

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

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| Case Title: NEDBANK NAMIBIA LIMITED and KARNIC DISTRIBUTORS CC 1st DEFENDANT CHRISTINE YVONNE MÖLLER 2nd DEFENDANT ANDRE LEFF 3rd DEFENDANT ABSOLUTE TRACING AND CLAIM CONSULTANCY CC 4th DEFENDANT SOUTHERN AFRICAN PRINTING AND PUBLISHING HOUSE (PROPRIETARY) LIMITED 5th DEFENDANT | Case No: HC-MD-CIV-ACT-CON-2022/02522 Division of Court: Main Division, Windhoek Heard on: 25 January 2024 |
| Heard before: Honourable Lady Justice Rakow | Delivered on: 25 January 2024 |
| Neutral citation: <i>Nedbank Namibia Limited v Karnic Distributors CC</i> (HC-MD-CIV-ACT-CON-2022/02522) [2024] NAHCMD 18 (25 January 2024) | |
| Order: | |
| CLAIM 1 1. Payment of the sum of N\$1 616 858, 43. 2. Compound interest calculated daily and capitalised monthly on the amount of N\$1 616 858, 43 at Plaintiff's mortgage lending rate of interest from time to time, currently 12.4% calculated from 24 February 2022 to date of final payment. CLAIM 2 | |

3. Payment in the amount of N\$3 436 268.36.

4. Compound interest calculated daily and capitalized monthly on the amount of N\$3 436 268.36 at Plaintiff's mortgage lending rate of interest from time to time, currently 12.4% calculated from 24 February 2022 to date of final payment.

5. An order declaring the following property executable:

CERTAIN: Erf No 1340(A Portion of Erf No 460) Swakopmund

SITUATE: In the Municipality of Swakopmund Registration Division "G" 29 Erongo Region

MEASURING: 1673 (One Six Seven Three) Square metres HELD: by Deed of Transfer No T4518/2014

SUBJECT: to the conditions contained therein

CLAIM 1 AND 2

6. Costs of suit on a scale as between Attorney and Client as agreed between the parties.

7. The matter is removed from the roll and regarded as finalised.

Reasons for order:

RAKOW J:

Introduction

[1] This is an application for summary judgement. The plaintiff is Nedbank Namibia Limited.

[2] The first defendant is Karnic Distributors CC, a close corporation duly registered and incorporated as such in terms of the Close Corporation Act No 26 of 1998. The second defendant is Christine Yvonne Möller, an adult female with chosen domicilium citandi et executandi at No. 70 Amasoniet Street, Eros Park, Windhoek, Republic of Namibia. The third defendant is Andre Leff, an adult male with chosen domicilium citandi et executandi at No. 7 Tobias Hainyeko Street, Swakopmund, Republic of Namibia. The fourth defendant is Absolute Tracing and Claim Consultancy CC, a close corporation duly registered and incorporated as such in terms of the Close Corporation Act No 26 of 1998, applicable in the Republic of Namibia. The fifth defendant is Southern African Printing and Publishing House (Proprietary) Limited, a legal entity duly registered in terms of the Laws of Namibia.

[3] Coleman J granted default judgment against the first, third, fourth and fifth defendants on 30 September 2022, therefore the only matter before court relates to the second defendant.

Arguments

[4] The plaintiff argued that the first issue that falls for determination is whether summary judgment should be granted. It was argued that summary judgment ought to be granted against the defendant since the defendant has failed to satisfy the requirements to escape summary judgment. The second issue that falls for determination is whether or not the defendant's property should be declared executable.

[5] It was further argued that the defendant's affidavit is not a model of clarity. She fails completely to give any detail of whatever defence she might have to the plaintiff's claims. No attempt whatsoever is made by the defendant to state what her defence to the plaintiff's claim is. She also fails to state a single fact upon which it can be concluded that she has a defence to the plaintiff's claims.

[6] The defendant argued in person. She indicated that she originally bought the business thinking it was in good financial standing but that was not the case. It seems that the previous owner took money out of the business and at some stage applied for the liquidation of the business. She further argued that the money which was raised by the fifth defendant never went to the fifth defendant but conceded that it was utilised by the first defendant. She further argued that the property which is sought to be declared executable belongs to the fifth defendant. No other reasons for not declaring it executable were put forward.

Legal principles

[7] The requirements of rule 60(5)(b), which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus*, *Maharaj v Barclays National Bank Ltd*¹ by Corbett JA with regard to the previous rule 32, dealing with summary judgment applications:

'Accordingly, one of the ways in which the respondent 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.

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

Where the defence is based upon facts, in the sense that material facts alleged by the applicants 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 respondent 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 respondent 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 respondent 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.'

[8] In general, the approach of the court is as set out by Justice Cheda in *Lofty-Eaton v Ramos* as follows:²

'The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by an applicant where a respondent raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate applicant who without doing so, will continue to endure the frustration mounted by an unscrupulous respondent (s) on the basis of some imagined defence. As remedy available to applicants is an extra-ordinary one and is indeed stringent to the respondent, it should only be availed to a party who has a watertight case and that there is absolutely no chance of respondent/respondent answering it, see *Standard Bank of Namibia Ltd v Veldsman*.³ Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caston Ltd v Barrigo*.⁴ In that case, Roberts, AJ went further and crystalised the principle as follows:

² *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

³ *Standard Bank of Namibia Ltd v Veldsman* 1993 NR 391 (HC).

⁴ *Caston Ltd v Barrigo* 1960 (4) SA I at 3H.

'It is confined to claims in respect of which it is alleged and appears to the court that the respondent has no bona fide defence, and that appearance has been entered solely for the purpose of delay.'

Discussion

[9] The defendant's defence which she seeks to advance in resisting summary judgment is not bona fide neither good in law. The defendant only argued that she never received any notice from the bank that they were going to close her over-draft facility but admits that she signed surety for the first defendant. No defence was put forward for the surety signed by her.

Declaring the property executable

[10] In *Kisilipile v First National Bank of Namibia*⁵ the Supreme Court said the following regarding declaring immovable property executable:

[18] In Namibia, judicial oversight takes the following form when it comes to declaring a primary home specially executable. If a property is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. The judgment debtor bears the evidential burden. He or she should preferably lay the relevant information before court on affidavit especially if assisted by a legal practitioner, either in resisting default judgment or summary judgment. The failure to do so does not relieve the court of its obligation to inquire into the availability of less drastic alternatives. If the debtor is legally unrepresented his or her attention must be drawn to the protection granted under rule 108.

[19] The debtor must be invited to present alternatives that the court should consider to avoid a sale in execution but bearing in mind that the credit giver has a right to satisfaction of the bargain. The alternatives must be viable in that they must not amount to defeating the commercial interest of the creditor by in effect amounting to non-payment and stringing the creditor along until someday the debtor has the means to pay the debt . . .'

[11] At para [20] the Supreme Court continued to lay down the law as follows in *Kisilipile*:

'Judicial oversight exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of the primary home is a last resort. The court is required to take into account "all the relevant circumstances".

When exercising the discretion under rule the court should bear in mind that a sale in execution of a

⁵ *Kisilipile v First National Bank of Namibia* 2021 (4) NR 921 SC para 17.

primary home does not necessarily extinguish a debt. The reality is often the contrary. In other words, the debtor remains indebted to the credit giver for the balance of the debt, considering that under the current rule framework the property is sold to the highest bidder for not less than 75% of the either the local authority or regional council evaluation.'

[12] Finally, at para [21], the Supreme Court reasoned as follows on the subject:

' . . . The court should also take into consideration the payment history of the debtor. Greater latitude should be given to the debtor who has a reasonably good payment history; the extent of the balance outstanding; the age of the debtor – which is an important factor whether or not the debtor will be able to secure another loan to buy a home.'

[13] Despite the second defendant bearing the onus to demonstrate that 'less drastic measures' exists other than selling the immovable properties in execution, the defendant has failed completely to address this issue and to state whether less drastic measures might be available to satisfy the judgment debt.

Order

CLAIM 1

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CLAIM 1 AND 2

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7. The matter is removed from the roll and regarded as finalised.

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| Judge's signature | Note to the parties: |
| E RAKOW Judge | Not applicable |
| Counsel: | |
| Plaintiff: | Second Defendants: |
| M U Kuzeeko Of Dr Weder, Kauta & Hoveka Inc., Windhoek. | C Y Moller In person. |