

SUMMARY

CASE NO. T (I) 3765/2006

RITZ REISE (PTY) LTD versus AIR NAMIBIA (PTY) LTD

HINRICHSEN, AJ

05 April 2007

PRACTICE - Summary Judgment -

Rule 32 leave to file supplementary affidavit – applicable test – bona fide defence – Court no discretion in terms of Rule 32 (7) read with 32 (3) – Court residual discretion – overriding discretion to refuse summary judgment – counterclaim by defendant not necessarily good defence per se – meaning of bona fides within context of summary judgment – possibility of plaintiff's claim incorrect – Court may, not must grant summary judgment – probability of fairly triable and arguable issue – defendant to discharge lighter onus than plaintiff – reasonable possibility of injustice to defendant

CASE NO. P (I) 3765/2006

IN THE HIGH COURT OF NAMIBIA

IN THE MATTER BETWEEN:

RITZ REISE (PTY) LTD

APPLICANT/PLAINTIFF

and

AIR NAMIBIA (PTY) LTD

RESPONDENT/DEFENDANT

Heard on: 03 April 2007

Delivered: 05 April 2007

JUDGMENT:

HINRICHSEN, A J

[1] In this matter the Applicant seeks summary judgment as prayed for by it as Plaintiff in the main action. The Applicant via its representative one Fanus Oosthuizen, its Managing Director relies on the mandatory grounds in compliance with Rule 32 (2) namely that the Respondent/Defendant has no *bona fide* defence and that its notice of intention to defend has been delivered solely for the purpose of delay.

[2] The Respondent denies this and advances reasons therefor in the Opposing Affidavit of its representative one Franchia Menjono, the Manager Revenue and Accounting of the Respondent.

[3] On the 2nd April 2007 the Respondent filed a Supplementary Affidavit "to provide some support for the allegation made in paragraph 6 of its

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Opposing Affidavit wherein it is alleged that "..... large amounts of United States Dollars were illegally transferred to banking accounts in Japan where the Respondent does not have accounts."

[4] Mr Boesak for the Respondent sought leave for having filed a Supplementary Affidavit, which was likewise deposed to by Franchia Menjono.

[5] Mr Heathcote appearing for the Applicant opposed the application for leave to file the Supplementary Affidavit. He referred the Court to the case of the Standard Bank of South Africa Limited vs Sewpersadh and Another 2005

(4) SA 148 (CPD). This case deals with the practice of filing Affidavits. It relates to an insolvency matter. Mr Heathcote also cited the cases of Sealed Africa (Pty) (Ltd vs Kelly and Another 2006 (3) SA 65 (WLD). This case deals with the filing of further Affidavits after the Replying Affidavit as being in the discretion of the Court. In that matter the Applicant instituted a claim by way of motion proceedings, the cause of action being founded upon a loan agreement. Finally Mr Heathcote cited the Namibia case of Piechaczek v. Piechaczek 1921 (SWA) 51. This case illustrates the procedure but does not carry the matter further for present purposes.

[6] In the light of these cases, Mr Heathcote urged this Court not to grant leave for the filing of the Respondent's Supplementary Affidavit.

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[7] Mr Boesak referred to the case of Juntgen t.a. Paul Juntgen Real Estate vs v Nottbusch 1989 (4) SA 490. This case deals directly with the issue of allowing additional Affidavits in opposition to an application for Summary Judgment. At page 491 F Flemming J had this to say:-

"generally a Court has a discretion which is inherent to the just performance of its decision reaching process to grant that relief which is necessary to enable a party to make a full representation of his true case. Amplification and rectification should be equally accessible in Summary Judgment proceedings. If not, the reason cannot be found in any expressed provision. It must follow from the nature and purpose of Summary Judgment proceedings."

And on page 493 C - D Flemming J states.

"It follows that, because of the scrutiny of the *bona fides* of the Defendant in respect of the defence to which he lays claim a Defendant may find that his Affidavit is inadequate. He may have forgotten to tell his attorney of an important fact or may have missed the significance thereof. Attorneys, like other humans, make errors which are called omissions. The attorneys view on what is adequate may differ from what counsel or the Court thinks. A defence may develop subsequent to the signing of the affidavit. It has all the potential to cause injustice if the Court's discretion to allow improvement of defective attempts is to be hampered by an application of the *dictum* in the *Joubert* case in any literal meaning thereof."

(The Joubert case is Joubert, Owens, van Niekerk Inc. v. Breytenbach 1986 (2) SA 357 (T). The dictum referred to appears on page 361 C – E.)

[8] In the present case the situation is similar. Initially in terms of paragraph 6 of the Respondent's Opposing Affidavit it was advised not to

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reveal certain preliminary findings at that stage beyond disclosing the information in relation to United States Dollars illegally transferred to banking accounts in Japan referred to above. In terms of paragraph 2 of the Respondent's Supplementary Affidavit the advice to it with reference to paragraph 6 of the Opposing Affidavit has now changed. The Respondent's legal practitioner now advises ".....that it may be prudent to provide some support for the allegation made in paragraph 6"

[9] The action taken by the Respondent in this matter squarely falls within the ambit of the dictum of Flemming J in the Juntgen case referred to above.

[10] This Court accordingly grants leave to the Respondent and allows the filing of its Supplementary Affidavit.

[11] The law and procedure pertaining to Summary Judgment and the test therefor have been set out and analysed in numerous decided cases and this need not be repeated here. Mr Heathcote cited the case of Krump v Rostami 1998 NR 79 (HC) regarding such tests.

[12] The Respondent's Supplementary Affidavit immediately raises two issues.

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Firstly, it casts doubt on the correctness of the amount of USD169801,83 claimed by the Applicant by raising the suspicion in paragraph 3, 3.4 of the Supplementary Affidavit that the correct amount may be USD 115178.

Secondly, and this is suggested by the Respondent in its Heads of Argument page 4, paragraph 5.4 a counterclaim may now have appeared in favour of the Respondent "after proper reconciliation of the accounts":
On this issue of a counterclaim Mr Heathcote referred the Court to the case of Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd 2004 (6) SA 29 (Supreme Court of Appeal). (the Soil Fumigation case).

[13] It was held in the Soil Fumigation case inter alia that "a Court should be less inclined to exercise its discretion in favour of a Defendant where the answer to the Plaintiff's claim is raised in the form of a counterclaim as opposed to a defence to the Plaintiff's claim in the form of a Plea. Moreover

a Court can exercise its discretion in the Defendant's favour only on the basis of the material placed before it and not on the basis of mere conjecture or speculation."

[14] Mr Heathcote also referred to the dictum of Brandt J A at page 35 D which reads as follows:-

"The reason why the remedy of summary judgment is referred to as 'stringent' and 'extraordinary' is because it effectively closes the

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door of the Court on the defendant without affording an opportunity to ventilate the case by way of a trial. When the answer raised in the opposing affidavit is in the nature of a counter claim instead of a plea, the position is, however, somewhat different. Even where summary judgment has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counterclaim by issuing summons in a separate action. Of course, summary judgment would deprive the defendant of a significant procedural advantage. But the fact remains that the doors of the Court are not finally closed."

[15] This Court does not take issue with the decisions in the Soil Fumigation case. In fact, the Authors S J van Niekerk, H F Geier and R J Mundell (the Authors) in their work on Summary Judgment - A Practical Guide at page 9/36 summarise the Soil Fumigation case inter alia as follows.

"The Court retains an overriding discretion to refuse Summary Judgment – not only to that part of the claim which would be extinguished by the counterclaim, but also to the balance – this overriding discretion to refuse Summary Judgment entitles refusal of the Application in its entirety, even where a defence (i.e. by means of the counterclaim) to only a part of the claim has been raised.

This overriding discretion explains the fact that leave to defend the Plaintiff's entire claim may be granted even if the counterclaim is less than that of the Plaintiff's claim and even if no payment of the balance into Court is made."

[16] The Authors go on to state at page 9 – 37 ISSUE 4 paragraph 9.5.7:-

"A Defendant, in raising a counterclaim, should provide full particularity of the material facts upon which it is based. This means that he must be as comprehensive as when advancing only a defence. The Court must be placed in a position to be able to consider not only the nature and grounds of the counterclaim, but also the magnitude thereof and whether it is advanced *bona fide*. The necessary elements of a completed cause of action must be included. The counterclaim must, moreover, be based on facts and not on mere conjecture or speculation or on the deponent's belief."

And the Authors cite decided cases in support.

[17] This Court has difficulty deciding whether or not a counterclaim in this case is advanced by the Respondent *bona fide*, because it is made entirely dependant upon "a proper reconciliation of the accounts" (Page 4, paragraph 5.4 Respondent's Heads of Argument).

[18] *Bona fides* within the context of Summary Judgment issues and with specific reference to Rule 32(3)(b) of the Rules of Court is pronounced upon by Coleman J in the matter of Breytenbach v Fiat S.A. (Edms) Bpk 1976 2 SA 226 TPD at 228 B as follows:-

"It cannot, therefore, be given its literal meaning when it requires the Defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the Defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

[19] Reverting to the point raised under Firstly page 4 above, namely, that the amount claimed by the Applicant could be incorrect it has been held in the case of the Standard Bank National Industrial Credit Corporation Limited v Postmasburg Metal and Mining Supplies (Pty) Ltd 1978 (3) SA page 812 (NC) at 816 A that the Court must guard against granting Summary Judgment for an amount which may be incorrect and, for that reason not owing by the Defendant. The onus, at the end of the day, remains on the Plaintiff to prove

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his quantum and Summary Judgment proceedings do not shift that onus. (The Authors page 11 – 35 issue 1.)

[20] Another issue which the Respondent raises is that of prescription (in terms of paragraph 4, page 4 of the Respondents Opposing Affidavit.) The reason which the Respondent advances is that the Applicant's claim in the main action is based on an agreement between the parties dating back to 1995. However this defence would again depend upon a reconciliation of the financial figures involved.

[21] The Respondent annexed to its Opposing Affidavit as Annexure FN4 a Statement or Remittance Advice reflecting a total due which co-incides with the Applicant's claim. It needs to be observed that Annexure FN4 does not show how the total due is arrived at and is therefore not a reconciliation in

itself.

[22] Annexure FN5 is a letter by the auditors K P M G Namibia addressed to the Applicant's directors. This cannot be considered to be clear support of the Applicant's claim in that the figures referred to therein are subject to qualification. It is stated in FN5 "since the Angola operations go back to 1994 it was not possible to obtain all the detailed information. We were not able to obtain profit / loss figures for the 1994 to 1997 years." On page 2 of the letter it is stated that "the principle of this is that all cash profits would have

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accumulated on the account with Air Namibia if no cash were withdrawn from the operations."

In a letter by the Applicant to the Respondent, Annexure FN4 (page 40 of the Record) it is stated inter alia that

".....when Ritz Reise opened the Air Namibia office in Luanda in 1994 it was just after the War and the Banking Rules and Procedures were of such complexity that Air Namibia and Ritz Reise decided to work from one bank account in the name of Air Namibia so as not to delay any payments of transfers of monies from Angola to Air Namibia."

The operation from one bank account at that stage must have made the supervision of financial transactions complicated and would constitute an urgent call for reconciliation.

[23] The Respondent clearly states that FN4 (Record page 42) incorrectly showed a credit balance amounting to the Applicant's claim. Counsel for the Respondent submitted in argument that the "mistake" as he called it was discovered afterwards.

[24] In the upshot it has become necessary and is in fact a precondition of a claim settlement between the parties that a proper reconciliation takes place.

[25] Counsel on both sides has gone rather deeply into the merits which really serves to highlight the contradictions flowing from allegations and

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counter-allegations and submissions and counter-submissions. This shows how complicated especially the financial relationship is between the parties.

[26] In essence the respondent raises three possible defences - Firstly, that the sum claimed by the Applicant may be incorrect Secondly, that there may be prescription and

Thirdly, that the respondent may have a counterclaim. These possible defences turn on the results of a comprehensive reconciliation which is still outstanding. In this regard the applicant alleges that respondent is in breach of an agreement to the effect that the respondent was obliged to finalise such reconciliation within one month after 1 August 1995 which the respondent has not done.

[27] This Court finds that without the benefit of a reconciliation the possible defences raised by the respondent fall short of *bona fides* in the technical sense. The Court is therefore not bound to dismiss the summary judgment application in terms of rule 32 (7) read with 32 (3) which would exclude its discretion.

[28] However the Court has a residual discretion to refuse summary judgment. It may, not must, grant summary judgment. In this matter there are

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simply far too many loose ends creating doubts which can only properly be resolved in an ordinary trial action on the basis of a reconciliation.

The applicant may not have an unanswerable case.

Applying the dictum Young J in the matter of Davis vs Terry 1957 (4) 98 (SR) at 102 F.

"This case is not so hopeless as to deprive the respondent of its normal right to go to trial. Moreover in these proceedings the respondent is not required to plead its case fully and there may be circumstances not yet disclosed"

In the instant case a proper reconciliation would bring such circumstances to light.

[29] The circumstances yield on a balance of probabilities that the respondent raises a fairly triable and arguable issue, namely that of an overall reconciliation called for in the light of the complicated situation prevailing in this case. (see Barclays Bank Ltd vs Smith 1975 (4) 675 per Booysen A.J. at 684 A).

[30] In having to assess the applicant's case more stringently than the respondent's case, the respondent having to discharge a lighter onus than the applicant leading to doubt as to the unassailability of the applicant's case the benefit of such doubt operates in favour of the respondent.

[31] Ultimately there exists in this case the reasonable possibility that the respondent may suffer an injustice were summary judgment be ordered against it.

[32] The all important rendering of a comprehensive reconciliation will settle the financial issues between the parties. In order to avoid an injustice the defendants must be given the benefit of such reconciliation being undertaken. In this regard the plaintiff itself recognises its importance in its notice of application for Summary Judgment where in it claims under prayer 3 "...that the Defendant be ordered to finalise the reconciliation, and present Plaintiff with the finalised reconciliated statement, and payment in respect thereof." This Court finding that the plaintiff's claim in terms of prayer 1 of the aforementioned application is open to doubt as to its correctness, it falls away together with prayer 2 as a basis for claiming Summary Judgment and the prayer for reconciliation becomes all important; but which is of course not competent as a basis for Summary Judgment.

[33] As regards the issue of costs this Court takes into consideration the fact that at the time of the launching of the summary judgment application the applicant did not have the benefit of considering the contents of the supplementary affidavit filed by the respondent and responding thereto.

[34] Considering all the circumstances the following Order is made:-

1. The supplementary affidavit filed by the respondent is admitted;
2. The summary judgment application is dismissed;
3. Costs shall be costs in the cause.

