



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 806/2014

In the matter between

GABRIELLE INVESTMENT (PTY) LTD

PLAINTIFF

And

STEELMASTER

DEFENDANT

Neutral citation: Gabrielle Investment (Pty) Ltd v Steelmaster (I 806/2014) [2014]
NAHCMD 299 (8 October 2014)

Coram: Smuts, J

Heard: 24 September 2014

Delivered: 8 October 2014

Flynote: Application for summary judgment. Defence set out in the defendant's answering affidavit in bald and sketchy manner and falling short of the sufficiency required by the courts. Summary judgment granted in respect of claim 1.

ORDER

(a)

1. There is summary judgment in favour of the plaintiff against the defendant in the sum of N\$121 522, 31 together with the interest thereon at the rate of 20% per annum as from 24 March 2013 to date of payment.
2. The defendant is to pay the costs of the application for summary judgement on an attorney and client scale, as agreed. These costs include those of one instructed and one instructing counsel.
3. The defendant is given leave to defend claims 2 and 3.
4. The matter is postponed to 22 October 2014 at 15h15 for the submission of a case plan under rule 23 in respect of claims 2 and 3.

JUDGMENT

SMUTS, J

(b) The plaintiff has applied for summary judgment against the defendant in respect of two of the three claims embodied in the plaintiff's particulars of claims arising from a lease agreement and its alleged breach on the part of the defendant.

(c) The first claim is in terms of the agreement and is in respect of rental due to May 2013, up to the date of the plaintiff's alleged cancellation of the lease agreement. It is in the amount of N\$121 322, 31.

(d)

(e) The second claim is in respect of damages for holding over for the period June to October 2013. It is in the sum of N\$122 833, 50. The third claim is not relevant for present purposes as the plaintiff correctly no longer pursues it in the summary judgment

application. It is in respect of damages for loss of rental in respect of the duration of lease agreement.

(f) In the particulars of claim, the plaintiff alleges that the parties entered into a lease agreement in respect of premises in Walvis Bay for the period 1 December 2010 to 30 November 2017. The lease agreement is attached to the particulars of claim. The rental amount is set out in the agreement with an annual escalation specified.

(g) It is alleged in the particulars of claim that the defendant breached the agreement by failing to pay rental and charges for electricity punctually as from January 2013 and that the plaintiff addressed a letter to cancel the agreement on 23 May 2013. It is further alleged that the defendant, despite the cancellation, remained in occupation until October 2013 and that he refused to pay the rental and electricity charges claimed as well as in respect of his further occupation.

(h) In the first claim, the plaintiff claims the amount due in respect of rental at the time of cancellation, being N\$121 522, 31. The plaintiff's second claim is for damages for holding over for the period June 2013 to 31 October 2013. It is in the amount of N\$122 833, 15. It is stated as being 'calculated as the reasonable rental per month plus VAT in the amount of N\$22 813, 13 and the average electricity consumption per month plus vat in the amount of N\$1 725 over the five month period from June 2013 to October 2013'

(i) The defendant opposed the application for summary judgment.

(j) In the opposing affidavit, the defendant alleges that the plaintiff's representative had informed him that the electricity supply to the premises was in an excellent working condition and that this was, so he alleged, a material misrepresentation. Had it not been made, the defendant contends that he would not have entered into the agreement, given the importance of a reliable electricity supply for the operation of his machinery. The defendant further states contends that he 'experienced problems' with the electricity supply which, so he contends, 'resulted in the aluminium machine and wheel alignment machines of defendant being damaged beyond repair'. The defendant further refers to the replacement value of the two items of machinery and referred to the income

generated by the operation of those machines. He states that he would have not entered into the agreement had it not been for the material misrepresentation made by the plaintiff concerning the electricity supply. The defendant further alleges that he has suffered damages as a consequence, represented by the replacement value of the machines and the loss of the income.

(k) When the matter was argued, both counsel did not differ as to the test applied by the courts concerning the requirements which the defendant needs to meet in establishing a defence in the answering affidavit. Both counsel referred to a recent judgment in the Supreme Court which in detail discussed these requisites.¹

(l) It is clear that courts require that a defendant must at least disclose a defence and the material facts upon which it is based with sufficient particularity and completeness to enable a court to decide whether the affidavit discloses a bona fide defence.²

(m) Mr P Barnard, who represented the plaintiff, argued that the defendant had fallen far short of this requirement in the answering affidavit. He submitted that the defence was not fully disclosed with reference to its nature and grounds upon which it was based or with reference to the material facts relied upon. He also pointed out that the court would not be in a position to determine the validity and extent of the counter claim in the absence of allegations made to support it. The claiming of what was merely termed the 'replacement value of the two machines' was, so he submitted, not the correct criterion for the claiming of damages in the circumstances set out in the affidavit. Mr Barnard further contended that the allegation in support of an alleged loss of income was similarly bald and sketchy and unsupported. He also criticised the extremely vague nature of the allegation concerning what was merely referred to as 'problems experienced' with reference to the electricity without any further specific at all.

(n) Ms Van der Westhuizen, who represented the defendant, submitted that the defendant would be entitled to rectification, given the fact that the agreement did not properly and adequately reflect what the parties had agreed upon. But this defence to the

¹*Di Savino v Nedbank* 2012 (2NR) 507 (SC) at par 23-25.

Gamikaub (Pty) Ltd v Schweiger 2008 (2) NR 464 (SC) at par 24.

²See *Di Savino v Nedbank* supra at par 25.

claim was not properly raised in the answering affidavit. It was not even referred to. The well established requisites for rectification were also not even sufficiently referred to in the answering affidavit.³

(o)

(p) Ms Van der Westhuizen further referred to the allegations in support of the defendant's counter-claim which, she pointed out, exceeded claims one and two. Ms Van der Westhuizen was however constrained to correctly concede that the manner in which the defence and counter-claim were set out was somewhat vague but submitted that the court should exercise its discretion in favour of the defendant so that he can contest the claims.

(q) Mr Barnard rightly referred to a number of clauses in the lease agreement which would preclude reliance upon the misrepresentation contended for. I do not propose to deal with each of these clauses in detail except to briefly cite them. They include clause 31.1 where defendant as lessee declared that no promises or representations had been made by the lessor which induced him to enter into the agreement. Then there is clause 10.2 in terms of which the lessee agreed that he would have no claim of any nature or whatsoever against the plaintiff for any damages caused to him. More importantly, there is clause 14 in terms of which it was agreed that the lessor does not warrant that the leased premises would be suitable for the purposes for which they were leased. Clause 22 provides that the lessee could not withhold payment. And finally clause 25.1 provides that the agreement supersedes any prior undertakings arrangements or agreements of whatever nature and constituted the whole agreement between the parties. Not only do these clauses preclude the reliance upon the misrepresentation contended for, but the terms of the misrepresentation contended for are, like the other components of the defence raised, vague and sketchy. The counter-claim, based upon that alleged misrepresentation is likewise not properly supported and is also pleaded in a very vague and sketchy manner.

(r) The defendant thus falls far short of the standard required of defendants in summary judgment proceedings to fully and adequately set out a bona fide defence to the action.

(s)

³*Sonap Petroleum SA (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A).

(t) It follows that the plaintiff is entitled to summary judgment in respect of claim 1.

(u)

(v) During oral argument, I raised the formulation of claim 2 with Mr Barnard, given the fact that the damages for holding over are claimed as being calculated as a reasonable rental plus VAT and the average electricity consumption for the period in question. He pointed out that the amount of rental claimed in respect of claim 2 was in terms of the agreement and appears from its terms. But this is not how it is pleaded in the particulars of claim. Furthermore, if the amount is not set in the agreement, the authorities are to the effect that a plaintiff is to allege and prove the market rental value of the premises for the period of the unlawful occupation when claiming damages for holding over and would need to allege that the premises were in fact rentable.⁴ These allegations are not contained in the particulars of claim.

(w)

(x) Given the shortcomings in the manner in which the claim for damages for holding over, embodied in claim 2, has been pleaded, it would follow that the plaintiff is not in my view, entitled to summary judgment in the amount claimed even though the defence to that claim falls short of the required standard.

(y) As far as costs are concerned, even though the plaintiff cannot succeed in respect of claim 2, it is in my view entitled to its full costs for the summary judgment application, given the fact that the defences raised in the answering affidavit were directed at both claims 1 and 2. Both parties were represented by instructed counsel. A costs order to reflect that would in my view be justified.

(z) In view of the conclusion I have reached, it follows that claims 2 and 3 would need to be further dealt with in accordance with the rules.

(aa) The order which I make is as follows:

1. There is summary judgment in favour of the plaintiff against the defendant in the sum of N\$121 522, 31 together with the interest thereon at the rate of 20% per annum as from 24 March 2013 to date of payment.

⁴*Sandown Park (Pty) Ltd v Hunter your wine and Spirit Merchants (Pty) Ltd* 1985 (1) SA 248 (W).

2. The defendant is to pay the costs of the application for summary judgement on an attorney and client scale, as agreed. These costs include those of one instructed and one instructing counsel.
3. The defendant is given leave to defend claims 2 and 3.
4. The matter is postponed to 22 October 2014 at 15h15 for the submission of a case plan under rule 23 in respect of claims 2 and 3.

(bb)

DF Smuts

Judge

APPEARANCE

PLAINTIFF:

P Barnard

Instructed by Fisher, Quarmby & Pfeifer

DEFENDANT:

C Van der Westhuizen

Instructed by Delpont-Nederlof Attorneys