

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/01564

In the matter between:

STANDARD BANK NAMIBIA LIMITED

PLAINTIFF

and

JOSHUA JOROKEE KATSILWA

FIRST DEFENDANT

MIRIAM NDIWENI KATSILWA

SECOND DEFENDANT

Neutral citation: *Standard Bank Namibia Limited v Katsilwa* (HC-MD-CIV-ACT-CON-2021/01564) [2023] NAHCMD 59 (16 February 2023)

Coram: COLEMAN J

Heard: 8 - 9 November 2022, 1 and 5 December 2022

Delivered: 16 February 2023

Flynote: Contract – Written loan agreement – Claim for payment against property in respect of a loan secured by a mortgage – Defence of signing an agreement without sufficient knowledge or understanding – Second defendant knew what she was signing – Joint estate of first and second defendant therefore liable

Summary: This is a claim for payment against second defendant in respect of a loan secured by a mortgage. Plaintiff obtained default judgment against first

defendant since he did not defend the matter. Second defendant is married in community of property to first defendant. Plaintiff's case is that it entered into a written loan agreement with both first and second defendant. In addition, a mortgage bond was registered in favour of the plaintiff over the immovable property. The deed of transfer in respect of this property also reflects the defendants as owners. Plaintiff's case is that the defendants are in breach of the loan agreement and as a result the entire balance outstanding has become due and payable. Second defendant raises an issue that first defendant deliberately defaulted on the loan agreement because he wants the house to be sold. Furthermore, while having signed the loan agreement, she did not read it and did not have sufficient knowledge, or an understanding, thereof.

Held that the second defendant participated in the purchase of the house and ultimately occupies it. She accompanied the first defendant to sign the loan agreement in order to finance the purchase of the house and therefore knew what she was signing. The joint estate of the first and second defendant is therefore liable and judgment should be entered in respect of the second defendant.

ORDER

1. Judgment is granted against second defendant in favour of plaintiff for payment of N\$ 610 738,44.
2. Interest is payable on the said amount at the rate of 9% per year calculated from 29 March 2021 to date of payment.
3. The first and second defendants are ordered to pay plaintiff's costs on an attorney and client scale.
4. The matter is removed from the roll as finalized.

JUDGMENT

COLEMAN J:

Introduction

[1] This is a claim for payment of N\$610 738,10 in respect of a loan secured by a mortgage against second defendant. Plaintiff obtained default judgment against first defendant on 24 August 2021 since he did not defend the matter. Second defendant is married in community of property to first defendant

Plaintiff's case

[2] Plaintiff's case is that on 6 August 2013 it entered into a written loan agreement with both defendants. It annexes a copy of the loan agreement signed by both defendants to its particulars of claim. In addition, a mortgage bond was registered in favour of plaintiff over the immovable property, erf 1992, Narraville, Walvis Bay. The deed of transfer in respect of this property (no. T 5393/2013) reflects the defendants as owners.

[3] Plaintiff's case is further that defendants are in breach of the loan agreement and as a result the entire balance outstanding has become due and payable. First defendant did not enter an appearance to defend the matter, but second defendant defends it. Plaintiff alleges that her plea lacks the necessary averments for a defence to its claim.

Second defendant's case

[4] Second defendant does not deny plaintiff's allegation that the defendants entered into the loan agreement with plaintiff in her plea. She raises an issue that first defendant deliberately defaulted on the loan agreement because he wants the house to be sold.

[5] Second defendant testified that due to marital problems first defendant moved out of the common home. He then connived with someone at the bank to stop paying

the loan and have the house sold. She also testified that she accepts that first defendant entered into the loan agreement with plaintiff. She testified that, while having signed the loan agreement, she did not read it and did not have sufficient knowledge, or an understanding, thereof. She confirmed that she went with first defendant to the bank to sign documents, including the loan agreement. She also admits to her signature on the deed of sale in respect of the common home.

[6] First defendant was subpoenaed to come and testify. He denied that he connived with anyone at the bank and testified that he became unable to pay the instalments on the loan agreement due to his other expenses, including maintenance payments to the second defendant.

Conclusion

[7] I had regard to the pleadings, the evidence and the submissions on behalf of the parties. From the facts it is clear that the defendants obtained a home loan from the plaintiff to purchase the house that the second defendant is currently occupying with her children. Second defendant took part in the purchase of the house and accompanied first defendant to the bank to sign the necessary documents to secure the home loan. She acknowledges that first defendant entered into the agreement in respect of the home loan, and that she signed it, but contends that she is not bound by it since she did not know what she was signing. I also understand her to say that judgment should not be granted against her because first defendant connived with the bank. The first defendant however denies that he connived with the bank.

[8] In my view the crux of this matter is whether the joint estate of the defendants is bound here. There is no dispute that the first defendant is bound. Therefore, the real question is whether he entered into the loan agreement with the consent of second defendant. As a point of departure, s 6 of the Married Persons Equality Act 1 of 1996 (the Act), provides that, subject to some exceptions, a spouse may perform any juristic act with regard to the joint estate without the consent of the other spouse.

[9] The exceptions are encapsulated in s 7 of the Act. One of the exceptions for which consent is required is entering into a credit agreement as credit receiver. I will therefore, accept that second defendant's consent was necessary to enter into the

loan agreement. This consent may be given orally or in writing. Section 8(1)(a) of the Act provides that if a transaction is entered into without the consent of one spouse it is deemed to have been entered into with the consent of the other spouse if the third party did not know the transaction had been entered into without the other spouse's consent. In this matter the second defendant attended to the bank's premises and signed the loan agreement along with first defendant. Therefore, one will be hard pressed to conclude that the bank was not left with the impression that second defendant consented to the loan agreement.

[10] Second defendant did not explicitly address her consent to the loan agreement as a defence herein. Her case is that she signed the loan agreement while not understanding what she was signing. I do not accept her contentions. In my view she pretends not to understand a number of things while she is clearly an intelligent woman. She participated in the purchase of the house and ultimately occupies it. She went with first defendant to sign the loan agreement in order to finance the purchase of the house. I do not for one moment believe that she did not discuss it with first defendant and knew exactly what she was signing. Therefore, the joint estate of defendant is liable and judgment should be entered in respect of second defendant.

[11] Second defendant also contests the mortgage. Plaintiff is not relying on the mortgage in this matter. It does not ask for declaring the common home executable. Therefore, there is no need for me to address it.

[12] I make the following order:

1. Judgment is granted against second defendant in favour of plaintiff for payment of N\$ 610 738,44.
2. Interest is payable on the said amount at the rate of 9% per year calculated from 29 March 2021 to date of payment.
3. First and second defendants are ordered to pay plaintiff's costs on an attorney and client scale.
4. The matter is removed from the roll as finalized.

G Coleman
Judge

APPEARANCES

PLAINTIFF: O'B Davids
Of Engling, Stritter & Partners, Windhoek

SECOND DEFENDANT: K Amoomo
Of Kadhila Amoomo Legal Practitioners,
Windhoek