to time,</li></ol>	

currently 11,75 per cent (prime rate of 10,75 per cent plus 1,00 per cent) per year as from 16 January 2022 until date of payment, calculated on the daily balance and compounded monthly in arrears.

3. The following immovable properties are declared specially executable, to wit:

CERTAIN: Remaining Extent of the farm BUBUS No. 213  
 REGISTRATION DIVISION: "B", Otjozondjupa Region  
 MEASURING: 3061,8848 Hectares  
 HELD BY: Deed of Transfer No. T95/2005  
 SUBJECT TO THE CONDITIONS CONTAINED THEREIN.

CERTAIN: Farm OMBUJOMBAERE NORD No. 6  
 REGISTRATION DIVISION: "H", Erongo Region  
 MEASURING: 5031,1137 Hectares  
 HELD BY: Deed of Transfer No. T4423/1995  
 SUBJECT TO THE CONDITIONS CONTAINED THEREIN.

4. The defendants are ordered to pay the plaintiff's costs of suit on the attorney and client scale, such costs to include one instructing and one instructed counsel.
5. The matter is removed from the roll and regarded as finalised.

**Reasons:**

COLEMAN J:

Introduction

[1] This is an application for summary judgment for payment of N\$10 083 643,95, plus interest and declaring two farms executable, together with costs on an attorney and client scale. I will refer to the parties as the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> defendants.

Pertinent facts

[2] The plaintiff's claim is based on a loan agreement with the 1<sup>st</sup> defendant. It is the plaintiff's case that the parties initially entered into a loan agreement on or about 24 September 2015 and allegedly agreed to restructure it because the 1<sup>st</sup> defendant had fallen into arrears on the loan. A new loan agreement was entered into on or about 29 April 2021. The alleged purpose of the new loan was to pay N\$9 500 000 on the outstanding debt in respect of the 2015 loan. The plaintiff alleges the defendants are in breach of the 2021 loan agreement in that they failed to make payments as agreed. A certificate of indebtedness reflecting the amount of N\$10 083 643,95 is annexed to the particulars of claim.

[3] The 2<sup>nd</sup> and 3<sup>rd</sup> defendants signed as sureties for the 1<sup>st</sup> defendant's liability to the plaintiff. Two properties were mortgaged in favour of the plaintiff as security for the 1<sup>st</sup> defendant's liability. One property, Farm Ombujombaere Nord no. 6, is owned by the 1<sup>st</sup> defendant and the other, Remaining Extent of the farm Bubus no. 213, is owned by the 2<sup>nd</sup> defendant. Neither the suretyships, nor the mortgages are disputed. Notice in terms of rule 108(2)(a) of the Rules of Court is given in the particulars of claim.

[4] The defendants, by virtue of an affidavit deposed to by the 2<sup>nd</sup> defendant, resist the application for summary judgment. Significantly, the opposing affidavit does not deal with the merits of the application in terms of rule 108. For example, there is no evidence before me whether or not the properties are primary homes and if less drastic measures other than the sale in execution of these properties exist.

[5] In their defence, the defendants firstly contend that the plaintiff should not be permitted to take a second bite at the cherry by, after the defendants disclosed their defences under rule 32(9), when the first summary judgment was contemplated, amending its particulars of claim and then pursuing a second summary judgment application. Secondly, the defendants contest liability for the loan amount and challenge the 'restructuring' based, amongst others, on the two loan agreements that have dissimilar terms. Finally, the defendants challenge the constitutionality of rule 108. This challenge turned into a general challenge of all the rules of

court during argument.

### Conclusion

[6] I considered all the facts and submissions on behalf of the parties and will address only those that I consider relevant for the purposes of my conclusions herein.

[7] As far as the submissions in respect of the second summary judgment is concerned (the 'second bite at the cherry'), rule 60 of the Rules of Court, which provides for summary judgment, does not prescribe a time period within which summary judgment should be applied for. Rule 60(4) grants the managing judge jurisdiction to give directions regarding the adjudication of an application for summary judgment. I could not find anything in the rules that places a limitation on the process the plaintiff adopted. At best for the defendants, the irregular proceedings provision in terms of rule 61 may have availed them. However, I do not understand the defendants to contend that they have been prejudiced in this process. In my view, this is not a good point.

[8] In the opposing affidavit on behalf of the defendants, the deponent contends that the 2021 loan agreement has different terms than the 2015 loan agreement and the defendants deny having received the 'new' loan. It is also denied that a restructuring occurred here. During argument, Mr Amoomo, who appeared for the defendants, also argued that there is a difference between a restructuring agreement and a loan agreement. He was critical of paragraph 18 of the particulars of claim which alleges that the plaintiff and the 1<sup>st</sup> defendant orally agreed on a restructuring without setting out the terms.

[9] In my view, there is no substance in Mr Amoomo's submissions. The plaintiff's case is simple; the 1<sup>st</sup> defendant got a loan from the plaintiff in 2015. It ran into arrears and it was agreed that the loan should be restructured. In order to effect the restructuring, a new loan agreement was entered into in 2021. The money advanced in terms of this new loan agreement was used to pay the 2015 loan which was in arrears. The terms of the 'restructuring' are neither here nor there. It does not constitute the plaintiff's cause of action. The allegations in paragraph

18 of the particulars of claim relating to restructuring are simply part of the narrative. The 2021 loan agreement is being enforced here. I am satisfied that the plaintiff made out a case for summary judgment in respect of the loan and the defendants did not disclose a *bona fide* defence.

[10] I am not going to entertain the defendants' constitutional points since this matter can, in my view, be decided on the merits and the constitutional issue would not afford the defendants a defence. In addition, the Constitution is not a blunt instrument. It should be utilised as a scalpel.

[11] The defendants chose not to put facts before the court to determine the requirements of rule 108. In my view, it amounts to a waiver of the protection afforded by the rule. According to the opposing affidavit, the deponent (the 2<sup>nd</sup> defendant) resides in Brakwater, not on any of the farms. There is no evidence before me that either of the farms is a primary home. As mentioned above there is also no indication of less drastic measures than sale in execution of the farms. There are therefore no less drastic measures before me for the rule 108 application.

[12] Accordingly, I make the following order:

1. The first, second and third defendants are ordered to pay the plaintiff N\$10 083 643,95, jointly and severally, the one paying the other to be absolved.
2. Interest is payable on the above amount at plaintiff's applicable rate from time to time, currently 11,75 per cent (prime rate of 10,75 per cent plus 1,00 per cent) per year as from 16 January 2022 until date of payment, calculated on the daily balance and compounded monthly in arrears.
3. The following immovable properties are declared specially executable, to wit:

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4. The defendants are ordered to pay the plaintiff's costs of suit on the attorney and client scale, such costs to include one instructing and one instructed counsel.
5. The matter is removed from the roll and regarded as finalised.

<b>Judge's Signature</b>	<b>Note to the parties:</b>
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendants</b>
PCI Barnard Instructed by Du Pisani Legal Practitioners, Windhoek	K Amomo Of Kadhila Amomo Legal Practitioners, Windhoek