

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
RULING  
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

<b>Case Title:</b>  DEVELOPMENT BANK OF NAMIBIA PLAINTIFF  and  PROTECTON ENGINEERING NAMIBIA CC FIRST DEFENDANT  ALASTAIR AVERILL SINCLAIR ASPARA SECOND DEFENDANT  TOBIAS ALUIS TJIMBANDI THIRD DEFENDANT	<b>Case No:</b> HC-MD-CIV-ACT-CON- 2023/04556
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER, ACTING	<b>Date of hearing:</b> 2 APRIL 2024
	<b>Delivered on:</b> 24 APRIL 2024
<b>Neutral citation:</b> <i>Development Bank of Namibia v Protection Engineering Namibia CC</i> (HC-MD-CIV-ACT-CON-2023/04556) [2024] NAHCMD 187 (24 April 2024)	
<b>IT IS ORDERED THAT:</b>  Summary judgment is granted in the following terms against all defendants, jointly and severally, the one paying the other to be absolved:  1. An order confirming the cancellation of the Loan Agreement;	

2. Payment in the amount of N\$ 5 372 097,87;
3. Interest on the aforesaid amount calculated from 31 July 2023 on the basis of the prime lending rate generally charged by First National Bank of Namibia Limited plus 4 per cent per annum on the aforesaid amount or any balance thereof outstanding from time to time and calculated daily and compounded monthly;
4. Costs of suit on attorney and own client scale;
5. The matter is finalised and removed from the roll.

**Following below are the reasons for the above order:**

PARKER AJ:

[1] In the instant action, the plaintiff claims repayment of the capital and interest in respect of a loan advanced by the plaintiff to the first defendant in terms of a written loan agreement. The claim against the second and third defendants is in terms of a deed of suretyship whereby the second and third defendants, as sureties, bound themselves to satisfy the obligation of the first defendant (the principal debtor) towards the plaintiff (the creditor) in respect of the repayment of the loan made under the loan agreement.

[2] In the present proceedings, the plaintiff seeks summary judgment against the defendants for repayment of the loan amount, interest thereon and the payment of costs on the scale as between attorney and own client.

[3] The defendants have moved to reject the relief sought and are represented by Mr Halweendo. Ms Vermeulen represents the plaintiff. I am grateful to both counsel for their helpful written submissions.

[4] It is trite that the purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain summary judgment swiftly without trial, if the plaintiff has a clear case and if the defendant is unable to set up a bona fide defence which is good in law or raise an issue against

the claim which ought to be tried.<sup>1</sup>

[5] To establish those requisites, the defendant must fully disclose the nature and grounds of the defence to summary judgment and the material facts upon which that defence is founded, in the sense that there need to be factual material placed before the court sufficiently placing in doubt that the plaintiff's claim is unanswerable.<sup>2</sup> Thus, in order to resist summary judgment, the defendant bears the onus of satisfying the aforementioned requisites.

[6] In the instant proceeding, the defendants rely on three defences. The first is the special plea of prescription. The second is that the first defendant has been deregistered as close corporation and is now trading as '(Pty) Ltd'. The third is that the suretyship agreement was signed by the sureties under duress.

[7] Mr Halweendo quickly abandoned the second defence – and wisely so – conceding that that defence has no merit. The fact relied on in respect of the third defence is that the sureties were informed that the creditor would not extend a loan to the first defendant if the second and third defendants did not enter into a deed of suretyship. I stress the point that the second and third defendants had the right to reject the creditor's request and there was no evidence that the right was taken away from them and the manner in which it was taken away. They entered into the deed of suretyship voluntarily and they knew what they were doing and the consequences of their action.

[8] Mr Halweendo submitted that the request (counsel characterized it as 'pressure') was offensive of the company law. Counsel failed to point the court to the section of any statutory provision or a rule of common law he relied on. In any case, as I have said, the defendants had the right to reject the so-called 'pressure' but they did not. The conclusion is ineluctable that the defendants' contention cannot amount to a bona fide defence that is good in law; neither can it raise a triable issue. It cannot, therefore, assist them in their attempt to resist summary judgment. I proceed to consider the special plea of prescription, ie the first defence.

[9] Mr Halweendo submitted as follows: It is common cause that the debt arose from a contract concluded by and between the parties on 3 March 2020. Therefore, in terms of s 11(d) of

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<sup>1</sup> *Namibia Wildlife Resorts v Maxuilili-Ankama* [2023] NAHCMD 94 (7 March 2023).

<sup>2</sup> *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* [2019] NASC (10 April 2019) para 37.

the Prescription Act 68 of 1969, the claim prescribed on 2 March 2023. Thus, according to counsel, when summons was issued on 5 October 2023 the claim had already prescribed. With respect, counsel is wrong. In our law, prescription begins to run not necessarily when debt arose, but when it became payable.<sup>3</sup> On the pleadings, I find that the debt became payable on 28 February 2022, being the last day within 22 months of the restructuring date. Therefore, when summons was issued on 5 October 2023, the claim had not prescribed.

[10] Consequently, I find and hold that the plaintiff's claims would only prescribe on 21 February 2025. It follows irrefragably that the defendants have failed to set up a bona fide defence which is good in law. They have also failed to raise an issue against the claim which ought to be tried. In sum, the defendants have not 'placed factual material before the court sufficiently placing in doubt that the plaintiff's claim is unanswerable.'<sup>4</sup>

[11] Based on these reasons, I find and hold that the plaintiff has made out a case for summary judgment and is, therefore, entitled to judgment.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>PLAINTIFF</b>	<b>DEFENDANTS</b>
J Vermeulen of Ellis Shilengudwa Inc., Windhoek	N Halweendo of Nafimane Halweendo Legal Practitioners, Windhoek

<sup>3</sup> *Jansen van Vuuren v Namibia Water Corporation Limited* 2006 (2) NR 607 (LC).

<sup>4</sup> *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* footnote 2 loc. Cit.