

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING**

Case no: HC-MD-CIV-ACT-CON-2022/02820

In the matter between:

STANDARD BANK LIMITED NAMIBIA LIMITED

PLAINTIFF

and

ALBERTOS ALEXANDER HARASEB

1st DEFENDANT

KAUNA NANCY HARASEB

2nd DEFENDANT

Neutral citation: *Standard Bank of Namibia Limited v Haraseb and another* (HC-MD-CIV-ACT-CON-2022/02820) [2024] NAHCMD 58 (14 February 2024)

Coram: Ndauendapo J

Heard: 31 October 2023

Delivered: 14 February 2024

Flynote: Civil Practice – Summary judgment – Respondents to disclose *bona fide* defence to avoid summary judgment-Respondents did not disclose a *bona fide*

defence – Summary judgment granted.

Summary: This is an application for summary judgment. The applicant seeks payment of N\$575 091, 46 from the respondents, being monies lent and advanced to the respondents to purchase an immovable property. The respondents failed to honour the monthly instalments. The applicant also seeks an order to have the immovable property declared specifically executable. The first respondent delivered an answering affidavit. He avers that he had instituted a labor dispute of unfair dismissal against his former employer and, if successful, he will have the funds to pay the arrears.

Held that: no *bona fide* defence was disclosed. Summary judgment granted.

Held further: The immovable property (ERF NO.2609 (A PORTION OF ERF NO.973) MONDESA, EXTENSION NO. 3, IN THE MUNICIPALITY OF SWAKOPMUND), is hereby declared specifically executable. The sale in execution of the said property should be held in abeyance for a period of 4 months from 14 February 2024, to afford the respondents to sell the said property privately.

ORDER

1. The summary judgment application is granted.
2. The respondents are ordered to pay the applicant an amount of N\$575 091, 46.
3. Interest thereon at prime rate 9.25% per annum from 17 March 2022 until date as certified until date of final payment.
4. Costs of suit, to be capped in terms of rule 32 (11).
5. The immovable property (ERF NO.2609 (A PORTION OF ERF NO.973) MONDESA, EXTENSION NO. 3, IN THE MUNICIPALITY OF SWAKOPMUND), is

5. Further and/or alternative relief.'

[2] The debt arose from a home loan advanced to the respondents. The arrears on the home loan was N\$164 876, 79 by end of November 2023.

[3] The respondents opposed the application. Mr Haraseb, the first defendant deposed to an answering affidavit. He avers that the property the applicant wishes to be declared specifically executable is the primary home of the respondents. He avers that the affidavit of Derick Colmer, in support of the summary judgment, does not disclose a cause of action.

[4] Mr Haraseb, submitted that the deponent does not aver under oath, to a breach of any kind committed by the respondents in relation to this matter. Furthermore, he states that, the deponent fails to disclose the amount paid by the defendants which amount repaid is N\$128 723, 49.

[5] He contends that both this application and the combined summons have no prospects of any success as the former does not disclose any cause of action, and the latter relies on patent misrepresentation for its cause of action. He contends that the bond in question was obtained on the basis of the first defendant's salary. "It was at least an implicit term of the bond, sustained by the rule of law, that in the event of the said salary dispute, the plaintiff would wait until the outcome of the dispute that would include interest. Given that the plaintiff was covered by insurance for any potential losses on the bonded property, the plaintiff did not stand to lose anything on the bond."

[6] In terms of the additional answering affidavit, the respondents rely on an alleged agreement between themselves and the applicant, in which the applicant allegedly agreed for the respondents to pay any amount into the Home Loan account. He annexed an email to support his contention.

Issue for determination

[7] The issue for determination is whether the respondents raised a *bona fide*

defence or triable issue to the averments of the applicant, that they (respondents) do not have a *bona fide* defence and only opposed the application for summary judgment to delay and frustrate the applicant from obtaining the relief sought.

Submissions on behalf of applicant

[8] Counsel submitted that it is important to note that the first respondent requesting for the stay of this application pending the outcome of his labor dispute with his previous employer, does not amount to a guarantee or alternatively an undertaking that the outstanding debt due to applicant will indeed be paid by the respondents.

[9] Counsel argued that this is an application for summary judgment. Form 24 that was attached to the summons (as Annexure E) was served personally on the respondents at the bonded property where they reside.

[10] Counsel submitted that the respondents shot themselves in their own foot when they breached the home loan agreement and the amount claimed in the summons plus interest and costs were re-affirmed in its own answering affidavit which clearly stipulate that by the respondents own reliance, their last instalment was on 25 November 2021, meaning that after November 2021 till date of this application, no payment has been made by the respondents, alternatively, the arrears alone have accumulated on the outstanding Home Loan for a period equivalent to one year and 11 months from date of this application hearing.

Submissions by the respondents

[11] Mr Haraseb, who appeared in person, submitted that there was an agreement between the applicant and themselves, wherein they agreed that they can pay any amount into the home loan account. He submitted that he was unfairly dismissed and he has instituted a case of unfair dismissal at the Labour court and if successful, he will be able to pay the arrears.

Discussion

[12] In order to ward off an application for summary judgment the respondents must submit an answering affidavit in which they set out a *bona fide* defence to the relief sought. In *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd*¹ the Supreme Court held that:

[20] In a summary judgment application, the court is not called upon to decide factual disputes or express any view on the dispute. It is called upon instead to determine firstly whether a defendant has 'fully' disclosed the nature and grounds of the defence and the material facts upon which that defence is founded. In the second instance the court is to determine whether on the facts set out by the defendant that it 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 upon these two criteria, the court must refuse summary judgment.'

[13] In this case, the respondents have not set out a *bona fide* defence at all. What the first respondent stated in the answering affidavit is bad in law and bogus. The applicant had set out a cause of action in its particulars of claim. The fact that the first respondent is waiting for the outcome of the labour dispute of unfair dismissal instituted by him against his former employer and, if successful, he will have the funds to settle the arrears, is not a defence at all. The issue of an alleged agreement raised in the further answering affidavit raised by the first respondent cannot be entertained as the further answering affidavit was filed without leave from this court.

[14] In the result, no *bona fide* defence was raised by the respondents and the applicant is entitled to the summary judgment.

[15] The immovable property (ERF NO.2609 (A PORTION OF ERF NO.973) MONDESA, EXTENSION NO. 3, IN THE MUNICIPALITY OF SWAKOPMUND), is hereby declared specifically executable. The sale in execution of the said property should be held in abeyance for a period of 6 months from 14 February 2024 to afford the respondents to sell the said property privately.

Order

¹ *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* (SA 11 of 2017) [2019] NASC 6 (10 April 2019).

1. The summary judgment application is granted.
2. The respondents are ordered to pay the applicant an amount of N\$575 091, 46.
3. Interest thereon at prime rate 9.25% per annum from 17 March 2022 until date as certified until date of final payment.
4. Costs of suit, to be capped in terms of rule 32 (11).
5. The immovable property (ERF NO.2609 (A PORTION OF ERF NO.973) MONDESA, EXTENSION NO. 3, IN THE MUNICIPALITY OF SWAKOPMUND), is hereby declared specifically executable. The sale in execution of the said property should be held in abeyance for a period of 4 months from 14 February 2024, to afford the respondents to sell the said property privately.
6. Matter is removed from the roll and regarded as finalised.

N NDAUENDAPO
Judge

APPEARANCES:

PLAINTIFF: MS KARAMATA
OF ANNE SHILENGUDWA INCORPORATED

THE DEFENDANTS: HARASEB
IN PERSON