**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO.: I 2452/2014**

In the matter between:

**ALEXANDER FORBES NAMIBIA GROUP (PTY) LTD** **PLAINTIFF**

And

**ANDREW NANGOMBE** **DEFENDANT**

**Neutral citation:** *Alexander Forbes Namibia Group (Pty) Ltd v Andrew Nangombe* (I 2452-2014) [2015] NAHCMD 167 (24 July 2015)

**Coram:** MASUKU, AJ
**Heard:** 2 July 2015
**Delivered:** 24 July 2015

**Flynote:** Practice - Rules of court – rule 32 (9) and (10) – effect of non-compliance – implication of unauthenticated "opposing affidavit" on an application for summary judgment – Procedural requirements exemption lay litigants.

**Contract** – Reality of consent – Duress (*metus*) – requirements – acknowledgement of debt - burden of proof on the party claiming such - fear to be reasonable enough.

**Summary:** Application for summary judgment in terms of rule 60. Rule 32 (9) and (10) not applicable when interlocutory application is not opposed. Application as been opposed, opposing affidavit not commissioned or authenticated in terms of rule 60 (5) (b) read with rule 1 of the rules of court. *Held*: there was no opposition to the summary judgment application due to non-compliance with rules of court.

Acknowledgment of debt signed by parties. Defendant claiming duress as a ground of opposition. The burden of proof lies with the party claiming such duress.

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## ORDER

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1. Payment in the amount of N$ 52 552,35.
2. Payment of interest on the amount of N$ 52 552,35 at a rate of 20% per annum calculated from 1 March 2014 to date of full payment.
3. Costs of suit on an attorney and client scale.

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## JUDGMENT

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MASUKU AJ

[1] This is an application for summary judgment brought in terms of rule 60.

[2] It is common cause that there was a motor vehicle accident involving the defendant and a certain Ms Julia Sam who was insured by the plaintiff. It is due to that accident, and the damages suffered by Ms Julia Sam that the plaintiff brought a claim against the defendant for the following relief:

1. ‘ Payment in the amount of N$ 52 552.35;
2. Payment of interest on the amount of N$ 52 552.35 at rate of 20% per annum calculated from 1 March 2014 to date of full payment;
3. Costs of suit on an attorney and client scale;
4. Further and/or alternative relief.’

This relief is based on an acknowledgement of debt between the Alexander Forbes Namibia Group (Pty) Ltd (the plaintiff) and Mr Andrew Nangombe (the defendant) in which the defendant acknowledged in writing his indebtedness in the amount of N$ 52 552, 35 to the plaintiff on 13 February 2012 by signature.

**Brief outline of the history of the case**

[3] The defendant; a self actor, defended the action and the matter was then set down for a case planning conference before the Angula, AJ (as he then was) on 23 September 2014. On that date, the matter was postponed to 29 September 2014 for a status hearing and the court put the parties to terms regarding compliance with the rules of court failing which sanctions would be imposed in terms of rule 53 and 54 respectively.

[4] The case plan report that was filed indicates that the plaintiff intended on applying for summary judgment. The court gave directions as to the filling of papers for the summary judgment and set the matter down for hearing on 10 – 14 November 2014 at 10h00. The application for summary judgment was filed as indicated in the report, and the defendant filed his opposing affidavit dated 10 October 2014, although titled ‘OPPOSING THE AFFIDAVIT’ as directed by the court. It is this affidavit whose validity came into question at the hearing.

[5] On 10 November 2014, when the matter was called, the parties seemed not to have appeared in court as expected and Angula, AJ (as he then was) struck the application from the roll for 'non-appearance by the parties'.[1]

[6] The plaintiff brought an application dated 24 November 2014 for the re-instatement of the application for summary judgment and the granting of summary judgment. This application was however not heard on that date, but only on 11 March 2015 where the application for summary judgment was re-instated. It was set down for yet another case planning conference and the matter was then postponed to 22 April 2015 for the setting of the hearing date and directions for filing heads of argument by the parties. At this point I must mention that the matter was re-allocated to me after Angula, AJ's acting term ended. On 22 April 2015, the matter was called and a date of 2 July 2015 at 9h00 was set for the hearing of the summary judgment application and the parties were directed to file heads of argument on or before 19 June 2015 for plaintiff and 26 June 2015 for defendant respectively.

[7] The issues I will deal with are the following:

7.1. Does rule 32 (9) and (10) find application in this matter?

7.2. Point in *limine*: is there opposition to the application for summary judgment?

7.3. If there was proper opposition, has either of the parties made out a case to (a) grant summary judgment for the plaintiff, and (b) dismiss the application and grant the defendant leave to defend the matter?

**<u>Plaintiff's case</u>**

***Application of rule 32 (9) and (10)***

[1] Court order dated 10 November 2014.

[8] The first issue to be determined is whether rule 32 (9) and (10)[2] was complied with as required. There has been recent case law on the matter that clearly states that these provisions are mandatory and the effect of non-compliance leads to matters being struck from the roll (see *Mukata v Appolus* ( I 3396/2014) [2015] NAHCMD 54 (12 March 2015), *Bank Windhoek (Pty) Ltd v Nosib Farming CC* (I 1404/2014) [2015] NAHCMD 89 (15 April 2015), *Visagie v Visagie* (I 1956/2014) [2015] NAHCMD 117 (26 May 2015) and *First National Bank of Namibia Limited v Louw* (I 1467/2014) [2015] NAHCMD 139 (12 June 2015)).

[9] In this matter, the provisions of rule 32 do not however find application due to the application being unopposed. Reasons for this will become apparent below. I am in agreement with plaintiff's submission on this point.

***Point in limine***

[10] At the outset, counsel for the plaintiff Mr Luvindao started his argument with a point in *limine* in which he attacked the document the defendant filed on 10 October 2014 as his opposing affidavit. According to counsel for the plaintiff, what was before court was not a valid opposing affidavit in terms of rule 60, rule 1 of the High Court Rules and the Justices of the Peace and Commissioners of Oath Act 16 of 1963, which led to his submission that the application is not opposed and should thus proceed unopposed and the court must use its discretion to grant the relief sought.

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[2]'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication.
(10) The party bringing any proceedings contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter resolved amicably as contemplated in subrule (9), without disclosing privileged information.'

[11] Examining the said document titled ‘Opposing the affidavit’ only bears defendant’s names and signature. It has not been commissioned by a commissioner of oaths as required by rule 1 of the rules of court which as Mr Luvindao correctly pointed out described an affidavit to be:

‘a written statement signed by the deponent thereof under oath or affirmation administered by a Commissioner of Oaths in terms of the Justices of the Peace and Commissioner of Oaths Act,1963 (Act 16 of 1963).’

[12] It was plaintiff’s ultimate submission that in terms of rule 60 (5)(b), there is no opposition to the application because there is no duly executed opposing affidavit before court against the summary judgment application.

[13] He further argued that, the defendant had ample time to rectify and/or address the non-compliance with the rules of court when he received the plaintiff’s heads of argument where the issue of his defective affidavit was raised. However, he failed to do so. The plaintiff cited the case of *Namquest Fishing (Pty) Ltd // Vilho Melkisendeki* (LC 2/2010) [2013] NALCMD 16 (20 May 2013) where the applicant brought an application to review and set aside an arbitration award in terms of section 89 (4) of the Labour Act 11 of 2007. A notice of motion accompanied by a supporting affidavit containing the facts upon which the applicant relied for the relief sought. The affidavit was not properly authenticated in terms of the justices of Place and Commissioners of Outns Act. In that case Ueitele, J stated that:

‘[19] An 'affidavit' is defined as 'a written statement, sworn by the deponent . . .’ It is trite that an affidavit must be sworn to before a person competent to administer an oath. Commissioners of oaths and Justices of the Peace are either appointed by the Minister of Justice for a specific area or magisterial district within the Republic of Namibia or are holders of specified offices designated as *ex-officio* Commissioners of oaths and Justices of the Peace.

[20] In the present matter the document purporting to be the supporting affidavit creates the impression that the statement contained in that document was sworn to before a certain Gloria Blanco Iglesias, with an address somewhere in "Espana" (Spain). If indeed that is correct there is no evidence before me that Gloria Blanco was appointed or designated as a Commissioner of Oaths in terms of section 8(1)(a) of the Justices of the Peace and Commissioners of Oaths Act, 1963. It thus follows that the affidavit was not sworn to before a person who is competent to administer an oath and the document attached to the notice of motion is thus not an affidavit as is required by the rules of this court.

[21] During argument Ms. Petherbridge who appeared for the applicant submitted that the affidavit must be containing typographic errors because Mr De Castro was not in Walvis Bay when he signed the affidavit, she said he was in Spain. But that still does not save the document, as rule 63 of the High Court Rules requires that a document executed outside Namibia be authenticated as contemplated in rule 63(2). If the document is not so authenticated it cannot be used in any proceedings before this court. The document annexed to the applicants' notice of motion launched on 15 February 2010 can therefore not be used in support of the relief sought. Since there is no affidavit attached to the application, there was no application filed within the 30 days contemplated in section 89(4) of the Labour Act, 2007.'[3]

[14] The labour application was thus struck from the roll because there was no paper application before court. Mr Luvindao was adamant that the reasoning employed in *Namquest Fishing* was correct and should be applied in this case. In view of the non compliance with Rule 1 and 60 (5)(b) of the rules of court, there is no proper opposing affidavit before court which makes this application an unopposed one. Further reasons why I came to this conclusion will become clear when I deal with defendant's case in paragraphs 20 and 21 below.

**Merits of the case**

[15] Although I have already come to the conclusion in paragraph [14] that there is no proper opposition, I in any event asked counsel to address me on the merits. As indicated earlier the matter is before court due to an acknowledgement of debt signed by the parties on 13 February 2012. For what the opposing affidavit is worth the defendant claimed duress

[3] See from page 11-13 of the judgment.

as a ground of defence in his signature to the acknowledgement of debt was obtained through intimidation, threats and force inflicted by the plaintiff.

[16] The plaintiff submitted and denied that there was any foul play in the form of duress from its staff toward Mr Nangombe. The elements necessary to set aside a contract or render it voidable simply do not exist in this matter.[4]

[17] Defendant claims that he was called three times to come to plaintiff's place of business to sign the acknowledgement of debt and at one of those meetings, a Mrs Roeline Koekemor, an employee of the plaintiff had indicated and explained to the defendant that he is in a "precarious financial position"[5] and that "they might place him on ITC". These statements according to counsel cannot be taken to induce any form of unlawful and reasonable fear of some considerable evil to the defendant.

[18] Thus the defence relied on by defendant is not sufficient to hold up at trial should the matter proceed in the normal course. I am inclined to agree with plaintiff on this score.

**<u>Defendant's case</u>**

[19] According to defendant, he is an unemployed 34 year old whom the applicant forced to sign the acknowledgement of debt which plaintiff is relying on.

[20] At the hearing I asked the defendant to address the court on the plaintiff's point in *limine* and why he thinks that his opposition is proper and should hold. I appreciated the fact

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[4] The grounds for duress were discussed the cases of *Arend and Another vs Astra Furnitures (Pty) Ltd* 1974 (1) SA 298 (C) and *Visser and Another vs Kotze* (519/2011) [2012] 73 (25 May 2012) and correctly listed by applicant's counsel as:

i. 'The fear must be a reasonable one;
ii. It must be caused by the threat of some considerable evil to the person concerned or his family;
iii. It must be the threat of an imminent or inevitable evil;
iv. The threat or intimidation must be unlawful or *contra bonos mores*;

The moral pressure used must have cause damage.'

[5] Pages 6-8 of the applicant's heads of argument.

that he is not learned in the law and needed a bit of direction and guidance I accordingly put a series of questions to him as follows:

'COURT: Thank you. Mr Nangombe? I am sure you have heard what Mr Luvindao has submitted to court.

MR NANGOMBE: Yes.

COURT: Yes, let us start with the first issue; the first issue that he has taken is that you have not complied with the rules because at the beginning you were served with the summons. You understand? And then you filed a notice of intention to defend and then after that they filed an application for summary judgment and then in terms of the rules where you deny liability, you have to state what your defense is in an Affidavit. So the point they make is that you did not comply with the rules because you merely wrote a letter which does not comply with the strict requirement of the rules. So they are saying that before Court there is no defense that is actually disclosed. So that is the first point they take, what do you say?

MR NANGOMBE: It is only that I do not understand what they described on the paper itself because there is nobody to help me so that I can understand more about those papers.

COURT: Yes but an Affidavit is a statement that you make under oath, which means you have to go to a commissioner of oath and raise your right hand and say so help me God if you believe in God, if you do not you make an affirmation. That is what an Affidavit is and in this case you did not file an Affidavit, you just made a statement.

MR NANGOMBE: I think when I was at the North when they used to bring the papers to my place where I was staying, I think those people that stay there they did not (indistinct). I told them there are papers coming from the court they must at least SMS me so that they must send it or I must come this side so that I can (intervention). . .

COURT: No, no it is not about you being served, here it is when they filed the application for summary judgment, in your papers opposing the summary judgment you had to make a statement under oath and you did not.

MR NANGOMBE: It is only that (indistinct). . .

COURT: And then also what Mr Luvindao has submitted is that they gave you the Heads of Argument and from what I read you received the Heads on the 15th of June. You could have, because they raised a point to say that before court there is no affidavit, you could have maybe gone, took your statement and you took it to a commissioner of oaths so that it becomes and then you sign it before a commissioner of oath having taken an oath then you would come to court and ask for maybe for condonation, for late filing of the affidavit, that is the matter the court would consider. But even after they had alerted you to the fact that your documents do not comply with the provisions of the rules, you still did not take the step to rectify that problem. What do you say Mr Nangombe?

MR NANGOMBE: I do understand what you say.

COURT: Yes.

MR NANGOMBE: I do not know what to do because I did not receive some of the files that I did reply as he said (intervention). . .

COURT: Sorry?

MR NANGOMBE: I did not receive some of the files, some of the (intervention). . .

COURT: The documents?

MR NANGOMBE: The documents.

COURT: No, no but all the documents are here, he is complaining about that document that you filed. Do you have your documents?

MR NANGOMBE: I only have for last week.

COURT: Sorry?

MR NANGOMBE: I only have for last week.

COURT: You did not bring the rest of them?

MR NANGOMBE: The rest of them they are at home but I received them.

COURT: No but you should have brought them Mr Nangombe because you must make reference to that. These are very, very important documents, that is the documents which you filed which he is complaining that it has not complied with the requirements of the rules so that when you received his Heads you should have then maybe gone and you should have gone and taken an oath, signed this before a commissioner of oaths.

MR NANGOMBE: I received some of the files from Ms Ipinge, then I always ask her where to go, she said no you do not need to ask me, that is why I end up now where. I have nowhere to direct you where to direct you, consult anybody to give me information how to do this like an opposing affidavit. She said no you do not need to ask me.

COURT: Ms Ipinge works for the plaintiff, I mean rather work with Mr Luvindao? Well I think she probably does not want to be seen to be influencing because she is acting for the plaintiff. So it might in some instance not be good for her to be, for her to be now telling you because if things go astray you are going to say no you led me into a (indistinct) deliberately so that I am not able to get myself out of the mess. Anyway let us move on, that was the first point, do you wish to say anything on the non-compliance with the rules in relation to the filing of an affidavit?

MR NANGOMBE: I do not have anything.'

[21] The court tried to get an answer from the defendant with regards to the non-compliance with the rules regarding his opposing affidavit which was not commissioned as required. He merely stated that he had no one who could assist him with the case; the drafting of the affidavit and to advise him that he needed to get the document commissioned in terms of the rules of court in order for it to be accepted as an opposing affidavit. His answers could not unfortunately move me to accept the document as a valid opposing affidavit in terms of the applicable rules of court as indicated earlier.

[22] I proceeded to ask him to address the court on his defence of duress. A lot of allegations were made in the document he relies on as an opposing affidavit in that he has been forced to sign the document (acknowledgement of debt) which he had refused to sign on three different occasions and he was led into a “cul de sac” as it were. At the end, he stated, he and had no choice but to sign.

[23] I asked him to address me on how his allegation meet the elements of duress as the applicant indicated that he failed to show how there was force or coercion on their part. He was only able to say that whenever he was called to attend to Alexander Forbes office, and presented with the acknowledgement of debt to sign it, he asked the employee he dealt with to give him an audience with management so that he can explain to them that he was unemployed and unable to pay for the damages, but his request was declined each time.

[24] He claims that ‘the lady call Louleen refuse me to see the management of Alexander Forbes and I don’t sign then lock me up. She blackmail and convincing me that if I pay the damage now it will be better for me to buy anything I want in any store I like of if a want to buy a car’(*sic*).

[25] According to him; the day he signed the acknowledgement of debt, he was called to Alexander Forbes and presented with the acknowledgement of debt to sign which he again refused. The staff member he dealt with locked him in the office and refused to let him out if does not sign. He pleaded to be let out of the room but the employee told him he must first sign before she unlocks the door. He then signed. The court enquired why he did not go to the police to report what happened. He submitted that he went to the police station to open a case and he was told that he can only open a case when ‘these people for Alexander Forbes open a case against you because that time there was no case against me. Then I was just waiting for them to open a case then I will open also’ (*sic*). He made all these claims in court but, were not contained in his “opposing affidavit”. Applicant replied that the room where defendant was placed in was a consultation room with two doors that cannot be locked by the staff he dealt with because she was not issued with keys to these doors. Those keys are kept by the

service staff and the doors can easily be opened because they are not locked. One cannot attach much credence to these allegations as they should have been on oath but are instead disguised as submissions

[26] In my view, the events that led to defendant signing acknowledgment of debt do not amount to force. The defendant unfortunately failed to prove duress and convince the court to set aside the acknowledgment of debt. In my view, the defense relied on is weak because he could not show the court that he was placed under immense pressure, and that the threat was considerably evil to his person which yielded reasonable fear in him to sign. Being placed on ITC also would not create the kind of fear that is necessary for the claim/ground of duress to stand. Being locked in a room unwillingly is also not a good enough reason for the defense claimed. He as a grown who man could have stood his ground and refused to sign the acknowledgment of debt if he had reservations regarding the amount he was agreeing to and the issues of quotes.

[27] In the case of *MB De Klerk & Associates // Eggerschweiler and Another*[6] Damaseb JP outlined the test for duress:

> **'The test for duress as a ground for avoiding a contract**
>
> [51] If a proper case for duress is made out the agreement which resulted therefrom is voidable on the basis that there is no true consent. The improper influence must have been the direct cause of entering into the transaction. The person alleging such duress bears the onus of proof. The pressure must be directed to the party, or to his/her family, must relate to an imminent injury to be suffered by the party himself in person or in property. Additionally, it must be proved that the pressure was exercised unlawfully or *contra bonos mores*. For example, to intern someone because he is unwilling to join the army has been held to be *contra bonos mores* and unreasonable.
>
> [52] Various decisions have debated the issue of the kind of pressure necessary to justify cancellation of an agreement executed under duress. *Smith v Smith* referred to Voet's statement which held that:

[6] 2014 (3) NR 609 at 623.

'(T)he fear ought to be justified in the sense of being grievous enough. It should be such fear as properly descends even upon a steadfast person. For idle alarm there is no excuse; and it is not enough for one to have been alarmed through the influence of any sort of fright. Nevertheless in assessing what fear must be said to be serious enough regard must be taken of the age, sex and standing of the persons. Hence the question, namely what fear is sufficient, is one for the investigation and discretion of the Judge.'

[53] A leading case on the nature of the threat is *Union Government (Minister of Finance) v Gowar* where Wessels AJA stated at 452 that —

'an act could be set aside where it was done under circumstances which showed that the act was not voluntary, because it was done under pressure. What the exact amount of pressure is which will enable a Judge to set aside an act, depends very much upon the surrounding circumstances. It is true that the Judge may use his discretion, but it must be a judicial discretion, and an act must not lightly be rescinded as having been induced by *metus*. The pressure necessary to set aside a payment must be of such a nature that it is clear to the Court that, but for this pressure, the payment would not have been made.'

[54] Duress is not satisfied if one exerts pressure in circumstances in which it is open to the affected party to adopt an alternative course of action for dealing with his predicament' (I underlined this paragraph for emphasis).

[28] I agree with the sentiments of Damaseb JP in this regard and I will take this point no further.

**The law and conclusion**

[29] Having stated already that defendant's defense of duress should fail, I wish to add to the issue of defendant's "opposing affidavit". I was fully appreciative of the fact that defendant is a lay litigant. In the case of *Nghiimbwasha and Another // Minister of Justice and Others*[7] where the applicants in that urgent application drew my attention to the *Xinwa* matter and these were my thoughts:

'[22]The applicants claim and correctly so that they are not trained in law and should not be dealt with by this court at the same level as lawyers and that any deficiencies evident in the

[7](A 38/2015) [2015] NAHCMD 67 (20 March 2015) at pages 10-11.

papers should be viewed from that perspective. So forceful was this argument that in reply, the applicants cited an excerpt from the case of *Xinwa And Others v Volkswagen SA (Pty) Ltd,* where the Constitutional Court of South Africa said:

> 'Pleadings prepared by lay persons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy; skill and precision in the presentation of their case required of lawyers. In such pleadings regard must be had to the purpose of the pleading as gathered not only from the context of the pleadings but also from context in which the pleadings is prepared. Form must give was to substance.'

[23] The above judgment has been accurately quoted by the applicants and it states that the court must not hold lay litigants to the same standards required of legal practitioners in the drafting of pleadings. This arose in a situation where the court found that although the applicants had failed to accurately capture the relief they sought in the pleadings, it was otherwise clear from the papers what it is they sought, namely an appeal against an unfavourable decision. The court considered that in those circumstances, it was clear that the applicants were seeking leave to appeal directly to the Constitutional Court.

[24] It is worth considering that having said so; the court noted however that the applicants had failed to comply with what it referred to as a "procedural requirement" i.e. to obtain a certificate in terms of rule 18. The court noted that no explanation had been tendered for that failure. By asking this question and commenting on it, it is clear that the court was not of the view that lay litigants were excused from complying with procedural requirements. The court however found it unnecessary to deal with the failure to comply with the said procedural requirement considering the view it took of the matter. It dismissed the application as it found there were no prospects of success.'

[30] Procedural requirements are mandatory and should be complied with by both legal practitioners and lay litigants alike. And just because a party is a lay litigant does not exempt him or herfrom complying with the rules of court. If courts allow such reasoning to be excuses by parties who fail to comply with the procedures of court we will make a mockery of the law.

[31] I thus find that defendant has not opposed the application as required in terms of rule 60 (5)(b) read with rule 1 of the Rules of the High Court. This application was unopposed

and should therefore succeed. Considering the defence mounted in the improperly filed affidavit, I find same does not pass muster.

[32] In the premises, I make the following order in favour of the plaintiff:

32.1 Payment in the amount of N$ 52 552, 35.

32.2 payment of interest on the amount of N$ 52 552, 35 at a rate of 20% per annum calculated from 1 March 2014 to date of full payment.

32.3 Costs of suit on an attorney and client scale.

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TS Masuku
Acting Judge

APPEARANCES:

| | |
|---|---|
| APPLICANTS: | T. Luvindao<br>Instructed by Dr Weder, Kauta & Hoveka |
| DEFENDANT: | A. Nangombe<br>In person |