REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: WAYNE DEON OPPERMAN N.O PLAINTIFF VS FERUSA CAPITAL FINANCING PARTNERS (PTY) LTD FIRST DEFENDANT NELSON NDELIMONO NAPEJE AKWENYE SECOND DEFENDANT	**Case No:** HC-MD-CIV-ACT-CON-2020/04010 **Division of Court:** HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	**Date of hearing:** 07 APRIL 2021 **Date of order:** 15 APRIL 2021
Neutral citation: *Opperman N.O v Ferusa Capital Financing Partners (Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/04010) NAHCMD (15 April 2021)	

Results on merits:

Merits not considered.

The order:

Having heard **CARLI SCHICKERLING**, for the Plaintiff and **KAREL GAEB**, for the First and Second Defendants, and having read the documentation filed of record:

IT IS HEREBY ORDERED THAT:

Summary judgment is granted against the First and the Second Defendants jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of N$ 92 737.34;
2. Interest a *tempore morae* calculated on N$89 833.84 at legal rate of 20% per annum from 1 September 2020 until date of final payment;
3. Cost as agreed on an attorney-own-client scale.
4. The matter is regarded as finalized and removed from the roll.

Reasons for orders:

Background

[1] In this ruling I will refer to the parties as they are referred to in the main action. The plaintiff, Wayne Deon Opperman N.O commenced proceedings by issuing summons out of this Court. In the summons the plaintiff amongst other claims, claims for payment in the amount of N$92 737.34 plus interest a *tempore morae* calculated on N$89 833.84 at legal rate of 20% per annum from 1 September 2020 until date of final payment from the first and second defendants.

[2] The plaintiff bases its claim against the first defendant on an alleged written agreement in terms of which the plaintiff would grant the first defendant a credit facility allowing the first defendant to purchase goods from the plaintiff on open account. The plaintiff annexed the written agreement to its particulars of claim as annexure “A”. In respect of the second defendant, the plaintiff alleged that the second defendant bound himself as surety and co-principal debtor with the first defendant for and in respect of the

first defendant's aforesaid liability. The deed of surety forms part of annexure "A".

[3] The plaintiff in its particulars of claim further alleged that it duly complied with its obligations in terms of the agreement in that during the period of May 2020 to August 2020 it sold and delivered goods in the amount of N$89 833.84, to the first defendant, at the first defendant's special instance and request and duly invoiced the first defendant and send monthly statements to the first defendant. Plaintiff furthermore alleged that the first defendant breached the agreement in that it *inter alia* fails and/or refuses to pay the plaintiff the amount of N$89 833.34 and interest at the rate of 20% per annum.

[4] The first and second defendant entered an appearance to defend the plaintiff's claim on 28 January 2020. The defendants having filed a notice of intention to defend, the plaintiff in its case planning conference indicated that it intends to apply for summary judgment which it did and is before me now for determination.

[5] In opposing the application for summary judgment the defendants filed an affidavit resisting summary judgment which I will replicate certain paragraphs for purposes of this ruling.

'9. On or about 28 January 2021 I attended to the Plaintiff's Legal Practitioner's offices for settlement negotiations after I became aware of the matter before court. The legal practitioner of the Plaintiff provided me with an Acknowledgment of Debt, which I signed. In terms of the Acknowledgment of Debt, I committed to pay off the debt in instalments of N$7,000.00 per month, which I believed instalments would have commenced end of March 2021 as the legal practitioner of the Plaintiff kept the original Acknowledgement of Debt and not provide me with a copy of same.

11. Having proper and full regard of the first defendant and my financial position, I signed the acknowledgment of debt for N$7,000 per month and it was my bona fide belief that the matter between the Plaintiff and I has been settled. {own emphasis}

12. On the same day after signing the Acknowledgement of Debt, I attended to the High Court Service Bureau Office building, to file a notice of intention to defend in order to get notifications on the further developments of the matter before court.

16. On 11 February 2021, the Plaintiff emailed me the Rule 32 (9) letter together with the draft case plan for my signature. I only received this email on 12 February 2021. At this juncture, I should emphasise that only then did the Plaintiff inform me in their Rule 32 (9) letter that the Acknowledgement of Debt signed was not accepted by the Plaintiff, despite my commitment to pay and the first instalment was only due in March 2021.

23. I do not dispute the amount owed; I have simply not been afforded the opportunity to amicably settle this matter outside court.

24. I am advised that the purpose of summary judgment is necessary when matters have been defended without a proper defence. In this matter that is not the case, as it is my bona fide believe that the parties can do away with this matter and excessive legal costs by simply agreeing on payment arrangement which is reasonable and in consideration of the current economic climate'.

The legal position

[6] The procedure to apply for summary judgment is currently regulated by rule 60 of the Rules of this Court. That rule in part reads as follows:

'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 specified movable property; or

(d) for ejectment.

(2) The plaintiff must deliver notice of the application which must be accompanied by an affidavit made by him or her or by any other person who can swear positively to the facts –

(a) verifying the cause of action and the amount, if any, claimed; and

(b) stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

(3) …

(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.' {emphasis added}

[7] The legal principles governing summary judgment proceedings are well-established and is clearly set out in *Di Savino v Nedbank Namibia Ltd*[1] as follows:

'[23] One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under rule 32(3) (b)[2], the affidavit must 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the

[1] *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).
[2] The forerunner of the current Rule 60.

probabilities lie.

[24] The enquiry that the court must conduct is foreshadowed in rule 32(3) (b) and it is this: first, has the defendant 'fully' disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law[3]. If the court is satisfied with these two grounds, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

[25] While the defendant is not required to deal 'exhaustively with the facts and the evidence relied upon to substantiate them', the defendant must at least disclose the defence to be raised 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'[4]. Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the rule.'[5]

[8] In the matter of *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*[6] Strydom JP (as he then was) said the following:

'There can be no doubt … that summary judgment is an extraordinary remedy which does result in a final judgment against a party without affording that party the opportunity to be heard at a trial. For this reason courts have required strict compliance with the rules and only granted summary judgments in instances where the applicant's claim is unanswerable.'

[9] Having dealt with the applicable legal principles, I know turn to deal with the application of the law to the facts.

[10] The defendant's in their affidavit resisting summary judgment raised a point that Rule 32 (9) has not been complied with by the plaintiff, however the defendant in the same affidavit at par 14 confirms that he did receive the Rule 32 (9) letter on 12 February 2021. Without dwelling much on this issue, I am satisfied that Rule 32 (9) has been

[3] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A – C.
[4] Supra at 426C – D.
[5] *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304A – B.
[6] *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC) at 201C – F.

complied with.

Issues in dispute

[11] From the onset, it is clear from the defendant's affidavit in resisting summary judgment that the amount owed is not in dispute. What however appears to be an issue between the parties is whether there was a meeting of the mind when the acknowledgment of debt was concluded between the parties?

[12] In order for me to clarify the issue, I wish to deal with the evidence before this court.
The defendant indicated[7] that as soon as he became aware of this matter he approached the offices of the plaintiff's legal practitioner where he signed the acknowledgment of debt on 28 January 2021. He further indicates that he only became aware of the fact that the acknowledgement of debt was not accepted by the plaintiff on 12 February 2021 when he received the Rule 32 (9) letter.

[13] What is interesting is, according to the defendants upon signing of the acknowledgment of debt, it was his bona fide belief that the matter between the plaintiff and himself was settled. With that in mind, the defendants then proceeded to file their notice of intention to defend on that very same day "in order to get notifications on the further developments of the matter before court"[8].

[14] On this issue, the plaintiff's version is that defendants were notified that the plaintiff does not accept the signed acknowledgement of debt and as a result thereof the defendants then filed their notice of intention to defend.

[15] I am of the considered opinion that the plaintiff's version on this score is the most probable one. If indeed according to the defendants, in their mind the matter was settled, why would they need to get notifications on the further developments of the matter that has been settled?, I am convinced that the defendant was notified of the refusal to accept the acknowledgment of debt as per the handwritten note on the acknowledgment of debt

[7] See par 5.
[8] Ibid.

which reads as follows:

'Debtor was informed on 28/01/21 that client will not accept his offer for down payment as capital and interest and costs (i.e. full outstanding amount) must be paid within 6 months'.[9]

Have the defendants fully disclosed their defence and is it bona fide?

[16] In *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd*[10] the Supreme Court state as follows with respect to the requirement resting on the a defendant to fully disclose his or her defence:

'[21] As to the requirement of 'fully' disclosing the defence, the court in *Maharaj* reiterated that whilst a defendant 'need not deal exhaustively with the facts and evidence relied upon to substantiate them', at the very least it is incumbent upon a defendant to disclose its 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. This is not an onerous threshold for a defendant to meet. A plaintiff has no right to reply. Nor is the procedure intended to deprive a defendant with a triable issue or a sustainable defence of its day in court as was correctly stressed by Navsa JA in *Joob Joob.* I agree with Navsa JA that the characterization of 'extraordinary' or 'drastic' concerning summary judgment would no longer apply after the successful application of this remedy for some 100 years in our courts and that it cannot be stated as weighted against a defendant, given the threshold a defendant is to meet. The remedy is only granted against defendants when it is clear that no defence is raised in response to a claim, thus preventing sham defences from defeating a creditor's rights by delay.'

[17] A defendant's position is not always precisely set out in an affidavit. However, there is a threshold in that, despite the affidavit's imperfections, there must be a defence disclosed. This defence must be set out with sufficient particularity and, importantly, that it must be sufficiently complete. If the setting out of a defence is not sufficiently complete, a defence is not disclosed. It is not for a court to speculate and complete a defence for a defendant.[11]

[9] See annexure "A" to defendant's affidavit resisting summary judgment.
[10] *Radial Truss Industries (Pty) Ltd v Aquatan (Pty) Ltd* (SA 11/2017) [2019] NASC (10 April 2019).
[11] *Government of the Republic of Namibia* v Gertze (HC-MD-CIV-ACT-OTH-2019/00978) [2019] NAHCMD 497 (30 October 2019).

[18] The defendant's opposing affidavit must fully disclose the nature and grounds of the defence and the material facts relied upon therefor so that the Court is satisfied that the defendant has a bona fide defence. The defence with respect must not merely 'appear' to be bona fide.[12]

[19] *In Pansera Builders Suppliers (Pty) Ltd v Van der Merwe t/a Van der Merwe's Transport*[13], Selikowitz, AJ (as he then was) held that:

'The discretion must be exercised judicially and upon the information which is before the Court. The Court must guard against speculation and conjecture and be astute not to substitute these for the actual information which has been placed before it. Where the facts before the Court raise a doubt as to whether the plaintiff's case is what has been described as 'unanswerable', summary judgment should be refused . . . Where there is an absence of the necessary allegations upon which a defence can be founded, it would be contrary to a judicial approach to exercise a discretion against the plaintiff and in favour of the defendant'.

[20] Having had sight of the papers before me I am of the considered view that the defendants failed to fully disclose their bona fide defence. In par 24 of the affidavit resisting summary judgment, the defendant's only make mention of the fact that it believes that there matter can be resolved by agreeing on a payment plan which is not defence in law. No evidence was placed before this court to enable me to exercise discretion in favour of the defendants.

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

Judge's signature	**Note to the parties:**

[12] Ibid par 24.
[13] *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe t/a Van der Merwe's Transport* 1986 (3) SA 654 (C).

	Not applicable.
Counsel:	
Applicant	**Respondent**
C Schickerling Of Etzold-Duvenhage Attorneys	K Gaeb Of Sisa Namandje & Co Inc.