REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2021/00296

In the matter between:

STANDARD BANK NAMIBIA LIMITED **PLAINTIFF**

And

A - Z INVESTMENTS HOLDINGS
(PROPRIETARY) LIMITED **1st DEFENDANT**
TOIVO ERASTUS SHIIMI **2nd DEFENDANT**

Neutral Citation: *Standard Bank Namibia Limited vs A - Z Investments Holdings (Proprietary) Limited* (HC-MD-CIV-ACT-CON-2021/00296) [2021] NAHCMD 3 (02 December 2021)

Coram: SIBEYA J
Heard: **10 November 2020**
Delivered: **02 December 2021**
Reasons: **14 January 2022**

Flynote: Practice – Summary Judgment – Requirements restated — Defence of impossibility of performance raised on the basis of the impact of the COVID-19 Pandemic – Court found that incapability is not impossibility – The effect of COVID-19

on businesses cannot be ignored but to constitute an impossibility, the circumstances of each case must assessed – In this matter, the defence of impossibility of performance cannot be sustained.

Summary: The court was tasked with determining the question whether the COVID-19 pandemic may be used as a reason for a party not to perform as per a contractual obligation, referring to the pandemic as a supervening impossibility.

The plaintiff's action is based on a written home loan agreement where the plaintiff allege that the first defendant breached the agreement by defaulting to pay the monthly instalments for the period March 2019 to October 2020. The defendants opposed the plaintiff's claim and summary judgment application on the premise that the alleged breach of contract was not merely due to wilfulness and ignorance of the loan agreement concluded by the parties, but was caused by the impossibility of the defendants to perform due to supervening impossibility of the COVID-19 Pandemic. The defendants further argued in the opposing affidavit that due to the adverse effect of the national lockdown Regulations on economic activities at the time and the business operations of the first defendant, which was determined as non-essential, it made it impossible to generate an income and prevented compliance with the agreement.

The plaintiff's case was that the defendants' inability to pay the debt due to COVID-19 is not a defence that is good in law which can absolve them from their contractual obligations and does not constitute a triable defence to the claim.

Held – The mortgage loan agreement between the parties, contains no provisions for the occurrence of force majeure, therefore, the requirements to be met by the defendants to raise a successful defence lies in the stringent provisions of the common-law doctrine of supervening impossibility of performance.

Held – The mortgage loan agreement was not conditioned subject to the defendants' business generating an income or not and therefore the sentiments expressed in

Nedbank Limited v Groenewald Famille Trust & others[1] that the pandemic cannot be loosely used as a shield to deprive creditors of what they are rightfully entitled to find support. As unfortunate as the pandemic has made economic activities very difficult in all sectors, it would lead to chaos to generally allow debtors to default on their contractual obligations wherein clear benefits were derived from, but still the effect COVID-19 to the enforcement of an agreement must be assessed based on the facts of each case.

Held further – To use the pandemic as an excuse to refuse to service loans in my view does not amount to a supervening impossibility. Personal incapability does not manifest into an impossibility of performance.

ORDER

The application for summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved, on the following terms:

a) Payment in the amount of N$436,540.26;
b) Compound interest calculated daily and capitalised monthly on the amount of N$436,540.26 at the plaintiff's mortgage lending rate of interest from time to time, calculated from March 2020 to date of final payment;
c) An order declaring the following property executable:
    a. CERTAIN: Erf 3727 (A Portion of Erf 1367) Windhoek
    b. SITUATE: In THE Municipality of Windhoek Registration Division "K" Khomas Region.
    c. MEASURING: 882 (Eight Hundred and Eighty-Two) Square Metres 9
    d. HELD BY: Deed of Transfer No. T3494/2007

[1] *Nedbank Limited v Groenewald Famille Trust & others* (3809/2020) [2021] ZAFSHC 150 (2 June 2021).

e. SUBJECT: to such conditions as set out in the aforesaid Title Deed

d) Costs of suit on an attorney and client scale.

JUDGMENT

Sibeya J:

Introduction

[1] Before this court is the question whether the COVID-19 pandemic may be used as a reason for a party not to perform as per a contractual obligation, clothing the pandemic as a supervening impossibility.

The parties and representation

[2] The plaintiff is Standard Bank Namibia Limited, a commercial bank duly registered in terms of the applicable laws of the Republic of Namibia (the Republic), with its principal place of business at No. 1371, 1 Chassie Street, Kleinne Kuppe, Windhoek.

[3] The first defendant is A-Z Investments Holdings (Proprietary) Limited, a company duly registered according to the company laws of the Republic with its chosen *domicilium citandi et executandi* at 3727, (A portion of Erf 1367), Windhoek.

[4] The second defendant is Mr Toivo Erastus Shiimi, an adult male, with the chosen *domicilium citandi et executandi* at 3727, (A portion of Erf 1367), Windhoek.

[5] The plaintiff is represented by Ms Paulus while the defendants are represented by Mr Amoomo.

Background

[6] In this matter, the plaintiff's action is based on a written home loan agreement where the plaintiff allege that the first defendant breached the agreement by defaulting to pay the monthly instalments for the period March 2019 to October 2020. The said breach by the first defendant entitled the plaintiff to the full outstanding amount of N$436,540.26. The claim against the second defendant is premised on the Deed of Suretyship where the second defendant bound himself for the debt of the first defendant to the plaintiff. As a result, the plaintiff seeks the following relief against the first and second defendants:

a) Payment in the amount of N$436,540.26;
b) Compound interest calculated daily and capitalised monthly on the amount of N$436,540.26 at the plaintiff's mortgage lending rate of interest from time to time, calculated from March 2020 to date of final payment;
c) An order declaring the following property executable:

1. CERTAIN: Erf 3727 (A Portion of Erf 1367) Windhoek SITUATE: In THE Municipality of Windhoek Registration Division "K" Khomas Region.

2. MEASURING: 882 (Eight Hundred and Eighty-Two) Square Metres 9

3. HELD BY: Deed of Transfer No. T3494/2007

4. SUBJECT: to such conditions as set out in the aforesaid Title Deed

d. Costs of suit.

[7] The defendants opposed the plaintiff's claim and summary judgment application on the basis that the breach of contract as alleged was not merely due to wilfulness and ignorance of the loan agreement as entered into by the parties, but was occasioned by the impossibility of the first defendant to perform due to supervening impossibility of the COVID-19 Pandemic. The defendants further argued in the opposing affidavit that due to the adverse effect of the national lockdown Regulations on economic activities at the time and the business operations of the defendants, which was determined as non-essential, it made it impossible to generate an income. This prevented compliance with the agreement, the defendants stated.

[8] The plaintiff, on the other hand, submitted that the defendants' inability to pay the debt due to COVID-19 is not a defence that is good in law and capable to absolve them from their contractual obligations. The plaintiff further submitted that just as impecuniosity can never constitute impossibility, so the inevitable results of impoverishment cannot constitute impossibility. The defendants could have avoided such result by remaining in a position to pay their debts, even if it meant exploring other avenues to generate income temporarily, plaintiff stated. Plaintiff conclude that the alleged repercussions suffered by the first defendant due to alleged reduced operations does not raise a triable defence and prayed for summary judgment as claimed.

[9] The defendants further raised the defence of compromise in their opposing affidavit which they abandoned at the commencement of the hearing. It was further contended by the defendants in their opposing affidavit and heads of argument that first defendant paid an amount of N$12,000 on 23 July 2021 and N$12,000 on 17 August 2021 which amount should accordingly reduce the outstanding amount from N$436,540.26. Ms Paulus submitted that the N$24,000 paid will be deducted from the amount due. This court is mindful of the fact that the amount claimed is the debt due as at October 2020 together with interest and costs. The amount of N$24,000 should thus be deducted from the total amount owed plus interest and costs if the defendants are found liable for the plaintiff's claim.

The Legal Principles

[10] For the plaintiff to be successful in its application, it has to satisfy the requirements set out in Rule 60(1) and (2) of the Rules of Court.

[11] Rule 60(1) and (2) provide:

'(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is –

(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of a specified movable property; or
(d) for ejectment.

(2) The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts –

(a) verifying the cause of action and the amount, if any, claimed; and
(b) stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

(3) If the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit and the notice of application must state that the application will be set down for hearing on a date fixed in the case plan order.'

[12] The law reports are replete with authorities on summary judgment applications. Summary judgments are drastic remedies available to a plaintiff where no *bona fide* defence to the claim exists. Mainga JA in *Kukuri v Social Security Commission*[2] discussed the drastic remedy of summary judgments and quoted with approval the following passages by Corbett JA in *Maharaj v Barclays National Bank Ltd:*[3]

[2] *Kukuri v Social Security Commission* Case No. SA 17/2015, Unreported judgment of the Supreme Court delivered on 29 November 2016.
[3] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G.

‘“the grant of the remedy is based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law.” The learned judge continued at 426A-E to say the following:

“Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the grounds of his defence and the material facts upon which it is founded, and

(b) whether on the facts so disclosed the defendant 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 on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. (See generally, *Herb Dyers (Pty) Ltd v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N); *Arend and Another v Astra Furnishers (Pty) Ltd*, *supra* at pp.303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine it by the standards of pleading. (See *Estate Potgieter v Elliot*, 1948 (1) SA 1084 (C) at p 1087*; Herb Dyers* case, supra at p 32.)”’

[13] A defendant who intend to oppose summary judgment has to invoke the

procedure set out in Rule 60(5) which provides the following steps to follow, namely that:

> (a) he must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given or
>
> (b) he may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may by leave of court be supplemented by oral evidence) that he has a bona fide defence to the claim on which summary judgment is sought or he has a bona fide counterclaim against the plaintiff.

[14] The affidavit must disclose the nature of defence and the material facts relied upon. The defendant need not deal exhaustively with the facts and evidence relied upon to substantiate those facts but he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to determine whether the affidavit discloses a bona fide defence or not.

[15] On the merits the defendants case stands or falls on the defence of supervening impossibility raised.

[16] In *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*,[4] Scott JA said the following about the defence:

> 'As a general rule impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the

[4] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), para 28.

impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving impossibility will lie upon the defendant.'

[17] LAWSA Vol 5(1) First Reissue para 160 states:

'The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.' [5]

[18] Flemming DJP in *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*[6] further that held:

'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.

Application of law to the facts

[19] A perusal of the mortgage loan agreement between the parties, reveal no provisions for the occurrence of force majeure, therefore, the requirements the defendants must meet in order to realise their defence lies in the stringent provisions of the common-law doctrine of supervening impossibility of performance.

[20] The mortgage loan agreement was not conditioned subject to the defendants' business generating an income or not and therefore I hold the same sentiments as was expressed in *Nedbank Limited v Groenewald Famille Trust & others*[7] that the pandemic cannot be loosely used as a shield to deprive creditors of what they are rightfully entitled to. As unfortunate as the pandemic has made economic activities very difficult in all

[5] [D 45 1 137 5 and see *Frye's (Pty) Ltd v Ries* 1957 3 SA 575 (A)]'.
[6] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2000 (4) SA 191 (W).
[7] *Nedbank Limited v Groenewald Famille Trust & others* (3809/2020) [2021] ZAFSHC 150 (2 June 2021).

sectors, it would lead to chaos to, generally, allow debtors to default on their contractual obligations wherein clear benefits were derived from. To use the pandemic mainly as an excuse to refuse to service loans, in my view, does not amount to a supervening impossibility. Personal incapability does not manifest into an impossibility of performance.

[21] The effect of the COVID-19 pandemic on a particular business activity or agreement between the parties should be assessed on the premise of the established facts of a particular case. The devastating effect of COVID-19 on businesses cannot be downplayed but for it to constitute a supervening impossibility the particular facts of the case must be carefully assessed. In *casu* and for reasons stated above, I find that the claim of the effect of COVID-19 does not constitute a supervening impossibility.

Conclusion

[22] It follows therefore that the defence raised by the defendants of supervening impossibility does not constitute a triable defence capable of warding off the present application for summary judgment.

Declaration of immovable property executable

[23] The first defendant secured its indebtedness to the plaintiff with a mortgage bond registered over Erf 3727 (A portion of Erf 136) Windhoek for the amount owed by the first defendant to plaintiff. The plaintiff seeks an order to have this property declared executable. The defendants appear to dispute the claim.

[24] It is stated in the opposing affidavit that the said immovable property is the defendants' primary residence. recover payment. The first defendant is a juristic person. The second defendant who is a natural person states in the opposing affidavit that he resides at "No 7 Pettenkofer Street, Windhoek West, Windhoek", clearly distinctive of the property sought to be declared executable.

[25] This court will therefor declare the immovable property, against which the loan was secured, specifically executable.

Costs

[26] No reasons were placed before this court why the well-established principle that costs should follow the event should not be endorsed in this matter. The court could also not find compelling reasons to depart from such principle.

Order

[27] In the result, I make the following Order against the defendants:

The application for summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved, on the following terms:

a) Payment in the amount of N$436,540.26;
b) Compound interest calculated daily and capitalised monthly on the amount of N$436,540.26 at the plaintiff's mortgage lending rate of interest from time to time, calculated from March 2020 to date of final payment;
c) An order declaring the following property executable:
    a. CERTAIN: Erf 3727 (A Portion of Erf 1367) Windhoek
    b. SITUATE: In THE Municipality of Windhoek Registration Division "K" Khomas Region.
    c. MEASURING: 882 (Eight Hundred and Eighty-Two) Square Metres 9
    d. HELD BY: Deed of Transfer No. T3494/2007
    e. SUBJECT: to such conditions as set out in the aforesaid Title Deed
d) Costs of suit on an attorney and client scale.

_____

O S SIBEYA

Judge

APPEARANCES

PLAINTIFF:	S PAULUS
	Dr Weder, Kauta & Hoveka Inc.
DEFENDANTS:	K AMOOMO
	Kadhila Amoomo Legal Practitioners