

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3664/2012

In the matter between:

**FAIR PLAY NAM INVESTMENTS (PTY) LTD**

**APPLICANT/PLAINTIFF**

and

**STANDARD BANK NAMIBIA LIMITED**

**RESPONDENT/DEFENDANT**

**Neutral citation:** *Fair Play Nam Investments (Pty) Ltd v Standard Bank Namibia Limited* (I 3664-2012) [2013] NAHCMD 227 (30 July 2013)

**Coram:** UNENGU, AJ

**Heard:** 11 June 2013

**Delivered:** 30 July 2013

**Flynote:** Practice – Judgments and orders – Summary judgment – *bona fide* – defence established – Application for summary judgment dismissed.

**Summary:** The application for summary judgment dismissed with costs – Respondent has established a *bona fide* defence, therefore the applicant does not

have an unanswerable case. Court exercised discretion against granting of summary judgment.

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**ORDER**

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- (i) The application for summary judgment is dismissed with costs, which costs include the costs of one instructing and one instructed counsel.
  
- (ii) The respondent is granted leave to defend the matter.

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**JUDGMENT**

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UNENGU, AJ:

[1] This is an application for summary judgment based on a combined summons wherein the applicant is seeking an order against the respondent for payment in the amount of N\$479 000.00, interest on the amount at the rate of 20% per annum calculated from 24 November 2009 until the date of final payment with costs of suit, which costs occasioned as a result of the employment of one instructing and one instructed counsel and further or alternative relief. The application was filed on 7 December 2012 at the office of the Registrar of this Court.

[2] Mr Sam Bob Moses who described himself as a major male person, employed as a director at applicant, deposed to the supporting affidavit on behalf of the applicant, verifying the cause of action of the claim as well as the indebtedness of the respondent to the application as prayed for in the relief sought. In paragraph 4 of the affidavit, Mr Moses states that in his opinion the respondent does not have a *bona fide* defence to the applicant's claim and that respondent entered an appearance to defend solely for the purposes of delay.

[3] On 16 January 2013, the respondent filed a notice of opposition indicating that the application for summary judgment by the applicant dated 7 December 2012 will be opposed. Mr Ismael Hakaaje, employed as Bank Manager of the respondent at

Standard Bank Oshakati as well as the Regional Manager of the Respondent's North-West branch, deposed to the affidavit indicating amongst others, that he was duly authorised to depose to the affidavit on behalf of the respondent (defendant) and to oppose the summary judgment application brought against the respondent. He further stated that the facts in the affidavits fall within his personal knowledge and are true and correct unless the context indicates otherwise. He then denied that the respondent was indebted to the applicant in the amount of N\$479 000.00; that the respondent has defended the matter solely for the reasons of delaying the matter and that the respondent does not have a *bona fide* defence.

[4] Rule 32 of the High court Rules deals with summary judgments and states as follows:

- '(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to the court for summary judgment on each of such claims in the summons as is only –
- (a) on liquid documents;
  - (b) for a liquidated amount in money;
  - (c) .....
  - (d) .....
- together with any claim for interest and costs”.

[5] Subrule (2) of Rule 32 amongst other things, stipulates that the plaintiff shall, within 15 days after the date of delivery of notice of intention to defend, deliver notice of the application for summary judgment, accompanied by an affidavit made by himself 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 opinion there is no *bona fide* defence to the action and that notice of intention to defend has been entered solely for the purpose of delay.

[6] This requirement, the applicant has complied with. An affidavit deposed to by Mr Moses has accompanied the application. Meanwhile, the respondent also filed an affidavit deposed to by Mr Hakaaje as indicated above.

[7] Therefore, in this application, what is required from the respondent, is, that it must satisfy the court that it has a *bona fide* defence. This should appear from the affidavit by Mr Hakaaje on behalf of the respondent. However, at this stage, respondent does not bear the onus. He must only set out facts which, in the absence of a trial, would satisfy the court that it has a *bona fide* defence, in order to entitle the court to decline the applicant's application for summary judgment<sup>1</sup>.

[8] Similarly, at this stage, the defendant does not need to convince the court that all facts are undisputed; as the court does not weigh probabilities at summary judgment stage<sup>2</sup>.

[9] On the other hand, even though the defence does not need to be comprehensive as pleadings – it should not be bald and sketchy. Teek, J (as he then was) in the matter of *Kramp v Rostami* above<sup>3</sup> stated the following: 'the word "fully" mentioned in the Rules is not meant to be given its literal meaning and it is sufficient for the respondent to set out facts so as to persuade the court that it has a *bona fide* defence to the claim. But if the defence averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides* – and grant the application sought'.

[10] There is, therefore, a duty on the respondent or any other person who deposes to the answering affidavit to set out sufficient facts in the affidavit to persuade the court that he or she in this matter, the respondent, has a *bona fide* defence against the claim of the applicant – such defence should not be in the form of a bald statement, vague or sketchy, giving the court a ground to grant the summary judgment.

[11] Above, I have indicated some of the principles of law applicable to summary judgments. These are Rule 32 of the High Court Rules and the case law dealing with summary judgments. Therefore, now, I deal with the issue of as whether or not

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<sup>1</sup> *Kramp v Rostami* 1998 NR79 (HC) at 82 C-D

<sup>2</sup> *Easy Life Management (Cape) (Pty) Ltd and Another v Easy Fit Cupboards Windhoek cc and others* 2008 (2) NR 686 at 691 I-J

<sup>3</sup> at 82H

the respondent has complied with the requirements of the law regulating summary judgments. In other words, as whether the respondent has set out facts in the answering affidavit which facts establish a *bona fide* defence, not a defence which is vague or sketchy.

[12] In *Standard Bank of Namibia Limited v Veldsman*<sup>4</sup> Muller, AJ (as he then was) stated the following: 'Summary judgment is a very stringent and final remedy which closes the doors of the court for a defendant and should only be granted if it is clear that the plaintiff has an unanswerable case. It has been stated by our and South African Courts that, even if the defence of the defendant does not sufficiently comply with the requirements of Rule 32(3), the court still has a discretion to refuse summary judgment. See *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) at 732; *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) 95 (C) at 103 G-H; *Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (C) at 811 C-G.'

[13] Subrule (3) deals with payment of security to the plaintiff for judgment and costs which may be given and an affidavit in the place of security satisfying the Court that the respondent has a *bona fide* defence, which is the position in this application.

[14] Mr Heathcote, counsel for the applicant argued that the respondent did not raise issues in the answering affidavit, therefore, according to him, there are no factual disputes in the application for summary judgment. He said that where there are not factual disputes involved, the principles regulating summary judgment should play a lesser significant role. With this argument, I assume, Mr Heathcote is implying that his client, the applicant has an unanswerable case, therefore, the summary judgment should be granted or that the principles should not be considered. Even if he is correct, that the respondent did not establish a *bona fide* defence, the court has a discretion to refuse summary judgment. See *Standard Bank of Namibia of Namibia Limited v Veldsman* above and cases quoted therein. Summary judgment is a stringent and final remedy which closes the doors of the Court for the defendant.

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<sup>4</sup> 1993 NR 391 at 392 D-E

The court is not obliged to grant summary judgment even where the court doubts the *bona fides* of the defence. *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd*<sup>5</sup>.

[15] In this application, the applicant does not have an unanswerable case. There are factual disputes raised in the answering affidavit of the respondent. In paragraph 3 of the respondent's affidavit it is stated that the concerned account was opened in the name of Ketu Two Thousand Guest House and Bar CC on or about 22 June 2009 at the Oshakati Branch of the respondent, where the founding statement of the close corporation was submitted indicating that a certain Joshua Sheelongo Natangweya Mwetupunga holds a 100% member's interests in the close corporation.

[16] Similarly, it is stated in paragraph 5 of the affidavit that on or about 6 August 2009, Mr Mwetupunga who holds 100% member's interests in the close corporation, gave respondent written instruction to change the previous signatory mandate, as a sole member of the close corporation, to sign alone for transfer of funds on the said account. And on the strength of this instruction, the amount of N\$479 000.00 was transferred from the investment account, but is not clear whereto the money was transferred. Further, the relationship between the applicant and the two persons who ostensibly acted as agents for the applicant has to be ventilated during the trial.

[17] With the above facts together with the allegations raised in the points in limine in the respondent's answering affidavit, coupled with the authorities cited in written heads of argument of respondent as amplified by oral submissions by Mr Coleman, in mind, I hold the view that the respondent established a *bona fide* defence.

[18] I further agree with Mr Coleman that the close corporation is the client of the bank, and Mr Mwetupunga is the 100% member thereof. The two so-called agents of the plaintiff, according to the documents, were only signatories to the account of the close corporation – which right was granted to them by Mr Mwetupunga by letter dated 6 August 2009.

[19] In the result, for reasons indicated above and having considered arguments from both counsel and the authorities referred to, I decided to exercise my discretion

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<sup>5</sup> 2007 (1) NR 447 (HC)

against the granting of the summary judgment. Therefore, I make the following order:

- (i) The application for summary judgment is dismissed with costs, which costs include the costs of one instructing and one instructed counsel.
- (ii) The respondent is granted leave to defend the matter.

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EP Unengu  
Acting Judge

APPEARANCE

PLAINTIFF: Mr Heathcote (assisted by B De Jager)  
Instructed by: Scholtz Law Chambers

DEFENDANT: Mr G Coleman  
Instructed by: AngulaColeman  
Windhoek