REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: I 1404/2014

BANK OF WINDHOEK LIMITED PLAINTIFF

And

NOSIB FARMING CC FIRST DEFENDANT

WAYNE LIEBENBERG SECOND DEFENDANT

PIETER JACOBUS LIEBENBERG THIRD DEFENDANT

PATRICK LIEBENBERG FOURTH DEFENDANT

ADRICO INVESTMENT NO 31 CC FIFTH DEFENDANT

Neutral citation: Bank Windhoek (Pty) Ltd v Nosib Farming CC (I 1404/2014) [2015] NAHCMD 89 (15 April 2015)

CORAM: MASUKU A.J.

Heard: 18 March 2015

Delivered: 15 April 2015

Flynote: In an application for summary judgment, the defendants did not file an opposing affidavit and withdrew their notice opposing summary judgment. The question was whether the provisions of Rule 32(9) and (10) apply. Held that in the peculiar circumstances of this case, the defendant not having filed papers in opposition and having withdrawn opposition, rule 32(9) and (10) did not apply. Summary judgment was granted as prayed.

JUDGMENT

MASUKU, AJ.:

1. After listening to argument presented by Mr. P. Barnard on behalf of the plaintiff on 18 March 2013, I issued an order granting summary judgment to plaintiff in the following terms and stated that reasons would follow:

> 'CLAM 1 AGAINST THE 1ST, 2ND AND 3RD DEFENDANTS THE ONE PAYING THE OTHER TO BE ABSOLVED
>
> 1.1 Payment in the amount of N$659 482.02;
>
> 1.2 Compound interest, calculated daily and capitalized monthly on the amount of N$659 482.02 at the plaintiff's prime rate of interest from time to time, currently at the rate of 9,25% per year plus 3% from 23 May 2014 to date of final payment;
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> CLAIM 2 AGAINST THE 1ST, 2ND, 3RD AND FIFTH DEFENDANTS JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED
>
> 1.3 Payment in the amount of N$254 735.93;

1.4 Compound interest calculated daily and capitalized monthly on the amount of N$254 735.93 at the plaintiff's mortgage lending rate of interest from time to time, currently at the rate of 9.25% per year calculated from 23 May 2014 to date of full payment.

EXCUSSION – AGAINST FIRST DEFENDANT

1.5 An order in terms of which the following property is hereby declared executable:

Certain: Remaining Extent of the Farm Nosib Block III No. 655

Situated: Registration Division "B", Oshikoto Region

Measuring: 7655,2630 (Seven Six Five Five comma Two Six Three Nil) Hectares

Held By: under Deed of Transfer No.T 559/2001; and

1.6 Costs of suit on a scale between attorney and own client, as agreed.'

2. The reasons promised on that day follow below and these are they:

3. By combined summons dated 18 June 2014, the plaintiff instituted action against the all the above named defendants claiming payment of the amount of N$659 482,02 on claim 1 at the plaintiff's prime rate of interest from time to time, currently at 9.25% per year plus 3% from 23 May 2014 to date of final payment; payment of the amount of N$254 735,93 interest thereon at the lending rate from time to time, currently calculated at 9.25% per year plus 3% calculated from 23 May 2014 to date of final payment on claim 2; and an order declaring the property described in paragraph 1.5 above specially executable.

4. It is imperative to mention quite early in the judgment that the second to fourth defendants were cited in their capacities as sureties and co-principal debtors with the first defendant for the due and proper fulfilment by the first defendant of its obligations to the plaintiff for the amount claimed, interest, commission, legal costs, stamps and other necessary and usual charges and expenses which they each signed on 6 December 2000 in Grootfontein. It is important to also point out that the 1st and 3rd defendants also signed a surety ship agreement in Grootfontein on the same date making common

cause as it were with the debts of the 5th defendant to the plaintiff in an unlimited amount.

5. On 9 September 2014, the defendants entered an appearance to defend the claims. The plaintiff thereafter, by notice dated 3 November 2014, which application was not opposed, applied for and amended its particulars of claim by deleting the totals in the various claims, namely N$659 482,02 on claim 1; N$254 735,93 on claim 2. There was no change regarding the particulars of the property liable to be declared executable. The matter thus became ripe for judicial case management once the notice to defend was entered. By notice dated 18 November 2014, the plaintiff filed an application for summary judgment, which application was opposed vide a notice to oppose filed on behalf of all the defendants dated 24 November 2014.

6. According to rule 60 (1), (a) to (d), the claim in respect of which summary judgment is sought must be predicated on a liquid document; for a liquidated amount of money; delivery of specified movable property or for ejectment. The claim may include interest and costs in respect of the above named variety of claims. A reading of the particulars of claim suggest inexorably that the present claims are competent to be moved in terms of the summary judgment rule as they represent liquidated amounts, interest and costs.

7. I therefor find that this was a proper case in which to launch an application for summary judgment. A perusal of the affidavit filed in support of the application for summary judgment is also procedurally in order and makes all the necessary allegations required by the rules when applications of this nature are moved.

8. Rule 60 (5) stipulates what a defendant may do on the hearing of the summary judgment application. It would appear that two main courses are open to the defendant. First, the defendant may give security to the plaintiff to the satisfaction of the registrar for any judgment, including interest and costs.[1] Second, the defendant may satisfy the

[1] Rule 60 (5) (a).

court by filing an affidavit before 12h00 on the court day but one before the day on which the application is to be heard.[2] In the alternative to the latter, the defendant may, with the leave of court, adduce oral evidence himself or herself, or have some other person to swear positively to the fact that he or she has a *bona fide* defence to the action. What is critical is that in either case, the affidavit or the oral evidence adduced should fully disclose the nature and grounds of the defence and should also state material facts relied upon.[3]

9. A reading of the papers filed of record shows indubitably that the defendant in this case did not put up any security for the claim nor did they file opposing affidavits within the time stipulated. Furthermore, they did not request to have oral evidence led in order to satisfy the court that they have a *bona fide* defence to the claim. According to the rules,[4] where a "defendant does not find security or satisfy the court as provided in subrule (5), the court may enter summary judgment for the plaintiff".

10. It is clear that the court has a discretion in these cases, hence the lawgiver chose to use the word "may" in the above-quoted subrule. It is my view that the court should also look at the papers filed carefully and satisfy itself that they are technically correct and that all the relevant provisions of the rule have been fully complied with. It is in my view within the court's powers to refuse to grant an application for summary judgment where the applicant has failed to comply with some provision of the rule and this may be so even if the defendant has failed to put up security or to satisfy the court that it has a *bona fide* defence to the claim. The court, in my view, should be even more circumspect in granting summary judgment when the defendant has fallen by the wayside as it were by failing to put up security or show that it has a *bona fide* defence to the claim as stated above. In that case, it is my view that the court should ensure that every procedural requirement is fully met and that granting judgment is eminently correct and not proceed to grant summary judgment merely because the defendant is not before court.

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[2] Rule 60 (5) (b) (i).
[3] Rule 60 (5) (b)
[4] Rule 60 (7)

11. At the hearing of the matter on 18 March 2014, Mr. Barnard, learned counsel for the plaintiff drew the court's attention to a notice filed by Ms. Botes from Koep and Partners, learned counsel for the defendants, to the effect that the defendants had filed a notice withdrawing their opposition to the matter. The said notice is dated 17 March 2014 and is signed by a representative of the said law firm.

12. It then appears to me that there are two principal reasons why this court was entitled to grant summary judgment, if satisfied that the papers are technically in order. First, as indicated above, the defendants did not comply with the provisions of rule 60 (5), discussed above. Secondly, the filing of the notice withdrawing the opposition to the grant of a summary judgment, placed the matter beyond doubt that the defendants were not opposing the grant of the summary judgment and that in a sense, their failure or neglect to comply with the provisions of rule 60 (5) are consistent with their non-opposition to the granting of summary judgment.

13. The learned author Van Niekerk *et al*[5] state the following:

> 'Should the defendant neither deliver an opposing affidavit nor avail himself of any of the other avenues to avoid summary judgment and, furthermore, fails to appear at the hearing of the application, he will be in default and summary judgment may, for that reason, be granted against him.'

This is the position in which the court found itself in this matter, of course taking into account the fact that the defendant filed a notice withdrawing its opposition, which ineluctably signified that the summary judgment was no longer opposed, considering as well that the defendant never sought in any event to satisfy the court about its defence as stated in the rules of court.

14. Another twist to the tale was that Koep and Partners also filed a notice of withdrawal as attorneys of record for the defendants in the matter and the notice is dated 18 March 2015. I am of the view that in the peculiar circumstances of the case,

[5] Summary Judgment: A practical Guide, Lexis Nexis, 2003 at page 11-10.

there was no viable reason not to grant judgment as there was non-compliance with rule 60 (5) by the defendants and in any event, their attorneys, on instructions, filed a notice of non-opposition to the summary judgment. It was clear to me that not only did the defendants not have a defence to the claim but they positively showed that by filing the notice of non-opposition.

15. There was therefore, in my view, no tangible reason to starve the plaintiff of enjoying the fruits of its judgment any longer, notwithstanding the filing of the notice of withdrawal by the defendants' attorneys. The notice of withdrawal as attorneys of record was filed after the withdrawal of the notice of opposition to the summary judgment. In the circumstances, it becomes clear that when the notice to withdraw the opposition was filed, Koep and Partners were still the attorneys of record for the defendants and it can be assumed that they had the mandate to file the notice of non-opposition and that they did so on instructions.

16. Mr. Barnard, learned counsel for the plaintiff than indicated that the matter had been settled with the fourth defendant and that whatever judgment is issued should exclude the fourth defendant. He however drew the court's attention to a judgment by Parker AJ in *Irvine Mukata v Lukas Appolus*.[6] Mr. Barnard indicated that the said judgment held that summary judgment applications are interlocutory and therefore that the provisions of rule 32 (9), (10) and (11), which are peremptory, apply to summary judgment as well. He indicated that he with respect, did not agree with the classification of summary judgment as interlocutory so as to have it being subjected to the application of the provisions of rule 32 aforesaid.

17. In view of the implications of this judgment and the fact that Mr. Barnard indicated that the case had come to his attention very late, I requested him to prepare brief heads of argument to assist the court in dealing with the matter, particularly in

[6] Case No. I 3396/2014

deciding whether rule 32 applies to summary judgment. I am grateful to Mr. Barnard for his assiduousness in preparing helpful heads of argument and for his ethical behavior in unilaterally bringing to the attention of the court a judgment prejudicial to his client's interests. This is why the legal profession is referred to as the noble and honourable profession. Mr. Barnard's good example in this regard, must be emulated.

18. In the judgment, Parker AJ said the following:[7]

> '[5] Rule 32 contemplates two types of proceedings, namely, first, applications for directions in respect of interlocutory applications (subrules (1), (4), (5), (6), (7) and (8); and, second, interlocutory applications (subrules (2), (3), and (11). Subrules (9) and (10) are common to applications for directions in respect of interlocutory applications and interlocutory applications. Thus, the clause "In relation to any proceeding referred to in this rule (i.e. rule 32) in subrule (9)" and the clause "The party bringing any proceeding referred to in this rule (i.e. rule 32" in subrule (10) refer to both applications for directions and interlocutory applications; and so, *pace* Ms. Shifotoka, rule 32 (9) and (10) apply to these two forms of proceedings. And I accept Mr. Jacob's submission that a summary judgment application is an interlocutory proceeding. See Andries Charl Cilliers, *et al Herbstein and Van Winsen: The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5 ed, Vol 2, p1204.*
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> [6] It is undisputed that the plaintiff did not comply with rule 32 (9) and (10) of the rules. Considering the use of the words "must" in rule 32 (9) and (10) and the intention of the rule maker as set out in rule 1 (2) concerning the overriding objective.

[7] Paragraphs [5] and [6]

19. I am of the view that it is not necessary, in the instant matter, to consider the implications of judgment of Parker AJ on the current case. I say so for the reason that this application for summary judgment is not opposed, as opposition thereto was withdrawn by the aforesaid notice. As pointed out earlier, in any event, the defendants did not comply with the rules relating to a possible successful warding off of a summary judgment as they filed no affidavit nor applied for oral evidence to be led, nor I may well add, did they put up security for the claim and interest and costs.

20. It is well to note that the position in the *Irvine Mukata* case (*supra*), is markedly different as the application for summary judgment in that case was opposed and the preliminary point taken was the non-compliance with the provisions of rule 32. It is accordingly unnecessary, in the instant case to decide the issues as to whether rule 32 applies or not and whether summary judgment is indeed an interlocutory proceeding or not. It would be odious in the circumstances, for the court in a case such as the present, where the application for summary judgment is not opposed, to insist on compliance with the provisions of rule 32 set out above. That would unnecessarily run up costs and further prevent the defendant from enjoying the ripe fruits of its judgment at an early stage when it is clear that at the end of the day that the claim for summary judgment is not opposed.

21. Mr. Barnard, in his heads of argument also comes to the same conclusion to which I did, namely that it is unnecessary in the present circumstances, to comment upon the correctness or otherwise of the *Mukata* case. He also contends that the circumstances obtaining in the two matters are different and in that he is eminently correct. The facts of the two cases are clearly distinguishable.

22. I may as well mention for the sake of completeness that no point or issue was taken by the defendants that would have brought the property sought to be declared executable, subject to the provisions of rule 108 (2), which stipulate conditions for sale

in execution for properties which are the primary home of the defendant. No allegation was raised to the effect that the property in question is a primary home.

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TS Masuku, AJ

APPEARANCES

PLAINTIFF:	C. Potgieter Instructed by Dr Weder, Kauta & Hoveka Inc.
DEFENDANT:	A. Botes Instructed by Koep & Partners