

## Practice Directive 61

## IN THE HIGH COURT OF NAMIBIA

<b>Case Title:</b> PAUL VIVIERS v JOHN BARRINGTON IRELAND	<b>Case No:</b> HC-MD-CIV-ACT-CON-2018/03932 (INT-HC-SUMJUD-2018/00168)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Neutral citation:</b> <i>Viviers v Ireland</i> (HC-MD-CIV-ACT-CON-2018/03932) [2019] NAHCMD 148 (10 May 2019)	<b>Date of hearing:</b> 12 APRIL 2019  <b>Date of order:</b> 10 MAY 2019  <b>Reasons delivered on:</b> 17 MAY 2019
<b>Results on merits:</b> Merits not considered.	
<b>The order:</b> Having heard <b>MR BARNARD</b> , for the Plaintiff and <b>MS GARBERS-KIRSTEN</b> and having read the documents filed of record:  <b>IT IS HEREBY ORDERED THAT:</b> 1. The application for summary judgment for the total capital of N\$2 335 200 (i.e. N\$ 2 126 700.00 plus the occupational rental amount from July 2018 to end of April 2019 in the amount of N\$ 208 500) as set out in the particulars of claim is refused.  2. A partial judgment is granted in the following terms: 2.1 In addition to the order of eviction granted on 09 April 2019, summary judgment is granted in favour of the plaintiff in the amount of N\$ 995 867.21. 2.2 Payment of accrued interest <i>a tempore morae</i> on the capital amount above as at end of June 2018 and in addition thereto accrued interest <i>a tempore morae</i> on the balance of the capital calculated from time to time from end of July 2018 to end of April 2019. 2.3 Costs of the summary judgment is ordered to be decided by the trial court.	

3. The defendants are granted leave to defend the balance of the amount being the amount claimed in para 1 above, less the amount granted in terms of para 2.1 above by filing the appropriated counterclaims.
4. The matter is hereby postponed until **23 May 2019** at **15:00** for further Case Planning Conference.
5. The Parties must file a joint case plan on or before 20 May 2019.

#### **Reasons for orders:**

##### Introduction and brief background

[1] The matter before this court has a long history and was described by the respondents' counsel as the sequel to the High Court<sup>1</sup> and Supreme Court<sup>2</sup> proceedings. The current action was instituted on 28 September 2018 pursuant to the judgment by the Supreme Court delivered on 03 May 2018 and more specifically in respect of paragraph 3 of the judgment<sup>3</sup>.

[2] The relief sought by the plaintiff in his particulars of claim and in the summary judgment application is two fold:

- 1.1 An order evicting the defendants from the premises, 16 Moses Tjitendero Street, Windhoek; and
- 1.2 An order for payment of the amount of accrued and future occupational rent and mora interest thereon due and payable by the defendants to the plaintiff.

[3] The respondents set out three intended counterclaims to the plaintiff's claim in their affidavit resisting summary judgment, namely:

1. Claim for damages<sup>4</sup>;
2. A claim for N\$1 100 000 plus interest, being repayment of the monies paid to the plaintiff as part payment of the purchase price;
3. Payment in the amount of N\$ 239 332.79 for necessary and useful improvements effected by the respondents on the occupation of the premises in question.

[4] On the issue of the claim for damages the defendants allege that the plaintiff stalled the transfer of the property and instructed the bank to cancel their bond, alleging that if the plaintiff did not halt the transfer process the respondents would be the owners of the property to the approximate value of N\$ 5.6 million already during 2010.

<sup>1</sup> Case number I 3757 /2012.

<sup>2</sup> Case number SA 24/2016.

<sup>3</sup>Paragraph 3 of the order of court:

'It is declared that the amount of occupational interest provided for in the agreement between the parties was increased to N\$20850 per month and that the respondents are liable for such occupational interest as from January 2010 up to the date of transfer of the property into the respondents' names;'

<sup>4</sup>Para 8 of affidavit opposing summary judgment.

[5] On the morning of the hearing of the matter *in casu* the respondents tendered vacating the premises of 16 Moses Tjitendero Street, Windhoek on or before 30 April 2019. This tender was accepted and was subsequently made an order of court.

[6] Further to this the applicant took no issue with the second and third claims set out in the respondents' opposing affidavit and the said claims were conceded for purposes of summary judgment. I must however interpose and qualify this statement and say that although the applicant does not take issue with the second proposed claim for N\$ 1 100 000 he denies any liability in respect of the interest on this amount. The amount of N\$ 1 339 332.29 was therefore conceded (for purposes of summary judgment).

#### Argument on behalf of the applicant

[7] The applicant took issue with the first proposed counterclaim of the respondents as set out in their opposing affidavit, which consist of a claim for damages. Mr Barnard, acting on behalf of the applicant, argued that this is a bald allegation as no averments are made as to the nature of the damages nor are the damages quantified, thus leaving the court in the position where it needs to speculate as to the net result in the patrimony of the defendants, as a result of the alleged conduct of the plaintiff.

[8] Mr Barnard further argued that the material allegations in the particulars of claim are not disputed but that the respondents rely on a counterclaim. In this regard the affidavit of the respondents should be scrutinized more closely to determine whether the respondents have complied with Rule 60(5)(b). He argued that the allegation regarding damages suffered does not satisfy this requirement. In order to be successful in averting summary judgment, the respondent is required to disclose the nature and grounds of the counterclaim as well as the material facts relied upon fully, and this was not done. He further argued that the respondents in fact did not establish that any damages was suffered. The court was referred to *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*<sup>5</sup> in support of this argument.

[9] Mr Barnard further pointed out that the respondents make reference to the present value of the property, which amounts to approximately N\$ 5, 600 000, but that this value is irrelevant for the current proceedings, but submitted that what is relevant and an essential allegation is the value at the time of the breach of contract in 2010. Respondents did not give any indication in this regard. He further submitted that any possible claim for damages must be quantified in 2010 when the alleged breach occurred, or within a reasonable time thereafter.

[10] Mr Barnard submitted that this alleged claim is devoid of factual foundation and is neither *bona fide*

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<sup>5</sup> 2004 (6) SA 29 (SCA) para 10; 11 and 23; 24 and 25.

nor is it legally tenable. In addition thereto on the facts as set out in the affidavit opposing summary judgment the claim has become prescribed.

[11] The issue of set off was also raised by the applicant. Mr Barnard argued that set off comes into operation when two parties are mutually indebted to each other and both debts are liquidated and fully due and same operates *ipso facto* and not only after it has been invoked and relied upon. In this regard Mr Barnard submitted that the claim of the applicant, based on the judgment of the Supreme Court is unanswerable, which then leaves the question of whether there is reasonable possibility that the counterclaims raised by the respondents are good. In answering this question it was submitted that the first claim has no prospect of success and the second and third claims are extinguished by set-off<sup>6</sup>.

[12] Should the court find that the first claim of the respondents has no merit then the respondents' second and third claim have been extinguished by set off against the occupational rent due to the applicant.

#### Argument on behalf of the respondents

[13] First and foremost it must be pointed out that the respondents raised a point *in limine* in this matter alerting the court to the fact that from the various correspondence between the legal practitioners of the parties, the applicant was well informed of the respondents' defences and counterclaims. Further, in reply to the applicant's argument that the first counterclaim is for an undisclosed amount and that the respondents did not disclose fully the grounds of defence and the material facts relied upon, Mrs Garbers-Kirsten argued that the respondents' damages claim is good in law in the specific circumstance of the case. It is conceded that the amount is not stipulated but the respondents set out the basis of their defence. She argued that the relevant rule does not provide that the respondents must state exactly the damages amount. The court was referred to *Barminus Rikukuri v Social Security Commission*<sup>7</sup> wherein the court discussed the concept of 'fully disclosed'. Mrs Garbers-Kirsten argued that the Supreme Court found that 'fully' in the context of the rule does not require the respondents to exhaustively deal with the facts and the evidence relied upon to substantiate them. In line with the *Rikukuri* case the respondents only need to disclose their defence and material facts upon which it is based to enable the court to decide if the respondents disclose a *bona fide* defence. In this regard Mrs Garbers-Kirsten argued that the respondents set out and explained in their opposing affidavit the grounds for the damages suffered and nature thereof in detail.

[14] With reference to the plaintiff's particulars of claim Mrs Garbers-Kirsten also addressed the submission made that the damages claim prescribed and argued that the respondents' damages claim could

<sup>6</sup> The payment of the amount accrued up to end of April 2019 less the amount of the second and third claim.

<sup>7</sup> SA 17/2015.

not be quantified in 2010 as the agreement between the parties only lapsed recently (according to the plaintiff's particulars of claim: "within a reasonable time from 2 July 2018"). This court was referred to *Stockdale v Stockdale*<sup>8</sup> in which matter the court drew the distinction between the coming into existence of the debt on the one hand and the recoverability on the other hand. In the matter in casu it is alleged that the debt arose in 2010 but only became due now due to the circumstances of the case, and therefor the damages claim has not prescribed.

[15] In respect of the second counterclaim Mrs Garbers-Kirsten submitted that although the applicant has conceded that the 1.1 million Namibian Dollars is repayable, the court cannot lose sight of the interest payable on the said amount which she submitted has, at this stage, probably already exceeds the capital amount and further submitted that the trial court should decide if the interest is payable or not.

[16] In closing Mrs Garbers-Kirsten argued that the respondents have set out a triable defence and submitted that summary judgment should be refused. She also pointed out the tender by the respondents to vacate the property is clearly demonstrative of the bona fides of the respondents

#### Principles of Summary Judgment

[17] Rule 60(5) of the Rules of the High Court provide as follows:

'(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.'

[18] In the matter *in casu* the material allegations as set out in the particulars of claim are not disputed but defendants rely on a number of counterclaims. After the tender to vacate by the end of April 2019 was extended by the respondents a large portion of the applicant's argument, as raised in the heads of argument, fell by the wayside and I will just deal with what is relevant to the case in light of the the acceptance of the

<sup>8</sup> 2004 (1) SA 68 at para 13.

tender on the claim for eviction.

[19] It is clear that where a party seeks to raise a counter-claim as a defence to a summary judgment, that defence need not be based on the same facts or even cause of action as the main claim.

[20] In *Summary Judgment: A Practical Guide* the learned authors<sup>9</sup> at para 9.5.7 stated the following on the issue of counterclaims:

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

[21] The learned authors proceed to state the following at 9-37 of the publication:

‘A defendant, in raising a counterclaim, should provide full particularity of the material facts upon which it is based. This means he must be as comprehensive as when advancing only a defence. The court must be placed in a position to be able to consider not only the nature and grounds of the counterclaim, but also the magnitude thereof and whether it is advanced *bona fide*. The necessary elements of a complete cause of action must be included. The counterclaim must more over, be based on facts and not on mere conjecture or speculation or on the deponent’s belief.’

[22] The first counterclaim is the contentious claim in this matter. It would not be necessary to address the second and third counterclaim as it was conceded for purposes of the summary judgment proceedings. In respect of the first counterclaim the respondents seek unliquidated damages, however the extent of the counterclaim is not stated. The damages in the counterclaim are to be based upon alleged breach of contract, but in order to succeed in resisting summary judgment, the respondents must set out the nature and the grounds of the claim and at minimum it must provide full particularity of the material facts upon which the claim is based. The proposed counterclaim is clearly lacking in this regard and is therefore vague and unsubstantiated.

[23] The requirements of a counterclaim filed in resisting a summary judgment application was clearly set out in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*<sup>10</sup> where Brand JA

<sup>9</sup> Van Nieker, Geyer, Mundell: Summary Judgment A Practical Guide, Service Issue 11 dated April 2012 .

stated as follows in this regard:

[24] In the light of the foregoing, I find myself in agreement with the alternative argument raised by the plaintiff in this Court, namely that the defendant failed to 'disclose fully the nature and the grounds of [its counterclaim] and the material facts relied upon therefor' as required by Rule 32(3)(b). See the classic exposition by Colman J on behalf of the Full Court in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B - H.

[25] What remains to be considered is whether, in these circumstances, the Court a quo should have exercised its overriding discretion to refuse summary judgment in the defendant's favour. I think not. For the reasons I have stated (in para [11] above) a Court should be less inclined to exercise its discretion in favour of a defendant in a matter such as this where the answer to the plaintiff's claim is raised in the form of a counterclaim as opposed to a defence to the plaintiff's claim in the form of a plea. Moreover, and in any event, a Court can only exercise its discretion in the defendant's favour on the basis of the material placed before it and not on the basis of mere conjecture or speculation. On the material before the Court, there is in my view no reason to think that the defendant's counterclaim has any merit. For these reasons I believe that summary judgment was rightly granted for the whole amount of the plaintiff's claim.'

[24] The vagueness of the proposed counterclaim is further exacerbated by the total absence of even an estimated extent of the damages suffered. The counterclaim for an unspecified sum and the fact that the respondents aver that they have a counterclaim for damages does not *per se* show that they have a *bona fide* defence to the plaintiff's claim.

[25] The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the counterclaims raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused.

[26] I must agree with Mr Barnard that the plaintiff's claim is unanswerable and it has become clear that the respondents cannot ward off summary judgment and the respondents' point *in limine* raised does not come to their assistance on the issue of the first counterclaim. Ultimately this court must find that the first counterclaim of the respondents is based on conjecture and speculation and devoid of any factual foundation and I cannot find that it is *bona fide*.

[27] As the first counterclaim cannot be found to be sustainable in law it would result in counterclaims 2

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<sup>10</sup> 2004 (6) SA 29 (SCA) at 39 G to 40A.

and 3 remaining, which are liquidated in nature and therefore set off comes into operation. According to *Amler's Precedents of Pleadings*<sup>11</sup> 'set off comes into operation when two parties are: (a) mutually indebted to each other; and both debts are liquidated and fully due'. It goes further to say that the effect of 'set off' operates automatically (*ipso facto*) and not only after or as result of a plea of set off<sup>12</sup>.

[28] The result of set off would therefor result in this court only granting a partial summary judgment as set out in rule 60(7)(b) to the remaining portion of the capital amount, which can be calculated as follows:

28.1 Total capital of N\$2 335 200 ( i.e. N\$ 2 126 700 plus the occupational rental amount from July 2018 to end of April 2019 in the amount of N\$ 208 500.00) less N\$ 1 339 332.79 (claim 2: N\$ 1 100 000 plus claim 3: N\$ 239 332.79) equals N\$ 995 867.21

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
<p style="text-align: center;"><i>Mr P Barnard</i> <i>On instructions of</i> <i>Du Pisani Legal Practitioners</i></p>	<p style="text-align: center;"><i>Ms H Garbers-Kirsten</i> <i>On instruction of</i> <i>Delport Legal Practitioners</i></p>

<sup>11</sup> Seventh Edition at 351-352.

<sup>12</sup> *Ndjavera v Du Plessis* 2010 (1) NR 122 (SC) at 128 E- G.