

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: HC-MD-CIV-ACT-CON-2020/03208

In the matter between:

**KWIKFORM FORMWORK AND SCAFFOLDING (PTY) LTD
T/A ABACUS MODULAR SPACE SOLUTIONS**

PLAINTIFF

and

**HIGHGATE PRIVATE SCHOOL
(INCORPORATED ASSOCIATION NOT FOR GAIN)
DEFENDANT**

FIRST

TARIRO CHATA

SECON DEFENDANT

Neutral Citation: *Kwikform Formwork and Scaffolding (Pty) Ltd T/A Abacus Modular Space Solutions v Highgate Private School (Incorporated Association Not For Gain)* (HC-MD-CIV-ACT-CON-2020/03208) [2021] NAHCMD 28 (05 February 2021)

Coram: UEITELE J
Heard: 02 December 2020
Delivered: 05 February 2021

Flynote: Practice – Summary Judgment – Requirements restated – A defective application for summary judgments spells the end of the matter – Rule 60 (2) (a) requires strict compliance and failure thereof fatal to any application for summary judgment – Defects thereof not disappearing merely because the respondent deals with the merits of the claim set out in the summons – Cause of action must be verified by deponent to the affidavit in support of the application for summary judgment.

Summary: The first defendant and plaintiff entered into two contracts. The first contract was concluded on 03 October 2017 and was an application for credit facilities. The second contract was concluded on 16 October 2017 and was a written contract of erection and hire. Plaintiff avers that it duly complied with its obligations under the agreements. According to the plaintiff, the first defendant failed to fulfil its obligations in that it failed to pay its rent in full as from June 2019 and that as at June 2020, it was in arrears in the amount totaling up to N\$488 500. As a consequence of the alleged defendant's breach of the agreement the plaintiff caused summons to be issued out of this court seeking payment, return of the goods and eviction of the first defendant.

The defendants defended the action and, having been served with an appearance to defend, the plaintiff, launched this application for summary judgment. The application is premised on the contention by the plaintiff that the defendants do not have a *bona fide* defence to its claim and that the notice to defend was filed solely for the purpose of delay, the defendants argue the contrary.

Held, for the plaintiff to be successful in its application, it has to satisfy the requirements set out in Rule 60(1) and (2) of the Rules of Court.

Held further, that the affidavit made in support of an application for summary judgment must be made by a person who has "personal" knowledge of the facts and must be one in which the cause of action and the amount, if any, are verified.

Held, that it will suffice if someone who has 'first-hand' and not necessarily 'personal' knowledge of the facts, and can thus verify the cause of action, deposes to such affidavit.

Held, that if the application for summary judgment is defective then that is the end of the matter. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.

Held, that an analysis and consideration of rule 60(2)(a) clearly shows that the Court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed to the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any.

ORDER

1. The application for summary judgment is dismissed.
2. The plaintiff must pay the defendants' costs.
3. The defendants are given leave to defend the action.
4. The case is postponed to 23 February 2021 at 08:30 for a Case Planning Conference Hearing.
5. The parties must file a joint case plan by not later than 18 February 2021.

JUDGMENT

Ueitele, J

Introduction

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[1] The applicant who is the plaintiff in the main action is a private Company which is registered in accordance with the Laws of Namibia. I will, in this judgment, refer to the applicant as the plaintiff.

[2] The first respondent, who is the first defendant in the main action, is an association not for gain which conducts its business under the name of Highgate Private School, a private school which caters for low and medium income members of our society. I will, in this judgment, refer to the first respondent as the first defendant. The second respondent, who is the second defendant in the main action is a certain Ms Tariro Chata, who is the director of the first defendant and she is being sued as a surety and co-principal debtor.

[3] On 10 August 2020 the plaintiff commenced proceedings out of this Court in terms which it, jointly and severally claimed payment in the amount of N\$488 500, return of goods and payment in the amount of N\$74 750 per month as from July 2020 to date of the return of the goods to the plaintiff, interest on those amounts at the rate of prime plus 2% (12%) per annum from the defendants and the eviction of the first defendant and its property from the Ezeespace classrooms and the collection of the goods from the first defendant. The plaintiff also claimed costs of suit on attorney and own client scale. The defendant gave notice that it will defend the plaintiff's action. The defendant's notice to defend was met with an application for summary judgment from the plaintiff.

[4] The quest for summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable

issues, summary judgment must be refused as to that cause of action. The purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action¹ or to use the language of Corbett J, properly employed summary judgment is a useful device for unmasking frivolous claims and putting an end to meritless litigation².

Background Facts

[5] During October 2017, the first defendant and plaintiff entered into two contracts. The first contract was concluded on 03 October 2017 and was an application for credit facilities. The second contract was concluded on 16 October 2017 and was a written contract of erection and hire. These two contracts, says the plaintiff, constitute the agreement between the plaintiff and the first defendant.

[6] I will not inundate this judgment by regurgitating *verbatim* all the 'express terms' of the agreement between the parties. I will highlight only those terms that are in my view relevant for the purpose of this judgment and to the extent necessary to arrive at a fair and just determination of the current dispute. The terms are that:

(a) The first defendant rented the following from the plaintiff for a period of 24 months (the plaintiff calls them the 'goods' and I will thus refer to them as such):

(i) Ten 6m x 6m Ezeespace classrooms at a monthly rate of N\$6 200 each;

(ii) Ten Aircons w/w 1800 BTU at a monthly rate of N\$300 each; and

(iii) Transport, delivery and collection cost split evenly over the contract period and amounting to N\$ 2 790 per month.

(b) The total monthly rent amounted to N\$74 740 (including VAT) per month in terms of the contract of erection and hire;

(c) The monthly rental would escalate annually by 5%.

¹ *Social Security Commission v Kukuri* (I 5042/2014) [2015] NAHCMD 79 (31 March 2015) and the authorities cited in that judgment.

² *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 at 304.

(d) any amount not paid to the plaintiff on the due date shall bear interest at a rate of 2% above the prime rate charged by Standard Bank in South Africa (currently 10%), calculated from due date for payment until actual date of payment, which interest shall be calculated on the daily balance and shall be compounded monthly in arrears; and

(e) the defendant is liable for all legal costs incurred by the plaintiff arising out of any action to be taken in respect of recovery of outstanding money on an attorney and own client scale.

[7] The plaintiff avers that in keeping with their agreement it complied with its obligations under the agreement and delivered the goods to the first defendant. In breach of the agreement, so says the plaintiff, the first defendant failed to fulfil its obligations in that it failed to pay its rent in full as from June 2019 and that as at June 2020, it was in arrears in the amount totaling up to N\$488 500. As a consequence of the defendant's alleged breach of the agreement the plaintiff caused summons to be issued out of this Court seeking payment, return of the goods and eviction of the first defendant.

[8] As I indicated earlier, the defendants, on 17 September 2020, defended the action. Having been served with an appearance to defend, the plaintiff, as indicated earlier, launched this application for summary judgment in the following terms:

- '1. Payment of the amount of N\$488 500;
2. Payment of N\$74 750 per month as from July 2020 to date of the return of the goods to the plaintiff;
3. Interest on the aforesaid sum at the rate of prime plus 2% (12%) per annum and calculated on the daily balance and shall be compounded monthly in arrears;
4. An order in terms of which the deputy sheriff for the district of Windhoek is directed to evict the first defendant and its property from the Ezeespace classrooms and to assist the plaintiff to collect the goods from the first defendant;

5. Costs of suit on attorney and own client scale.'

[9] The application is premised on the contention by the plaintiff that the defendants do not have a *bona fide* defence to its claim and that the notice to defend was filed solely for the purpose of delay. During November 2020 the plaintiff amended its application for summary judgment and abandoned the claims for payment as set out in paragraph 8 above. It narrowed its application for summary judgment to the following:

'1. An order in terms of which the deputy sheriff for the district of Windhoek is directed to evict the First Defendant and its property from the Ezeespace classrooms and to assist the Plaintiff to collect the Goods from the First Defendant.

2. Costs of suit on attorney and own client scale.'

[10] The application was opposed by the defendant and in support of the opposition the second defendant filed an opposing affidavit. This Court is petitioned to determine whether on the facts alleged by the plaintiff in its particulars of claim, it must grant summary judgment in favour of the plaintiff or whether the facts contained in the defendant's opposing affidavit disclose a *bona fide* defence which may persuade the court to refuse summary judgment.

[11] To make that determination, it is necessary to examine the facts alleged by the plaintiff in its particulars of claim as against the defence raised by the defendants in the opposing affidavit in relation to those facts.

The Pleadings

[12] The bulk of the plaintiff's particulars of claim deal with the agreements that were concluded between the plaintiff and the first defendant, the terms of those agreements and the alleged breaches by the first defendant. The plaintiff pleaded that the first defendant was liable to pay rental as from 1 January 2018 which amounts to N\$74 750 per month, but the first defendant has failed to pay its rent in full since June 2019 and

as at the 1st of June 2020 the first defendant's rental payments were in arrears with the amount of N\$488 500.

[13] The plaintiff further pleaded that despite written demand on 5 December 2019, first defendant has failed or refused or both failed and refused to effect payment of the arrear amount and that in the correspondence of 5 December 2019 the plaintiff has cancelled the agreement and demanded return of the goods. It proceeded to plead that the first defendant has failed to return the goods to the plaintiff.

[14] The defendants dispute the amount of indebtedness and amongst other defences, raised various points of law including; non-compliance with the Stamp Duties Act, 15 of 1993; *vis major* and non-joinder. In view of the plaintiff having abandoned the claim for payment and only limiting itself to the eviction of first defendant from the Ezeespace classrooms and the return of the goods to plaintiff, I will not deal with all the defences raised by the defendants but will limit my determination to the question of whether the plaintiff has made out a case for the eviction of the defendant from the Ezeespace classrooms and the return of the goods to plaintiff.

The Legal Principles

[15] For the plaintiff to be successful in its application, it has to satisfy the requirements set out in Rule 60(1) and (2) of the Rules of Court. Rule 60(1) and (2) provide:

'(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.

(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) If the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit and the notice of application must state that the application will be set down for hearing on a date fixed in the case plan order.’

[16] In the leading case of *Maharaj v Barclays National Bank Limited*³ Corbett JA (as he then was) pointed out that the ‘extraordinary and drastic nature’ of summary judgment was ‘based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law’. To this end, it was therefore important that the affidavit made in support of an application for summary judgment must be made by a person who had ‘personal’ knowledge of the facts and must be one in which the cause of action and the amount if any, are verified. It has been held subsequently that it will suffice if someone who has ‘first-hand’ and not necessarily ‘personal’ knowledge of the facts, and can thus verify the cause of action, deposes to such affidavit. Corbett JA said:

“While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised ... The grant of the remedy is based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to by either the plaintiff himself or by someone who has personal knowledge of the facts.

³ *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 422G.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court ... The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it ..."⁴

[17] A defendant wishing to oppose summary judgment has to invoke the procedure set out in Rule 60(5) which provides it with the following steps to follow, namely that:

(a) he must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given⁵ or

(b) he may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may by leave of court be supplemented by oral evidence) that he has a *bona fide* defence to the claim on which summary judgment is sought or he has a *bona fide* counterclaim against the plaintiff⁶.

[18] The affidavit must disclose the nature of defence and the material facts relied upon⁷. The defendant need not deal exhaustively with the facts and evidence relied upon to substantiate those facts but 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 determine whether the affidavit discloses a *bona fide* defence or not.

Discussion

[19] The proper starting point is the application. If the application for summary

⁴ At 423 A – H. I have omitted the authorities to which the Court has had reference in the passage quoted.

⁵ Rule 60(5)(a).

⁶ Rule 60(5)(b).

⁷ *Slabert v Volkscas Bpk* 1985 (1) SA 141 (T)

judgment is defective then that is the end of the matter⁸. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons. In the South African case of *FirstRand Bank Limited v Beyer*⁹ Ebersohn AJ dealt with a summary judgment application brought by First Rand Bank which stated that it acted as “agent” on behalf of Saambou Bank Limited in relation to a mortgage bond granted by the defendant in favour of the latter bank. The deponent to the affidavit in support of the application for summary judgment in that case, one Von Mohlman, described herself as “*Manager Arrears – Legal in the employ of First Rand Bank*”. Her affidavit stated the following:

“I have personal knowledge of the facts and records relating to this matter, the cause of action as well as the amount owing by the respondent to the applicant. I can and do swear positively to the facts, verify the cause of action and the amount claimed and confirm all such to be true and correct. I confirm that the respondent is currently in arrears with his monthly repayments in the amount of R100 411,37.

I verify that the respondent is indebted to the applicant as set out in the summons. I verify the cause of action on which the applicant’s claim against the respondent is based as set out in the summons.”¹⁰

[20] Ebersohn J had the following to say in respect of that allegation:

“It seems to me from the many similarly worded affidavits filed in support of applications for summary judgment which come before this motion court that plaintiffs nowadays apparently are of the opinion that an affidavit deposed to by anybody in the employ of a plaintiff firm, who mechanically goes through the motions and makes an affidavit ‘verifying’ the cause of action and the amount owing, would suffice to obtain summary judgment. The tragedy is that such plaintiffs often get away with it and obtain summary judgments on the strength of such lacking affidavits.

An analysis and consideration of rule 32(2) clearly show that the court must, from the

⁸ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 115 (KZP) at para [25].

⁹ *First Rand Bank Limited v Beyer* 2011 (1) SA 196 (GNP)

¹⁰ Paragraph [6].

facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and be able to form the opinion that there was no *bona fide* defence available to the defendant, and that the notice of intention to defend was given solely for the purpose of delay.

The affidavit deposed to by Von Mohlman lacks the necessary evidential material from which the court could make a finding that it suffices as far as rule 32(2) requires. Although she refers to her knowledge of 'records', the records are not identified at all and one is left with doubt whether it is the records of First Rand Bank Ltd or Saambou Bank Ltd, and whether the records were complete or not.

It is clear that strict compliance with the provisions of Rule 32(2) is required, for a summary judgment is a final judgment unless reversed on appeal. A summary judgment is an extremely extraordinary and drastic remedy, often referred to as a draconian measure. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy must, in my view, comply strictly with the requirements of the rule."¹¹

[21] Later in the judgment, Ebersohn AJ stated the following:

"Companies, firms and other legal *personae*, like the plaintiff, can only speak and act through a representative, and therefore the deponent on behalf of such company or legal *personae* has to state unequivocally that the facts were within his personal knowledge and furnish particulars as to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it, and to be able to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes.

An employee of a bank like Von Mohlman will clearly not acquire personal knowledge of every one of millions of accounts with her employer bank, and the supporting documents thereto, and would clearly not be able to testify with regard thereto in an open court. To argue that her evidence becomes relevant and acceptable just because it is put before the court by way of an affidavit would be a fallacy and unacceptable. It is thus incumbent upon the court to be strict with regard to summary judgments and to ensure that

¹¹ Paragraphs [8] to [11].

sufficient positive material, and not hear-say matter, appears *ex facie* the affidavit filed in support of an application for summary judgment, to warrant a factual finding by the court to the effect that the deponent happens to be a competent deponent.

If the necessary and required particulars were not provided in the affidavit the court is obliged *mero motu* to refuse the application for summary judgment, whether it is opposed or not.”¹²

[22] I align myself with the pronouncements by Justice Ebersohn, Acting. In the present matter the plaintiff’s affidavit in support of the application for summary judgment is deposed to by one Catherina Olivier who makes oath and state that:

“1.1 I am an adult female and presently employed by the Applicant as Business Manager. The Applicant’s physical address is at 5 Nickel Street, Prosperita, Windhoek, Namibia.

1.2 The facts set out herein fall within my personal knowledge, save where otherwise stated, and are true and correct.

1.3 I am duly authorised by the Applicant to bring this application for summary judgment against the Defendant and to depose to this affidavit.

2.

I can and do hereby swear positively to the fact that the defendant is indebted to the Plaintiff in respect of the claim as more fully set out in the Particulars of Claim and on the grounds as stated therein.

3.

I verily believe that the Defendant does not have a *bona fide* defence and have filed a notice to defend solely for the purpose of delay.

4.

¹² Paragraphs [19] to [22].

WEREFORÉ I respectfully pray that it may please the above Honourable Court to grant me the relief as set out in the accompanying notice of motion.”

[23] I echo the words of Justice Ebersohn, Acting that an analysis and consideration of Rule 60(2)(a) clearly shows that the Court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any. Although Ms Olivier unequivocally states that the facts set out in the affidavit fall within her personal knowledge she fails to furnish particulars as to how the knowledge was acquired by her so as to enable the court to assess the evidence put before it, and to be able to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes. To this extent the plaintiff’s affidavit is defective.

[24] The second difficulty which confronts the plaintiff’s affidavit supporting the application for summary judgment is the fact that Ms Olivier simply states that she “... can and do hereby swear positively to the fact that the defendant is indebted to the plaintiff in respect of the claim as more fully set out in the particulars of claim and on the grounds stated therein.” The Rule (that is Rule 60(2)(a)) requires the deponent to the affidavit to verify the cause of action. Ms Olivier does not verify the cause of action she simply swears that the defendant is indebted to the plaintiff in respect of the claim as more fully set out in the plaintiff’s particulars of claim. To this extent the application is defective and must fail.

[25] There remains only the question of costs. It is a well-established principle of our law that costs are in the discretion of the Court and that costs follow the event. No reasons have been advanced to me why this general rule must not apply. As a result, the plaintiff must pay the defendants’ costs.

[26] In the result, I make the following Order:

[26.1] The application for summary judgment is dismissed.

[26.2] The plaintiff must pay the defendant's costs.

[26.3] The defendants are given leave to defend the action.

[26.4] The case is postponed to 23 February 2021 at 08:30 for a Case Planning conference Hearing.

[26.5] The parties must file a joint case plan by not later than 18 February 2021.

S UEITELE
Judge

APPEARANCES

PLAINTIFF:

Ray Silungwe
Of Silungwe Legal Practitioners

DEFENDANTS:

SJ Jacobs
Instructed by Ellis Shilengudwa Inc.