

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

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| Case Title: NAMCOR PETROLEUM TRADING AND DISTRIBUTION (PTY) LTD v SHARED ADVERTISING CC T/A SHARED PETROLEUM | Case No: HC-MD-CIV-ACT-CON-2021/04596 |
| | Division of Court: HIGH COURT(MAIN DIVISION) |
| Heard before: HONOURABLE JUSTICE COLEMAN, JUDGE | Date of Hearing: 21 April 2022 |
| | Date of Order: 16 May 2022 |
| Neutral citation: <i>Namcor Petroleum Trading and Distribution (PTY) Ltd v Shared Advertising Close Corporation, T/A Shared Petroleum</i> (HC-MD-CIV-ACT-CON-2021/04596) [2022] NAHCMD 245 (16 May 2022) | |
| Results on merits: Merits not considered. | |
| The order: | |

1. The application for summary judgment is dismissed.
2. The plaintiff is ordered to pay the defendant's costs, to include the costs of one instructing and one instructed counsel.
3. The matter is postponed to **16 June 2022** at **15:30** for a Further Case Planning Conference.
4. The parties shall file a further joint case plan on or before **9 June 2022**.

Reasons for orders:

COLEMAN J

Introduction

[1] This is an application for summary judgment brought by the plaintiff. I will refer to the parties as they are referred to in the main case. Mr Narib represented the plaintiff and Mr Jones the defendant.

Plaintiff's case

[2] Plaintiff's case commences with a written agreement entered into between the parties on or about 5 September 2014 for the purchase of petroleum products by defendant from the plaintiff.

[3] Plaintiff alleges that defendant initially breached this agreement by failing to pay for some of the products delivered to it by the plaintiff. As a result, on 12 November 2019 plaintiff instituted action in this court against defendant for payment of N\$ 60 441 764.02.

[4] The plaintiff then instituted summons again on 25 November 2021 against the defendant for failing to honour the terms of the settlement agreement. In para 9 of its particulars of claim, plaintiff alleges that, "(d)uring or about November 2019 the plaintiff...and defendant...entered into an oral agreement, to settle the issue of the defendant's outstanding account with plaintiff.

The settlement agreement was reduced to writing on or about 01 July 2020, and a copy thereof is attached, marked annexure 'A'." This settlement agreement was made an order of court on 6 July 2020 and the case was withdrawn.

[5] The terms of the settlement agreement are somewhat fluid and formed part of the debate between counsel. In essence, defendant agreed to commence settling its account with plaintiff from December 2019 by monthly instalments of N\$ 500 000 until defendant is paid an amount of N\$ 18 276 892.69 by an entity named Bulk Haulage Logistics (Pty) Ltd – presumably a debt owed to defendant by this entity. Once this payment was made, defendant would increase its monthly payment to N\$ 1 million. Defendant also agreed to make an upfront payment of N\$ 2 million.

[6] In addition, the plaintiff reserved its right to in future re-issue summons against defendant should the need arise. Exercising that right plaintiff issued summons again on 25 November 2021 against defendant. This time it is for payment of N\$ 50 248 201.08. The cause of action is encapsulated in para12 of the particulars of claim. It is alleged to be defendant's failure to honour the settlement agreement by failing to make the monthly payment of N\$ 500 000 and the upfront payment of N\$ 2 million. This is the case now before me.

Defendant's opposition

[7] An affidavit deposed to by Craig Thomson was filed on behalf of defendant in opposition to the application for summary judgment. He alleges he is the CEO of the defendant and is authorised to oppose this application. Mr Narib raises issues around this authority and the affidavit, including that defendant's member is deceased. Due to the nature of the proceedings and Mr Tomson's allegations referred to above I will not entertain these objections. It is trite that I can accept an allegation of authority under oath.

[8] Defendant raises a number of defences and concludes that the particulars of claim is excipiable.

Conclusion

[9] I gave consideration to the heads of argument filed on behalf of each of the parties as well as the submissions by Mr Narib and Mr Jones.

[10] In my view the core issue here is that plaintiff has a court order issued on 6 July 2020 ordering defendant to commence settling its account with plaintiff by paying plaintiff N\$ 500 000 from December 2019 and to make upfront payment of N\$ 2 million to plaintiff. Plaintiff's remedy is to execute this court order, not issue summons again. On this basis alone I am not inclined to grant summary judgment herein.

[11] Therefore, I make the following order:

1. The application for summary judgment is dismissed.
2. The plaintiff is ordered to pay the defendant's costs, to include the costs of one instructing and one instructed counsel.
3. The matter is postponed to **16 June 2022** at **15:30** for a Further Case Planning Conference.
4. The parties shall file a further joint case plan on or before **9 June 2022**.

| Judge's signature | Note to the parties: |
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| Coleman Judge | Not applicable. |
| Counsel: | |
| Plaintiff | Defendant |
| Mr Narib, assisted by Mr Kavendjii Instructed by Kangueehi & Kavendjii Inc. | Mr Jones, assisted by Mr Hohne Instructed by Hohne & Co. |

