

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
RULING  
(PRACTICE DIRECTION 61)



MAIN DIVISION, WINDHOEK

<b>Case Title:</b> CRESTA PANDU (PTY) LTD T/A CITY CENTRE BUILDING  and  ANNE AND JUSTIN INVESTMENTS CC T/A A & J CAFÉ  ANNA MAGANO NDAGWEDHA IPANGELWA  JUSTINA VALINDI	<b>Case No:</b> HC-MD-CIV-ACT-CON-2022/05431
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>PLAINTIFF</b>	
<b>FIRST DEFENDANT</b>	
<b>SECOND DEFENDANT</b>	
<b>THIRD DEFENDANT</b>	
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER, ACTING	<b>Date of hearing:</b> 27 JULY 2023
	<b>Delivered on:</b> 16 AUGUST 2023

**Neutral citation:** *Cresta Pandu (Pty) Ltd t/a City Centre Building v Anne and Justin Investments CC t/a A & J Cafe* (HC-MD-CIV-ACT-CON-2022/05431) [2023] NAHCMD 504 (16 August 2023)

**IT IS ORDERED THAT:**

- Judgment for the plaintiff as against the first, second and third respondents (defendants), jointly and severally, the one paying, the other to be absolved for:
  - Payment in the amount of N\$286 017.53, plus interest on the said amount at the rate per annum of prime plus 5 per cent as charged by First National Bank from 14 December 2022 to the date of full and final payment.
  - Costs of suit on the attorney (legal practitioner) and own client scale.
- The matter is finalised and removed from the roll.

**REASONS:**

[1] In this application for summary judgment, Dr Diedericks represents the plaintiff (the applicant), and Ms Chinsembu represents the first, second and third defendants (the respondents). In the particulars of claim, the plaintiff alleges that the first defendant (the first respondent in the instant application), a close corporation, breached a material term of the lease agreement entered between the applicant and the first respondent on 11 June 2019. It is crucial to note at this juncture that the lease was to run for five years, that is, from 1 December 2019 to 30 November 2024. Several addendums were added to the lease agreement.

[2] The factual allegation relied on by the applicant for the breach is this: 'The first defendant failed and/or neglected to pay the full monthly rental and operating amounts, monthly services charges (electricity and water), penalty charges, and interest during the period 1 December 2019 to December 2022 in the amount of N\$286 017.53'.

[3] The factual allegation relied on in respect of the second and third respondents is that each one of them stood as an individual surety of the first respondent. Thus, the applicant claims on a deed of suretyship against the first and second respondents.

[4] In the instant application, what have the respondents, who are sued jointly and severally and represented by one counsel, placed before the court to resist summary judgment? It is the following.

[5] Before considering what the respondents have placed before the court, it is of great importance to note this. What the respondents have placed before the court does not in substance include an uncoloured denial of first defendant's indebtedness to the applicant. A complaint that the amount claimed is 'exorbitant' is not a categorical, uncoloured denial of indebtedness. As Dr Diedericks put it, the respondents do not say, we are not indebted to you: We have paid the rentals.

[6] Dr Diedericks submission has force, and it is valid. I proceed to consider what the respondents have placed before the court to resist summary judgment which are substantially and primarily points of law.

[7] The first point of law is that the debt has prescribed in terms of s 11 of the Prescription Act 68 of 1969. Ms Chinsembu's argument flows in this way: Part of the applicant's claim became due on 1 December 2022. The applicant only instituted the action against the respondents on 14 December 2022. Therefore, any monthly rental and incidental charges and interest thereon on any date before 14 December 2022 has prescribed.

[8] Ms Chinsembu's argument, though superficially attracted, has no merit. First, the rental and incidental amounts for December 2019 were paid on 20 December 2019. This makes the sweeping statement by Ms Chinsembu of nonsignificance. Second, and more important, prescription does not begin to run when the *mora* was continuing.<sup>1</sup> As in December 2022, the breach was continuing as respects the unpaid rentals and the incidental charges. Prescription would have to begin to run after December 2022; and the applicants instituted the action in December 2022. The result is that the plea of prescription is not well taken. It is rejected. I pass to consider the next point which concerns revenue stamps.

[9] The respondents take the point that the addendums are invalid on the sole ground that revenue stamps were not affixed to or stamped on them as required by the Stamp Duties Act 15 of 1993. Dr Diedericks answered that the fact that the revenue stamps were not stamped on the addendums when they were settled does not on that fact alone make the addendums invalid. In 1918 the Supreme Court rejected the argument that when a document was not stamped with a revenue stamp it would lead to a nullity of the document<sup>2</sup>, as Ms Chinsembu argued. The Supreme Court rejected such argument in *Denker v Ameib Rhino Sanctuary (Pty) Ltd*. I proceed to consider the last point which relates to the suretyship of the second and third respondents.

[10] There is a deed of surety filed of record. The introductory part of the deed contains the name and particulars of the third respondent, and it is signed by the second respondent. The lease provides for suretyship; and it provides that a surety will bind himself or herself irrevocably and *in rem suam* as surety for a co-principal debtor in respect of the lease. It is a term of the lease agreement that the deed of suretyship forms part of the agreement.

[11] The second respondent concedes that she signed the deed of suretyship. The third respondent does not deny that she is a surety; except that she avers that she did not sign it, even though her particulars appear at the beginning of the deed. In the lease agreement it is

<sup>1</sup> *Katjivena and Others v Prime Minister of the Republic of Namibia* 2016 (3) NR 903 (HC).

<sup>2</sup> *Denker v Ameib Rhino Sanctuary (Pty) Ltd and Others* 2017 (4) NR 1173 (SC).

indicated that the second and third respondents are the sureties. Clause 26.1 (titled 'suretyship') of the lease agreement and clause E.1 of the deed of suretyship make it clear that each co-surety intends to contract separately and 'hereby bind myself' and not jointly. That being the case, the deed is valid in respect of each signatory, irrespective of whether the other co-sureties have signed.<sup>3</sup> Thus, in the instant matter, the signature of the second respondent binds the third respondent. The result is that the point taken by the second and third respondents has no merit and it is rejected.

[12] I have found that the first respondent does not deny its indebtedness to the applicant. And I have rejected all the legal points taken by the second and third respondents as having no merit.

[13] Based on these reasons, I come to the resolute and ineluctable conclusion that the respondents have not placed any factual material before the court to establish that they have a bona fide defence which is good in law; neither have they raised a triable issue and, thus, 'sufficiently placing in doubt that the applicant's claim is unanswerable'.<sup>4</sup>

[14] From the bad points of law raised by the respondents, it appears to me that the delivery of notice was done solely as a mere delaying tactic, amounting to an abuse of the process of the court.<sup>5</sup>

[15] In the result, I conclude that the applicant has made out a case for summary judgment.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendants</b>
J DIEDERICKS	W CHINSEMBU

<sup>3</sup> RH Christie *The Law of Contract in South Africa* 3 ed (1996) at 139.

<sup>4</sup> *Redial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* [2019] NASC (10 April 2019) para 37.

<sup>5</sup> *First National Bank of Namibia v Yeung Tai Foodstuff & Trading CC* [2022] NAHCMD 143 (28 March 2022) para 19.

instructed by Isaacks & Associates Inc. Windhoek	Of Henry Shimutwikeneni & Co Inc. Windhoek
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