



**NOT REPORTABLE**

CASE NO: SA 99/2023

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**ERASTUS HAFENI HAITENGELA  
GUNTHER FARMING ENTERPRISES (PTY) LTD  
ROBURST INVESTMENTS CORPORATION  
(PTY) LTD**

**First Appellant  
Second Appellant  
  
Third Appellant**

and

**FIRST NATIONAL BANK NAMIBIA LIMITED**

**Respondent**

**Coram:** FRANK AJA  
**Heard:** IN CHAMBERS  
**Delivered:** 8 November 2023

**Summary:** The respondent, as plaintiff *a quo*, sued the appellants in respect of a loan of N\$9 500 000 advanced to second appellant together with interest and costs. First and third appellants bound themselves as sureties in respect of the loan repayment. Furthermore, as security in respect of the loan, continuous covering mortgage bonds were registered in respect of two immovable properties, namely one in respect of the property of first appellant and one in respect of the property of the second appellant. In the particulars of claim, a total amount due to the respondent

(interest included) amounting to N\$10 083 643,95 was claimed and in addition, an order was sought to declare the bonded properties executable. The appellants as defendants *a quo* filed a notice of opposition to the claim and the respondent applied for summary judgment in terms of rule 60 of the Rules of the High Court.

The appellants opposed the summary judgment application, arguing that the application 'cannot be used as a fishing expedition to determine the defence of the defendants [appellants] in order to address that defence in the amended particulars of claim'. The second defence raised was based on what was stated to be the unconstitutionality of rule 108(1)(b) of the Rules of the High Court which provides for circumstances under which an immovable property can be declared executable. The basis for this attack was Art 78(4) of the Namibian Constitution. The application was heard on 21 July 2023 and a judgment granting summary judgment in favour of the respondent in the amount of N\$10 083 643,95 jointly and severally against the appellants, the one paying the others to be absolved plus interest and costs and the court *a quo* further declared the bonded properties specially executable. The defence that the money in respect of the loan was not advanced was so obviously contrary to the facts that it fell to be dismissed out of hand. Prior to approaching the court for the adjudication of the summary judgment application, the parties met in terms of rule 32(9) to attempt to amicably resolve their dispute. At this meeting, the respondent was made aware of certain defects in its application for summary judgment by the appellants. This caused the respondent to amend its particulars of claim and when finalised, it approached the court to adjudicate on its application. The appellants filed an opposing affidavit wherein it raised defences.

The appellants noted an appeal against this judgment of the court *a quo*. The respondent filed a rule 6 application for summary dismissal in terms of the Rules of the Supreme Court and it submits that the appeal is without merits and it enjoys no prospects of success.

*Held that*, a litigant who approaches a court is entitled to have the matter heard expeditiously. Rule 1(3) of the Rules of the High Court states that 'the objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable'. Rule 60 which deals

with applications for summary judgments also makes it clear that it is designed to provide a speedy remedy in cases where it is apparent that a defendant is seeking to defend solely for the purpose of delaying the inevitable (see rule 60(2)(b)).

*Held that*, a litigant who has a valid claim is entitled to a judgment and to proceed to execution so as to enforce his claim and where the process leading up to judgment is held up solely to delay either the judgment or the execution such conduct amounts to an abuse of proceedings and should not be tolerated by the courts who should also discourage such conduct with punitive costs orders.

*Held that*, the appellants have failed to establish any defence on the merits to the claim of the respondent and if they had a defence, they could and should have raised it in their affidavit opposing the summary judgment.

*Held that*, there is no basis to attack the constitutionality of rule 108(1)(b) – the decision in *Standard Bank Namibia Limited v Shipila & others* 2018 (3) NR 849 (SC) refers.

*Held that*, the court *a quo* was correct to not entertain the defence to the summary judgment application and there is no chance an appeal court will deal with this constitutional attack. It does thus also not enjoy any prospects of success on appeal.

*It is held that*, the appellants' case is such that they have no prospects of success on appeal as their submissions are so lacking in merits that it stands to be rejected out of hand and cannot even be described, on the facts of this matter, as arguable. The noting of the appeal in this matter was done to delay the inevitable.

The appeal is dismissed with costs on the scale of legal practitioner and client.

---

## JUDGMENT PURSUANT TO A RULE 6 APPLICATION

---

FRANK AJA:

### Introduction

[1] Respondent, as plaintiff *a quo*, sued the appellants in respect of a loan of N\$9 500 000 advanced to second appellant together with interest and costs. First and third appellants bound themselves as sureties in respect of the loan repayment. Furthermore, as security in respect of the loan, continuous covering mortgage bonds were registered in respect of two immovable properties, namely one in respect of the property of the first appellant and one in respect of the property of the second appellant.

[2] In the particulars of claim, a total amount due to the respondent (interest included) amounting to N\$10 083 643,95 was claimed and in addition, an order was sought to declare the bonded properties executable.

[3] The appellants as defendants *a quo* filed a notice of opposition to the claim of the respondent and the latter applied for summary judgment. The summary judgment application was opposed by the appellants and an opposing affidavit was filed by first appellant in his personal capacity and also for and on behalf of second and third appellants.

[4] The court *a quo* heard the application on 21 July 2023 and in the judgment delivered on 10 August 2023 granted summary judgment in favour of the respondent

in the amount of N\$10 083 643,95 jointly and severally against the appellants, the one paying the others to be absolved plus interest and costs and further declared the bonded properties specially executable.

[5] On 1 September 2023, the appellants noted an appeal against the judgment of the court *a quo* to this Court. The current application by the respondent is to have this appeal dismissed summarily in terms of rule 6 of this Court as it submits that the appeal is without merits and that it enjoys no prospects of success at all.

Particulars of claim in the court *a quo*

[6] In its particulars of claim, respondent alleges that it lent an advanced in the amount of N\$11 800 000 to second appellant pursuant to a written loan agreement entered into on 24 September 2015. This loan agreement provided for certain security to be provided in respect of the repayment of this loan from the second appellant. Relevant to this appeal is a mortgage bond registered over the property referred to as 'Farm Bubus' of first appellant and a mortgage bond registered over the property referred to as 'Farm Ombujombaere Nord' of second appellant. Both these bonds were continuing security bonds, which meant that they secured any amounts due and owing to the respondent in respect of the loan. Furthermore, in respect of this loan, first and third appellants executed written unlimited suretyships in favour of the respondent.

[7] The particulars proceed to aver that the repayments of the above loan fell in arrears and second appellant and the respondent agreed to restructure the loan and in pursuance of this objective a further written loan agreement was entered into

between the parties on 29 April 2021. In terms of this loan agreement the amount of the loan was stated to be N\$9 500 000 which had to be repaid in bi-annual installments of N\$694 501,51. It was a condition precedent of this agreement that the security arrangements in respect of the 2015 loan would remain in place, ie the two mortgage bonds and the sureties referred to above would remain in place as security for the respondent in respect of this 2021 agreement.

[8] Once again, second appellant fell into arrears in respect of the second loan agreement of 2021 and the respondent sent numerous letters of demand to no avail and hence claimed N\$10 083 643,95 inclusive of interest and costs from the appellants jointly and severally, the one paying the others to be absolved.

[9] Lastly, and in respect of the particulars of claim, the respondent 'forewarned the appellants' that it would seek an order to declare the mortgaged properties executable pursuant to rule 108(2)(a) of the Rules of the High Court averring that there were no reasonable prospects of a suitable alternative manner in which the appellants would be able to settle their indebtedness to the respondent.

#### Summary judgment application

[10] The respondent gave the appellants notice in terms of rule 32(9) of the Rules of the High Court, which applies to interlocutory proceedings that it intended to apply for summary judgment subsequent to the filing of the notice of intention to defend by the appellants.

[11] In terms of this sub-rule, parties must attempt to, before launching interlocutory proceedings, reach an amicable resolution in respect of such proceedings and only if this attempt fails may 'such proceedings be delivered for adjudication by the court'. According to the appellants, certain defects in the particulars of claim were pointed out by them to the respondent when the parties met in accordance with the provisions of rule 32(9). This led to certain amendments to the particulars of claim and once the amendments were finalised, the summary judgment application was 'delivered for adjudication by the court'. The appellants' stance was and is that the respondent should not be allowed in these circumstances to bring a summary judgment application as this would give it a 'second bite at the cherry' because if the deficiencies were not pointed out to it, at the rule 32(9) meeting it would not have been able to obtain summary judgment on the original particulars of claim.

[12] On behalf of the appellants, it was stated that the summary judgment application 'cannot be used as a fishing expedition to determine the defence of the defendants [appellants] in order to address that defence in the amended particulars of claim' and then reapply for summary judgment. This attack was dismissed by the court *a quo* which pointed out that rule 60 which deals with summary judgments does not put a time limit in place for a summary judgment application and that procedures in matters such as these were in the hands of the managing judge.

[13] A litigant who approaches a court is entitled to have the matter heard expeditiously. Thus rule 1(3) states that the 'objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost

effectively as far as practicable . . .'. Rule 60 which deals with applications for summary judgment also makes it clear that it is designed to provide a speedy remedy in cases where it is apparent that a defendant is seeking to defend solely for the purpose of delaying the inevitable (see rule 60(2)(b)). A litigant who has a valid claim is entitled to a judgment and to proceed to execution so as to enforce his claim and where the process leading up to judgment is held up solely to delay either the judgment or the execution, such conduct amounts to an abuse of proceedings and should not be tolerated by the courts who should also discourage such conduct with punitive costs orders.

[14] If appellants had any defence on the merits to the claim of the respondent, they could and should have raised it in their affidavit opposing summary judgment.<sup>1</sup> The appellants complained that they did not get the benefit of the matter being allowed to proceed in the ordinary course to trial. They however did not provide a single acceptable defence on the merits as I shall indicate below. It is thus clear that the whole purpose in raising the procedural points was to delay the inevitable outcome. In view of the overall objective of case management stated above, which is in line with the approach in rule 60 which seeks to enforce the general principle that a successful litigant should be allowed to execute a favourable judgment as expeditiously as possible, it is clear that the appellants suffered no prejudice in the legal sense when the summary judgment application was dealt with on its merits. In short, if the appellants had a defence the summary judgment would not have been granted. Why, when appellants could not establish any defence should the matter have been allowed to go to trial simply because respondent amended its particulars

---

<sup>1</sup> Rule 60(4)(b).



of claim when this course of action would simply have led to a delay before the inevitable judgment would follow?

[15] The second defence raised was based on what was stated to be the unconstitutionality of rule 108(1)(b) which provides for circumstances under which an immovable property can be declared executable. The basis for this attack is stated to involve Art 78(4) of the Namibian Constitution which relates to the inherent power of the High Court to regulate its own procedures and the making of court rules for that purpose. How and why rule 108(1)(b) offends in this regard is not stated. What was stated is that there was another case before the High Court where such attack was made against this rule.<sup>2</sup> According to the deponent on behalf of the appellants, he had similar intentions.

[16] Apart from stating the contention that rule 108(1)(b) is unconstitutional and referring to Art 78(4), no basis is stated for this attack. Even in the notice of appeal, the matter is not taken any further. This Court in *Standard Bank Namibia Limited v Shipila & others*<sup>3</sup> pronounced itself and sanctioned the use of rule 108. Furthermore, the matter referred to in which a similar point was taken according to the deponent on behalf of the appellants, has also in the meantime been withdrawn. It must also be kept in mind that this attack is irrelevant to whether the appellants owed the respondent the money claimed but only relates to the execution process, ie how the respondent must go about to enforce the judgment it obtained. It follows that the defence to the summary judgment application was correctly not entertained and

---

<sup>2</sup> *Kelly Nghixulifwa v The President of the Republic of Namibia & others* HC-MD-CIV-MOT-GEN 2022/0010.

<sup>3</sup> *Standard Bank Namibia Limited v Shipila & others* 2018 (3) NR 849 (SC).

there is no chance an appeal court will deal with this constitutional attack for the reasons mentioned above. It thus also obviously enjoys no prospects of success.

[17] Lastly, and on the merits, the defence raised is that the second loan of 2021 was not a restructuring of the first loan of 2015 because this is not expressly stated in the latter loan agreement and neither does the second loan agreement deal with how the original loan came to be reduced from N\$11 800 000 to N\$9 500 000. This, according to appellants, meant that the second loan was a standalone agreement and there had been no proof that the N\$9 500 000 was actually advanced.

[18] The court *a quo* dealt succinctly with this ground in its judgment as follows:

'In my view, there is no substance in Mr Amoomo's submissions. The plaintiff's case is simple; the 1<sup>st</sup> defendant got a loan from the plaintiff in 2015. It ran into arrears and it was agreed that the loan should be restructured. In order to effect the restructuring, a new loan agreement was entered into in 2021. The money advanced in terms of this new loan agreement was used to pay the 2015 loan which was in arrears. The terms of the 'restructuring' are neither here nor there. It does not constitute the plaintiff's cause of action. The allegations in paragraph 18 of the particulars of claim relating to restructuring are simply part of the narrative. The 2021 loan agreement is being enforced here. I am satisfied that the plaintiff made out a case for summary judgment in respect of the loan and the defendants did not disclose a *bona fide* defence.'

[19] I am in full agreement with the reasoning of the court *a quo* and can also mention that the bank statements attached to the particulars of claim confirms the position as set out by the court *a quo*. The correctness of these statements was not put in issue at all.

[20] It follows that the issues raised in opposition to the summary judgment application were all correctly dismissed by the court *a quo*. The same issues are raised in the notice of appeal to this Court. The respondent's case is such that the appellants' have no prospects of success on appeal as their submissions are so lacking in merits, that it stands to be rejected out of hand and cannot even be described, on the facts of this matter, as arguable. The only inference that can be drawn from the noting of the appeal in this matter, is that it was done to delay the inevitable.

[21] The last aspect flowing from the notice of appeal is the contention on behalf of the appellants that the costs should have been capped at N\$20 000 in terms of rule 32(11) of the High Court Rules as the application for summary judgment was an interlocutory one. This is not correct. It was a final judgment. It disposes of the claim instituted by the respondent finally. If it was interlocutory, there would still have to be some outstanding issue for the court *a quo* to decide. There is none. I do not know why rule 32(9) was adhered to initially. It is clear that the parties did this without demur and this is not an issue to be determined in this appeal and I therefore decline to do so.

[22] In the result, the appeal is dismissed with costs on the scale of legal practitioner and client. This is so for the reason that the mortgage bonds and the loan agreement make provision for costs at this scale and also because the noting of the appeal in this matter was solely for the purpose of delay.

---

**FRANK AJA**

REPRESENTATION

APPLICANT/RESPONDENT:

Du Pisani Legal Practitioners

RESPONDENTS/APPELLANTS:

Kadhila Amoomo Legal Practitioners