

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2017/03356

In the matter between:

**AIR LIQUIDE NAMIBIA (PTY) LTD**

**APPLICANT**

and

**AFRINAM INVESTMENTS (PTY) LTD**

**FIRST RESPONDENT**

**FANUEL ALEXANDER**

**SECOND RESPONDENT**

Neutral citation: *Air Liquide Namibia (Pty) Ltd v Afrinam Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2017/03356) [2018] NAHCMD 123 (11 May 2018)

**Coram:** UEITELE J

**Heard:** 18 April 2018

**Delivered:** 11 May 2018

**Flynote:** Practice — Judgments and orders — Summary judgment — *Bona Fide* defence — Defendant must satisfy the court that he has a *bona fide* defence — Defendant must depose to facts which, if true, would establish a defence — Defendant must disclose facts upon which defence was based — Court must be satisfied that defendant has a good defence in law — Defendant must make a full disclosure so that the court is apprised of all relevant facts.

*Practice* - Judgments and orders - Summary judgment - Stringent remedy - Should only be granted if clear that plaintiff has unanswerable case - Court having discretion to refuse summary judgment even if defendant not sufficiently complying with requirements of Rule 60(5) of Rules of Court.

**Summary:** Applicant applied for summary judgment against the first and second respondents on an alleged written agreement for the sale of gas and lease of gas cylinders. Both first and second defendants entered notice to defend the plaintiff's claim. In support of the application for summary judgment the plaintiff filed an affidavit verifying the indebtedness of first defendant to the plaintiff in the amount of the claim and that the defendants have no *bona fide* defence to the action and they delivered the intention to defend solely for the purpose of delay.

Plaintiff alleges the second respondent bound himself as surety and co-principle debtor with the first defendant for the due performance of any obligation of the first defendant and for the due payment of the plaintiff by the first defendant of any amount which may become owing to the plaintiff by the first defendant. The plaintiff also set out the terms of the alleged written surety agreement. The defendants filed an opposing affidavit setting out the basis of their defence.

*Held that* summary judgment is a very stringent and final remedy which closes the doors of the Court for a defendant and should be granted only if it is clear that the plaintiff has an unanswerable case.

*Held further* that it has often been stated by the Courts that, even if the defence of the defendant does not sufficiently comply with the requirements of Rule 60(5) of the Rules of Court, the Court still has a discretion to refuse summary judgment

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**ORDER**

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- a) The application for summary judgment is refused.
- b) The defendants must file their plea (and counter claim if any) by not later than 24 May 2018.
- c) The plaintiff may replicate and plead to the counterclaim (if necessary) by not later than 8 June 2018.
- d) The parties must file case management report by not later than 15 June 2018.
- e) The matter is postponed to 26 June 2018 for case management conference.
- f) The first and second defendants must, subject to Rule 32(11), jointly and severally, the one paying the other to be absolved, pay the plaintiff's costs of this application, such costs to include the costs of one instructing and one instructed legal practitioner.

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**JUDGMENT**

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Ueitele J:

Introduction

[1] The applicant,<sup>1</sup> Air Liquide Namibia (Pty) Ltd, which is the plaintiff in the main action, commenced proceedings by issuing summons out of this Court. In the summons the plaintiff amongst other claims, claims payment in the amount of N\$336 547,87 plus interest at the rate of 20 % a *tempore morae* from the first respondent, Afrinam

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<sup>1</sup> I will for ease of reference refer to the applicant as the plaintiff in this judgment and to the first and second respondents as the first and second defendants respectively.

Investments (Pty) Ltd, which is the first defendant in the main action and also from the second respondent, Mr Fanuel Alexander, who is the second defendant in the main action.

[2] The plaintiff bases its claim against the first defendant on an alleged written agreement for the sale of gas and lease of gas cylinders in Windhoek, and against the second defendant on an alleged written suretyship agreement. In the particulars of claim the plaintiff alleges that, on the 30<sup>th</sup> day of March 2015 at Windhoek, the plaintiff and the first defendant entered into a written agreement for the sale of gas and lease of gas cylinders. The plaintiff annexed what it termed a true copy of the agreement to its particulars of claim as Annexure "A". The plaintiff thereafter set out the terms of the alleged written agreement. The pleaded terms of the alleged written agreement run into some sixty paragraphs and I will therefore not repeat them here.

[3] In respect of the second defendant, the plaintiff in its particulars of claim, alleges that, on the 29<sup>th</sup> of March 2015 at Windhoek, the second defendant bound himself as surety and co-principle debtor with the first defendant for the due performance of any obligation of the first defendant and for the due payment of the plaintiff by the first defendant of any amount which may become owing to the plaintiff by the first defendant. The plaintiff also set out the terms of the alleged written suretyship agreement.

[4] The plaintiff further alleges that, in its particulars of claim, the first defendant is in possession of 39 of the gas cylinders. It further alleges that the market value of one gas cylinder is N\$ 6 000 amounting to N\$234 000 for the 39 gas cylinders. The plaintiff continued to allege that the first defendant breached the agreement in that it failed to pay part or all of the rental and charges as from 30 June 2015 to 17 May 2017. The plaintiff furthermore alleges that it did, in terms of the written agreement, notify the first defendant of the breaches and requested the defendant to rectify the breaches. The total amount in respect of the rent and charges that the first defendant was required to pay is set out as the amount of N\$102 547-87. The total amount claimed from the defendants is thus N\$ 336 547-87.

[5] After the summons were served on the first and second defendants, they both entered a notice to defend the plaintiff's claim. The defendants, having filed a notice of intention to defend, the plaintiff at the case planning conference indicated that it intends to, and in fact did apply for summary judgment. In support of the application for summary judgment, the plaintiff filed an affidavit deposed to by the plaintiff's business consultant, a certain Tobias Johannes Kruger. Mr. Kruger swore to the facts verifying the indebtedness of first defendant to the plaintiff in the amount of the claim and that the defendants have no *bona fide* defense to the action and that they delivered the intention to defend solely for the purpose of delay.

[6] The defendants filed an opposing affidavit, deposed to by Mr. Fanuel Alexander, setting out the basis of their defence as follows (I quote verbatim from the opposing affidavit):

- '8. From the outset it is important to note that the Respondents' notice of intention to defend in the main action was not filed merely for the purpose of delay.
9. The Respondents in effect have a *bona fide* defence in respect of the Applicants Particulars of Claim as shall be illustrated herewith.
10. Firstly, the Respondents intent to raise an exception on the basis that the Applicant's Particulars of Claim do not disclose a cause of action in that the Applicant basis its claims on a written agreement, attached to the Particulars of Claim as Annexure A, which was never signed and thus never came into force.
11. Secondly, the Applicant is claiming for an amount in respect of rental and charges in respect of cylinders in the amount of **N\$ 102,547.87 (one hundred and two thousand dive hundred and forty seven Namibian dollars and eighty seven cents)**.
12. There was however no agreement that the Respondents were renting the cylinders from the Applicant, instead the Respondents purchased the gas in the cylinders and after using the gas and emptying the cylinders the Respondents returned the cylinders to the Applicant.

13. Therefore the Applicant is not entitled to the rental and charges amount of any cylinders but rather the value of any missing cylinders or damage thereto if such can be proven by the Applicant, which they failed to do in their Particulars of Claim.

### **C.1 CLAIM AGAINST THE SECOND RESPONDENT**

14. The Applicant claims that I signed a suretyship agreement binding myself, in my personal capacity, to any debts that the First Respondent may incur as a result of the alleged agreement.
15. I never signed the alleged agreement as can be seen on Annexure D of the Applicants Particulars of Claim, which is the deed of suretyship that the Applicant relies on.
16. As a result thereof, the Respondents intends to raise another exception in that I am not, in my personal capacity, liable in terms of the alleged agreements nor should I have been joined in these proceedings because no suretyship agreement ever existed in respect of this matter.'

[7] Having set out this brief introduction, I now proceed to set out the legal principles that govern applications for summary judgment.

#### The legal position

[8] When I heard this application, I was of the view that there was no need for me to write a detailed judgment because the principles governing summary judgment have been restated in this Court on so many occasions.<sup>2</sup> But as I was preparing for the order that I intended to make, I came across a judgment that made me change my mind, compelling me to write a reasoned judgment in this case. The judgment that I came across is the

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<sup>2</sup> See for example: *Kamwi v Ministry Of Finance* 2007 (1) NR 167 (HC); *Commercial Bank Of Namibia Ltd v Trans Continental Trading (Namibia) And Others* 1991 NR 135 (HC); *Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC); *Easy Life Management (Cape) (Pty) Ltd And Another vs Easy Fit Cupboards Windhoek Cc And Others* 2008 (2) NR 686 (HC); *Standard Bank of Namibia Limited v Veldsman* 1993 NR 391 (HC); *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC); *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) and *Social Security Commission v Kukuri* (I 5042/2014)[2015] NAHCMD 79 (31 March 2015).

judgment in the matter of *Ongwediva Town Council v Kavili and Others*.<sup>3</sup> In that matter the Court stated as follows:

'... In the opposition, respondents raised a number of issues and argued that there are disputes of facts in this matter which cannot be resolved on papers. In support of that application they relied on the affidavit filed by first respondent who is the Headman of the property. In that affidavit he chronicled the historical background of this land dispute.

It is our legal position that a summary judgment application is determined on motion proceedings except where a dispute of facts has arisen which cannot be resolved on papers. This is trite law. The test for the existence or otherwise of a dispute of facts was formulated in the case of *Stellenbosch Farmers Winery (Pty) Ltd v Stellenbosch Winery Ltd* 1957 (4) SA 234 © at 235 E-G where *Van Wyk J* (with whom *De Villies JP* and *Rosenow J* concurred) stated:

"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. ...Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted."

This rule has been with us for a long time and has been followed in numerous cases ... '

[9] I am acutely aware of the fact that I am not sitting as an Appeal Court to determine the correctness or otherwise of the pronouncements of a court of equal jurisdiction, but I feel duty bound and obliged to point out the application of legal principles which in my view are not in line with the established legal principles, with the view that the Supreme Court will in due course, ultimately speak the last word on the correct approach in this regard. For reasons that will become apparent in the following paragraphs, I do not agree with my learned Brother in the case of *Ongwediva Town Council v Kavili and Others* that '*it is our legal position that a summary judgment application is determined on motion proceedings except where a dispute of facts has arisen which cannot be resolved on papers.*'

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<sup>3</sup> *Ongwediva Town Council v Kavili* (HC-NLD-CIV-ACT-DEL-2017/00228) [2018] NAHCNLD 35 (16 April 2018) An unreported judgment of the High Court Of Namibia Northern Local Division.

[10] The reason for my disagreement with the statement in the *Ongwediva Town Council v Kavili matter* lies in the understanding of what summary judgment is. Van Niekerk *et al*<sup>4</sup> argue that any endeavour to define “summary judgment” accurately and concisely is as futile as an attempt to define “politics” or “pornography”. The authors continue and state that:

‘An appropriate explanation is that summary judgment is that remedy in civil procedure which may be utilised as an independent, distinctive, unique and speedy debt collecting mechanism by creditors who wish to claim liquidated amounts in money, whether or not the claim is contained in a liquid document, and in circumstances in which the enforcement of the claim is by the meritless appearance to defend...’

[11] The *rationale* for adopting that independent, distinctive, unique and speedy debt collecting mechanism procedure was articulated as follows in the High Court of Wisconsin (USA) in the case of *McLoughlin et ux v Malmar et ux*<sup>5</sup> where Fairchild J said:

‘The practice of resorting to motions for summary judgement came to being to prevent delay in the entry of a judgement due to the interposition of unfounded, false or frivolous answers ... the summary judgment procedure is not calculated to supplant the demurer, or motion to make pleadings more definite and certain, nor is it to be a trial on affidavits . It is aimed at a sham answer which is intended to secure a delay.’

[12] The procedure to apply for summary judgment is currently regulated by rule 60 of the Rules of this Court. That rule in part reads as follows:

‘60. (1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is –

(a) on a liquid document;

(b) for a liquidated amount in money;

<sup>4</sup> SJ van Niekerk, HF Geyer, ARG Mundell: *Summary Judgment: A Practical Guide*, LexisNexis, 2010. Service Issue 9 at 1-5.

<sup>5</sup> Quoted in *van Niekerk et al* supra footnote 3 at 1-7.



- (c) for delivery of specified movable property; or
  - (d) for ejectment.
- (2) The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts –
- (a) verifying the cause of action and the amount, if any, claimed; and
  - (b) stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.
- (3) ...
- (5) On the hearing of an application for summary judgment the defendant may –
- (a) where applicable give security to the plaintiff to the satisfaction of the registrar for any judgment including interest and costs; or
  - (b) satisfy the court by –
    - (i) affidavit, which must be delivered before 12h00 on the court day but one before the day on which the application is to be heard; or
    - (ii) oral evidence, given with the leave of the court, of himself or herself or of any other person who can swear positively to the fact, that he or she has a *bona fide* defence to the action and the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.’ (emphasis added)

[13] In the case of *Maharaj v Barclays National Bank Ltd*<sup>6</sup> Corbett JA, interpreting Rule 32(5) which is the forerunner of our current rule 60(5) said the following:

‘... one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his

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<sup>6</sup> *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418(A)

summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be.’

The learned judge continued and said:

‘The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. (See generally, *Herb Dyers (Pty) Ltd v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N); *Arend and Another v Astra Furnishers (Pty) Ltd.*, *supra* at pp. 303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine it by the standards of pleading. (See *Estate Potgieter v Elliott*, 1948 (1) SA 1084 (C) at p 1087; *Herb Dyers* case, *supra* at p 32.)’ (Underlined for emphasis)

[14] In the matter of *Shepstone v Shepstone*<sup>7</sup> Miller J had this to say on the word “fully”:

‘While there is a great deal to be said for the view that the word “fully” in the context of Rule 32(3) (b) should not be given its strictly literal meaning and that it is not required of a defendant to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence, it is clear, I think, that there ought to be a sufficient disclosure of material facts to enable the court to decide whether the defendant, if those facts are true, would have a defence to claim.’

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<sup>7</sup> *Shepstone v Shepstone*, 1974 (2) SA 462 (N) at 466-467.

[15] In the matter of *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*<sup>8</sup> Strydom JP (as he then was) said the following:

'There can be no doubt ... that summary judgement is an extraordinary remedy which does result in a final judgment against a party without affording that party the opportunity to be heard at a trial. For this reason courts have required strict compliance with the rules and only granted summary judgments in instances where the applicant's claim is unanswerable.'

[16] From the authorities that I have referred to above, it is clear that applications for summary judgment do not metamorphose into motion proceedings, they remain action proceedings. What happens is simply that when a defendant enters a notice to defend the action instituted by a plaintiff and the plaintiff is of the opinion that the entering of the notice to defend is calculated to delay his or her claim because the defendant does not have a defence that is good in law, the rules provide the plaintiff an avenue to avoid the delay of his claim by entitling him or her to apply for summary judgement. As it can be seen from rule 60 (5) (b), the application for summary judgement may be supported by affidavit or be supported by oral evidence.

[17] In the case of *Kramp v Rostami*,<sup>9</sup> Teek J said:

'The test in an application of this nature is for the respondent [the defendant] to set out a *bona fide* defence in his answering affidavit. There is no *onus* on him apart from setting out the facts which in the absence of a trial would satisfy the court that he has a *bona fide* defence in order to entitle the court to decline applicant's application for summary judgment.'

[18] The enquiry, where a plaintiff has applied for summary judgment is thus not, as the Court in the *Ongwediva Town Council v Kavili and Others* held, whether 'a dispute of facts has arisen which cannot be resolved on papers' but whether the defendant has, in his or her affidavit opposing the application for summary judgment, "fully" disclosed the nature and grounds of his or her defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or

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<sup>8</sup> *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC) at 201C – F.

<sup>9</sup> 1998 NR 79 (HC) at 82C – I.

part of the claim, a defence which is both *bona fide* and good in law. It is to that enquiry that I now turn.

Have the defendants fully disclose their defence?

[19] At the hearing of this application Mr Jacobs, who appeared on behalf of the plaintiff, informed the Court that the plaintiff is not pursuing the application for summary judgment in respect of the entire amount of N\$ 336 547 - 87 claimed in the particulars of claim and verified in the application for summary judgment, but limits the application to the rental and charges which amounts to N\$ 102 547 - 87.

[20] Mr Ntinda who appeared on behalf of the first and second defendants argued that the defendants intend to raise an exception against the particulars of claim, on the basis that the particulars of claim do not disclose a cause of action because the written agreement, including the suretyship agreement, was never signed on behalf of the first defendant and the second defendant never signed the suretyship for that reason, argued Mr Ntinda and further that the written agreement and the suretyship never came into force.

[21] Mr Jacobs who appeared for the plaintiff argued that it is trite law that for a successful factual defence, the opposing affidavit must “fully” disclose the nature and grounds of the defence and the material facts upon which it is founded. It must not be set out baldly, vaguely or laconically so that the court, with due regard to all the circumstances, receives the impression that the defendant has, or may have dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have, where the statements of fact are equivocal or ambiguous or contradictory or fail to canvas matters essential to the defence raised, then the affidavit does not comply with the rule, argued Mr Jacobs.

[22] In this matter, the first defendant’s defence is set out paragraphs 10 to 13 of its opposing affidavit which I have quoted above. The crux of the defence is that the defendants intend to raise an exception on the basis that the plaintiff’s particulars of claim allegedly do not disclose a cause of action because the written agreement, attached to the

plaintiff's particulars of claim as Annexure A, was never signed on behalf of the defendant and thus never came into force. The defendants proceed and state that there was however no agreement that the defendants were renting the cylinders from the plaintiff, instead the defendants purchased the gas in the cylinders and after using the gas and emptying the cylinders the defendants returned the cylinders to the plaintiff. Therefore, say the defendants, the plaintiff is not entitled to the rental and charges amount of any cylinders but rather to the value of any missing cylinders or damage thereto if such can be proven by the plaintiff which the plaintiff has failed to do in its particulars of claim.

[23] My reading and understanding of the defendants' defence is that that defence is equivocal, in one breath, the defendants deny the existence of a written agreement for the sale of gas and lease of gas cylinders but in the same breath the defendants say they purchased gas in the cylinders and after using the gas and emptying the cylinders they returned the cylinders to the plaintiff and if the plaintiff has any claim, it is for the unreturned cylinders. The defendants therefore do not, in my view, deny that that they had a sale and purchase arrangements with the plaintiff. They are coy about the terms of the purchase and sale arrangement that existed between the plaintiff and them.

[24] The question that confronts me is therefore whether the defence that the written agreement which is annexed to the plaintiff's particulars of claim is not valid because it was not signed on behalf of the defendants, is a good defence in law. It is trite that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the *onus* of proving an agreement that legal validity should be postponed until the due execution of a written document lies upon the party who alleges it.<sup>10</sup> In the case of *Goldblatt v Freemantle*<sup>11</sup> the court held that any contract may be [orally] entered into, writing is not essential to contractual validity.<sup>12</sup> I have therefore reached the conclusion that denying the existence of an agreement simply because it was not signed is a bad defence in law. I further agree with Mr Jacobs, who argued convincingly that the defendants did not sufficiently prove their defences as is required in terms of Rule 60(5) and that I must grant summary judgment in the amount of amounts to N\$ 102 547 – 87.

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<sup>10</sup> See *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C).

<sup>11</sup> *Goldblatt v Freemantle* 1920 AD 123 at 128.

<sup>12</sup> *Goldblatt* was followed in *Menelaou v Gerber and Others* 1988 (3) SA 342 (T).

[25] In the *Shepstone*<sup>13</sup> matter, the Court was of the opinion that where a defendant fails to 'fully' disclose his or her defence and thereby fails to 'satisfy' the court that he or she has a *bona fide* defence, the defendant necessarily runs the risk of having judgment entered against him or her but the court is not obliged to condemn him or her summarily without the benefit of a trial of the action. The court has a discretion in such a case whether or not to grant summary judgment.<sup>14</sup> In the *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* matter<sup>15</sup> the Court stated that when hearing an application for summary judgment, the Court must not only look at the documents of the applicant, but at all the documents, including those filed by the respondent.

[26] I have had a look at the plaintiffs particulars of claim and am of the view that, if the matter should go to trial, judgment given against the defendants now in respect of the defence that it did not rent and lease the gas cylinder may eventually be shown to have been unjust. It would particularly have been unjust if the plaintiff succeeds in proving that the defendants failed to return 39 gas cylinders, as the root of the defence is based on the agreement between the parties that, if the defendant fails to return a cylinder, he may be charged for the market value of such gas cylinder.

[27] Will it then be fair in such circumstance to be charged for the value (the amount of which is uncertain at this stage) of the unreturned gas cylinder and also for the rental and other charges of that gas cylinder? In my view, the value of the unreturned cylinders may affect the amount charged in respect of the rent and other charges levied in respect of the use of the gas cylinder. Consequently, I have decided to exercise my discretion in this instance and refuse summary judgment at this stage and allow the matter to take its normal course so that all the issues can properly be determined at a trial.

[28] What is left is the question of costs. The general rule is that costs is in the discretion of the Court and that costs must follow the course. In my view, the plaintiff did not act frivolously when it applied for

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<sup>13</sup> *Supra* footnote 7.

<sup>14</sup> *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*.

<sup>15</sup> *Ibid*.

summary judgment. The conclusion that I reached that that the defendants did not fully set out their defence in the opposing affidavit, leads me to conclude that it will only be fair for the defendants to, subject to rule 32(11) carry the costs of this application. In the result I make the following order:

- a) The application for summary judgment is refused.
- b) The defendants must file their plea (and counter claim if any) by not later than 24 May 2018.
- c) The plaintiff may replicate and plead to the counterclaim (if necessary) by not later than 8 June 2018.
- d) The parties must file case management report by not later than 15 June 2018.
- e) The matter is postponed to 26 June 2018 for case management conference.
- f) The first and second defendants must subject to Rule 32(11), jointly and severally the one paying the other to be absolved, pay the plaintiff's costs of this application, such costs to include the cost of one instructing and one instructed legal practitioner.

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SFI Ueitele  
Judge

APPEARANCES:

APPLICANTS:

J Jacobs

instructed by Koep & Partners, Windhoek

1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS:

M NTINDA

of Sisa Namandje Inc, Windhoek