

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: HC-MD-CIV-ACT-CON-2019/03629

In the matter between:

**SCIENTIFIC SOCIETY SWAKOPMUND**

**APPLICANT**

and

**GELATERIA PIA CLOSE CORPORATION**

**1<sup>ST</sup> RESPONDENT**

**ULRIKE MEYER**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Scientific Society Swakopmund v Gelateria Pia Close Corporation* (HC-MD-CIV-ACT-CON-2019-02629) [2020]  
NAHCMD 101 (17 March 2020)

**CORAM:** NDAUENDAPO J

**Heard:** 25 February 2020

**Delivered:** 17 March 2020

**Flynote:** Summary Judgment - Court must be satisfied that an applicant who seeks summary judgment has established its claim clearly on the papers and the respondent has failed to set up a bona fide defence - Application for Eviction – Applicant must show Necessary averments – Parties to the memorandum of agreement to be cited correctly – No averment why applicant's name is different from

the name in the memorandum of agreement – No locus standi – Summary Judgment refused.

**Summary:** The plaintiff instituted an action for eviction against the second defendant from the premises, the plaintiff alleges he is the lawful possessor and occupier of in terms of an agreement attached to the particulars of claim as annexure “SSS1” which it concluded with the Municipality of Swakopmund during 1979.

The plaintiff entered into a lease agreement with the first defendant (being Gelateria Pia CC (being represented by Mr. Thomas Raith) which lease agreement was extended until 31 July 2019.

During 2016 the first defendant permitted the second defendant to operate the Museum Café on the aforesaid premises under and in terms of the lease agreement with the plaintiff. The lease agreement between plaintiff and first defendant was terminated by effluxion of time. The plaintiff wants to evict the second defendant from the premises, however, the second respondent refused to vacate the premises.

The defendant challenges the plaintiff’s locus standi to bring such proceedings on the basis that the recipient of possession and occupation of the land as per SSS1 is not the same person, ex facie on SSS1.

Held, the defence challenging the locus standi and challenging the plaintiffs authority to institute these proceeding, is well founded. This defence, should the trial proceed, have the effect of shifting the onus on the plaintiff to prove the truthfulness thereof.

Held further, the particulars of claim are silent in explaining the difference. In the absence of that, the applicant appears to have no *locus standi* to bring this application for summary judgment and in any event the defence is a well-founded, and discloses a bona fide defence. Application for Summary Judgment refused.

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**ORDER**

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1. The application for summary judgement is refused.
2. Costs shall be costs in the main cause.

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**JUDGMENT**

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NDAUENDAPO, J

Introduction

[1] This is an application for summary judgment. The applicant instituted an action against the second defendant praying for an eviction order of the second respondent from Museum Café situated on the premises of the Swakopmund Museum at strand street, Swakopmund. The summary judgement is opposed by second respondent.

Factual background

[2] The plaintiff instituted an action against first and second defendants. In the particulars of claim the plaintiff alleges that in 1979 it entered into a memorandum of agreement (annexure "SSS1") with the Municipality of Swakopmund to occupy the Museum Building .Subsequently thereto the plaintiff entered into a lease agreement with the first defendant (Gelateria PIA CC), in terms of which the first defendant leased from the plaintiff a portion of the premises for purposes of operating a coffee shop therefrom.

[3] During 2016 the first defendant sublet the premises to second defendant to operate the Museum Café under and in terms of the lease agreement with the plaintiff. No contractual agreement of any kind exists between plaintiff and second defendant. On 31 July 2019 the lease agreement between plaintiff and first

defendant was terminated by effluxion of time. The written confirmation of the first defendant that it so terminated as at 31 July 2019 is attached to the particulars of claim as annexure "SSS3"<sup>1</sup>. Second defendant does not deny that the lease agreement between plaintiff and first defendant came to an end. The first defendant does not oppose the action.

[4] During 2018 and 2019 the plaintiff communicated the termination date to both defendants. The second defendant failed and or refuses to vacate the premises.

[5] In the affidavit to resist the summary judgement, the second respondent raises several defences, however when addressing the court stated that they raise only one defence, namely: that the applicant does not have locus standi to bring the eviction order. She avers that the legal persona who is party to the agreement attached as SSS1, is not the same as the person who instituted these proceedings.

#### The applicable legal principles

[6] In terms of rule 60(b) the respondent must satisfy the court that there exists a bona fide defence to the action and the affidavit must disclose fully the nature and grounds of the defence and the material facts relied on. Rule 60(5) further requires an affidavit resisting summary judgment to satisfy the court that the defendant 'has a bona fide defence to the action and the affidavit . . . must disclose fully the nature and grounds of the defence and the material facts relied on.

[7] The above has been interpreted by this court to mean that the Rules of court require a respondent to disclose fully the nature and grounds of the defence and the material facts relied upon. This means a sufficiently full disclosure of the material facts to persuade the Court hearing the application for summary judgment that, if the respondent's allegations are proved at a trial, it will constitute a defence to the applicant's claim.

[8] If a respondent omits facts upon which a defence can be based or sets out the facts upon which he does rely in such a manner that the court is unable to say

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<sup>1</sup> Particulars of claim, paragraph 10 read with "SSS3" thereto.

that if they are established they will constitute a defence to their action or some part of it, he will fail in his defence.

[9] In *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard*<sup>2</sup> at 793C-D the learned judge Van Rhyn quotes with approval the following:

‘It will therefore be seen that summary judgment is an extremely extraordinary and drastic remedy. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy must in my view strictly comply with the requirements of the Rule.

.....

In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a bona fide defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the Plaintiff’s claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if plaintiff’s claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court’. [Emphasis Added]

#### Applicant’s submissions

[10] Counsel in his written heads argues that the second respondent compared the allegations contained in para 1 of the particulars of claim (where it is stated that the plaintiff (applicant) is a duly registered and incorporated as an association not for gain in accordance with applicable company laws) with annexure “SSS1” and then come to the conclusion that the agreement was apparently and ex facie annexure “SSS1” concluded with a separate persona from the plaintiff. Counsel submits that conclusion is reached simply on the basis of a slight difference in the description of

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<sup>2</sup> *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793C-D

the plaintiff as per the particulars of claim and the description which appears in “SSS1”.

Counsel further argues that not a single fact has been advanced for the bald contention that these refer to two separate juristic entities. Counsel further argues that should be contrasted with the plaintiff’s clear and unequivocal allegation in its particulars of claim that annexure “SSS1” was concluded between plaintiff and the Municipality of Swakopmund and in terms of which the plaintiff was granted the right of possession, use and occupation as set out in “SSS1”.

#### Second Respondent’s submissions

[11] Counsel argued that the applicant has no locus standi to bring the application for summary judgement on the basis that the memorandum of agreement “sss1” was entered into between the Municipality of Swakopmund and Society for scientific development and not with the applicant (Scientific society Swakopmund).

#### Discussion

[12] The parties to the memorandum of agreement attached to the particulars of claim as ‘SSS1’, are the Municipality of Swakopmund and Society for Scientific Development. The applicant is Scientific Society Swakopmund. Those two names are different. There is no allegation in the particulars of claim to state that the name of Society for Scientific Development was changed to Scientific Society Swakopmund. In my considered view the difference is not slight as Mr. Totemeyer wants the court to believe. It is significant. The duty is on the applicant to state clearly in the particulars of claim why the name of the applicant is different from the one on the memorandum of agreement “SSS1”.

[13] In *Shimuadi v Shirungu*<sup>3</sup> cited with approval in *Kavezeri v Kavezeri*,<sup>4</sup> where Levy J held that:

‘It is trite that in order to eject a defendant from immovable property, a plaintiff need only allege that he is the owner and that the defendant is in occupation thereof. Should the defendant deny any one of these elements, namely that the plaintiff is the owner or that the defendant is in occupation, the *onus* is on the plaintiff to prove the truth of the element

<sup>3</sup> *Shimuadi v Shirungu* 1990 (3) SA 347 (SWA)

<sup>4</sup> *Kavezeri v Kavezeri* (HC-MD-CIV-ACT-OTH-2016/02421) [2018] NAHCMD 205 (06 July 2018)

which is denied. The plaintiff would succeed in discharging the *onus* of proof in respect of ownership by providing registered title deeds in his favour.

[14] To my mind, it can similarly be said, when dealing with an order for ejectment from immovable property which the plaintiff has been in bona fide possession of, such possessor need only allege that he is in lawful possession thereof and that the defendant is in occupation thereof. Similarly, if the defendant denies one of these elements, the onus shifts to the plaintiff to prove the truthfulness of the elements which are denied.

[15] The authorities quoted above require of the court to not only to satisfy itself that the defendant has failed to set up a bona fide defence but additionally, whether the plaintiff who seeks summary judgment has established its claim clearly on the papers. If either of these requirements is not met, the court is obliged to refuse summary judgment.

[17] It being clearly established that *ex facie* "SSS1", the party who received a limited real right in terms of the property and the plaintiff who seeks to evict the second defendant, displays two different names and the particulars of claim being silent in explaining the difference, I agree that the applicant appears to have no *locus standi* to bring this application for summary judgment. This not only negatively affects the requirement that the claim must be clear from the papers but also discloses a bona fide defence.

[18] As a result of the aforementioned the following order is made:

1. The application for summary judgement is refused.
2. Costs shall be costs in the main cause.

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**G N NDAUENDAPO**  
**Judge**

**APPEARANCES****FOR THE APPLICANT**

Mr. R Töttemeyer Sc

Instructed by LorentzAngula Inc.

**FOR THE 2<sup>nd</sup> DEFENDANT**

Ms Y Campbell

Instructed by Dr. Weder, Kauta &amp; Hoveka Inc.