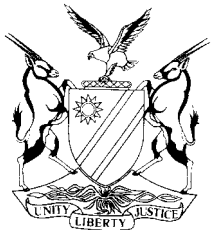

NOT REPORTABLE

CASE NO. I 2465/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GQI ENERGY (PTY) LTD **APPLICANT/PLAINTIFF**

and

ANTONIO EUZEBIO MENDONCA **1st RESPONDENT/2nd DEFENDANT**

AUTOGAS NAMIBIA (PTY) LTD **2nd RESPONDENT/2nd DEFENDANT**

CORAM: **CORBETT, A.J**

Heard on: 25 October 2011

Delivered on: 7 November 2011

JUDGMENT

CORBETT, A.J: .

[1] This is an application for summary judgment in terms of Rule 32 of the Rules of the High Court brought against the defendants. For the sake of convenience, I shall refer to the applicant as “plaintiff” and the first and second respondents as the “first defendant” and the “second defendant”.

[2] In the summons the plaintiff claims re-payment of an amount of N$2,6 million which it paid to the first defendant in respect of the purchase by the plaintiff of a 51% shareholding in the second defendant. In terms of the memorandum of agreement for the sale of shares signed by the plaintiff and the first defendant, the first defendant was obliged to deliver a resolution passed by the Directors of the second defendant approving the transfer of the shares so purchased into the name of the plaintiff, but the first defendant’s legal practitioners informed the plaintiff on 11 January 2011 that such resolution could not be obtained. It is pleaded by the plaintiff that this constituted a repudiation of the agreement by the first defendant, which repudiation plaintiff accepted, and as a consequence, the sale of shares agreement had been cancelled with effect from 31 January 2011.

[3] It is further pleaded by the plaintiff that during the negotiations for and the signing of the agreement the first defendant represented to the plaintiff that he

was the sole shareholder and only Director of the second defendant and the transfer of the 51% shareholding in the second defendant to the plaintiff was a forgone conclusion and within his control. The plaintiff pleads that these representations were false, alternatively were negligently made by the first defendant, in that he did not make enquiries to establish the true position, which he should have done in view of the contemplated agreement. The plaintiff alleges that these representations induced the agreement. A copy of the memorandum of agreement for the sale of shares is annexed to the summons.

[4] The plaintiff further pleads that he made payments in the total amount of N$253,968.70 for and on behalf of and at the request of first defendant during the period 1 September 2010 to 1 February 2011. It is plaintiff's case that these payments were made as a consequence of the same false, alternatively negligent, misrepresentations by the first defendant to the plaintiff that the plaintiff was a 100% shareholder in the second defendant and a 100% shareholder and Director of the second defendant and that the transfer of the shareholding was a forgone conclusion and within his control. It is pleaded that this amount was repayable on demand, alternatively on cancellation of the agreement.

[5] The third claim against the first defendant is based upon the allegation that the plaintiff, again induced by the aforesaid misrepresentations, lent and advanced the total amount of N$4,537,691.89 to the second defendant, alternatively made such payments on its behalf during the period 22 August 2010

to 5 January 2011. The plaintiff claims this amount, less any amount recovered from second defendant, as damages.

[6] In the alternative to this third claim, the plaintiff relies upon the *condictio indebiti* in claiming repayment of the sum of N$4,537,691.89 from the second defendant.

THE VERIFYING AFFIDAVIT

[7] Manuel Alexandrino Joao, a director of the plaintiff, made an affidavit substantially in the form prescribed by Rule 32 (2) verifying the cause of action. In the opposing affidavit filed by the first defendant on his own behalf and also in his capacity as managing director of the second defendant, the defendants claim that the verifying affidavit filed on behalf of the plaintiff is defective. The point is taken that the deponent to the affidavit must swear positively to the facts verifying the cause of action and the amount claimed, that this had not been done and accordingly that the application for summary judgment should be dismissed on this basis alone.

[8] Mr Wylie, who appeared on behalf of the defendants, submitted that there is no indication in the affidavit that Manuel Joao could in fact swear positively to the facts since he was not present when the negotiations took place between the plaintiff and the first defendant in respect of the sale of shares in the second

defendant. It is true that it must appear from the verifying affidavit that the deponent has personal knowledge[1]. However, it is common cause that Manuel Joao is a director of the plaintiff and thus generally can be assumed to have knowledge of the plaintiff's dealings. He in fact says so[2]. The defendants' argument loses some of its force since no allegation is made in the opposing affidavit that Manuel Joao was not present when the negotiations indeed took place. The thrust of the defendants' argument is that *ex facie* the memorandum of agreement for the sale of shares Mr Riaan Steyn represented the plaintiff in the signing of the agreement. The fact that Riaan Steyn signed the agreement, clearly would not preclude Mr Joao from being involved in the negotiations or indeed being aware of the content of the negotiations and the representations made.

[9] In regard to the verifying affidavit the relevant portion of Rule 32 (2) reads that the plaintiff may deliver notice of the application -

> "**…accompanied by an affidavit made by himself or herself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, and stating that in his or her opinion there is no *bona fide* defence to the action and the action and that notice of intention to defend has been delivered solely for the purpose of delay …**".

[1] Raphael & Co. v Standard Produce Co. (Pty) Ltd, 1951(4) SA 244 (CPD) at 245E
[2] Sand & Co. Ltd v Kollias, 1962 (2) SA 162 (T). A managing director is presumed to be familiar with the facts. See Conradie v Landro en Van der Hoff (Edms) Bpk, 1965 (2) SA 304 (G.W.P.A.), at 308 C - D

All that is required is that the plaintiff verifies, not the facts on which the cause of action and the amount claimed is based, but rather the cause of action and the amount claimed. [3]

[10] Mr Coleman, who appeared on behalf of the plaintiff, conceded that the deponent does not use the words "*swear positively*", but this is of no import. What the deponent, on behalf of the plaintiff, does confirm or verify positively is that the first and second defendants are indebted to the plaintiff in the amounts set out in the summons and on the basis of the cause of action and on the grounds stated in the summons. In this sense, I am of the view that the plaintiff has positively sworn to the facts verifying the cause of action and the amount claimed.

[11] The plaintiff must also allege that, in his opinion, no *bona fide* defence exists [4] and the appearance to defend is entered solely for the purposes of delay. What is required is that the deponent expresses his or her own opinion and not that of another person. This the plaintiff does. The defendants' contention that the verifying affidavit does not comply with the Rules, is accordingly without merit.

[3] Dowson v Dobson Industrial Ltd v Van der Werf, 1981 (4) SA 417 (C), at 427 C - G
[4] Group Areas Development Board v Hassim, 1964 (2) SA 327 (T), at p. 328 G - H

PAYMENT OF THE PURCHASE PRICE FOR THE SHARES

[12] The first and second defendants do not deny that the memorandum of agreement for the purchase of shares was entered into between the plaintiff and the first defendant. They also do not place in issue that the purchase consideration in the amount of N$2,6 million was paid by the plaintiff to the first defendant pursuant to the agreement. What the first defendant does allege, is that there was a certain understanding as to how the N$2,6 million would be utilized, namely in settling certain claims against the second defendant. The first defendant annexes a resolution of the members of the second defendant in terms whereof the remaining shareholders were to transfer their shares in the second defendant to the first defendant.

[13] It is common cause that this transaction ultimately did not take place. This is why the first defendant was unable to comply with his obligations in terms of the purchase of shares agreement entered into with the plaintiff. Having confirmed this, the first defendant in the opposing affidavit blandly states:

> "**I further deny that I and the second defendant entered an appearance to defend for the purposes of delay.**"

He goes on to specify that N$2,2 million would be used to pay the second defendant's shareholders and the remainder to settle liabilities towards some of

the second defendant's creditors. The N$2,6 million was held in Shikongo Law Chambers' trust account and it is further alleged that the plaintiff authorized certain payments to be made out of the trust account amounting to a sum of N$263,794.17. The first defendant claims that this was done without his or the second defendant's consent or knowledge. He further claims that an amount of N$1,346,250.53 out of the N$2,6 million, was in fact reimbursed to the plaintiff. He attaches a trust ledger account seeking to substantiate this latter allegation.

[14] On the basis of the facts set out in the opposing affidavit and bearing in mind the extraordinary nature of summary judgment proceedings[5], I am satisfied that the defendant has established a *bona fide* defence in respect of the amounts of N$263,794.17 and N$1,346,250.53. On the other hand, no defence is established for the balance claimed by plaintiff. In the circumstances, the plaintiff has established that it is entitled to the repayment by the first defendant of the amount he paid for the purchase of the shares in the second defendant, less the amounts referred to above, which is an amount of N$990,000.04.

THE LIQUIDITY OF THE CLAIMS IN RESPECT OF MONIES PAID/LENT AND ADVANCED

[15] The plaintiff claims that it paid an amount of N$253,968.70 for and on behalf and at the request of the first defendant during the period 1 September

[5] Arend and Another v Astra Furnshers (Pty) Ltd, 1974(1) SA 298 (C) at 304 F – H
Gamikaub (Pty) Ltd v Schweiger, 2008 (2) NR 464 (SC), at 487 I – 488C

2010 to 1 February 2011. The plaintiff further claims that it lent and advanced the amount of N$4,537,691.89 to the second defendant, alternatively made payments on behalf of the second defendant during or about 22 August 2010 to 5 January 2011. The first and second defendants contend that these amounts are not based on a liquid document, nor are such amounts liquidated amounts in money, and accordingly the plaintiff is not entitled to summary judgment in respect thereof.

[16] It is trite that a claim for monies paid or lent and advanced is generally labled as a claim for a liquidated amount in money within the ambit of Rule 32 (1) (b). Since the amount is set out, it is ascertained. The first and second defendants do not cast doubt on this fact, nor in fact contest this in the opposing affidavit. They simply resort to a bald denial that the amount constitutes a liquidated amount in money. This cannot form a *bona fide* defence to the plaintiff's claim. [6]

[17] It is inherent in the law and practice of summary judgment that the merits of a denial is one the determining factors in deciding on the grant or refusal of an application for summary judgment. It is incumbent upon the first and second defendants in their opposing affidavit to advance facts to show why, *in casu*, the plaintiff's claim is not capable of easy and prompt ascertainment. [7] They have not done so. I accordingly find that there is no merit in the contention that the

[6] Conradie case *supra*, at 308 C - D
[7] Quality Machine Builder v M I Thermo–Couples (Pty) Ltd, 1982 (4) SA 591 (W), at 596 A - C

amounts claimed under these heads are not in respect of liquidated amounts in money.

THE DEFENCE OF NO KNOWLEDGE OF THE PAYMENT

[18] In the opposing affidavit the first defendant claims that he has no knowledge of the payments made by the plaintiff in the amount of N$253,968.70. The deponent, on behalf of the second defendant, further claims that as far as the amount of N$4,537,691.89 is concerned, he has no knowledge of the payment of N$522,370.77, of which N$461,185.62 has been repaid by the second defendant to plaintiff, leaving an outstanding balance of N$61,185.15. The first defendant does not deny that this latter amount is owed by the second defendant. The second defendant further denies knowledge of the payment by the plaintiff of the sum of N$576,506.74 to Kulani Africa Gas (Pty) Ltd for gas delivered to the second defendant.

[19] A simple denial in an opposing affidavit is insufficient to avoid summary judgment. [8] It is important to note that the defendants do not deny that these amounts were paid, but simply state that they have no knowledge of any such payments being made by the plaintiff to it. It is trite that the opposing affidavit need not focus on each and every aspect of the defence. The defence need not be presented with the precision of a plea, but the affidavit must at least disclose the material facts of the defence. The Court is not obliged to search for a defence

[8] Mmabatho Food Corporation v Fourie en Andere, 1985 (1) SA 318 (T), at p. 323 I

between loosely made allegations. [9] The defendant must state his or her defence unequivocally, or at the very least, a defence must appear from the contents of the opposing affidavit. [10] The defendant must depose to facts which, if accepted as the truth or which can be proved at the trial with admissible evidence, disclose a defence. [11]

[20] The defendant must properly inform the Court of his or her defence. In deposing to the opposing affidavit the defendant must not be vague or sketchy since these attributes entitle the Court to form the impression that the defendant cannot or will not play open cards. [12] It is stated on behalf of the second defendant that the deponent simply has no knowledge of the payments. He further says that after the sale of shares agreement was signed he was no longer the managing director but a business director of the second defendant and did not deal with financial aspects of the second defendant. These bland statements simply do not constitute a defence on the part of the defendants. Should the second defendant have wished to do so, it should have put an affidavit from someone with personal knowledge of the financial dealings of the second defendant who could positively set out the basis of the denial of indebtedness to the plaintiff. This the second defendant has demonstrably failed to do.

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[9] Central News Agency Ltd v Cilliers, 1971 (4) SA 351 (NC), at 352 *in fin* – 353 A
[10] Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd, 1975 (1) SA 79 (W) at 82 C - G
[11] Estate Potgieter v Elliott, 1948 (1) SA 1084 (C), at 1087
[12] Appliance Higher (Natal) (Pty) Ltd v Natal Fruit Juices (Pty) Ltd, 1974 (2) SA 287 (D), at 290 H – 291 B

[21] It was further contended on behalf of defendants that the plaintiff's particulars of claim did not put up sufficient facts to enable the defendants to properly set out their defence thereto. This contention does not appear in the opposing affidavit. In the matter of *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd, 1992 (2) SA 295 (W)* the defendant raised a similar argument. Zulman J dealt with this contention as follows: [13]

> "**I am singularly unpersuaded by this argument. It seems to me that the defendant should certainly be in a position to indicate in his affidavit what equipment he hired. If he had difficulty of knowing what equipment the plaintiff was talking about in its summons, one would have expected the defendant to say as much in his affidavit and not have to rely upon counsel's argument to advance such a proposition. It would have been a simple matter for the defendant, for example, to have said, if that was the case, that he had hired a lot of equipment and that he was uncertain what equipment the plaintiff was referring to, or that he was unable, by reason of not having records and not having details, to deal with the statements in the summons. No such allegations were made. The affidavit remains vague in the extreme. I do not believe that the Rules go so far as to indicate that it is only in unanswerable cases that summary judgment is granted. An affidavit, to use the words of Coleman J in *Breytenbach v Fiat SA (Edms) Bpk, 1976 (2) SA 226 (T), at 231 A* which**
>
> '**…** ***lacks the forthrightness, as well as the particularity, that a candid disclosure of a defence should embody***'

[13] at 298 H – 299 B

is in my view insufficient to successfully resist the grant of summary judgment."

[22] In the matter of *Nedperm Bank Ltd v Verbri Projects CC, 1993 (3) SA 214 (W)* the Court found this argument to be unpersuasive: [14]

"**One does not lightly wish to condemn a defendant without a trial to pay such a large sum of money.**

It was urged upon me, indeed correctly so, that there are a number of cases where Courts have said, in the exercise of discretion, that they would not grant summary judgment. … I have looked at all of these cases. They indeed support the proposition of a discretion, but a discretion exercised in appropriate cases where there is some factual basis, or belief, set out in the affidavit resisting summary judgment which will enable a Court to say that something may emerge at a trial, and there was a reasonable probability of it so emerging, that the defendant would indeed be able to establish the defences which it puts up in its affidavit and which at the particular time it might have difficulty in precisely formulating or in precisely quantifying because of lack of detailed information. I do not believe that on a proper analysis of this application, and indeed of the voluminous affidavits filed by the defendant, that there is an indication that there is any real prospect of this happening."

[14] at 224 B - F

The Court accordingly concluded: [15]

> "**It seems to me that this is not a case where one can say, with any degree of confidence or certainty, that a trial will provide all the answers to the defendant's problems or that this is a case where this Court should exercise a discretion in favour of this defendant.**
>
> **I have considered the remaining matters raised in the affidavits. None of them seem to me to advance any further possible defences, and accordingly it seems to me that the defendant has failed to establish a defence as required in terms of the Rules. It therefore follows that the plaintiff is entitled to summary judgment as claimed in the notice of set down.**"

[23] *In casu*, I have a similar view. There is no such thing as a plea of no knowledge of the payments referred to in the plaintiff's particulars of claim. This does not amount to a denial of the claim, nor to a *bona fide* defence in respect of the plaintiff's claim. It is true that the Courts have on occasion taken the view that due to the paucity of information contained in the plaintiff's summons, the defendant ought to be given a further opportunity to fully present its version. This is particularly so where there has been a complete absence of a recordal of individual transactions entered into over a period of more than three years. [16] However, this matter can be distinguished. The transactions referred to were over a relatively short period of approximately five months, and in any event, the

[15] at 226 C - E
[16] Mahomed Essop (Pty) Ltd v Sekhukhulu & Son, 1967 (3) SA 728 (D), at 732B - D

first defendant does not state that there was no recordal of the transactions by him, but rather that he has no knowledge of them, because he was no longer the managing director of the second defendant. This statement simply does not pass muster as a defence.

[24] Where the first defendant states that the recipient of the amount of N$576,506.74 is not disclosed, this is simply incorrect. In the particulars of claim it is alleged that the payment was made to Kulani Africa Gas (Pty) Ltd for gas delivered to the second defendant. The precise dates of payment are pleaded and accordingly it would be a simple matter of investigation for the second defendant to verify whether such payments were made or not.

[25] The same cannot be said about the amount of N$400,000.00 allegedly paid by the plaintiff as a loan to the second defendant on 30 September 2008. It is pleaded by the plaintiff that this amount forms part of the overall amount of N$4,537,691.89 lent and advanced by the plaintiff to the second defendant. However, the summons is contradictory in that the allegation is made by the plaintiff that all such amounts, including the amount of N$400,000.00 was lent and advanced by the plaintiff to the second defendant during the period 22 August 2010 to 5 January 2011, i.e. two years after September 2008. On the face of it, the dates are mutually exclusive and this aspect renders this portion of the

claim excipiable. I accordingly find that *ex facie* the pleadings the second defendant might have a defence to this particular portion of the claim.

[26] It is pleaded by the plaintiff that on 28 October 2010 an amount of N$3,5 million was paid by the plaintiff to the Development Bank of Namibia, being re-payment of a loan owed by the second defendant to the Bank. In this regard, the first defendant states that he and the plaintiff had agreed that before the loan was settled with the Bank, he and the plaintiff would enter into a written agreement concerning the loan, but that this step was never taken. Although not spelt out in as many words, it would seem that the first defendant places reliance on the fact that this transaction was unauthorized by the second defendant. In this regard, I am persuaded that a possible defence is raised in the opposing affidavit and that this issue should be referred to trial.

[27] In view of the approach I have taken, I am satisfied that the plaintiff is entitled to judgment against the second defendant in the amounts of N$61,185.15 and N$576,506.74.

[28] In the circumstances, I make the following order:

1. Summary judgment is granted against the first defendant:

1.1 in the amount of N$990,000.04, together with interest calculated thereon at the rate of 20% per annum, from 1 February 2011 to date of payment;

1.2 In the amount of N$253,968.70, together with interest calculated thereon at the rate of 20% per annum from the date of judgment to the date of payment;

2. Summary judgment is granted against the second defendant in the amount of N$637,691.80, together with interest calculated thereon at the rate of 20% per annum from the date of judgment to the date of payment.

3. That the first and second defendants be granted leave to defend the balance of the plaintiff's claims.

4. That the costs of the application for summary judgment are to stand over for determination by the trial Court

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CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:	Adv. G Coleman *Instructed by Viljoen & Associates*
ON BEHALF OF THE DEFENDANTS*:*	Adv. T Wylie *Instructed by Koep & Partners*