

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: DESERT FRUIT (PTY) LTD v WAYNE SMITH	Case No: HC-MD-CIV-ACT-CON-2020/00672
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 15 September 2020
	Date of order: 7 October 2020
	Reasons delivered on: 8 October 2020
Neutral citation: <i>Desert Fruit (Pty) Ltd v Wayne Smith</i> (HC-MD-CIV-ACT-CON-2020/00672) [2020] NAHCMD 461 (7 October 2020)	
Results on merits: Merits not considered. Summary judgment application	
The order: Having heard MS VAN DER MERWE , for the Plaintiff and MR VISSER , for the Defendant and having read the documentation filed of record: IT IS HEREBY 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. The cost to stand over for determination at the end of the trial.4. The matter is postponed to 29 October 2020 at 15h00 for Case Planning	

Conference.

5. The Parties must file a further joint case plan in terms of rule 23(5) on or before 26 October 2020.

Reasons for orders:

PRINSLOO, J

[1] This matter is decided on the papers in terms of the 4 May 2020 Revised Roadmap for the High Court of Namibia whilst the state of emergency persist¹ and no oral arguments were advanced herein. I will refer to the parties as they are in the main action.

[2] This is an application for summary judgment. The plaintiff instituted action against the defendant for breach of a loan agreement seeking payment in the amount of N\$ 4 900 133.43 interest and costs.

[3] The plaintiff alleges that it lend and advanced to the defendant an amount of N\$ 4 million. The plaintiff alleges that it complied with its obligations in terms of the loan agreement and that all suspensive and resolute conditions in clauses 3 and 4 of the loan agreement have been fulfilled. The plaintiff further alleges that the defendant breached the loan agreement by failing to pay monthly instalments since May 2017, alternatively, he is deemed to be in breach thereof by virtue of his failure to pay the instalments due under the agreement since May 2017 and failing to remedy such default within 7 days of being given notice to do so by the plaintiff and by failing to give notice to the plaintiff about the fact that he may default on the monthly instalment. As a result the plaintiff is entitled to cancel the loan agreement and claim the payment of all outstanding amounts in terms of the loan agreement. (I will not repeat the terms and conditions set out in the loan agreement for purposes of this ruling.)

¹ '2.7.3.3.2. The parties in civil and labour motion and review matters, where all the parties are represented by legal representatives, are called upon to agree in having the interlocutory or ancillary applications determined on the papers before court, without the need of oral arguments'

[4] The affidavit of Seth Jesse Holms, the Managing Director of the Plaintiff, 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.

[5] The defendant opposed the application and filed an extensive affidavit opposing the summary judgment. The defendant denies breach of the agreement or that he may be deemed to be in breach of the agreement and raises a number of reasons which can be summarised as follows:

- a) the plaintiff had to deduct the N\$ 40 000 instalment from the defendant's salary to which deduction he agreed irrevocably and unconditionally;
- b) the plaintiff unilaterally and unlawfully ceased to deduct the N\$ 40 000 instalments from his salary since May 2017;
- c) the plaintiff is precluded from relying on its own unlawful failure to deduct the instalment from this salary as a basis for placing him in mora or default.

[6] The defendant further maintains that any amount which defendant may owe the plaintiff in respect of the N\$ 40 000 instalments that have fallen due since May 2017 has been extinguished by set-off against the plaintiff's indebtedness to him in respect of his arrear salary. The defendant alleges in support of his defence the following facts:

- i) the plaintiff ceased to pay his salary unilaterally and unlawfully since September 2017 when he was suspended without pay and has persisted in the unlawful refusal to pay his salary despite the fact that the disciplinary chairman did not recommend dismissal in his ruling;
- ii) the plaintiff owes the defendant at least N\$ 5 million in arrear salary and bonus repayment (with interest thereon) which is overdue and payable to him since October 2017.

[7] As a result it is the defendant's case that he is not indebted to the plaintiff in any amount whatsoever.

Principles governing summary judgment

[8] The practice relating to summary judgments is governed by Rule 60 of the High Court Rules. Rule 60(5) provides 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 costs which may be given; or
 - (b) satisfy the court by –
 - (i) affidavit which must be delivered before 12h00 on the court day but one preceding the day on which the application is to be heard; or
 - (ii) by oral evidence given with the leave of 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 such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied on.'

[9] The requirements of rule 60(5)(b) which must be satisfied for a successful opposition to a claim for summary judgment was stated as follows in the *locus classicus* *Maharaj v Barclays National Bank Ltd*² by Corbett JA with regard to the previous rule 32, dealing with summary judgement applications as follows:

'Accordingly, one of the ways in which the 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.

² 1976 (1) SA 418 (A) at 426A.

All that the Court enquires into is:

- (a) whether the defendant has fully disclosed the nature and the 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 *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. The word fully, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the 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'

[10] The *bona fides* requirement pertains to the defence raised by the defendant and same is determinable on the merits of the defence so raised. That in essence means that the defendant must disclose the facts upon which his/her defence is based. However, even if the defendant did not establish a *bona fide* defence, the court has a discretion to refuse summary judgment³. Summary judgment is a stringent and final remedy which closes the doors of the Court for the defendant. The court is not obliged to grant summary judgment even where the court doubts the *bona fides* of the defence.⁴

[11] The plaintiff takes issue with the particularity of the defence raised by the defendant and I am in agreement that the defendant 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* defence⁵. This, however, is not to say that the defendant should do so by disclosing all the details and particulars as would be in the case of proceedings.⁶

³ See *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) at 732; *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) 95 (C) at 103 G-H.

⁴ *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd* 2007 (1) NR 447 (HC)

⁵ See *Breitenbach v Fiat SA (Edms) BPK* 1976 (2) SA 226 (T) at 228 B-C and *Namibia Breweries Ltd v Marina Nenzo Serrao* (2006) NAHC 37.

Application to the facts

[12] In his opposing affidavit the defendant dedicates a large portion of the affidavit to narrate the background and history between the parties as seen in paras 1 to 31. This background also illustrates a complicated financial relationship between the parties. From paras 22 onwards to para 39 the defendant sets out how the loan agreement between him and the plaintiff came into existence and the subsequent negotiations and re-negotiations between the parties, but also how the relationship between the parties deteriorated since 2017.

[13] The relevant portion of the opposing affidavit that deals with the defendant's defence to the plaintiff's claim is set out in paras 40 to 51.

[14] The plaintiff takes issue with the defence of set-off relied on by the defendant which is not one which will be raised in a counterclaim and that the defendant must demonstrate in his affidavit that he has complied with the requirements for a successful reliance on set-off and disclose material facts relied upon for that defence.

[15] I am of the considered view that it is not necessary for the defendant for purposes of defeating summary judgment to present its defence with the precision of a plea and that having considered the defendant's opposing papers the defendant disclosed the fact relied on for his defence of set-off with sufficient particularity. This court cannot during the current proceedings consider the plaintiff's various calculation wherein it attempts to cast doubt about the plaintiff's indebtedness to the defendant. This is a factual dispute that can only be resolved during the trial of this matter.

[16] What is clear from the opposing papers is that there exists triable issues between the parties. I am unable to find, as the plaintiff wants this court to do, that the plaintiff's case is unanswerable and that there is no reasonable possibility that the defence raised

⁶ See *Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 and Breitenbach v Fiat SA (EDMS) (BPK) 1976 (2) 226.*

by the defendant is good in law.

[17] In conclusion I wish to address what appears to be a new defence raised in the defendant's heads of argument. This defence relates to the alleged excepiability of the plaintiff's particulars of claim.

[18] In *Aquantum (Pty) Ltd v Radical Trust Industries (Pty) Ltd*⁷ Masuku J stated in regard to the duty of a defendant intent on opposing an application for summary judgment as follows:

'[23] It must be stressed that the court cannot and should not be expected to base its decision to refuse or grant summary judgment on any facts other than those contained in the affidavit filed by or on behalf of the defendant. In this regard, the facts must be stated with fullness and completeness to enable the court to appropriately exercise its judgment. A defendant can choose to be chary in this regard, to its own detriment.'

[19] Although the plaintiff replied to the defendant's heads of arguments in this regard I do not intend to consider this 'defence' for purposes of this ruling.

[20] My order is therefor set out as above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
N Bassingthwaighte Instructed by Ellis Shilengudwa Inc	C Visser Koep and Partners Windhoek

⁷ HC-MD-CIV-ACT-2016/02337 at para 23.

Windhoek	
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