

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIONS 61

Case Title: Namdeb Diamond Corporation (Pty) Ltd and Twenty Eleven Investments (Pty) Ltd	Applicant	Case No: HC-MD-CIV-ACT-CON-2023/00237 INT-HC-SUMJUD-2023/00138
		Division of Court: High Court, Main Division
	Respondent	Heard: 11 July 2023
Heard before: The Honourable Justice Maasdorp		Delivered: 3 August 2023
Neutral citation: <i>Namdeb Diamond Corporation (Pty) Ltd v Twenty Eleven Investments (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2023/00237) [2023] NAHCMD 463 (3 August 2023)		
Order:		
<ol style="list-style-type: none">1. The cancellation of the lease agreement between the parties is confirmed.2. The defendant and all persons occupying the property together with the defendant are evicted from the plaintiff's property at 17 – 9th Avenue, Oranjemund.3. The defendant shall pay to the plaintiff N\$169 749,38.		

4. The defendant shall pay interest on N\$169 749,38 at 20 per cent per annum calculated from the date of summons until date of final payment.
5. The defendant shall pay to the plaintiff N\$ 4 813 for each month defendant remains in occupation of the property from 15 January 2023 to date of eviction, alternatively the date on which the defendant vacates the property.
6. Costs of suit, including the costs of one instructing and one instructed legal practitioner, not limited to rule 32(11).
7. The matter is regarded as finalised and removed from the roll.

Reasons for order:

MAASDORP AJ:

[1] This is an opposed summary judgment application for allegedly unpaid rentals, for eviction, and for related relief. The applicant is Namdeb Diamond Corporation (Pty) Ltd. The respondent is Twenty Eleven Investment (Pty) Ltd.

Material background and procedural history

[2] The parties concluded a written lease agreement on 18 October 2012. Under the lease agreement the applicant let to the respondent part of the property situated on 17 – 9th Avenue, Oranjemund, at a monthly rental starting at N\$ 2 349,56 escalating annually by 10 per cent.

[3] The applicant issued summons on 23 January 2023 for unpaid rental from January 2017 to 15 December 2022 and for the eviction of the respondent. After the respondent noted its intention to defend the action, the applicant applied for summary judgment for the balance of N\$169 749,38 and for eviction.

[4] On 25 April 2023, the court directed the respondent to deliver its opposing affidavit by 29 May 2023. The respondent filed the opposing affidavit one day late, on 30 May 2023. The respondent delivered an application for condonation on 5 June 2023. In response, the applicant raised several points of law on 8 June 2023, including numerous alleged irregularities.

[5] In terms of the 25 April 2023 court order, the applicant filed heads of argument on 8 June. The respondent's heads were filed on 15 June 2023. The application for summary judgment was scheduled for hearing on Monday, 10 July 2023.

[6] On 7 July 2023, the respondent withdrew its earlier condonation application that it had filed on 5 June 2023. It filed a new condonation application that addressed and seemingly cured the applicant's points of law. Later the same afternoon, although after 16h00, the applicant delivered a new notice under rule 66(1)(c) in which it set out the grounds of opposition to the respondent's latest condonation application. The grounds included the absence of an explanation for the late delivery of the latest condonation application and the absence of prospects of success in opposing the summary judgment application to act as a counterweight for the missing explanation for the delay in the filing of the latest condonation application..

The merits

[7] The respondent raised two defences against the merits of the applicant's claim. First, it raised prescription of all rentals that accrued before 22 January 2019. Second, it claimed that the parties had settled this dispute sometime after the applicant originally issued summons for rentals accruing under this lease agreement in late 2018 under case number HC-MD-CIV-ACT-CON-2018/01706.

[8] In its heads of argument, the applicant abandoned its claim for summary judgment for the accrued rentals that allegedly prescribed but persisted in seeking summary judgment for the balance, for eviction and for related relief. The applicant argued that the respondent had not complied with its obligations as a respondent in a summary judgment application since it had not set out the material facts to sustain its second defence. In addition, the applicant argued that the respondents did not plead a bona fide defence which, if proven at a trial, could defeat the applicant's claim.

[9] To support the allegation that the parties had settled this dispute, the respondent attached a joint status report in the 2018 action. The report stated that:

“1. Whereas the parties attended court connected mediation on 29 October 2018 and in principle reach (sic) a settlement agreement in respect of plaintiff's claim 2.

2. Whereas the plaintiff and defendant engaged each other thereafter in further settlement

negotiations.

3. Whereas the parties respectfully request that the matter be postponed for a status hearing on 18 December 2018, pending finalisation of the settlement negotiations.”

[10] The respondent then made the following material allegations:

- (a) ‘settlement was finalized in respect of that matter’.
- (b) ‘the parties reached a settlement which was not recorded in writing’.
- (c) One of the terms of the settlement was that the applicant would compensate the respondent for ‘improvements’ on the ‘immovable business property’.
- (d) Another term was that the respondent could remain in occupation of the property until the finalization of the calculation of the compensation.
- (e) A further term was that the applicant would not charge the respondent for its occupation of the property pending the finalization of the calculation process.
- (f) The only reason the respondent remains in occupation is due to the applicant’s undertaking to provide an offer for compensation.
- (g) The offer or calculations were supposed to have been finalized immediately after the settlement.
- (h) The applicant has not provided an offer of compensation for the improvements despite various follow-ups by the deponent with the applicant.

[11] On the strength of these allegations, the respondent asserted that the applicant’s claim is premature: all parties agreed the respondent would only leave the premises once an offer to compensate the respondent for the improvements had been made and claimed and once the claim for improvements has been paid by the applicant.

[12] In essence, the applicant argues that these allegations by the respondent in support of the conclusion that the parties had reached a compromise:

- (a) are incurably vague;
- (b) are bad in law;
- (c) do not set out what the cause of action was in the case allegedly settled;
- (d) do not set out the prayers in that action so as to allow a proper comparison with the prayers now before court;
- (e) do not support a conclusion that an offer in full and final settlement of the current dispute had been made or accepted;
- (f) are ambiguous in the sense that they refer sometimes to an 'undertaking' and other times to a 'settlement';
- (g) appear to support, at best for the respondent, a settlement conditional on an offer for compensation;
- (h) are inadequate for the respondent to meet its onus to prove a compromise clearly and unambiguously;
- (i) are not supported by the inherent probabilities – why would the applicant forego all of its contractual rights without any reason appearing from the respondent's papers; and
- (j) even if the allegations are accepted as true, the compromise would amount to an impermissible oral variation of clauses 3, 8, 16, 20 and 21 of the written lease agreement.¹

[13] In addition, and perhaps most importantly, the applicant relies on these crucial omissions from the respondent's opposing affidavit:

¹ Clause 3.1 requires the respondent to pay rental while in occupation of the premises. Clause 8 requires the applicant's written consent before any alterations or additions may be made to the premises. Clause 16 specifies the rights and obligations in case of default by the lessee, in this case, the respondent. Clause 20 is the ordinary 'no relaxation or waiver' clause. And clause 21 is the 'Whole Agreement' clause. After the normal provision that the written lease agreement contains all the terms and conditions of the parties' agreement, the clause concludes with this sentence: 'No alteration or variation of the terms of this Lease or any alleged cancellation by mutual consent shall be of any force or effect unless reduced to writing and signed by the Lessor and the Lessee or any person duly authorised thereto in writing by them.'

- (a) The date on which the settlement agreement was allegedly concluded;
- (b) The place where the settlement agreement was allegedly concluded;
- (c) The identity of the persons who allegedly concluded the settlement agreement and their authority to have done so (both parties are companies).

The law on summary judgments and its application to the facts

[14] The controlling law is uncontroversial. The numerous superior court judgments raised by both parties provide ample guidance. It is the application of the law to the facts where the parties differ.

[15] In my view, this application can be decided on the law set out in the respondent's heads of argument, in particular the passages on which the respondent relies from *Di Savino v Nedbank Namibia Ltd*² and *Fair Play Nam Investments (Pty) Ltd v Standard Bank Namibia Limited*³.

[16] From *Di Savino*:

[23] One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3)(b) the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

[24] The enquiry that the court must conduct is foreshadowed in Rule 32(3)(b) and it is this: first, has the defendant "fully" disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

² *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC) paras 25 – 28.

³ *Fair Play Nam Investments (Pty) Ltd v Standard Bank Namibia Limited* (I 3664-2012) [2013] NAHCMD 227 (30 July 2013) paras 7 – 9 and 12.

[25] While the defendant is not required to deal “exhaustively with the facts and the evidence relied upon to substantiate them”, the defendant must at least disclose the defence to be raised and the material facts upon which it is based “with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.” Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.

[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. 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.

[27] But the failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect may, nevertheless be cured by reference to other documents relating to the proceedings that are properly before the court. In *Sand and Co Ltd v Kollias* the court held that the principle that is involved in deciding whether or not to grant summary judgment is to look at the matter “at the end of the day” on all the documents that are properly before the court.

[28] This approach to the opposing affidavit in summary judgment is a recognition of the drastic nature of the remedy of summary judgment. It offends against the fundamental right of a litigant to have access to court and be heard. Its aim is to protect the plaintiff against a defendant who has no bona fide defence and who has entered appearance to defend to delay the recovery of the debt and whose conduct thus amounts to an abuse of the process of court. But it “was never intended to replace the exception as a test of one or other of the parties’ legal contentions; nor to provide the plaintiff with a unilateral advantage of the preview of defendant’s evidence.’

[17] And from *Fair Play Nam Investments* (excluding the footnotes):

[7] Therefore, in this application, what is required from the respondent, is, that it must satisfy the court that it has a *bona fide* defence. This should appear from the affidavit by Mr Hakaaje on behalf of the respondent. However, at this stage, respondent does not bear the onus. He must only set out facts which, in the absence of a trial, would satisfy the court that it has a *bona fide* defence, in order to entitle the court to decline the applicant’s application for summary judgment.

[8] Similarly, at this stage, the defendant does not need to convince the court that all facts are undisputed; as the court does not weigh probabilities at summary judgment stage.

[9] On the other hand, even though the defence does not need to be comprehensive as pleadings – it should not be bald and sketchy. Teek, J (as he then was) in the matter of *Kramp v Rostami* above stated the following: ‘the word “fully” mentioned in the Rules is not meant to be given its literal meaning and it is sufficient for the respondent to set out facts so as to persuade the court that it has a *bona fide* defence to the claim. But if the defence averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides* – and grant the application sought.

[10] There is, therefore, a duty on the respondent or any other person who deposes to the answering affidavit to set out sufficient facts in the affidavit to persuade the court that he or she in this matter, the respondent, has a *bona fide* defence against the claim of the applicant – such defence should not be in the form of a bald statement, vague or sketchy, giving the court a ground to grant the summary judgment.

[11] Above, I have indicated some of the principles of law applicable to summary judgments. These are Rule 32 of the High Court Rules and the case law dealing with summary judgments. Therefore, now, I deal with the issue of as whether or not the respondent has complied with the requirements of the law regulating summary judgments. In other words, as whether the respondent has set out facts in the answering affidavit which facts establish a *bona fide* defence, not a defence which is vague or sketchy.

[12] In *Standard Bank of Namibia Limited v Veldsman Muller*, AJ (as he then was) stated the following: ‘Summary judgment is a very stringent and final remedy which closes the doors of the court for a defendant and should only be granted if it is clear that the plaintiff has an unanswerable case. It has been stated by our and South African Courts that, even if the defence of the defendant does not sufficiently comply with the requirements of Rule 32(3), the court still has a discretion to refuse summary judgment. See *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) at 732; *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) 95 (C) at 103 G-H; *Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (C) at 811 C-G.’

[18] The respondent has not met the test to successfully resist a summary judgment application. Its defence of settlement or compromise was pleaded in ‘needlessly bald, vague or sketchy’ terms and failed to canvass matters of facts that are essential to the defence it raised. For these reasons alone I would grant the summary judgment application. These factors support this conclusion:

(a) The deponent did not allege that he was present when the settlement was allegedly concluded.

(b) The respondent must have known that it ought to have complied at the very least with the basic requirements for pleading a contract under the High Court rules. The party seeking to rely on a contract must set out who concluded the contract, whether they were authorised and where the contract was concluded.

(c) Instead of pleading the primary facts necessary to prove the conclusion of a binding contract of compromise, the respondent relied on conclusions.

(d) In addition to the reasons that support the requirements in rule 60(5) as set out many times by the superior courts, the respondent's unduly vague approach on such important aspects cannot be countenanced since it robs a large commercial establishment with many employees like the applicant of the opportunity to gauge the merits of the alleged conclusion of a compromise with reference to the allegations in the opposing affidavit. If this opportunity is unnecessarily impeded, it interferes with the very purpose of summary judgments: to prevent unnecessary delays in finalising cases where the defendant does not have a bona fide defence, thus avoiding delays in the enforcement of plaintiffs' rights and freeing up the court system to deal with genuine disputes. It might have been different if the parties were individuals who dealt only with one another since it might have been easier to establish whether a compromise had been concluded.

(e) The respondent did not plead any justification for the absence of this vital information and no justification can be inferred from the facts before the court.

[19] In addition, I agree with the applicant that the respondent's allegations clash impermissibly with several provisions of the lease agreement. The respondent did not supply any facts, or present any argument, to support any reasonably possible interpretation that could allow it to succeed with its opposition to the applicant's claim at trial.

[20] In the premises, I find that the respondent has not disclosed 'a bona fide defence to the action' by way of an affidavit that fully discloses 'the nature and grounds of the defence and the material facts relied on'.

Conclusion on condonation

[21] The conclusion that the respondent has not put up a bona fide defence means that the respondent's application for condonation must fail, on the basis that there are no prospects of success on the merits to make up for the complete failure to explain the delay in presenting a rule – compliant application for condonation.

Costs

[22] The applicant argued for a costs order not subject to the cap under rule 32(11) and on an attorney and own client scale. The applicant argued that such costs were justified because of the complexity of the issues on the merits, the necessity of the points of law it raised on the original condonation application, the prejudice and costs caused by the unexplained correction of the condonation application on a Friday afternoon before the hearing of the application the next Monday, and the failure by the respondent to disclose its defence during the parties' rule 32(9) meeting. When I consider these factors with the dispositive nature of this summary judgment application, where both parties were represented by instructing and instructed counsel and each sought costs against the other, it appears that the circumstances as set out by the applicant sufficiently resemble those that informed an uncapped costs order in *South Africa Poultry Association and Others v Ministry of Trade and Industry and Others*⁴, as explained in paras 67 and 68 of that judgment. I am satisfied that such an order should follow. However, partly because of the absence of admissible evidence on the failure to disclose the basis for the respondent's opposition during the rule 32(9) meeting, and partly because I have not found evidence of such bad faith in the conduct of the respondent's case to justify a punitive costs order, I am not satisfied that attorney and own client costs should follow.

Relief

[23] In the premises, the following orders are issued in favour of the applicant against the respondent:

1. The cancellation of the lease agreement between the parties is confirmed.
2. The defendant and all persons occupying the property together with the defendant are evicted from the plaintiff's property at 17 – 9th Avenue, Oranjemund.

⁴ *South Africa Poultry Association and Others v Ministry of Trade and Industry and Others* (A 94/2014)[2014] NAHCMD 331 (7 November 2014)

3. The defendant shall pay to the plaintiff N\$169 749,38.
4. The defendant shall pay interest on N\$169 749,38 at 20 per cent per annum calculated from the date of summons until date of final payment.
5. The defendant shall pay to the plaintiff N\$4813 for each month defendant remains in occupation of the property from 15 January 2023 to date of eviction, alternatively the date on which the defendant vacates the property.
6. Costs of suit, including the costs of one instructing and one instructed legal practitioner, not limited to rule 32(11).
7. The matter is regarded as finalised and removed from the roll.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Plaintiff:	Defendant:
D Quickfall Instructed by W Van Greunen Köpplinger Boltman Windhoek	L Ihalwa Instructed by T Iileka-Amupanda Sisa Namandje & Co. Inc. Windhoek