

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING
(PRACTICE DIRECTION 61)



MAIN DIVISION, WINDHOEK

Case Title: NEDBANK PLAINTIFF and GIFT KAVARI GODFRIEDINE DOLLA KAVARI DEFENDANT	NAMIBIA FIRST DEFENDANT SECOND	Case No: HC-MD-CIV-ACT-CON- 2023/03803
		Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE- PRESIDENT		Date of hearing: 19 MARCH 2024
		Delivered on: 9 APRIL 2024
Neutral Citation: <i>Nedbank Namibia v Kavari</i> (HC-MD-CIV-ACT-CON-2023/03803) [2024] NAHCMD 161 (9 APRIL 2024)		

IT IS ORDERED THAT:

1. Summary judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved for:
 - 1.1. Payment in the amount of N\$1 618 040,15.
 - 1.2. Compound interest calculated daily and capitalized monthly on amount of N\$1 618 040,15 at plaintiff's mortgage lending rate of interest from time to time,

currently at 18.40% calculated from 5 July 2023 to date of final payment.

1.3. Costs of suit on a scale as between attorney and client as agreed.

2. The matter is finalised and removed from the roll.

Reasons for the order:

Introduction

[1] This is a summary judgment application in which the plaintiff seeks the repayment of the loans it had advanced to the defendants and for an order that the defendant's immovable property be declared specially executable. The second defendant filed a consent to judgment on 24 January 2024.

[2] The parties are referred to as in the main action. The plaintiff was represented by Mr Tjitere, whereas the first defendant acted in person.

Background

[3] The plaintiff and the first and second defendants entered into five different written loan agreements as follows: The first agreement was entered into on 21 February 2008 for an amount of N\$785 000 with interest at the rate of 13.25 percent per annum. The second agreement was entered into on 14 October 2008 for an amount of N\$70 000 with interest on the amount at the rate of 13.50 percent per annum. The third agreement was entered into on 27 October 2008 for the sum of N\$100 000 with interest at the rate of 8.50 percent per annum. The fourth agreement was entered into on 8 April 2015 for the sum of N\$450 000 with interest at the rate of 9.25 percent per annum. The fifth agreement was entered into on 20 September 2016 for the sum of N\$220 000 with interest at the rate of 9.25 percent per annum.

[4] As security for the loan agreements, the defendants caused registration of first, second, third, fourth and fifth mortgage bonds over their immovable property being Erf 281 , Klein Kuppe, Windhoek, in favour of the plaintiff, numbered B1186/2008, B6557/2008, B1589/2015, B4846/2016 and B2674/2017.

[5] In addition to the continuing covering bonds registered over their immovable property, the defendants executed deeds of suretyship on 22 January 2008 and bound themselves jointly and severally as sureties and co-principal debtors *in solidum* for the repayment on demand of all or any sum of money due to the Nedbank.

[6] The defendants breached the agreements by failing to pay the monthly instalments and were in arrears in the amount of N\$153 337,15 as at 5 July 2023. As a result of the defendants' breach the plaintiff instituted proceedings against the defendants for the full outstanding balance in the amount of N\$1 618 040,15, including compounded interest calculated daily and capitalized monthly at Nedbank's mortgage lending rate of the interest which was at the time 18.40 percent per annum up to 5 July 2023. In terms of the agreement the certificate of balance owed and issued by the bank constitutes *prima facie* proof of the defendants' indebtedness to the plaintiff.

[7] On 17 August 2023 the plaintiff sued out summons against the defendants claiming payment of the sum of N\$1 618 040 15 August 2023. Thereafter the defendants filed their notice of intention defend on 31 October 2023. On 14 November 2023 the plaintiff informed the court of its intention to apply for summary judgment. The parties engaged each other in terms of rule 32(9) in an attempt to find an amicable solution to the dispute.

[8] Thereafter the plaintiff filed report in terms of rule 32(10) report in which the plaintiff reported that the second defendant has agreed to consent to judgment in terms of rule 62. In the consent document, the second defendant consented to all the relief sought by the plaintiff in the summons with the proviso that the orders would not be executed until June 2024 to allow the second defendant to pay off the total amount owed in monthly instalments of N\$10 000.

[9] It is necessary to point out at this juncture after the filing of the consent to judgment by the second defendant, the plaintiff did not apply to the managing judge for judgment as provided by rule 62 (2). Instead the plaintiff filed its application for summary judgment on 19 January 2024 seeking summary judgment against the Defendants in this action for:

1. Payment in the amount of N\$1 618,040.15.
2. Compound interest calculated daily and capitalized monthly on the amount of N\$1 618,040.15 at Plaintiff's mortgage lending rate of interest from time to time, currently at 18.40% calculated from 05 July

2023 to date of final payment;

3. An order Declaring the following property executable: CERTAIN Erf No 281 Kleine Kuppe SITUATE In the Municipality of Windhoek Registration Division "k" Khomas Region MEASURING 776 (Seven Hundred and Seventy-Six) square metres HELD By Deed of Transfer No. T 4701/2006 SUBJECT to such conditions as set out in the aforesaid Title Deed.
4. Costs of suit on a scale as between Attorney and own Client as agreed.
5. Further and/or alternative relief.'

[10] On 14 March 2024, the first defendant filed a document labelled 'founding affidavit' in response to the summary judgment application. In that document, the defendant requested the court to 'remove' his name from the claim. He contended that in terms of the divorced settlement agreement which was concluded between him and the second defendant they have agreed that the immovable property, being erf 281 Okondeka Street, Kleine Kuppe was to be transferred to the second defendant and thereafter the second defendant would become liable for the amount owed to the plaintiff in terms of the loan agreements. The settlement agreement which was attached to the affidavit was made an order of court on 18 May 2022.

[11] He pointed out in terms of divorce order, the property being erf 281 Okondeka Street in Kleine Kuppe was ordered by the court to be transferred into the name of the second defendant name. He claimed that he had fully paid and settled his loan account with the plaintiff.

Arguments

[12] Mr Tjitere, for the plaintiff, in his arguments before court, persisted that the first defendant is jointly and severally with the second defendant, liable to the plaintiff for the payment of the amount claimed in the summons and that his liability is premised on the deed of suretyship that was signed by him the (first defendant) whereby he bound himself jointly and severally with the second defendants for the debts all the debts owed to the plaintiff.

[13] The first defendant argued that he is not liable as he has already paid off what he owed to the plaintiff and that he relinquished his right of ownership in the said immovable property to the second defendant in terms of the divorce settlement agreement. The first defendant further, submitted that if the immovable property is to be declared executable, then such declaration may

only be made after June 2024 as the second defendant is in the process of selling the property. He further submitted that the second defendant only consented to judgment because she was forced by her legal representative.

[14] In reply, Mr Tjitere submitted that, the affidavit filed by the second defendant should be disregarded by the court due to the consent to judgment document that was filed by the first defendant.

[15] Having regard to the foregoing, the crisp issue for determination is whether or not the first defendant has demonstrated that he has a bona fide defence against the plaintiff's claim.

Applicable law

[16] According to *Herbstein & Van Winsen*¹ a bona fide defence is disclosed if the defendant swears to the defence, valid in law, in a manner that is not inherently or seriously unconvincing. In other words, the affidavit must set out facts, if proved at the trial, would constitute a defence to the plaintiff's action. Failure to allege an essential element of the defence may result in the summary judgment being granted.

[17] The test for summary judgment was laid out in *Maharaj v Barclays National Bank Ltd*² and confirmed in *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd*³ as follows:

'The court in *Maharaj* made it clear that the court is not called upon to decide factual disputes or express any view on the dispute. It is 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.'

Discussion

[18] Keeping in mind the legal principles outlined above, I proceed to consider whether the first defendant has demonstrated that he has a bona fide defence to the plaintiff's claim. It is common

¹ The Civil Practice of the Supreme Court of South Africa 4th Edition at page 442

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426.

³ *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* (SA 11 of 2017) [2019] NASC 6 (10 April 2019).

ground that the first defendant and the second defendant between 2008 and 2017 entered into five loan agreements in terms whereof they borrowed money from the plaintiff. As security for the repayment of such loans they mortgaged their immovable property being erf 281 Okondeka Street, Klein Kuppe. On 22 January 2008, the defendants signed a suretyship agreement in terms whereof they bound themselves, jointly and severally as surety and as co-principal debtors of each other, in *solidum* for the repayment to the plaintiff, on demand, of any sum of money due to the plaintiff in terms of the loans agreement.

[19] As mentioned earlier, the second defendant has signed a consent to judgment. It is only the first defendant who is currently opposing the granting of the summary judgment. The crux of his defence is that in terms of the divorce settlement agreement he has transferred his right in the immovable property to the second defendant. The first defendant does not, however, allege that the plaintiff was a party to the divorce settlement agreement; and that the plaintiff agreed to release him from his joint liability towards the plaintiff in terms of the loan agreements. To my mind, it is 'inherently or seriously unconvincing' that 'the plaintiff would have released the first defendant from his liability to it (the Bank) without any written proof. If such release existed, the first defendant would have attached to his opposing affidavit documentary proof indicating that his name has been removed or redacted from the mortgage bond in order to demonstrate the bona fide of his defence. For this reason alone, the first defendant's defence lacks the element of bona fide.

[20] Furthermore, failed to address the issue of suretyship, whereby he and the second defendant had signed jointly and severally as surety and co-principal debtors *in solidum* for the repayment of the amount borrowed from and owed to the plaintiff.

[21] In terms of clause 6.1 of the suretyship agreement the defendants had acknowledged that they would only be released from their obligations under the suretyship agreement upon a written notice from the plaintiff; that the plaintiff had acknowledged receipt of such request; and that the plaintiff has *inter alia* acknowledged that such suretyship has been terminated. It is not even the first defendant's case that the plaintiff has orally acknowledged, through its representative, that the suretyship agreement has been terminated. In this regard, it was held in *Paulus v Development Bank of Namibia Ltd*⁴, that 'where a litigant has bound himself or herself jointly and severally as surety and co-principal debtor in a written deed of suretyship, such a litigant cannot rely on a subsequent oral agreement to escape his or her obligations in terms of the suretyship

⁴ *Paulus v Development Bank of Namibia Ltd* (SA 23-2021) [2023] NASC (7 September 2023).

agreement.’

[22] The first respondent does not allege in his opposing affidavit, in order to demonstrate that he has a bona fide defence, that he has been released from his liability by the plaintiff in terms clause 6.1 of the suretyship agreement. In my judgment, this constitutes a further ground for holding that the first respondent failed to demonstrate that it has a bona fide defence against the plaintiff’s claim.

[23] As regards the first respondent’s allegation that the property has been transferred to the second defendant, he failed to provide proof of such transfer.

[24] In respect of the first defendant’s complaint that the ‘outstanding home loan balance contained in annexure K1 is incorrect’ the loan agreement provides that the defendants have ‘agreed that a certificate signed by a manager or authorised official of the Bank, stating that the total amount owing to or claimable by the bank in terms of the mortgage bond... ‘shall be conclusive evidence of such facts for all purpose and that the onus shall rest on me/us to prove that such facts are not correct’. In this connection the first defendant has failed to prove that the amount claimed is not correct.

[25] Finally, the first defendant’s purported defence is, in my view, undermined or compromised by the second defendant’s (as surety and co-principal debtor) consent to judgment.

[26] It is necessary to stress that this summary judgment application has nothing to do with the judgment by consent in terms of rule 62. If so advised, the plaintiff has not applied to the managing judge in terms of rule 62(2) for a judgment in terms of the consent made by the second defendant.

[27] In the result and having regard to the foregoing considerations, findings and conclusion I am of the considered view that the first defendant has failed to demonstrate that he has a bona fide defence against the plaintiff’s claim.

[28] As regards the application to have the property declared executable there is an affidavit by the second defendant that the property is her primary home accordingly an inquiry in terms of rule 108 needs to be conducted to determine whether the property is indeed a primary home and what less drastic measure are available which may save the primary home being declared executable.

In the consent to judgment document which appeared to have been accepted by the plaintiff, there is a condition that the property would not be executed until 30 June 2024 to allow the second defendant to pay off the outstanding amount in minimum monthly instalments of N\$10 000. In view thereof the court is not prepared to grant an order declaring the property specially executable.

Conclusion

[29] Those are my reasons for the order made above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
PLAINTIFF	FIRST DEFENDANT
M TJITERE <i>of</i> Dr Weder, Kauta & Hoveka Inc., Windhoek	In Person