

REPORTABLE

CASE NO. (P) I 887/2007

SUMMARY:

NAMIBIA AIRPORTS COMPANY LTD

and

DIRK H CONRADIE

HOFF, J

2007/06/08

CIVIL PROCEDURE:

Application for summary judgment – one of operative guidelines is that the Court is restricted to manner in which plaintiff has represented his or her case before even considering whether defendant has established a *bona fide* defence.

Plaintiff's claim and pleadings must be clear and technically correct.

It is permissible for defendant to attack validity of application on any proper ground. Defendant not limited to the requirements set out in Rule 32 (3) (i.e. giving of security or delivering affidavit disclosing a *bona fide* defence)

Defendant may base opposition to application for summary judgment on excipiability of plaintiff's claim.

Court has residual discretion, to be exercised judicially, to refuse summary judgment even if a defendant has not found security or disclosed a *bona fide* defence.

CASE NO.: (P) I 887/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA AIRPORTS COMPANY LIMITED

PLAINTIFF

and

DIRK H CONRADIE

DEFENDANT

CORAM: HOFF, J

Heard on: 2007.05.29

Delivered on: 2007.06.08

JUDGMENT:

HOFF, J: [1] This is an application for a summary judgment in which plaintiff claims payment in the amount of N\$115 421.25.

[2] This application is opposed.

The cause of action arose from the payment of bills of costs presented to plaintiff by defendant in respect of professional services rendered. Plaintiff in its founding affidavit avers that full payment of the bills of costs were made

with the *bona fide* and reasonable belief that the amounts presented to plaintiff were owing and correct. Plaintiff subsequently submitted the bills of costs to the Law Society of Namibia for taxation and on 9 May 2006 the bills were duly taxed by the Standing Committee on Taxation of the Law Society. It is common cause that defendant is a member of the Law Society of Namibia established in terms of the Legal Practitioners Act, No. 15 of 1995.

Plaintiff now claims the difference between the amount paid to defendant and the amount allowed after taxation stating that the amount originally paid to defendant was neither correct nor owing in full.

It was submitted by Mr Kamanja, appearing on behalf of plaintiff, that the debt arose as a result of a lawful decision by a committee of the Law Society to the effect that the accounts presented to plaintiff were unreasonable and thus repayable by the defendant.

It is common cause that payment was received by defendant during September 2004.

[3] The defendant's response to the notice of an application for summary judgment was to give notice of an exception in terms of Rule 23(1) of the Rules of this Court. This notice of exception was incorporated in defendant's affidavit in opposition to the application for summary judgment.

[4] The defendant in its notice of exception avers that the claims of plaintiff are based either on the *condictio indebitii* or on the *condictio sine causa* but there is no allegation that *at the time that the various payments were made* that the amounts were (a) paid without any underlying *causa*; (b) incorrect, unreasonable or excessive; and (c) not payable. It was further averred that plaintiff does not allege or indicate the existence of any reasonable and/or excusable error. The pleading is thus vague and embarrassing since it fails to make an allegation central to plaintiff's case.

[5] Defendant further in his opposing affidavit avers that the plaintiff was driven by an ulterior motive in initiating the action against defendant. He stated that during the year 2004 he gave plaintiff advice to launch proceedings in another matter against a third party, advice which was not followed by plaintiff. Defendant avers that he subsequently reported the matter *inter alia* to the Minister of Finance since he held the belief that the advice given by him was in the best interest of the plaintiff. He believes that this turn of events caused plaintiff to attempt to resuscitate disputes against him regarding his fees. He continues that some seven months after the (now disputed) fees had been paid plaintiff deposed to an affidavit which was submitted to the Law Society of Namibia as a complaint against him. On 09 February 2005 the Law Society advised him of the complaint and sought his response. The complaint was treated as a disciplinary infraction and would have been dealt by the Law

Society's Standing Committee on Legal Ethics and if the complaint was *prima facie* justified the matter would have been forwarded to the Disciplinary Committee, established in terms of the Legal Practitioner Act 15 of 1992.

[6] The matter was never dealt with by the Ethics Committee but was instead referred to the Standing Committee on taxation. He was informed on 16 February 2007 of the outcome of the deliberations by the Taxation Committee purporting to disallow certain fees in his absence. He further stated that he does not accept that the Taxation Committee's *allocatur* has been properly provided to him in prescribed form nor that its findings are binding on him or binding on this Court. He submitted that this Court would be required to separately determine the reasonableness of the fees charged and that the plaintiff does not assert that his fees were unreasonable but points his liability as flowing automatically from the Taxation Committee's findings.

[7] One of the guidelines operative in the adjudication of a summary judgment application is that the court is restricted to the manner in which the plaintiff has represented his or her case.

[8] In *Gulf Street (Pty) Ltd v Rack – Rite Bop (Pty) Ltd and Another* 1998 (1) SA 679 (OPD) at 683 G – 684B the following appears:

*“In the matter of **Northern Cape Scrap & Metals (Edms) Bpk v Uppington Radiators & Motor Graveyard (Edms) Bpk 1974 (3) SA 788 (NC) at 793 C – D** the learned judge quotes with approval:*

‘It will therefore be seen that summary judgment is an extraordinary and drastic remedy. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy must in my view strictly comply with the requirements of the Rule.’

*In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a **bona fide** defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet namely a clear claim and pleadings, which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a **bona fide** defence, it is necessary for the Court to be satisfied that the plaintiff’s claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence, which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless*

be refused if plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court.

(See also Dowson & Debson Industrial Ltd vs Van der Werf and Others 1981 (4) SA 417 (CPD) at 424 F – 427 A)."

[9] It appears to me in both instances of *condictio indebiti* and *condictio sine causa* that the transfer or payment or that the enrichment must be *sine causa*. This must be alleged and proved.

Thus in the present application there must have been an allegation that when the payment was made that there was no legal or natural obligation to make it which allegation does not appear in plaintiff's supporting affidavit.

In *Frame v Palmer* 1950 (3) SA 340 CPD at 346D – F the requisites for a claim under the *condictio indebiti* were set out as follows:

- (a) plaintiff must prove that the property or amount he is reclaiming was transferred or paid by him or his agent to the defendant;
- (b) he must prove that such transfer or payment was made *indebite* in the widest seuse (i.e. that there was no legal or natural obligation or any reasonable cause for the payment or transfer);
- (c) he must prove that it was transferred or paid by mistake.

[10] Regarding paragraph (a) it is common cause that defendant received payment from plaintiff.

Regarding requirement (b) that the payment was made *indebite* the following was said regarding the meaning of *indebite* in *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd 1997 (2) SA 35 AD at 40G – I*

*“I would have thought that an **ultra vires** payment represents a prime example for a payment **indebite**. Such payments are, by their very nature, payments of something not owing (‘onverskuldig’) by the payee. Sir John Wessels was of a like mind in Law of Contract in South Africa 2nd ed para 3642, he said that a payment is considered not to be due if a claim was thought to exist but which, after payment, is discovered to have been null and void.”*

[11] I need not decide the point at this stage but it appears to me that plaintiff may experience some difficulty in proving that payment was made *indebite*.

I have my doubts whether plaintiff has established its claims clearly on the papers.

I shall now turn to the requirement of a *bona fide* defence.

[12] Another guideline in the adjudication of a summary judgment is that it is permissible for a defendant to attack the validity of the application on any proper ground.

In addition to the requirements set out in Rule 32 (3) (i.e giving of security or delivery of an affidavit disclosing a *bona fide* defence) a defendant may base his or her opposition on the excipiability of plaintiff's claim. In the present instance defendant has not only excepted to the claim but has in addition deposed to an affidavit incorporating the exception.

The exception, which goes to the root of the claims is that plaintiff did not allege that payment was made *sine causa* or that the bills of costs were unreasonable or excessive.

The exception taken by defendant *in casu* in my view constitutes a *bona fide* defence.

[13] In *Jagger & Co Ltd v Mohamed* 1956 (2) SA 73C CPD at 738 C –D the following appears:

“The exception which has been taken goes to the root of the action and amounts to this, that even if the applicant should prove all the facts alleged by him in his declaration he would still not succeed. That, in my opinion, amounts to a defence to the action. There are cases, which occur to me in which a defendant could resist summary judgment without going

*into the merits of the dispute at all. For example, a defendant who is sued for the recovery of a debt, which is admittedly due, but in a Court which has no jurisdiction. In such a case an allegation of absence of jurisdiction would, in my opinion, constitute a defence to the action. In the same way a defendant who has a good legal defence on the version of the facts alleged by the plaintiff, has a good defence to the action if he raises that legal defence, even though he may also have a defence on the facts which he does not wish to raise at that stage of the proceedings. In the present case the respondent, by taking the exception which he has taken has, in my view, shown that he has a **bona fide** defence to the action.”*

[14] Similar sentiments were expressed in *Dowson (supra)* were the following appears at 430 C – D.

“The adequacy of plaintiff’s pleadings must perforce be tested upon the assumption that the defendant’s version of the suretyship is true.

Once it is accepted that an attack upon plaintiff’s pleading may constitute a bona fide defence for the purpose of resisting summary judgment application, I can see no reason why the defendant should be disabled from availing himself of such a defence.....”

[15] (See also *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (CPD) 314A; *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (TPD) at 592 F).

[16] It is trite law that in the determination of whether a defendant has a *bona fide* defence it will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing.
(See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 TPD at 228 B).

[17] In my view the nature of the exception raised by defendant discloses a *bona fide* defence.

[18] The adjudication of a summary judgment application does not include a decision on factual disputes.

(In *Triplejay Equipment (SWA) (Pty) Ltd v Muller* 1962 (3) 115 SWA at 116 B the following was said by Badenhorst J (as he then was):

*“It seems to me quite clear that the summary judgment procedure was designed to whether **ex facie** the defendant’s affidavit, the defendant has shown that he has a **bona fide** defence and not to try the whole issue.”*

[19] The defendant disputes the correctness of the taxation of the bills of costs which taxation was determined in his absence, and the taxed bills of costs was the cause of the action according to the plaintiff.

[20] The correctness and reasonableness of the taxed bills of costs would only be determined by the trial court after hearing evidence and argument on this issue.

[21] This Court has a residual discretion, to be exercised judicially, to refuse summary judgment even if a defendant has not found security or disclosed a *bona fide* defence.

[22] In *Tesven CC and Another v South African Bank of Athens 2000 (1) 268 (SCA) at 277 H – I* it was held that the residual discretion “*may be exercised in a defendant’s favour if there is doubt as to whether the plaintiff’s case is unanswerable and there is a reasonable possibility that the defendant’s defence is a good one.*”

(See also *Visser v Incorporated General Insurances 1994 (1) SA 472 TPD at 479 B*; *Gruhn v M Pupkewitz & Sons (Pty) Ltd 1973 (3) SA 49 (A) at 58 C – D*; and *Dowson supra at 419 G – 420 A*).

[23] In my view the application for summary judgment should be refused on the following grounds (a) that the claim and pleadings are not clear and

technically correct; (b) defendant raised a *bona fide* defence; and (c) this Court is not satisfied that plaintiff has an unanswerable case.

[24] In the result the following order is made:

The application for summary judgment is refused with costs.

HOFF, J

COUNSEL ON BEHALF OF THE PLAINTIFF:

MR KAMANJA

Instructed by:

SISA NAMANDJE & CO.

COUNSEL ON BEHALF OF THE DEFENDANT:

IN PERSON

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