

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON SUMMARY JUDGMENT APPLICATION**

Case no: HC-MD-CIV-ACT-CON-2022/04989

In the matter between:

NEDBANK NAMIBIA LIMITED

PLAINTIFF/APPLICANT

and

CYRIL JAMES RICHARD VAN ROOI FIRST DEFENDANT/RESPONDENT

BEULAH VANESSA VAN ROOI SECOND DEFENDANT/RESPONDENT

Neutral Citation: *Nedbank Namibia Limited v Van Rooi* (HC-MD-CIV-ACT-CON-2022/04989) NAHCMD 615 (5 October 2023)

Coram: MASUKU J

Heard: **Decided on the papers**

Delivered: **5 October 2023**

Flynote: Civil Practice - Summary Judgment – Point of law *in limine* – defective affidavit in support of summary judgment – Legislation - The Justice of the Peace and Commissioners of Oaths Act, (No. 16 of 1963), ('the Act') – Effect of failure to include date of deposition by Commissioner of Oaths.

Summary: The applicant, on 18 June 2012, lent and advanced an amount of N\$1 740 000, in respect of a housing loan to the respondents. A second agreement, referred to as a re-advance, was entered into *inter partes*, namely, on 17 October 2017, for a loan of N\$113 716.

It is alleged by the applicant that the respondents have fallen into arrears in the repayment of the two loans. As a result of not keeping their end of the bargain, the applicant issued a combined summons for payment of the amount of N\$ 1 624 647,19.

The respondents entered an appearance to defend the matter. The applicant with the belief that the respondents do not have a *bona fide* defence, applied for summary judgment. The court is to determine whether this case constitute a proper case in which it should grant an application for summary judgment.

Held: The provisions of the Regulations made in terms of s 10 of the Act are merely directory and not peremptory. As such, the court retains a discretion, regard had to whether substantial compliance is proved, to overlook non-compliance.

Held that: Commissioners of oaths must perform their functions with a full presence of mind and not be perfunctory in their approach, resting on the forlorn hope that the court will invariably apply the lower standard of substantial performance in reviewing their work.

Held further: A summary judgment application, it being a drastic order, the applicant should ensure that the papers are technically correct. Where there is an omission in the affidavit on which the summary judgment application is predicated, the court may refuse to exercise its discretion in favour of the applicant for summary judgment.

Held: The applicant had an opportunity to remedy the defect raised in the opposing affidavit by withdrawing the application and filing a new and properly attested affidavit, but it did not do so.

The application for summary judgment was refused with costs.

ORDER

1. The application for summary judgment is refused.
2. The applicant is ordered to pay the costs of this application, subject to the provisions of rule 32(11).
3. The parties are ordered to file a revised joint case plan, together with a proposed case planning draft order on or before **13 October 2023**.
4. The matter is postponed to **19 October 2023** at **08h30** for a case planning conference.

RULING

MASUKU J:

Introduction

[1] The parties, being Nedbank Namibia Limited, of the one part, and Mr Cyril James Richard van Rooi and his wife Mrs Beulah Vanessah van Rooi, of the other part, are at serious loggerheads. At issue in this judgment is an application for summary judgment lodged by the former against the latter, which is seriously resisted by the latter.

[2] Accordingly, the remit of this court in this ruling is to answer one major question *viz*, does this case constitute a proper case in which this court should grant an application for summary judgment. In this regard, the

applicant has argued and quite forcefully too, that regard had to the high level of indebtedness and the breach of agreement by the van Roois, this court is eminently placed to grant the relief sought.

[3] Dishing a response in kind, the respondents have submitted that this is not a proper case in which this court should be enamoured to the applicant's application. It is, in this connection claimed that the application for summary judgment is defective and furthermore, that in any event, the circumstances of this case do not admit of this being a proper case in which the court should grant judgment in the applicant's favour, together with the appended order that the property, which is subject to a bond, should be declared specially executable.

Background

[4] The facts giving rise to the present claim do no admit of much controversy. They are largely common cause and may be summarised in the following fashion: The applicant, on 18 June 2012, lent and advanced an amount of N\$1 740 000, in respect of a housing loan to the respondents. A second agreement, referred to as a re-advance, was entered into *inter partes*, namely, on 17 October 2017, for a loan of N\$113 716.

[5] It is alleged by the applicant that the respondents have fallen into arrears in the repayment of the two loans above. At the issuance of the summons, the respondents' arrears stood at the amount of N\$ 200 000. As a result of the failure by the respondents, to comply with their contractual obligations in terms of the contractual agreements, the applicant issued a combined summons for payment of the amount of N\$ 1 624 647,19, together with interest and costs, which is said to be due, payable and owing by the respondents to the applicant.

[6] Upon being served with the combined summons, the respondents filed a notice of intention to defend, upon which the applicant indicated that it wished to move an application for summary judgment. As the respondents are

entitled to, they opposed the application for summary judgment. In their opposing affidavit, the respondents raise three cardinal issues.

[7] First, they contend that the application ought to be dismissed because the affidavit filed in support of the application for summary judgment does not comply with the provisions of the relevant regulations of the Justices of the Peace and Commissioner of Oaths Act, ('the Regulations').¹ Second, the respondents' claim that the applicant failed to comply with the provisions of rule 32(9) and (10) and that the application should, if that point be upheld, be struck from the roll.

[8] Last, but by no means least, the respondent punch holes in the entire lending procedure followed by the applicant. Chiefly, they claim that the applicant failed to comply with the provisions of BID-33 Regulations, which were issued by the Bank of Namibia. These required the banks to publish criteria and/or requirements that their clients should meet for a loan moratorium and distressed restructuring on their websites. It is the respondents' case that they may have qualified for the relief introduced by the Regulations if this had been known to them, especially because of the intervention of the notorious COVID 19 Pandemic, which the respondents contend contributed to their indebtedness.

[9] Obviously, the applicant does not, by the very nature of the procedure followed in summary judgment, need to engage the latter contention. This is because applicants for summary judgment, unlike in some jurisdictions within the region,² are not allowed to file replying affidavits, which can be seen as destroying the very notion and essence of the remedy of summary judgment.

[10] Having regard to the issues raised by the protagonists in this matter, I am of the considered view that it is necessary and probably prudent that I deal first with the contention that the applicant's affidavit in support of the

¹ Regulations made under section 10 of the Justices of the Peace and Commissioners of Oaths Act No 16 of 1963.

² Rule 32 of the Rules of High Court of Swaziland, following the English practice, allows an applicant for summary judgment, to file a replying affidavit.

application for summary judgment is defective. The value in doing so, is that if the contention is upheld, that may possibly (but not necessarily), spell the end of the application for summary judgment. I deal with that question first.

Alleged non-compliance with Regulation 4(1) of the Regulations

[11] Mr Thambapilai, for the respondents, argued that the applicant should be non-suited in respect of the application for summary judgment for the reason of non-compliance with the provisions of Regulation 4(1). It was contended in that connection, that the applicant's affidavit in support of the application for summary judgment, does not comply with the Regulations for the reason that the commissioner of oaths in the instant matter, failed to indicate the date on which the oath was administered to the deponent of the applicant's affidavit in support of the application.

[12] Ms Kuzeeko, for the applicant, argued that the Regulation in question does not compel the court to throw out an affidavit that does not comply with the provisions of the said Regulation. The court, she argued, rather may exercise a discretion and refuse to throw out the affidavit, if there has been substantial compliance with the said regulation. That is the course that the applicant implored the court to adopt in this matter, namely, that the court may and is empowered, to condone the non-compliance.

[13] It is opportune, at this juncture, to have regard to the relevant provisions cited as a basis for the non-compliance by the applicant. Regulation 4(1), reads as follows:

'Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.'

[14] Ms Kuzeeko argued that in the instant case, there was substantial compliance with the above regulation for the reason that it is clear from the

affidavit that first, the commissioner of oaths administered the oath to the deponent; second, before administering the oath, the commissioner asked the deponent whether she knows and understands the contents of the declaration; whether she has any objection to taking the prescribed oath and whether she considers the oath binding on her conscience.

[15] It was further submitted in this regard, that the deponent acknowledged that she knows and understands the contents of the declaration and that she had no objection to taking the prescribed oath and that she considered the oath to be binding on her conscience. Furthermore, the declaration was made in the presence of the commissioner of oaths and the latter signed the declaration and stated her designation and the area in respect of which she holds the appointment as commissioner of oaths.

[16] The court was further referred to the judgment in *Tsamkxao Oma v Minister of Land Reform*³ by Ms Kuzeeko, in a case where she appeared. She pointed out that the court, in that matter, held that failure to comply with the provisions of the Act is not fatal for the reason that the provisions thereof are merely directory and not peremptory. As such, non-compliance can be cured by the defaulting party tendering a reasonable explanation. It was her submission that by the very nature of the summary judgment procedure, it was not possible for the applicant to tender that explanation in the instant case.

[17] If I were to agree with Ms Kuzeeko that her contentions are correct, namely, in reference to the *Oma* judgment, it is clear that there is no explanation in this matter as to how the non-compliance came about. In the absence of that explanation, there can, in my considered view, be no legal basis for the court to exercise its discretion in the applicant's favour in this matter. This places Ms Kuzeeko's argument on a serious precipice.

³ *Tsamkxao Oma v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2018/00093) [2020] NAHCMD 162 (7 May 2020).

[18] Furthermore, when one has regard to the relevant regulation, it appears to have two 'shalls', so to speak. The first applies in relation to a certification that the deponent acknowledged that he or she knows and understands the contents of the affidavit and knows and understand the contents of the declaration. The further 'shall', which is peremptory, it must be added, relates to the commissioner stating the manner, place and date of taking the declaration. Should an omission to state the date of signature of the affidavit or the place, be seen as innocuous and treated as such? (Emphasis added).

[19] I am of the considered view that the inclusion of the place and date where the declaration was made are serious matters. I say so because for instance, the place where the oath is administered may be indicative of whether or not the commissioner of oaths has jurisdiction to administer the oath. If not, I do not think the court can be correct to overlook that fact. Ms Kuzeeko's argument that the date when the affidavit was filed can be seen on eJustice, in my considered view, is trifling. It does not always mean that the date of signing the affidavit is close to the filing thereof.

[20] People may depose to an affidavit in one year and file it another year. It may well be that the affidavit may even have been signed before the claim was launched, or even worse, before the payments claimed are due. It would be important in that regard to ascertain the date of deposition. It is thus an important requirement and should not be regarded as idle and therefor inconsequential as to whether a commissioner includes it or not.

[21] I am of the considered view that the issue of the date of the deposition is important and that is why there is an additional 'shall' attaching to it together with the other requirements in the latter part of the regulation. If this requirement would always be regarded as idle, there may be situations where people swear on affidavit to issues which had not even occurred and the court would be compelled to accept those. The date of the declaration is therefor important in my considered view.

[22] There is an added reason why in this particular case, being an application for summary judgment, which in terms of the case law, a stringent remedy, must be followed to the letter. This is because summary judgment, if granted, is issued in circumstances where the defendant is not afforded the full effects of a trial, considering the summary nature of the procedure followed in this type of proceeding. In the case of *Nored Electricity (Pty) Ltd v Ouster*,⁴ it was stated that in cases of summary judgment, the papers must be in apple pie order, so to speak. That is not the case in the instant matter.

[23] Ms Kuzeeko further helpfully referred the court to *Ladybrand Hotels v Stellenbosch Farmers*⁵ where it was reasoned that where it was not apparent that an affidavit had been signed in the presence of the commissioner of oaths, the maxim *omnia praesumuntur rite esse acta* ie all things are presumed to have been correctly and solemnly done, applies. The court considered that if the affidavit was defective, it should be condoned.

[24] It will be readily apparent that the issue that afflicted the affidavit in that matter, was of a different type from the one in the instant case. The fact that the oath was administered in the presence of the commissioner may be readily assumed but not where or when the said oath was administered. The issue of substantial compliance does not, in my considered view readily apply where there is no indication where or when the oath was administered. This must especially be the case where the matter in question relates to a stringent and possibly prejudicial matter such as a summary judgment. In this particular case, it may herald the possibility of the respondents not having a roof over their heads, which is a serious matter especially given the first respondent's precarious health conditions painted on the canvass of the respondents' opposing affidavits.

[25] In the premises, I am of the considered view that the issue of non-compliance with regulation 4(1) in this matter, regard particularly being had to the relief sought, as seen through the prism of the *Nored Electricity (Pty) Ltd v*

⁴ *Nored Electricity (Pty) Ltd v Ouster* (I 3670-2015) [2015] NAHCMD 178 (3 August 2015).

⁵ *Ladybrand Hotels v Stellenbosch Farmers* 1974 (1) SA 490 (O) at 493 C.

*Ouster*⁶ case, the court should insist on the full and proper compliance with the peremptory requirement that the date when the oath is administered is stated.

[26] In that case, the court dealt with the seven golden rules of summary judgment that the court should consider in dealing with summary judgment applications. One of these was that 'in determining summary judgment, the court is restricted to the manner in which the plaintiff has presented its case, namely, that the court must insist on strict compliance by the plaintiff and technically incorrect papers should see the application refused.'

[27] It must be stated that the law is a profession that in many cases, requires accuracy, precision and attention to minute details. Commissioners of oath must perform their functions with a full presence of mind. They must not be perfunctory in their approach, resting on the forlorn hope that the court will invariably apply the lower standard of substantial compliance in reviewing their work and will invariably hold that non-compliance with the regulations is merely directory.

[28] In the book of the Songs of Solomon 2:15, it is stated that it is the small foxes that spoil the vine. Commissioners of oath must be alive to the small foxes – the date, the place and manner of taking the oath, among other things. The substantial compliance doctrine must not be an invitation to laxity for commissioners of oath. Where appropriate, as in this case, inattention, must be visited with a harsh penalty. It is clear that space was provided for inserting a place where the oath would be administered by the author of the affidavit for the commissioner to insert by hand. The commissioner of oaths did not do so and there is no explanation for that glaring omission placed before court.

[29] I am of the considered view that the applicant cannot be said to have been without a remedy entirely. Once made alive to the fact that there may have been an omission in the affidavit by the opposing affidavit, the applicant could and should have withdrawn the application for summary judgment in

⁶ *Nored Electricity (Pty) Ltd v Ouster, supra.*

order to attend to the oversight, lest it have crippling effects. The obstinacy, in proceeding with summary judgment, stringent a remedy as it is, must return to haunt the applicant.

[30] I must point out at the end of the day that the authorities do say and I admit, that the compliance with the said provisions is ordinarily merely directory. In *Swart v Swart*,⁷ the court stated the following regarding the issue of compliance in these matters:

‘I am inclined to accept the views expressed in *Rex v Pietersen* cited above, but, even if sub-reg. 1(c) is merely directory and the Court has a discretion whether to receive or reject the document in question, it seems to me that the discretion should be exercised against the applicant. The present petition is the very foundation of the proceedings: it is not merely a supplementary or supporting document which it is sought to place before the Court, but the *sine qua non* to the litigation.’

[31] Yet in *S v Munn*,⁸ van den Heever J (as she then was), stated the following regarding the court’s discretion in these matters:

‘It is in this light that the Court has, in my view, a “discretion” to refuse to receive an affidavit attested to otherwise than in accordance with the regulations: depending upon whether substantial compliance has been proved or not.’

[32] It is accordingly clear from the above-cited cases that at the end of the day, the court exercises a discretion as to whether the non-compliance must be condoned and the affidavit accepted notwithstanding the deficiency. That decision will turn on the nature of the non-compliance, the explanation tendered therefor, if any and I would think, any prejudice that might result therefrom.

[33] As stated above, in the instant case, the affidavit is the very foundation of the application for summary judgment and the sentiments expressed in the *Swart* case above, would in my considered view, be important. This is so

⁷ *Swart v Swart* 1950 (1) SA 263 (OPD) p 267.

⁸ *S v Munn* 1973 (3) SA 734 (NCD) at 738A-B.

when viewed in the light of the nature and possibly drastic nature of summary judgment, and in this case coupled with the fact that the respondents would at the end of the day, possibly lose their primary home and be thus susceptible to the vicissitudes of nature.

[34] There is one other argument that Mr Thambapilai raised. He argued that the commissioner of oaths in this matter, was a lawyer, who works for another bank. For that reason, so he submitted, the commissioner of oaths had an interest in the matter and should have been precluded from serving as a commissioner of oaths in this matter. I am uncertain that Mr Thambapilai is correct in this argument. I do not, however, have to deal with it for the reason that it was not raised in the opposing affidavit but merely mushroomed, as it were, in the heads of argument. As a result, the court has not benefitted from argument advanced by the applicant in this connection. The less said about the argument, the better.

Conclusion

[35] In view of the foregoing discussion and conclusions, I am of the considered opinion that the respondents' point of law *in limine*, must, in the peculiar circumstances of this case, be upheld. In the premises, it is not rendered necessary for the court to deal with the other issues that arise. As mentioned above, the applicant deprived itself of the opportunity to deal with the oversight apparent from its founding affidavit. In the premises, the application for summary judgment must be refused as there is no properly attested affidavit before court, on which the relief sought in the papers is predicated.

Order

[36] Having regard to what is stated above, I am of the considered opinion that the following order must accordingly ensue:

1. The application for summary judgment is refused.
2. The applicant is ordered to pay the costs of this application, subject to the provisions of rule 32(11).
3. The parties are ordered to file a revised joint case plan, together with a proposed case planning draft order on or before **13 October 2023**.
4. The matter is postponed to **19 October 2023** at **08h30** for a case planning conference.

T S MASUKU
Judge

APPEARANCES

APPELLANT: M Kuzeeko
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

RESPONDENT: G Thambapilai
Of Delpport Legal Practitioners, Windhoek