



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2481/2013

In the matter between:

THE MUNICIPAL COUNCIL FOR THE

MUNICIPALITY OF WINDHOEK

PLAINTIFF/APPLICANT

and

DAVID JOHN BRUNI

1ST DEFENDANT/RESPONDENT

IAN ROBERT McLAREN

2ND DEFENDANT/RESPONDENT

SIMON HERCULES STEYN

3RD DEFENDANT/RESPONDENT

DE WET ESTERHUIZEN

4TH DEFENDANT/RESPONDENT

RAMATEX TESTILES NAMIBIA

(PROPRIETARY) LIMITED

5TH DEFENDANT/RESPONDENT

Neutral citation: *The Municipal Council for the Municipality of Windhoek v Bruni (I 2481/2013)* [2014] NAHCMD 195 (13 June 2014)

Coram: HOFF J

Heard: 01 April 2014

Delivered: 13 June 2014

Reasons: 20 June 2014

ORDER

1. The application for summary judgment is refused.
2. The defendants are granted leave to defend the action.
3. The costs of this application be determined by the trial court.

JUDGMENT

HOFF J:

[1] In an application for summary judgment this court made an order on 13 June 2014 in the following terms:

1. The application for summary judgment is refused.
2. The defendants are granted leave to defend the action.
3. The costs of this application be determined by the trial court.

[2] These are the reasons. The relief claimed in an application for summary judgment was the ejectment of the defendants from a certain piece of land described in the particulars of claim for the plaintiff. The first, second, third and fourth respondents are joint liquidators of the fifth respondent. It is common cause that the liquidators are in possession of the relevant immovable property. The applicant's action is premised on the *rei vindicatio*. The fact that the applicant is the owner of the property is not disputed. The respondents in an opposing affidavit stated that they

have a *bona fide* defence to applicant's claim in the form of an improvement lien, that the value of the buildings erected on the property is approximately N\$79,481,426 that they are therefore entitled to remain in possession of the property, and that the applicant was at all times aware of this fact.

[3] In *Council of the Municipality of Windhoek v Bruni NO and Others* 2009 (1) NR 151 (HC) at 164 par [29] this court held that if an owner brings a *rei vindicatio* and alleges that he is the owner and that the defendant is holding the *res*, the onus is on the defendant to allege and establish any right to hold against the owner.

[4] Mr Töttemeyer who appeared on behalf of the applicant submitted that the respondents' opposing affidavit regarding an improvement lien lacks a number of essential ingredients for such a defence namely:

- (a) that the expenses incurred were useful in the sense that they have increased the value of the property;
- (b) the actual expenses and the extent of the enrichment of the plaintiff (both have to be given because the lieu covers only the lesser of the two amounts);
- (c) that plaintiff's enrichment is *iniusta* (unjustified); and
- (d) that there was no contractual arrangement between the parties in respect of the expenses.

[5] These essential requirements it was submitted do not appear from the opposing affidavit and since Rule 32(3) requires that the nature and grounds of the defence and the material facts relied on must be disclosed fully the defendants have failed to satisfy this court that they have a *bona fide* defence. This court was referred to the relevant authorities including the case of *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (SCA).

[6] Mr Heathcote who appeared on behalf of the first four respondents submitted that it is trite law that the respondents' opposing affidavit need not be assessed with the precision of a plea and that a court is entitled to apply a more accommodating approach (*Traut v Du Toit* 1966 (1) SA 69 (O) at 70H); that a court is not necessarily

bound by the manner in which a defendant has presented his case in his opposing affidavit and is entitled to ascertain from the content of the affidavit itself what the defendant actually intended to say (*Maharaj v Barclays National Bank (Pty) Ltd* 1976 (1) SA 418 (A) at 426; *Easy Life Management (Cape) (Pty) Ltd and Another v Easy Fit Cupboards Windhoek CC and Others* 2008 (2) NR 686 at 691).

[7] It was further submitted that the respondents set out their *bona fide* defence with enough clarity to meet the requirements of Rule 32(3)(b).

[8] Summary judgment is regarded as an extraordinary, stringent and drastic remedy which closes the doors of the court (figuratively speaking) and permits a judgment to be given without a trial. It should only be granted where the court has no doubt that the plaintiff has an unanswerable case. (See *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA CPD 298 at 304F-H).

[9] It has been said that the granting of a summary judgment is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendants' defence is bogus or bad in law. (See *Maharaj* (supra) at 423G).

[10] In *First National Bank of South West Africa v Graap* 1990 NR 9 at 13 this Court (per Strydom J) referred to the case of *Grilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C) at 811C-G where Van Winsen J said the following:

'It is important to note that a decision as to whether a plaintiff's case is unanswerable or not must be founded on information before the Court dealing with the application. This information is derived from the plaintiff's statement of case, the defendant's affidavit or oral evidence and any documents that might properly be before the Court. It would be inappropriate to allow speculation and conjecture as to the nature of the grounds of the defence to constitute a substitute for real information as to these matters. On the other hand, even if, a Court concludes that such information as is disclosed by the defendant in his affidavit is not a sufficient compliance with the provisions of Rule 32(3), it may nevertheless consider that it is sufficient to raise a doubt as to whether plaintiff's case can be characterised as "unanswerable". In that case the Court would in the exercise of its discretion refuse summary judgment.'

[11] In *Easy Life Management* (supra) at 691F-I Muller J referred to the work of the authors Van Niekerk, Geyer & Mundell, *Summary Judgment: A Practical Guide* where the following appears at para 11.2.7:

‘This rule is founded in the consideration that an erroneous finding in summary judgment proceedings has more drastic consequences for a defendant than for a plaintiff. Any error that goes against the plaintiff has less drastic consequences – he may still, at the eventual trial, obtain relief plus interest and costs. An error going against the defendant, however, means that he will have to apply for leave to appeal or, should that be refused, petition to the Chief Justice for leave to appeal. Thereafter, if his petition succeeds, he will have to pursue the appeal to its final conclusion with all the attendant legal costs. Accordingly, even though success for the defendant appears unlikely from the opposing affidavit, leave ought to be granted unless he presents a hopeless case. If there is doubt whether the plaintiff’s case is unanswerable, the defendant must get the benefit of the doubt and the court must refuse summary judgment. Similarly, if there is a reasonable possibility that the plaintiff’s case or his papers are defective, summary judgment cannot be entered.’

[12] In respect of the defence of the respondents disclosed in their opposing affidavit (ie the improvement lien) even if it is accepted, as submitted by Mr Töttemeyer, that it does not allege all the ‘essential ingredients’, it nevertheless, in my view, cannot be said that plaintiff’s claim is unanswerable.

[13] In any event this court has a discretion (to be exercised judicially) to refuse summary judgment even if no *bona fide* defence is disclosed (*First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (C) at 184F-J; *Soil Fumigation Servicess Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 35B-D; and *Graap* (supra)).

[14] In *First National Bank v Myburgh* Moosa J at 184F-H explains this discretion as follows:

‘The criticism of Mr Gess is justified. The particulars in second defendant’s affidavit in respect of the defence in question fall far short of the requirements in terms of Rule 32(3)(b).

Second defendant fails to disclose with sufficient particularity and completeness the material facts on which he relies for his defence. This impacts, no doubt, on the *bona fides* of his defence. As pointed out by Farlam AJA (as he then was) in *Tesven CC and Another (supra at 277H)*, that is not the end of the matter. The Court still has a discretion in such a case to refuse summary judgment if the Court is of the opinion that there is sufficient evidentiary material to lead the Court to believe that plaintiff's case may not be unanswerable.'

[15] These then are the reasons why this court refused summary judgment.

E P B HOFF
Judge

APPEARANCES

PLAINTIFF/APPLICANT: R Töttemeyer SC
Instructed by Lorentz Angula Inc., Windhoek

1ST – 4TH DEFENDANTS/
RESPONDENT R Heathcote SC
Instructed by Koep & Partners, Windhoek