

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

Case No: HC-MD-CIV-ACT-CON-2017/01164

In the matter between:

**STANDARD BANK NAMIBIA LIMITED**

**APPLICANT/PLAINTIFF**

and

**SILAS HAFENI NEKWAYA**

**RESPONDENT/DEFENDANT**

**Neutral Citation:** *Standard Bank Namibia Limited v Nekwaya* (HC-MD-CIV-ACT-CON-2017/01164) [2018] NAHCMD 172 (15 June 2018)

**CORAM:** UEITELE J  
**Heard:** 29 March 2018  
**Delivered:** 15 June 2018

**Flynote:** *Practice* — Judgments and orders — Summary judgment — Interlocutory application — Compliance with High Court Rules — Rule 32 (9) and (10) preemptory for all interlocutory applications.

*Practice* - Judgments and orders — Summary judgment — Bona fide defence — What constitutes — Respondent should set out defence so as to constitute bona fides — Bald

and sketchy statements not amounting to bona fide defence — Respondent not bearing onus — However, had to satisfy Court that had bona fide defence.

**Summary:** The plaintiff issued summons, claiming amongst other relief an order confirming the cancellation of the agreement, forfeiture of payments made by the defendant to the plaintiff in terms of the instalments sales agreement and an order directing the defendant to immediately restore the vehicle to the plaintiff.

The defendant indicated that he intends to defend the action instituted by the plaintiff. Being of the opinion that the defendant does not have a *bona fide* defence to its claim the plaintiff, acting in terms of Rule 60 of this Court's rules, the plaintiff applied for summary judgment. The plaintiff's application for summary judgment was struck from the roll on two occasions due to non-compliance with Rule 32 (9) and (10).

The plaintiff placed the application for summary judgment back on the roll for a third time. The defendant raised two preliminary objections the first being that the plaintiff failed to file its heads of arguments within the time set by the Court and its application for the condonation of the late filing of the heads of arguments was an interlocutory application and had to comply with Rule 32 (9) and (10).

The second preliminary objection being that, because the application for summary judgment was struck from the roll, the plaintiff had to do a 'formal' act to place the matter back on the roll. The defendant argued that the plaintiff did not perform any formal act to place the matter back on the roll and there was as such no application for summary judgment before Court.

*Held that* as a general rule a process will only be pending either when it was issued by the registrar or when it was served on the other party. Once the application was struck from the roll, it was no longer before the court and some formal act to again bring it before the court was necessary either by issuing it or serving it or the court gives other directions regarding the prosecution of such application, or the parties otherwise agree.

*Held further that* in the present instance, the directions given by the managing judge, on 1 November 2017 and the request by the parties in their separate status reports of 10 November 2017 for the managing judge to set down the application for summary judgement for a hearing constitute the 'formal act' envisaged in the *Swakopmund Airfield CC v Council of the Municipality of Swakopmund* matter and the defendant's point *in limine* must therefore fail.

*Held further that* the relief to confirm the cancellation of the agreement is not based on a liquid document and is therefore not a relief that can be prayed for in summary judgment proceedings.

*Held further that* the defendant has "fully" disclosed the nature and grounds of his or her defence and the material facts upon which it is founded and I will thus refuse the application for summary judgment.

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### ORDER

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- a) The application for summary judgment is refused.
- b) The defendant must file his plea (and counterclaim if any) by not later than 29 June 2018.
- c) The plaintiff may replicate and plead to the counterclaim (if necessary) by not later than 13 July 2018.
- d) The parties must file case management report by not later than 20 July 2018.
- e) The matter is postponed to 24 July 2018 for case management conference.
- f) The plaintiff must subject to Rule 32(11), pay the defendant's costs of this application.

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## RULING

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UEITELE J:

### Introduction

[1] On the 11<sup>th</sup> of December 2015 Mr Silas Hafeni Nekwaya, who is the respondent in these proceedings,<sup>1</sup> concluded a Vehicle and Asset Finance Instalment Sale Agreement (I will, in this judgment, refer to this agreement simply as the 'agreement') with Standard Bank Namibia,<sup>2</sup> who is the applicant in these proceedings, in terms of which agreement Mr Nekwaya purchased a Maserati Ghibli 3.0 V6 motor vehicle with engine number M 156B296492 (I will, in this judgment, refer to it as the vehicle).

[2] The terms of the agreement were, amongst other terms, that; the agreement will be governed by the Credit Agreements Act, 1980 (Act No. 75 of 1980), the purchase price of the vehicle is N\$ 2 078 433-60, the purchase price will be paid in 59 equal instalments of N\$ 36 640-56, the vehicle will remain the property of the plaintiff until the defendant has paid all amounts due in terms of the agreement, if the defendant defaults and fails to pay any instalment on due date the plaintiff will be entitled to cancel the agreement, repossess the vehicle and claim damages from the defendant.

[3] Alleging that the defendant breached the agreement in that he failed to pay the instalments on due date as from 12 August 2016 resulting in the defendant being in arrears in the amount of N\$ 1 757 343-29. The plaintiff on, 14 February 2017, in writing notified the defendant that it is cancelling the agreement and that it is proceeding with legal actions against him. On 17 April 2017 the plaintiff issued summons out of this Court claiming amongst other relief an order confirming the cancellation of the agreement, forfeiture of payments made by the defendant to the plaintiff in terms of the

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<sup>1</sup> I will, in this judgment, refer to Mr Nekwaya who is also the defendant (in the main action) by this title that is '*defendant*'.

<sup>2</sup> Standard Bank Namibia (Pty) Ltd is the plaintiff in the main action and the applicant in these proceedings and I will, in this judgment, refer to it as the plaintiff.

instalment sales agreement and an order directing the defendant to immediately restore the vehicle to the plaintiff.

[4] On 25 July 2017 the defendant indicated that he intends to defend the action instituted by the plaintiff. Being of the opinion that the defendant does not have a *bona fide* defence to its claim the plaintiff, acting in terms of Rule 60 of this Court's rules, applied for summary judgment. The defendant also opposed the application for summary judgment and filed an affidavit in support of his opposition of the application for summary judgment. This Court per court order dated 8 September 2017 set matter down to hear the plaintiff's application for summary judgment on 21 September 2017.

Events following the set down of the application for summary judgment.

[5] At the hearing of the application for summary judgment on 21 September 2017, counsel acting on behalf of the defendant raised an argument that the plaintiff did not comply with Rule 32 (9) and (10) prior to it launching the application for summary judgment. The Court upheld that argument and struck the application for summary judgment from the roll. The Court further postponed the matter to 26 September 2017 for a case planning conference and for the parties to file a joint case plan.

[6] The parties did not, as instructed by the Court, file a joint case plan. The plaintiff instead filed a report in terms of Rule 32 (9) and (10) in which it reported on the steps it took to arrive at an amicable solution with regard to its application for summary judgment. The defendant on the other hand filed a report as contemplated in Rule 23 in terms of which he proposed dates on which to file further pleadings. Because of the divergent approaches by the parties, the Court, on 26 September 2017, made an order directing the plaintiff to deliver an application for reinstatement of the summary judgment application by 06 October 2017 and the defendant to file his opposing papers by 16 October 2017. The Court then postponed the matter to 24 October 2017 for the purpose of determining a date to hear the application for the re-instatement of the summary judgment application. On 24 October 2017, the Court set the date for the

hearing of the application for the reinstatement of the summary judgment application as 01 November 2017.

[7] At the hearing on 1 November 2017 of the application for the reinstatement of the application for summary judgment, counsel for the defendant again argued that the application for the reinstatement of the summary judgment application must be struck from the roll because the plaintiff failed to comply with Rule 32 (9) and (10) in respect of the reinstatement application. The Court agreed with the submissions made by counsel for the defendant and struck the application for the reinstatement of the summary judgment application from the roll.<sup>3</sup> After striking the reinstatement application from the roll, the Court postponed the matter to 14 November 2017 for a status hearing and ordered the parties to file a status report indicating their proposals for the further conduct of the case.

[8] On 10 November 2017, both parties filed separate status reports indicating that they unsuccessfully attempted to amicably resolve the matter, they accordingly requested the Court to set the matter down for hearing the summary judgment application. This Court, on 14 November 2017, postponed the matter to 7 December 2017 to hear the summary judgment application. On 7 December 2017, Mr. Muhongo appeared for the defendant and he indicated that he was unable to argue the matter as he was only briefed on that morning before the hearing. As a result, the court postponed the matter to 17 January 2018.

[9] During the year 2018, some administrative changes took place at the High Court and because of the administrative changes, the application for summary judgment came to my attention only on 16 January 2018. I accordingly rescheduled the hearing of the application for summary judgment to 22 January 2018. At the hearing of 22 January 2018, counsel for the plaintiff indicated that she required time to respond to some of the arguments raised by counsel for the defendant. I accordingly postponed the matter to 01 February 2018 for hearing the application for summary judgment and I ordered

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<sup>3</sup> The reasons for striking the application from the roll are set out in the matter of *Standard Bank of Namibia Limited v Nekwaya* (HC-MD-CIV-ACT-CON-2017/01164) [2017] NAHCMD 365 (01 November 2017).

counsel for the plaintiff to file her supplementary heads of arguments by not later than 29 January 2018.

[10] Counsel for the plaintiff, however only filed her heads of arguments on 30 January 2018. A day after, that is on 31 January 2018, she filed the heads of arguments, counsel for plaintiff filed an application seeking an order whereby I condoned her late filling of the heads of arguments.

Defendant's basis of opposing the application for summary judgment.

[11] At the hearing on 01 February 2018 of the application for summary judgment, Ms. Losper (counsel for the defendant) raised some preliminary objections. The first preliminary objection which Ms. Losper raised was the question of the plaintiff's non-compliance with Rule 32 (9) and (10) of the Rules of this Court with respect to the plaintiff's late filing of its heads of argument. Ms. Losper argued that since an application to condone a party's non-compliance with a court order is interlocutory in nature, it falls within the ambit of Rule 32 (9) and (10) of the rules of Court.

[12] Ms. Losper accordingly submitted that because the plaintiff's application for the condonation of its late filing of its heads of arguments was not preceded by an attempt to eliminate the necessity of filling such an application, the plaintiff did not comply with Rule 32 (9) and (10) and the application to condone the late filing of the heads of arguments must for that reason be struck from the roll.

[13] The second preliminary aspect raised by Ms. Losper was that, since the application for summary judgment and the application to reinstate the summary judgment application were struck from the roll, the plaintiff needed to perform some formal act in order to place the matter back on the roll. Ms. Losper thus argued that the plaintiff did not perform any formal act to place the matter back on the roll and there is as such no application for summary judgment before Court and the application for summary judgment must be struck from the roll.

[14] As regards the merits of the application for summary judgment, Ms. Losper argued that the relief which the plaintiff seeks in the summary judgment application (namely the confirmation of the cancellation of the agreement, the declaring of the amounts paid by Mr. Nekwaya in terms of the agreement to be forfeited in favour of the plaintiff, and interest at the rate of 10, 25% per year as from 14 February 2017) is incompetent.

#### The preliminary points

[15] I find it appropriate to, before I deal with the merits of the application for summary judgment, deal with the preliminary points raised on behalf of the defendant. As to the heads of argument, it is my view that heads of argument are for the convenience of the presiding judge. The heads of arguments, in this matter, were filed one day out of time, the defendant did not place before me any facts which demonstrate how the late filing of the heads of arguments prejudiced him nor did Ms Losper argue that the defendant will suffer any prejudice if I condone the plaintiff's late filing of the heads of arguments. I am therefore of the further view that it would be, unreasonable, unfair and contrary to Rule 1(3) (a) and (b) to strike the application for summary judgment from the roll for the simple reason that the plaintiff did not comply with Rule 32(9) and (10) in respect of the condonation application. I would therefore condone the late filing of the plaintiff's heads of arguments.

[16] Ms Losper placed great reliance on the argument that, because both the application for summary judgment and the application for the re-instatement of the application for summary judgment were struck from the roll, there was no application before court. In support of this argument, she referred me to the unreported judgment of this Court in the matter of *Naruseb v The Government of the Republic of Namibia*.<sup>4</sup> In that matter, this Court held that where a court refuses to condone the non-compliance with the rules that is, generally speaking, the end of that particular process unless the court gives other directions regarding its prosecution or unless the parties otherwise agree. The Court further held that because there was no adjudication on the merits of

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<sup>4</sup> *Naruseb v The Government of the Republic of Namibia* (A12/2014) [2014] NAHCMD 74 (19 February 2014).



the disputes between the parties, a litigant may, now in the ordinary course and using the prescribed form, bring such dispute before the court.

[17] In *Swakopmund Airfield CC v Council of The Municipality of Swakopmund*,<sup>5</sup> the Supreme Court held that as a general rule a process will only be pending either when it was issued by the registrar or when it was served on the other party. Once the application was struck from the roll, it was no longer before the court and some formal act to again bring it before the court was necessary either by issuing it or serving it or the court gives other directions regarding the prosecution of such application, or the parties otherwise agree.<sup>6</sup>

[18] In the present instance, the application for summary judgment was neither issued again nor served on the defendant after both the application for summary judgment and the application to reinstate the application for summary judgement were struck from roll. But what happened is that the judge who, is by the rules of this Court, obliged to manage and 'drive' the case gave directions as to what must happen, that he did, in the Court Order of 1 November 2017. In addition, the parties agreed in the separate status reports filed on 10 November 2017 to proceed to set down the application for summary judgment for hearing.

[19] In the circumstances, I am of the view that the directions given by the managing judge, on 1 November 2017 and the request by the parties in their separate status reports of 10 November 2017 for the managing judge to set down the application for summary judgement for a hearing, constitute the 'formal act' envisaged in the *Swakopmund Airfield CC v Council of the Municipality of Swakopmund* matter and the defendant's point in *limine* must therefore fail.

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<sup>5</sup> *Swakopmund Airfield CC v Council of The Municipality of Swakopmund* 2013 (1) NR 205 (SC) at para [30].

<sup>6</sup> At para [28] at I – J.

## Applicable law

[20] The procedure to apply for summary judgment is currently regulated by Rule 60 of the Rules of this Court. The law regulating summary judgment applications has been restated in many cases of this Court. But in a nutshell the law is as stated in the matter of *Maharaj v Barclays National Bank Ltd*<sup>7</sup> (which matter has been approved by this Court and the Supreme Court) where Corbett JA, interpreting Rule 32(5) which is the forerunner of our current rule 60(5) said:

'... 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 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.' (Underlined for emphasis)

[21] 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.'

[22] From the authorities on the topic of summary judgment, it is clear that a plaintiff may apply to court for summary judgment on each claim in the summons, together with

<sup>7</sup> *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418(A) at 426A – C.

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

a claim for interest and costs, so long as the claim is; on a liquid document or for a liquidated amount in money or for delivery of a specified movable property or for ejectment. Where a defendant enters a notice to defend the claim 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.

[23] 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. The test as to whether a defendant will escape summary judgment and will be allowed to defend the matter was summarised in *Kramp v Rostami*<sup>9</sup> where 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.'

[24] The enquiry, where a plaintiff has applied for summary judgment is thus whether (a) 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 part of the claim, a defence which is both *bona fide* and good in law. It is to that enquiry that I now turn.

#### Has the defendant fully disclose his defence?

[25] The defendant, in his affidavit filed in opposition to the application for summary judgment, sets out the facts on which he relies for his defence. The facts that he has set out are these. The defendant alleges that the relief sought, by the plaintiff, apart for the prayer for delivery of the *merx* is incompetent for want of compliance with Rule 60(1), that s 2 and s 3 of the Conventional Penalties Act, 1962 apply to the agreement that he

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

and the plaintiff concluded. He proceeds and states that s 2(1) of the Conventional Penalties Act, 1962 prohibits the plaintiff from claiming damages and penalty. He therefore submitted that the relief of forfeiture claimed in the summary judgment application offends the Conventional Penalties Act, 1962.

[26] The defendant contends that he is, in terms of the agreement, entitled to dispute the plaintiff's cancellation of the agreement and that he does dispute the cancellation of the agreement. He disputes the cancellation of the agreement on the basis that the plaintiff's notice issued in terms of s 11 of the Credit Agreements Act, 1980 was not hand delivered to him and as such the cancellation of the agreement was not in accordance with that Act. He proceeds to state that once he has disputed the cancellation of the agreement the plaintiff is, in terms of clause 3.3 of the agreement, not entitled to the return of the vehicle. This is particularly so if he continues to pay the instalments and the plaintiff accepts the instalments which the defendant has paid after the disputed cancellation of the agreement.

[27] Apart from disputing the cancellation of the agreement, Mr Nekwaya disputes some of the charges that the plaintiff has charged him and alleges that the charges were levied in contravention of the Bank of Namibia Determination and the Usury Act, 1968.

[28] I have indicated above that Rule 60 (1) of the Rules of Court ("the Rules") provides that where the defendant has delivered a notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons so long as the claim is; on a liquid document; or for a liquidated amount in money or for delivery of a specified movable property or for ejectment together with any claim for interest and costs.

[29] The question that requires an answer is whether plaintiff's claim for the confirmation of the cancellation of the agreement, the declaring of the amounts paid by the defendant in terms of the agreement to be forfeited in favour of the plaintiff plus the interest on the amounts paid by the defendant to the plaintiff are claims based on a

liquid document. Ms Angula who appeared on behalf of the plaintiff argued that, in this matter, the claim for the delivery of the Maserati Ghibli 3.0 V6 motor vehicle (which is the specified merx) cannot be made if the agreement is not cancelled. She argued that the delivery of the Maserati Ghibli 3.0 V6 motor vehicle is ancillary to the cancellation of the agreement.

[30] In my view, the relief to confirm the cancellation of the agreement is not based on a liquid document and is therefore not a relief that can be prayed for in summary judgment proceedings. In the South African case of *Absa Bank v De Villiers and Another*<sup>10</sup> Fourie J said the following:

'[18] According to our law of contract, restitution is the normal result following from the cancellation of a contract. By cancelling the instalment sale agreement, applicant, as the innocent party, would seek to set aside the agreement and return to the status *quo ante*, by claiming repossession of the vehicle, and to claim damages for breach of contract.

[19] It follows from the aforesaid that, in terms of the general principles of our law of contract, an order authorising the attachment of a vehicle which is the subject of an instalment agreement, would be granted by the court as a claim ancillary to the cancellation of the instalment agreement.'

[31] Relying on the above statement of law, Mokoena AJ, in the matter of *Toyota Financial Services South Africa v Mohlabi*<sup>11</sup> argued that:

'... in summary judgment proceedings, the plaintiff cannot be entitled to a final order authorising restitution (in this case the attachment of the motor vehicle) absent the cancellation of the instalment sale agreement as doing so would amount to the infringement of the consumer's rights to protection against arbitrary repossessions of property by credit providers.'

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<sup>10</sup> *Absa Bank v De Villiers and Another* 2009 (5) SA 40 (C) page 11

<sup>11</sup> *Toyota Financial Services South Africa v Mohlabi* (2145/2015) [2015] ZAFSHC 178 (10 September 2015).

[32] If the relief to confirm the cancellation of the agreement cannot be sought in summary judgment proceedings, it follows that a plaintiff cannot be entitled to a final order authorising restitution (in this case the attachment of the motor vehicle) absent the cancellation of the instalment sale agreement. In the present matter, Ms Angula argued that the agreement was cancelled and the relief seeking the cancellation of the agreement is immaterial. The defendant on the other hand disputes the cancellation of the agreement, on the ground that the cancellation of the agreement did not comply with the Credit Agreements Act, 1980.

[33] Section 11 of the Credit Agreements Act, 1980 reads as follows:

'No credit grantor shall, by reason of the failure of the credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, handed over to the credit receiver and for which an acknowledgement of receipt has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of section 5(1)(b) or the address changed in accordance with section 5(4), has notified the credit receiver that he so failed and has required him to comply with the obligation in question within such period, being not less than 30 days after the date of such handing over or such posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement: Provided that should the credit receiver have failed on two or more occasions to comply with obligations in terms of any credit agreement and the credit grantor has given notice as aforesaid, the said period shall be reduced to 14 days.'

[34] In the affidavit opposing the application for summary judgment, the defendant states that he is a major unmarried male residing at Erf: 1216 Chobe Street, Cimbebasia, Windhoek, Republic of Namibia. The defendant denies that he resides at the address cited in the summons which is Erf 361, No 57, Chobe Street, Cimbebasia, Windhoek, Republic of Namibia. In paragraph 16 of the affidavit filed in opposition to the summary judgment application the defendant acknowledges that the plaintiff issued a in compliance with section 11 of the Credit Agreements Act, 1980 but denies having received the notice because it was not hand delivered to him.

[35] In my view, if the defendant succeeds at the trial to prove that the notice contemplated in s 11 of the Credit Agreements Act, 1980 was not handed over to him and he did not acknowledge receipt of the notice, the cancellation of the agreement may as well be invalid and the plaintiff may well not be entitled to restitution. Keeping in mind that in an application of this nature there is no *onus* on the defendant 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, I am satisfied that the defendant has "fully" disclosed the nature and grounds of his or her defence and the material facts upon which it is founded and I will thus refuse the application for summary judgment.

[36] What is left is the question of costs. The general rule is that costs are in the discretion of the Court and that costs must follow the course. The plaintiff must, 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 defendant must file his plea (and counter claim if any) by not later than 29 June 2018.
- c) The plaintiff may replicate and plead to the counterclaim (if necessary) by not later than 13 July 2018.
- d) The parties must file case management report by not later than 20 July 2018.
- e) The matter is postponed to 24 July 2018 for case management conference.
- f) The plaintiff must subject to Rule 32(11), pay the defendant's costs of this application.

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SFI Ueitele  
Judge



## APPEARANCES:

## APPLICANT:

E M Angula

Of AngulaCo Incorporated, Windhoek

## RESPONDENT:

G Losper

of Tjombe-Elago Incorporated, Windhoek