REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING APPLICATION: SUMMARY JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2020/05012

In the matter between:

JACK TRACKS SWA (PTY) LTD **APPLICANT**

and

UNION TILES WINDHOEK (PTY) LTD **RESPONDENT**

Neutral Citation: *Jack Tracks SWA (Pty) Ltd v Union Tiles Windhoek (Pty) Ltd* (HC-MD-CIV-ACT-OTH-2020/05012) [2021] NAHCMD 383 (09 July 2021)

CORAM: SIBEYA J
HEARD: **27 MAY 2021**
DELIVERED: **09 JULY 2021**
REAONS: **30 AUGUST 2021**

Flynote: Practice – Summary Judgment based on a lease agreement – Defendant opposing summary judgment application disclosing the defence and the material facts

relied upon – Court satisfied that the defence raised sufficiently raises triable facts – Summary judgment application dismissed.

Summary: The facts are as they appear in the judgment below

ORDER

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1. The summary judgment application is dismissed.
2. The applicant must pay the respondent's costs of opposing this application, limited to N$20,000 in terms of rule 32 (11).
3. The matter is postponed to 7 September 2021 at 14h00 for status hearing.

RULING

SIBEYA J

Introduction

[1] The court is seized with an opposed application for summary judgment. The applicant and respondent in these interlocutory proceedings are the plaintiff and the defendant in the main action. For ease of reference, I will refer to the applicant and respondent as they appear in the main action and where reference is made to both of them, they will be referred to as "the parties".

[2] The plaintiff instituted action against the defendant on 02 December 2020 where it sought the following:

a) An order confirming the cancellation of the agreement between the parties.
b) Ejectment of the defendant from the property at Erf 782 Daimler Street, Windhoek.
c) Payment of N$705 627.45 for outstanding rental.

d) Payment of an amount of N$65 872.98 for arrear City of Windhoek accounts.

e) Damages of N$137 064.33 calculated from December 2020 to the date when the defendant vacates the property.

f) Interest on the said amounts calculated at the rate of 20% per annum from date of judgment to date of final payment.

g) Costs of suit on an attorney and client scale.

[3] After the defendant entered an appearance to defend the action, the plaintiff filed an application for summary judgment for:

a) Confirming the cancellation of the lease agreement.

b) Ejectment of the defendant from Erf 782 Daimler Street Windhoek with immediate effect.

c) An order that the defendant pays the plaintiff an amount of N$642 171.74 for arrear rent.

d) An order that the defendant pays the plaintiff an amount of N$137 064.33 for damages for rent calculated from 01 March 2020 to the date that the defendant vacates the property.

e) Costs of suit on an attorney and client scale.

[4] The cause of action is premised on a written lease agreement concluded between the parties on 12 June 2008 (hereinafter referred to as “the main agreement”) and subsequent several addendums thereto marked “JT2”, “JT3” and “JT4”. The plaintiff claims that the defendant breached the main agreement with addendums by failing to pay the rental amounts due, settle arrear rental and further failed to pay for water and electricity.[1] The defendant disputes the alleged breach of the agreement and consequentially all the relief sought by the plaintiff.

The parties

[1] Para 10 of the Particulars of Claim.

[5] The plaintiff is Jack Tracks SWA (Pty) Ltd, a private company incorporated and registered according to the laws of Namibia with its principal place of business situated at No. 5 Daimler Street, Windhoek.

[6] The defendant is Union Tiles Windhoek (Pty) Ltd, a private company incorporated and registered according to the laws of Namibia with its principal place of business situated at Erf 782 Daimler Street, Windhoek.

[7] Mr. Nekwaya appeared for the plaintiff while Mr. Heathcote appeared for the defendant.

Background

[8] On 12 June 2008, the plaintiff represented by its director Anita Savoldelli ("Anita") and the defendant represented by its director Jorge Neves ("Mr. Neves") entered into a written lease agreement. The defendant would lease four warehouses, a flat and an open yard (jointly referred to as "the property") for N$53 178.50 per month from 01 June 2008 to 31 May 2011 for a period of three years with an option of renewal.[2] The rental amount shall be payable in advance on or before the 07th day of each month.[3] The rental agreement shall be subject to escalation at the rate of 8.5% annually.[4] The parties further agreed that the defendant shall pay for water, electricity, sewerage and sanitation services and other services or municipal charges levied.[5]

[9] The property was to be utilised for business activities as storage facilities, offices and warehousing.[6]

[10] Should the defendant fail to pay the amounts due, the parties agreed that the plaintiff would be entitled to summarily cancel the lease agreement without

[2] Clause 4.1, 4.1.1, 4.1.2, 4.1.3 and 4.3 of the main agreement.
[3] Clause 4.2 of the main agreement.
[4] Clause 4.5 of the main agreement.
[5] Clause 12.1 of the main agreement.
[6] Clause 7 of the main agreement.

compromising any of its existing rights, including evicting the defendant and claiming damages.[7]

[11] Clause 17.1 of the main agreement contains a non-variation clause and provides that:

> 'No alteration, cancellations, variation of, or addition to this lease including warranties or guarantees shall be of any force or effect unless reduced to writing and signed by all parties to this Agreement or their duly authorised representatives.'

[12] The parties signed addendums which the plaintiff claims extended the lease period. [8]

[13] The plaintiff claims that the defendant breached the agreement when it defaulted in rentals and municipal account payments when due. Plaintiff submits that some of the arrear rental amounts were paid in the interim, leaving the outstanding amount of N$ 642 171.74. Armed with the said breach on the part of the defendant, the plaintiff seeks the relief claimed as it argued that the defendant has no *bona fide* defence. It is noted that the application for summary judgment does not include the relief sought in the particulars of claim for payment of arrear City of Windhoek accounts of N$ 65 872.98. The plaintiff submitted in its heads of argument that it seeks no judgment regarding this claim. It consequentially follows that the said claim is of no moment for purposes of these interlocutory proceedings and deserves no further mention.

[14] The defendant set out grounds in an affidavit upon which it claims not to have entered an appearance to defend for purposes of delay but rather that it has a *bona fide* defence to the action.

The Law

[7] Clause 15.1 and 15.2 of the main agreement.
[8] Annexure "JT2", "JT3" and "JT4".

[15] The law on summary judgment applications is trite. Summary judgments are drastic remedies available to the plaintiff where no *bona fide* defence to the claim exist. Mainga JA in *Kukuri v Social Security Commission,*[9] while discussing the drastic remedy of summary judgments, quoted with approval the following passages by Corbett JA in *Maharaj v Barclays National Bank Ltd:*[10]

'"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." The learned judge continued at 426A-E to say the following:

"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.

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. (See generally, *Herb Dyers (Pty) Ltd v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N);

[9] *Kukuri v Social Security Commission* Case No. SA 17/2015, Unreported judgment of the Supreme Court delivered on 29 November 2016.
[10] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G.

Arend and Another v Astra Furnishers (Pty) Ltd, *supra* at pp.303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine it by the standards of pleading. (See *Estate Potgieter v Elliot*, 1948 (1) SA 1084 (C) at p 1087*; Herb Dyers* case, supra at p 32.)"'

Analysis of the defences raised

Lack of personal knowledge

[16] It is a fact that the when the main agreement was entered into, the plaintiff was represented by Anita in her capacity as its director while the affidavit supporting the application for summary judgment was deposed by Ms. Nadia Savoldelli ("Nadia"). Nadia states in her affidavit, beyond dispute, that she is a director and public officer of the plaintiff. She further states that she is authorised and able to depose to the affidavit, the content of which falls within her personal knowledge. She obtained her knowledge from records and documents of the plaintiff.

[17] The defendant takes issue with the personal knowledge of facts deposed to by Nadia or lack thereof as submitted Mr. Heathcote. It was further submitted on behalf of the defendant that Nadia bears no personal knowledge of the circumstances under which the main agreement was concluded where the plaintiff was represented by Anita and Anita did not provide a confirmatory affidavit. Mr Nekwaya for plaintiff submitted contrariwise.

[18] Rule 60(2) of the Rules of this provides that:

'(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 positively swear 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.'

[19] The defence of lack of knowledge can be disposed of without breaking a sweat. It is not in dispute that Nadia obtained knowledge of the facts which she verified to be true, from records and documents of the plaintiff. In *Standard Bank of South Africa Limited v Secatsa Investments (Pty) Ltd and Others*,[11] the court said the following during the discussion of whether or not first-hand knowledge of a fact was required from a deponent who deposed to an affidavit on behalf of a corporate entity:

'It is clear from the case law that first-hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that, where the plaintiff is a corporate entity, the deponent may well legitimately rely for his or her personal knowledge of at least certain of the relevant facts and his or her ability to swear positively to such facts, on records in the company's possession (See Erasmus, Breitenbach and Van Loggerenberg (op cit at B1-215-B1-217), Herbenstein and Van Vinsen The Civil Practice of the Supreme Court of South Africa 4th ed by Van Vinsen, Cilliers and Loots (edited by Dendy) 1997at 437-8 and cases there cited).'

[20] I find that the above principle has equal application in our jurisdiction. It would be an arduous task to expect a deponent to an affidavit in support of an application for summary judgment, on behalf of the plaintiff which is a corporate entity, to have first-hand knowledge of every fact verified as correct. I find that it is sufficient if the personal knowledge is said to have been derived from records and documents of the company. Nadia put the argument to rest when she proceeded to state in her affidavit that the company documents relied on are within her control.[12] The defence of lack of knowledge in view of the foregoing is therefore without merit and falls to be dismissed.

The latest Addendum

[21] The plaintiff claims that the parties signed an addendum marked "JT4" to renew the agreement ("the latest addendum"). The parties agreed to extend the lease

[11] *Standard Bank of South Africa Limited v Secatsa Investments (Pty) Ltd and Others* 1999 (4) SA 229 (C) at 235 A - C.
[12] Para 3.1 of the supporting affidavit to the application for summary judgment.

agreement on the same terms and conditions of the main agreement for a period of five years from 01 June 2019 to 21 May 2024. For all intent and purpose, the latest addendum read together with the main agreement appear to constitute the lease agreement between the parties. The latest addendum further provides that the rental amount was fixed at N$ 126 922.41 to escalate at the rate of 8% for every renewal period.

[22] Plaintiff claims in the particulars of claim that the defendant breached the lease agreement by failing to pay the rental amount alternatively failing to settle the arrear rental totalling N$705 627.45 consisting of the period March 2020 to date. I must express concern about pleadings which contain ambiguous terms. When the plaintiff provides in the particulars of claim that the claim is from March 2020 to date, it creates at least three interpretations to the reader. To date could mean the date on which the summons were issued, in *casu*, 02 December 2020, or the date of judgment or the date of final payment. Parties should therefore provide particulars with sufficient clarity to enable the defendant to appreciate the case which he or she or it has to answer.

[23] Mr. Neves, who deposed to the affidavit opposing summary judgment stated that at the time of the conclusion of the latest addendum, the new monthly rental was still up for negotiation. The monthly rentals, Mr. Neves said, were exorbitant considering the fact that the defendant expended, with the consent of the plaintiff, significant amounts of about N$393 358.21 to renovate and maintain the property. The plaintiff created a perception to the defendant that the defendant will be compensated for same.

[24] It cannot miss the eye to note that clause 10.4 of the main agreement stipulates that amongst other obligations, the Lessee should not make alterations, additions or improvements to the property without the written consent of the Lessor. The defendant did not produce any written consent from the plaintiff to authorise the renovations and maintenance of the property. To the contrary, the defendant says that the plaintiff created an impression to the defendant that it will be compensated for the renovations and maintenance. If it is found that the main agreement was properly extended by the

latest addendum, then this argument falls flat as it will be contrary to clause 10.4 of the main agreement.

[25] Clause 2.3.3 of the latest addendum provides that:

'The Lessee and the Lessor agreed that no revenue stamps as required in terms of the Stamp Duties Act, Act 15 of 1993, on the extended lease, such amount to be paid within 7 (seven) days from signature of this Addendum.'

[26] Mr. Neves stated in the opposing affidavit that at the conclusion of the latest addendum, the plaintiff amended the standard clause relating to payment of stamp duties to read that the parties agreed that no stamp duties would be payable on the extended period of the lease. When the alleged exorbitant rental amount of N$126 911.41 was queried by the defendant, the plaintiff's representative responded that "take it or leave it" as the defendant was already saved a lot of money when the obligation to pay stamp duties was deleted. Mr. Neves allegedly alerted the plaintiff's representative on the illegality of such clause. The plaintiff's representative insisted on the agreement being signed on the terms presented nevertheless. Mr. Neves signed the latest addendum on behalf of the defendant out of the consequential risk of having to search for other business premises at short notice, the opposing affidavit states. The defendant submits that the plaintiff intended to avoid paying stamp duties.

[27] Section 15 of the Stamp Duties Act[13] provides that:

'Any contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to precluding objection or inquiry relating to the due stamping of any instrument, shall be void.'

[28] Mr. Nekwaya submitted that clause 2.3.3 of the latest addendum does not provide that the parties should avoid payment of stamp duties. He further submitted that the clause actually makes it mandatory for the parties to pay the revenue stamp on the

[13] Act 15 of 1993.

new period of the lease within seven days of signature. The plaintiff further stated that in any event, an adequately stamped copy of the latest addendum will be produced at the hearing of the application for summary judgment.

[29] Clause 2.3.3 of the latest addendum provides for two versions. The first part of the clause provides that the parties agreed that no revenue stamps are required as per the Stamp Duties Act. The later part of the clause, on the other, provides that the stamp duties must be paid on the extended lease within seven days from date of signature of the latest addendum.

[30] The main agreement provides in clause 6 that: “The costs … including revenue stamps shall be borne by the Lessee.”

[31] The defendant disputes paying for revenue stamps relating to the latest addendum and emphasised that the plaintiff deleted the obligation to pay for revenue stamps. If the parties indeed agreed to avoid paying stamp duties, then the latest addendum would be *void ab initio*. When one considers that at this stage of the proceedings, where a defence raised is based on factual allegations, the court does not determine such facts or the balance of probabilities (as per the *Maharaj* case *supra*), it follows that the factual allegations contained in the opposing affidavit in support of the defence that the latest addendum is void for avoidance of payment of stamp duties, raises a triable issue which could be resolved at trial.

[32] I take note that the case of the plaintiff is centred on the main agreement together with the latest addendum to such main agreement. If the latest addendum is found to be void for reasons stated above, then the main agreement would not assist the plaintiff as it would have lapsed by effluxion of time without being extended by such latest addendum. In such circumstances the plaintiff could rely on an oral agreement. The defendant says in the opposing affidavit that the parties varied the main agreement to the extent that the defendant will pay one half of the monthly rental from March 2020 until the end of the COVID 19 State of Emergency and lockdown. The State of Emergency and lockdown proceeded at different levels from March to September 2020.

During this whole period, the defendant continued to pay rent but the parties are at loggerheads in respect of the alleged arrear rentals.

[33] It appears to me that the defendant raised a *bona fide* defence to the plaintiff's claim based on the challenge to the validity to the latest addendum and further that owing to the COVID 19 Regulations and lockdown, the parties agreed that the defendant should only pay half of the rental amount for the duration of the lockdown. Without weighing and determining the balance of probabilities of the factual allegations raised by the defendant, I find at the very least, that the defendant raised a *bona fide* defence which can be resolved at trial.

[34] One other debated issue between the parties is the fact that the revenue stamp of N$ 10.00 affixed to the latest addendum annexed to the particulars of claim is inadequate. The is no qualm about this status quo. It is on this basis that the plaintiff submitted that a sufficiently stamped latest addendum will be produced at this hearing. A copy of the latest addendum with several revenue stamps affixed to it was produced at the hearing. To this, the defendant had another arsenal in the string that the latest addendum was still not properly stamped. Inviting as this argument appears, I find it unnecessary to address at this stage in view of the findings that I have made hereinabove.

Conclusion

[35] As the matter stands, I am satisfied that the defendant's affidavit opposing summary judgment sufficiently discloses the nature of the defence and the material facts relied upon. I am of the view that the defendant has set out triable facts on which a *bona fide* defence to the claim is based.

[36] Having found that the defendant raised a *bona fide* defence, as a matter of consequence the application for summary judgment ought to be refused. In the premises granting summary judgment now at this stage would be premature.

Costs

[37] Ordinarily costs follow the cause. Considering that the court is seized with interlocutory proceedings, the costs to be awarded to a successful party are subject to rule 32 (11) unless the court is convinced otherwise. In *casu*, I am not persuaded that the defendant, despite engaging one instructing and two instructed counsel deserve to be awarded costs above what is provided for is rule 32 (11).

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

1. The summary judgment application is dismissed.
2. The applicant must pay the respondent's costs of opposing this application, limited to N$20,000 in terms of rule 32 (11).
3. The matter is postponed to 7 September 2021 at 14h00 for status hearing.

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O SIBEYA

Judge

APPEARANCES

PLAINTIFF:	E NEKWAYA
	Instructed by ENSAfrica Namibia
	Windhoek
DEFENDANTS:	R HEATHCOTE SC assisted by
	Y CAMPBELL,
	Instructed by Neves Legal Practitioners
	Windhoek