

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case Title: <i>Daniel Herselman vs Melchoir Mokhatu</i>	Case No.: HC-MD-CIV-ACT-CON-2020/01395
	Division of Court: High Court (Main Division)
Heard/trie before: Honourable Mr Justice B Usiku J	Date of hearing: 18 September 2020
	Delivered on: 18 September 2020
Neutral citation: <i>Herselman v Mokhatu</i> (HC-MD-CIV-ACT-CON-2020/01395) [2020] NAHCMD 424 (18 September 2020)	
The Order: Having heard Mr Andima , on behalf of the Plaintiff and Ms Gaes , on behalf of 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 judgment is refused.2. The defendant is granted leave to defend the action.3. I make no order as to costs.4. The defendant shall file plea and counterclaim, if any on or before 2 October 2020.5. The plaintiff shall file replication and plea to counterclaim, if any, on or before 16 October 2020.	

6. The defendant shall file replication to plea to counterclaim, if any, on or before 23 October 2020.
7. The parties shall file respective discovery affidavits and exchange bundles of discovered documents on or before 6 November 2020.
8. The matter is postponed to 18 November 2020 at 15:15 for case management conference.
9. The parties shall file a joint case management report on or before 11 November 2020.

Reasons: Practice Direction 61(9)

Introduction

[1] This is an application by the plaintiff for summary judgment. The plaintiff applies for summary judgment in the following terms:

(a) payment in the amount of N\$ 43,100.00;

(b) interest on the aforesaid amount at the rate of 20% per annum calculated from 12 June 2018 until date of final payment;

(c) costs of suit.

Background

[2] On 02 April 2020 the plaintiff instituted action against the defendant for payment of N\$ 43,100 being an outstanding amount allegedly due and owing to the plaintiff by the defendant in terms of an agreement of lease of a motor vehicle. In addition, the plaintiff alleges that the defendant has acknowledged in writing his indebtedness to the plaintiff, in the aforesaid amount. The defendant defends the action. Having been served with an appearance to defend, the plaintiff launched the present application.

Application for summary judgment

[3] The plaintiff's application is premised on the ground that the defendant does not have a bona fide defence to the plaintiff's claim and that the notice to defend has been filed solely for the purpose of delay. On the day of the hearing of the application neither the

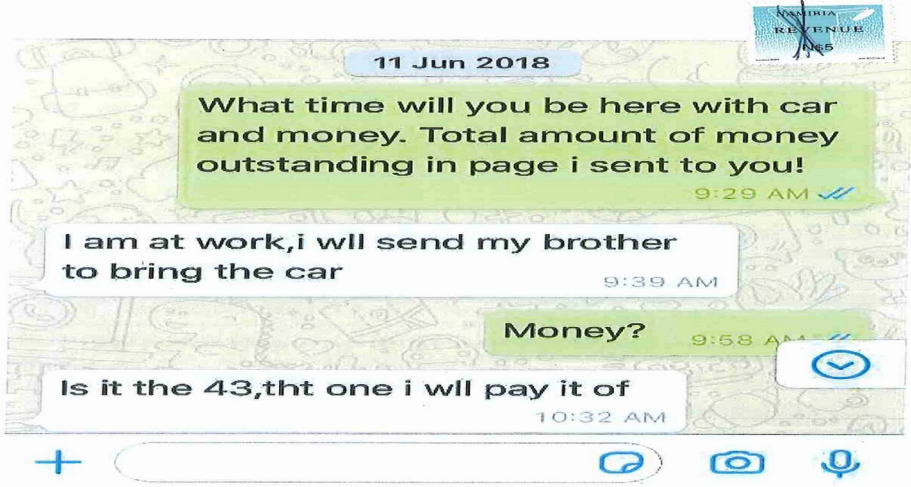
defendant nor his legal representative appeared in court. The defendant's legal representative filed a notice of withdrawal as counsel of record on 15 September 2020.

[4] The application is opposed by the defendant and in support of the opposition the defendant has filed an answering affidavit. At the outset the defendant raises a *point in limine* to the effect that the plaintiff has not complied with *rule 32 (9) and (10)* prior to launching his application for summary judgment, therefore the application for summary judgment, should be struck from the roll. The plaintiff, on the other hand, contends that he has complied with those provisions.

[5] In regard to the issue of compliance (or otherwise) with *rule 32(9) and (10)*, I have read the correspondent exchanged between the parties, prior to the launching of the application for summary judgment. I have come to the conclusion that, even though the plaintiff's *rule 32(10)* report leaves much to be desired insofar as it does not set out details of the steps taken to have the dispute resolved amicably, I am satisfied that the provisions of *rule 32(9) and (10)* have substantially been complied with. However, I should caution that this should not be interpreted as an endorsement that it is acceptable for a *rule 32 (10)* report to merely assert that 'the parties have exchanged correspondence and were unable to resolve the dispute'. A party that does that would do that at his own peril.

[6] As regards the merits of the application, it is alleged that the parties entered into an oral lease agreement in terms whereof the plaintiff let to the defendant a motor vehicle for the defendant's use and enjoyment, in return of payment of N\$ 9,500 per month. On or about June 2018, the plaintiff demanded the return of the motor vehicle, there was an amount of N\$ 43100 outstanding and due from the defendant to the plaintiff. The plaintiff further alleges that on or about 11 June 2018 the defendant has acknowledged in writing his indebtedness to the plaintiff in the aforesaid amount. In argument the plaintiff contends that his cause of action is based on the acknowledgement of debt. The acknowledgment of debt relied on consists in a number of 'WhatsApp' text messages purportedly exchanged between the parties; reading as follows:

"A"





EC-Boy Boy
last seen today at 12:39 PM



Is it the 43,tht one i will pay it of

10:32 AM

No sir you had your chances, or the money or blacklist today!

10:34 AM ✓✓

I will pay the money off

10:35 AM

If you go tp police station and get and affidavit where you declare your outstanding payment and how and on which dates you going to pay the amount off before the end if the month. You not in the position to choose. I hope you understand blacklisting.

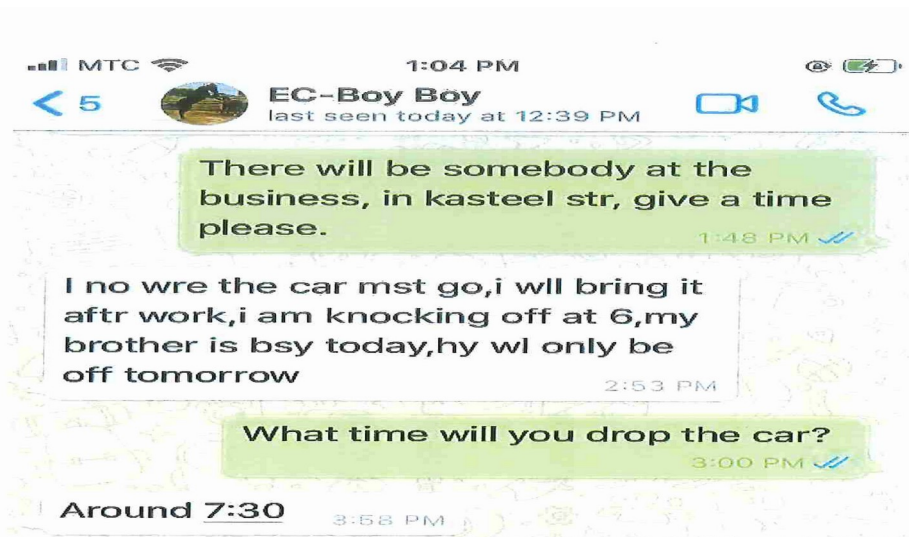
What time will the car be back?

11:05 AM ✓✓

Like now the car is at carwash,whn thy r finish thn i wl send him,who wl be home

11:12 AM





[7] In his answering affidavit, the defendant states that he and the plaintiff entered into a lease agreement, which was later turned into an oral agreement of the sale of the motor vehicle in question. The defendant alleges that he has paid the purchase price to the plaintiff and claims to be the owner of the motor vehicle in question. In regard to the alleged acknowledgement of debt, the defendant disputes having acknowledged indebtedness to the plaintiff.

Analysis

[8] A quest for summary judgment is generally based on trite argument that there are no triable issues of fact and that all the necessary factual issues are settled and need not therefore be tried. If there are triable issues or if it is unclear whether there are triable issues, summary judgment cannot be granted.

[9] The court has an overriding discretion on whether on the facts averred by the plaintiff, it should grant summary judgment, or on the basis of the defence raised by the defendant, it should refuse it. If the court has doubt as to whether the plaintiff's case is answerable at trial, such doubt should be exercised in favour of the defendant and summary judgment should be refused.¹

[10] For the plaintiff to be successful in his application he has to satisfy the requirements set out in rule 60. Rule 60 (1) provides:

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;
- (c) for delivery of a specified movable property; or
- (d) for ejectment.'

[11] In the present matter, the court is invited to grant summary judgment on the basis of the alleged liquid document (acknowledgment of debt). A liquid document is described as a document that reflects an unconditional acknowledgment of indebtedness for an ascertained sum of money.

[12] The document referred to by the plaintiff as an acknowledgment of debt, refers to a two digit number, namely 43. There is an assertion in the document that the 43 will be paid off.

¹ Phillips v Phillips (292/2018) [2018] ZAECGHC 40 (22 May 2018) para 38.

[13] It appears that the plaintiff contends that the document in question constitutes an unconditional acknowledgment of indebtedness for N\$ 43,100 by the defendant to the plaintiff.

[14] In my opinion, the document presented by the plaintiff does not constitute a liquid document. In any case, even if the document was a liquid document, I am of the opinion that the number 43 could be interpreted to mean anything from 43 cents; 43 dollars, 43 hundred dollars to 43 thousand dollars. A commitment to pay off 43 cannot, in my opinion, be said to be an unconditional acknowledgment of indebtedness for N\$ 43,100. Furthermore, the alleged acknowledgment of debt is not signed by the defendant.

[15] In my view, evidence needs to be led to determine what 43 represents, which the defendant has allegedly committed to pay off and the appropriate forum for that purpose is the trial court. It therefore follows, that summary judgment stands to be refused for the foregoing reasons.

[16] As far as costs are concerned, the defendant has not filed heads of argument and has not appeared at the hearing of summary judgment application. In the circumstances, I am not going to make a costs order.

[17] In the result I make the following order:

1. The plaintiff's application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. I make no order as to costs.
4. The defendant shall file plea and counterclaim, if any on or before 2 October 2020.
5. The plaintiff shall file replication and plea to counterclaim, if any, on or before 16 October 2020.
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Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff	Second Defendant
T. Andima Of Van der Merwe-Greef Andima Inc Windhoek	F. Gaes Of Uanivi Gaes Inc Windhoek