REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

JUDGMENT

Case no: I 920/2012

In the matter between

SIEGFRIED ECKLEBEN **PLAINTIFF/APPLICANT**

and

MOBILE TELECOMMUNICATIONS LIMITED **DEFENDANT/RESPONDENT**

Neutral citation: *Eckleben v Mobile Telecommunications Limited (I 920/2012) [2012] NAHCMD 27 (15 October 2012)*

Coram: **Smuts, J**

Heard on: 25 September 2012

Delivered on: 15 October 2012

Flynote: Application for summary judgment – defendant meeting requirement of setting out bona fide defence – application refused.

ORDER

The application for summary judgment is refused and that the costs of the application stand over for subsequent determination at the trial.

JUDGMENT

SMUTS, J

[1] This is an opposed application for summary judgment.

[2] The plaintiff claims payment for the sum of N$326 644,73 together with interest from date of judgment to date of payment and costs. The claim arises from a lease agreement. The leased premises are referred to as a small room in a tower for the purpose of installation of equipment and an antenna. The premises are alocated near Swakopmund.

[3] The plaintiff acquired the premises subject to the lease. The particulars of claim contend that the defendant unilaterally terminated the lease agreement by giving two months notice where as the expiry date of the lease was 31 July 2016. The claim is thus for the balance of the rental for the entire period of the lease.

[4] After the defendant entered an appearance to defend, the plaintiff launched an application for summary judgment. In the defendant's opposing affidavit, it is firstly contended that the application for summary judgment constitutes an abuse of process and justified a special order as to costs as the plaintiff had been fully aware of the defendant's defences to the action. Certain correspondence is attached in support of that assertion. The defences raised both in the correspondence and in the answering affidavit include a contention that the lease agreement was invalid and unenforceable. It was contended that an essential term of the lease was that the premises should be identified or identifiable from the provisions of the documents itself. It was contended that the description of the premises as being a "small room in a tower" in a definitions portion where the premises are described was insufficient, particularly when read with clause 11 of the schedule which under special conditions, provided that:

'Initial installation done in temporary allocated room and tower. MTC to relocate equipment and antenna to permanent tower and equipment room as it becomes available at no cost to the lesser'. (Sic)

It was thus contended that the description of the premises and the lesser with thus incapable of being identified or identifiable without recourse to evidence extraneous to the written lease agreement. The defendant's answering affidavit also referred to the fact that the lease agreement expressly provided that it is the full agreement between the parties.

[5] A second defence of rectification was raised. It was contended that clauses 1 and 11 of the schedule were incorrect and did not reflect the common intention of the parties. The opposing affidavit set out what was alleged to have been a common intention of the parties which was thus not reflected in the lease agreement. It entailed the construction of a new concrete tower where equipment and antennas would be installed. The third defence raised was that of a breach on the part of the plaintiff. It was contended that when the equipment was installed in the existing tower it was a stand alone structure above the roof of the adjacent building and that there would be no danger of radiation. It was further contended that, unknown to the defendant, the plaintiff's predecessor went ahead to construct a sundowner platform in close proximity to the antennas which would create a danger radiation at an unacceptably high level for those making use of the sundowner platform and thus resulting in the leased premises being no longer suitable for the intended purpose.

[6] Mr P Barnard appeared for the defendant amplified these defences in his written and oral submissions. He referred to the several authorities of this court to the effect that summary judgment is an extra-ordinary remedy and should only be granted in circumstances where the court has no doubt that a plaintiff has an unanswerable case. Where there was doubt that the plaintiff's claim is unanswerable, the defendant should get a benefit of that doubt and court would then refuse summary judgment[1]. Mr Barnard also referred to authorities concerning the *essentialia* of a lease agreement being that

[1]Easy Life Management (Cape) v Easy Fit Covers Windhoek cc 2008 (2) NR686 (HC) at 692, par 15 and the authorities usefully collected there.

the leased premises must be ascertained or ascertainable[2]. If this requirement had not been complied with, then no valid lease agreement would be in existence. He submitted that the leased premises are not identified in the agreement at all and that the lease agreement is accordingly invalid and unenforceable. He further submitted that the plaintiff did not contend that he relied upon a partly written and partly oral agreement. On a contrary, the written agreement in turn provided that it constitutes the whole agreement between the parties and that no other agreements would be binding upon the parties. Mr Barnard thus submitted that the defendant had established that it had a bona fide defence to the claim with reference to the assertion that the agreement was not enforceable by reason of failing to properly identify the leased premises.

[7] Mr Vaatz who represented the plaintiff disputed these assertions. He accepted that the lease agreement on one hand referred to the initial installation as being temporary and that there would be a relocation to a permanent tower as it becomes available. He contended that the claim of huge costs of relocating would not constitute a defence. In this respect, he is correct, as long as the place of relocation is properly identified or identifiable from the agreement. This would not however appear to be the case with reference to the written agreement itself.

[8] It would thus follow that the defendant has in my view met the requisite of establishing a bona fide defence to the claim in its opposing affidavit. Much of the argument focused upon this initial defence although the other defences were also referred to by Mr Barnard. Once a bona fide defence is raised, as it would appear to me to be the case in respect of this first defence, then it would follow that the plaintiff would not be entitled to summary judgment. It would however also seem to me that the two further defences raised would also amount bona fide defences to a claim for summary judgment.

[9] It thus follows that the application for summary judgment should be refused. Despite the request in the opposing affidavit that a refusal of the application should be

[2]Stellmacher v Christians & Others 2008 (1) NR 285 (HC) at 287, 288

visited with an adverse costs order, I decline to do so. After I canvassed this aspect with both Mr Barnard and Mr Vaatz, both parties were correctly of the view that if I were to decline summary judgment, then the question of costs should rather stand over for determination at the trial. I am likewise inclined to that view.

[10] It follows that the application for summary judgment is refused and that the costs of the application stand over for subsequent determination at the trial.

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DF SMUTS

Judge

APPEARANCE

PLAINTIFF/APPLICANT:	A Vaatz Of Andreas Vaatz & Partners
DEFENDANT/RESPONDENT:	Mr P Barnard Instructed by Lorentz Angula Inc.