

REPUBLIC OF NAMIBIA



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

Case Title: STANDARD BANK NAMIBIA LTD PLAINTIFF and BIP CONTAINER TERMINAL CC 1 ST DEFENDANT WARREN LIONEL OCKHUYS 2 ND DEFENDANT ISAI ZIMINA HAISHONGA 3 RD DEFENDANT CORNELIUS PETRUS WILLEMSE 4 TH DEFENDANT CHERYL NICOLETTE WILLEMSE 5 TH DEFENDANT	Case No: HC-MD-CIV-ACT-CON- 2023/04438
Heard before: Honourable Justice Sibeya	Division of Court: High Court (Main Division)
	Heard on: 15 March 2024 Delivered on: 10 April 2024
Neutral citation: <i>Standard Bank Namibia Ltd v BIP Container Terminal CC</i> (HC-MD-CIV- ACT-CON-2023/04438) [2024] NAHCMD 164 (10 April 2024)	

The order:

1. The summary judgment application is refused.
2. The plaintiff must pay the defendants' costs of opposing the application for summary judgment on a party-party scale, subject to rule 32(11).
3. The parties must file a joint case plan on or before 15 April 2024, for the further filing of pleadings.
4. The matter is postponed to 18 April 2024 at 08h30 for a Case Planning Conference hearing.

SIBEYA J

Introduction

[1] Serving before court is an opposed application for summary judgment. The court must, therefore, determine whether or not the plaintiff is entitled to the relief sought.

[2] The action is defended and the defendants opposed the application for summary judgment. The fourth defendant, in his personal capacity and in the capacity of being a member of the first defendant, deposed to the affidavit filed in opposition to the application for summary judgment.

The parties and representation

[3] The plaintiff is Standard Bank Namibia Limited, a duly registered bank in terms of the laws of the Republic with its principal place of business situated at No. 1 Chasie Street, Windhoek.

[4] The first defendant is BIP Container Terminal CC, a close corporation duly registered in terms of the laws of the Republic, with its address of service situated at Erf 4501 Langer Heinrich Street, Walvis Bay.

[5] The second defendant is Mr Warren Lionel Ockhuys, a major male resident of Walvis Bay.

[6] The third defendant is Mr Isai Zimina Haishonga, a major male resident of Walvis Bay.

[7] The fourth defendant is Mr Cornelius Petrus Willemse, a major male married in community of property to the fifth defendant and a resident of Walvis Bay.

[8] The fifth defendant is Ms Cheryl Nicolette Willemse, a major female married in community of property to the fourth defendant and a resident of Walvis Bay.

[9] Ms Griffiths appears for the plaintiff, while Mr Karsten appears for the defendants.

The relief sought

10] The plaintiff, in the main action, sought the following relief against the defendants:

‘1. Payment in the amount of N\$1 151 977,45 (One Million One Hundred and Fifty-One Thousand Nine Hundred and Seventy-Seven Namibia Dollars and Forty-Five Cents) together with interest at 16% per annum as from 27th of June 2023 until date of full and final payment;

2. Costs of suit on a scale as between attorney and client; and

3. Further and/or alternative relief.’

Background

11] On 24 January 2019, the first defendant obtained a business revolving credit loan from the plaintiff for the amount of N\$2 300 000 at the floating interest rate of 14 percent per annum, repayable in monthly instalments of N\$57 918,76, plus 3.5% prime overdraft

rate.

[12] The plaintiff and the first defendant agreed that the first defendant would maintain a business operational account with the plaintiff where the plaintiff was authorised to debit the said monthly instalments for the duration of the loan. They further agreed that should the account be in debt, the indebtedness of the first defendant should be determined and proven by a written certificate signed by a manager of any branch of the plaintiff and the amount stated therein shall be due and payable.

[13] The plaintiff advanced the loan to the first defendant. The first defendant is alleged to have breached the loan agreement by failure to pay the monthly instalments resulting in the account being overdrawn. In terms of the certificate of balance issued by the plaintiff, it is claimed that the first defendant is indebted to the plaintiff in the amount of N\$1 151 977,45 plus interest at the rate of 16 percent per annum calculated from 27 June 2023, to date of final payment.

[14] The second to the fourth defendants bound themselves, in suretyship agreements, as sureties and co-principal debtors of the first defendant for an unlimited amount in respect of all debts due to the plaintiff by the first defendant. The fifth defendant is cited by virtue of her marriage to the fourth defendant in community of property, in terms of which she co-signed the suretyship agreement and consented to the fourth defendant binding their joint estate.

[15] It is on the basis of the suretyship agreements that the second to the fifth defendants are alleged to be jointly and severally liable for the debt of the first defendant.

[16] The plaintiff filed an affidavit in support of the application for summary judgment deposed to by Mr Derick William Colmer, a manager of Specialised Recoveries at the plaintiff. Mr Colmer deposed, *inter alia*, that he verified the defendants' indebtedness to the plaintiff in the amount claimed together with interest. He further deposed that the defendants have no *bona fide* defence to the claim and have entered appearance to

defend solely for the purpose of delaying the matter.

[17] The defendants, in the affidavit resisting summary judgment deposed to by the fourth defendant denied liability for the plaintiff's claim, denied that they entered appearance to defend for the purpose of delaying the matter, and raised a barrage of grounds on which their opposition to summary judgment is based together with points *in limine*.

Arguments

[18] The defendants contend that Annexure 'C' to the plaintiff's particulars of claim, the loan agreement, is incomplete and does not constitute the entire agreement concluded between the plaintiff and the first defendant.

[19] The defendants take issue with the accuracy of the calculation of the indebtedness in respect of the amount and the related interest. The defendants contend that the relief sought by the plaintiff, in respect of interest, differs substantially from the business revolving credit loan application and agreement annexed as 'C' to the particulars of claim. On this basis, Mr Karsten submitted that the plaintiff's papers are technically not in order.

[20] The defendants proceeded to dispute the correctness of the amount and calculations provided for in the certificate of balance.

[21] The defendants further contended that the plaintiff failed to state, in the particulars of claim, the names of the persons who concluded the loan agreement, neither did the plaintiff state that a representative of the plaintiff was duly authorised to enter into the agreement.

[22] The defendants contend further nowhere was it agreed in the loan agreement that the monthly instalments would be an of N\$57 918,76.

[23] The plaintiff engaged the defendants pound for pound as it were. For the purpose of this ruling, I have no intention, time or energy to engage into each and every argument raised by the parties. That should not be perceived as taking a dim view towards the arguments raised but rather as unnecessary for the decision reached.

[24] In respect of the attack mounted by the defendants to the certificate of balance, Ms Griffiths argued that no strong factual basis was laid down by the defendants to succeed to dismantle the certificate of balance, which should, therefore, be accepted for what it provides. This, she argued against the backdrop of the clause in the loan agreement where it was agreed to that the certificate of balance shall be prima facie proof of the indebtedness.

[25] In respect of interest, Ms Griffiths submitted that the defendants were charged interest in terms of the provisions of the agreement and further that no penalty interest was charged.

Mr Karsten argued the contrary that the account statements reveal that over and above the interest charged, the plaintiff charged the defendants penalty interest on the overdraft while no such agreement for penalty interest exists between the parties.

Analysis

[26] The law on summary judgment applications is well settled and calls for no repetition. A reminder will suffice that rule 60 regulates applications for summary judgment where the claim is based on a liquid document; where the claim is for a liquidated amount in money; where the claim is for delivery of specified movable property; and where the claim is for ejectment.

[27] The general approach to summary judgment applications was set out in the celebrated judgment *Maharaj v Barclays National Bank Ltd*,¹ where Corbett JA remarked as follows:

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A. See also: *Di Savino v Nedbank Namibia Limited* (SA 24/2010) [2012] NASC 3 (21 June 2012) paras 24-27.

'Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

If satisfied on these matters, the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence 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.'

[28] The above remarks are a correct disposition of our law, which I endorse without hesitation.

[29] The defendants attacked the correctness of the plaintiff's certificate of balance. In the same vein, the defendants challenged the correctness of the amount and the calculation contained in the certificate of balance.

[30] The submission made by Ms Griffiths that the parties agreed that the certificate of

balance shall be prima facie proof of the indebtedness of the defendants, is correct. It should, therefore, be determined whether the defendants laid a proper basis for challenging the correctness of the calculations and amounts set out in the certificate of balance.

[31] The defendants contend that the plaintiffs relied on the certificate of balance to claim the amount of N\$1 151 977,45 together with interest at the rate of 16 percent per annum calculated from 27 June 2023, while the said interest rate is not provided for in the loan agreement. Mr Karsten submitted that the loan agreement provides for interest at the rate of 14 percent.

[32] The loan agreement provides for interest to be charged on the loan amount at the initial rate of 14 percent and the prima overdraft interest rate of 3,5 percent. This appears to be different from 16 percent interest provided for in the certificate of balance. Questions are, therefore, raised regarding the correctness of the certificate of balance. I hold the view, on this basis, that the defendants did not make bare averments in disputing the correctness of the certificate of balance but laid a basis for such challenge.

[33] When further challenged that the amount on the certificate of balance and the statement of the loan account differs materially, Ms Griffiths submitted in oral argument that the difference was not material as it only amounted to about N\$10 000. I find that the said difference of about N\$10 000 in the statement of the loan account prepared by the plaintiff and the certificate of balance prepared by the plaintiff, is too much of a difference to be wished away. I, therefore, find on the basis of the above conclusions that the plaintiff's papers are not technically correct.

[34] This court in *Marenga and Another v Tjikai*² remarked as follows:

[10] (iv) In determining a summary judgment application the court is restricted to the manner

² *Marenga and Another v Tjikai* ((P) I 1841 / 2011) [2011] NAHC 317 (21 October 2011) para [10](iv).

in which the Plaintiff has presented its case. It is trite that a court must insist on strict compliance with the Rule by a Plaintiff. To this extent a Plaintiff is bound by the manner in which it has presented its case and a court will not entertain an application for summary judgment moved on technically incorrect papers. (*Western Bank Beperk v De Beer*, [1975 \(3\) SA 772 \(T\)](#); *Credcor Bank v Thompson*, [1975 \(3\) SA 916](#); *Visser v De La Ray*, [1980 \(3\) SA 147 \(T\)](#))

[35] I find that the challenge to the correctness of the certificate of balance referred to above demonstrates the existence of a foundation on which the *prima facie* proof of the certificate of balance is questionable. On this basis, it cannot be said that no bona fide defence is raised by the defendants.

Conclusion

[36] In view of the findings and conclusions made hereinabove, I find that the papers in the applicant's application are not technically correct. I further find that the defendants, as a result, managed to ward-off the plaintiff's application for summary judgment. Resultantly, and in the exercise of my judicial discretion, I find that the application for summary judgment ought to be refused.

Costs

[37] It is well-established law that costs follow the result. The contrary was not argued, neither could I deduce same from the documents filed of record. The defendant will, therefore, be awarded costs. This ruling is, in my view, interlocutory in nature and, therefore, rule 32(11) finds application, unless the court states otherwise. Despite the submissions made by Mr Karsten not to invoke the provisions of rule 32(11) in this matter, I am not convinced that a case was made out for the award of costs to exceed the rule 32(11) cap. Resultantly, costs will be subject to rule 32(11).

Order

[38] In the result, judgment is granted in favour of the defendant against the plaintiffs in

the following terms:

1. The summary judgment application is refused.
2. The plaintiff must pay the defendants' costs of opposing the application for summary judgment on a party-party scale, subject to rule 32(11).
3. The parties must file a joint case plan on or before 15 April 2024, for the further filing of pleadings.
4. The matter is postponed to 18 April 2024 at 08h30 for a Case Planning Conference hearing.

Judge's signature:	Note to parties:
O S SIBEYA JUDGE	
For the plaintiff: N Griffiths, Of Koep & Partners, Windhoek	For the defendants: L Karsten, Of Karsten-Lardelli Inc, Windhoek