



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## REASONS

Case no: I 1386/2013

In the matter between:

QUINTIN ROWLAND LOFTY-EATON

1<sup>ST</sup> PLAINTIFF

CLAUDIA PATRICIA GOMES RAMOS

2<sup>ND</sup> PLAINTIFF

and

GRANT BRANDON NOBLE

DEFENDANT

**Neutral citation:** *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013)

**Coram:** CHEDA J

**Heard:** 29 October 2013

**Delivered:** 08 November 2013

**Flynote:** A party who desires to inform the court on the basis of an affidavit should file an affidavit which is signed before a commissioner of oaths and it must be dated. An affidavit that does not meet the above criteria does not qualify as an affidavit to be considered by the courts.

A defective notice of opposition is no opposition at all.

**Summary:** Summary judgment is a method or tool which the courts use to prevent defendants who enter appearances to defend when they have no *bona fide* defence. When a notice of opposition is defective, it is not valid and the courts will proceed as

if there was no opposition at all – applicants issued out summons for arrear rentals – defendant filed a notice of intention to defend, but, failed to file a proper opposing affidavit. Defendant had no *bona fide* defence – application for summary judgment was granted.

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### ORDER

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- (1) Respondent is hereby ejected from Erf 3543, Walvis Bay, and Republic of Namibia.
- (2) Respondent shall pay the amount of N\$45 000.00.
- (3) Respondent shall pay the sum of N\$7 500 per month from date of service of summons to the date of the respondent vacating Erf 3543, Walvis Bay, Republic of Namibia.
- (4) Respondent shall pay interest on the amount of N\$45 000.00 at the rate of 20% per annum *a tempore morae* alternatively from the date of judgment until final payment thereof.
- (5) Respondent shall pay the costs of suit, which costs to include one instructing and one instructed counsel.

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### REASONS

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**CHEDA J** [1] This application was placed before me on the 29<sup>th</sup> of October 2013, After hearing arguments, I granted it with reasons to follow. These are they:

[2] This is an application for a Summary Judgment which was “*opposed*”. Applicants (Plaintiffs) are the joint owners of the immovable property known as Erf 3543 (hereinafter referred to as “*the property*”) in Walvis Bay. Respondent (Defendant) has been in occupation of the said property since 31 October 2012. The parties for the purpose of this application will be referred to as applicants and respondent respectively. It is applicant’s contention that despite demand, respondent refused to give it vacant possession of the said property. His refusal, therefore, has

resulted in applicants' failure to realize financial gains from the property as they are unable to lease it to anybody. Applicants issued out combined summons out of this court on the 8<sup>th</sup> of May 2013 wherein, the following claims were made:

**Claim 1**

Respondent's ejectment from the said property; and

**Claim 2**

- (a) Payment in the amount of N\$45 000.00 being arrear rental from 31 October 2012 to 30 April 2013;
- (b) Payment of N\$7 500.00 per month from date of service of summons to date of respondent's vacation of the premises; and
- (c) Interest on the amount of N\$45 000.00 per month at the rate of 20% per annum *a tempore morae* from date of judgment to date of final payment.

[3] Summons was served on respondent and he filed a notice of intention to defend on the 21<sup>st</sup> of May 2013. In response, applicants applied for a summary judgment on the basis that the respondent had no *bona fide* defence and his opposing affidavit was defect. Second applicant deposed to an affidavit wherein she fully associated herself with the facts as set out in the particulars of claim and indeed verified the cause of action. Of note is that she stated that respondent is in unlawful possession of the immovable property in question and hence prayed for a summary judgment.

[4] Mr Mbaeva the legal practitioner for respondent filed an application for condonation for the late filing of the respondent's opposing affidavit. The application was filed on 27 June 2013 and in his own affidavit he confirmed the contents of respondent's affidavit. His own affidavit was signed on the 26 June 2013 before a commissioner of oaths. He also filed "an opposing affidavit" for and on behalf of respondent. However, the said opposing affidavit was undated and was not signed before a commissioner of oaths as is required by law. As far back as 17 June 2013 respondent promised to file an affidavit, but to date failed to do so.

[5] The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by a plaintiff where a defendant raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate plaintiff who without doing so, will continue to endure the frustration mounted by an unscrupulous defendant (s) on the basis of some imagined defence. As remedy available to plaintiff is an extra-ordinary one and is indeed stringent to the defendant, it should only be availed to a party who has a watertight case and that there is absolutely no chance of respondent/defendant answering it, see *Standard Bank of Namibia Ltd v Veldsman*<sup>1</sup>. Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caton Ltd v Barrigo*<sup>2</sup>. In that case, Roberts, AJ went further and crystallised the principle as follows:

*'It is confined to claims in respect of which it is alleged and appears to the court that the defendant has no bona fide defence, and that appearance has been entered solely for the purpose of delay.'*

[6] In *casu* the only valid document filed by the respondent is a *notice of intention to defend*. After this, there was an attempt to apply for condonation. I use the word "*attempt*" for the reason that, this application does not come anywhere near the requirements of rule 6 of the High Court Rules which deals with Interlocutory applications. Therefore, there is no such application before this court which can be determined in order to consider an opposition to the application for summary judgment by applicants. It is for that reason that I used the word "*attempt*."

[7] Where a summary judgment has been applied for, the respondent is entitled to oppose, if he has a *bona fide* defence and in that opposition he/she must dipose to an affidavit where he/she should positively state and show that he/she has a *bona*

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<sup>1</sup> *Standard Bank Namibia Ltd v Veldsman* 1993 NR 391 (HC).

<sup>2</sup> *Caton Ltd v Barrigo* 1960 (4) SA I at 3 H.

*fide* defence to applicant's claim. Respondent must not only show, but, must satisfy the court that he/she has a *bona fide* defence. In furtherance of the satisfaction to the court, respondent must at least disclose his defence and 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, see *Breitenbach v Fiat SA (Edms) BPK*<sup>3</sup> and *Namibia Breweries Ltd v Marina Nenzo Serrao*<sup>4</sup>. This, however, is not to say that he/she should do so by disclosing all the details and particulars as would be the case of proceedings, see *Maharaj v Barclays National Bank Ltd*<sup>5</sup> and *Breitenbach v Fiat SA*<sup>6</sup>.

[8] The requirement seems to be relaxed to a certain extent as it is not rigorous *per se*, but, is designed to enable a genuine respondent to defend a claim which otherwise would result in applicants' obtaining judgment under circumstances where respondent had a genuine defence. The need for clarity on defendant's part is designed to avoid the entry of intention to defend an action solely to delay an otherwise just claim by plaintiff.

[9] For that reason, these courts will always seriously consider the granting of a summary judgment and will only do so where a proper case has been made out by applicants. The above principle has been applied in many cases, see also *Crede v Standard Bank of South Africa Ltd*<sup>7</sup> where Kannemeyer, J remarked:

*"One must bear in mind that the granting of summary judgment is an extraordinary and drastic remedy based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law"*

[10] I find that the dilatory stance adopted by respondent in this matter speaks volumes of his inability to raise a *bona fide* defence. This is a classical case where a notice of intention to defend was filed with one objective and one objective only

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<sup>3</sup> *Breitenbach v Fiat SA (Edms) BPK* 1976 (2) SA 226 (T) at 228 B-C.

<sup>4</sup> *Namibia Breweries Ltd v Marina Nenzo Serrao* (2006) NAHC 37.

<sup>5</sup> *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418.

<sup>6</sup> *Breitenbach v Fiat SA (EDMS) (BPK)* 1976 (2) 226.

<sup>7</sup> *Crede v Standard Bank of South Africa Ltd* 1988 (4) SA 786 at 789 E.

being that of frustrating applicant's valid and legal claim. This type of conduct cannot be allowed to prevail in these courts.

[11] It is for that reason that the application was granted as prayed.

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M Cheda  
Judge

**APPEARANCES**

**PLAINTIFF :** Ms CE van der Westhuisen  
Instructed by Nederlof Inc.  
Windhoek

**STATE:** Mr T N Mbaeva  
Of Mbaeva & Associates.  
Windhoek