

“ANNEXURE 11”
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: ONO NATANGUE HAILOMBE // PHILLIP OUPAPA NASHANDI	Case No: HC-MD-CIV-ACT-OTH-2019/02607
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE MILLER, ACTING	Date of hearing: 13 JULY 2020
	Delivered on: 3 AUGUST 2020
Neutral citation: <i>Hailombe v Nashandi</i> (HC-MD-CIV-ACT-OTH-2019/02607) [2020] NAHCMD 329 (3 August 2020)	
The order: Having heard Mr Ntinda , counsel for the plaintiff and Mr Beukes , counsel for the defendant, and having read the documents filed of record: IT IS ORDERED THAT: <ol style="list-style-type: none">1. The plaintiff’s application for summary judgement is dismissed.2. The defendant is granted leave to defend.3. The parties are to file a case plan not later than 12 August 2020.4. There will be a case planning conference on 17 August 2020 at 14h15.5. Costs to stand over.	
Following below are the reasons for the above orders:	
[1] The plaintiff in this matter brought an application for summary judgment on 12 June 2019, seeking an order ejecting the defendant or any other person under the authority of the defendant in occupation of Erf 5780, Kuisebmond, Walvis Bay in the Republic of Namibia, and in the event of the defendant failing to comply therewith, authorising the Deputy-Sheriff of the High Court to	

enforce the order.

[2] The affidavit of Ono Natangue Hailombe was used in support of the application for summary judgment. In his affidavit, he stated that in his opinion and belief, the defendant does not have a *bona fide* defence to the plaintiff's action, and the notice of intention to defend has been delivered for purposes of delaying the action. He further stated that he has attached a copy of the Deed of Transfer/Title Deed to the particulars of claim as Annexure 'HON1', and that there is no any further agreement between him and the defendant authorising the defendant or anyone residing with the defendant on his property to continue residing on his property. He concluded that the defendant is in unlawful occupation of his property, and prayed that the court grant the orders against the defendant with costs as prayed for in the particulars of claim.

[3] In his answering affidavit, Phillip Oupapa Nashandi stated that he has a valid and/or *bona fide* defence against the plaintiff's claim because a title deed is only *prima facie* proof of ownership, but same in itself does not necessarily prove ownership over the property or the transfer of such ownership. He submitted that the plaintiff is not the lawful owner of the property, but he simply holds the property in trust on behalf of the actual lawful owner of the property, who is an uncle of the defendant and the plaintiff by the name Petrus Ducky Hailombe. He further submitted that he enjoys occupation of the property with the permission of his uncle, Petrus Ducky Hailombe, and that his occupation of the property is thus lawful. Lastly, he stated that he believes that he has made out a case and prayed that the court dismiss the plaintiff's application for summary judgment with costs.

[4] Petrus Ducky Hailombe provided a background of the matter in his supporting affidavit and stated that the plaintiff is not the owner of the property, but he simply holds the property in trust on his behalf. He stated that he purchased the property and paid the full purchase price of the property, and that he paid and continues to pay all the property taxes, and has paid for the maintenance of the property for the benefit of the Hailombe family, and that the plaintiff made no contribution to the property in that regard. He stated that a title deed is not sufficient proof of ownership and further that registration of an immovable property in one's name does not necessarily mean ownership has been transferred, because such registration must be coupled with an intention to pass and receive ownership. He submitted that it was never his intention to pass ownership to the plaintiff. He said that the property is registered in the name of the plaintiff because it was the wish of the elders of his family, and he agreed. The plaintiff and the defendant are his nephews. He denied that the plaintiff is the owner of the property and submitted that he is the owner of the property in question, and added that the defendant currently enjoys undisturbed use and enjoyment of the property on his behest, and on that basis denied that the defendant is in unlawful occupation of the property.

[5] Lastly, Petrus Ducky Hailombe stated that he believes that a valid and *bona fide* defence has been raised against the plaintiff's claim in that the plaintiff is not the owner of the impugned property, nor is the defendant in unlawful occupation of the property; therefore the application for summary judgment should be dismissed with costs.

[6] In the case of *Lofty-Eaton v Ramos*¹, it was held as follows:

[5] The general approach of these courts in applications of this nature is that cognisance is taken into account that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilized by creditors. It is a tool to use by a plaintiff where a defendant raises some lame excuse or defence in order to defend a clear claim. These courts, have, therefore, been using this method to justly grant an order to a desperate plaintiff who without doing so, will continue to endure the frustration mounted by an unscrupulous defendant(s) on the basis of some imagined defence. As remedy available to plaintiff is an extra-ordinary one and is indeed stringent to the defendant, it should only be availed to a party who has a watertight case and that there is absolutely no chance of respondent/defendant answering it, see *Standard Bank of Namibia Ltd v Veldsman*². Rule 32 specifically deals with the said applications. Summary Judgment is therefore a simple, but, effective method of disposing of suitable cases without high costs and long delays of trial actions, see *Caton Ltd v Barrigo*³. In that case, Roberts, AJ went further and crystallised the principle as follows:

“It is confined to claims in respect of which it is alleged and appears to the court that the defendant has no *bona fide* defence, and that appearance has been entered solely for the purpose of delay.”

[7] Where a summary judgment has been applied for, the respondent is entitled to oppose, if he has a *bona fide* defence and in that opposition he/she must depose to an affidavit where he/she should positively state and show that he/she has a *bona fide* defence to applicant's claim. Respondent must not only show, but, must satisfy the court that he/she has a *bona fide* defence. In furtherance of the satisfaction to the court, respondent must at least disclose his defence and 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 *Breitenbach v Fiat SA (Edms) BPK*⁴ and *Namibia Breweries Ltd v Marina Nenzo Serrao*⁵. This, however, is not to say that he/she should do so by disclosing all the details and particulars as would be the case of proceedings, see *Maharaj v Barclays National Bank Ltd*⁶ and *Breitenbach v Fiat SA*⁷.

¹ *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

² *Standard Bank Namibia Ltd v Veldsman* 1993 NR 391 (HC).

³ *Caton Ltd v Barrigo* 1960 (4) SA 1 at 3 H.

⁴ *Breitenbach v Fiat SA (Edms) BPK* 1976 (2) SA 226 (T) at 228 B-C.

⁵ *Namibia Breweries Ltd v Marina Nenzo Serrao* (2006) NAHC 37.

⁶ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418.

⁷ *Breitenbach v Fiat SA (EDMS) (BPK)* 1976 (2) 226.

[8] The requirement seems to be relaxed to a certain extent as it is not rigorous *per se*, but, is designed to enable a genuine respondent to defend a claim which otherwise would result in applicants' obtaining judgment under circumstances where respondent had a genuine defence. The need for clarity on defendant's part is designed to avoid the entry of intention to defend an action solely to delay an otherwise just claim by plaintiff.

[9] For that reason, these courts will always seriously consider the granting of a summary judgment and will only do so where a proper case has been made out by applicants. The above principle has been applied in many cases, see also *Crede v Standard Bank of South Africa Ltd*⁸ where Kannemeyer, J remarked:

“One must bear in mind that the granting of summary judgment is an extraordinary and drastic remedy based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law.” ‘

[7] Rule 60(5) of the Rules of the High Court says that on the hearing of an application for summary judgment the defendant may satisfy the court by affidavit, 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.

[8] Taking into consideration the principles reiterated in *Lofty-Eaton v Ramos*⁹ and the provision of rule 60(5) of the Rules of the High Court in contrast with the content of the papers filed by the parties as discussed before, I find that the defendant in this case has satisfied the court that he has a *bona fide* defence to the action, in that the plaintiff is not the owner of the impugned property, nor is the defendant in unlawful occupation of the property, and that the defendant's affidavit supported by the affidavit of Petrus Ducky Hailombe has disclosed the full nature and grounds of the defence and the material facts relied on. It cannot be said in this case that the notice of intention to defend by the defendant was filed with an objective to delay the action or to frustrate the applicant's valid and legal claim.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	

⁸ *Crede v Standard Bank of South Africa Ltd* 1988 (4) SA 786 at 789 E.

⁹ *Lofty-Eaton v Ramos* (I 1386/2013) [2013] NAHCMD 322 (08 November 2013).

Applicant	Respondent
M Ntinda <i>of</i> Sisa Namandje & Co. Inc., Windhoek	R Beukes <i>of</i> Henry Shimutwikeneni & Co. Inc., Windhoek