

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

EX TEMPORE

RULING ON SUMMARY JUDGMENT APPLICATION

Case Title: Namdeb Diamond Corporation (Proprietary) Limited Plaintiff v Sonny's General Construction Services CC Defendant	Case No: HC-MD-CIV-ACT-DEL-2022/05262
Heard before: Honourable Justice Sibeya	Division of Court: High court (Main Division)
	Heard on: 16 May 2023 Delivered on: 16 May 2023
Neutral citation: <i>Namdeb Diamond Corporation (Proprietary Limited) v Sonny's General Construction Services CC</i> (HC-MD-CIV-ACT-GEN-2022/05262) [2023] NAHCMD 275 (16 May 2023)	
The order: 1. Cancellation of the Lease Agreement is confirmed; 2. Payment in the amount of N\$216 940,45 in respect of unpaid rentals;	

3. Payment in the amount of N\$6 025,43 in respect of one notice month's rental;
4. Interest on the aforesaid amounts at a rate of 20% per annum from the date of summons to the date of final payment;
5. The Defendant is ejected from the Lease Premises at E28 – 8th Avenue, Oranjemund, Republic of Namibia;
6. Costs of suit;
7. The matter is removed from the roll and regarded as finalised.

Reasons:

SIBEYA J

Introduction

[1] This court is seized with an application for summary judgment where the plaintiff instituted action proceedings against the defendant, based on a lease agreement, for a claim sound in a liquidated amount of money and ejectment. The plaintiff alleged that the defendant is in default of payment of the rental amounts which had become due and payable.

[2] On 20 April 2023, the plaintiff launched an application for summary judgment against the defendant in terms of rule 60(1) of the rules of this court.

[3] The defendant defended the action and opposed the application for summary judgment. The defendant then filed an affidavit in opposition of the application for summary judgment. It is the propriety of this application that the court is called upon to determine.

Representation

[4] Mr Avila appears for the plaintiff while Mr Jan van Wyk appears in person for the defendant.

The merits and arguments

[5] The plaintiff sought, in the main action, the following orders:

- '1. An order of cancellation of the Lease Agreement;
2. Payment in the amount of N\$216 940.45 in respect of unpaid rentals;
3. Payment in the amount of N\$6 025.43 in respect of one notice month's rental;
4. Interest on the aforesaid amounts at a rate of 20% per annum from the date of summons to the date of final payment;
5. An order of ejectment of the Defendant from the Lease Premises at E28 – 8th Avenue, Oranjemund, Republic of Namibia;
6. Costs of suit;
7. Further and/or alternative relief.'

[6] The plaintiff, in an affidavit deposed to by Ms Tashrikah Theresia Nel, the (Legal) Mine Secretary of the plaintiff, stated that she is duly authorised and able to depose to the founding affidavit filed in support of the application for summary judgment. She stated further that the content of the affidavit falls within her personal knowledge, which she confirmed as both true and correct. She further verified that the defendant is indebted to the plaintiff for a liquidated claim arising out of a written lease agreement, whereby the

defendant leases a property situated at E28 – 8th Avenue, Oranjemund, Republic of Namibia. Ms Nel further deposed that the indebtedness of the defendant stands in the amount of N\$216 940.45 for arrear rentals.

[7] In respect of claim two, Ms Nel deposes that the defendant's right to occupy the leased property terminated due to non-compliance with the lease agreement. She concluded her affidavit with a statement that, in her opinion, the defendant has no *bona fide* defence to the action and that it filed a notice of intention to defend the action solely for purposes of delay.

[8] As stated hereinabove, the defendant opposed the application for summary judgment. The basis for the opposition is set out in the affidavit deposed to Mr van Wyk. The said basis is that the combined summons were not served on him by the Deputy Sheriff and that the return of service prepared by the Deputy Sheriff is fraudulent. Mr van Wyk states further that the application for summary judgment constitutes a nullity for the summons not being served on the defendant. He stated further that the lease was subject to a contract between the parties and the said lease agreement is in an unresolved dispute between the parties. Mr van Wyk deposed further that the above averments renders the application frivolous, and it should be dismissed with costs.

[9] Mr Avila argued that it is apparent from the lease agreement concluded between the parties on 7 September 2018, that the plaintiff is the lessor and owner of the property (E28-8th Avenue, Oranjemund, Republic of Namibia), while the defendant is the lessee. He argued that the defendant took occupation of the leased property with a contractual obligation to pay rental amounts when they became due. Mr Avila took issue with the documents attached (pages 3-9), to Mr van Wyk's affidavit filed in opposition of the application for summary judgment for not being initialled by both Mr van Wyk and the commissioner of oaths. He argued further that the defendant failed to explain the relevance of the said attachments.

[10] The salient terms of the lease agreement are that:

- (a) The defendant was required to pay the rental amount set out in Annexure A to the lease agreement, monthly in advance effective from 1 August 2018 and thereafter on the first day of each subsequent month;
- (b) The monthly rental amount would escalate by a market related percentage as from 1 June 2019 and thereafter on the anniversary of the said date;
- (c) The lease agreement was valid for a period of 17 months, however, after the termination of the initial period, the lease would continue on a month-to-month basis and only be terminated upon receipt of a one month's written notice by either party;
- (d) At the time of the institution of the action, on 2 December 2022, the defendant was liable to pay the monthly rental amount of N\$5 809,43.

[11] Mr Avila argued that the lease agreement was not conditional upon the conclusion of a written agreement, to the contrary, it was just a lease agreement for letting and hiring. He argued that the defendant failed to pay the monthly rental amount due and payable but still remains in occupation of the leased property. The defendant, therefore, failed to pay the rental amount and charges while still occupying the property, so Mr Avila argued. He prayed for the summary judgment to be granted.

[12] Mr van Wyk, argued contrariwise. He argued that the plaintiff's application for summary judgment constitutes a nullity and should be declared as such for failure to have the summons served on the defendant. He argued further that the return of service of summons served on the defendant is fraudulent. He insisted on the dismissal of the application for summary judgment with costs.

Analysis

[13] The law on summary judgment applications is trite and plentiful and need not be repeated in this ruling. Suffice to say that rule 60 regulates applications for summary judgment where the claim is based on a liquid document; where the claim is for a liquidated amount in money; where the claim is for delivery of specified movable property; and where the claim is for ejectment.

[14] The general approach regarding summary judgments can be surmised as follows as set out by Corbett JA in *Maharaj v Barclays National Bank Ltd*:¹

‘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

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

discloses a bona fide defence.’

[15] In *Standard Bank Namibia Limited v Somaeb*,² Cheda J remarked as follows at para 7-8:

‘[7] Applicant seeks the return of possession and ejectment of the respondent from Erf 4785 (a portion of Erf 8446, Katutura, Ext 15, Windhoek, Republic of Namibia) [hereinafter referred to as “the property”]. Applicant seeks to regain possession of its immovable property on the basis of the principle of *rei vindicatio*. A litigant relying on this common law principle is entitled to repossess its property provided that it fulfills certain requirements, namely that:

- 1) he is the owner and;
- 2) that defendant is in possession of it;

[8] In that instance applicant/plaintiff will be entitled to an order for ejectment unless respondent/defendant is able to prove that he is entitled to a continued possession/occupation of the said property, see *Chetty v Naidoo*³. It was also stated in *Chetty’s* case that the owner may claim his property, wherever found and from whomsoever is holding it. It therefore, stands to reason that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner, e.g. a right of retention or a contractual right.’

[16] I align myself with the above legal principles as constituting the correct position of the law regarding applications for summary judgment.

[17] It is common cause between the parties that the plaintiff’s claim is sound in money. The plaintiff annexed a statement of account dated 10 November 2022, to the particulars of claim. The statement of account depicts that the defendant failed to pay the monthly rentals when due to the extent that, by then, the total monthly rental amount outstanding is N\$216 940,45, being a liquidated amount owed to the plaintiff.

[18] The plaintiff claims that the failure by the defendant to pay the monthly rentals when

² *Standard Bank Namibia Limited v Somaeb* (I 1912/2013) [2014] NAHCMD 98 (26 March 2014).

³ *Chetty v Naidoo* 1974 (4) SA 13 (A).

due, entitles the plaintiff to cancel the lease agreement and to recover the outstanding monthly rentals from the defendant.

[19] In claim two, the plaintiff, the owner of the property, claims ejectment of the defendant from the leased property on account of the defendant being in default with the payment of the monthly rentals. The defendant confirms that the plaintiff is the owner of the leased property. The plaintiff has since cancelled the lease agreement.

[20] The defendant's defence is, by and large, that the combined summons were not served on the defendant. The return of service of the summons on the defendant provides that, the Deputy Sheriff, on 2 February 2023, at 18:01 affixed the combined summons, the particulars of claim and annexures A-B to the front door of Erf E28-8th Avenue, Oranjemend, Republic of Namibia. The return of service further provides that service was carried out on the defendant's *domicilium citandi et executandi*, which is in compliance with clause 26 of the lease agreement. The return of service further provides that no other person was willing to accept service of the process.

[21] I find on the face of the return of service filed of record that the defendant was sufficiently served with the combined summons. There is no substantive reason advanced by the defendant why the Deputy Sheriff would state that he indeed served the defendant in the manner set out in the return of service, if that is far from what occurred. I find that the address of service of the defendant is indeed the chosen *domicilium citandi et executandi* of the defendant and it is the same address that the Deputy Sheriff states that he effected service of the combined summons.

[22] I further find that the defendant actively participated in the proceedings after filing the notice to defend and went on to oppose the application for summary judgment and filed an affidavit in opposition of such application.

[23] The defendant raised another defence to the application for summary judgment, that the lease agreement was conditional to another contract between the parties. I find it

difficult to understand this ground of opposition. For what it's worth, the lease agreement concluded between the parties is annexed to the particulars of claim and makes no reference to being conditional to another contract. This much was conceded to by Mr van Wyk during oral arguments. I find that, this defence, does not constitute a *bona fide* defence to the claim and falls to be dismissed.

[24] The defendant further alleges that the lease agreement is subject to an unresolved dispute between the parties. The plaintiff states that the lease agreement was cancelled on account of non-payment of monthly rentals when due and further that the defendant continued, thereafter, to occupy the property unlawfully.

[25] The defendant fails, in my view, to set out the facts fully on which the defence is based.

[26] As I conclude, I take notice that the defendant alleged during the oral hearing that it was not afforded sufficient time by the court to state its case in opposition of the application for summary judgment. The order of 13 April 2023, provides that the defendant was relieved from sanctions for non-court appearance on the previous date. The court further ordered the plaintiff to file its application for summary judgment on or before 21 April 2023. The plaintiff filed its application on 20 April 2023. The defendant was ordered to file its affidavit opposing the application for summary judgment on or before 8 May 2023. That is a period in excess of two weeks. The defendant filed its opposing affidavit on 8 May 2023 as ordered. The plaintiff was further ordered to file heads of argument on or before 11 May 2023. The defendant, considering the fact that it is not represented by a legal practitioner, was ordered to file heads of argument, if it so elects, on or before 12 May 2023. The defendant filed written arguments on 12 May 2023.

[27] Traditionally, this court does not insist on filing of heads of argument by self-actors and have heard oral arguments from self-actors without having filed written heads of arguments. This was the backdrop for the order of 13 April 2023 regarding filing of heads of argument by the defendant.

Conclusion

[28] In view of the foregoing findings and conclusions arrived at above, I find that the defences raised by the defendant falls short of constituting *bona fide* defences to the plaintiff's application for summary judgment. The defendant's defences resultantly falls to be dismissed.

Costs

[29] It is settled law that costs follow the result and a contrary view had not been argued before me, neither could I deduce the contrary from the documents filed of record. The plaintiff will, therefore, be awarded costs.

Order

[30] In the result, judgment is granted in favour of the plaintiff against the defendant in the following terms:

1. Cancellation of the Lease Agreement is confirmed;
2. Payment in the amount of N\$216 940,45 in respect of unpaid rentals;
3. Payment in the amount of N\$6 025,43 in respect of one notice month's rental;
4. Interest on the aforesaid amounts at a rate of 20% per annum from the date of summons to the date of final payment;
5. The Defendant is ejected from the Lease Premises at E28 – 8th Avenue, Oranjemund, Republic of Namibia;

6. Costs of suit; 7. The matter is removed from the roll and regarded as finalised.	
Judge's signature:	Note to parties:
O S SIBEYA JUDGE	
For the plaintiff: R Avila Of Metcalfe Beukes Attorneys, Windhoek	For the defendant: J Van Wyk In person