REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I 1183/2015

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA
PLAINTIFF

And

GERSHON BEN-TOVIM **1ST DEFENDANT**
URBAN FARMING CC/2002/1558 **2ND DEFENDANT**

Neutral citation: *First National Bank of Namibia Ltd v Ben-Tovim (I 1183-2015) [2016] NAHCMD 196 (7 July 2016)*

CORAM: MASUKU J.

Heard: 14 June 2016
Delivered: 7 July 2016

FLYNOTE: **CIVIL PRACTICE** – Summary judgment – RULES OF COURT- Rules 60, 32 (9) and (10) and rule 108 - defence of interference with contractual relations.

EVIDENCE – The parole evidence rule and how it impacts on the defence of an unliquidated counterclaim.

SUMMARY: The plaintiff sued the defendants for payment of a sum of money resulting from failure to comply with the conditions of a loan agreement. After filing a notice of intention to defend, the plaintiff moved an application for summary judgment which the defendants opposed. In their affidavit in opposition, the defendants alleged that the plaintiff interfered with a contractual relation and consequently raised a counterclaim in the excess of the plaintiff's claim against them.

Held – that although summary judgment is a stringent remedy, it is not altogether correct that the defendant's right to a hearing is violated as affidavit evidence is allowed.

Held – the parole evidence rule, when sought to be invoked in cases where a separate agreement is being referred to than that the plaintiff relies upon, cannot operate in a way that may result in a defendant being deprived of a defence based on a counter-claim which is predicated on other facts or cause of action not substantially connected with the plaintiff's claim.

Held further – that the defendants' counterclaim based on unlawful interference with a contractual relation constitutes a counter-claim and thus a defence to the plaintiff's claim though based on other facts than those on which the plaintiff's claim is predicated. *Held that* – the defendants' affidavit makes allegations which if proved at trial may constitute a defence and that a defendant is not required, in summary judgment, to make allegations that bear the standard of preciseness expected in a plea.

Held further – that it was unnecessary to deal with the issue of the application of rules 32 (9) and (10) and 108 in view of the order granted in respect of the summary judgment.

The application for summary judgment was thus refused and the costs therefor were ordered to be determined by the trial court.

ORDER

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1. The application for summary judgment is dismissed.
2. The costs of the summary judgment application are reserved for determination by the trial Court.
3. The defendants are ordered within 15 days from the date hereof, to file their plea and counterclaim, if any, or any other pleading they may by law or in terms of the rules of court be entitled to file.
4. If no other pleading is filed in terms of 3 above, the plaintiff is ordered to file its replication, if any, within 10 days from the filing of the plea and counter-claim.
5. The matter is postponed to **7 September 2016** at **15:15** for case management.

JUDGMENT

MASUKU J,.

Introduction

[1] This is an opposed application for summary judgment in which the plaintiff, a financial institution, claims payment from the defendants jointly and severally of the amount of N$ 4 372 631.89, compound interest at the rate of 20% per annum as from 3 March 2015, to the date of final payment; an order declaring Farm Ehuiro No. 120 in the Omaheke Region specially executable and costs of suit at the attorney and client scale.

Background

[2] The facts giving rise to this application appear to be fairly common cause and not the subject of much contention. They acuminate to the following: On 27 September, and

in Windhoek, the plaintiff and the 1st defendant entered into a written loan agreement in terms of which the former extended to the latter credit facilities in the amount of N$ 5 Million, as a personal loan and on terms that I need not, for present purposes enumerate.

[3] It is alleged, and it is not denied, that as at 4 March 2015, the 1st defendant was indebted to the plaintiff in the mount of N$ 179, 507.62, being the arrears due. The 2nd defendant, it is further alleged, and also not denied, that the 2nd defendant signed a suretyship agreement for the 1st defendant's due and timeous fulfilment of its obligations to the plaintiff in relation to the credit facility in question. Furthermore, a deed of hypothecation was entered into in favour of the plaintiff in respect of the property mentioned in para [1] above.

[4] As a result of the 1st defendant failing to comply with his obligations in terms of the agreement, the plaintiff called up the facility and claimed the amount of N$ 4 372 631.89, and the ancillary orders specified in para 1 above from both defendants.

[5] The defendants, as they are entitled to, entered their notice to defend which culminated in the plaintiff filing an application for summary judgment. It is important, for present purposes, to consider the affidavit filed by the defendants in opposition to the application for summary judgment, to consider whether it is proper, in the circumstances, to enter summary judgment as prayed against both defendants.

Basis of opposition to summary judgment application

[6] In the affidavit resisting summary judgment, which is deposed to by the 1st defendant, it is denied that the defendants entered their notice to defend solely for the purpose of delaying the action. They further claim that they have a *bona fide* defence to the claim. In defence, the 1st defendant claims that he is involved in a business of manufacturing biomass green coal on the farm in respect of which the deed of hypothecation was made and of which the plaintiff was acutely aware. It is further

averred that the plaintiff was well aware that the 1st defendant required the facility applied for to successfully acquire the plant and equipment in order to profitably run the said business.

[7] The 1st defendant alleges that the greencoal business is run by an entity known as Greencoal Namibia (Pty) Ltd and of which he is the Managing Director. He claims further that he was well remunerated by the company and used his remuneration to make good his indebtedness to the plaintiff, a fact that the plaintiff was allegedly well aware of. It is further stated that as a result of some disagreements with the other co-directors regarding contributions and recapitilisation of the company, the plaintiff wrongfully and without permission, froze the operational account of the company, thus 'killing' the business of the company.

[8] This alleged unlawful action of the plaintiff, it is further claimed, resulted in the company being unable to do its business and consequently being unable to pay the 1st defendant his remuneration which he used to make good his indebtedness to the plaintiff in relation to the loan facility. He claims that efforts on his part to amicably resolve this impasse with the plaintiff was unsuccessful.

[9] The 1st defendant accordingly alleges that as a result of the plaintiff's alleged unlawful action of unilaterally freezing the account of the company, which in turn resulted in the company being unable to pay him his remuneration by which he settled his indebtedness to the plaintiff, he has a counterclaim against the defendant and accordingly claims an amount of N$ 9 500.000, representing loss of income, damages to the plant and equipment due to lack of maintenance and payment of the salaries of the employees of the company. The 1st defendant also opposes the application to declare the property specially executable. I will not traverse the grounds on which the opposition is grounded presently, that being a matter I shall deal with later in the judgment, if this does become necessary.

<u>Sustainability of the defendant's defence</u>

[10] I intend to carefully consider the sustainability of the defendant's counterclaim and to determine whether it is a sufficient basis on which summary judgment can be correctly deflected in the circumstances. Before I do so though, there is an argument that I need to consider that was canvassed by Ms. De Jager in support of the application for summary judgment and it relates to a procedural issue.

[11] In her carefully manicured heads of argument, Ms. De Jager referred to the learned author Van Niekerk,[1] where the following appears:

> '. . . this hackneyed refrain is judicial anachronism. The remedy does not bar a defendant from the courts; furthermore it is not unusual that judgment "without trial" is granted exclusively on affidavits. The *audi alteram partem* principle is not violated as a defendant is given an opportunity to present his case.'

[12] Ms. De Jager's criticism was that courts normally overstate the stringent nature of the remedy of summary judgment to the extent that an impression may well be created that the defendant's right to a hearing is violated when that is not actually the case. I am in agreement with the learned author that although an actual trial is not conducted in the conventional sense in summary judgment applications, the defendant's right is not, however, totally negated as evidence, in the nature of an affidavit is placed before court and in terms of which the defendant states to the court the nature and grounds of his or her defence. This is allowed and followed in many other types of proceedings.

[13] Furthermore, the court is astute and is placed on the *qui vive* in the sense that the court is acutely aware that a full trial is not conducted and therefore has to ensure that in granting summary judgment, it does not do so in a rash manner when the fullness of a trial may have revealed that the defendant does in fact have a *bona fide* defence. In this regard, the court examines the pleadings carefully to ensure that they are technically correct and that all necessary allegations are made and procedural requirements are met.

[1] Summary Judgment: A Practical Guide Issue 5 p 5-4.

[14] In dealing with the defence raised by the defendants, it is fair to say that same is in the nature of what can be referred to as wrongful or unlawful interference with a contractual relationship. I will examine this defence and consider whether the facts of the instant case admit of its applicability in this matter. I must state that Ms. De Jager argued very strenuously that the purported defence does not apply in the instant matter.

[15] In *Minister of Safety and Security v Scott and Another,*[2] the court dealt with the claim of interference in a contractual relationship as follows, quoting from Neethling *et al*:[3]

> 'Interference with a contractual relationship is present where a third party's conduct is such that a contracting party does not obtain the performance to which he is entitled *ex contractu,* or where a contracting party's contractual obligations are increased. . . This exposition is, however, subject to the general rule in South Africa that the contractual relationship of another in principle constitutes an independent delictual cause of action.'

[16] What can be emphasized is that in dealing with the claim of unlawful interference, the court, correctly in my view, was worried about what it referred to as indeterminate liability and for that reason inclined to the view that for the claim to hold, it must be shown that there was knowledge of the contract or its terms before the claim can be said to apply. Another case that deals with the claim is *Country Cloud Trading CC v MEC, Department of Infrastructure Development.*[4]

[17] In their heads of argument, the defendants, relying on the principle enunciated in the above cases alleged that the plaintiff, by unilaterally freezing the company's account unlawfully interfered with the contract in that it knew of the contract between the 1st defendant and Greencoal in terms of which the latter paid remuneration to the 1st defendant from the account it froze. It is the defendant's submission that if it were to

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[2] 2014 (6) SA 1 (SCA) at 11 at para 28.
[3] Visser Law of Delict.
[4] 2015 (1) SA 1 (CC).

establish these averrals at the trial, same would constitute a defence thus constituting a *bona fide* defence as required by the rule on summary judgment.

[18] The plaintiff moved the court to dismiss the defendants' contention on a number of basis. First, it is claimed that the application of the parole evidence rule should preclude the court from accepting the defendants' purported defence for the reason that the other agreements relied upon and which are alleged to have been breached have nothing to do with the agreement which forms the basis of the instant claim.

[19] In this connection, the court has been urged to focus its attention to one document, namely the agreement in question which the defendants are alleged and do not deny they have breached and no other. In other words, the court must consider one question and one question only, namely, have the defendants breached the agreement relating to loan facility? If the answer is in the affirmative, then *cadit quaestio.* Other agreements and their alleged breach by the plaintiff, if at all, are irrelevant to the present dispute.

[20] In support of its argument, the plaintiff placed reliance on *Damaraland Builders CC v Ugan Terrace Lodge CC,*[5] where the court expressed itself in the following terms:

> 'A further aspect that needs consideration in respect of the interpretation of the contracts is the parole evidence rule.
>
> > "The rule is that when a contract has once been reduced to writing, no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence."
>
> The parole evidence rule is of particular importance in respect of building contracts where it has been preceded by negotiations before the contract was reduced to writing. No oral written evidence is admissible in respect of the negotiations prior to or contemporaneous with a reduction of the contract to writing in order to show that the intention of the parties was.'

[21] I am of the considered view that in the instant case, the defendants are not seeking to interpret, add to or vary the contract between them and the plaintiff. What is

[5] 2012 (1) NR 5 (HC).

clear is that they do not deny that they fell into arrears in relation to the written agreement is issue and that ordinarily the plaintiff would, all things being equal, be entitled to judgment in that respect. What changes the position, is that the defendants claim that they have a counterclaim, which is not, however, based on the same agreement as the plaintiff's claim.

[22] It is clear that where a party seeks to raise a counter-claim as a defence to summary judgment, that defence need not be based on the same facts or even cause of action as the main claim. In this regard, the learned authors Van Niekerk say the following:[6]

> 'An unliquidated counterclaim does constitute a *bona fide* defence to a plaintiff's liquidated claim. A defendant may, accordingly, rely on an unliquidated counterclaim to avoid summary judgment – even when he admits owing a liquidated amount of money to the plaintiff. There is no requirement that the counterclaim should depend upon the same facts as those upon which the plaintiff's claim is based. Any unliquidated counterclaim, even when it is based upon facts and circumstances differing entirely from those forming the basis of the plaintiff's claim, may be advanced by a defendant and in law constitutes a *bona fide* defence in summary judgment proceedings.'

[23] In the premises, if the plaintiff's argument was to be adopted, it would render nugatory the issue of the counter-claim as it would effectively mean that if the claim on which summary judgment is claimed, is based on a written document, you cannot raise any counterclaim based on another cause of action unrelated to the written agreement. This would clearly deprive litigants of the panoply of alternatives open to them in summary judgment applications and this would not serve the interests of justice nor those of fairness. I am accordingly of the considered view that the issue of the parole evidence rule in this matter does not in any way obliterate the defence sought to be raised by the defendants and is to that extent, inapplicable and irrelevant.

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[6] *Supra* Note 1 at 9-34.

[24] The plaintiff's Counsel also argued that the defendants have failed in their affidavit to disclose grounds upon which the plaintiff's claim is disputed with particular reference to material facts underlying the disputes raised. In support of this argument, the court was referred to a number of authorities, which I will not, with no disrespect to the plaintiff's counsel, however, cite.

[25] In *Agra Co-Op Ltd v Aussenkehr Farms (Pty) Ltd*[7] Strydom JP said the following in this regard:

'However, before a Court will exercise its discretion in favour of a defendant there must be some factual basis, or belief, set out which will enable a Court to say that there was some reasonable possibility that something will emerge at the trial, that the defendant would still be able at the trial to establish its defences.'

[26] The court was also referred to *Moder v Teets t/a Neyer's Garage Nachfolger,*[8] where the court referred with approval to *Schnebel & Hansen (Pty) Ltd v J & R Properties*, judgment of this court, where it was stated as follows:

'It is however also clear that a Court cannot exercise its discretion in favour of the respondent on a hunch that there may be a defence lurking somewhere in the allegations set out by the respondent. The Court's discretion must be exercised on facts placed before it.'

[27] The plaintiff adopted the position that the defendants' affidavit simply formulated the dispute they allege but failed to disclose the material grounds upon which it is based. In that regard, it was further stated, a factual basis must be set out for the dispute, consisting of all material facts on which the disputes will be based. For that reason, it was submitted, the court cannot be convinced that there is a reasonable possibility that something will emerge at the trial to found a defence.

[28] For their part, the defendants referred the court to *Namibia Breweries Limited v Serrao,*[9] where the court reasoned as follows on this issue:

[7] 1996 NR 208 (HC) at p. 212.
[8] 1997 NR 122 (HC) at 125.
[9] 2007 (1) NR 49 at 50J-51A.

'Rules of Court require a respondent to "disclose fully the nature and grounds of the defence and material facts relied upon therefor'. This means a sufficiently full disclosure of the material facts to persuade the Court hearing the application for summary judgment that, if the respondent's allegations are proved at a trial, it will constitute a defence to the applicant's claim.'

[29] If the issue in contest was one of brevity, the defendants may well have failed the test. To determine whether the defendant's affidavit meets the test, it is not necessary that the defendant engages in long and winding verbiage. Nor must its affidavit be prolix, for it is the content and not the quantity of what is included that counts. In this instance, the defendant has stated that the plaintiff, with full knowledge of the existing contractual relationship between the 1st defendant and Greencoal wrongfully froze the latter's account in the full knowledge that that very action will impact negatively upon the 1st defendant's ability to service the loan in respect of the plaintiff's claim.

[30] The learned authors Van Niekerk *et al* (*supra*),[10] say that the defendant's affidavit should not be assessed with the precision of a plea. They continue to say:

'A court is, therefore, entitled to apply a more accommodating approach thereto. Furthermore, the defendant is not obliged to disclose all of his defences in the opposing affidavit. A court is also not necessarily bound to the manner in which the defendant has presented his case and is entitled to ascertain from the content of the affidavit itself what the defendant actually intended to say.'

[31] I am of the considered view that the allegations made by the defendants, if proved at trial, do have the prospect of raising a defence to the plaintiff's claim. Clearly, allegations that *prima facie* raise the defence of unlawful or wrongful interference with a contractual relationship has been made out. I say so for the reason that the defendants may well be able to show at the trial that the plaintiff is not entitled to enforce its rights in respect of its claim as it is responsible for the breach of the agreement it seeks to rely on. Second, it is clear that the defendants' counterclaim is in an amount larger than that

[10] Issue 5 at para 9.5.1.1.

claimed by the plaintiff. This court does not have the wherewithal at this juncture, to determine whether the counterclaim will succeed or not and it is not desirable that it should engage in divination escapades about the possible success or failure of the defendant's defence. As long as the defence canvassed is good in law and *prima facie* carries a prospect of success that should be considered condign for a summary judgment application.

[32] On a mature consideration of all the papers filed, I am of the considered view that the defendant has, in its affidavit, raised issues, which if proved at trial, might well found a good defence to the plaintiff's claim. To that extent, I am of the view that it has discharged its obligations at this stage. The application for summary judgment must accordingly fail.

Rule 108

[33] I am of the view that it is unnecessary, in view of the answer returned on the application for summary judgment, to deal with the issue of the declaration of the property specially executable. I did, in any event, declare my difficulties to the plaintiff's counsel with the granting of the prayer during the hearing. This, as indicated, was premised on the judgment of this court in *Futeni Collections Limited v O B Davids Property and 31 Others*[11].

Applicability of rule 32 (9) and (10)

[34] I am also of the considered view that it is unnecessary to decide the issue of the implications of the alleged non-compliance with rule 32 (9) on this matter. This entailed making a finding on whether summary judgment is an interlocutory proceeding within the meaning of rule 32. I have, however, made my *prima facie* views in this regard known in the following cases, to which none of the Counsel appearing before me referred, namely *First National Bank of Namibia Limited v Andries Louw*[12] and *Bank*

[11] (I 709/2013) [2015] NAHCMD 104 (30 March 2015).
[12] (I 1467/2014) [2105] NAHCMD 139 (12 June 2015)

Windhoek Limited v Nosib Farming CC and Four Others[13]. I should say that I still maintain those *prima facie* views, although my mind is open to persuasion, should full argument on this issue be poignantly raised and it is, in those circumstances, rendered strictly necessary for the court to determine the issue decisively.

Costs

[35] In view of the fact that the court has granted the defendant leave to defend the claim, I am of the view that the costs of the summary judgment application should be reserved for determination by the trial court and I so order.

Order

[36] In the circumstances, I grant the following order:

1. The application for summary judgment is dismissed.
2. The costs of the summary judgment application are reserved for determination by the trial Court.
3. The defendants are ordered within 15 days from the date hereof, to file their plea and counterclaim, if any, or any other pleading they may by law or in terms of the rules of court be entitled to file.
4. If no other pleading is filed in terms of 3 above, the plaintiff is ordered to file its replication, if any, within 10 days from the filing of the plea and counter-claim.
5. The matter is postponed to **7 September 2016** at **15:15** for case management.

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T.S. Masuku

Judge

[13] (I 1404/2014) [2015] NAHCMD 89 (15 April 2015)

APPEARANCES

PLAINTIFF:	B. De Jager Instructed by Fisher, Quarmby & Pfeiffer
DEFENDANTS:	G. Narib Instructed by Conradie & Damaseb