

**REPUBLIC OF NAMIBIA**



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

Case No. I 3670/2014

In the matter between:

**NORED ELECTRICITY (PTY) LIMITED APPLICANT/PLAINTIFF**

And

**NAKADILO JIM OUSTERRESPONDENT/DEFENDANT**

*Neutral citation: Nored Electricity (Pty) Ltd v Ouster (I 3670-2015) [2015] NAHCMD 178 (3 August 2015)*

**CORAM: MASUKU A.J.**

Heard: 3 July 2015

Delivered: 3 August 2015

**Flynote:** PRACTICE – Summary judgment application; the seven golden rules of summary judgment revisited – meaning of liquidated amount.

**Summary:** The plaintiff sued the defendant for an amount of damages due as a result of fraudulent claims made by the defendant to the plaintiff. The court held that the defendant's affidavit did not meet the required standards of setting out a defence which if proved at trial would deflect judgment. The court considered whether a claim for damages may be regarded as a liquidated amount within the meaning of the rules of court. Summary judgment granted as prayed.

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### **ORDER**

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- (1) Payment of the amount of N\$ 996,631.40
  - (2) Payment of interest on the aforementioned amount calculated at the rate of 20% per annum from the date of judgment to the date of final payment.
  - (3) Costs of suit.
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### **JUDGMENT**

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**MASUKU, AJ;**

[1] The issue crying out for determination is whether an application for summary judgment filed by the plaintiff and opposed by the defendant in this matter should be granted.

[2] In order to come to a definitive conclusion on whether the summary judgment application in the instant matter is sustainable, it is necessary to consider the pleadings filed of record and the affidavits filed by both protagonists for and against the grant of the application.

[3] The facts giving rise to the present proceedings may be summarized in the following fashion as may be gleaned from the papers filed of record: The plaintiff is a company duly incorporated and registered in terms of the company laws of Namibia. Its main place of business is in Ondangwa, Oshana Region. The defendant, on the other hand, is a Namibian male residing at Erf 537, Ngweze, New Cowboy in Katima Mulilo.

[4] It is common cause that the plaintiff and the defendant entered into an electricity vending agreement, which was reduced to writing. It is attached to the pleadings. In terms of the written agreement, the parties covenanted as follows:

- (a) the plaintiff appointed the defendant to act as an independent contractor who was to operate and manage the plaintiff's NORED Mobile Terminal equipment for the supply of prepaid electricity units to consumers within the plaintiff's area of operation;
- (b) the plaintiff was to supply the defendant with electricity vending equipment to be used for the sale and dispensing of electricity units to consumers within the plaintiff's area of operation;
- (c) the said equipment remained the property of the plaintiff;
- (d) the plaintiff agreed to remunerate the defendant by paying upfront commission calculated at 4% of the total upfront purchase of metered electricity purchased by the defendant and which was paid to the defendant's account or in any other manner determined by the plaintiff in its sole discretion; and
- (e) the defendant would be entitled to a basic monthly remuneration by the plaintiff at N\$300 to cater for incidental costs such as transport, telephone calls towards the proper operation of the equipment.

[5] The plaintiff alleged that contrary to the agreement, the defendant wrongfully and unlawfully and falsely represented to the plaintiff that he had made deposits into the plaintiff's account which was in fact untrue as the defendant had inflated the figures of the deposits allegedly made. It is averred that as a result of the inflated figures provided by the defendant to the plaintiff, the latter was induced to load credit of metered

electricity into the defendant's equipment. As a result of the falsified figures provided, the plaintiff further alleges, it loaded and paid commission to the plaintiff to which he was otherwise not entitled.

[6] It is the plaintiff's case that as a result of the falsified figures provided by the defendant to the plaintiff, the latter paid to the defendant an amount of N\$ 996,631.40 constituting the value of the wrongful credit of metered electricity and commission it paid to the defendant and which it would not have done had the true and accurate state of affairs been brought to its attention. It is this amount, which is itemized in the particulars of claim that the plaintiff claims is due from the defendant, who notwithstanding demand, refuses to pay. The plaintiff further prays for an order for interest and costs.

[7] On receipt of the combined summons, the defendant, as he was entitled to, filed a notice to defend, which elicited the present application for summary judgment. The application is accompanied by an affidavit deposed to by Gottlieb Nendongo Amanyanga. This affidavit contains all the necessary and customary allegations specified in the rules of court regarding the contents of an affidavit in support of applications for summary judgment.

[8] In order to determine the application, it is important to consider in some detail what the defendant says in his affidavit resisting summary judgment. I should commence by saying that the defendant does not deny entering into the agreement with the plaintiff in the terms set out earlier in this judgment. The paragraphs of his affidavit resisting summary judgment are unfortunately not numbered. A few paragraphs towards the end of the affidavit he states the grounds which constitute the gravamen of his defence in the following terms:

'I therefore would like to inform the Honourable Court of my grounds for my defence in this matter and are as follows:

1. I have never received a signed agreement from NORED as promised I only receive it with Solomon

2. Never received any records (accounting) given a detail of summary of transaction of such agreement.
3. As per agreement, I was entitled to a 4 % commission which was additional to the units bought.
4. NORED failed to pay N\$ 300 monthly fee to me as agreed.
5. On several occasion (*sic*) I have raised discrepancies, such as incorrect loading of units and uttering of deposit slips which NORED at times ignored.
6. The removal of the vending machine without my concern (*sic*).
7. That I am in possession of copies of deposit slips.'

[9] It is important at this juncture, to consider the relevant authorities regarding the particular allegations or averments in an affidavit resisting summary judgment and which may serve to successfully deflect an application for summary judgment that is otherwise hanging precariously over the head of a defendant like the sword of Damocles and stopping it from eventually descending and landing on the defendant with devastating effect.

[10] In the case of *First National Bank of Namibia v Louw*<sup>1</sup> I had occasion to consider what may properly referred to as the 'golden rules of summary judgment'. They are seven in number and may be summarized as follows:

- (a) the resolution of summary judgment does not entail the resolution of the entire action, namely that the defendant is required to set out facts which if proved at trial would constitute a defence;
- (b) the adjudication of summary judgment does not include a decision on factual disputes i.e. the court is not should decide summary judgment from the premise that the defendant's allegations are correct. For that reason, summary judgment can be refused if the defendant discloses facts which accepting the truth thereof will constitute a defence;
- (c) because summary judgment is an extra-ordinary remedy and which closes the portals of the court in final fashion in the face of the defendant

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<sup>1</sup> Case No. I 1467/2014 [2015] NAHCMD 139 (12 June 2015) at page 9-10.

without a full trial, summary judgment should not be granted unless the plaintiff has an unanswerable case;

- (d) in determining summary judgment, the court is restricted to the manner in which the plaintiff has presented its case, namely that the court must insist on strict compliance by the plaintiff and technically incorrect papers should see the application being refused;
- (e) the court is not bound by the manner in which the defendant presents its case. In this regard, if the defendant files an opposing affidavit that discloses a triable issue, the defendant ought to be granted leave to defend the action;
- (f) it is permissible for the defendant to attack the validity of the application for summary judgment on any other proper ground, including raising argument regarding the excipiability or irregularity of the particulars of claim or even the admissibility of the evidence tendered in support of the application without having to record same in the affidavit; and
- (g) summary judgment must be refused in the face of any doubt arising as to whether or not to grant the said application. The basis for this rule is that an erroneous finding to enter summary judgment heralds more debilitating consequences for a defendant than it does for a plaintiff because any error committed in refusing to enter summary judgment may be dealt with and corrected in the course of the trial. For that reason, leave to defend ought ordinarily to be granted unless the court is of the view that the plaintiff has an unanswerable case or conversely, the defendant has a hopelessly bad case.

[11] It is some of these stainless principles or golden rules that I will call in aid in resolving the main question whether or not this is an appropriate case in which this court should enter summary judgment in the plaintiff's favour. I should mention that the defendant was a self-actor and was unrepresented in these proceedings. This fact placed the court in a sense on a back foot for the reason that the court did not benefit

from properly prepared and manicured and balanced argument on all the legal issues that arose had the defendant also been legally represented.

[12] The first question I have to ask is whether the defendant's affidavit correctly meets the test of setting out a *bona fide* defence which *prima facie* carries a prospect of success if proved at trial. Talking about the *bona fides* of a defence, this court said the following in *Ritz Riese (Pty) Ltd v Air Namibia (Pty) Ltd*.<sup>2</sup>

'It cannot, therefore, be given that literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a defence valid in law, in a manner that is not inherently and seriously unconvincing'

[13] It must be recalled that summary judgment is a stringent remedy that must be granted with a degree of caution for it serves in a sense to deprive a defendant the full exercise of his right to a trial and may serve to close the door of the court in a summary fashion without full and exhaustive examination of all the issues at hand. In *Lofty Eaton v Ramos*,<sup>3</sup> Cheda J described the approach to summary judgment in the following terms:

'The general approach of these courts in applications of this nature is that cognizance 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 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 a remedy available to the 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 the respondent/defendant answering it. . . Summary judgment is therefore a simple but effective method of disposing of suitable cases without the high costs and long delays of trial actions.'

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<sup>2</sup>(J3765-2006) [2007] NAHC 15 (5 April 2007), par [18].

<sup>3</sup>(I 1386/2013) [2013] NAHC MD 322 (8 November 2013).

[14] Having set out the parameters of the enquiry, I now embark on a process of elimination, by considering the purported defences raised by the defendant in his affidavit. I will consider these in conjunction with any relevant facts he may have set out in the body of the affidavit, although not captured in the excerpt quoted above, which would, from all indications constitute the gravamen or mainstay of his defence. I presently turn to the contents of paragraph [8] where the defendant sets out his defence to the claim.

[15] Firstly, the allegation that the defendant did not receive an agreement signed by the plaintiff is not, by any stretch of the imagination. a defence to the claim. The fact of the matter is that the defendant signed the contract and bound himself to order his conduct in relation to the equipment in conformity therewith. That he did not receive a copy signed by the plaintiff does not, in my view constitute a defence at all, let alone a *bona fide* one.

[16] Equally unmeritorious as a defence is the allegation that the defendant did not receive any accounting records detailing the summary of transactions of the agreement. It must be recalled that the plaintiff's claim, as can be deciphered from the particulars of claim is that the defendant wrongfully and unlawfully massaged the figures of the amounts it received in order to get a benefit of money and electricity units it was otherwise not entitled to, which resulted in the amount claimed. This issue is simply not addressed by the defendant in the issues raised as purported defences and presently considered.

[17] I am also of the considered view that the allegations by the defendant that the plaintiff did not keep its part of the bargain by not being giving the 4% commission as appears to be the claim, and also not being given the N\$300 as per the agreement, do not, standing alone, constitute a defence to the plaintiff's claim, even if proved. At best, these may constitute a counter-claim to the plaintiff's claim but certainly not a defence thereto. In any event, the amounts allegedly not paid have not been quantified in any event by the defendant.



[18] In point 5, the defendant states that he noticed some discrepancies like the incorrect loading of units and 'uttering' of deposit slips which the plaintiff allegedly ignored. In the affidavit, the defendant claims that the plaintiff's staff acknowledged the said discrepancies 'and upon enquiry they would simply acknowledge and inform me that head office will correct and that verification will be made with bank statements, and that they will explain the re-writing on the deposit slip to head office, because the fax machine was not operating properly'.

[19] It is clear that the names of the officials of the plaintiff with which the defendant allegedly dealt and whom he would, all things being equal, be expected to know, have not been identified for purposes of confirming the correctness of the allegations. Furthermore, the said paragraph contains inadmissible hearsay evidence as statements are purported to have been made by certain persons who have not been named and more importantly, whose confirmatory affidavits have not been obtained and no explanation therefor tendered. This cannot constitute a defence carrying a prospect of success at trial in my considered view.

[20] A reading of the last allegations also do not pass muster. The defendant claims that the vending machine was removed without his 'concern'. That is not a defence to the claim at all. If the defendant has a legitimate claim to the said machine, he can sue for its return but would in all probability face a formidable hurdle in that regard as in terms of the agreement, the said equipment belongs to the plaintiff. How the removal of the equipment constitutes a defence is in any event not apparent from the defendant's affidavit. The last allegation that he possesses copies of the deposit slips is also no defence. The nature, purpose and effect these deposit slips would have on the claim have not been explained and even with the greatest benevolence being extended to the defendant, such do not constitute a defence to the plaintiff's claim.

[21] In sum, having had regard to the requirements placed on a defendant facing the prospect of summary judgment and the purported defences raised by the defendant in

this matter, I have come to the ineluctable conclusion that the defendant has dismally failed the test. The allegations contained in his affidavit are bald, sketchy and laconic. They cannot convince a court, properly directed that the defendant has a defence carrying reasonable prospects of success at trial. The plaintiff's claim appears unanswerable and on the basis of the papers filed, I entertain no doubt that the defendant may be yielded no injustice by having summary judgment entered against him, considering the contents of the plaintiff's particulars of claim and the affidavit in support of the application for summary judgment of the one hand and the opposing affidavit filed of record, of the other.

[22] Before drawing the judgment to a close, there is one other aspect I would like to briefly examine. It is whether the plaintiff's claim is technically correct. The important issue in this particular regard is whether the claim can be said to be a liquidated amount in money as contemplated by the provisions of rule 60. This is primarily so for the reason that it is apparent from the particulars of claim that the amount claimed is stated to be damages, which are in many cases not easily quantifiable, if at all.

[23] The learned author Patterson<sup>4</sup> states the following regarding the concept of a liquidated amount in money, 'The concept of a 'liquidated amount in money' is used to indicate an amount that is fixed and certain. In other words, it is an agreed amount in money or an amount that has been precisely quantified or that is readily capable of accurate determination and that is not in dispute'. The learned author proceeded to explain what is meant by the words readily capable of ascertainment as follows:

'It means simply that the presiding officer should be able to ascertain *ex facie* the document precisely what amount is due and payable, for example, by making a simple arithmetic calculation.'

[24] A reading of the plaintiff's particulars of claim shows indubitably what amounts are alleged to be owing to the plaintiff to the last cent, including the various dates; the

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<sup>4</sup> TJM Paterson, Eckard's Principles of Civil Procedure in the Magistrate's Court, 5<sup>th</sup> edition, Juta & Co, 2005, p 135.

actual amount properly to have been claimed; the inflated figure and amount actually paid on the basis of the defendant's misrepresentation. I am, in view of the forgoing, fortified in the conclusion that although the amount claimed is stated to be damages, the same has been computed and it is possible, by simple arithmetic calculation to ascertain the amount of the entire claim. In this regard, it is my considered opinion that the claim falls and fits neatly within the purview of summary judgment.

[25] The learned authors Van Niekerk *et al*<sup>5</sup> state that 'Even damages claims can be liquidated by agreement, in which instance they can sustain an application for summary judgment. A claim for liquidated damages, can, therefore, form the basis for a summary judgment application, for example when a hire purchase agreement contains a provision that the plaintiff's loss is the difference between the unpaid balance of the purchase price and the value of a vehicle as per the valuation.'

[26] Furthermore, I am of the considered opinion that the plaintiff's particulars of claim, as they stand are not excipiable nor did I detect any irregularities in them. It would appear to me that all the necessary averrals in support of the claim they seek have been properly and fully pleaded. This leads me to come to a conclusion that the particulars of claim are proper and regular on the face of it and no injustice would be visited on the plaintiff by granting summary judgment as prayed.

[27] In the premises, I am of the view that summary judgment ought to be granted as prayed. I accordingly grant the following order against the defendant:

- (1) Payment of the amount of N\$ 996,631.40
- (2) Payment of interest on the aforementioned amount calculated at the rate of 20% per annum from the date of judgment to the date of final payment.
- (3) Costs of suit.

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TS Masuku

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<sup>5</sup>Summary Judgment : A Practical Guide, Lexis Nexis, April 2006 at page3-6.



APPEARANCE

APPLICANT/PLAINTIFF:

A.E.J Kamanja

Instructed by Amupanda Kamanja Inc.

RESPONDENT/DEFENDANT:

N. Ouster (the defendant in person)