

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: ZANNIER HOTELS NAMIBIA (PTY) LTD T/A SONOP LODGE and DAY DREAMERS INVESTMENTS CC	APPLICANT RESPONDENT	Case No: HC-MD-CIV-ACT-CON-2023/02113 INT-HC-SUMJUD-2023/00214 Division of Court: Main Division Heard on: 5 September 2023
Heard before: Honourable Lady Justice Rakow	Reasons delivered on: 29 September 2023	
Neutral citation: <i>Zannier Hotels Namibia (Pty) Ltd T/A Sonop Lodge v Day Dreamers Investments CC</i> (HC-MD-CIV-ACT-CON-2023/02113) [2023] NAHCMD 606 (29 September 2023)		
Order:		
<ol style="list-style-type: none">1. The summary judgment application of the first claim for the return of the vehicle is granted.2. The respondent is directed to immediately restore the vehicle, to wit a, Toyota Hilux GD6, with registration number N 88579 W, bearing engine number 2GDC477766, chassis number AHTKB8CD602970426 to the applicant.3. In the event that the Respondent fails to return the vehicle within thirty (30) days from		

date of this judgment then the Deputy Sheriff for the district of Rehoboth and/or Windhoek is hereby authorized to enforce this court's order.

4. The summary judgment application for claim two is dismissed.
5. The costs of this application stands over to be determined at the end of the matter.
6. The plaintiff to file their notice to amend their particulars of claim on or before 5 October 2023.
7. The matter is postponed to 24 October 2023 at 15:30 for a Status hearing. (Reason: For the plaintiff to comply with rule 32(9) and (10)).

Reasons for order:

RAKOW J :

Introduction

[1] The applicant issued summons against the respondent for the delivery of the applicant's motor vehicle (ad claim 1) and for damages in the amount of N\$205 650.04 for fair and reasonable costs of motor vehicle rental ad claim. The applicant filed an application for summary judgment to seek a speedy redress to its claims. The respondent opposed the application for summary judgment on the basis that it is entitled to refuse return of the applicant's motor vehicle as the respondent vested a lien in respect of the motor vehicle and that the respondent is not indebted to the applicant in the amount of N\$205 650.04 or any other amount notwithstanding that a claim for damages falls beyond the ambit of rule 60(1) and (2)

Parties

[2] The applicant is Zannier Hotels Namibia (Pty) Ltd t/a Sonop Lodge, a private company, with registration number 2017/0021, duly registered and incorporated in terms of the Companies Act 28 of 2004. The respondent is Day Dreamers Investments CC, a close corporation with registration number CC/2017/03637, duly registered and incorporated in accordance with the applicable Close Corporation Laws of the Republic of Namibia.

Background

[3] On 30 June 2022 and at Windhoek, the applicant and the respondent, duly represented by Ms Charissa Hagen, entered into a partly oral and partly written agreement (hereinafter referred to as “the agreement”), the terms of which the respondent was to repair the vehicle with registration number N 88579 W, a Toyota Hilux GD6, motor vehicle, bearing engine number 2GDC477766, chassis number AHTKB8CD602970426 of the applicant. At all material times hereto, the applicant was the owner, alternatively bona fide possessor of one Toyota Hilux GD6, vehicle registration number N 88579 W (the “Vehicle”) of which said ownership still persists.

Claim

[4] In its particulars of claim, the applicant claimed the following:-

'Claim 1

- 1.1. An order directing the Defendant to immediately restore the vehicle, to wit a, Toyota Hilux GD6, with registration number N 88579 W, bearing engine number 2GDC477766, chassis number AHTKB8CD602970426 to the applicant
- 1.2. In the event that the Defendant fails to return the vehicle within thirty (30) days from date of this judgment then the Deputy Sheriff for the district of Rehoboth and/or Windhoek is hereby authorized to enforce this court's order.
- 1.3. Costs of suit;
- 1.4. Further and alternative relief

Claim 2

- 2.1 Payment in the amount of N\$ 205,650.04 (Two Hundred and Five Thousand Six Hundred and Fifty Namibian Dollars and Four Cents Only);
- 2.2. Interest on the above claimed amount at a rate of 20% per annum calculated from the date of summons to date of final payment;
- 2.3. Costs of suit;
- 2.4. Further and alternative relief.'

Arguments

Applicant

[5] Ms Angula argued on behalf of the applicant that the applicant is entitled to summary judgment as the applicant proofed its claims. The respondent raised a defense that they have a lien over the applicant's vehicle. This defense is premised on an allegation that the applicant has failed to pay the "tow in costs", "standing fees" and "usage of the trailer". The applicant's vehicle remains with the respondent since the partial oral and written agreement was settled on June 30 2022. In terms of this agreement, the repairs were supposed to be completed within three days. The respondent quoted the applicant for the services and received payment on 8 July 2022 and 19 September 2022. It was argued that the respondent is attempting to compel/strong-arm the applicant into paying fees that the applicant views as being a fabrication and not in terms of their agreement.

[6] It was further argued that rule 60(2)(a) relates to a deponent to an affidavit in a summary judgment application, verifying the cause of action and the amount, if any, claimed. The deponent in this matter has complied with the rule, in that at paragraph 2 of the founding affidavit, the deponents do verify the cause of action and the amount claimed. The respondent further alleges that the deponent to the summary judgment application does not have the "personal knowledge not indicate establish how the knowledge was acquired" and relies on information obtained from others. These allegations remain unsupported by facts or evidence. The deponents act for and on behalf of the applicant and thus generally can be assumed to have knowledge of the applicant's dealings and the breach of the respondent in terms of the loan agreement.

Respondent

[7] Mrs Lardelli argued that in view of the nature of the remedy, the court must be satisfied that an applicant who seeks summary judgment has established its claim clearly on the papers

and that the respondents have failed to set up a bona fide defence as required in terms of the rules of this court. Even if a respondent fails to put up any defence or puts up a defence which does not meet the standard required of a respondent to resist summary judgment, summary judgment should be refused, if the applicant's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of the Court.

[8] It was further argued on behalf of the respondent that Cornel de Villiers, in paragraph 1 of her affidavit accompanying the applicant's purported application for summary judgment, states that she is the General Manager for the applicant, Zannier Hotels Namibia. In paragraph 2 of her affidavit accompanying the applicant's purported application for summary judgment, she states that she is duly able and authorized to depose to the affidavit and to bring this summary judgment application on behalf of the applicant. The contents hereof falling within her personal knowledge unless the context indicates otherwise or the contrary appears there from and same being true and correct. The court was referred to paragraph 4 of the applicant's particulars of claim, where the applicant alleges that on 30 June 2022 and at Windhoek, the applicant, duly represented by William A. J. Williams entered into a partly oral and partly written agreement with the respondent. As such, Cornel de Villiers was not present when the agreement was entered into by and between the applicant and the respondent and she did not represent the applicant during the conclusion of the agreement.

Legal considerations

[9] Applications for summary judgment are governed by rule 60 of the Rules of this Honourable Court, which stipulates as follows:

'Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is –

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) delivery of a specified movable property; or

(d) for ejection.’

[10] In the case of *Maharaj v Barclays National Bank Ltd*¹ Corbett JA, interpreting rule 32(5) which is the forerunner of our current rule 60(5) said the following:

‘... one of the ways in which a 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 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 both 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 learned judge continued and said:

‘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 discloses a bona fide defence. (See generally, *Herb Dyers (Pty) Ltd v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N); *Arend and Another v Astra Furnishers (Pty) Ltd.*, supra at pp. 303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N)...’

[11] In *Right – Path Investment (Pty) Ltd v Hebei Xinjian Construction CC*² Justice Ueitele stated the following:

‘Where the statements of fact are ambiguous or fail to canvass matters essential to the defence

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

² *Right – Path Investment (Pty) Ltd v Hebei Xinjian Construction CC* (I 460-2014) [2014] NAHCMD 314 (22 October 2014).

raised, then the affidavit does not comply with the rule.'

[12] In *First National Bank of Namibia Limited v Louw*³ the court laid out seven golden rules of summary judgment. The following are the said rules:

(a) The resolution of summary judgment does not entail the resolution of the entire action i.e., the 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.

(b) The adjudication of summary judgment does not include a decision on factual disputes. This means that the court should decide the matter from the assumption or premise that the defendant's allegations are correct. For that reason, summary judgment must be refused if the defendant discloses facts which, excepting the truth thereof, or if proved at trial, will constitute a defence.

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

(d) In determining summary judgment, 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 its case. This is to mean that 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 exceptibility 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 is heralds more debilitating

³ *First National Bank of Namibia Limited v Louw* (I 1467-2014) [2015] NAHCMD 139 (12 June 2015).

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.’

[13] Van Heerden AJ, in *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd & Others*⁴, stated that:

‘Firsthand knowledge of every fact which goes to make up the plaintiff’s cause of action is not required, and that where the plaintiff is a corporate entity, the deponent may well legitimately rely on records in the company’s possession for his or her personal knowledge of at least certain of the relevant facts and his or her ability to swear positively to such facts, on record in the company’s possession.’

Discussion

[14] The court accepts that the deponent of the applicant’s affidavit indeed has the necessary knowledge to depose to the affidavit in support of the summary judgment application. There is however two claims, one for the return of the vehicle against which the respondent raised the defence of a lien. There is however, no evidence before court as to the claim amount of this lien and no indication that the amount for the lien was ever invoiced and provided to the applicant. The applicant only received quotations for the work done to the vehicle. The court therefore accepts that those amounts are the only ones payable as there is after a year, no invoice and no indication as to the amount payable for tow in costs, standing fees and usage of the trailer were forthcoming despite some meetings between the applicant’s representative and that of the respondent. The applicant pleaded in its particulars of claim that payment was made on a pro-forma invoice and quotation.

[15] Regarding the second claim, it is clear that it was not based on any agreement as the existence of such an agreement was not pleaded and the court concludes that it is indeed a damages claim, for damages suffered by the applicant for the expenses of vehicle rental. As per rule 60, damages are not one of the four categories of claims for which summary judgment applications can be brought.

⁴ *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd & Others* 1999 (4) SA 229 (C) at 235A–C.

Order

[16] In the result, I then make the following order:

1. The summary judgment application of the first claim for the return of the vehicle is granted.
2. The respondent is directed to immediately restore the vehicle, to wit a, Toyota Hilux GD6, with registration number N 88579 W, bearing engine number 2GDC477766, chassis number AHTKB8CD602970426 to the applicant.
3. In the event that the respondent fails to return the vehicle within thirty (30) days from date of this judgment then the Deputy Sheriff for the district of Rehoboth and/or Windhoek is hereby authorized to enforce this court's order.
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7. The matter is postponed to 24 October 2023 at 15:30 for a Status hearing. (Reason: For the plaintiff to comply with rule 32(9) and (10)).

Judge's signature	Note to the parties:
RAKOW J Judge	Not applicable
Counsel:	
APPLICANT:	RESPONDENT:
M Angula Of Monika Angula & Associates Incorporated, Windhoek	L Lardelli Of Louis Karsten Legal Practitioner, Windhoek

