REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/02286

In the matter between:

JOHANNES NICOLAAS HAMMAN **PLAINTIFF**

and

SAFARI HOTELS (PTY) LTD **DEFENDANT**

Neutral citation: *Hamman v Safari Hotels* (*Pty) Ltd* (HC-MD-CIV-ACT-CON-2020/02286) [2021] NAHCMD 73 (16 February 2021)

Coram: Ndauendapo J
Heard: 8 December 2020
Delivered: **16 February 2021**
Reasons: **25 February 2021**

Flynote: Civil procedure - Summary judgment – whether defendant's opposing affidavit raises bona fide defence to particulars of claim. Bona fide defence raised – Defendant must satisfy court that it has bona fide defence – Defendant must deposed to facts which, if true, would establish a defence – Court must be satisfied that

defendant has a good defence in law.

Practice - Summary judgment – Stringent remedy – Should be granted if court is satisfied that there are no triable issues.

Summary: The plaintiff sued the defendant for repayment of N$1,536,021. The repayment relates to monies the plaintiff paid in respect of stamp duties and insurance premiums. The N$1,536,021 was paid involuntarily and under protest to defendant. The plaintiff, defendant and other parties unrelated to this action entered into a sale of shares agreement in respect of which the sellers sold their shares to the purchasers. Clause 10.2.2 of the agreement provides:

> 'After payment of the Second Tranche as provided for in clause 5.1.2 above, JN Hamman shall be entitled to take over all benefits in respect of existing key-man life insurance policy(ies) relating to JN Hamman, provided he assumes full liability for all future life insurance premiums payable in respect of such policy(ies), it being the understanding that the Purchasers shall maintain this insurance until the date of payment of the Second Tranche and in the event that JN Hamman should pass away prior to payment of the Second Tranche as provided for in clause 5.1.2 above, apply the proceeds thereof towards payment of the Second Tranche.'

Payment of the second tranche took place on 28 February 2019 and cession of the benefits of the insurance policies had to take place on 1 March 2019.That did not happen. Defendant refused to cede the policies unless the plaintiff paid all stamp duties relating to the agreement and the premiums since March 2019. Plaintiff avers that he was never liable for payment of stamp duties relating to the agreement, but only to affix the stamp on the agreement as he was not the seller nor the purchaser of the shares. In order to avoid any situation of uncertainty, which would have prevailed had he died before cession of the policies to him, he paid the claim amount under protest. The plaintiff is now claiming repayment of that amount.

The defendant filed an opposing affidavit. Mr. Ellis, the chairperson of the board of the defendant, deposed to the affidavit. He states that he and the purchasers were orally informed that there was only one key man policy taken by the defendant on the life of plaintiff. However on transfer date, he ascertained that there were two endowment

policies and not one key man policy. He avers that was not authorised by the defendant.

He further states that the plaintiff was obliged to pay for the stamp duty as per clause 9.2 of the agreement. Clause 9.2 provides:

> 'On the Transfer Date the Sellers shall hand over to the Purchasers: 9.2.1 duly signed share transfer forms (CM42) in respect of the Shares, the Preference Shares and all the issued shares held by the Sellers or JN Hamman in Safari Casino (Pty) Limited, stamped as to 100% of the amount of stamps required in respect of such transfers.'

He states that, the defendant was not liable to pay the stamp duties on the share transfer certificates of the sellers.

He states that, the plaintiff instructed the company secretaries of the defendant to affix the stamps on the share transfer forms and invoiced the holding company, that was done without any authority from the board of the defendant or the holding company. 'It is therefore proper that plaintiff should reimburse the defendant for monies misappropriated.'

He further states that, once the policies were ceded to the plaintiff, he directly enjoyed the benefits of the premiums paid by the defendant from 1 March 2019 to date of cession, totalling N$738 000. Despite that, the plaintiff is claiming that amount without being entitled thereto.

He further states that, the defendant has raised triable issues and summary judgment should be refused.

Held that, as far as the issue of insurance policies is concerned, there is a non-variation clause in the sale of shares agreement. The agreement was signed by the plaintiff, defendant and other parties and therefore is binding. Most importantly, Mr Ellis was not a contracting party and what he believed as to the number and nature of the policies is irrelevant. Therefore, the allegation that the endowment policies were not authorised by the defendant is without merit and does not raise triable issues.

Held further that, in terms of clause 9.2 and 9.2.1 the seller had to pay for the stamp duty and the plaintiff in his personal capacity was not the seller and did not receive a purchase price and therefore there was no obligation on him to pay stamp duty. He only had to affix the stamp. The payment was done involuntarily and under protest. Therefore, no triable issue is raised.

Held further, that after the second tranche was paid on 28 February 2019, the defendant was under an obligation to cede the policies to the plaintiff, but it refused. Any premiums paid by defendant from 1 March 2019 to date of cession cannot be for the account of the plaintiff as no benefits would have accrued to him, but to the defendant, before cession to him.

Held further, that no bona fide defences were raised by the defendant. The application for summary judgment must succeed.

ORDER

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1. The application for summary judgment is granted.
2. The defendant is ordered to pay the costs of the plaintiff, such costs to include the costs of one instructing and two instructed counsel and such costs not to be capped in terms of rule 32(11).

JUDGMENT

NDAUENDAPO J;

Introduction

[1] Before me is an opposed application for summary judgment. The plaintiff,[1] Johannes Nicolaas Hamman, instituted action against the defendant, Safari Hotels (Pty) Ltd, a private company with limited liability duly incorporated in accordance with the company laws of the Republic of Namibia, claiming repayment in the amount of N$

[1] For the sake of convenience, I will refer to the parties in my judgment as in the summons.

N$1,536,021 from the defendant. The repayment relates to stamp duties for a Sale of Shares Agreement ("the agreement") and premiums for two insurance policies paid by the plaintiff to the defendant under protest. The defendant entered an appearance to defend the action. The plaintiff than launched this application for summary judgment. The defendant opposed the application and filed an opposing affidavit.

The particulars of claim

[2] In the particulars of claim, the plaintiff alleges that:

'[1] *In terms of a multi-party written Sale of Share Agreement ("the Agreement") concluded between plaintiff and defendant as well as other parties unrelated to this action, the plaintiff became entitled to take over all benefits of two existing insurance policies as from 1 March 2019 and for such purposes the defendant had to cede the policies in question to the plaintiff, effective as from 1 March 2019. A copy of the agreement is annexed as "A".*

[2] *Subject to what is pleaded below, all the terms and conditions of the Agreement has been fulfilled. The only clause of the Agreement that is relevant for purposes of this action, is clause 10.2.2 thereof, which provides as follows:*

"*After payment of the Second Tranche as provided for in clause 5.1.2 above, JN Hamman shall be entitled to take over all benefits in respect of existing key-man life insurance policy(ies) relating to JN Hamman, provided he assumes full liability for all future life insurance premiums payable in respect of such policy(ies), it being the understanding that the Purchasers shall maintain this insurance until the date of payment of the Second Tranche and in the event that JN Hamman should pass away prior to payment of the Second Tranche as provided for in clause 5.1.2 above, apply the proceeds thereof towards payment of the Second Tranche."*

[3] *The payment of the Second Tranche referred to in the above quoted clause 10.2.2 of the Agreement, in the amount of N$84,783,001.20, took place on 28 February 2019, as a result of which the cession of the benefits of the policies had to take place on 1 March 2019, on which day, and upon the cession of the policies being completed, the plaintiff would have become the owner and beneficiary of the policies and the further*

premiums of the policies would have become the responsibility and liability of the plaintiff.

[4] *The only existing policies relating to the plaintiff at the time of the conclusion of the Agreement, and, in fact, at all relevant times, are, and were, the following two insurance policies (collectively herein referred to as "the policies"):*

1. Sanlam Policy Number 10174258; and
2. Liberty Life Policy Number DYH202793.

[5] *Prior, and at the time the Agreement was entered into:*

1. the defendant was the beneficiary of the policies;
2. the defendant was liable to pay the premiums of the policies and
3. the plaintiff's life was insured by the policies.

[6] *Had the defendant complied with its obligations in terms of the Agreement:*

6.1 the plaintiff would have become liable for the premiums on the policies as from 1 March 2019, and would have, as from that date, become the owner and beneficiary of the policies; and
6.1 the defendant would have ceded the policies to the plaintiff on 1 March 2019.

[7] *The defendant breached the Agreement, by not ceding the Policies to plaintiff on 1 March 2019.*

[8] *As a result of the breach of the Agreement by defendant, it remained the beneficiary of the policies, had to, and did, pay the premiums on the policies as from 1 March 2019.*

[9] *Upon the plaintiff seeking cession of the policies from the defendant as aforesaid, the defendant refused to perform unless the plaintiff makes payment to the defendant of all stamp duties relating to the Agreement as well as all insurance premiums in respect of the policies as from 1 March 2019.*

[10] *The plaintiff is not, and never was, liable to the defendant for stamp duties relating to the Agreement as well as all insurance premiums in respect of the policies as from 1 March 2019.*

[11] *The plaintiff is not, and never was, liable to the defendant for stamp duties relating to the Agreement or the insurance premiums in respect of the policies prior to cession thereof to the plaintiff for the following reasons:*

11.1 *section 7(1)(h) of the Stamp Duties Act, 15 of 1993 provides that the persons respectively liable for duty and required to stamp any instrument referred to in that section shall be, in the case of the acquisition of any marketable security as contemplated in items 11(5) of Schedule 1 (which includes the sale of shares as in terms of the Agreement), the person by whom such marketable security is acquired. The plaintiff was neither the seller nor the acquirer of the shares in terms of the Agreement;*

11.2 *although the parties were entitled to agree that another regime shall apply to liability of stamp duties for the sale of shares in terms of the Agreement (i.e. a regime other than the one prescribed in the Stamp duties Act as set out above), the parties deliberately did not do so in the Agreement; and*

11.3 *had the plaintiff deceased after the effective date of 1 March 2019, and before the defendant complied with its obligations to cede the policies to the plaintiff, the proceeds from the policies would have been paid to the defendant.*

[12] *The premiums on the policies are due monthly in advance on the first day of each consecutive month.*

[13] *By the beginning of 2020, the defendant still refused to cede the policies to the plaintiff, making the unlawful demand that the plaintiff should pay the stamp duties for the Agreement and repay the premiums of the policies which the defendant paid as form 1 March 2019.*

[14] *As further premiums in respect of the policies would have become due to the relevant insurance companies and as a result of the uncertainty which would have prevailed if the plaintiff deceased before the defendant complied with its obligations in terms of the Agreement, the plaintiff paid the amounts so unlawfully demanded by defendant to the defendant under protest and in the manner set out below.*

[15] *The amount of N$1,536,021.00 was paid by the plaintiff to the defendant, under protest, on 18 February 2020.*

[16] *The amount of N$1,536,021.00 was correctly calculated and arrived at by the plaintiff as follows:*

16.1 *an amount of N$669,386.00 which constitutes the total stamp duties paid together with compound interest (although only simple interest would be applicable in circumstances where the defendant may have had a valid claim, which is denied) at the rate of 20% per annum calculated as from 1 March 2019 until date of payment of the amount of N$866,635.00 on 18 February 2020.*

[17] *The aforesaid payment was made:*

17.1 *Involuntary and under protest;*

17.2 *due to the pressure of the circumstances and to avoid the uncertainties which would have arisen had the plaintiff deceased before the policies were ceded by the defendant to the plaintiff, leaving the plaintiff's executor (of his estate) and his loved ones in an uncertain disarray of litigation in the plaintiff's absence.*

17.3 *as a result of the unlawful demand form the defendant that if such payment is not received, the defendant shall not cede the Policies relating to the plaintiff to him;*

17.4 *in respect of a non-existent debt;*

17.5 *subject to an unequivocal written statement of objection issued prior to payment attached hereto marked annexure "B"; and*

17.6 *sine causa in that the amount was neither due nor owing to the defendant by the plaintiff and the plaintiff have no legal duty to pay the defendant such amount or any part thereof.*

[18] *The defendant appropriated the payment received from the plaintiff, and has ceded the policies to the plaintiff on or about 26 March 2020, as a result of which the plaintiff became the owner and beneficiary of the policies as from that date.*

[19] *In the premises the plaintiff is entitled to repayment in the amount of N$1,536,021.00 from the defendant, which amount became due and payable to plaintiff by defendant on 18 February 2020 and which amount (or any part thereof) the defendant fails or refuses to pay to the plaintiff*.'

The opposing affidavit

[20] Mr Ellis, the Chairperson of the Board of Directors of the defendant, deposed to the opposing affidavit on behalf of the defendant. The defendant operates and owns two hotels on the same premises, known as Safari Hotel. The plaintiff was the Managing Director prior to 1 March 2017. The current shareholders were not directors and had no say in the affairs of the defendant.

[21] In the affidavit he sets out the acrimonious relationship between the three Hamman brothers and founders of the Trusts who were the shareholders in the holding company (JN Hamman Beherende Bellegings (Pty) Ltd), which hold all the issued shares in the defendant. The relationship between the siblings deteriorated to such an extent that the defendant was on the verge of being liquidated. To avert liquidation, the Sale of Shares Agreement ("the Agreement") was entered into between the parties.

[22] As "defences" to the application for summary judgment, Mr Ellis in summary states that the purchasers paid an inflated purchase price for the shares as no due diligence was done on the true values of the shares because of the acrimonious relationship that existed between the siblings.

[23] He states that at the time of the negotiations of the Agreement, he and the purchasers were orally informed that there was a single key man insurance policy taken out by the defendant on the life of the plaintiff. However, on the date when the policy had to be transferred to the plaintiff, on the date of payment of the second tranche as required by clause 10.2.2, did he (Ellis) ascertain that there were two endowment policies, instead of one key-man policy. He was provided with the two endowment policies by the broker. He questioned the contractual arrangement of those two policies as he could not find any resolution where the defendant agreed to take out the two endowment policies and as such he states that those endowment policies were not authorised by the defendant. According to Mr Ellis, it follows that clause 10.2.2 materially misrepresents the nature of the policies which were intended to form the subject matter thereof. It was therefore never agreed nor intended by the parties that the defendant was obliged to cede to the plaintiff the two endowment policies in question.

[24] He further states that the stamp duty should have been paid by the sellers and the plaintiff and that it was improperly and illegally paid for by the plaintiff, using the defendant funds and thus falls to be refunded by the plaintiff. Defendant was thus entitled to withhold the transfer of the policies to the plaintiff. He states that "at the time that the plaintiff demanded cession of the policies he was in breach of the agreement in particular clause 9.2." It reads:

'On the Transfer Date the Sellers shall hand over to the Purchasers: 9.2.1 duly signed share transfer forms (CM42) in respect of the Shares, the Preference Shares and all the issued shares held by the Sellers or JN Hamman in Safari Casino (Pty) Limited, stamped as to 100% of the amount of stamps required in respect of such transfers'.

[25] He states that the defendant was not liable to pay the stamp duties on the share transfer certificates of the sellers. The plaintiff, without any authority from the board of directors of defendant or the holding company, instructed the company secretaries of the defendant to affix the stamps on CM42 and invoiced the holding company. The defendant was not liable to pay the stamp duties on the share transfer certificates of the sellers.

[26] He further states that once the policies were ceded to the plaintiff, he directly enjoyed the benefits of the premiums paid by the defendant from 1 March 2019 to date of cession, totalling N$738 000. Despite that, the plaintiff is claiming that amount without being entitled thereto.

[27] He further states that the plaintiff is not entitled in terms of any factual or legal obligation to reclaim payment of any interest. He states that the application for summary judgment should be dismissed as the defendant has raised triable issues.

Submissions by the plaintiff

[28] Counsel, in his written heads of argument, submitted that the plaintiff is not the seller in terms of the agreement, yet the defendant treats the plaintiff as the seller. Counsel argued that 'clause 10.2.2 of the agreement makes it plain that the policies had to be ceded to the plaintiff once the second tranche of N$ 84,783,001.20 was paid by the purchasers to the sellers. This clause has nothing to do with the stamp duties payable. In other words, the defendant correctly does not rely on the *exceptio non adimpleti contractus* as a defence. It cannot, because the cession of the policies is not dependant on the stamp duties being paid. The cession of the policies is only dependant on the second tranche being paid. It is common cause that the second tranche was duly paid.'

[29] Counsel submitted that 'clause 9.2.1 of the agreement on which the defendant wants to rely is against the defendant. It does not say that the sellers had to pay for the stamps. The sellers merely had to affix the stamps. Clause 9.2.1 does not alter the provisions of section 7(1)(h) of the Stamp Duties Act, 15 of 1993. That section contains two distinct obligations, being the person "liable and required to stamp" the document. The agreement deals with the duty to stamp, not with the liability to pay for the stamps. The Provisions of the Act, as far as the liability for the stamp duty is concerned, was plainly left unaltered by the parties.[2] Section 7 of the Stamp Duties Act, 15 of 1993 specifically refers to '(t)he persons respectively liable for duty and required to stamp any instrument…'. Thus the purchasers had to pay for the stamp duties. That is exactly what happened. Just how this can raise a triable issue is not explained by the

[2] *Ndjavera v Du Plessis* 2010 (1) NR 122 (SC) page 2.

defendant at all according to counsel.

[30] Counsel further argued that even if the defendant could arguably be correct that the sellers must have paid for the stamps, it would still not create a triable issue, as the plaintiff is and was not the seller. So, the defendant's protestations on the stamp duty issue does not take it anywhere close to a triable issue.

[31] Counsel further submitted that the defendant relies on a misrepresentation made by the plaintiff in the face of clause 19.1 which stipulates that:

> 'This is the whole of the agreement between the parties, who/which acknowledge that they have not been induced to enter into this agreement by any representations or warranties, other than those set out or contained herein. No representations or warranties shall be of any force and effect unless reduced to writing and contained herein.'

Just why the defendant agrees in the above clause, and then ignores it in its endeavours to raise a triable issue is not explained at all. It is trite law that such a clause is enforceable in the absence of an allegation of fraud made by a contracting party. The defendant does not make such an allegation.

[32] On the issue of the number and nature of the key-man policy, counsel argued that what Mr Ellis believed that it was only one key-man policy, but in reality were two policies with an endowment component is irrelevant because he was not a contracting party to the Agreement. Also none of the purchasers confirm that. In addition, when the parties were concluding the sale of shares agreement, they had in mind the existing policy (ies) and there were two policies at all relevant time. Counsel further argued that, the fact that one of the purchasers, Mr Pimenta, represented the defendant in the conclusion of the policy agreements disproves the allegation that the purchasers were under the impression that there was only one policy.

[33] Counsel further argued that Mr. Ellis is wrong in alleging that once the policies were ceded, the plaintiff enjoyed any past accrued benefits up to that point and as a result he is liable for past premiums. Counsel argued that in terms of clause 10.2.2 '… JN Hamman shall be entitled to take over all benefits in respect of existing key-man life

insurance policy(ies) relating to JN Hamman, provided he assumes full liability for all future life insurance premiums payable in respect of such policy (ies)…'

Counsel argued that, the plaintiff's obligation to take over insurance policies is reciprocal to the cession of the policies to the plaintiff by the defendant and only arises once the policies are ceded to him. Up until that point the parties expressly agreed that the defendant enjoys the benefit of the policies the defendant breached that obligation and is as a result not entitled to say plaintiff should nevertheless have paid the premiums in that period and to defendant's benefit.

Submissions by the defendant

[34] Counsel, in his written heads of argument, submitted that 'in light of the relevant context to the agreement, the reference to "sellers" in clause 9.2 thereof must, properly be construed to include a reference to the plaintiff personally, at least, in relation to his shareholding in Safari Casino (Pty) Limited. It follows that the argument by the plaintiff's counsel that the plaintiff was not the seller is wrong. Plaintiff was a seller in respect of his personal shareholding in Safari Casino (Pty) Limited which was part of the subject matter of the agreement.

Clause 9.2 provides that on the:

'Transfer Date the Sellers shall hand over to the Purchasers, duly signed share transfer forms (CM42) in respect of the Shares, the Preference Shares and all the issued shares held by the Sellers or JN Hamman in Safari Casino (Pty) Limited, stamped as to 100% of the amount of stamps required in respect of such transfers.'

[35] According to counsel, clause 9.2 requires the plaintiff to sign share transfer forms in respect of those shares held by him in Safari Casino (Pty) Limited or the Sellers to do so on his behalf in respect of his shareholding in Safari Casino (Pty) Limited.

[36] In the latter event, the Sellers would do so as the agent of the Plaintiff, who would, of course retain the principal obligation to sign share transfer forms in respect of

his personal shareholding in Safari Casino (Pty) Limited and, moreover, to cause such shares to be stamped. Thus, reciprocal to the obligation of the Purchasers to make payment of the First Tranche to the sellers "against transfer of the subject matter", was the obligation of the sellers and the plaintiff, in respect of his personal shareholding, to hand over to the Purchasers duly signed transfer forms "stamped as to 100% of the amount of stamps required in respect of such transfers".

[37] Counsel submitted that 'whatever the effect of section 7(1)(h) of the Stamp Duties Act, the intention of the parties derived from the proper construction of clause 9.2.1 of the agreement, was that the Sellers, and Plaintiff in respect of his personal shareholding, would both sign, stamp and pay for "100%"of the amount of stamps required in respect of such transfers'

[38] Counsel submitted that it would be absurd to construe clause 9.2 of the agreement which requires the Sellers, and the Plaintiff to "hand over" duly signed and stamped share transfer forms to require the Sellers, qua transferee, first to pay for the stamps which would then be affixed by the Sellers to the CM42 form. Clause 9.2.1 of the agreement thus constitutes a departure from the provisions of section 7(1)(h) of the Stamp Duties Act. Although this construction of clause 9.2.1 of the agreement is undoubtedly correct and, to that extent, the statutory regime was altered by the parties, for the purposes of a summary judgment application, it is sufficient if the construction asserted raises 'a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation may succeed at trial, and, if successful, will establish a defence that is good in law'[3]

[39] Counsel further argued that the sellers, and the plaintiff in respect of his personal shareholding, were obliged to make payment of the stamp duty in respect of the transfers contemplated by clause 9.2. In material breach of the agreement, the Sellers, and the Plaintiff in respect of his personal shareholding in Safari Casino (Pty) Limited, failed timeously and in accordance with the agreement, to make payment of the stamp duty required by clause 9.2.1 thereof. This is because the Plaintiff caused the relevant stamps on the share transfer forms to be paid for by the Defendant and to render the account thereof to the holding company.

[3] *Di Savino v Nedbank Namibia* 2012 (2) NR 507 (SC) at paragraph 26.

[40] ‘In other words, contrary to the agreement, the Plaintiff as the managing director of the Defendant, caused it to pay for the stamps to be affixed to the share transfer forms instead of payment therefor being made by the Sellers and the Plaintiff himself, to then permit the Plaintiff to recover the amount paid by the Defendant in respect of stamp duty would be to allow the Plaintiff to benefit from his own default, a trite prohibition, and have the impermissible consequence of allowing him to recover an amount that he never disbursed save belatedly when he eventually purged his breach of the agreement. His remedy, if any, lies against the Sellers pro rata. Effectively, in these premises, the stamp duty which should have been paid by the Sellers and the Plaintiff, was “misappropriated” from the Defendant and/or its holding company.’

[41] Counsel argued that clause 10.2 of the agreement provided, in summary, that after payment of the Second Tranche, ‘JN Hamman shall be entitled to take over all the benefits in respect of all the existing key-man life insurance policy (ies) relating to JN Hamman, provided he assumes full liability for all future life insurance premiums payable in respect of such policy(ies), it being the understanding that the Purchasers shall maintain this insurance until the date of payment of the Second Tranche…’.

Properly construed, clause 10.2.2 of the agreement required the plaintiff personally, to make payment of all future life premiums from the date of payment of the Second Tranche. The Second Tranche was duly paid by the Purchasers on 28 February 2019. Thus, all payments of future premiums from 1 March 2019 were for the personal account of the Plaintiff; he cannot now require the Defendant to repay the premiums paid by it while he remained in breach of clause 9.2.1 of the agreement. Prior thereto, however, the Defendant became aware, first, that the Sellers and the Plaintiff had not paid the stamp duty required in terms of clause 9.2.1 of the agreement, and more significantly, that the “existing key-man life insurance policy(ies) relating to JN Hamman” were not key-man policies but indeed endowment policies, a materially different institution.

[42] Moreover, the fact that the policies said to be described in clause 10.2.2 of the agreement were endowment policies, and not key-man life insurance policies, constituted a breach of clause 10.1.7 of the Agreement. Clause 10.2.2 of the

agreement, thus, materially misrepresented the nature of the policies which were intended to form the subject matter thereof. Such misrepresentation was, to the knowledge of the Plaintiff false, and was reasonably relied upon by the Defendant'.

[43] Counsel contended that 'but for such misrepresentation, and which was intended by the Plaintiff to induce the Purchasers to agree to clause 10.2.2 of the agreement, "the latter would not have agreed to any cession of any endowment policies, including those described in Annexures "PE3" and "PE4". Mr Ellis argued that the "contractual arrangement" relating to the purchase of the policies were questionable and believed they were not authorised by the defendant.

[44] Counsel further argued that by 27 February 2019, the sellers, and the plaintiff personally, were in breach of clause 9.2 of the agreement. They remained in breach, despite payment of the Second Tranche on 28 February 2019, and there was accordingly no obligation in law on the part of the Defendant to cede the benefits "in respect of existing key-man life insurance policy (ies)". This is because the obligation to pay the First Tranche on the Transfer Date was reciprocal to the obligation of the Sellers, and the Plaintiff, to hand over to the Purchasers duly signed and stamped share transfer forms. Accordingly, and for so long as the Sellers and the Plaintiff remained in breach of clause 9.2.1 of the agreement, there was no obligation on the part on the Purchasers to cede any policy (ies). Indeed, pending due compliance with clause 9.2.1 of the agreement, any obligation on the part of the Purchasers to cede any policy had not yet even arisen.[4]

[45] Counsel submitted that: 'This is a consequence of the general principle applicable to all bilateral contracts undoubtedly 'that one party cannot, in the absence of a special agreement, call upon another party to perform his contract without himself having performed or being ready to perform his part of the contract…'[5] Moreover, to the extent that the refusal of the Sellers, including the Plaintiff, to make payment of the relevant stamp duty and, indeed, payment of any premiums payable from 1 March

[4] *Ndjaverav v Du Plessis* 2010(1) NR 122 (SC); *Grand Mines (Pty) Limited v Giddey N*O 1999 (1) SA 960 (SCA); See also *Damaraland Builders CC v Ugab Terrace Lodge* 2012 (1) NR 5(HC) 8 BK Tooling (Edms); *Bpk v Scope Precision Engineering* (Edms Bpk 1979(1) SA 391(A).

[5] *Hauman v Nortje* 1914 AD 293 at 306; See *Hauman v Nortje* 1914 AD 293 at 306.

2019, constituted a repudiation of the agreement, any obligation on the part of the Defendant to cede any policy (ies) to the Plaintiff was suspended.[6]

[46] Counsel submitted that the amount of N$1, 536, 021, as a matter of law, and upon a proper construction of clauses 9.2 and 10.2.2 of the agreement, represented the amount due and payable by the Sellers and the Plaintiff in terms of the agreement; they, until 18 February 2020, and in breach thereof, failed to pay such amount.

[47] Counsel submitted that, in the premises the defendant has fully disclosed the nature and the grounds of its defence and the material facts upon which it is founded and, indeed, on the facts disclosed, the Defendant "appears" to have a defence which is both bona fide and good in law. The Defendant, it is submitted, has thus satisfied the requirements of rule 60(5)(b).

The law applicable to summary judgment

[48] Rule 60(5) deals with application for summary judgment. It provides:

> '(5) On the hearing of an application for summary judgment the defendant may-
> (a) where applicable give security 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 on the defence and the material facts relied on.'

[49] If a defendant fails to so satisfy the court (or provide security), rule 60(7), like the erstwhile rule 32(5), states that the court 'may enter summary judgment for the plaintiff'.

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[6] *Erasmus v Pienaar* 1994(4) SA 9 (T); *Moodley v Moodley* 1990 (1) SA 427(D).

[50] In *Di Savino v Nedbank Namibia*[7] Ngcobo AJA (Shivute CJ and Mainga JA concurring) of the Supreme Court aptly summarised the legal position 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), the affidavit must 'disclose fully the nature and grounds of the defence and the material facts relied upon therefore.' 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.'

[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. 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.

[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.' 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.

[26] 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.'

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[7] *Di Savino v Nedbank Namibia* 2012 (2) NR 507 (SC).

[51] ‘Because summary judgment is an extra-ordinary remedy and which closes the portals of the court, in final fashion in the face of the defendant without a full trial, summary judgment should not be granted unless the plaintiff has an answerable case.

[52] The court is not bound by the manner in which the defendant presents its case. In this regard, if the defendant files an opposing affidavit that discloses a triable issue, the defendant ought to be granted leave to defend the action.’

Discussion

[53] The starting point of the discussion should be clause 9.2 of the Sale of Shares Agreement. It provides:

> ‘On the Transfer Date, the Sellers shall hand over to the Purchasers: 9.2.1 duly signed share transfer forms (CM42) in respect of the Shares, the Preference Shares and all the issued shares held by any of the Sellers or JN Hamman in Safari Casino (Pty) Ltd, stamped as to 100% of the amount of stamps required in respect of such transfers.’

The sellers are not defined in the definition clause, but the agreement clearly sets out who the sellers are. The plaintiff is not one of the sellers and did not receive any purchase price in his personal capacity. He says that all what he had to do was to affix the stamp duty to the transfer forms (CM42), but was not liable to pay for the stamp duty. The crucial question is: Who was liable to pay for the stamp duty as per the agreement? Clause 9.2 states:

> ‘…the Sellers shall hand over to the Purchasers: 9.2.1 duly signed share transfer forms (CM42)…stamped as to 100% of the amount of stamps required in respect of such transfers.’

On the proper construction of clause 9.2.1, the sellers had to affix the stamps. Clause 9.2.1 only deals with the duty to stamp and not with the liability to pay for stamp duty. To that end, the agreement does not change the provisions of s 7 (1)(h) of the Stamp Duties Act, which has ‘two distinct obligations, namely, “the persons” respectively liable for duty and required to stamp any instrument’. Who then was liable to pay for the stamp duties? If the obligation of the sellers was to affix the stamp, then it follows that the purchasers were liable to pay for the stamp duty because they were the other

parties to the sale of shares agreement and according to the plaintiff that is what exactly happened.

[54] Counsel for the plaintiff correctly argued that, even if the defendant was correct to argue that the sellers were liable to pay for the stamp duty, the plaintiff was not the seller and therefore the defendant's argument does not raise a triable issue.

[55] The defendant refused to cede the policies to the plaintiff on 1 March 2019, demanding payment from the plaintiff of stamp duties and repayment of the premiums which the defendant paid as from 1 March 2019. On 18 February 2020 the plaintiff paid the amount of N$1,536,021 consisting of the stamp duty and the premiums under protest because he correctly argued that it was the defendant who had to pay. Counsel for the defendant argued that, the plaintiff as the owner of the shares in Safari Casino, was the seller of those shares and therefore he had to pay for stamp duty in his personal capacity, although the plaintiff was the owner of shares in Safari Casino (Pty) Ltd, he was not the seller, and there is no dispute about that and that is clearly not a triable issue.

[56] Counsel for the defendant further argued that when the plaintiff paid the stamp duty, he paid on behalf of the seller, without authorisation from the defendant, and therefore he cannot get it back. Mr Ellis has no personal knowledge of whether or not the plaintiff had authorization to cause payment of the stamp duties in the manner the plaintiff did, as the then managing director of the defendant. There is no confirmatory affidavit from anyone who has personal knowledge. Therefore no triable issue arises from that argument.

[57] Another issue raised by Mr Ellis relates to the number and nature of the policy (ies) ceded by the defendant to the plaintiff. He states that during the negotiations of the agreement, he and the purchasers were orally informed that there was a single key man insurance policy, taken by the defendant on the life of the plaintiff. However, on the transfer date he ascertained that it was two endowment policies and not a single key man insurance policy. He was provided with the two endowment policies by the broker. He questioned the contractual arrangement of those two endowment policies as he could not find any resolution where the defendant agreed to take out the two

endowment policies and were thus not authorised by the defendant.

[58] According to Mr Ellis, it follows that clause 10.2.2 materially misrepresents the nature of the policies which were intended to form the subject matter thereof. It was therefore never agreed nor intended by the parties that the defendant was obliged to cede to the plaintiff the two endowment policies in question, 'Because the cession of the endowment policies constituted a benefit to the plaintiff, which was contrary to the express agreement of the parties…' That argument ignores the fact that there is a non variation clause in the Agreement. Clause 19.1 provides:

> 'This is the whole agreement between the Parties, who/which acknowledge that they have not been induced to enter into this agreement by any representations or warranties, other than those set out or contained herein. No representations or warranties shall be of any force or effect unless reduced to writing and contained herein.
> 19.2 No alteration, amendment, variation or consensual termination of this agreement shall be of any force or effect unless reduced to writing and signed by each of the parties.'

The non-variation clause is enforceable. The parties are bound by the written agreement and the agreement was that:(clause 10.2.2) '…JN Hamman shall be entitled to take over all benefits in respect of existing key-man life insurance policy(ies) relating to JN Hamman..'. In addition, the contract of the endowment policies was signed by Mr Pimenta, one of the purchaser to the sale of shares agreement, so he must have been aware that it was not a single key man policy, but two endowment policies .Most importantly, Mr Ellis is not a signatory or party to the agreement and what he believed or what they were told about the number and nature of the insurance policies is irrelevant as it is not confirmed by the purchasers to the Agreement. There is no confirmatory affidavit to that effect. No triable issue arises from that argument.

[59] The defendant further argued that, once the policies were ceded, the plaintiff enjoyed (any) past accrued benefits up to the date of the cession, and therefore plaintiff is liable for past premiums paid by defendant in the amount of N$738 000. In terms of the agreement, cession had to take place on 1 March 2019, after the payment of the second tranche, which was duly paid on 28 February 2019, however, cession only took place on 26 March 2019 after the plaintiff paid the stamp duty and the premiums under

protest. The N$738 000 past premiums relate to the period between 1 March 2019 and 18 February 2020. Up until the date of cession, the defendant remained the beneficiary of the insurance policies and had the plaintiff died before cession, the proceeds from the policy (ies) would have accrued to the defendant, how (then) the plaintiff could be held liable for the past premiums defies logic. That argument by the defendant does not raise a triable issue.

[60] In conclusion, I am not satisfied that the defendant raised bona fide defences to the plaintiff's particulars of claim and the opposing affidavit fell short of the requisites of rule 60(5), accordingly, summary judgment must be granted.

[61] The order

1. The application for summary judgment is granted.

2. The defendant is ordered to pay the costs of the plaintiff, such costs to include the costs of one instructing and two instructed counsel and such costs not to be capped in terms of rule 32(11) with costs.

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NDAUENDAPO G N

Judge

APPEARANCES:

PLAINTIFF	Adv. Heathcote (SC) Instructed by Koep & Partners Windhoek
DEFENDANT:	Adv. M Fitzgerald (SC) Instructed by Ellis & Partners Legal Practitioners Windhoek