REPORTABLE

CASE NO. I 2486/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DESMOND AMUNYELA **PLAINTIFF**

and

AROVIN PROPERTY DEVELOPERS (PTY) LTD **DEFENDANT**

CORAM: CORBETT, A.J

Heard on: **19 OCTOBER 2011**

Delivered on: **5 APRIL 2012**

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 defendant. The claim has its origins in bad blood between the parties arising out of a commercial transaction, which transformed into an incident at a local restaurant where a shareholder of defendant, Mr Vincent Sorenson, sent a provocative and ill-considered note to the plaintiff suggesting in crude terms that the plaintiff was a sycophant of the founding President, Dr Sam Nujoma. The note was offensive and displayed a level of disrespect to the persons implicated, and given the location and timing of the conduct in question, the dissolute hand of *Bacchus* could be detected.

[2] The defendant states in the opposing affidavit resisting summary judgment that, in the light of the incident at the restaurant, the plaintiff threatened to expose Sorensen as a racist and to destroy his good standing and reputation. Mr Sorensen tendered a written apology for his conduct which was refused by the plaintiff. Then followed a series of articles in the press describing Sorensen as a racist. There was also official government condemnation. Thereafter the parties agreed that defendant would pay the plaintiff N$2.1 million in return for which the plaintiff would back off and withdraw criminal charges which he had laid against Sorensen in respect of the incident.

[3] A document was signed to this effect suggesting that the debt arose by virtue of consultancy work done by plaintiff for defendant. The misleading description of the *causa* for the debt was not explained by the defendant. Sorensen states that in terms of the acknowledgment the defendant paid an amount of N$700,000.00 to plaintiff. An amount of N$1.4 million remained outstanding which was due and payable before the end of July 2011. The defendant refused to pay this amount, hence summons was issued against the defendant for the outstanding balance based upon the acknowledgment of debt signed between the parties.

[4] The defendant's opposing affidavit in terms of Rule 32(3)(b) was filed outside of the time period provided for in the Rules of Court and the defendant sought condonation for the late filing thereof. The plaintiff did not oppose the application. Given that the opposing affidavit was filed approximately thirty minutes out of time and the delay was explained, I granted condonation to the defendant.

BONA FIDE DEFENCE

[5] High Court Rule 32(3)(b) requires that the opposing affidavit must fully disclose the nature and grounds of the defence and the material facts upon which reliance is placed, such that the affidavit satisfies the Court that there is a

bona fide defence to the action. Whilst the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them –

> "*he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence*" [1].

[6] Upon perusal of the defendant's opposing affidavit the following defences emerge: firstly, that the document purporting to be an acknowledgment of debt does not qualify as such due to ambiguity concerning the parties to that agreement; secondly, that the acknowledgment of debt is invalid and unenforceable due to the fact that the plaintiff fraudulently and through undue influence induced the defendant to sign it; and thirdly, an allegation that any debt which underpinned the acknowledgment of debt has become prescribed.

[7] Mr Namandje, who appeared for the plaintiff, submitted that if regard is had to the particulars of claim and the opposing affidavit, there can be no doubt that the acknowledgment of debt, annexed to the particulars, constitutes a valid and enforceable document. There is some validity in the submission that the acknowledgement creates some confusion in referring to amounts being due to the "undersigned", since those parties are (within the context of the letterhead on which the acknowledgment appears) Sorensen and the plaintiff. However, to

[1] Maharaj v Barclays National Bank Ltd, 1976 (1) SA 418 (A), 426: Quoted with approval in Mbambus v Motor Vehicle Accident Fund, 2011 (1) NR 238 (HC), 243, para [15]; Commercial Bank of Namibia Ltd v Transcontinental Trading, 1991 NR 135 (HC) at 143 E – I; Kramp v Rostrami, 1998 NR 79 (HC) at 82 C – I; Autogas Namibia (Pty) Ltd v Mushimba, 2008(1) NR 253 (HC)

suggest that the acknowledgment is evidence of a debt owed by defendant to itself would lead to absurdity and I consider that a Court would at the trial seek to give meaning to the parties' intention. I also regard it as relevant that the defendant has in fact already made payment of N$700,000.00 in respect of the acknowledgment of debt, the validity of which it now seeks to contest. In the circumstances, I do not consider that the defendant has shown on this basis that it has a *bona fide* defence.

[8] The defendant's reliance upon fraud inducing the signing of the acknowledgment of debt is based upon an allegation that the plaintiff fraudulently misrepresented that he would upon payment in terms of the acknowledgment withdraw criminal charges laid against the defendant in respect of the incident at the restaurant and publish an article in the Windhoek Observer indicating that the matter had been resolved. Critically no facts are put up as to whether the obligations were to be performed simultaneously or whether one formed a condition precedent to the other. Sorensen states that he made one payment of N$700,000.00. The remaining payment of N$1.4 million was in terms of the acknowledgment due by the end of July 2011 but has not been paid. The fact that Sorensen made an initial payment prior to the plaintiff performing his obligations suggests that the parties' understanding was that payment would precede the performance of the plaintiff's obligations. I also agree with Mr Namandje that the very existence of the plaintiff's obligations is called into question by the provisions of the parol evidence rule[2]. No material facts are put

[2] Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd, 1941 AD 43 at 47

up which suggest that a Court should go behind what purports to be the exclusive memorial of the transaction entered into between the parties. This memorial – the acknowledgement of debt – does not make payment in terms thereof conditional upon the withdrawal of charges or any other such obligations.

[9] The defendant's defence of duress and undue influence is also cryptically pleaded. It is unclear as to whether any of the suggested threats allegedly made by the plaintiff to Sorensen induced the defendant, of which Sorensen is a fifty per cent shareholder, to enter into the acknowledgment of debt. There is no evidence in the opposing affidavit of the effect that the alleged duress might have had on Mr Aaron Mushimba, the other shareholder of defendant. The emphasis is placed solely upon Sorensen. A possible explanation for defendant signing the acknowledgment was that Sorenson realized that the ill-conceived and insensitive remarks at the restaurant would do harm to his business and accordingly as a matter of strategy, rather than fear, decided to reduce any collateral damage caused by his remarks by seeking to enter into a financial arrangement with the plaintiff, the effect of which would be to put a stop to the further ventilation of these issues.

[10] In regard to the defence of prescription, I accept Mr Namandje's submission that the defendant's reliance thereon is misplaced. The entering into of the acknowledgment of debt would constitute a compromise in respect of the

original cause of action, and no facts had been put up to justify the defendant falling back upon the original right of action [3].

[11] As a consequence, I find that the defendant has failed to satisfy the Court by way of affidavit that it has a *bona fide* defence to the plaintiff's claim. Defendant has thus not complied with the provisions of Rule 32(3)(b). I pause to mention that this does not necessarily signify that the defendant has no defence to the plaintiff's claim, but rather that the manner in which the defence has been presented by way of affidavit in these proceedings falls short of the standard required by Rule 32(3)(b).

THE PROVISION OF SECURITY

[12] However, the matter does not end there. The defendant has hedged its bets. A day before the hearing of the matter the defendant filed a document purporting to be a bond of security, giving security should it be found that defendant had not complied with the provisions of Rule 32(3)(b). In terms thereof the defendant tendered security for the payment of the judgment debt, interest and costs subject to the maximum of N$2.1 million. It was stated in the bond that this was the amount determined by the Registrar of the High Court in terms of Rule 32(3)(a) of the Rules. In somewhat confusing terms the bond further states that, in the event of the Court not being inclined to accept the security provided in the bond, an amount of not less than N$2.1 million in cash had been deposited

[3] Van Zyl v Niemann, 1964 (4) SA 661 (A)

into the trust account of the defendant's legal practitioners of record as alternative security. It is not the function of the Court to determine security, but this discretion lies solely in the hands of the Registrar.

[13] In argument at the hearing of this matter, Mr Titus who appeared on behalf of the defendant, sought to place evidence before the Bar that the security so tendered was to the satisfaction of the Registrar. I refused to permit Mr Titus to tender such evidence, for the obvious reason that no weight could be attached to any such assurances where the Registrar had not herself confirmed this to be the case.

[14] Mr Namandje submitted that the security provided by the defendant did not comply with the provisions of Rule 32(3)(a), in that the amount, nature and mode of security was not determined by the Registrar. He emphasized that the setting of security was a discretionary function of the Registrar and the Court has no power to usurp the Registrar's functions. He further attacked the terms in which the security was given as not complying with the requirements of the Rule.

[15] In this context the question arises whether a defendant who, having realised that his or her opposing affidavit will not pass muster, may belatedly tender security in order to avoid summary judgment. The further question arises as to whether the form of security provided is sufficient, and if not, what the consequences would be.

[16] Security furnished by the defendant provides the plaintiff with certainty that, should the plaintiff prove his or her claim, the plaintiff's judgment and costs will be met. In the matter of *Spring & v.d. Berg Construction v Banfrevan Properties* [4] the Court was not satisfied with the facts upon which the defendant sought to rely such as to establish that the defendant had a *bona fide* defence to the action. In those circumstances, it followed that summary judgment should be granted against the defendant unless the Court was of the opinion that justice required that the defendant should in all the circumstances of the case be given an opportunity to defend. Towards the end of argument in the summary judgment proceedings defendant's counsel sought to tender security to the plaintiff. In dealing with the applicable principle, James J stated [5]:

> "Now it is clear that at the hearing of an application for summary judgment a defendant may give security to the plaintiff to the satisfaction of the Registrar for any judgment which may be given. If he does so he is free to enter upon his defence and is not obliged to satisfy the Court on affidavit that he has a *bona fide* defence. The fact that he gives security is a sufficient ground for allowing him to defend. I can see no reason in principle why a defendant who has initially elected to file an affidavit relating to the *bona fides* of his case should not change his mind at the hearing of the application and give security instead. This in itself gives the plaintiff a valuable assurance – that if he proves his case his judgment

[4] 1968 (1) SA 326 (D)
[5] at 328 A – B. This dictum has been applied in a number of subsequent cases, including Bank van die Oranje Vrystaat Bpk v Kleiwerke Bpk., 1976(3) SA 804 (O) at 809 E –F and Gralio (Pty) Ltd v DE Claassen (Pty) Ltd, 1980(1) SA 816 (AD) at 826 F - G

> will be satisfied - and the Rule clearly regards this as a sufficient reason for refusing summary judgment."

[17] A defendant may up to the late stage of the hearing of an application for summary judgment tender security in order to avoid summary judgment [6]. Such conduct does not constitute an abuse of the process of Court as a *male fide* defendant wishing to play for time, would in any event, be afforded leave to defend by furnishing security which would absolve him or her from delivering an opposing affidavit [7].

[18] The opening words of Rule 32(3)(a), namely to "*give security to plaintiff to the satisfaction of the Registrar*", refer purely to the form and quality of the security furnished [8]. The Registrar has a wide discretion to determine the content of the security furnished. It has been stated in this regard that[9]:

> "If the Registrar approves a form of security which commercial men might think is not proper or sufficient security, then the matter rests there because this aspect is left to the Registrar's discretion and once he has decided that a particular form is satisfactory, it is the end of the matter."

---

[6] Bank van die Oranje Vrystaat – case *supra*, 811 C - D
[7] Bank van Oranje Vrystaat –case, *supra,* 811 C - D
[8] Cinemark (Pty) Ltd v Alfetta Tune-Up Centre, 1979 (4) SA 802 (WLD), 803 H
[9] Cinemark –case *supra*, 803 H – 804 A

[19] I have already found that there was no evidence that the Registrar had satisfied herself in regard to the appropriateness of the security tendered by the defendant. The question then arises as to how the Court should then deal with the matter where there is no evidence of compliance with Rule 32 (3) (a). In the *Spring* –case the Court stated [10]:

> "Nevertheless the fact that the defendant has made this tender has at least added weight to its contention that it has a *bona fide* defence which it intends to pursue. The fact that it has tendered at a late stage and that it has done so conditionally upon its contentions on the merits being dismissed, is a matter which can be cured by an award of costs to the plaintiff. Since the giving of security at any earlier stage would have entitled the defendant to defend the action, it seems to me that justice requires in all the circumstances of this case that, subject to it filing security, it should be allowed to defend."

[20] I am of the view that the dictum in the *Spring* –case applies with equal force to the facts of this matter. The defendant, whilst initially electing to file an affidavit relating to the *bona fides* of its case, is entitled to give security at the hearing, and where such security on the face of it does not comply with Rule 32(3)(a), the Court may in the exercise of its discretion taken cognizance of the fact that the tender has been made[11]. The fact that the defendant has tendered security lends weight to the contention that the defendant has a *bona fide*

[10] Spring –case, *supra*, 328 C - D
[11] Doyle v Nash, 1952 (1) SA 77 (T), 80E

defence which it intends to pursue. I am convinced that justice requires in all circumstances of the case that the defendant be allowed to defend the matter.

[21] In the light of the fact that there is no evidence that the Registrar has satisfied herself of the appropriateness of the security tendered, the correct procedure would be to order the defendant to refer the matter to the Registrar so that the Registrar can exercise a discretion in terms of Rule 32(3)(a)[12].

[22] The fact that the defendant chose to file an affidavit in terms of Rule 32 (3) (a) at such a late stage of proceedings, whereas it could have done so earlier, in my view, impacts on the issue of costs. This fact is reflected in the costs order I make in this matter.

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

1. Subject to the defendant within one week of this judgment filing security to the satisfaction of the Registrar for any judgment, including interest *a tempore morae* and costs, which may be granted to the plaintiff in this action, the defendant is granted leave to defend.

[12] Spring –case *supra* at 328 G – H; Doyle case supra at 80F

2. Should such security not be filed within a stipulated period referred to in paragraph 1, the plaintiff may renew his application for summary judgment upon the same papers.

3. The plaintiff is awarded the costs of the application for summary judgment.

_____

CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:

Mr S Namandje

Instructed by Sisa Namandje & Co

ON BEHALF OF THE DEFENDANT:

Mr I Titus

Instructed by Koep & Partners