

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case no. I 2379/2011

In the matter between:

DANIËL BEUKES

PLAINTIFF

and

ELSIE RAGEL LOTTERING

DEFENDANT

Neutral citation: *Beukes v Lottering* (I 2379-2011) [2012] NAHCMD 76 (27 January 2012)

Coram: VAN NIEKERK J

Heard: 20 January 2012

Judgment: 27 January 2012

Reasons: 23 November 2012

Flynote	Practice – Application for summary judgment – Does not qualify to be judicially managed under the rules relating to judicial case management
Summary	<p>The plaintiff moved an opposed application for summary judgment in the first motion court. The defendant, who had not filed an opposing affidavit, opposed the application on several grounds, inter alia that, as the application is opposed, it falls to be placed before a case managing judge who will have to decide upon a date to hear the application. The court considered certain amendment to the rules to provide for judicial case management and concluded that summary judgment applications do not qualify to be judicially managed under rule 6(5), as amended. The court also considered rule 37(1)(b) which requires allocation to a managing judge of cases in action proceedings only where the pleadings have closed. Summary judgment applications are interlocutory applications brought in the course of action proceedings. It is self-evident that in such cases the pleadings have not closed. There are no express provisions specifically requiring summary judgment applications to be allocated for judicial case management. The defendant's objection on these grounds failed.</p>

REASONS FOR JUDGMENT

[1] The plaintiff issued combined summons against the defendant for two claims. In the particulars of claim he alleges that he entered into an oral agreement of purchase and sale with the defendant in 16 October 2011, in terms

of which the defendant would sell to the plaintiff, who would purchase, two tame juvenile kudu bulls for N\$5 000 each. The terms of the agreement further were that delivery would take place after payment of the purchase price. In respect of the first claim it is alleged that the plaintiff made payment as agreed, but that the defendant breached the agreement by failing to deliver the animals. On 22 June 2011 the plaintiff cancelled the agreement and demanded repayment of the purchase price. Alternatively, plaintiff pleads that, if the court finds that the agreement was not cancelled, he is entitled to cancellation and repayment.

[2] In the first claim he prays for an order confirming the cancellation of the agreement, alternatively an order cancelling the agreement, plus payment of N\$10 000, interest thereon from date of summons and costs of suit.

[3] There is a second claim for payment of damages of N\$8 861 allegedly arising from the defendant's wrongful breach of the agreement.

[4] The defendant entered an appearance to defend, where after the plaintiff filed a notice of application for summary judgment on the first claim only.

[5] The application was originally set down in the first motion court on 9 December 2011. On that day Mr Jones for the plaintiff and Mrs Petherbridge for the defendant appeared. The matter was postponed to 20 January 2012 before me, when the same counsel were in attendance.

[6] There is no notice of opposition on the court file, but it seemed that Mr Jones accepted that the application was opposed. He pointed out that no opposing affidavit had been filed and moved for summary judgment. Mrs Petherbridge objected thereto and submitted (i) that as the application is opposed, it falls to be placed before a case managing judge who will have to decide upon a date to hear the application; (ii) that there is no need to file an affidavit; and (iii) that, in any event, the matter is not one that can be determined by way of summary judgment. These submissions were countered by Mr Jones, who persisted in moving the application.

[7] At the time I indicated that I would provide a ruling on the matter on the following Friday, which I did, granting summary judgment for the plaintiff for:

1. An order confirming the cancellation of the agreement.
2. Payment of the amount of N\$10 000.00.
3. Interest from the date of summons at a rate of 20% per annum.
4. Costs of suit.

The reasons for this ruling now follow.

[8] As to the defendant's first objection, the introduction of judicial case management required the amendment of the rules of this Court (see G.N. 57 of 13 May 2011). The newly inserted rule 1A(1) sets out the objectives of judicial case management 'of an action or application'. Application proceedings are dealt with in rule 6. It is trite that, apart from interlocutory applications dealt with in rule 6(11), rule 6 provides for two kinds of substantive applications. These are (i) rule 6(4) applications which are brought *ex parte* by way of petition or upon notice (if by notice, it shall be in accordance with Form 2(a) of the First Schedule (the so-called 'short form'); and (ii) rule 6(5) applications (which are not brought *ex parte*) brought on notice of motion in accordance with Form 2(b) of the First Schedule (the so-called 'long form').

[9] As far as this distinction between kinds of applications is concerned, it is only with respect to the second kind, i.e. those under rule 6(5), that amendments were made to rule 6 to cater for judicial case management. These consist of the substitution of rule 6(5)(c) and the insertion of sub-rule (5)(i) after sub-rule (5)(h). Hereby the clear intention is conveyed that it is only rule 6(5) applications that are to be placed before a managing judge.

[10] An application for summary judgment is an interlocutory application brought during the course of action proceedings. It is governed by rule 32 and not by rule 6(5), which, as I have already stated, deals with applications brought on notice of motion. Summary judgment applications are not brought on notice of motion. As such they do not qualify to be judicially managed under rule 6(5), or, for that matter, under rule 6(5A), 6(5B) and 6(5C).

[11] Furthermore, rule 37 deals with the assignment in individual case files to managing judges and provides for certain procedures to be followed and

actions to be taken with respect to, inter alia, case management conferences and status hearings in relation to action proceedings. Rule 37(1)(b) provides:

‘On the date of coming into operation of the case management rules or so soon thereafter the registrar must, with the concurrence of the Judge-President, allocate every case in which pleadings have closed, to a managing judge who must manage the case as provided herein until its conclusion.’ [my underlining]

[12] In order to give effect to rule 37(1)(b), the Consolidated Practice Directions provide in paragraph 33.B for a procedure whereby the plaintiff, failing which, the defendant, must notify the Registrar not later than 4 days ‘after close of pleadings’ of the fact that the pleadings have closed and call on her to allocate the case to a managing judge.

[13] From these provisions it is clear that the intention is that, except in cases falling under rule 37(1)(c), which is not applicable in this matter, only cases in which pleadings have closed are to be allocated to managing judges. It is self-evident that the pleadings in cases where summary judgment is applied for have not closed as the defendant has not pleaded.

[14] Lastly, a perusal of the relevant rules further indicates that there is no express provision specifically requiring an application for summary judgment to be allocated to a managing judge.

[15] On all these bases the first objection must therefore fail.

[16] I now consider the defendant’s second objection. It is so that in terms of rule 32(3) a defendant may elect not to file an affidavit opposing summary judgment, but may rather upon the hearing of the application (a) give security to the plaintiff for any judgment including costs which may be given; or (b) obtain leave from the court to satisfy it by oral evidence that summary judgment should be refused. However, in this case the defendant did not exercise any of these options, nor did she apply for a postponement to do so at a future date or give any indication of which course of action she intended following. In the circumstances the second objection is not upheld.

[17] The third objection must also fail. In terms of rule 32(1)(b) summary judgment may be granted on each of such claims in the summons as is only for a

liquidated amount in money, together with any claim for interest and costs. Claim 1 in this matter clearly is such a claim.

[18] For these reasons the order set out in paragraph [7] *supra* was made.

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Mr J R Jones

of Neves Legal Practitioners

For the defendant:

Mrs M C Petherbridge
of Petherbridge Law Chambers