CASE NO.: (P) I 6/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SIEGMAR PASCHEKA
PLAINTIFF

and

MANUELA BERNSTEIN
DEFENDANT

CORAM: HOFF, J

Heard on: 2005.05.19

Delivered on: 2005.06.03

RULING:

HOFF, J: This is an application for summary judgment in which an order is being sought ordering defendant to deliver a motor vehicle to plaintiff since defendant has no *bona fide* defence to the claim of plaintiff and that the appearance to defend has been entered solely for the purpose of delay.

In his particulars of claim plaintiff alleges that he is the owner of an Audi A4 motor vehicle with registration number N 30273 W and that the defendant is in possession of the said motor vehicle.

In her opposing affidavit defendant states that Plaintiff has given her *“the full right to possess and use”* the said motor vehicle on a permanent basis and by virtue of the fact that she rendered services to him personally and to his close corporation for which services she was never remunerated she *“obtained vested and valid enrichment claims”* against plaintiff.

It is common cause that there was a love affair between plaintiff and defendant from which a child was born on [day/month] 2002. Plaintiff states in her affidavit that she is using the said motor vehicle to transport their child to pre-school and day care centres. She further states that she has an enrichment claim against plaintiff and that she may decide to hold the Audi as *security* only. In her opposing affidavit defendant states that she realises that she *“may not strictly use”* the said motor vehicle.

Rule 32 (5) of the Rules of this Court provides a plaintiff with an extra-ordinary remedy and a Court will grant an application for summary

judgment only where

there is no reasonable doubt about plaintiff's claim and *Rule 32" is designed to prevent a* plaintiff having to suffer the delay and additional expense of trial procedure where the defendant's case is a bogus one or is bad in law and is raised merely for the purpose of delay, but in achieving this it makes drastic inroads upon the normal right of a defendant to present his case to the Court".

See Arend and Another v Astra Furnitures (Pty) Ltd 1974 (1) SA CPD 298 at 304 F – G.

Plaintiff is reclaiming possession of his property based on the *rei vindicatio* and must allege and prove that he is the owner of the thing and that the defendant was in possession of his property at the time of the institution of the action.

See Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 82

Chetty v Naidoo 1974 (3) SA 13 (AA) at 20

Minister van Wet en Orde v Matshoba 1990 (1) SA (A) 280 at 286 A – B

It is common cause that plaintiff is the owner of the said vehicle and that defendant is in possession thereof.

In Chetty v Naidoo the Court held at 20 C – F:

> "The owner in instituting a *rei vindicatio,* need, therefore, do no more than allege and prove that he is owner and that the defendant is holding the *res* –
>
> the *onus* being on the defendant to allege and establish any right to continue to hold against the owner. It appears immaterial whether, in stating his claim, the owner dubs, the defendant's holding *'unlawful'* or *'against his will'* or leaves it unqualified. But if he goes beyond alleging merely his ownership and defendant being in possession (whether unqualified or described as *'unlawful'* or *'against his will',* other considerations come into play.

The other considerations referred to relate to a situation where e.g. a plaintiff concedes in his or her particulars of claim that the defendant has an existing right to hold the property, plaintiff must then *ex facie* his statement of claim prove the termination of such right to hold.

(See Chetty v Naidoo 21 G – H)

In Shimaudi v Shirungu 1990 (3) SA 344 SWA Levy J said the following at 347 E – F

> *"In respect of occupation, the defendant may will admit such occupation but contend that his occupation is lawful. The onus would then be on him to*
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> *prove such lawfulness but he is relieved of this onus if there is some form of admission on the pleadings in terms whereof plaintiff concedes that he lawfully parted with such occupation".*

Mr. Brandt who appeared on behalf of defendant submitted that defendant relies on a right to permanent possession and the use of the said motor vehicle by virtue of an *agreement* between plaintiff and defendant, that defendant has alleged and proven such a sight, and furthermore that plaintiff has failed to prove a valid termination of that right of use or possession of the said motor vehicle.

There is no concession by plaintiff in his particulars of claim that the defendant has the right to use or possess the said motor vehicle, and in terms of the authorities cited *supra,* there is no *onus* on plaintiff to

prove the termination of such an agreement but the *onus* is on defendant to allege and prove the validity of the agreement she relies upon.

Mr. Brandt submitted in the alternative that plaintiff may not recover the Audi motor vehicle from defendant by virtue of the fact that defendant has a valid enrichment claim and that until the defendant has been compensated, defendant is entitled to hold the vehicle as security.

I shall first deal with the submission that the motor vehicle is being held as security and shall thereafter consider whether the defendant has proved that she has the right to possess and to use the motor vehicle.

A lien (right of retention) has been defined as *"the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating of securing expenditure of money or something of monetary value by the possessor, on that property, until the claim has been satisfied".*
See LAWSA Vol. 15 par. 40.

Liens have thus been described as affording merely a defence against an owner's vindicatory action, and is not a cause of action.
See Brooklyn House Furnishers Ltd v Knoetze & Sons 1970 (3) SA 264 (A) at 270 F – G.

Three types of liens are recognised namely salvage liens, improvement liens, and debtor and creditor liens.
It is clear from the authorities that persons entitled to liens are those persons who are in possession of property and who have spent some money or money's worth on the said property.

Defendant never mentioned in her opposing affidavit the type of expenditure incurred by her in respect of the motor vehicle neither what her state of mind was if and when she incurred such expenditure.

I am of the view that there is no legal basis to found a right of retention by the defendant.

The fact that defendant might have an enrichment claim is also a defence not good in law.

In Spilhaus & Go. Ltd vCoreejees 1966 (1) SA 525 CPD one of the

claims relied upon by plaintiff was the return of certain equipment delivered to defendant by plaintiff. The defence raised by defendant in a application for summary judgment was that because the equipment had not been delivered timeously defendant has suffered damages in excess of the value of the equipment.

The Court as par *Watermeyer J* held as follows at *529 E – H.*

> *"In the present case the defendant has no legal defence to plaintiff's claim for return of the equipment. The ownership of the equipment is still vested in the plaintiff and the defendant has no right to retain possession of it. Even if defendant were to succeed on his counterclaim judgment thereon would in no*
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> *way extinguish plaintiff's claim for return of the equipment. Defendant's request that judgment should be delayed could only be justified on some broad equitable principle that it might be unfair to order defendant to return the equipment to plaintiff until such time as judgment has been given on the counterclaim. But the defendant will in any event have to return the equipment and short of its being attached in execution of any judgment which the defendant might obtain the equipment could in no way furnish security for payment of defendant's counterclaim. In these circumstances, and in the absence of any authority on the*

> *point, it seems to me that the fact that the defendant has a counterclaim for damages is not a "defence" to plaintiff's action on claim (b) within the meaning of sub-rule 3 (b) of Rule 32".*

Claim (b) refers to the claim in respect of the return of the equipment.

I must add however that it is clear from the *dictum supra* at 529 A – D, if plaintiff's claim had been a *"money claim"* e.g. payment of the purchase price, summary judgment could in the view of the counterclaim not have been given.

I shall now deal with the requirement that the affidavit of the defendant *"shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor".*

It is trite law that defendant must set out his defence fully in his opposing affidavit. Although defendant need not deal exhaustively with the facts and evidence relied upon he or she must at least disclose his or her 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. The defence must not only be *bona fide* but must be good in law.

See Maharaj v Barclays National Bank Ltd 1976 (1) 418 A at 426 B – D.

First National Bank of South West Africa v Graap 1990 NR 9 at 13 C.

It is sufficient if at the hearing of the application it "appears" that the defendant is entitled to defend the action.

(See Maharaj's case at 425 H.)

Regarding what interpretation should be attached to the word "fully" in Rule 32 (3) (b) it was held that the word "fully" should not be afforded its literal meaning "and no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to plaintiff's claim … however … if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides".

See Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 TPD at 228 D – E.

In my considered view the contents of the affidavit by defendant falls far short of the requirements of Rule 32 (3) (b). No material facts are disclosed by defendant regarding the prevailing circumstances which prompted plaintiff to give her the right to possess and use the said

motor vehicle. Her affidavit contains a bald statement to the effect that plaintiff gave her the full right to possess and use the motor vehicle on a permanent basis. She also avers that she rendered personal services to plaintiff and to his close corporation. Again neither is the nature of the services disclosed nor any detail regarding the terms and conditions in terms of which services had been rendered to plaintiff and his close corporation. Defendant baldly refers to enrichment claims she has against plaintiff. Here again no particulars are provided. Her affidavit on this point is incomplete, vague and bald.

In addition as pointed out *supra* in the *Spilhaus v Coreejees* case her enrichment claim is bad in law as a counterclaim to a vindicatory action.

Furthermore no material facts had been disclosed by defendant as required by Rule 32 (3) (b). This together with the fact that defendant concedes in her affidavit that she realizes that she *"may not strictly use"* the motor vehicle compelled me to conclude that not only does her affidavit not disclose any *bona fide* defence but she herself is not *bona fide* in opposing the application for summary judgment.

I am accordingly of the view that plaintiff has an unanswerable case and that the application for summary judgment should be granted.

In the result the following orders are made:

1. The application for summary judgment is granted and defendant is ordered to deliver the Audi A4 motor vehicle with registration number N 30273 W immediately to plaintiff.

2. Defendant to pay the costs of this application.

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HOFF, J

ON BEHALF OF THE PLAINTIFF: MR. VAATZ

Instructed by: A. VAATZ & PARTNERS

ON BEHALF OF THE DEFENDANT: MR.BRANDT

Instructed by: CHRIS BRANDT ATTORNEYS