
**CASE NO: I 2210/09**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

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| **MOBILE TELECOMMUNICATIONS LTD** | **APPLICANT** |

and

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| **VIRTUAL AIRTIME SOLUTIONS CC** | **FIRST RESPONDENT** |
| **JACOBUS JOHANNES ISAAKS** | **SECOND RESPONDENT** |
| **ROBERT GRANT REID** | **THIRD RESPONDENT** |

**CORAM:** GEIER, AJ

Heard: 22 March 2011
Delivered: 5 April 2011

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**JUDGMENT:**

**GEIER, AJ.:** [1]The claim formulation, as verified on behalf of applicant, in terms of Rule 32 (2) of the Rules of Court, for summary judgment purposes, was pleaded as follows:

"**5. On or about 13th September 2005 at Windhoek, the Plaintiff and First, Second and Third Defendants, the First Defendant represented by the Second and Third Defendants, entered into a written agreement in terms whereof the First Defendant was appointed by the Plaintiff as a non-exclusive dealer of dealer services and the selling of Tango products of the Plaintiff on the terms and subject to the conditions set out in the agreement. A copy of the agreement is hereto attached marked "A".**

**6. The terms of agreement relevant to the present proceedings are *inter alia*:**

**6.1 The First Defendant would appoint *(a)* secondary Dealer to render dealer services which include amongst other financing, setting up and implementation of the distribution system, including all equipment, technology, development, management and administration of the system; negotiating and concluding agreements with various secondary dealers' chains and retailing of products to the public;**

**6.2 The First Defendant agreed to pay, within 30 (thirty) days after date of statement, for all Tango products ordered and received by the First Defendant. The First Defendant also assumes the risk and responsibility for payment of the dealer services and products ordered by the secondary dealers and agree to under no circumstances whatsoever withhold payment due to the Plaintiff as a direct/indirect result of any of the secondary dealer not paying; that any payments not effected within 30**

**(thirty) days as aforesaid would automatically bear interest at the prime lending rate of Standard Bank Namibia Ltd as applicable from time to time plus 5% *per annum*, but subject however at all times to the maximum annual interest rate as may from time to time be provided in terms of the Usery Act;**

**6.3 Alternatively, the First Defendant would, prior to delivery of the products, pay in cash or electronic bank transfer for all tango products so ordered; that the First Defendant would also assume the risk and responsibility for payment of the dealer services and products ordered by the secondary dealers and shall under no circumstances whatsoever withhold payment due to Plaintiff as a direct/indirect result of any of the secondary dealer(s) not paying; that delivery would be effected within 3 (three) days from receipt of the order.**

**6.4 Notwithstanding** *(the)* **date of payment for the products by the First Defendant, the First Defendant accepts and assumes all risk and liability for the Tango products delivered. In the case of the secret numbers for the virtual recharge vouchers, the Plaintiff would in exclusive opinion determine the date and time when the receipt of the secret numbers by the First Defendant has occurred, provided that the Plaintiff would also be able to prove receipt thereof by way of e-mail or facsimile transmission reports or otherwise, which reports would be regarded as *prima facie* evidence of receipt of the secret numbers by the First**

**Defendant, unless evidence to the contrary is produced.**

**6.5 The First Defendant would negotiate and conclude agreements with secondary dealers for the distribution of the Tango products.**

**6.6 The First Defendant would provide to the Plaintiff, on a monthly basis, before or on the 2nd of each and every month, reports detailing Tango products sold by date and location.**

**6.7 The First Defendant would on a regular basis provide the Plaintiff with updated details of all its secondary dealers, including their contact details so as to facilitate the branding of Plaintiff.**

**6.8 The Plaintiff would sell to the First Defendant Tango products and deliver and/or forward to the Second Defendant's premises as per the First Defendant's orders: *provided* always that the Dealer would have no right of action against the Plaintiff for delay in replenishing such stock occasioned by shortage of stock, delays in transit, accidents, strikes or other unavoidable occurrences.**

**6.9 The First Defendant would at all times during the subsistence of the agreement, offer for sale and sell the right to the dealer services and product as Tango products according to the specifications(s) supplied by the Plaintiff from time to time, and would not make any representation(s) or give any warranty in respect of the dealer services and/or**

**Tango products, other than those contained in the Plaintiff's conditions of sale at the time of the offering for sale.**

**6.10 As remuneration, the First Defendant would be allowed monthly discount(s) and/or be paid monthly commissions as set out in Schedule 2, to the agreement, which commission amount would be credited to the First Defendant's account monthly arrears.**

**6.11 That the Plaintiff would be entitled to terminate the agreement if the First Defendant fails to pay any statement within 60 (sixty) days of statement.**

**6.12 That upon the termination of the agreement for any cause, or at any time prior to such termination at the request to the Plaintiff, the First Defendant shall promptly return to the Plaintiff, or otherwise dispose of as the Plaintiff may instruct, all instruction books, advertising material, specifications and any other materials and dealer services and/or products, documents and papers whatsoever then in possession of the First Defendant and relating to the business of the Plaintiff, and also return to the Plaintiff upon the termination of the agreement all separate books of account and records relating to the distribution.**

**7. Simultaneously with the execution of the agreement referred to in paragraph 4 hereof and on the 13th September 2005 and the 14th November 2005 the Second and Third Defendants respectively each signed a**

**Suretyship in favour of the Plaintiff, in terms whereof the Second and Third Defendants bound themselves as surety and co-principal debtors jointly and severally and *in solidum* with the First Defendant for the punctual payment of all amounts owing to the Plaintiff, including interest, discount, commission and legal expenses. Copies of the two Suretyships is hereto attached marked "B" and "C".**

**8. Pursuant to the conclusion of the agreement and during the subsistence of the agreement, the Plaintiff sold and delivered the Tango products to the First Defendant and further complied with all its obligations in terms of the agreement.**

**9. In breach of the agreement the First Defendant failed to pay to the Plaintiff in respect of Tango products and sold and delivered to the First Defendant by the Plaintiff.**

**10. The total amount owed, due and payable by the Defendants in terms of the agreement and Suretyship is the sum of N$ 11 349 113.71.**

**11. Notwithstanding due and proper demand the Defendants fail, neglect or refuse to pay the said amount of N$ 11 349 113.71.**"

[2]It appears on closer scrutiny of this lengthy claim formulation that the nucleus of the allegations, (paragraphs 8 to 11), founding the cause of action relied upon herein, was pleaded, as counsel for the respondent's labelled it, 'in cryptic terms'.

[3] Essentially it was alleged:

a) that there was compliance on the part of the applicant with the agreement in terms of which applicant sold and delivered Tango products to the first respondent;

b) that the first respondent had failed to pay the applicant in respect of such products sold and delivered;

c) that the total amount owed due and payable by all the respondents in terms of the 'Tango Dealer Agreement' and the suretyship agreements relied upon was the sum of N$ 11 349 113.71; and

d) that the respondents despite due and proper demand had failed and/or neglected to pay this amount.

[4]As the applicant's summons was issued on 29 June 2009 and as it was apparent from the particulars of claim that the relied upon contract was concluded on 13 September 2005, the inference could at least be drawn that the applicant must have sold and delivered certain Tango products to the first respondent at sometime during this period.

[5]It however immediately becomes clear that the claim formulation relied upon does not state:

a) when precisely during this period Tango products to the value of N$ 11 349 113.71 were actually sold;

b) how this amount is made up and arrived at;

c) when such products were delivered and in which quantities;

d) what amounts where involved on each occasion;

e) when precisely the claimed amount or portions thereof became due and payable;

f) whether or not the amount of N$ 11 349 113.71 constitutes the total or the balance of a total amount of products sold and delivered during the contract period or any other;

g) if first respondent ever paid any amounts in respect of such total or balance, and if so, indicating when such payments were made; and

h) which part of the amount of N$ 11 349 113.71 consists of capital, VAT, interest, discount, commission and legal expenses?

[6]It appears further from the contract relied on that two options were available to first respondent i.e. applicant could have sold and delivered Tango products to the first respondent, in respect of which first respondent would have to pay within 30 days of date of statement, alternatively applicant could require first respondent to pay upfront before any Tango products would be delivered.

[7] It is not apparent from the claim formulation which option was followed.

[8] Finally it needs to be pointed out that *ex facie* the terms of the pleaded agreement any payments, not effected within 30 (thirty) days, would automatically bear interest at the prime lending rate of Standard Bank Namibia Ltd, as applicable from time to time, plus 5% *per annum*, but subject, to the maximum annual interest rate as may from time to time be provided in terms of the Usury Act. Nowhere was it indicated, which claimed amounts attracted this rate of interest, what Standard Bank's prime lending rate plus 5%, was, from time to time and whether or not such agreed rate at any time exceeded the maximum annual interest rate provided for in terms of the Usury Act.

[9]It is against this background that the applicant persisted with its application for summary judgement.

[10] All the respondents opposed the application.

[11]As far as the first respondent was concerned, and following a general denial of liability, in terms of which it was disputed that the amount of N$ 11 349 113.71 was the amount due, owing and payable to the applicant, it was averred in addition that the first respondent was currently involved in litigation with various of its customers, of which some did allege, that they have made direct payment into MTC's bank, not reflected by the applicant as having been paid. It was alleged:

> "**I can say that it may amount to millions of Namibian dollars. In order to verify this, I need MTC to discover all documents reflecting payment made to the first defendant's customers directly to the plaintiff. I do not make these submissions for purposes of delay, but say it is of vital importance, as it was always the understanding between the plaintiff and Virtual Airtime Solutions CC (the First Defendant), that customers of Virtual Airtime Solutions CC could pay directly into MTC's bank account. By agreement these amounts had to set off against first defendant's account. Millions of dollars were paid by first Defendant's customers to MTC in this manner.**"

[12]A further defence was mounted on a dispute which had arisen between applicant and first respondent as to who was liable to pay Value Added Tax on the products so sold by applicant. This dispute would translate itself to an amount of N$ 1 000 000.00, which in turn would impact on the interest calculations in respect of any amounts outstanding.

[13]The second and third respondents, in essence denied that they had bound themselves as sureties and co-principal debtors in respect of first respondent's liabilities.

[14] The Second respondent alleged that:

> **'(a) All documents were brought to him and that he initialled them.**

**(b) That he did not read the documents, and that he merely initialled at the foot of the pages as a witness.**

**(c) That his initials on annexure "B", the Suretyship agreement relied upon, do not appear so as to indicate that he had accepted its terms.**"

[15]Similarly, third respondent alleged that he had merely signed the agreement as a witness.

[16]It also requires mention that the application for summary judgment had initially been set down for the 7th of August 2009 but was subsequently postponed on a number of further occasions.

[17]When the matter was eventually argued Mr. Schickerling, who appeared on behalf of the applicant, immediately took issue with the respondents failure to have utilised, in the time available, the discovery procedures available to them and that they were thus unable to satisfy the court that they had any bona fide defence to the applicant's claim.

[18]He countered the criticism levelled in respect of the so- called 'terseness of the claim formulation' by submitting that the applicant's cause of action was clearly confirmed under oath and that the rules pertaining to summary judgment had, substantially, been complied with.

[19]He mounted a further attack against the lack of particularity in which, especially, the first respondent had pleaded its defence. He pointed out that although the first respondent had referred to disputes which had arisen with its customers during 2007, the first respondent had failed to provide any details in respect of those customers with whom first respondent was involved in litigation, in that no details, such as case numbers, had been provided or that the various parties, who had allegedly made such payments, had not been identified.

[20]Counsel also argued that the alleged understanding that, first respondent's customers could pay directly to applicant, 'flies in the face' of certain clauses of the relied upon agreement, of which, in any event, no detail had been provided. This also held true for the VAT dispute alluded to.

[21]Given the fact that the alleged dispute arose as early as 2007, so the argument ran, it was inconceivable that, respondents were unable to provide more detail than that provided by them in their answering affidavits. It was certainly nowhere alleged that applicant ever withheld information from respondents or that they never received any statements. This in itself rendered the paucity of information provided by respondents totally unacceptable. He accepted however that the above argument was however somewhat tempered by the approach Fannin J had adopted in *Mohamed Essop (Pty) Ltd v Sekhukulu & Son* 1967 (3) SA 728 (D) where the court went on to state:

> "**Having regard to the paucity of the information contained in the summons I do not think that I should grant summary judgment.**"

[22] In fairness to Mr. Schickerling it must be said that he recognised that the *Mohamed Essop* case was distinguishable from the present matter in that there summary judgment had been applied for following on a simple summons which contained a dearth of detail and where it was alleged that the plaintiff had failed to provide monthly statements as a result of which the court ordered the parties to take certain additional steps.

[23] Ultimately Mr. Schickerling submitted that the first respondent had failed to set out any *bona fide* defence to the applicants claim.

[24] As far as the defences relied upon by the second and third respondent's were concerned he urged the court not to accept at face value the allegations that they had merely signed the relied upon suretyship agreements as witnesses as the agreements clearly identified the witnesses to it by name, (other than the

respondents), and as the given address of the first witness was curiously also the chosen domicilium address of first respondent. Third respondent did also not state whose signature he had witnessed.

[25] As far as second respondent's allegations were concerned it was pointed out that he had contradicted himself in respect of what his intentions at the time of signature had been. The second respondent's allegations, according to Mr Schickerling, were also undermined by the fact that he had failed to explain why the suretyship agreement marked annexure "**B**" was signed some 2 months after the signing of the main agreement.

[26] Mr. Heathcote, who appeared on behalf of the respondents, on the other hand submitted that respondents had explained that it always had been the understanding between the applicant and first respondent that customers of first respondent could also pay *(for their purchased Tango products)* directly into applicants account. By agreement these amounts had to be set- off against first respondents account. Millions of dollars were so paid by first respondent's customers to applicant.

[27] He argued that the respondents were entirely dependent on the applicant as to the information relating to these amounts which were so paid by the said customers directly to applicant. The fact that respondents cannot give the exact figures of such amounts should not be criticised 'realistically' as first respondent was simply not privy to that information and therefore 'needs the plaintiff to discover all documents reflecting such payments'.

[28] The first respondent had also averred that a dispute had arisen between the applicant and the first respondent in respect of VAT, which had to be paid over to the Receiver of Revenue in respect of the sold Tango products. Although the first respondent could not be entirely sure whether these amounts had been paid over to the Receiver (as these facts were only be known to applicant), such payments would have a "major effect on the interest calculations in respect of the amounts

outstanding" and that this (in respect of interest only) calculates to approximately one million Namibian dollars".

[29] He submitted further with reference to the Headnote[1] of *Gruhn v Pupkewitz and Sons (Pty) Ltd* 1973 SA 49 (AA) that the sufficiency of the formulation of a defence for summary judgement purposes should also be adjudged with particular regard to the way in which a cause of action had been set out. Accordingly, and if I understand his argument correctly, the 'vague' formulation of the first respondent's defences should pass muster, (for summary judgment purposes), if measured against the 'terseness' of the claim formulation, (as verified for summary judgment purposes).

[30] On the strength of the same Headnote he urged the court to take into account that it was stated there also that, where a seller applies for a summary judgment against a surety, and a surety alleges that he has reason to believe the amount claimed does not represent the correct price of the goods sold, it cannot be said that he has no defence to the application for summary judgment, and that the court in such circumstances should exercise its discretion and give the surety the opportunity of asking for further particulars and of defending the action.[2]

[31] In addition it was submitted that should the court find that summary judgment should not be granted against first respondent it would follow in any event that summary judgment should also not be granted *vis a vis* second and third respondents as sureties. Although conceding that criticism was justifiably levelled *vis a vis* the defences raised ... "**with all the suspicions applicant might gather ...**" he submitted that the respondents versions should nevertheless be accepted.

[32] Although counsel referred me to various other Namibian authorities dealing with the approach to opposed summary judgment applications, against the

[1] "As far as Rule 32 of the Uniform Rules of Court is concerned, there are of course two chief elements which come to the fore, the cause of action and the defence and, although in the majority of cases no problems arise in the formulation of the cause of action, it can be that a defence must be judged with particular regard to the way in which the cause of action is set out."

[2] See headnote of *Gruhn v Pupkewitz and Sons (Pty) Ltd* op cit

background of which this application also falls to be decided, I need to look no further than the decision of *Standard Bank of Namibia Ltd v Veldtsman*[3] in which Muller AJ (as he then was) stated:

> "**summary judgment is a very stringent and final remedy which closes the doors of the court for the defendant and should be granted only if it is clear that the plaintiff has an unanswerable case. It has often been stated by the courts that, even if the defence of the defendant does not sufficiently comply with the requirements of Rule 32 (3) of the Rules of Court the court still has a discretion to refuse summary judgment**".[4]

[33] In this regard it will already have appeared, from what has been set out above, that Mr. Schickerling's criticisms, of the vague manner, in which the respondents have set out their defences, in their affidavits filed in opposition to the summary judgment application, were validly made. His arguments though, in my view, were ultimately undermined, and their impact lost, due to the vague claim formulation as verified for summary judgment purposes. This must be the conclusion if one applies the test formulated in the Headnote to *Gruhn v Pupkewitz and Sons (Pty) Ltd*.

[34] Even though Mr. Schickerling refers to the clauses 13 and 13.2 of the 'Tango Dealer Agreement', which in express terms provides that the contract relied upon would be 'the entire agreement between the parties', it is simply not inconceivable that the first respondent's customers could have made payments of millions of dollars directly into the bank account of applicant, as is alleged on the part of first respondent. These allegations, if proved at a subsequent trial, would impact materially on applicant's claim, and would thus constitute a *prima facie* defence, at least in part.

[35] Also the defence mounted on the VAT dispute translates itself, at least on a prima facie basis, to a further defence amounting to 1 million Namibian Dollars.

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[3] 1993 NR 3 918 C
[4] Standard Bank of Namibia Ltd v Veldtsman at p 392

[36] In addition, and in the circumstances of the particular claim formulation, the affidavit, filed on behalf of first respondent, at least endeavours to show, and thus discloses an acceptable reason, for the first respondent's inability to quantify any amount owed on the part of the first respondent with greater precision. After all it is not apparent from the applicants 'terse' claim formulation:

a) when precisely Tango products to the value of N$ 11 349 113.71 were actually sold;

b) how this amount is made up and arrived at;

c) when such products were delivered and in which quantities;

d) what amounts where involved on each occasion;

e) when precisely the claimed amount or portions thereof became due and payable;

f) whether or not the amount of N$ 11 349 113.71 constitutes the total or the balance of a total amount of products sold and delivered during the contract period;

g) if first respondent ever paid any amounts in respect of such total or balance, and if so, indicating when such payments were made; and

h) which part of the amount of N$ 11 349 113.71 consists of capital, interest, discount, commission and legal costs?

[37] In addition it has since become apparent that the total amount claimed possibly includes interest incorrectly charged at the legal rate, contrary to the agreed rate, at the prime lending rate of Standard Bank Namibia Ltd, as applicable from time to time, plus 5% *per annum*, but subject, to the maximum annual interest rate as may from time to time be provided in terms of the Usury Act. All these aspects actually render the applicants' claim so-to-say "illiquid".

[38] In such circumstances it cannot be said that the first respondent has no defences to the application for summary judgment, or to put it, as Muller J formulated it : " ... *it is (not) clear that the plaintiff has an unanswerable case ... ".*

[39] In my view this is even more so in regard to the sureties who have in any event on the papers indicated a 'triable' *prima facie* defence in respect of the suretyship agreements relied upon. They squarely raise the defence that they never entered into the relied upon suretyship agreements.

[40] Again I take into account that counsel's criticisms in this regard were not without substance and that the respondent's versions are questionable, to say the least, but, for purposes of summary judgment proceedings, I have to determine whether or not such allegations, if ultimately proved at a subsequent trial would amount to a defence[5]. I am accordingly constrained to find that the second and third respondents have made out such a defence, at least, on paper.

[41] Even if I am wrong in this regard and the defences of the respondents do not sufficiently comply with the requirements of Rule 32 (3) of the Rules of Court I cannot ignore that the claim formulation in casu failed to inform the respondents adequately of the case they had to meet.

[42] It must be taken into account that the respondents were as a result handicapped in their endeavours to meaningfully and contextural respond to those allegations in their answering affidavits filed in defence of the summary judgment proceedings they were facing. I consider that such claim formulation simply did not supply the respondents with sufficient information and with the necessary

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[5] See for instance : *Namibia Breweries Ltd v Serrao* 2007 (1) NR 49 (HC) at p 51 para [3] - See also the commentary in *Erasmus Superior Court Practice* at p B1-224 (Service 35,2010) were it is stated :*"The subrule does not require the defendant to satisfy the court that his or her allegations are believed by him or her to be true.- It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing;' or put differently, if his or her affidavit shows that there is a reasonable possibility that the defence he or she advances may succeed on trial."*

particularity which would ordinarily be required of a declaration or particulars of claim.

[43] In this regard I take into account further that once the applicant had elected to file a combined summons it had become incumbent upon it to comply with the requirements relating to pleadings set by Rule 20 (2) of the Rules of Court as read with Rules 18(4) and 21(1). Ultimately the applicant was obliged to supply the respondents with ‘a clear and concise statement of the material facts relied upon’ so as to have enabled the respondents eventually to plead or tender an amount in settlement to that claim, or at the very least to reply thereto meaningfully. The claim formulation is found to be wanting in this regard.

[44] Given the stringent consequences of summary judgment, the final nature of the remedy, as well as the paucity of information as contained in the claim formulation, I consider this in any event to be a fit and proper instance in which to exercise my discretion in favour of the respondents.

[45] In the result the application for summary judgment is dismissed. Costs will be costs in the cause.

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**GEIER, AJ**

**Counsel for Applicant:**

**Adv J. Schickerling**

**Instructed by:**

**LorentzAngula Inc**

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