

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI
PRACTICE DIRECTION 61

Case Title: Development Bank of Namibia and Superior Investment Group Close Corporation Daniel Shindume Super Cool Trading Close Corporation	Case No: HC-NLD-CIV-ACT-CON-2023/00029 Division of Court: High Court, Northern Local Division Heard: 4 October 2023 Delivered: 25 October 2023
Plaintiff	1 st Defendant 2 nd Defendant 3 rd Defendant

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Development Bank of Namibia v Superior Investment Group Close Corporation and Others* (HC-NLD-CIV-ACT-CON-2023/00029) [2023] NAHCNLD 112 (25 October 2023)

ORDER

Summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved in the following terms:

1. Payment in the amount of N\$2 380 814.37
2. Interest thereon calculated on the fluctuating FNB Prime Rate plus 3 per cent per annum, compounded monthly, plus a default margin of 2 per cent, as from date of judgment to date

of final payment.

3. An order declaring the following property executable, Erf 286 Eenhana, situated in the Municipality of Eenhana, Registration Division "A", Ohangwena Region, measuring 2537 Square Metres and held by Deed of Transfer No: T 395/1999.
4. Costs of suit on the attorney and own client scale, not capped in terms of rule 32(11).
5. The matter is removed from the roll and regarded finalised.

MUNSU J:

Introduction

[1] This is an opposed application for summary judgment. The plaintiff instituted action against the defendants for payment of an amount of N\$2 380 814.37, interest thereon, and a further order declaring Erf 286, Eenhana executable. The plaintiff's claim is based on money lent and advanced in August 2019.

The application

[2] Mr Erastus Hoveka deposed to the affidavit on behalf of the plaintiff. He is employed by the plaintiff as the Head of Credit and Risk. He avers that on 19 August 2019, the parties entered into a loan agreement in terms of which the plaintiff lent and advanced to the first plaintiff an amount of N\$1 650 000 plus agreed interest thereon. In terms of the agreement, the loan amount was repayable over a period of 120 months, with the first instalment due after a six months grace period.

[3] It was a further term of the agreement that, on account of any default, the plaintiff would be entitled to cancel the agreement and claim immediate payment of all or part of the outstanding amount under the agreement.

[4] In terms of the particulars of claim annexed to this application, the second and third defendants, by way of a continuing covering suretyship, bound themselves jointly and severally, as surety and co-principal debtor for the due and punctual performance of all the first defendant's obligations towards the plaintiff.

[5] Furthermore, the third defendant on 29 March 2016, duly executed a mortgage bond

(B1275/2016 held by Deed of Transfer T395/1999) in favour of the plaintiff as security for the repayment of the loan amount. The said mortgage bond would remain as continuing security and covering bond for any sum owing by the third defendant to the plaintiff, at the time or in future irrespective of the cause from which it arose.

[6] Additionally, it is further claimed that on application for judgment in respect of the claim, the plaintiff would seek an order declaring the mortgaged property specially executable. A rule 108(2) notice was served on the defendant together with the summons.

[7] Mr Hoveka further states that the defendants have no *bona fide* defence to the action and that their notices of intention to defend have been filed solely for the purpose of delaying the action.

The opposition

[8] The second defendant, Mr Daniel Shindume, who is the sole member of the first and third defendants, deposed to the affidavit on behalf of the defendants. He avers that the parties did not agree on a monthly premium and that the defendants still have 78 months of the 120 repayment term remaining.

[9] Mr Shindume further states that the first defendant made payments amounting to N\$51 349.99. He denies that the defendants entered appearance to defend merely to delay the action.

Discussion

[10] In *Di Savino v Nedbank Namibia Ltd*¹ the Supreme Court succinctly sets out the principles governing summary judgment. The following is said at para 23:

‘One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a *bona fide* defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3)(b)² the affidavit must “disclose fully the nature and grounds of the defence and the material facts relied upon therefor”. Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.’

¹ *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 07 (SC).

² The forerunner of the current rule 60.

[11] In *Standard Bank of Namibia Limited v Veldsman*³ the court opined as follows:

'Summary judgment should only be granted if it is clear that the plaintiff has an unanswerable case'⁴

[12] It is common cause that the plaintiff advanced a loan to the first defendant and that same is repayable monthly in terms of the agreement. The first defendant has not been paying monthly, claiming that the loan agreement does not stipulate the monthly instalment. At the hearing of the interlocutory, counsel for the plaintiff attempted to clarify this issue, however, the court denied him the opportunity as in motion proceedings, the parties must stand by their papers.⁵

[13] The first defendant does not allege any terms different from those contained in the loan agreement and relied upon by the plaintiff. While it is true that the agreement between the parties does not specify the monthly instalment, I find the defence raised by the first defendant to be purely technical, devoid of substance and not *bona fide* under the circumstances.

[14] The first defendant is benefiting from a loan amount it is fully aware should have been serviced monthly. The loan amount was expended during 2019 and the first defendant defaulted by March 2020. In a space of 42 months, only three instalments were paid.

[15] The first defendant hopes to avoid repaying the loan on a technicality without demonstrating to the court the steps it has taken to address what it claims is an anomaly. If the first defendant is sincere with its defence, it would have addressed the issue already in 2019. To date, there is no proof of any attempts it made to address the alleged anomaly. This is notwithstanding the letter of demand addressed to it on 30 March 2022 and the issuance of the summons on 8 February 2023. Not a single payment was made even after the issuance of the summons. Under the circumstances, the first defendant would not have been expected to sit back and not do anything if it had the intention to service the loan.

[16] What defence will the first defendant take to trial? Is it that because the agreement does not specify the monthly instalment, the loan amount cannot become due until the year 2029? That would be prejudicial to the plaintiff especially given the fact that the loan should have been serviced monthly. Even on the first defendant's version, there is no indication as to when it is going to service the loan. Accordingly, I find that the first defendant has no *bona fide* defence.

³ *Standard Bank of Namibia Limited v Veldsman* 1993 NR 391 at 392 D-E.

⁴ See *Fair Play Nam Investments (Pty) Ltd v Standard Bank Namibia Limited* (I 3664-2012) [2013] NAHCMD 227 (30 July 2013).

⁵ See *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC).

[17] The third defendant executed a bond in favour of the plaintiff. There was compliance with rule 108, and the property does not constitute a primary home.

[18] In terms of the agreement, the certificate of indebtedness is prima facie proof of the amount due and the parties agreed on the applicable interest rate. Additionally, the parties agreed on a scale of attorney and own client.

[19] In the result, I make the following order:

Summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved in the following terms:

1. Payment in the amount of N\$2 380 814.37.
2. Interest thereon calculated on the fluctuating FNB Prime Rate plus 3 per cent per annum, compounded monthly, plus a default margin of 2 per cent, as from date of judgment to date of final payment.
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	Note to the parties:
D MUNSU Judge	None
Counsel:	
Plaintiff	Defendants
D Ndana Of Jacobs Amupolo Lawyers & Conveyancers Ongwediva	A Shapumba Of Shapumba and Associates Ondangwa