

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		Case No: HC-MD-CIV-ACT-CON-2020/01888
V5 Farming Boerdery CC	Plaintiff	Division of Court: Main Division
and		
Mount Karas CC	Defendant	Heard on: 25 March 2021
Heard before: Honourable Mr. Justice Usiku, J		Delivered on: 19 April 2021
Neutral citation: <i>V5 Farming Boerdery CC vs Mount Karas CC</i> (HC-MD-CIV-ACT-CON-2020/01888) [2021] NAHCMD 167 (19 April 2021)		
Order:		
<ol style="list-style-type: none">1. Application for summary judgment is refused;2. I make no order as to costs;3. The matter is postponed to 12 May 2021 at 15h15 for a further case planning conference;4. The parties are directed to file a joint case planning report on or before 05 May 2021.		
Reasons for order:		
USIKU, J:		
<u>Introduction</u>		
<p>[1] Serving before court is an application, by the plaintiff, for summary judgment. The plaintiff applies for summary judgment against the defendant for an order in the following terms:</p> <p>(a) delivery of the curved glass meat chiller and a Teroaka Plus Point Print Scale, within 7 days from the date of this order;</p>		

- (b) failing such delivery, payment in the amount of N\$142,168.75;
- (c) interest on the aforesaid amount calculated at the rate of 20% per annum as from the date of this order until date of final payments;
- (d) costs of suit.

[2] The defendant is described in the particulars of claim, as Mount Karas CC, 'a close corporation duly incorporated by the laws applicable in the Republic of Namibia with principal place of business situated at Unit 5, Newcastle Street, Northern Industrial Area, Windhoek, Republic of Namibia'.

[3] The application for summary judgment is opposed by a certain Shaun Esterhuizen, "Mr Esterhuizen", who asserts that he resists the application in his personal capacity as summons were served on him personally. Mr Esterhuizen relates further that he was involved in discussions regarding the formation of and registration of a close corporation with the name of 'Mount Karas CC', however, such close corporation was never registered. He averred further that he instructed his legal representative to defend the matter as he was unsure as to his possible personal liability in the matter.

[4] It is, therefore, common cause in this matter that a non-existence entity is cited as the defendant.

[5] On the 05 March 2021, the plaintiff filed its heads of argument relating to the application for summary judgment, together with a 'notice to amend' the particulars of claim. The notice to amend seeks to substitute "Mount Karas CC" with "Shaun Esterhuizen trading under the name and style of Mount Karas". On 16 March 2021, Mr Esterhuizen filed notice of intention to oppose the intended amendment.

[6] The matter was then heard on 25 March 2021 to hear and determine the application for summary judgment.

The application for summary judgment

[7] The plaintiff submits that Mr Esterhuizen entered into an agreement with the plaintiff, in terms of which he represented an entity described as Mount Karas CC. Thus, the plaintiff submits, Mr Esterhuizen is estopped from raising the defence that an entity cited as the

defendant is non-existent. The plaintiff contends that summary judgment be granted against Mr Esterhuizen in his personal capacity, trading under the name and style of Mount Karas.

Opposition to Summary Judgment

[8] It is submitted on behalf of Mr Esterhuizen that the matter before court is an application for summary judgment. The plaintiff's papers are not in order. The hearing of a summary judgment is not the appropriate forum for consideration of possible amendments to the pleadings filed by the plaintiff.

Analysis

[9] In this matter, the court is not seized with an application for leave to amend the particulars of claim.

[10] It is common cause that, *ex facie* the summons, the defendant is a close corporation, which is a separate legal entity and which, in the present case, does not exist.

[11] It is trite law that summary judgment will be refused in the face of defects in the plaintiff's papers, which are not of a purely technical nature.¹ It is also settled law that the hearing of a summary judgment application is not the appropriate forum for the consideration of or for allowing the plaintiff to amend its papers.²

[12] In the present matter Mr Esterhuizen is not a party to the suit and no summary judgment or costs order, may be granted against him.

[13] Because of the foregoing conclusion, it is not necessary for me to deal with other issues raised by the parties in the application for summary judgment.

[14] It, therefore, follows that for the foregoing reasons, the application for summary judgment stands to be refused.

[15] In the result, I make the following order:

1. Application for summary judgment is refused;

¹ Van Niekerk, Geyer, Mundell: *Summary Judgment: A Practical Guide* March 2008; para 11.7.

² Ibid.

2. I make no order as to costs;
3. The matter is postponed to 12 May 2021 at 15h15 for a further case planning conference;
4. The parties are directed to file a joint case planning report on or before 05 May 2021.

Judge's signature:

Note to the parties:

B Usiku
Judge

Not applicable

Counsel:

Plaintiff:

Defendant:

M Schurz
Of Delport Legal Practitioners,
Windhoek

AJB Small
Of PD Theron & Associates,
Windhoek