REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: **HC-MD-CIV-ACT-CON-2016/02512**

In the matter between:

BART ERNST VAN KEYMEULEN **PLAINTIFF**

and

PAUL MARIE GEORGES MACHITUS VAN DE VIJVER **1ST DEFENDANT**

NAMBEL INVESTMENTS (PTY) LIMITED **2ND DEFENDANT**

CORAM: MASUKU J

Neutral Citation *Keymeulen v Van der Vijver (2016/02512)[2017] NAHCMD 159 (9 June 2017)*

Heard : 16 May 2017
Delivered : 9 June 2017

Flynote: RULE 60 – Summary Judgment application **–** Rule 60 (5) **-** Content of the opposing affidavit by Defendant **– NEW DEFENCES RAISED IN THE**

HEADS OF ARGUMENT – whether such defences should be considered by the Court – **LAW OF CONTRACT** – Specific performance – party claiming specific performance from other must perform or tender to perform their part of the reciprocal obligation.

Summary : The Plaintiff instituted an action against the 1st Defendant in terms of which he sued for monies outstanding on a dual purpose agreement signed between the parties. The claim involves a lot of money which runs in excess of a million Euros, which was allegedly owed due to sale of a crusher and the Plaintiff's shares in the 2nd Defendant. It is alleged that the defendant breached the agreement by not paying the purchase price as per the terms of the agreement and on this basis the Plaintiff moved for an application for summary judgment, which was hotly contested by the Defendant. It was argued that the Defendant's affidavit opposing the summary judgment application did not meet the rule 60 requirements, in that new defences were raised for the first time in the heads of argument as opposed to the opposing affidavit. The issue that arises is whether the court should, at this juncture, entertain the defences raised in the heads of argument.

Held that - Where the Defendant's affidavit opposing summary judgment fails to measure up to the rule 60 (5) requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before Court. Furthermore, the principle is that in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it.

Held further – that the court has a discretion whether or not to allow a litigant to raise a new point in the heads of argument. This the court held, would depend on whether the new point was covered by the pleadings, whether there would be unfairness to the other party.

Held that – It is a generally accepted principle that the defendant may attack the validity of a summary judgment on any proper ground.

Held further – that a party claiming for specific performance from the other must plead same and perform thereunder or tender performance of its part of the bargain. Furthermore, failure to plead that aspect may render one's

particulars of claim excipiable and would constitute a technical defect in the pleadings that would render the granting of summary judgment inappropriate. The court in conclusion refused the summary judgment application and ordered the 1st defendant to pay the costs of such application.

ORDER

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1. The application for summary judgment is refused.
2. The 1st defendant is granted leave to defend the claim and to this end, the following time limits are set out:
   2.1 The parties are ordered to file a joint case plan on or before 19 June 2017.
3. The 1st defendant is ordered to pay the costs of the summary judgment, consequent upon the employment of one instructing and one instructed counsel.
4. The matter is postponed to 21 June 2017 for a case planning conference at 15:15.

JUDGMENT

MASUKU J;

Introduction

[1] Serving before this court for determination presently, is a hotly contested application for summary judgment. The claim involves a lot of money which runs in the excess of a million Euros.

[2] The 1st defendant, whilst admitting that his papers filed in opposition to the application for summary judgment were not the model of clarity and that they were inelegantly drafted, has prayed that the said shortcomings notwithstanding, this is a proper case in which this court should, on account of

factors to be considered in due course, exercise its discretion by refusing the summary judgment application. The jury is out!

Background

[3] The application for summary judgment arises in the following circumstances: The plaintiff is an adult businessman resident in Belgium. He issued out a combined summons from this court suing the 1st defendant Mr. Paul Marie Georges Van Der Vijver, an adult businessman resident in Windhoek and a juristic person known as Nambel Investments (Pty) Ltd, whose place of business is situate at in Bismarck Street, Windhoek.

[4] In his particulars of claim, the plaintiff claims the Namibian Dollar equivalent of Euro 1 029 491.31, interest thereon at the rate of 20% per annum, from the date of issue of the summons, to the date of payment and costs of suit.

[5] From the averrals in the particulars of claim, the claim arose in the following manner: On 28 June 2010, in Windhoek, the parties (with the 1st defendant representing the 2nd defendant), entered into what is referred to as a dual purpose agreement in terms of which the 1st defendant would purchase a crusher from the plaintiff which was situate on a farm in Monte Christo, in Windhoek. The 1st defendant would, for its part, purchase the plaintiff's 49% shareholding in the 2nd defendant.

[6] The purchase price for the crusher was Euro 300 000, which was, in terms of the agreement, to be paid on or before 31 July 2011. On the other hand, the shares purchased by the 1st defendant were, by agreement, worth Euro 1 410 000. The effective date of the agreement was to be date of payment of the latter amount to the plaintiff or the date of transfer of the shares into the 1st defendant's name, whichever event occurs last.

[7] It is alleged that the 1st defendant was, in terms of the written agreement, to pay to the plaintiff part payment in the amount of Euro 1 164

000 on the effective date and the balance thereof, i.e. Euro 246 000, together with agreed interest of Euro 50 000, rounded off to Euro 300 000, was due to be paid on or before 31 July 2011. The amounts due were also secured on terms that I need not, for present purposes, advert to.

[8] It is alleged by the plaintiff in his particulars of claim, that he complied with his part of the bargain in terms of the agreement but the 1st defendant, whilst acknowledging and accepting the amounts due from him, breached the agreement by failing to keep his part of the bargain by not paying the amounts due to him on time and by further failing to put up the security for the due fulfilment of his obligations in terms of the agreement aforesaid.

[9] It is further averred in the particulars of claim that the parties, i.e. the plaintiff and the 1st defendant, two years after the money referred to above was due, signed an addendum to the agreement dated 9 August 2013. In terms of this agreement, it is further averred, the 1st defendant admitted liability for the outstanding amounts, and agreed to pay to the plaintiff namely N$ 1 000 000 as part settlement of the amounts due. I interpolate to observe that the addendum does not, as averred, contain an admission of liability for the amount claimed. This amount, i.e. the N$1 000 000, it is further alleged, was paid on 13 August 2013. Thereafter, the plaintiff made demand for the payment of the outstanding amount of Euro 1 029 491. 31, which is the amount presently claimed from the 1st defendant.

[10] It would appear, from the foregoing, that the present claim is only against the 1st defendant. I say so for the reason that there does not appear to be any money alleged to be due from the 2nd defendant. In this regard, there is also no claim for joint and several liability by both defendants. I should, in the circumstances, make no mention of the purchase of the crusher, as it does not presently appear to be part of the present claim.

[11] Upon defendants entering their notice of intention to defend the action, the plaintiff, as he was entitled to, filed an application for summary judgment, which is the matter presently serving before court as previously stated.

Bases of opposition to summary judgment application

[12] The 1st defendant deposed to the affidavit resisting summary judgment. Stripped to the bare bones, the said defendant denied that the notice to defend had been filed for dilatory purposes. He alleged that any performance by him in terms of the agreement would constitute an offence as the necessary consent in terms of the Exchange Control Regulations,[1] to pay the amount claimed in Namibia in a foreign currency had not been obtained. The carrying out of the agreement, the 1st defendant accordingly claims, would be illegal and hence unenforceable.

[13] In the event the court was to find that the above defence is not sustainable, the 1st defendant had another bow up his string. He contended that the amount claimed by the plaintiff is disputed based on the calculation thereof. A lot of store was, in this regard laid on the calculation of interest. It was contended in this connection that the *mora* interest claimed is not payable nor enforceable on an amount due in foreign currency as interest due on such amounts is regulated by the foreign exchange regulations.

[14] In the further alternative event that the court would find that the amount claimed is enforceable, the 1st defendant alleges that he made calculations of his own and in this regard concluded that the amount payable in that regard would be Euro 578 597. 52. In conclusion, the 1st defendant prayed that the application for summary judgment should be dismissed with costs and in the alternative that he and the 2nd defendant should be granted leave to defend the action.

Further defences disclosed in the heads of argument

[15] In the heads of argument, filed in respect of the case, the defendants, for the first time raised new defences. The plaintiff has applied that the court should have no regard whatsoever to these new defences as these have not

[1] GN R 1111 of December 1961.

been brought to light in the manner and form prescribed in the rules of court. In this regard, it is common cause that the relevant rule requires that any defence to an application for summary judgment, should be contained in the affidavit filed in opposition thereto.[2]

[16] The 1st defendant, in this case has, in the further defences raised, cited certain provisions of the agreement on which the claim is predicated, to argue that full and proper defences are contained therein. The first in that regard is clause 4.1.1, which deals with 'the effective date of the agreement.' It is argued, in relation to the latter clause that the 1st defendant was to pay the amount claimed 'within a period of 60 days from date of signature of the agreement failing which the sale would be null and void.'

[17] It is accordingly contended that in this case, the amount claimed was not paid within the period set out above and that as a result of that failure, the agreement in question is null and void and that in the premises the plaintiff's claim cannot stand. This, it is contended raises a *bona fide* defence within the meaning of the rule and should, as such, entitle the court, in the proper exercise of its discretion, to grant the defendant leave to defend.

[18] Another issue raised by the 1st defendant relates to the legal point that properly construed, the plaintiff claims specific performance from the 1st defendant. It is argued in this regard, that a claimant for such a remedy must, in his or her pleadings, allege performance under the contract or at the least, make a tender to perform his or her part of the bargain. It is contended in this regard that the plaintiff has failed to make the relevant averrals in this regard, the total effect of which is to render the plaintiff's particulars of claim excipiable, an indication that this is not a proper case in which to grant the stringent relief of summary judgment.

<u>Determination on the alleged defences raised in the heads of argument - should these be considered by the Court at all?</u>

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[2] Rule 60 (5) (b) (i).

[19] The major question that arises for determination in the instant matter is whether the court should, at this juncture, entertain the defences raised in the heads of argument. This question, as will be seen from what I have said above, arises chiefly in the light of what I consider to be the mandatory provisions of the rules and what has been stated repeatedly in many a judgment of this court regarding the form in which a defence to an application for summary judgment should ordinarily assume. In this regard, it is clear that heads of argument, as a medium for conveying defences is ordinarily excepted by express exclusion, if I may say so.

[20] Should any authority for this proposition be required, I would refer to a judgment of this court in *Aquantum (Pty) Ltd v Radical Trust Industries (Pty) Ltd,*[3] where the following is stated in regard to the duty of a defendant intent on opposing an application for summary judgment:

'[23] It must be stressed that the court cannot and should not be expected to base its decision to refuse or grant summary judgment on any facts other than those contained in the affidavit filed by or on behalf of the defendant. In this regard, the facts must be stated with fullness and completeness to enable the court to appropriately exercise its judgment. A defendant can choose to be chary in this regard, to its own detriment.'

[21] At para 26 to 28, the court proceeded as follows:

'[26] I must also state that in the instant case, Ms. Mondo attempted to introduce in argument certain issued within her knowledge, probably on instructions from the defendant. Crucially, this information, sought to be introduced in argument, was not deposed to on affidavit. This is not allowed. The defendant should address the nature and bases of the defences in the affidavit it is allowed to file in terms of the rules. This may even include supporting affidavits if some of the facts are not within the knowledge of other deponents other than the main one.

[27 It can only be in very exceptional circumstances that the court may allow such evidence, and on good cause shown, to be led, considered and accepted. Legal

[3] HC-MD-CIV-ACT-2016/02337 at para [23].

practitioners may not seek to introduce evidence in this regard from the bar, through the backdoor, by dressing and disguising same as legal submissions in an effort to embellish their client's case, when that evidence was not included in the affidavits filed.

[28] I must also stress that a defendant should appreciate that he or she has one opportunity to convince the court of the sustainability of the defence contended. The three-strike rule employed in American baseball, does not apply in summary judgment. If a defendant, as stated earlier, chooses to be extremely chary in the affidavit it files, it must appreciate that that may be the last opportunity it has to place material before the court, which may persuade the court as to the credence and sustainability of its defence. There is no further opportunity to bring some fuller or more comprehensive defence in further affidavits filed at a later stage. In this regard, the defendant stands or falls on the contents of the affidavit filed in opposition to the summary judgment.'

[22] It must be stated that from the above quotation, the court appears to have opened a door to the court being able to exercise its discretion in a deserving case but upon the applicant therefor showing that there are 'very exceptional circumstances' shown to exist which would lead the court to allow such evidence to be led, considered and accepted. This, I may hazard, is because of the stringent nature of the summary judgment application and its potential to allow an adverse judgment to be granted without the defendant having his or her normal right to an ordinary and fully fledged trial.

[23] In her able and carefully 'manicured' argument, Ms. Schimming-Chase contended that the new defences raised in the heads of argument should be accepted by the court in the instant matter. It was her contention that although these were not included in the opposing affidavit, as should have been the case ordinarily, these were, however, legal issues that appear *ex facie* the pleadings and which the court ought, in the proper exercise of its discretion, take into account, particularly considering, as mentioned earlier, the extra-ordinary, stringent and devastating nature of granting summary judgment.

[24] It was argued that from a reading of the plaintiff's own particulars of claim, it can be reasonably concluded that the plaintiff failed to make a case for the granting of a summary judgment, a conclusion that should, if accepted, entitle the court to exercise its discretion in the 1st defendant's favour. In this regard, it was further argued that the court has a wide discretion to consider arguments raised by a defendant in spite of the latter's admitted failure to raise same in its opposing affidavit.

[25] In this regard, the court was referred to the following passage in *Sand and Co Ltd v Kollias*[4] :

'But assuming that I am wrong and that, as in English practice, the deponent must be authorised by the plaintiff to make an affidavit, I think the existence of such authority, if it does not emerge from the affidavit itself, can be sought for in all the documents that are properly before the Court in connection with the application. The Court is not confined to the affidavit itself. . . But in any event, if the affidavit defective in any aspect, that defect can be cured by the other documents relating to the proceedings that are properly before the Court.' (Emphasis added).

[26] The court was also referred to the *locus classicus* case, rightfully cited with reckless abandon, if I may say so, in this and other jurisdictions, namely *Maharaj v Barclays National Bank Ltd,*[5] where the legendary Corbett JA expressed himself in the following terms:

'Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before Court . . . The principle is that in deciding whether or not to grant summary judgment, the Court looks at the matter "at the end of the day" on all the documents that are properly before it…"

[27] In the *Maharaj* case, the court proceeded to consider what the plaintiff's cause of action was on the particulars of claim, namely that the cause of action was based on moneys disbursed on the defendant's behalf in terms of an oral agreement of an overdraft facility. In this regard, the relevant

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[4] 1962 (2) SA 162 (W.L.D.) at 165 B-C.
[5] 1976 (1) SA 418 (AD) at 423 H and 424.

facts considered were the conclusion of the contract, the terms thereof, the deposits, withdrawals etc. (Emphasis added).

[28] Ms. Schimming-Chase was not done with her treatise. She further referred the court to a local authority in *Di Savino v Nedbank,*[6] where the Supreme Court dealt with an application for summary judgment in which, amongst other things, the court had to consider the propriety of further grounds or defences being raised before the Supreme Court and which were never raised in the opposing affidavit nor before this court during the hearing of the summary judgment application at the time.

[29] In its judgment, the Supreme Court underlined the importance of compliance of compliance with rule 32 (3) (b) (as it then was) and the reasons for doing so,[7] namely giving the court an opportunity to consider the grounds of attack, thus giving the Supreme Court the benefit of this court's views on the issue; exposing the arguments advanced to scrutiny and reveals their strengths and weaknesses and that it is a process that is vital to the development of coherent jurisprudence in this country.

[30] The court proceeded to consider whether the defendant's affidavit passed muster and found that it was not a model of clarity but viewed the said affidavit 'as a whole', particularly in the light of the particulars of claim and the annexures thereto attached. It concluded that taking all the above documents into account 'at the end of the day' and the new argument advanced before the Supreme Court, that the affidavit did pass muster and disclosed a certain defence. The court allowed the appeal and refused the summary judgment that had been granted by this court in the premises.

[31] During my research, I came across the latest judgment of the Supreme Court on this subject i.e. the case of *Barminus Rick Kukuri v Social Security Commission.*[8] In this case, the Supreme Court had to deal with an application for summary judgment on appeal which had been granted by this court and

[6] 2012 (2) NR 507 (SC).
[7] *Ibid* at p 517, para [31].
[8] Case No. SA 17/2015.

where new grounds were sought to be raised on appeal for the first time by the appellant.

[32] There are some applicable nuggets of wisdom that fell from the lips of the Supreme Court that I am compelled to quote as they resonate with the issues in contention and the argument advanced in this matter. At p.15 of the cyclostyled judgment, Mainga J.A., writing for the majority of the Court said the following at para [14]:

'As a general matter the Appeal Court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battle ground, a party should not be allowed to move to a different terrain. However, the court has a discretion whether or not to allow a litigant to raise a new point on appeal. This will depend on whether, the new point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have conducted its case differently had the point been raised earlier in litigation. . . Summary judgment is a drastic remedy, a court of law should be slow in disallowing the new point. It appears that it has been generally accepted that a defendant may attack the validity of summary judgment on any aspect. But there are instances where the court will, in the exercise of its discretion, refuse to permit the defendant to raise a new defence, for example, where it appears to the court that the defendant is clutching at straws, as is the case here. We allowed counsel to argue this new defence but the argument is untenable.'

[33] In response to this argument, Mr. Totemeyer, for his part, argued strenuously, with all the powers of persuasion at his command that the court should not allow the defendant to argue the new defences not included in the affidavit. He posited that the new defences are not included in the pleadings but are in the heads of argument and should, for that reason, be met with a decisive action from the court, as it were, slamming the door shut in the defendant's face for his lack of pleading his case fully and properly.

[34] Regarding the defence of the agreement having lapsed, as argued by the 1st defendant in his new defence, Mr. Totemeyer argued that this defendant's actions, particularly in signing the addendum to the agreement, are inconsistent with this defence and the court should therefor dismiss this

defence as untenable. He also stated that in some portions of the affidavit, the defendant appeared to admit that some amount was owing and that this is inconsistent with the stance of a defendant who has a valid and *bona fide* defence to the plaintiff's claim.

[35] All in all, he was of the strong view, placing strong reliance on relevant parts of the *Di Savino* judgment, that the defendant, by not raising all his defences in the opposing affidavit, had made its bed and must consequently lie on it, regardless of the spikes evident on the bed and which would in all certainty, not induce sleep but pain and bloodshed, figuratively speaking. Is he correct in his approach?

[36] I am of the considered view that the matters raised by the 1st defendant, albeit raised at the wrong time and using the wrong medium, should not be discarded merely for the reasons stated above. I am of the considered view that the issues raised do arise from the pleadings and other documents that are properly before court, in particular, the particulars of claim and the annexures thereto. The issue of the agreement and its terms, including the lapsing thereof, in my view appears *ex facie* the papers properly before court and may be had regard to, particularly in view of the stringent nature of summary judgment to an unsuccessful defendant.

[37] The issue of the lapsing of the agreement in my view appears from the very clauses of the agreement relied upon by the plaintiff and which agreement is properly before court. It appears, from the reading thereof, that there was no timeous compliance by the defendants therewith and which should ordinarily resulted in the agreement lapsing. The disparate interpretational views on the meaning and effect of these clauses in my view constitute a dispute within the meaning ascribed to matters in respect of which the court may grant a defendant leave to defend in summary judgment proceedings.

[38] Although Mr. Totemeyer's argument is understandable and persuasive, I am of the that the issue of the clause relating to the lapsing of the agreement

raises a triable issue and whether the defendant's conduct was inconsistent with the agreement having lapsed, is a matter that can be properly settled at trial and need not detain this court at this juncture. This court is not properly placed in the current proceedings to fully and properly investigate this allegation relating to the defendant's alleged inconsistent conduct. This can be properly and fairly done after the adduction of oral evidence.

[39] It must be recalled that the resolution of summary judgment does not entail the resolution of the entire action. The defendant is required to set up facts (or defences), which if proved at trial, would constitute a defence. For this reason, the court is required to refuse summary judgment even though it might consider that the defence will probably fail at the trial.[9]

[40] In *First National Bank v Louw,*[10] this court dealt with what it referred to as the 'seven golden rules of summary judgment'. The last one it dealt with at p 10 para (f) of the judgment, which resonates with the judgment in *Kukuri's* case, quoted above, is the following:

> 'It is permissible for the defendant to attack the validity of the application for summary judgment on any proper ground. This may include raising an argument about the excipiability or irregularity of the particulars of claim or even admissibility of the evidence tendered in the affidavit in support of summary judgment, without having to record same in the affidavit.'

In support of this proposition, the court cited with approval the case of *Spice Works and Butcheries (Pty) Ltd v Conpen Holdings (Pty) Ltd.*[11]

[41] It must be mentioned also that the defendant also raised the issue that although the plaintiff essentially seeks the remedy of specific performance, it has not, itself tendered performance of its part of the bargain. The law in this

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[9] Estate Potgieter v Elliot 1948 (1) SA 1084 (C) at 1087.
[10] (I 1467/2014) [2015] NAHCMD 139 (12 June 2015).
[11] 1959 (2) SA 198 (W).

regard is clear. If any authority for this proposition is required, the learned author G. B. Bradfield,[12] says the following in this regard:

> 'In accordance with the general principles applying to reciprocal obligations, a plaintiff who claims specific performance must perform or tender to perform its own reciprocal obligations. It is not relieved of this duty by the defendant's repudiation and its own election to hold the defendant to the contract.'

[42] Furthermore, the learned author Harms[13] states the following regarding the onus of a party which wishes to claim specific performance in terms of a contract, namely that he or she must (a) allege and prove the terms of the contract, (b) allege and prove the compliance with any antecedent or reciprocal obligations, or tender to perform them; (c) allege non-performance by the defendant and (d) claim specific performance.

[43] In this case, I am of the view that the plaintiff although claiming specific performance, has not complied with (b) above. It would appear to me that the failure to plead that aspect may render one's particulars of claim excipiable and would constitute a technical defect in the pleadings that would render the granting of summary judgment inappropriate. It is a permissible course, from the authorities cited above, to raise such a legal issue which goes towards excipibility of the particulars of claim without the need to actually raise that issue in the affidavit resisting summary judgment.

[44] What is of particular importance is the portion of the *Kukuri* judgment where the Supreme Court stated unequivocally, that it is accepted that defendant may attack summary judgment on any aspect.

[45] In sum, it appears to me that the first defence raised by the 1st defendant in the heads of argument, i.e. relating to the lapsing of the agreement, falls into the category of defences that should have been properly deposed to on the affidavit. I have, however, found and indeed held that

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[12] Christie's Law of Contract in South Africa, 7th ed, Lexis Nexis, 2016 at p 628.
[13] Amler's Precedents of Pleading, 7th ed, at p356.

notwithstanding that it was not included in the opposing affidavit, it does however, appear *ex facie* the documents that are properly before court.

[46] Considering the extra-ordinary and stringent nature of summary judgment as earlier adverted to, it would be harsh to sanction the granting the granting of the summary judgement against the defendant in the circumstances.

[47] The second defence, i.e. of the failure to make averrals regarding the remedy of specific performance sought, it appears to me that this is a defence that need not necessarily be included on affidavit as stated in the *Kukuri* case, the *Aquantum* judgments referred to above. It is in the nature of an exception and would ordinarily go to questioning the validity of the summary judgment, it being alleged to be predicated on defective pleadings.

[48] Having said this, I must mention that the issues arising in the *Aquantum* case were a different kettle of fish altogether. They were not issues which appeared *ex facie* the pleadings nor were they legal issues falling within the rubric of the *Louw* case cited above. It was therefore important for the issues raised to have been stated in the affidavit in the peculiar facts of that case.

[49] It appears, from the authorities, particularly those discussed by the Supreme Court in *Kukuri* and those others referred to above, that the court should consider the matter in the larger scheme of things ‘at the end of the day’ and enquire, considering the stringent nature of summary judgment, where the interests of justice lie in the particular case. Taking that holistic view in this matter, I am of the view that the matters raised in the heads of argument should in this case be considered as defences that do raise triable issues in the context of the entire case.

[50] In this regard, the stringent nature of summary judgment weighs in heavily in this case and points to the direction of the court having to accept the new defences, which it must be mentioned, the Supreme Court also

allowed in appropriate cases in deserving cases when raised for the first time on appeal. The staggering amount claimed in a very strong currency, it must be mentioned, cannot be an idle consideration in this case. I say so without encouraging parties to adopt a lackadaisical approach to raising their defences in opposing affidavits.

[51] In any event, even if I may be wrong on this aspect, I find comfort in the *Kukuri* judgment, read together with the *Louw* judgment quoted above. The fact that the defendant admitted to owing a certain amount, as argued by Mr. Totemeyer, must be viewed and considered in a proper perspective. The admission was made by the 1st defendant as an alternative, in case the court did not accept its defences raised in both the affidavit and in the heads of argument, as stated above.

[52] In view of the conclusion I have arrived at in relation to the defences raised in the heads of argument, I am of the considered view that it is unnecessary for me, in the context of this case, to pronounce the court's view on the sustainability of the defences raised in the affidavit, which the plaintiff claimed were not good defences at all. I hope that Mr. Totemeyer will not feel hard done by the court not making reference to his very articulate and compelling argument on the defences raised in the affidavit, which may have carried the day in different circumstances.

[53] In the premises, I am of the view that the application for summary judgment should be refused and that the defendant should, in the circumstances, be granted leave to defend the claim launched against him.

Costs

[54] It is a general rule that costs are in the discretion of the court. To be exercised judicially in the light of the circumstances of the case. In summary judgment, the ordinary course followed by the court is to order costs to be in the cause or to be decided by the trial court.

[55] In the instant matter, I am of the view that although the 1st defendant has succeeded in staving off the plaintiff's application for summary judgment, the manner in which the defendant went about its defence of the summary judgment is inexcusable and placed the plaintiff in a precarious position, with new defences sprung upon it for the most part in the heads of argument.

[56] I should, in the regard, mention that Ms. Schimming-Chase did, in argument and as a conscientious officer of the court, submit that in view of how the matter was handled by the defendant, this would be a proper case to order the defendant to bear the costs of the summary judgment. This is merited in this case and I order the defendant to pay the costs of the summary judgment.

[57] In the result, the following order is issued:

1. The application for summary judgment is refused.
2. The 1st defendant is granted leave to defend the claim and to this end, the following time limits are set out:
   2.1 The parties are ordered to file a joint case plan on or before 19 June 2017.
3. The 1st defendant is ordered to pay the costs of the summary judgment, consequent upon the employment of one instructing and one instructed counsel.
4. The matter is postponed to 21 June 2017 for a case planning conference at 15:15.

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T.S. Masuku

Judge

APPEARANCES:

PLAINTIFF:	R. Totemeyer
Instructed by:	Ellis & Partners
DEFENDANT:	E. Schimming-Chase
Instructed by:	Koep & Partners

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