

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

RULING

Case Title: Standard Bank Namibia LTD v Ngenonye Maria Tayilombwele Ngolo	Case No.: HC-NLD-CIV-ACT-CON-2020/00274
	Division of Court: Northern Local Division
	Heard on: 17 November 2023
Heard before: Honourable Mr. Justice Munsu, J	Delivered on: 08 December 2023.
Neutral citation: <i>Standard Bank Namibia Ltd v Ngenonye Maria Tayilombwele Ngolo</i> (HC-NLD-CIV-ACT-CON-2020/000274) [2023] NAHCNLD 141 (08 December 2023)	
The order: Summary Judgment is granted in the following terms: <ol style="list-style-type: none">1. Payment in the amount of N\$ 584 792.46.2. Compound interest calculated daily and capitalized monthly on the amount of N\$ N\$ 584 792.46 at the rate of 12.25% per year as from 11 October 2019 until the date of	

final payment.

3. The following immovable property is declared specially executable:

(a) CERTAIN Erf No.2311 Oshakati north
(Extension No.4)

SITUATE In the town of Oshakati
Registration Division "A"
Oshana Region

MEASURING 667 (Six six seven) Square Meters

SUBJECT TO Such conditions as set out in the aforesaid title deed. (herein after referred to as the property)

4. Costs of suit on an attorney and own client scale.

Reasons for the order:

MUNSU J:

Introduction

[1] This is an opposed application for summary judgment. The plaintiff claims payment in the amount of N\$584 792.46 and interest on the said amount, at the rate of 12.25% per year, calculated daily and capitalised monthly from date 11 October 2019 until the date of final payment. The Plaintiff further prays for an order declaring the following immovable property specially executable:

(a) CERTAIN Erf No.2311 Oshakati north
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SITUATE In the town of Oshakati
Registration Division "A"
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SUBJECT TO Such conditions as set out in the aforesaid title deed. (herein after referred to as the property)

In terms of rule 108 of this court rules and costs on a higher scale as agreed.

The parties

[2] The plaintiff is Standard Bank Namibia Limited, a commercial bank and a public company with limited liability duly registered and incorporated in terms of the company laws of this Republic. Its place of business is situated at Standard Bank Center, 5th Floor, Corner of Werner List Street and Post Street, Windhoek, Republic of Namibia.

[3] The defendant is Ngenonye Maria Tayilombwele Ngolo, an adult female and resident of Oshakati.

Background

[4] The plaintiff alleges that in November 2016, the parties entered into a home loan agreement in the amount of N\$ 540 399.00. It was further agreed that a continuing covering mortgage bond of the property would be passed in favour of the plaintiff as security for such facility.

[5] The plaintiff further alleges that the defendant received an additional sum not exceeding N\$ 135 100.00, in respect of the interest on any amounts that would be secured by the bond. It was a further term of agreement that the loan would be repayable in monthly instalments of N\$ 6 235.19, which would include the capital amount and interest.

[6] The plaintiff claims that it complied with all its obligations and advanced the loan amount to the defendant in full and the defendant did not comply with her obligations in terms of the agreement in that she failed to pay the amounts due on time. It records that the last

regular instalment made by the defendant was on 29 March 2019. Due to the outstanding arrears, the plaintiff asserts that the entire balance, amounting to N\$584,792.46, is now due and payable. The plaintiff further alleges that this breach of the agreement has entitled the plaintiff to cancel the agreement, which it did.

[7] After the defendant filed her notice of intention to defend, the plaintiff filed an application for summary judgment, which is opposed by the defendant.

The application

[8] Mr. Derick William Colmer, Manager: Specialised Recoveries and Rehabilitation of the plaintiff deposed to the founding affidavit. He avers that settlement attempts in the matter failed. This is so because the offer received by the defendant would not satisfy the outstanding balance, interest accrued and the monthly instalments on the loan account.

The opposition

[9] The defendant filed an affidavit resisting summary judgment. She states in paragraph 2 of the affidavit that:

“2.2.1 I lost my permanent employment from SME Bank on 11th July 2017.

1.2.2 I have been working at Letshego Bank as an agent, and I get paid on commission (commission based salary) and this salary is not consistent.

1.2.3 The last payment I made on the house in question which is situated at ERF 2311, Ehenye, Oshakati, was in July 2022.

1.2.4 Due to my inconsistent salary I have made an offer to the Plaintiff to pay an amount of N\$9600, per month to cover the arrears, offer (sic) was made on the 23rd May 2023. Which offer was rejected by the Plaintiff.”

[10] The defendant avers that the purchase of the property in question commenced in 2016, and was finalised in November 2018. She lost her employment at SME bank in 2017 and has since been unable to get permanent employment.

[11] The defendant goes on to say that although the plaintiff claims that she owe N\$ 708 702.47 in total, the loan she took out was for N\$ 542 265. She claims that she would not be in this situation if the plaintiff had begun deducting its monthly payment earlier.

[12] The defendant adds that she hasn't been idle, that she has made every effort to make payments towards the loan facility, that she has offered to pay what she can afford, and that she would never want to lose her property.

The law

[13] In *Maharaj v Barclays Bank Ltd*¹, Corbett JA stated the applicable law, which has been approved in this jurisdiction², as follows:

'Accordingly, one of the ways in which a 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 are 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 the issues or to determine whether or not the probabilities lie 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 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 both *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 evidence relied upon to substantiate them, he must at least disclose his defence with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.'

[14] The question to be determined in this regard, is whether the defendant set out a

¹ *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 at 426 A-D. See also *Kukuri v Social Security Commission* SA 17/2015 [2016] NASC 29 November 2016.

² See *Kukuri v Social Security Commission* (SA 17-2015) [2016] NASC (29 November 2016).

defence that is *bona fide* and good in law, either as to the whole or part of the claim.

Discussion

[15] The Plaintiff in its arguments makes reference to the Supreme Court matter of *Radial Truss (Pty) Ltd Aquatian (Pty) Ltd*³ where the court states that, 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 defence and the material facts upon which that defence is founded. In the second instance the court is to determine whether or not on the facts set out by the defendant that it appears to have 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 is to refuse summary judgment.

[16] The defendant, in her affidavit, outlined her personal circumstances regarding the loss of employment and her efforts to ensure the repayment of the loan facility. I find that, this does not constitute a sufficient defence to dispel an application of this nature. Her assertions are not accompanied by a defence. Therefore, I am of the considered view that summary judgment is appropriate and must be granted.

Rule 108 Application

[17] The plaintiff seeks, among other prayers, a declaration that the immovable property be specifically executable under Rule 108(1)(b). The plaintiff has duly provided the defendant with notice in the particulars of claim, allowing the defendant the opportunity to present reasons to the court as to why an order of such nature should not be granted.

[18] In arguments, the defendant made reference to *Standard Bank of Namibia Limited v Goagoseb*.⁴ However, in the said matter, defendant debtor had been making regular

³ *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* (SA11-2017) [2019] NASC (10 April 2019).

⁴ *Standard Bank Namibia Limited v Goagoseb* (HC-MD-CIV-ACT-CON-2022/02469) [2023] NAHCMD 146 (27 March 2023).

payments to the plaintiff consistently and without delay. The issue was only with the arrears, which amount was too low. The debtor was unable to secure additional finance due to being listed on ITC. In the circumstances, the court found sufficient evidence to show that the plaintiff had other viable and less drastic measures available. One such less drastic measure was restructuring the debt.

[19] The court went on to refer to the Supreme Court decision in *Kisilipile and Another v First National Bank of Namibia Limited* wherein the court held that:

[18] In Namibia, judicial oversight takes the following form when it comes to declaring a primary home specially executable. If a property is a primary home, the court must be satisfied that there are no less drastic alternatives to a sale in execution. The judgment debtor bears the evidential burden. He or she should preferably lay the relevant information before court on affidavit especially if assisted by a legal practitioner, either in resisting default judgment or summary judgment. The failure to do so however does not relieve the court of its obligation to inquire into the availability of less drastic alternatives.

[19] The debtor must be invited to present alternatives that the court should consider to avoid a sale in execution but bearing in mind that the credit giver has a right to satisfaction of the bargain. The alternatives must be viable in that it must not amount to defeating the commercial interest of the creditor by in effect amounting to non-payment and stringing the creditor along until someday the debtor has the means to pay the debt. Should the circumstances justify, the court must stand the matter down or postpone to a date suitable to itself and the parties to conduct the inquiry. A failure to conduct the inquiry is a reversible misdirection...

[20] Judicial oversight exists to ensure that debtors are not made homeless unnecessarily and that the sale in execution of a primary home is a last resort. The court is required to take into account "all the relevant circumstances"....'

[20] Unlike in *Standard Bank*, the defendant in this matter has not made consistent repayments, the last having been recorded since July 2022. This is despite the defendant

having made an undertaking to pay N\$ 9600 per month. It remains unclear how she would have managed to afford this payment even if the proposal had been accepted.

[21] At the hearing, the defendant informed the court that she has secured a commission-paying contract job with Momentum Metropolitan, set to commence on 01 December 2023. She will earn N\$ 8 500 monthly as a trainee for six months, after which she will become a financial advisor with earnings dependent on work done. Presently, there are no viable alternatives presented for consideration. There is a significant arrear amount that has remained outstanding for an extended period.

Costs

[22] The court finds no reason to deviate from the general rule regarding costs. Consequently, it is determined that costs should follow the cause. Notably, the parties had agreed to costs on an elevated scale.

Order

[23] It is ordered that summary judgment is granted in favour of the plaintiff against the defendant for:

1. Payment in the amount of N\$ 584 792.46
2. Compound interest calculated daily and capitalized monthly on the amount of N\$ N\$ 584 792.46 at the rate of 12.25% per year as from 11 October 2019 until the date of final payment.
3. The following immovable property is declared specially executable:

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Judge	Comments:
MUNSU, J	NONE
Plaintiff: S Edegware Instructed by Angula & Co, Oshakati	Defendant: In Person