**REPUBLIC OF NAMIBIA**

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

**RULING**

Case no: **HC-MD-CIV-ACT-CON-2022/00561**

In the matter between:

**CONNIS AYEHEOYETU NICANOR CHRISTOPH** **1st PLAINTIFF**

**SELMA CHRISTOPH** **2nd PLAINTIFF**

and

**TUYENIKUMWE FOOD AND COMMODITY DISTRIBUTORS CC** **1st DEFENDANT**

**MICHAEL NGHIILWAMO** **2nd DEFENDANT**

**Neutral citation:** *Christoph v Tuyenikumwe Food and Commodity Distributors CC* (HC-MD-CIV-ACT-CON-2022/00561) [2022] NAHCMD 595 (31 October 2022)

**Coram:** Schimming-Chase J
**Heard:** **21 October 2022**
**Delivered:** **31 October 2022**

Flynote: Practice — Judgments and orders — Summary judgment — Defendant must satisfy court that bona fide defence exists — Defendant must only depose to facts which, if true, would establish defence — Opposing affidavit stating that particulars of claim vague and embarrassing — Defendant disclosing a triable defence.

**Summary:** The plaintiffs and the first defendant concluded a written deed of sale of certain immovable property in Katutura. The plaintiffs made payment as agreed and the defendant failed to comply with the agreement in that it did not service the instalments on the mortgage bond that was registered over the property to its then mortgagor. As a result, the then mortgagor obtained judgment against the first defendant and the said property was declared specially executable. The plaintiffs then purchased the same property in execution. The plaintiffs instituted action against the defendants for breach of contract and unjust enrichment, alternatively misrepresentation on account that the first defendant represented to them that the balance on bond registered over the property was N$400 000, whilst it was in fact over N$800 000. Plaintiff claimed payment of the amounts paid to the first defendant. The first defendant's affidavit was barely acceptable given the paucity of facts raised in support of the defences. However the affidavit correctly pointed out that the particulars of claim were vague and embarrassing at best. The defendant also disclosed a triable issue on the claim of unjustified enrichment.

*Held that*, the remedy for summary judgment is an extraordinary remedy and a very stringent one in that it permits a judgment to be given without a trial. It closes the doors of the court to the defendant and must accordingly must be exercised with great care. That can only be done if there is no doubt that the plaintiff has an unanswerable case. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.

*Held that*, the defendant's affidavit resisting summary left much to be desired, specifically a lack of particularisation was given to a number of averments relating to the defences raised. However, the affidavit passed muster in revealing that the particulars of claim were

excipiable, and that a triable issue was raised on the plaintiffs' claim for unjustified enrichment and the amount claimed. In the circumstances, summary judgment was refused.

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**ORDER**

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1. The application for summary judgment is refused.
2. The first defendant is granted leave to defend the action.
3. The costs of the application for summary judgment shall be costs in the cause.
4. The case is postponed to 5 December 2022 at 15:30 for a case planning conference.
5. The parties are directed to file a joint case plan on or before 30 November 2022.
6. The defendant must pay the wasted costs of Ms Shipindo and such costs shall be limited to the drafting and filing of the mediation brief as well as the travel expenses of Ms Shipindo for the hearing on 5 September 2022.

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**JUDGMENT**

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SCHIMMING-CHASE J:

[1] This is an application for summary judgment launched by the plaintiffs who are married to each other in community of property, for relief based in the main on a breach of contract for the sale of immovable property.

[2] On 24 June 2018, the plaintiffs acting in person and the first defendant (a duly incorporated close corporation), represented by the second defendant, in his capacity as sole

member of the first defendant, concluded a written deed of sale ("the agreement"), in terms of which the first defendant sold to the plaintiffs certain immovable property.

[3] The relevant terms of the agreement are the following: –

'The Seller hereby sells to the Purchasers who hereby purchase:

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| CERTAIN: | ERF NO, 2152 KATUTURA |
| | EXTENSION NO 1 |
| SITUATE: | IN THE MUNICIPALITY OF WINDHOEK |
| | REGISTRATION DIVISION "K" |
| | KHOMAS REGION |
| MEASURING: | 957 (NINE FIVE SEVEN) SQUARE METRES |
| HELD: | BY DEED OF TRANSFER NO T 2267/2013 |

Subject to the following terms and conditions:

1. PURCHASE PRICE
   1.1 The Purchase price is the sum of N$ 2 630 000.00 (TWO MILLION SIX HUNDRED AND THIRTY THOUSAND NAMIBIA DOLLARS) excluding transfer fees, payable as follows:
   1.2 N$ 1 000 000.00 (One Million Namibia Dollars) against signing of this Agreement of Sale into the following Bank account of the Seller:

   MICHAEL NGHILWAMO

   STANDARD BANK

   ACCOUNT NO 6000 269 4963

   BRANCH CODE 082 672

   1.3 The balance of N$ 1 630 000.00 (One Million Six Hundred and Thirty Thousand Namibia Dollars) in instalments as follows:

1.3.1 N$ 130 000.00 (One Hundred and Thirty Thousand Namibia Dollars) on the 1st December 2018

1.3.2 N$ 500 000.00 (Five Hundred Thousand Namibia Dollars) on the 1st December 2019

1.3.3 N$ 500 000.00 (Five Hundred Thousand Namibia Dollars) on the 1st December 2020

1.3.4 N$ 500 000.00 (Five Hundred Thousand Namibia Dollars) on the 1st December 2021

For which amounts the Purchaser shall sign an acknowledgment of debt.

1.4 The transfer of the property shall only be given to the Purchasers on date of final payment of the instalments as mentioned in 1.3 above.

12. MORTGAGE BOND

The Seller admits that there is a bond over the property with an outstanding amount of more or less N$ 400 000.00. He undertakes to continue paying the instalments of the bond which will be settled before registration of the property in the name of the Purchaser on receipt of the final instalment.'

[4] The parties further agreed that the first defendant would be liable for the payment of rates and taxes in respect of the property until the date of transfer, whereafter the plaintiffs will be liable for the said rates and taxes.

[5] The plaintiffs allege that they paid the first instalment of N$1 million to the second defendant as per the agreement on 20 June 2018 and on 24 August 2018, they paid N$200 000. The plaintiffs further paid N$326 840.27 to the City of Windhoek on behalf of the first defendant. This much is confirmed in the addendum to the agreement that the parties later concluded on 8 November 2018 wherein the first defendant acknowledged that the plaintiffs paid N$200 000 and N$326 840.27 to it.

[6] The plaintiffs allege that they made further payments in the following manner: N$100 000 on 7 December 2018, N$903 160 on 17 September 2019, which was the balance of the purchase price, as well as N$145 585 for the transfer duty.

[7] The total amount paid in terms of the agreement and its addendum was alleged to be N$1 626 840.27.

[8] The plaintiffs proceeded to make improvements on the property by erecting fixtures of a permanent nature.

[9] During or about 9 May 2019, the defendants were sued jointly and severally by Bank Windhoek, the mortgagor, under case number HC-MD-CIV-ACT-CON-2019/02033 for arrears in the amount of N$821 784.56 on a mortgage bond registered in respect of the same immovable property that the plaintiffs had purchased from the first defendant. The deputy sheriff served the combined summons in that action at the immovable property.

[10] It is then that the plaintiffs realised that the first defendant breached the agreement, in that it failed to pay the monthly instalments towards the mortgage bond as reflected in the aforesaid agreement. The plaintiffs also became aware that the outstanding arrears on the property were N$821 784.56 and not N$400 000 as was misrepresented by the first defendant when the agreement was concluded and as stated in the agreement.

[11] On 4 October 2019 default judgment was granted in favour of Bank Windhoek Ltd and the immovable property was declared specially executable by this court.

[12] In the alternative, the plaintiff pleaded that the first defendant breached the agreement in that it falsely represented to the plaintiffs that the outstanding mortgage bond amount was more or less N$400 000. The misrepresentation came to the plaintiffs' knowledge when summons was served on the immovable property. The plaintiff alleged in addition that the representations made by the first defendant were 'false and wrongful' in that:

(a) the actual outstanding amount on the property was approximately N$821 784.56;

(b) the first defendant had a legal duty towards the plaintiffs not to make the misrepresentation;

(c) such misrepresentation was material as it influenced the plaintiffs to conclude the agreement;

(d) the misrepresentation was intended to induce the plaintiffs to conclude the agreement with the first defendant;

(e) the representation by the second defendant (on behalf of the first defendant) induced the contract.

[13] The plaintiffs plead further that they demanded transfer of the property into their names after they complied with the agreement. However, as a consequence of the first defendant's breach, the property was declared specially executable and the property was sold in execution by the deputy sheriff for an amount of N$ 1 600 000.

[14] As a further consequence of the first defendants' breach, the plaintiffs allege that the agreement between the plaintiff's and the first defendant was cancelled due to the first defendant's 'impossibility to perform.' The first defendant was therefore 'unjustly enriched with N$ 1 626 840.27 and the plaintiffs were impoverished by such amount. Relief was claimed in this amount from the defendants, jointly and severally, the one paying the other to be absolved.

[15] The plaintiffs then withdrew their action against the second defendant and applied for summary judgment against the first defendant.

[16] The first defendant's main defence relates to the formulation of the plaintiffs' claim, to the effect that it is vague and embarrassing. The first defendant's position is that, since the plaintiffs' claim is based on a contract, they should have sued the defendant for damages for breach of contract which led to the cancellation of the agreement, instead of unjustified enrichment.

[17] The second defence is that the plaintiffs failed to meet their payment obligations in terms of the agreement. The first defendant admits receiving N$1 300 000 from the plaintiffs. However, it avers that the purchase price agreed to was N$2 630 000 and posits that the claim for N$1 626 840.27 is incorrect. The first defendant avers that in any event, the claim of unjustified enrichment cannot stand, because, apart from the fact that this is denied by the first defendant, the first defendant could in any event not have been enriched more than the amount of approximately N$596,840.27 if the claim was properly founded. This is because the total purchase price was N$2 630 000, and on plaintiffs' version they paid the first defendant the amount of N$1 626 846.27, and the deputy sheriff the amount of N$1 600 000.00. Plaintiff could therefore not have been enriched in the amount claimed.

[18] The first defendant further avers that due to the plaintiffs' failure to comply with the deed of sale by failing to make payments as agreed, the first defendant suffered damages and it intends to launch a counterclaim for such damages.

[19] The principles governing applications for summary judgment were succinctly expressed by Masuku J in *First National Bank of Namibia Limited v Louw*[1] as follows:

> (a) To stave off an application for summary judgment, a defendant is required to set out facts which if proved at trial would constitute a defence. The upshot of this is that the court is required to refuse summary judgment even though it might consider that the defence will probably fail at the trial.
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> (b) The adjudication of summary judgment does not include a decision on factual disputes. This means that the court should decide the matter on the assumption or premise that the defendant's allegations are correct. For that reason,

[1] *First National Bank of Namibia Limited v Louw* (I 1467-2014) [2015] NAHCMD 139 (12 June 2015) para 19 and the authorities there collected. See also *Nored Electricity (Pty) Ltd v Ouster* (I 3670-2015) [2015] NAHCMD 178 (3 August 2015) at para 10.

summary judgment must be refused if the defendant discloses facts which, accepting the truth thereof, or if proved at trial, will constitute a defence.

(c) Because summary judgment is an extra ordinary remedy, it should be granted only where there is no doubt that the plaintiff has an unanswerable case.

(d) The court is restricted to the manner in which the plaintiff has presented its case. In this regard, the court must insist on a strict compliance by the plaintiff and technically incorrect papers should see the application being refused.

(e) The court is not bound by the manner in which the defendant presents his/her case. Thus, if the defendant files an opposing affidavit that discloses a triable issue, the defendant should, on that account, be granted leave to defend the action.

(f) It is permissible for the defendant to attack the validity of the application for summary judgment on any proper ground. This may include raising an argument about the excipiability or irregularity of the particulars of claim or even the admissibility of the evidence tendered in the affidavit in support of summary judgment, without having to record same in the affidavit.

(g) Summary judgment must be refused in the face of any doubt arising as to whether or not to grant it. The basis for this rule is that an erroneous finding to enter summary judgment heralds more debilitating consequences for a defendant than a plaintiff. This is because any error committed in refusing summary judgment may be dealt with during the substantive trial. In this regard therefore, leave ought ordinarily to be granted unless the court is of the opinion that the defendant has a hopeless case.

[20] I must record at the outset that the opposing affidavit leaves much to be desired. The denials of the first defendant were entirely unsubstantiated, without reference to any proper

documentation. In *Di Savino v Nedbank Namibia Ltd*[2] , the Supreme Court stated in this regard that:

'[29] But where the opposing affidavit does not satisfy the requirements of rule 32(3)(b), the court has a discretion under rule 32(5) 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. In Arend and Another v Astra Furnishers (Pty) Ltd Corbett J (as he then was) put the matter thus:

"In my view, an important factor to be taken into account by the Court in determining how to exercise its discretion is the consideration that the procedure of summary judgment constitutes an extraordinary and very stringent remedy: it permits a final judgment to be given against a defendant without a trial. It is designed to prevent a plaintiff having to suffer the delay and additional expense of the trial procedure where the defendant's case is a bogus one or is bad in law and is raised merely for the purpose of delay, but in achieving this it makes drastic inroads upon the normal right of a defendant to present his case to the Court."'

[21] However the formulation of the plaintiff's claim is also somewhat unclear. The damages incurred as a result of the alleged breach were not properly pleaded at all, only aspects of the alleged breach. There was a reference to cancellation of the agreement between the parties due to impossibility to perform. It is not even pleaded how the agreement was cancelled, if at all. No notice appears to have been given. The potential damages claim is then conflated with a claim of unjustified enrichment. The two causes of action should have been separately pleaded, and not lumped together into one claim. For a stringent remedy such as summary judgment to operate in the plaintiffs' favour, the claim should be properly formulated.

[22] In any event, the amount claimed by the plaintiff's does not, *ex facie* the particulars of claim, correspond with the loss alleged to have been incurred by the plaintiffs. This is evident from the purchase amount of N$2 630 000, the amount that the plaintiffs paid to the defendant of N$1 626 840.27, and the amount of N$1 600 000 that the plaintiffs paid the deputy sheriff at the sale in execution. On the claim of damages[3] or unjustified enrichment,

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

[3] It is by now trite that the purpose of a damages award is to put the innocent party back in the position it was

the plaintiffs essentially would only have lost what they paid in excess of the N$2 630 000 that they agreed to pay, and the first defendant denies that it breached the agreement, albeit vaguely.

[23] In light of the foregoing, I exercise my discretion in favour of the first defendant and grant leave to defend to the first defendant.

[24] This leaves the determination of the question of wasted costs sought by the plaintiffs' legal practitioner of record Ms Shipindo, in particular, her travelling expenses for an appearance in this court for case management 5 September 2022 (where there was no appearance by or on behalf of the defendants), as well as her costs for preparation for an aborted mediation. The first defendant was ordered to file an explanatory affidavit, which was filed.

[25] Prior to the setting down of the summary judgment application, the matter was referred to court connected mediation, primarily at the request of the first defendant. The request was granted and the matter was referred to mediation. The mediation was however cancelled at the request of the defendant at the last minute because he was unavailable to attend.

[26] The second defendant, who is the sole member of the first defendant deposed to the explanatory affidavit. The affidavit is poorly drafted at best. What can be gleaned from the averments is that the mediation did not proceed because, according to the second defendant, an employee of the firm of legal practitioners representing it, informed him about the mediation a day before the mediation was scheduled to take place. The defendants could not make the mediation on such short notice and thus the proceedings were cancelled. This apparently also resulted in a further non-appearance on 5 September 2022 for case management subsequent to the cancelled mediation, in breach of a court order *inter alia* requiring attendance on that date. It is not in dispute that Ms Shipindo prepared for the mediation and travelled from Oshakati to Windhoek to represent the plaintiffs at the

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had the breach/wrong not been committed.

scheduled mediation, and appeared in court on 5 September 2022.

[27] This is a situation where it appears from the affidavits, the lawyers failed their client. However, as the litigant, the first defendant also had a responsibility to keep itself abreast with its case, given that it initiated the mediation proceedings. Costs were expended on behalf of the plaintiffs and the costs were wasted as a result of the conduct of the first defendant and his legal team.

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

1. The application for summary judgment is refused.
2. The first defendant is granted leave to defend the action.
3. The costs of the application for summary judgment shall be costs in the cause.
4. The case is postponed to 5 December 2022 at 15:30 for a case planning conference.
5. The parties are directed to file a joint case plan on or before 30 November 2022.
6. The defendant must pay the wasted costs of Ms Shipindo and such costs shall be limited to the drafting and filing of the mediation brief as well as the travel expenses of Ms Shipindo for the hearing on 5 September 2022.

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EM SCHIMMING-CHASE

Judge

APPEARANCES

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|---|---|
| FOR THE PLAINTIFFS: | R Shipindo<br>Of Shipindo & Associates Inc., Oshakati. |
| FOR THE DEFENDANTS: | B Cupido<br>Isaacks & Associates inc., Windhoek. |