

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b>  EROS AIRCRAFT SERVICES CC PLAINTIFF  v  NAMIBIA AVIATION SERVICES CC 1 <sup>ST</sup> DEFENDANT WINDHOEK FLIGHT TRAINING CENTRE CC 2 <sup>ND</sup> DEFENDANT TRIO AVIATION CC 3 <sup>RD</sup> DEFENDANT NAMIBIA AIRPORT COMPANY 4 <sup>TH</sup> DEFENDANT	<b>Case No:</b> HC-MD-CIV-ACT-CON-2023/00476 INT-HC-SUMJUD-2023/00075
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE LADY JUSTICE PRINSLOO	<b>Date of hearing:</b> 26 June 2023  <b>Delivered on:</b> 13 July 2023
<b>Neutral citation:</b> <i>Eros Aircraft CC v Namibia Aviation Services CC</i> (HC-MD-CIV-ACT-CON-2023/00476) [2023] NAHCMD 397 (13 July 2023)	
<b>Results on merits:</b>  Merits not considered.	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The application for summary judgment is refused.</li><li>2. The defendants are granted leave to defend the action.</li><li>3. Costs of this application are to be decided by the trial court.</li><li>4. The matter is postponed until 27 July 2023 at 15h00 for Case Planning Conference in</li></ol>	

terms of rule 23(5).

5. The parties must file a further joint case plan on or before 23 July 2023.

### **Reasons for orders:**

#### Introduction

[1] The plaintiff in this matter, Eros Aircraft Services CC (EAS), applied for summary judgment against the first to third defendants. The first to third defendants are Namibia Aviation Services CC (NAS), Windhoek Flight Training Centre CC (WFTC) and Trio Aviation CC (TRIO), of whom Mr Dreyer is the single member. The fourth defendant is the Namibian Airports Company. However, no relief is sought against the fourth defendant.

[2] The plaintiff instituted action against the defendants on 2 February 2023, which was defended by the first to the third defendants on 20 February 2023.

#### Background

[3] The plaintiff pleads that it entered into a lease agreement with the fourth defendant, which commenced on 1 December 2009. The terms of the agreement were that the plaintiff would lease a portion of developed and/or undeveloped land at the Eros Airport measuring 660m<sup>2</sup> and 560m<sup>2</sup>. The lease became operational on 1 December 2009 and continues for 168 months until 30 November 2023.

[4] The premises comprise of Hanger 1, Hangar 2 and the shade ports.

[5] The plaintiff pleads that the first, second and third defendants unlawfully occupy Hangar 1 and the shade ports.

[6] The plaintiff pleads that on 15 December 2020, it gave the defendants written notice to vacate the premises. The defendant refused to vacate the premises.

[7] In summary, the plaintiff sought to evict the first to the third defendants from that portion of the premises, further claims further and/or alternative relief and cost of suit.

[8] The applicant now seeks summary judgment against the first to third defendants.

#### Application for summary judgment

[9] Rule 60(2) of the Rules of Court sets out the averments that must be made by a party seeking summary judgment. The deponent must swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that, in his or her opinion, there is no bona fide defence to the action and that the intention to defend has been delivered solely for the purpose of delay.

[10] Mr Frank Stein, the sole member of the plaintiff, deposed to the founding affidavit to the summary judgment application. I am satisfied that the affidavit contains the necessary averments.

[11] The summary judgment procedure aims to provide a plaintiff with a clear case and the opportunity to swiftly enforce his/her claim against a defendant who lacks a real defence to that claim.<sup>1</sup>

[12] This court has discretion on whether or not to grant summary judgment. Due to this remedy's stringent and drastic nature, the court, in exercising its discretion, may refuse summary judgment even if a defendant has not found security or where the defendant's answering affidavit does not satisfy the requirements of rule 60(5)(b).

[13] In *Namibia Airports Company Limited v Conradie*,<sup>2</sup> this court quoted the South African Supreme Court, which held that the court's discretion in summary judgment applications 'may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is a good one'.<sup>3</sup>

[14] The threshold to ward off summary judgment proceedings is, therefore, very low. The Supreme Court in *Di Savino v Nedbank Namibia Ltd*<sup>4</sup> stated as follows:

<sup>1</sup> Herbstein & van Winsen: *The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> Ed at 516.

<sup>2</sup> *Namibia Airports Company Limited v Conradie* 2007 (1) NR 375 (HC) para 22.

<sup>3</sup> *Tesven CC and Another v South African Bank of Athens* 2000 (1) 268 (SCA) at 277 H – I.

<sup>4</sup> *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC).

[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.<sup>5</sup> 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.<sup>16</sup>

### The defence

[15] The summary judgment procedure was designed to determine whether ex facie the defendant's affidavit has shown that he has a bona fide defence and not to try the whole issue.

[16] The defendants claim to have a bona fide defence to the plaintiff's claim for eviction. The defence is first that the particulars of claim are excipiable because it is vague and embarrassing. The defendants plead that the particulars of claim do not comply with rule 45(7) of the Rules of Court in that no allegation is made as to when and where the agreement was entered into and who signed the lease agreement on behalf of the plaintiff and the fourth defendant. Further, the premises in the lease agreement are identified as a 'portion of development and/or undeveloped land at the Eros Airport'. The defendants plead that this description could refer to any portion of land at the Eros Airport, yet the plaintiff intends to link the premises in the lease agreement with Annexure B to the particulars of claim, alleging that it is the premises in question.

[17] Secondly, the defendants rely on an agreement entered into between them and one Mr Brian Roos in 2009. Mr Dreyer, the sole member of the defendants, states that NAS entered into a written lease agreement with Mr Roos for office space in 2009. During 2014/2015, the parties entered into a further verbal agreement to include Hangar 1 and the shade ports in their lease agreement. A written agreement was drawn up to that effect, this agreement was however never signed. Although the agreement was never signed, the parties conducted themselves in a manner that gives rise to an inescapable inference that they are bound by the terms of the lease agreement for Hangar 1 and the shade ports. In amplification, Mr Dreyer states that during 2021 Mr Roos instituted action wherein he sought an order confirming the cancellation of the first defendant's lease agreement and an order ejecting the first defendant from the premises. His

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<sup>5</sup> *Shingadia v Shingadia* 1966 (3) SA 24 (R) at 26A – B; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) [1999] 4 All SA 396 at para 26; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467A; *Marsh and Another v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 949.

<sup>6</sup> *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) at [26].

claim was dismissed due to non-appearance. The defendants plead that the agreement was, therefore, never cancelled and is extant.

[18] The defendants deny that the portion of land in respect of which the plaintiff allegedly signed a lease agreement with the fourth defendant comprises of Hangar 1, Hangar 2 and the shade ports due to an existing agreement between the defendants and Mr Brian Roos. It is the submission of the defendants that if Mr Roos had the locus standi to lease the premises to the first defendant, the plaintiff's lease agreement could not have commenced during 2009 (the lease agreement on which the case is premised).

[19] A further issue the defendants raised is the lease agreement upon which the plaintiff relies, which was backdated to 2009. The agreement was signed between the plaintiff and the fourth defendant on 11 November 2022. However, the agreement indicates that the lease agreement would subsist for an uninterrupted period of 168 months from 1 December 2009 until 30 November 2023.

#### Discussion

[20] The plaintiff argues that the defendants' defence is neither bona fide nor good in law. This court must decide if the defence raised by the defendants is arguable and whether, if established, it would be a defence that is good in law.

[21] It is clear from the arguments and the papers before this court that there is a dispute of fact between the parties. Each party claims to have a valid lease agreement for the same premises. On the one hand, a lease agreement between the plaintiff and the fourth defendant and, on the other hand, a lease agreement between the first defendant and Mr Roos.

[22] There is further a dispute about the identification of the premises as per Annexure B attached to the particulars of claim, but which does not form part of the lease plaintiff's lease agreement with the fourth defendant.

[23] It is trite law that in determining whether a defendant has a bona fide defence will be sufficient if the defendant swears to a defence, valid in law in a manner that is not inherently or seriously unconvincing.<sup>7</sup>

[24] The adjudication of a summary judgment application does not include a decision on factual

<sup>7</sup> *Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228B.*

disputes. In *Triplejay Equipment (SWA) (Pty) Ltd v Muller*,<sup>8</sup> the following was said by Badenhorst J:

'It seems to me quite clear that the summary judgment procedure was designed to whether ex facie the defendant's affidavit, the defendant has shown that he has a bona fide defence and not to try the whole issue.'

[25] In my view, the nature of the defences raised by the defendant (more specifically, the first defendant) discloses a bona fide defence. Although the second and third defendants were not party to the alleged lease agreement with Mr Roos from what I can determine, I am of the view that the interest of these entities are intertwined with that of the first defendant as Mr Dreyer is the sole member of all the defendants, conducting his business in respect of all the defendants from the same premises. Therefore, I am not prepared to complicate the issues by granting summary judgment regarding the second and third defendants at this stage.

[26] In the result, I make the order as set out above.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
JP Jones Instructed by Koep & Partners Windhoek	M Kemp of Metcalf Beukes Attorneys Windhoek

<sup>8</sup> *Triplejay Equipment (SWA) (Pty) Ltd v Muller* 1962 (3) SA 115 (SWA) at 116B.