

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIONS

<b>Case Title:</b> Tecmed West Medical Distributors (Pty) Ltd and Edward Fynn	Plaintiff  Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2023/00184 <b>Division of Court:</b> Main Division <b>Heard:</b> 8 June 2028 <b>Supplementary heads:</b> 15 June 2023
<b>Heard before:</b> Honourable Mr Justice Ueitele		<b>Delivered:</b> 18 July 2023
<b>Neutral citation:</b> <i>Tecmed West Medical Distributors (Pty) Ltd v Fynn</i> (HC-MD-CIV-ACT-CON-2023/00184) [2023] NAHCMD 408 (18 July 2023)		
<b>Order:</b>		
<ol style="list-style-type: none"><li>1. The defendant must pay to the plaintiff the amount N\$4 784 445,43, plus interest at the rate of 20% per annum on the amount of N\$4 784 445,43 reckoned from 19 July 2023 to date of final payment.</li><li>2. The defendant must pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed legal practitioner.</li><li>3. The matter is regarded as finalised and is removed from the roll.</li></ol>		
<b>Reasons for order:</b>		
UEITELE J:  <u>Introduction and background</u>  [1] The applicant is the plaintiff in the main action. It is a private company registered in Namibia and is in the business of selling and distributing medical equipment. The respondent is		

the defendant in the main action and he is a general medical practitioner, practising in Windhoek under the name and style of Fynn and Associates Radiology. I will, for sake of convenience, refer to the applicant as the plaintiff and the respondent as the defendant.

[2] On 29 July 2020, and at Windhoek, the plaintiff and the defendant concluded an agreement in terms of which the plaintiff sold and the defendant bought two Aquilion Start 16 Slice CT Scanners (together with all ancillary software and material) (herein 'scanners'), for a purchase consideration of N\$7 078 367,38 (inclusive of VAT) ( herein 'purchase price').

[3] In terms of the agreement, the defendant had to pay the plaintiff the purchase price of the scanners upon the defendant's acceptance of the quotation proposal and within 30 days of receipt of an invoice for the scanners. In the event that the defendant fails to pay the invoices on the due date, the outstanding amounts would bear interest on a basis of prime plus 3% per annum charged per month on the outstanding balance.

[4] From the pleadings, it appears that by January 2022, that is approximately 18 months after the scanners were sold to the defendant, the latter had only paid N\$2 193 921,95 of the purchase consideration of N\$7 078 367,38 leaving a balance of N\$4 884 445,43.

[5] On 22 February 2022 the parties, that is, the defendant and a certain Mr Theron, representing the plaintiff, signed a document titled '*Payment Term for Canon Hid Performance CT Scanners and UPS's*'. The document reads as follows (I quote verbatim):

'I the undersigned agree to the terms of payment for the above-mentioned equipment purchased from Tecmed West Medical Distributor PTY LTD as set out below.

Aquilion Start CT Scanners:	N\$ 3,539,183.68 (Incl Vat)
Tescorn 10KVA Single Phase UPS's:	N\$ 171,587.89 (Incl Vat)
Lead glass and Doors:	N\$ 257,986.11 (Incl Vat)
Millensys Mipublisher:	N\$ 629,339.64 (Incl Vat)
AGFA CR30 MX:	N\$ 286,348.11 (Incl Vat)
Remaining Balance:	N\$ 4,884,445.43 (Incl Vat)

The remaining balance will be settled monthly over a period of 12 Months to the value of N\$ 407,037.12.'

[6] The plaintiff, alleging that the defendant was in breach of the settlement agreement, on 21

January 2023, issued summons out of this court in terms of which he claimed payment in the amount of N\$4 876 031,83 from the defendant.

[7] In its particulars of claim, the plaintiff alleges that: On 22 February 2022, and at Windhoek, the plaintiff and the defendant concluded a written settlement agreement in terms of which agreement the defendant agreed to be indebted to the plaintiff in the amount of N\$4 884 445,43 and that the defendant agreed to repay the capital in 12 monthly instalments of N\$407 037,12 commencing 1 March 2022, alternatively within a reasonable time from 22 February 2022.

[8] The plaintiff furthermore avers that it complied with all its obligations in terms of the settlement agreement that it may have had. The plaintiff furthermore avers that the defendant, apart from a payment of N\$100 000 which he made on 14 June 2022, breached the settlement agreement in that he failed to pay the capital within the 12 months and 12 monthly instalments agreed upon. The plaintiff avers that despite demand, the defendant has failed to pay the balance in the sum of N\$4 876 031,83.

[9] The defendant, during February 2023, signified its intention to defend the plaintiff's claim. Upon the defendant entering his notice of intention to defend the action, the plaintiff, as it was entitled to, filed an application for summary judgment. In its application for summary judgment, the plaintiff filed an affidavit deposed to by a certain Mr Theron, a director of the plaintiff, who represented the plaintiff when the agreement was signed with the defendant. Mr Theron verified the cause of action in the summons and the amounts owed by the defendant.

#### Basis of opposition to summary judgment application

[10] The defendant deposed to the affidavit resisting summary judgment. The defendant raised a preliminary objection to the plaintiff's application for summary judgment. The objection raised by the defendant is that the plaintiff's application for summary judgment is defective and procedurally flawed. He contends rule 60(3) of the rules of the High Court provides that:

'If a claim is founded on a liquid document, a copy of the document must be annexed to the affidavit and the notice of application must state that the application will be set down for hearing on a date fixed in the case plan order.'

[11] The defendant thus contends that the plaintiff in para 5 of its affidavit in support of the

summary judgment application, simply swears positively to the facts, verifies the cause of action, the amounts claimed and the grounds as set out in its summons and particulars of claim. However, fails to annex the summons and particulars of claim to the application, pursuant to and as contemplated by rule 60(3) of the rules of the court.

[12] As regards the bona fides of his defense, the defendant contends that the plaintiff relies on a purported settlement agreement which is annexed to its particulars of claim (which is the document I have quoted above in para 5). He continues and contend that the purported settlement agreement falls short of the requirements of a settlement agreement and consequently is not a settlement agreement and contends that nowhere in the payment terms does he acknowledge his indebtedness to the plaintiff.

[13] At the hearing of this application, the court explicitly asked Mr Jantjies, who appeared for the defendant, whether the defendant denies that he purchased the scanners from the plaintiff and that a portion of the purchase price (ie N\$4 876 031,83) was still outstanding. Mr Jantjies' answer was that the defendant does admit that he purchased the scanners from the plaintiff and that he still owed the plaintiff a portion of the purchase price.

### Discussion

[14] Before I consider the issues that I am required to resolve, I want to digress and make the following preliminary comments. Litigation is not only time consuming, it is also expensive. It is common cause that the time between issuing summons and delivery of judgment after a full trial, may take months and sometimes years. Van Niekerk<sup>1</sup> reasons (and I fully agree with that reasoning) that it is of little consolation to the honest plaintiff that eventually obtains judgment with *morae* interest and costs when most of the costs eventually end up in the hands or pockets of lawyers.

[15] The learned authors continue and reason that in any event, the costs awarded on a party and party scale do not actually make up for the attorney and client costs incurred.<sup>2</sup> Interest a *tempore morae* does not adequately compensate a plaintiff for not being able to use his or her money over the period that litigation endures. Most plaintiffs would suggest that they could generate a far better return on their capital than that produced by the prescribed rate of interest.<sup>3</sup>

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<sup>1</sup> V Niekerk, HF Geyer and ARG Mundell *Summary Judgement: A Practical Guide* para 2.1 at 2-3.

<sup>2</sup> Ibid.

<sup>3</sup> Footnote 1.

[16] Summary judgment is an attempt to counter the difficulties identified by Van Niekerk. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*<sup>4</sup> Navsa JA argued that the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. He continued and said:

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule . . . .'

[17] It is in the context that I have set out in the preceding paras that I intend to consider the preliminary objections raised by the defendant and the defences that he has raised. After counsel for the parties made their submissions, the court, at the hearing of the summary judgment application, requested them to submit additional heads of argument on the question of whether non-compliance with rule 60(3) must result in the dismissal of the application.

[18] The court is grateful to counsel for submitting additional heads in support of their respective stand on the above issue. I will thus firstly deal with the objection raised by the defendant in these proceedings, namely that the plaintiff has failed to attach the liquid document, upon which it basis its claim, to its verifying affidavit. Rule 60(3)<sup>5</sup> requires the plaintiff, in an

<sup>4</sup> *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)

<sup>5</sup> Rule 60(3) reads as follows:

'(3) If the claim is founded on a liquid document, a copy of the document must be annexed to the

application for summary judgment, to attach a copy of the liquid document upon which it basis its claim to its verifying affidavit.

[19] Mr Jantjies, on behalf of the defendant, argued that rule 60(2)(a) requires the deponent to the affidavit supporting an application for summary judgment to 'verify' the cause of action. He continued and argued that where the liquid document is not attached to the verifying affidavit, the requisite evidentiary material, with reference to the facts set out in the affidavit itself, is lacking and renders the application non-compliant with rule 60(2)(a). To that end, annexing the liquid document to the verifying affidavit never amounts to a 'superfluous duplication' if already annexed to the combined summons as such reasoning misconstrues the ambit of the requirement in rule 60(2)(a).

[20] Mr Jantjies continued and argued that evidently, rule 60(3) serves the purpose of rule 60(2)(a), requiring the deponent, having knowledge, to verify the cause of action under oath with reference to the requisite evidentiary material. In consequence, the issue of prejudice arising is an irrelevant consideration as compliance with rule 60(2)(a) is the jurisdictional fact upon which summary judgment can permissibly be granted.

[21] He continued and argued that rule 60(3) is not an end in itself. Lest the requirement of rule 60(2)(a) be diluted through a debate as to whether or not prejudice arises through non-compliance with rule 60(3), the defendant submits that the correct interpretation to be accorded is this: a party suing on a liquid document who fails to annex the liquid document to the verifying affidavit fails to comply with rule 60(2)(a), rendering the application fatally defective and liable it being struck from the roll.

[22] In *Credcor Bank Ltd v Thomson*<sup>6</sup> the court held that the object of the provision that a copy of the liquid document must be annexed to the affidavit is to ensure that a defendant against whom the extraordinary and stringent remedy of summary judgment is sought, must be allowed at least to see a copy of a document which forms a vitally important part of the case which is being made against him.

[23] In *Maharaj v Barclays National Bank Limited*<sup>7</sup>, Corbett JA pointed out that summary judgment was 'based upon the supposition that the plaintiff's claim is unimpeachable and that

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affidavit and the notice of application must state that the application will be set down for hearing on a date fixed in the case plan order.'

<sup>6</sup> *Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D).

<sup>7</sup> *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 422G.

the defendant's defence is bogus or bad in law'. To this end, it was therefore important that the affidavit made in support of an application for summary judgment must be made by a person who had 'personal' knowledge of the facts and must be one in which the cause of action and the amount if any, are verified. Corbett JA said:

'While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32<sup>8</sup> that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised ... The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to by either the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court ... The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it . . . .'<sup>9</sup>

[24] In *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd*<sup>10</sup> this court held that:

'There can be no doubt, ... that summary judgment is an extraordinary remedy which does result in a final judgment against a party without affording that party the opportunity to be heard at a trial. For this reason Courts have required strict compliance with the rules and only granted summary judgments in instances where the applicant's claim is unanswerable. ...However..., the Court should not only look at the documents of the applicant, but at all the documents, also those filed by the respondent. Where a respondent, as is the case here, admits his indebtedness in a fixed amount it seems to me that the reason why Courts require strict compliance with the procedural aspects of the Rule, has fallen away. This is so because the Court can be satisfied on the assurance of the respondent himself that he is in fact indebted to the applicant in the amount admitted by him and furthermore that he has no defence in regard to such amount. If any uncertainty was created by the plaintiff's verification of the cause of action, that in my opinion, was removed by the admission which was made by the respondent.

[25] In light of the authorities that have referred to in the preceding paras, I cannot agree with Mr Jantjies that a party suing on a liquid document who fails to annex the liquid document to the

<sup>8</sup> Rule 32 of the South African Uniform Rules is the predecessor of our rule 60.

<sup>9</sup> At 423 A – H. I have omitted the authorities to which the Court has had reference in the passage quoted.

<sup>10</sup> *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC).

verifying affidavit, fails to comply with rule 60(2)(a). I do not agree for the simple reason that the principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day' on all the documents that are properly before it. The omission to attach a copy of the liquid document to the verifying affidavit, where it has already been attached to the summons is, however, condonable.<sup>11</sup>

[26] In the present matter it is common cause between the parties that although the liquid document upon which the plaintiff basis its claim is not attached to the verifying affidavit, it has been attached to the plaintiff's summons. The defendant has furthermore not denied his indebtedness in the amount claimed by the plaintiff. It therefore follows that the reason why the court require strict compliance with the procedural aspects of rule 60(3), has fallen away. I accordingly condone the plaintiff's failure to attach 'Annexure A' to the affidavit of Mr Theron in which he verifies the cause of action.

[27] As regards the defendant's defence, the legal principles relating to summary judgment and what the parties are required to prove on a balance of probabilities, were summarised by the Supreme Court decision of *Di Savino v Nedbank Namibia*<sup>12</sup>. I will not repeat those principles here as they have been restated in a number of cases in this court.<sup>13</sup> It, however, suffice to state that the opposing affidavit to a summary judgment application must disclose fully the nature and the grounds of the defence as well as the material facts relied upon.

[28] From a consideration of the affidavits and all documents before court, the defendant has not made a single allegation denying that the amount claimed is due, or that he undertook to pay the outstanding balance of the purchase consideration in 12 equal instalments as alleged by the plaintiff, or that the scanners were delivered to him, or that the cash deposit agreement was concluded. He furthermore did not deny that he paid an amount of N\$100 000 in reduction of the amount due in terms of the undertaking to pay the balance of the purchase price in 12 equal instalments.

[29] At the hearing of this matter, Mr Jantjies in essence, submitted that the defendant denies liability because the date on which he is required to commence with the instalment payments is not stated in what the plaintiff terms a settlement agreement. That submission is essentially an admission of the plaintiff's claim. Even if the defendant is correct that the undertaking to pay the

<sup>11</sup> *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* 2005 (2) SA 432 (C) at 434D – E.

<sup>12</sup> See the case of *Kamwi and Another v Gertze and Another* (HC-MD-CIV-ACT-CON- 2706 of 2021) [2021] NAHCMD 572 (7 December 2021).

<sup>13</sup> *Di Savino v Nedbank Namibia* 2012 (2) NR 505 SC.



balance of the purchase price does not specify a date from which payment commences, it is now well established (I need not cite any authority for that proposition) that payment must be done within a reasonable time.

[30] From a comprehensive consideration of the answering affidavit, the defendant has not fully, materially, or at all, shown to the court that there is an arguable or a triable defence. Instead, he only raises technical points, which are not defences to the plaintiff's claim.

[31] This case is a classic example of a case where the defendant, on technical and procedural grounds, is delaying the inevitable, namely payment of the plaintiff's claim. There is clearly no defence raised in response to the plaintiff's claim and this Court cannot allow the technical objections raised by the defendant to subject the plaintiff to incur litigation expenses and delay the recovery of its money merely on the basis that summary judgment is characterized as an extraordinary or drastic remedy. The court having considered all the facts placed before it, has no hesitation that it must grant the summary judgment as claimed by the plaintiff.

#### Costs

[32] There remains only the question of costs. It is a well-established principle of our law that costs are in the discretion of the court and that costs follow the event. No reasons have been advanced to me why this general rule must not apply. As a result, the defendant must pay the plaintiff's costs and such costs are not subject to rule 32(11).

[33] I therefore, make the following order:

1. The defendant must pay to the plaintiff the amount N\$4 784 445,43, plus interest at the rate of 20 per cent per annum on the amount of N\$4 784 445,43 reckoned from 19 July 2023 to date of final payment.
2. The defendant must pay the plaintiff costs of suit such costs to include the costs of one instructing and one instructed legal practitioner.
3. The matter is regarded as finalised and is removed from the roll.

**Judge's signature**

**Note to the parties:**

S Ueitele Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
L Lochner Instructed by P D Theron & Associates, Windhoek	A Jantjies Of Afrika Jantjies and Associates, Windhoek