NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: A16/2011

LUBBE'S AUTO CENTRE CC **APPLICANT**

and

GROUT INVESTMENTS CC **RESPONDENT**

Case no: A 17/2011

1.1.1.1.

1.1.1.2. **LUBBE'S AUTO CENTRE CC**

APPLICANT

and

DRUPPEL INVESTMENTS CC **RESPONDENT**

Neutral citation: *Lubbe's Auto Centre CC v Druppel Investments CC and Lubbe's Auto Centre v Grout Investments CC (A 17/2011 and A 16/2011) [2013] NAHCMD 59 (2013)*

Coram: Smuts, J
Heard: 27 February 2013
Delivered: 6 March 2013

Flynote: The applicant sought a referral to trial in 2 applications under Rule 6(5)(g). Power of court to dismiss applications when a dispute of fact should have also been anticipated discussed. Applicant's founding affidavit raising sketchy averments in support of relief and applicant failed to reply to answering affidavit. Court exercising discretion to decline to refer matters to trial and dismissed applications.

ORDER

In case A 16/2011, the application to refer this application to trial is refused and the application itself is dismissed with costs. These costs include those occasioned by the employment of one instructed and one instructing counsel and include the costs in the rescission application.

In case A17/2011, the application to refer this application to trial is refused and the application itself is dismissed with costs. These costs include those occasioned by the employment of one instructed and one instructing counsel and include the costs in the rescission application.

JUDGMENT

SMUTS, J

(b) I have before me two opposed applications with strikingly similar facts. Most of the relevant facts are identical. The respondents are however different entities and the quantum of the claims also differs. Both of these applications entail the same legal principles and have by agreement been argued together. They are dealt with together in this judgment. The applicant is the same entity in both matters and the two different respondents are referred to by name, Druppel Investments CC and Grout Investments CC respectively where separate reference to them is required. I otherwise refer to them as the respondents.

(c)

(d) At issue in both applications is whether they should be referred to trial, as sought by the applicant in terms of Rule 6(5)(g).

(e)

(f) The applicant had in both matters claimed that the parties had entered into agency agreements in the same terms. In terms of these agreements the applicant would act as a transport agent for the respondents in securing work for the respondents' trucks and would earn commission for doing so.

(g) The applicant stated in both applications that it was also agreed that it would ensure that the trucks would be in good running order and that it would effect mechanical services and supply parts and materials for this purpose and that it would also incur expenses or disbursements on behalf of both respondents for which they would be liable, including to securely store the trucks and trailers when not in use.

(h)

[5] In each application the applicant states that it had rendered such services

and provided parts and materials, and incurred expenses on behalf of the respondents. It claimed payment of N$321 072,40 in respect of Grout Investments CC and payment of N$776 628,74 in respect of Druppel Investments CC together with interest at the legal rate to date of payment in both instances. These claims were each made in a notice of motion supported by a short affidavit. The applications were served in February 2011 on both respondents' registered address which was the same. Judgment by default was sought and obtained at the earliest opportunity in the same month.

[6] The respective principals of the respondents are based in Angola and spend much of their time there. When they discovered some months later that default judgment had been obtained, they applied for rescission of judgment. Those applications were opposed but were granted by Corbett, AJ in May 2012. He also dealt with both applications in a single judgment.

(i) [7] After the rescission of judgments, the respondents each filed detailed answering affidavits to the applicant's original applications claiming the sums against them. They set out their opposition to them and each refers to counterclaims to be instituted against the applicant in sums considerably in excess of those claimed against them. The applicant did not file replying affidavits within the designated time.

(j)

(k) [8] The applications were then referred to case management in terms of Rule 37. In the case management report filed of record on 28 November 2012, the applicant indicated in each matter that it would file a replying affidavit and bring a condonation application. The respondents recorded in the report that a condonation application would be opposed.

(l)

(m) [9] On 30 November 2012 the applications were set down for hearing on 27 February 2013. At the request of the parties, a status meeting was convened for 6 February 2013. At that occasion, the applicant gave notice that it would on 27 February 2013 apply that both applications be referred to trial. The respondents' representative recorded that such an application would be opposed and that the dismissal of the applications would be sought.

(n)

(o) [10] Mr Van Vuuren who appeared for the applicant stated at the outset of the hearing that the applicant would confine itself to an application for a referral to trial – and not the merits of the application. I pointed out that it was the applicant's election to apply for a referral to trial but that would not preclude the respondents from referring to the merits in seeking the dismissal of the applications.

[11] The factual background to the claims is first referred to before these competing contentions are assessed.

[12] In their answering affidavits, the respondents confirm that an agency relationship existed between each of them and the applicant. Each respondent owned super link trucks, comprising horses and trailers. The respondents state that these agency agreements each entailed terms implied by the law of agency such as the obligation upon the applicant to act in their best interests, to take all diligent and reasonable steps to secure business for the super links, to report to the respondents, to pay over proceeds of such business regularly and to account to them. For this the applicant would receive 10% commission on the net proceeds after expenses, which the applicant would incur on their behalf.

[13] The respondents state that the applicant at no stage accounted to them. Nor were they paid. They then in February 2010 demanded the return of the trucks. The respondents did not pursue the issue at the time. When Pepe Vetura, the son of one of the principals of the respondents, went to the applicant's premises in September 2011, he noticed that the trucks were no longer there and was informed that they had been sold in execution. The respondents then engaged their lawyers and the applications for rescission proceeded and were subsequently granted.

[14] The respondents state that the default judgments had come as a complete surprise to them. They had after all not been preceded by an accounting process to them. They also claim that the applicant's managing member knew that the respondents' principals only visited Windhoek irregularly

and that it would be unlikely that an application served on the respondents' same registered address (an accounting firm) would be drawn to their attention timeously. This turned out to be the case. Whilst a party is entitled to serve process on an entity's registered address, the applications had not been preceded by the applicant accounting to the respondents or any notice to them of the applications – despite the unsupported reference to a demand in the founding affidavit.

[15] The respondents also state that certain of the respondents' vehicles were purchased by or on behalf of the applicant at the sales in execution at prices well below their market value. The respondents intend pursuing claims against the applicant for damages arising from those sales and for loss of income and for earnings not paid over.

[16] As I have said, the applicant elected not to file replying affidavits to the applications. When I raised this with Mr Van Vuuren in considering the factual matter before me, particularly with regard to whether the applicant could have foreseen a dispute of fact, he invited me to have regard to the applicant's answering affidavits in the rescission application. But the respondents filed replying affidavits in those applications. Their answering affidavits in these applications contained further matter which deals with some of the material contained in the applicant's answering affidavits in the rescission applications which called for a response.

[17] The parties rightly agreed that there was a real and material dispute of fact in both applications. Mr Van Vuuren argued that the applications should be referred to trial while Mr P Barnard, who appeared for the respondents, submitted that disputes of fact should have been foreseen and that the applications should be dismissed with costs. He also submitted that the applications were also defective and did not contain the necessary averments to sustain a cause of action and for that reason as well should result in the dismissal of the applications.

[18] It is well settled that a court may dismiss an application where an

applicant should have realised when launching his application that a serious dispute of fact would develop which was incapable of being resolved on affidavit[1].

[19] As to the anticipation of a dispute of fact, Mr Van Vuuren countered by referring to paragraphs 20 and 21 of the founding affidavits which were in identical terms, stating:

'At all times material, respondent's representatives agreed that respondent was indebted to applicant, always stating that respondent was not immediately in a position to pay the outstanding amount to applicant.

Respondent's representatives went so far as to state that they would ensure that payments would be effected on a monthly and periodic basis until the total outstanding amount due has been paid in full. Despite demand for payment, no such payments were forthcoming.'

[20] These allegations were vehemently denied in both answering affidavits – also in similar terms. The respondents state that the son of one of the principals, Pepe Ventura, visited the applicant's premises from time to time but was not authorised to conduct negotiations and conclude agreements on their behalf. The respondents denied that any admission of liability had been made or any undertakings made to repay the allegedly indebted amounts. On the countrary, they said there would not have been any indebtedness as the applicant had secured work for or used the trucks and this would have earned far more than what was claimed from them. Affidavits of independent experts were attached in support of estimates of earning for trucks of that type and size.

[21] Mr Van Vuuren referred to a statement contained in the answering affidavits which referred to Pepe Ventura as acting on behalf of the respondents in response to paragraphs 20 and 23 of founding affidavit where it is stated:

'The only people who acted on behalf of the respondent other than me, is Pepe and Mr Philander of LorentzAngula Inc. . . They both confirm that they at no stage

[1]Mahe Construction (Pty) Ltd v Seasonaire 2002 NR 398 (SC) at 407 F-H

See generally Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1153 (T)

acknowledged liability.' (sic)

This statement together with the preceding statement are to be read in their respective contexts. They are not necessarily inconsistent. On the contrary, there is an unequivocal denial of admitting liability. This is also to be read with the further facts stated in both matters that the respondents' trucks were used during the period in question and would have earned amounts well in excess of the claims against the respondents. The statements concerning the use of the trucks are made by a senior former employee of the applicant who would have had knowledge as to their use. They are corroborated by another former employee of the applicant. There were also affidavits setting out independent expert opinion evidence as to the sums which would have been earned for such use.

[22] The applicant did not file any replying affidavits to deal with these and other issues. Mr Van Vuuren submitted that it was not necessary for the applicant to do so because it had decided to apply for the referral of the matters to trial. But the failure to do so was at the applicant's risk in not dealing with matter which could be relevant in assessing whether the applications should be referred to trial, such as assessing whether the applicant should have foreseen whether there would have been material dispute of fact. The answering affidavits denying the admission of liability and undertaking to pay in instalments and the matter raised in support of those denials would in my view be relevant as would be the failure on the part of the applicant to account to them or make any payment to them in assessing whether the applicant should have anticipated disputes of fact. The failure to address these issues in the context of the reciprocal nature of the agency agreements in question is in my view a significant factor in this regard.

[23] This court would also be entitled to take into account the probabilities which arise from those facts on the papers in tipping the balance in favour of the applicant or vice versa, compounded by the failure to deal with them in reply.[2]

[2]Kalil v Decotex (Pty) Ltd and Another 1988(1) SA 943 (A) at 979 H-I Approved by the Supreme Court in Executive Properties and Another v Oshakati Tower (Pty) Ltd case No. SA 35/2009, unreported 13 August 2012

The probabilities of making admissions of liability and an undertaking to repay in the context of little contact with the respondents' principals and more pertinently of the substantiated assertions relating to the use and estimated earnings of the trucks by reason of their use are to be considered against the vague and unsupported statements contained in the founding affidavit in support of the claims.

[24] A further factor is the duty to account by the applicant to the respective respondents. The failure to have done so was not put in issue. Indeed, Mr Barnard submitted with reference to authority that in the absence of such accounting, the applicant's claims are defective and that the matters should not be referred to evidence or to trial for this reason as well. He referred to Kerr *The Law of Agency*[3] where it is stated that a mandatory must render an account before taking action.[4] This would in my view also reflect the state of the law in Namibia on the issue.

[25] When I raised this issue and the paucity of information contained in the brief founding affidavit with Mr Van Vuuren, he submitted that the applicant should be given leave to supplement its founding papers to deal with this and other issues, essentially correctly conceding that the details in the founding affidavit were at best sketchy. But the applicant elected not to reply. Whilst it is well settled that an applicant must make out its case in the founding affidavit and should not make out a mere skeleton of a case which is then sought to be covered with flesh in a replying affidavit[5] the applicant in these matters did not even seek to address in reply the shortcomings as to how its cases were pleaded in the founding affidavit. Included in the shortcomings was the failure to allege or even deal with the obligation on the part of an agent to account to the respondents, particularly where the applicant accepted that the scope of its mandate was to secure business for the respondents' trucks.

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[3](4th ed) p178.

[4]See also McEwen v Khader 1969(4) SA 559(N).

[5]Swart and Another v Marais and Others 1992 NR 47(HC) at 51D-E and the authorities collected there.

[26] As is correctly contended by Mr Barnard, there is no averment in the founding affidavits of the applicant stating that it had performed its obligations or was excused from doing or had tendered to do so, as must be made in a claim of this nature arising from reciprocal obligations.[6]

[27] This issue – fundamental to agency not only raises a defect in the claims as pleaded, but it also goes to the heart of the reciprocal nature of the relationship. The reciprocity inherent in the kind of agency relationships in these matters – where the applicant would secure business for the trucks for reward and where it appears that the trucks were used whilst in the applicant's custody – should most clearly have alerted the applicant in both matters that a serious dispute of fact was bound to develop. This factor alone should, in the exercise of my discretion, give rise to the dismissal of the applications.

[28] The defective nature of the claims as well is a further factor which I take into account in exercising my discretion. The referral of a matter to trial would ordinarily presuppose that the affidavits filed would form the pleadings in the trial. This is what occurred in Pressma Services (Pty) Ltd v Schuttler and Another[7] relied upon by Mr Van Vuuren. The court in that matter, in referring it to evidence, expressly noted that "all the necessary averments" were contained in the affidavits and "define the issues with sufficient clarity". That is not the case in these applications where the sketchy and skeletal founding affidavits lacking in necessary averments have not been amplified in reply.

[29] In all the circumstances and in the exercise of my discretion under Rule 6(5)(g), I decline to refer the applications for trial and would dismiss both applications with costs. The parties agreed that any cost order would include those of one instructed and one instructing counsel. In the rescission application the court directed that costs be in the cause. The costs of those applications would thus be covered by the orders I make.

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[6]Municipality of Windhoek v MW Coetzee t/a MW Coetzee Builders 1999 NR 129 (HC) at 135 B-C (per Strydom, JP as he then was).

[7]1990 (2) SA 411 (C).

[30] The following orders are made:

In case A 16/2011, the application to refer this application to trial is refused and the application itself is dismissed with costs. These costs include those occasioned by the employment of one instructed and one instructing counsel and include the costs in the rescission application

In case A17/2011, the application to refer this application to trial is refused and the application itself is dismissed with costs. These costs include those occasioned by the employment of one instructed and one instructing counsel and include the costs in the rescission application.

(p)

(q)

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DF SMUTS

Judge

APPEARANCE

APPLICANT:	A Van Vuuren Instructed by Erasmus & Associates
RESPONDENTS:	P. Barnard Instructed by Lorentz Angula Inc.