

Practice Directive 61

“Annexure 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: BEVEN LISWANI KAMWI AND ANOTHER v HAROLD ROTNIE GERTZE AND ANOTHER	Case No: HC-MD-CIV-ACT-CON-2021/02706
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Schimming-Chase	Date of hearing: 7 December 2021
	Date of order: 7 December 2021
Neutral citation: <i>Kamwi v Gertze</i> (HC-MD-CIV-ACT-CON-2021/02706) [2021] NAHCMD 572 (7 December 2021)	
Results on the merits: Merits considered.	
<p>Having heard Ms I Mupinda, on behalf of the first and second applicants, and Mr Gertze, the first respondent in person, and having read the papers filed of record for HC-MD-CIV-ACT-CON-2021/02706.</p> <p>IT IS HEREBY ORDERED THAT:</p> <p>Summary judgment is granted in favour of the applicants/plaintiffs against the respondents/defendants, jointly and severally, the one paying the other to be absolved in the following terms.</p> <ol style="list-style-type: none"> 1. Payment of the amount of N\$96,730.00 2. Interest on the aforementioned amount calculated at the rate of 20% per annum a <i>tempore morae</i> from date hereof to date of full and final payment. 3. Costs of suit. 4. The matter is removed from the roll and considered finalised. 	

EX TEMPORE

SCHIMMING-CHASE J

[1] Serving before me is an opposed application for summary judgment. The first and second applicants (“the applicants”) instituted action proceedings in this court against the first and second respondents (“the respondents”), during July 2021 seeking payment of the outstanding balance of a deposit which the respondents were to have paid to the applicants as part of the purchase price of certain immovable property, which was duly transferred to the respondents on 20 May 2021.

[2] In their particulars of claim the applicants (who are married in community of property) allege that the parties concluded a written agreement in terms of which the respondents (also married) purchased from the applicants, certain immovable property situate at Rocky Crest for a price of N\$1,450,000.

[3] It is further pleaded that it was an express term of the written agreement that the respondents would pay a cash deposit to the applicants in the amount of N\$280,000, which deposit was to be made into the trust bank account of Phillip Swanepoel Legal Practitioners. Attached to the particulars of claim was a copy of a document referred to therein as a cash deposit payment agreement. In this document, it is clear that the respondents expressly agreed to pay a cash deposit of N\$280,000. Also attached to the particulars of claim is a copy of a deed of transfer, showing that the immovable property was transferred to the respondents on 20 May

2021.

[4] It is further alleged that the respondents, in breach of the written agreement, only paid half of the agreed deposit amount. Resultantly, the applicants' sought, inter alia, payment of the outstanding amount of N\$140,000.

[5] The respondents noted their defence to the applicants' claim, prompting the present application wherein the applicants seek the following relief:

'1. That the respondents jointly and severally, the one paying the other to be absolved to pay the plaintiffs in the amount of N\$96,730.00.

2. Interest on the aforesaid amount calculated at a rate of 20% per annum a tempore morae from the date of judgment.

3. Costs of suit on attorney client scale.'

[6] The first applicant deposed to the affidavit in support of the application for summary judgment, verifying the applicants' cause of action, and stated that in the applicants' opinion the respondents had no bona fide defence to the applicants' claim.

[7] The amount verified in the affidavit in support of the summary judgment application is less than the N\$140,000.00 contained in the particulars of claim, namely the amount of N\$96,730.00. The applicants proffered an explanation for the lesser amount claimed in their affidavit as follows:

'I pause to highlight that the amount as per the cash deposit payment agreement was N\$280 000.00. The Defendants paid N\$140 000.00 into the account of Phillip Swanepoel Legal Practitioner and a further payment of N\$43,270.00 was deposited into the account of Swanepoel Legal practitioners. A copy of the proof of payments are attached hereto and marked as "A". Therefore, the remaining balance is N\$96 730.00.'

[8] The proof of payment of N\$43,270.00 was annexed to the first applicant's affidavit verifying the cause of action. As previously mentioned, the cash deposit agreement and the deed of transfer were annexed to the particulars of claim.

[9] The self-representing respondents opposed the application and filed their affidavit resisting summary judgment. The respondents did not dispute the veracity of the agreement of sale of the aforementioned immovable property, or cash the deposit agreement, or the proof of payment attached to the affidavit in support of the summary judgment application. They did not dispute that the property was

transferred to them either.

[10] What the respondents raise to stave off the summary judgment application, is that they have commenced a third-party procedure to join Phillip Swanepoel as joint wrongdoer, for purposes of claiming an apportionment in terms of the Apportionment of Damages Act 34 of 1956. Respondents in this regard, averred that the third-party notice must ensure that 'the issue of miscalculation between the defendants and third party should properly be determined between the defendants and third party.' The basis of the miscalculation is not dealt with by the respondents at all.

[11] It is noted that a copy of the cash deposit agreement, which is a liquid document¹ was annexed to the particulars of claim but not annexed to the affidavit in support of the summary judgment application, as required by rule 60(1)(a) read with rule 60(3).

[12] The legal principles relating to summary judgment and what the parties are required to prove on a balance of probabilities were summarised by the Supreme Court decision of *Di Savino v Nedbank Namibia*² as follows:

(a) The opposing affidavit to a summary judgment application must disclose fully, the nature and the grounds of the defence as well as the material facts relied upon.

(b) One of the ways in which a 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.

(c) 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 probabilities lie.

¹ A liquid document may be defined as a document in which the debtor acknowledges over his signature, or that of a duly authorised agent, or is in law regarded as having acknowledged without his or her signature being actually affixed to the document, his indebtedness in a fixed determinate sum of money. Examples of such documents include cheques, promissory notes, mortgage bonds, acknowledgements of debt and deeds of sale. See Herbstein & Van Winsen, the Civil Practice of the High Courts of South Africa fifth edition volume 2 at 1315 and the authorities collected at footnote 26 and 27.

² *Di Savino v Nedbank Namibia* 2012 (2) NR 505 SC.

(d) The enquiry foreshadowed by the rule 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. If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

(e) 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'.

(f) 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.

(g) Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the defendant is correct. What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may succeed at trial, and, if successful, will establish a defence that is good in law. Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.

(h) The failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect may, nevertheless be cured by reference to other documents relating to the proceedings that are properly before the court.

(i) The principle that is involved in deciding whether or not to grant summary judgment, is to look at the matter 'at the end of the day' on all the documents that are properly before the court.

(j) Where the opposing affidavit does not satisfy the requirements of the rule the court has a discretion whether or not to refuse summary judgment. This discretion must be exercised, with due regard to the drastic nature of the procedure of

summary judgment.

(k) This approach to the opposing affidavit in summary judgment proceedings is a recognition of the stringent remedy of summary judgment, as well as the right of a plaintiff against a defendant who has no bona fide defence and who has entered appearance to defend to delay the recovery of the debt.³

[13] In applications for summary judgment, the applicant should also not be punished simply because his or her papers were technically wanting, albeit in an insignificant respect.⁴

[14] In *Maharaj v Barclays National Bank Limited*⁵ it was held that that 'while undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications that the plaintiff do what is required of him by the Rule. Where there is a defect in an application, 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 ...'⁶

[15] From a consideration of the affidavits and all documents before court, the applicants have presented and verified their claim, together with copies of all documents relied upon in support of the claim, namely a copy of the cash deposit agreement, the deed of transfer, and proof of payment giving rise to the lesser amount claimed.

[16] The respondents have not made a single allegation denying that the amount claimed is due, or that the contract for sale of immovable property was concluded as alleged, or that the property was transferred to them, or that the cash deposit agreement was concluded. Payment by the respondents of the amounts of N\$140,000 and N\$43,270 in reduction of the amount due in terms of the cash deposit agreement was also not denied by the respondents. Even the stillborn

³ *Di Savino* at [23] - [31].

⁴ *Mushimba v Autogas (Pty) Ltd* 2008 (1) NR 253.

⁵ *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A).

⁶ *Maharaj* at 423 A – H.

attempt at joinder and the basis of the “miscalculation” is not explained by the respondents in their affidavit. At the hearing, the first respondent submitted in essence, that the intention is to attempt to pay off the amount claimed in instalments, which is essentially an admission of the applicants’ claim.

[17] From a comprehensive consideration of the answering affidavit, the respondents have not fully, materially, or at all, shown to the court that there is an arguable or a triable defence. Instead, only unexplained and meritless technical points were raised.⁷

[18] Applicants sought a costs order exceeding the maximum of N\$20,000.00 contained in rule 32(11) on the grounds that the respondents unnecessarily delayed and frustrated the finalisation of the matter by taking unnecessary and meritless technical points, which caused unnecessary legal costs.

[19] It is true that the respondents – who are unrepresented – may have frustrated the proceedings, however their conduct does not warrant a punitive costs order. Summary judgment is an extraordinary and stringent remedy, and respondents, who were unrepresented attempted to put forward a defence, even though unsuccessful.

[20] I am guided in this regard by the decision of *South African Poultry Association and Others v Ministry of Trade and Industry and Others*⁸ where this court observed the following factors to be determinative in the exercise of the court's discretion with respect to rule 32(11):

[67] . . . The rationale of the rule is clear: to discourage a multiplicity of interlocutory motions which often increase costs and hamper the court from speedily getting to the real disputes in the case. A clear case must be made out if the court is to allow a scale of costs above the upper limit allowed in the rules. . . . The onus rests on the party who seeks a higher scale. To add to the factors . . . the parties must be litigating with equality of arms and it will be a weighty consideration whether both crave a scale above the upper limit allowed by the rules. Another critical consideration will be the reasonableness or otherwise of a party during the discussions contemplated in rule 32(9). Another important consideration is the dispositive nature of the interlocutory motion and the number of interlocutory applications moved in the life of the case.’

⁷ See *Kelnic Construction (Pty) Ltd v Cadilu Fishing* 1998 NR 198.

⁸ *South African Poultry Association and Others v Ministry of Trade and Industry and Others* 2015 (1) NR 260 (HC).

[21] A case has not, in my opinion, been made out for departing from the scale of costs provided for in rule 32(11).

[22] For the foregoing reasons, the following order is made:

Summary judgment is granted in favour of the applicants/plaintiffs against the respondents/defendants, jointly and severally, the one paying the other to be absolved in the following terms.

1. Payment of the amount of N\$96,730.00
2. Interest on the aforementioned amount calculated at the rate of 20% per annum a *tempore morae* from date hereof to date of full and final payment.
3. Costs of suit.
4. The matter is removed from the roll and considered finalised.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
First and second applicants	First and second respondents
Ms I Mupinda of Brockhoff & Associates Legal Practitioners	Mr H Gertze The first respondent in person

